GATT - COUNCIL*

United States unilateral restrictions against Brazil widely condemned

On 20 December, Brazil submitted a complaint to the Council concerning the imposition by the United States, as from 20 October 1988, of 100 per cent import duties on certain drugs, paper products and consumer electronics goods imported from Brazil. According to the United States, the duties concerned a trade volume of US$39 million but Brazilian estimates were much higher. Although the duties were bound at rates ranging from 0 to 5 per cent, the United States had not invoked any GATT provision to justify this action, which was a clear violation of Article II and also of Article I, by reason of its discriminatory nature. In November Brazil had unsuccessfully held bilateral consultations with the United States under Article XXIII. It therefore requested the Council to establish a panel to rule on the United States action.

The United States replied that the decision to raise tariffs had been taken after two years of fruitless discussion with Brazil, which had refused to take into consideration the damage suffered by the United States as a result of the lack of adequate intellectual property protection for pharmaceutical and chemical products. The United States said the tariff increase was designed to compensate for the damage suffered by the two industry sectors and that it was an action of last resort. The United States stated that it was prepared to lift these sanctions as soon as Brazil responded to its concerns. Furthermore, this situation argued forcefully for rapid progress in GATT concerning trade effects of intellectual property. The United States said it was studying Brazil's request, and was not prepared to respond to it at the present Council meeting.

Brazil's request for the establishment of a panel was supported by twenty-three speakers representing thirty-seven contracting parties: Argentina, Canada, Colombia, Nigeria, the European Communities, Mexico, Chile, Hong Kong, Uruguay, Yugoslavia, Singapore, Australia, India, Egypt, Peru, Jamaica, Kuwait, Indonesia, Thailand, Malaysia, New Zealand, Norway on behalf of the Nordic countries, and Hungary. Broadly speaking, these countries condemned any recourse to unilateral action to resolve a trade dispute between GATT member countries. They considered that the United States action infringed Articles I and II of the General Agreement and constituted a threat to the GATT dispute-settlement system. Some countries pointed out that it was also contrary to the standstill commitments entered into at Punta del Este. Reference was also made to the destabilizing effects that could result for the trade of third countries. Some countries emphasized the need to ensure adequate protection for intellectual property in the GATT, although that shortcoming did not justify the adoption of unilateral compensatory action.

Brazil noted that all speakers had stressed the lack of any legal foundation for the United States action. Furthermore it considered that the US description of the Brazilian pharmaceutical industry was misleading and over-simplistic. The laws applied in that area dated back to 1945, and were in conformity with the Paris Convention. The same treatment was accorded to domestic and foreign companies. Besides, the latter had 80 per cent of the Brazilian market for drugs, of which the United States accounted for 35 per cent. No case of patent infringement for pharmaceutical products had been raised against Brazil. The tariff increase affected highly competitive export sectors, to which it was causing great damage. Furthermore, the United States was one of the strongest advocates, in the Uruguay Round, of an acceleration of dispute-settlement procedures. It was therefore urgent to establish a panel.

The Council agreed to revert to this matter at its next meeting.

Meat with hormones: EC complaint concerning increasing United States tariffs

The European Community drew the Council's attention to the unilateral

* [These are extracts from GATT Focus, No.59 January 1989].

increase in tariffs established by a United States Presidential Proclamation, in reply to the implementation by the EC, from 1 January 1989, of its Directive concerning the prohibition of the sale and importation of meat treated with hormones. The tariff increase, of up to as much as 100 per cent of the ad valorem duties, concerned nine tariff headings, including in particular boneless bovine meat, pork, pet food, tomato preserves, fruit juice and coffee extracts. The EC argued that decision violated Article II of the General Agreement, since the increase concerned bound tariffs, Article I, since it was applied discriminatorily to the EC, and Articles XXII and XXIII on conciliation and dispute settlement.

In addition, the European Community expressed its concern, which went well beyond the specific case under consideration, with regard to the automatic nature of the procedure followed by the United States, and the strengthening by that country of its internal legislation in a manner contrary to the General Agreement. It therefore requested the Council to make a ruling on the legal issues involved in the case and come forward with recommendations on appropriate action to remedy the situation.

The United States replied that the dispute resulted from the unilateral application by the EC of a directive that utterly lacked scientific justification and its repeated refusal to accept scientific arbitration under the aegis of the Committee on Technical Barriers to Trade. The EC itself had admitted that the ban on hormones for animal feedstuffs was based on political and not scientific grounds. The United States added that for eighteen months the EC had stalled consideration of the issue by the Committee on Technical Barriers to Trade. Its request for a legal ruling by the Council was wholly unjustified and the United States opposed it. It was ready to discuss the issue under dispute in an appropriate multilateral forum.

