

ARTICLE XVII
STATE TRADING ENTERPRISES

I.	TEXT OF ARTICLE XVII, INTERPRETATIVE NOTE AD ARTICLE XVII AND URUGUAY ROUND UNDERSTANDING ON INTERPRETATION OF ARTICLE XVII	469
II.	INTERPRETATION AND APPLICATION OF ARTICLE XVII	472
A.	SCOPE AND APPLICATION OF ARTICLE XVII	472
1.	General: "State trading enterprises".....	472
2.	Paragraph 1.....	473
(1)	"State enterprise".....	473
(2)	"exclusive or special privileges".....	474
(3)	"involving either imports or exports".....	475
(4)	"act in a manner consistent with the general principles of non-discriminatory treatment".....	475
(5)	"having due regard to the other provisions of this Agreement".....	476
(6)	"commercial considerations".....	476
(a)	Relationship of sub-paragraphs (b) and (c) to sub-paragraph (a).....	476
(b)	Charging of different prices.....	476
(c)	Tied loans.....	476
(d)	"customary business practice".....	477
(7)	Paragraph 1(c): "No contracting party shall prevent any enterprise ... within its jurisdiction".....	477
(8)	State trading enterprises in countries maintaining a complete monopoly of their import trade.....	478
3.	Paragraph 2.....	479
(1)	"imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale ...".....	480
(2)	"goods".....	481
(3)	"fair and equitable treatment".....	481
4.	Paragraph 3.....	481
5.	Paragraph 4.....	481
(1)	"Contracting parties shall notify the CONTRACTING PARTIES".....	481
(2)	"import mark-up".....	482
B.	RELATIONSHIP BETWEEN ARTICLE XVII AND OTHER GATT PROVISIONS	483
1.	Article II.....	483
2.	Article III.....	483
3.	Article XI.....	484
4.	Articles XII and XVIII.....	485
5.	Part IV.....	485
C.	EXCEPTIONS AND DEROGATIONS	485
III.	PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS	485
IV.	RELEVANT DOCUMENTS	486

I. TEXT OF ARTICLE XVII, INTERPRETATIVE NOTE AD ARTICLE XVII AND URUGUAY ROUND UNDERSTANDING ON INTERPRETATION OF ARTICLE XVII

Article XVII

State Trading Enterprises

1.* (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales

solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.

(b) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

(c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interests under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Interpretative Note *Ad* Article XVII from Annex I

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1 (b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph 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.)

Paragraph 4 (b)

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

UNDERSTANDING ON THE INTERPRETATION OF ARTICLE XVII
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members,

Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;

Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;

Recognizing that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;

Hereby *agree* as follows:

1. In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184-185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

4. Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.

5. A working party shall be set up, on behalf of the Council for Trade in Goods, to review notifications and counter-notifications. In the light of this review and without prejudice to paragraph 4(c) of Article XVII, the Council for Trade in Goods may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the above-mentioned questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the

Secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all Members indicating their wish to serve on it. It shall meet within a year of the date of entry into force of the WTO Agreement and thereafter at least once a year. It shall report annually to the Council for Trade in Goods.¹

Note 1: The activities of this working party shall be coordinated with those of the working group provided for in Section III of the Ministerial Decision on Notification Procedures adopted on 15 April 1994.

II. INTERPRETATION AND APPLICATION OF ARTICLE XVII

A. SCOPE AND APPLICATION OF ARTICLE XVII

1. General: "State trading enterprises"

Article XVII makes a distinction between various types of enterprises: a "State enterprise" or "any enterprise" that has been granted "formally or in effect, exclusive or special privileges" (paragraph 1(a)) including "Marketing Boards" (interpretative note to paragraph 1); "any enterprise" under the jurisdiction of a contracting party (paragraph 1(c)); and an "import monopoly" (paragraph 4(b)).

In March 1964, in reaction to a proposal of the representative of Egypt seeking an interpretation of Article XVII, the Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries agreed that "there was nothing in Article XVII which prevents a contracting party from establishing or maintaining State-trading enterprises, nor does the General Agreement sanction discrimination against State-trading enterprises which are, in this regard, placed on the same basis as any other enterprise".¹

The 1989 Panel Report on "Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States" notes the argument made by the US that the Livestock Products Marketing Organization (LPMO), which was established to administer import restrictions on beef, constituted an import monopoly controlled by domestic producers and was in itself a separate "import restriction" within the meaning of Article XI, aside from the restrictions administered by the LPMO. Korea stated that the LPMO administered but did not itself determine quota levels.

"The Panel ... examined the further claim by the United States that the existence, or use, of producer-controlled import monopolies to restrict imports was inconsistent with the provisions of Articles XI:1 and XVII. Korea contested that the existence of a producer-controlled import monopoly in itself constituted an additional barrier to trade. The Panel noted that the LPMO had been granted exclusive privileges as the sole importer of beef. As such, the LPMO had to comply with the provisions of the General Agreement applicable to state-trading enterprises, including those of Articles XI:1 and XVII.

"Article XI:1 proscribed the use of 'prohibitions or restrictions other than duties, taxes or other charges', including restrictions made effective through state-trading activities, but Article XVII permitted the establishment or maintenance of state-trading enterprises, including enterprises which had been granted exclusive or special privileges. The mere existence of producer-controlled import monopolies could not be considered as a separate import restriction inconsistent with the General Agreement. The Panel noted, however, that the activities of such enterprises had to conform to a number of rules contained in the General Agreement, including those of Article XVII and Article XI:1. The Panel had already found that the import restrictions presently administered by the LPMO violated the provisions of Article XI:1. As the rules of

¹L/2281, paras. 9-10 (referring to proposal at L/2147, p. 7, and Secretariat Note at LEGAL/W/3). The proposal, made during the preliminary work on the drafting of Part IV of the General Agreement, was designed to ensure that "in interpreting the provisions contained in Article XVII of the General Agreement, contracting parties should give sympathetic consideration to the need for developing contracting parties to make use of State-trading enterprises as one means of overcoming their difficulties in their early stages of development".

the General Agreement did not concern the organization or management of import monopolies but only their operations and effects on trade, the Panel concluded that the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement.”²

See also Article II:4, which applies to “a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement”.

2. Paragraph 1

(1) “State enterprise”

The US Draft Charter contained the following definition in the section on State trading: “For the purposes of this Article, a State enterprise shall be understood to be any enterprise over whose operations a Member government exercises, directly or indirectly, a substantial measure of control”. The London Report states that certain delegates at the London session of the Preparatory Committee wished to add a reference to “effective control over the trading operations of such enterprise” but others “considered that in such circumstances it would be proper that the government conferring the exclusive or special privileges should assume the responsibility of exercising effective control over operations affecting the external trade of such enterprise”. Also, “It was agreed that when marketing boards buy or sell they would come under the provisions relating to State-trading; where they lay down regulations governing private trade their activities would be covered by the relevant articles of the Charter. It was understood that the term ‘marketing boards’ is confined to boards established by express governmental action.”³

In the London and New York Drafts of the Charter, the article on non-discriminatory administration of State trading enterprises included an explicit definition of “State enterprise”. This definition was deleted at Geneva in the view that such enterprises are defined as precisely as practicable in sub-paragraph 1(a).⁴ The Sub-Committee at the Havana Conference which considered the Charter articles on state trading noted as follows:

“In the opinion of the Sub-Committee, the term ‘state enterprise’ in the text did not require any special definition; it was the general understanding that the term includes, *inter alia*, any agency of government that engages in purchasing or selling.”⁵

In 1959-60 a Panel on Subsidies and State Trading examined the notifications made under Article XVII:1(a) and made recommendations on improving the procedure for such notifications. The 1959 interim report of this group on “Notifications of State-Trading Enterprises” discusses the scope of paragraph 1(a) in connection with the notification requirements contained in paragraph 4(a).⁶ Its Final Report of 1960 notes that

“In discussing which enterprises were covered by Article XVII it was thought that there was sufficient guidance in the Article itself and in the Interpretative Notes. The Panel, however, drew special attention to the following points:

“(a) not only State enterprises are covered by the provisions of Article XVII, but in addition any enterprises which enjoy ‘exclusive or special privileges’;

“(b) marketing boards engaged directly or indirectly in purchasing or selling are enterprises in the sense of Article XVII, paragraphs 1(a) and 1(b), but the activities of marketing boards which do not purchase or sell must be in accordance with the other provisions of GATT;

“(c) the requirements in paragraph 4(a) of Article XVII that contracting parties should notify products ‘imported into or exported from their territories’ should be interpreted to mean that countries should notify

²L/6503, adopted on 7 November 1989, 36S/268, 301-302, paras. 114-115.

³London Report, p. 17.

⁴EPCT/160, pp. 4, 6; EPCT/A/PV.15, pp. 9-24.

⁵Havana Reports, p. 114, para. 10.

⁶L/970, adopted on 13 May 1959, 8S/142, 143, para. 16.

enterprises which have the statutory power of deciding on imports and exports, even if no imports or exports in fact have taken place”.⁷

With regard to this reference to ‘enterprise’ in sub-paragraph (c) directly above,

“... the Panel did not use the word ‘enterprise’ to mean any instrumentality of government. There would be nothing gained in extending the scope of the notification provisions of Article XVII to cover governmental measures that are covered by other articles of the General Agreement. The term ‘enterprise’ was used to refer either to an instrumentality of government which has the power to buy or sell, or to a non-governmental body with such power and to which the government has granted exclusive or special privileges. The activities of a marketing board or any enterprise defined in paragraph 1(a) of Article XVII should be notified where that body has the ability to influence the level or direction of imports or exports by its buying or selling.