Canada considered that the EC ban on hormones had no scientific justification and was an unjustified barrier to trade. Canada had a trade interest too, and considered that the issue raised several questions of principle concerning the application of technical standards to the agricultural sector. However, Canada regretted that the United States should reply to one unilateral measure by another unilateral measure, and called on the United States and the EC to review their decisions.

The Council agreed to revert to the item at its next meeting.

North American ice cream and yoghurt

The United States drew the Council's attention to the fact that in 1988 Canada had introduced restrictions on ice-cream and yoghurt, by requiring import permits based in practice on importers' past performance. As a result United States exports of those products were reduced. The United States considered that the measures were inconsistent with Article XI and lacked transparency. Consultations under Article XXII with Canada had not been able to settle the matter satisfactorily.

Canada considered that its action was fully in accordance with Article XI: 2(c)(i) of the General Agreement: controls on dairy imports were necessary for the enforcement of Canada's measures which operated to restrict quantities of industrial milk that could be produced in Canada. It remained willing to seek a negociated bilateral solution, but would not stand in the way of the establishment of a panel.

The Council agreed to establish a panel.

● For its part, Canada said that it had requested the United States to modify the administration of its quota for ice cream, allocated in 1970 to five countries, not including Canada, so as to make a single global quota. Canada argued that circumstances had changed, and very little use had been made of the quotas. Furthermore, the legal basis for that decision, the 1955 Waiver, did not exempt the United States from obligations under Article XIII on the non-discriminatory distribution of import quotas. Canada had requested consultations under Article XXIII:1, and if a satisfactory solution could not be reached rapidly, it reserved the right to request the establishment of a panel. The United States said that it was prepared to hold consultations with Canada, and that a review of the quotas was under way.

The Council agreed to revert to the matter at its next meeting.

United States restrictions on sugar imports under the Waiver and the Headnote to the Schedule of Tariff Concessions

The European Community recalled that this was the third time it was requesting the establishment of a panel to examine the restrictions applied by the United States on sugar and sugar-containing

products under the 1955 Waiver and the Headnote to Chapter 10 of the United States Tariff Schedule. The United States continued to link progress on that matter with the settlement of procedural issues in another dispute. The EC said that in addition to the explanations submitted to the Council in September and October, it had sent a letter to the United States pointing out that the issue raised concerned the GATT consistency and implications of the application of measures taken under the Waiver and the Headnote. The sugar sector was the most evident example of the incompatibility of those measures with the General Agreement.

The United States considered that the EC had not satisfactorily explained the legal basis for its claim.

The Council agreed to revert to the issue at its next meeting.

United States taxes on petroleum: consultations on compensation

The European Community informed the Council that consultations were underway with the United States concerning compensation for the damage it had suffered as a result of the maintenance by the United States of GATT-inconsistent taxes.[1]

Canada and Mexico, which were co-complainants with the EC in the dispute, as well as Nigeria, Kuwait, Malaysia and Indonesia, as third countries, stressed that removal of the illegal taxes was the only real solution. However, Canada and Mexico said that they were ready to hold consultations with the United States for the granting of compensation. Canada pointed out that it reserved its right to resort to Article XXIII:2 for authorization, if necessary, to withdraw concessions to compensate for the injury suffered.

Trade in semi-conductors

The EC drew the Council's attention to the fact that Japan had not yet taken any action to modify its trade practices in this sector, some of which had been found inconsistent with the General Agreement[2]. Japan said that decisions would probably be taken early in 1989.

On another point, Japan informed the Council that the United States had only partially removed its unilateral measures against certain Japanese exports concerning trade in semi-conductors[2]. This was a case of violation of Articles I and II, and Japan reserved its right to request the establishment of a panel.

The EC said that it shared the viewpoint of Japan.

UNITED STATES - RESTRICTIONS ON IMPORTS OF SUGAR

Report of the Panel

1. INTRODUCTION

1.1 At its meeting in June 1988, the Council was informed that Australia had held consultations on 7 June 1988 with the United States under Article XXII:1 concerning United States import restrictions on sugar, in particular for the purpose of establishing the United States' justification under the General Agreement for its current sugar import régime. As these consultations did not lead to a satisfactory settlement, Australia, in a communication circulated as L/6373 of 19 July 1988, requested the establishment of a panel to examine the matter pursuant to Article XXIII:2.

1.2 At the meeting of the Council on 22 September 1988, the United States sought confirmation of its understanding that Australia's request for a panel referred only to United States import restrictions on raw and refined sugar implemented pursuant to the authority of the Headnote in the Tariff Schedules of the United States (TSUS) (hereinafter referred to as the Headnote) and reflecting the provision contained in the GATT Schedule of Concessions of the United States (Schedule XX). Australia confirmed that its request referred to United States import restrictions on raw and refined sugar as justified by the United States under the authority of the Headnote (C/M/224).

1.3 At the same meeting, the Council agreed to establish a panel with the following terms of reference:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Australia in document L/6373 and to make such findings as would assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in paragraph 2 of Article XXIII" (C/M/224).

1.4 The representatives of Argentina, Brazil, Canada, Colombia, the European Economic Community, Nicaragua and Thailand reserved their respective rights to make submissions to the Panel (C/M/224).

1.5 At its meeting on 20 December 1988, the Council was informed that an agreement had been reached on the following composition of the Panel (C/M/227):

Chairman:	Mr. Keith Broadbridge
Members:	Mr. Elbio Rosselli
	Mr. Witold Jozwiak

1.6 The Panel held meetings with the parties to the dispute on 16 February and 17 March 1989, met with interested contracting parties on 17 February 1989 and submitted its conclusions to the parties on 16 May 1989.

2. FACTUAL ASPECTS

2.1 In the Annecy Round in 1949, the United States negotiated and included in Schedule XX tariff concessions on raw and refined sugar subject to a provision relating to Title II of the Sugar Act of 1948 or substantially equivalent legislation. Title II of the Sugar Act of 1948 required the Secretary of Agriculture to establish quotas on the importation and domestic production of sugar on the basis of his yearly determination of the amount of sugar needed to meet consumers' requirements in the continental United States.

2.2 This provision, enlarged to authorize the President of the United States to proclaim a rate of duty and quota limitation on imported sugars if the Sugar Act or substantially equivalent legislation should expire, was reflected in Schedule XX following the Torquay Round in 1951 and, with some modification, following the Kennedy Round in 1967 and the Tokyo Round in 1979. By Proclamation 3822 of 16 December 1967, the President of the United States added to the TSUS the Headnote reflecting this provision.

2.3 In 1988 the United States modified its GATT Schedule in accordance with the harmonized system. Since then, the provision has been contained in Chapter 17 of GATT Schedule XX (United States), and reflected in the corresponding portion of the Harmonized Tariff Schedule of the United States (HTSUS). The provision reads as follows:

> "2. The rates in subheadings 1701.11, 1701.12, 1701.91.20, 1701.99, 1702.90.30, 1702.90.40, 1806.10.40 and 2106.90.10, on 1 January 1968, shall be effective only during such time as Title II of the Sugar Act of 1948 or substantially equivalent legislation is in effect in the United States, whether or not the quotas, or any of them, authorized by such legislation, are being applied or are suspended: Provided,
>
> (a) That, if the President finds that a particular rate not lower than such 1 January 1968 rate, limited by a particular quota, may be established for any articles provided for in the above-mentioned subheadings, which will give due consideration to the interests in the United States sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade, he shall proclaim such particular rate and such quota limitation, to be effective not later than the 90th day following the termination of the effectiveness of such legislation;
>
> (b) That any rate and quota limitation so established shall be modified if the President finds and proclaims that such modification is required or appropriate to give effect to the above considerations; and
>
> (c) That the 1 January 1968 rates shall resume full effectiveness, subject to the provisions of this note, if legislation substantially equivalent to Title II of the Sugar Act of 1948 should subsequently become effective."

2.4 The Sugar Act of 1948 expired on 31 December 1974 and was not replaced by substantially equivalent legislation. The President of the United States established, by Proclamation 4334 of 16 November 1974, import quotas and rates of duties on raw and refined sugar on the basis of the Headnote. Subsequent Presidential Proclamations modified the applicable duties and quota amounts.

2.5 On 5 May 1982, the President of the United States, pursuant to his authority under the Headnote, established, by Proclamation 4941, an emergency import quota programme to regulate imports of sugar into the United States market, according to which the size of the global import quota is determined and announced quarterly or for other periods by the Secretary of Agriculture and allocated between the different supplying countries according to their past performance during a previous representative period. Australia retained a share of 8.3 per cent of the total United States import sugar market. For fiscal year 1982/83 the global import quota was fixed at 2.80 million short tons (raw value), plus 2,000 short tons (raw value) for the specialty sugar import quota. Average United States imports of sugar during 1977/81 were 5.08 million short tons.

2.6 Since 1982, the global import quota has generally been set on an annual basis. For 1988 (calendar year), the global quota was 1,056,675 short tons (raw value). For 1989 (calendar year), the quota announced was 1,125,255 metric tonnes (raw value)[1], equal to 1,240,380 short tons (raw value). Australia's exports to the United States market was of 232,400 short tons (raw value) in 1982/83; 83,335 short tons (raw value) in 1988 and an allocated 96,343 short tons (raw value) in 1989. Although Australia's share of the base quota remained at 8.3 per cent, Australia's actual share of the total United States market for imported sugar declined to less than 7.9 per cent in 1987-1988 due to minimum shipment provisions provided in the quota arrangements for small quota countries.

2.7 Production of sugar in the United States (beet and cane, raw value) increased from 5.9 million short tons in 1982 to 7.3 million short tons in 1987. In 1988, production, as estimated by the United States Department of Agriculture, was 7.1 million short tons.