“It is clear from the interpretative note to paragraph 1 of Article XVII that the activities of a marketing board or any enterprise covered by paragraph 1(a) of the Article and not covered by paragraph 21 of this report would not be notifiable solely by virtue of a power to influence exports or imports by the exercise of overt licensing powers; where such measures are taken they would be subject to other Articles of the General Agreement.

“Where, however, an enterprise is granted exclusive or special privileges, exports or imports carried out pursuant to those privileges should be notified even if the enterprise is not itself the exporter or importer.”⁸

See also the discussion of the term “State enterprise” in the unadopted 1981 Panel Report on “Spain - Measures Concerning Domestic Sale of Soyabean Oil”.⁹

The definition of “State enterprise” within the scope of Article XVII:1(a) was also discussed in the Committee on Trade in Industrial Products in 1970 and 1971¹⁰, in the Group on Quantitative Restrictions and Other Non-Tariff Measures in 1985¹¹ and in the Council in 1986.¹²

Paragraph 1 of the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994 provides the following “working definition” for the purposes of notification under Article XVII:

“Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”

See also the Interpretative Note *ad* paragraph 1, and, as regards monopolies, paragraph 4 of Article II and paragraph (d) of Article XX.

(2) “exclusive or special privileges”

See the Interpretative Note.

The report of a Sub-Committee which considered the articles of the Charter on State trading during the Geneva session of the Preparatory Committee records that: “It was the understanding of the Sub-Committee that governmental measures imposed to ensure standards of quality and efficiency in the execution of external trade, or privileges granted for the exploitation of national natural resources, did not constitute ‘exclusive or special privileges’” and that “It was the understanding of the Sub-Committee that if a Member Government exempted an

⁷L/1146, adopted on 24 May 1960, 9S/179, 180-181, para. 8.

⁸*Ibid.*, 9S/183-184, paras. 21-23.

⁹L/5142.

¹⁰L/3496.

¹¹NTM/W/13 p. 39.

¹²L/5955, C/W/495, C/M/195 p. 24-25, C/M/196 p. 6-7, C/M/198 p. 11-12.

enterprise from certain taxes, as compensation for its participation in the profits of this enterprise, this procedure should not be considered as 'granting exclusive privileges'.¹³

(3) “involving either imports or exports”

The same Sub-Committee report also records that

“It was the understanding of the Sub-Committee that the intent of these words is to cover, within the terms of this Article, any transactions by a State enterprise through which such enterprise could intentionally influence the direction of total import or export trade in the commodity in a manner inconsistent with the other provisions of the Charter”.¹⁴

(4) “act in a manner consistent with the general principles of non-discriminatory treatment”

Under Article 26 of the US Draft Charter, State enterprises were to accord to the commerce of other Members “non-discriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located”. In the London Draft Charter, the non-discrimination obligation was reformulated to read: “the commerce of other Members shall be accorded treatment no less favourable than that accorded to the commerce of any country, other than that in which the enterprise is located”.¹⁵ At Geneva, the present words “act in a manner consistent with the general principles of non-discriminatory treatment” were inserted in order to allay the doubt that “commercial considerations” (in paragraph 1(b)) meant that exactly the same price would have to exist in different markets.¹⁶ This point is covered in the third paragraph of the interpretative note to paragraph 1.¹⁷ During discussions at Geneva, it was stated that the Article on State trading referred only “to most-favoured-nation treatment and not to national treatment”.¹⁸

The 1952 Panel Report on “Belgian Family Allowances” notes: “As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III”.¹⁹

The Working Party Report which examined the “Haitian Tobacco Monopoly” in 1955 found, with respect to an import licensing scheme operated in connection with an import and production monopoly, that “As the representative of Haiti informed the Working Party that the import licenses issued by the Régie may be used for purchases from any source, it was considered that the measure did not conflict with the provisions of Article XVII calling for non-discriminatory treatment.”²⁰

In the panel proceeding relating to Canada’s administration of its Foreign Investment Review Act, arguments were presented concerning both the issue of whether Article XVII:1 requires national treatment, and the distinct question of whether (even if this is not the case) contracting parties are required to conform to Article III in the administration of any laws or regulations bearing on State trading enterprises. The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” notes:

“The Panel saw great force in Canada’s argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a). However, the Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent

¹³EPCT/160, p. 3 and p. 4.

¹⁴*Ibid.*, p. 4.

¹⁵London Report, p. 32.