3. MAIN ARGUMENTS

Abstract

3.1 Australia asked the Panel to find that import restrictions on sugar implemented by the United States were contrary to the provisions of Article XI:1 and qualified neither for the exceptions provided for under that Article, nor for those provided under any other relevant provision of the General Agreement and also that these restrictions constituted, *prima facie*, a case of nullification or impairment of Australia's rights under the General Agreement. Australia noted that the United States did not justify these restrictions in terms of Section 22 of the Agricultural Adjustment Act (of 1933) as amended, or any other measure. Specifically,

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[1] Since 1 January 1988, in order to meet the requirements of the Harmonized Tariff System, the country-by-country allocations have been measured in metric tonnes (raw value) on the basis of 1 metric tonne equals 1.10231125 short tons.

Australia noted that the Section 22 Waiver did not permit the imposition of fees and quotas simultaneously, nor did it permit quotas to be set at less than 50 per cent of the level of imports during a previous representative period (BISD 3S/32).

3.2 The United States maintained that the import restrictions subject to Australia's complaint were administered pursuant to a negotiated tariff concession, and thus pursuant to provisions which were an integral part of the General Agreement. On this basis, the United States asked the Panel to reject Australia's complaint.

Article XI

3.3 Australia claimed that the import restrictions on sugar maintained by the United States pursuant to Presidential Proclamation 4941 of 5 May 1982 were inconsistent with the provisions of Article XI:1, which stated that:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party ..."

3.4 Australia noted that paragraph 2 of Article XI provided for exemptions from the provisions of paragraph 1 of that Article, but argued that the import restrictions on sugar maintained by the United States did not qualify for any of the requirements in the relevant sub-paragraphs of Article XI:2. In particular, Australia recalled that Article XI:2(c)(i) required that, for the exemption from the provisions of Article XI:1, the import-restricting measures must be "necessary to the enforcement of governmental measures which operate: to restrict the quantities of the like domestic product permitted to be marketed or produced ...". It also required that the restrictions "... shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions".

3.5 Australia maintained that the United States import restrictions on sugar did not meet either of these requirements. Regarding governmental measures in force, Australia recalled that in the case of Article XXII consultations on 7 June 1988, the United States had confirmed that the United States sugar programme did not contain any provisions designed to limit or restrict quantities of cane or beet sugar produced domestically or to limit the quantities eligible for support under the Price Support Loan Program. Similarly, United States sugar import quotas and total sugar imports had declined significantly since the introduction of restrictive quotas in 1982, whereas the United States domestic sugar production had increased over this period (paragraph 2.7 refers).

3.6 The United States pointed out that these restrictions were in accordance with a negotiated provision of a tariff concession which was an integral part of the General Agreement. Therefore, the United States considered that Article XI was not relevant to the matter examined by the Panel as one provision of the General Agreement could not overrule another (see also Australia's argument in paragraph 3.10).

Article II

3.7 The United States recalled that the import restrictions on raw and refined sugar examined by the Panel were administered pursuant to a provision which was part of a tariff concession first negotiated in the Annecy Round in 1949. The United States maintained that this provision was consistent with Article II:1(b) which, inter alia, permitted contracting parties to subject tariff concessions to "the terms, conditions or qualifications set forth" in their Schedules of Concessions. Pursuant to Article II:7, these Schedules were annexed to the General Agreement and were made an integral part of it. The United States concluded that the terms, conditions and qualifications applicable to particular tariff concessions, including the import restrictions at issue in the present case, were an integral part of the General Agreement. Therefore, they could neither be challenged nor overruled by another part or provision of the General Agreement.

3.8 Australia did not question the United States argumentation that qualifications to tariff concessions were permissible under the provisions of Article II:1(b). However, Australia claimed that qualifications to concessions could neither justify the application of measures contrary to other provisions of the General Agreement, nor could they provide a derogation from contracting parties' obligations under specific provisions of the General Agreement. Australia pointed out that Article II, unlike other GATT Articles which provide for derogations from the provisions of the General Agreement, contained no mechanism, explicit or implicit, for escape from those provisions. Article II dealt simply with concessions to other contracting parties, not rights to exempt specific goods from provisions of the General Agreement. Australia noted that the Sugar Act of 1948 allowed for quotas on both domestic production and imports (paragraph 2.1 refers), which made it a system which might, if challenged in the GATT, have had elements necessary for prima facie conformity with Article XI:2. The substitute mechanism provided for in 1951 (paragraph 2.2 refers) also did not rule out this possibility. Australia noted that there was no reason for other contracting parties to believe that the Headnote would be implemented in a manner inconsistent with Article XI:2 and therefore could not accept the argument that the qualification in Schedule XX obliged the United States to introduce GATT-inconsistent import quotas.

3.9 Australia recalled that at the 9th Session in 1955, the CONTRACTING PARTIES had adopted the report of the Review Working Party on Other Barriers to Trade (BISD 3S/222). This report contained, inter alia, an agreement that matters which might affect the practical effects of tariff concessions could be negotiated and incorporated into the appropriate schedule annexed to the General Agreement "provided that the results of such negotiations should not conflict with other provisions of the Agreement" (BISD 3S/225). Australia further recalled that in a precedent dispute settlement case brought by Canada against the EEC about a footnote to a concession on high-quality beef included in the EEC's Schedule of Concessions, the Panel had found, inter alia, that the words "terms, conditions or qualifications" in Article II:1(b) could not be interpreted to mean that a contracting party could explicitly or by the manner in which a concession was administered actually contravene another provision of the General Agreement (BISD 28S/99).

3.10 Australia said that contrary to the United States argumentation (see also paragraph 3.6), it was not Australia but the United States which claimed that one part of the General Agreement could overrule another as it was arguing that a provision contained in its Schedule annexed to Part I overrode any obligations the United States might have under Part II of the General Agreement. In Australia's view, the question of one part of the General Agreement overriding another should not arise, as Schedules in Part I could not contain provisions which, in their operation, were inconsistent with those set out in other parts of the Agreement. Australia argued that this was supported, inter alia, by the argument presented by the United States to the panel examining Japan's restrictions on imports of certain agricultural products (L/6253, paragraphs 3.12-3.13 refer).

3.11 The United States contested that the cases cited by Australia were relevant to the issue examined by the Panel. The Working Party on Other Barriers to Trade was limited by its terms of reference to consideration of proposals submitted with respect to (a) subsidies, countervailing and anti-dumping measures, and (b) state trading, surplus disposal, disposal of non-commercial stocks and the general exceptions to the Agreement. It did not set out to make recommendations on Article II which was the subject of another working party, the Working Party on Schedules and Customs Administration also established as part of the 1955 review process. The United States noted that the statement cited by Australia would not support Australia's claim even if it were read to apply to matters other than subsidies. In that statement, the Working Party agreed that contracting parties "should" avoid agreeing to subsidies provisions in their Schedules which might not be consistent with other provisions of the General Agreement. In the United States view, this was clearly nothing more than a policy recommendation and not a legal requirement.

3.12 Regarding the case brought by Canada against the EEC on high-quality beef, the United States pointed out that this turned on the EEC's implementation of a provision in its Schedule. The panel did not examine

the GATT consistency of the provision itself, which still stands in the EEC's Schedule as written at the time it was negotiated, but rather examined the manner in which the concession was implemented. And the panel "concluded that the manner in which the EEC's concession on high-quality beef was implemented accorded less favourable treatment to Canada than that provided for in the relevant EEC Schedule, thus being inconsistent with the provisions of paragraph 1 of Article II of the General Agreement" (BISD 28S/99, paragraph 4.6). Regarding the case brought by the United States against Japan on imports of certain agricultural products, the United States said that, in that case, it was merely arguing that the application of Article XI:1 was not limited to items that were subject to tariff bindings under Article II but applied as well to unbound items. Thus, the argument advanced by Australia had not been established on a principle of GATT law.

3.13 Australia replied that the relevant extract from the cited Working Party report referred to a situation where, in the context of negotiating tariff bindings or tariff reductions, there were parallel negotiations on "matters, such as subsidies" (BISD 3S/225, paragraph 14). Australia maintained that the obvious intent of this language was that the principle should apply generally, i.e., that the results of such negotiations should not conflict with other provisions of the General Agreement. If this had not been the intent, the reference would have been simply to "subsidies". Australia also recalled that reports adopted by the CONTRACTING PARTIES were interpretations of the General Agreement and became the views of the contracting parties without qualification. Australia also argued that the issues in the case were analogous to the adopted findings of the Canada/EEC beef panel which had concluded that the concession was implemented inconsistently with Article I.

3.14 The United States maintained that, unlike the qualification to the EEC concession on beef, the Headnote explicitly authorized a quota on imports of sugar. The United States said that, by raising this claim, Australia was requesting the Panel to declare that actions taken by the United States in conformity with a negotiated tariff provision were not permissible. In other words, Australia was seeking to terminate or to modify a United States tariff concession not by negotiation, but by the operation of a dispute settlement panel.

3.15 Furthermore, the United States recalled that in many instances both the Schedules negotiated in 1947 and those now in effect contained terms, conditions and qualifications other than tariffs. If Australia's claim was correct, all these non-tariff conditions, including those in Australia's own Schedule, would not be permissible. But if a contracting party could do under a Schedule qualification only what it could do under another provision of the General Agreement, then there would be no need to have schedule qualifications and Article II:1(b) would be, to a great extent, meaningless.

3.16 Australia replied that it was not attempting to alter the GATT Schedule of the United States through the dispute settlement process, but only to have the United States sugar import régime brought into conformity with the GATT obligations of the United States. Australia stressed that, although a contracting party could unilaterally modify its Schedule, if the

argumentation made by the United States was accepted, it would be open to any contracting party to have included in its GATT Schedule provisions which gave it wide derogations from its obligations under any other provisions of the General Agreement it considered appropriate. And once such provisions were in the Schedule, they would not be open to challenge by another contracting party.

3.17 Australia sought clarification from the United States on its interpretation of its tariff concession on sugar. Australia noted that, failing clarification to the contrary, it understood that with the expiry of the Sugar Act of 1948 and in the absence of substantially equivalent legislation, the United States claimed to be able to set tariffs at any rate above 0.6625 cents a pound and quotas at any level (including possibly a zero level). If this understanding was correct, the concessions operated in a manner contrary to the purpose of Article II. Moreover, Australia assumed that the United States claimed to have exemption not only from Article XI, but also from Articles I and XIII of the General Agreement.

Article XIII

3.18 Australia noted that in December 1988, the United States authorities had modified the country-by-country allocations established for that year under the sugar import quota programme. Specifically, a shortfall declared by Guyana had been reallocated to three other CARICOM countries on the basis of an exchange of letters between the United States and CARICOM in 1984, in which the United States had agreed that any quota shortfall declared by a CARICOM country would be reallocated among other CARICOM countries. Australia maintained that this reallocation was discriminatory and inconsistent with the provisions of Article XIII:2. Australia also noted that the decision of the CONTRACTING PARTIES to grant the United States a waiver in respect of the Caribbean Basin Economic Recovery Act made explicit reference to the requirement of the United States not to contravene the principle of non-discriminatory allocation of sugar quotas (BISD 31S/22).

3.19 The United States considered that issues relating to Article XIII fell outside the terms of reference of the Panel. The United States claimed that Australia had referred only to Article XI in its request for consultations and for the establishment of the Panel. The United States argued that presumably other contracting parties would have wished to have had their views heard by the Panel, had they known about Australia's intention to raise arguments relating to Article XIII.

3.20 Australia considered that Article XIII was within the scope of the terms of reference of the Panel, which covered the relevant provisions of the General Agreement, in particular Article XI, and asked the Panel to make a finding on this matter also. It was Australia's understanding of GATT dispute settlement practices that issues directly relevant to a panel's work, even if they took place after the establishment of the panel, could legitimately be considered and ruled on by the panel.

4. SUBMISSIONS BY INTERESTED THIRD PARTIES

(a) Argentina

4.1 Argentina recalled the importance for some of its regions of sugar exports to the United States. Following the imposition of restrictive import quotas in 1982, Argentina's earnings from these exports dropped from US$21 million in 1981 to US$14 million in 1987. The tendency to apply quantitative restrictions as an instrument of protection was also evident from the decline in United States annual imports of sugars from more than 5 million short tons in the period 1977-81 to some 1 million short tons in 1988.

4.2 Argentina considered that the quantitative restrictions on imports of sugars imposed by the United States were contrary to Article XI. Argentina further considered that the United States could not justify such restrictions in the light of the Headnote authority. Items to which these restrictions applied were bound. If the possibility of having recourse to the Headnote provision was admitted, the United States would have the right to reduce its import quota to zero, which would render the concession meaningless. This would be inconsistent with the basic purpose of concessions, which was to create stable conditions of competition.

(b) Brazil

4.3 Brazil stated that, when the United States adopted a restrictive quota system for imports of sugar in 1982, the measure was announced as transitory, aimed at alleviating an emergency situation created by the instability of world market prices. But the quota system had been maintained and no signs of eliminating these restrictive policies had been given. Moreover, this policy had greatly contributed to the deterioration of the world sugar market.

4.4 The restrictions maintained by the United States had caused irreparable losses to Brazil which had seen its annual sugar exports decline from 1 million short tons in the early '80s to 15,300 short tons in 1988. Furthermore, sugar substitute programmes which favoured greater consumption of alternative sweeteners in the United States tended to restrict the Brazilian share of the United States sugar market even more. For these reasons, Brazil considered that the maintenance by the United States of restrictive import quotas on sugar had nullified or impaired benefits accruing to Brazil under the General Agreement.

(c) Canada

4.5 Canada said that since the imposition of restrictive quotas in 1982, it had suffered a decline in exports of sugars to the United States while, at the same time, United States exports of sugars to Canada had grown. Quotas on refined sugars had restricted Canadian exports which had declined from 29,419 short tons in 1983 to 9,749 short tons in 1987. It was Canada's understanding that the United States did not consider that the quotas maintained under the Headnote authority fell within the waiver granted to the United States under Section 22 of the Agricultural Adjustment Act (of 1933), as amended.

4.6 Canada argued that these restrictions were contrary to Article XI and could not be justified under paragraph 2 of that Article. Furthermore, it was Canada's view that the existence of a headnote in a schedule of concessions allowing the combination of duties and quotas did not provide justification for measures inconsistent with the General Agreement. The fact that the United States Tariff Schedule and its Headnote became part of the GATT Schedule in 1951 and were included in the Geneva Protocol of 1967 affected only the operation of the tariff concessions that had been granted and did not imply any recognition that the quotas imposed were justified under the General Agreement.

4.7 Canada maintained that the simple inclusion of the Headnote could not, and did not, in itself, justify a derogation from the obligations of Article XI. It was Canada's view that, the provision of Article II:7 notwithstanding, the United States was not thereby permitted to impose restrictions on the import of sugar that were in violation of another provision of the General Agreement. Canada, therefore, requested the Panel to recommend the removal of the United States import restrictions on sugar. Canada stressed that any resolution of this complaint should be on a non-discriminatory basis.

(d) Colombia

4.8 Colombia stated that the restrictive import quota system adopted by the United States was one of the factors which had impaired Colombia's participation in the world sugar market. Colombia was confident that the Panel would give careful consideration to the Australian complaint and that a solution for agricultural trade liberalization would be found in the Uruguay Round negotiations.

(e) European Economic Community

4.9 The EEC stated that the restrictive application of import quotas had greatly limited United States sugar imports since 1982. This sharp reduction in United States imports had contributed substantially to a plunge in sugar prices on world markets with harmful effects for all sugar exporters, including the EEC. Furthermore, by maintaining domestic sugar prices at very high levels, the United States had encouraged the production of isoglucose, and its by-product corn gluten feed, which was produced almost exclusively for export to the EEC. The distorting effects of these exports were serious in that they constituted a very cheap substitute for EEC cereals for animal feed and thus tended to encourage the growth of EEC milk and beef production.

4.10 The EEC maintained that these quantitative restrictions on sugar imports were contrary to Article XI:1 and were neither consistent with the provisions set out in Article XI:2, nor with the terms of the 1955 Waiver granted to the United States. Having been informed about the United States arguments relating to Articles II:1(b) and II:7, the EEC argued that Article II:1(b) could not be interpreted as allowing for derogations from the prohibition on quantitative restrictions provided for in Article XI. The "terms, conditions or qualifications" set forth in a Schedule could not be considered as providing a waiver from the obligations under the other provisions of the General Agreement. Thus Article II:1(b) could not

justify measures that were inconsistent with the provisions of the General Agreement. Since the United States Headnote authority could not modify the United States obligations under provisions other than Article II, it was for the United States to prove that the quantitative restrictions in question were compatible with the provisions of Article XI. Failing such proof, in the EEC's view, the Panel must conclude that the restrictions applied by the United States on imports of sugar were contrary to the provisions of Article XI:1.

4.11 The EEC took note of the fact that Australia did not invoke the 1955 Waiver in the present matter. The EEC believed that there was no explicit reference to any such limitation on the scope of the Panel's review. However, if the Panel were to restrict the scope of its review, the EEC wished the terms and grounds of the Panel's decision to be made clear in this respect in its final report.

(f) Nicaragua

4.12 Nicaragua argued that the decision of the President of the United States of 5 May 1982 to introduce a quota system for regulating imports of sugar into the United States constituted a restriction within the terms of Article XI:1. The system did not meet the conditions for exceptions mentioned in Article XI:2 and was not justifiable under the 1955 Waiver granted to the United States.

4.13 Nicaragua further argued that no justification for such a system could be found in Article II:1(b). In Nicaragua's view, the "terms, conditions or qualifications" provided for in that Article could not allow measures contrary to other provisions of the General Agreement. Consequently, the Headnote did not have any validity as a waiver either to Article XI or to Article XIII. If a different interpretation was to be accepted, it might be asked what would be the value and scope of the United States concessions, which in an extreme case could lead to an outright prohibition of sugar imports.

4.14 Nicaragua stated that the propositions formulated above had been presented to the Panel responsible for examining the measures taken by the United States against Nicaragua in May 1983.

(g) Thailand

4.15 Thailand said that since the introduction of an increasingly restrictive country quota system for sugar imports in 1982, the quota allocated to Thailand had been reduced greatly, affecting the country's sugar industry and export earnings.

4.16 In Thailand's view, the system operated by the United States contravened the provisions of Article XI:1 and could not be justified under Article XI:2. Another major concern was that this system had encouraged the expansion of the non-sugar sweetener industry in the United States and the development of substitute sweeteners. As this trend would further distort the situation on the world sugar market, Thailand requested the Panel to recommend an appropriate solution to this matter.

5. FINDINGS

5.1 The Panel noted that the basic issue before it was as follows. The United States maintains quantitative restrictions on the importation of certain sugars described in its GATT Schedule of Concessions (Schedule XX). The maintenance of quantitative restrictions is inconsistent with Article XI:1 of the General Agreement which provides, inter alia, that:

> "No restrictions ... made effective through quotas ... shall be ... maintained by any contracting party on the importation of any product of the territory of any other contracting party."

Article II:1(b) of the General Agreement provides that the products described in the Schedules of Concessions of the contracting parties

> "shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein." (emphasis added).

The United States argues that the proviso "subject to the terms, conditions or qualifications set forth in that Schedule" in Article II:1(b) permits contracting parties to include qualifications relating to quantitative restrictions in their Schedule. The United States had made use of this possibility by reserving in its Schedule of Concessions the right to impose quota limitations on imports of sugar in certain circumstances. Since the restrictions on the importation of sugar conformed to the qualifications set out in the Schedule of the United States, and the Schedules of Concessions were, according to Article II:7, an integral part of the General Agreement, the restrictions were consistent with the United States obligations under that Agreement. Australia argues that qualifications to concessions made in accordance with Article II:1(b) cannot justify measures contrary to other provisions of the General Agreement, in particular not quantitative restrictions inconsistent with Article XI:1 (for a complete description of the parties' arguments, see Section 3 above).

5.2 The Panel first examined the issue in the light of the wording of Article II. It noted that in Article II:1(b), the words "subject to the ... qualifications set forth in that Schedule" are used in conjunction with the words "shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]". This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is "Schedules of Concessions" and that the ordinary meaning of the word "to concede" is "to grant or yield". This also suggests in the view of the Panel that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.

5.3 The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General

Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade". Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

5.4 The Panel then examined the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

> "may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement (See paragraph 4 of Article II and the note to that paragraph)." (emphasis added).

The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

5.5 The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the report of the Review Working Party on Other Barriers to Trade, which had concluded that:

> "there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement." (emphasis added) (BISD 3S/225).

Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.

5.6 The Panel finally examined the issue in the light of the drafting history. It noted that the reference to "terms and qualifications" was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to "conditions". This amendment was proposed and adopted "in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than conditions governing the tariff bindings to which they relate" (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.

5.7 For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1.

5.8 Australia claimed that the reallocation of a portion of Guyana's sugar quota to Belize, Jamaica and Trinidad and Tobago in December 1988 was inconsistent with Article XIII:2 of the General Agreement. The United States argued that this matter was not covered by the Panel's terms of reference because it had arisen after the establishment of the Panel by the Council in September 1988. The Panel considered that it had to interpret its terms of reference not only in the light of the interests of the parties to the dispute, but also in the light of the rights of third contracting parties. The Panel noted that, according to paragraph 15 of the Understanding on Dispute Settlement (BISD 26S/210), "any contracting party having a substantial interest in the matter before a Panel, and having notified this to the Council, should have an opportunity to be heard by the panel". The Panel concluded from this that only those issues which interested third contracting parties could reasonably have expected to be part of the proceedings when the Panel was established by the Council could be considered to be part of the matter referred to the Panel by the Council. The issue raised by Australia involves directly two contracting parties (Jamaica and Trinidad and Tobago); it also has implications for other contracting parties. Since the matter raised by Australia had arisen only after the establishment of the Panel by the Council in September 1988, contracting parties had no reason to expect that the reallocation of the sugar quotas among Caribbean countries would be an issue before the Panel. The Panel therefore decided that this reallocation was not part of its mandate. The Panel however recalled in this context that it had found all restrictions imposed by the United States on the importation of sugar under the authority of the Headnote in the Tariff Schedules of the United States to be inconsistent with the General Agreement independent of the quota allocation to specific countries. It also recalled its finding that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that this

could not justify inconsistencies with any article of the General Agreement, including Article XIII.

5.9 The Panel noted that the EEC, in its submission as an interested third party, argued that the restrictions on the importation of sugar were contrary to the terms of the waiver granted in 1955 by the CONTRACTING PARTIES in connection with import restrictions imposed under Section 22 of the United States Agricultural Adjustment Act (of 1933) as amended (BISD 3S/32). The Panel noted that the matter referred to the CONTRACTING PARTIES by Australia were restrictions maintained under the authority of the Headnote in the Tariff Schedules of the United States, and not restrictions taken under Section 22 of the Agricultural Adjustment Act (of 1933) as amended (see paragraph 1.2 above). Therefore the issue raised by the EEC could not be examined by the Panel. The Panel also recalled in this context that the practice has been for panels to make findings only on those issues raised by the parties to the dispute, not on those raised solely by third parties (L/6264, page 43 and L/6309, page 37).

6. CONCLUSIONS

6.1 In the light of the considerations set out in Section 5 above, the Panel has concluded that the restrictions on the importation of certain sugars maintained by the United States under the authority of the Headnote in the Tariff Schedule of the United States are inconsistent with Article XI:1 and cannot be justified under the provisions of Article II:1(b).

6.2 The Panel therefore recommends that the CONTRACTING PARTIES request the United States either to terminate these restrictions or to bring them into conformity with the General Agreement.