¹⁶EPCT/160, p. 5-6; EPCT/A/PV.14, p. 24.

¹⁷EPCT/A/SR.14, p. 3.

¹⁸EPCT/A/SR.10, p. 34.

¹⁹G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

²⁰L/454, adopted on 22 November 1955, 4S/38, 39, para. 8; see also earlier decision and report on the same measure, II/27, II/87.

with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements”.²¹

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” also examined this issue:

“The Panel ... turned its attention to the relevance of Article XVII and in particular to the contention of the European Communities that the practices under examination contravened a national treatment obligation contained in paragraph 1 of that Article. The Panel noted that two previous panels had examined questions related to this paragraph The Panel considered, however, that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article XVII because it had already found that they were inconsistent with Article XI”.²²

(5) “having due regard to the other provisions of this Agreement”

It was agreed in discussions at Geneva in 1947 that this phrase “covers also differential customs treatment maintained consistently with the other provisions of the Charter”.²³

(6) “commercial considerations”

(a) Relationship of sub-paragraphs (b) and (c) to sub-paragraph (a)

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” includes the following finding:

“The Panel takes the view that, through its reference to sub-paragraph (a), paragraph 1(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-trading and other enterprises ‘in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders’. This obligation is defined in sub-paragraph (b), which declares, *inter alia*, that these principles are understood to require the enterprises to make their purchases and sales solely in accordance with commercial considerations. The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words ‘The provisions of sub-paragraph (a) of the paragraph shall be understood to require ...’. For these reasons, the Panel considers that the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment prescribed by the General Agreement”.²⁴

(b) Charging of different prices

See the Interpretative Note to paragraph 1.

(c) Tied loans

The London Report provides: “The view was generally held that a country receiving a loan would be free to take this loan into account as a ‘commercial consideration’ when purchasing its requirements abroad. The position of countries making such ‘tied loans’ was another question”.²⁵

²¹L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.

²²L/6304, adopted on 22 March 1988, 35S/37, 90, para. 4.27 (citing the material above from the Panel Reports on “Belgian Family Allowances” and “Canada - Administration of the Foreign Investment Review Act”).

²³EPCT/160, p. 5; EPCT/183, p. 3.

²⁴L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.

²⁵London Report, p. 17, para. 1(a)(v).

See the Interpretative Note to paragraph 1(b).

(d) “*customary business practice*”

The report of a Sub-committee which considered the articles of the Charter on State trading during the Geneva meetings of the Preparatory Committee notes that “It was the understanding of the Sub-Committee that the expression ‘customary business practice’ was intended to cover business practices customary in the respective line of trade”.²⁶

(7) **Paragraph 1(c): “No contracting party shall prevent any enterprise ... within its jurisdiction”**

The 1984 Panel Report on “Canada - Administration of the Foreign Investment Review Act” includes the following treatment of a claim under this paragraph relating to undertakings concerning purchases of goods, submitted to the Canadian government by prospective foreign investors, which became legally binding on the investor if the investment were allowed:

“The United States requested the Panel to find that the purchase undertakings obliging investors to give less favourable treatment to imported products than to domestic products prevent the investors from acting solely in accordance with commercial considerations and that they therefore violate Canada’s obligations under Article XVII:1(c).

“The Panel takes the view that, through its reference to sub-paragraph (a), paragraph 1(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-trading and other enterprises ‘in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders’. This obligation is defined in sub-paragraph (b), which declares, *inter alia*, that these principles are understood to require the enterprises to make their purchases and sales solely in accordance with commercial considerations. The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words ‘The provisions of sub-paragraph (a) of the paragraph shall be understood to require ...’. For these reasons, the Panel considers that the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment prescribed by the General Agreement. The Panel saw great force in Canada’s argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a). However, the Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements.

“The United States requested the Panel to find that the undertakings which oblige investors to export specified quantities or proportions of their production - are inconsistent with Article XVII:1(c) because the export levels of companies subject to such undertakings cannot be assumed to be the result of a decision-making process based on commercial considerations.

“As explained in paragraph 5.16 above, Article XVII:1(b) does not establish a separate obligation to allow enterprises to act in accordance with commercial considerations but merely defines the obligation of the enterprises, set out in sub-paragraph (a) of Article XVII:1, to ‘act in a manner consistent with the general principles of non-discriminatory treatment’ prescribed in the General Agreement. Hence, before applying the commercial considerations criterion to the export undertakings, the Panel first had to determine whether Canada, in accepting investment proposals on the condition that the investor export a certain quantity or proportion of his production, acts inconsistently with any of the general principles of

²⁶EPCT/160, p. 4.

non-discriminatory treatment prescribed in the General Agreement. The Panel found that there is no provision in the General Agreement which forbids requirements to sell goods in foreign markets in preference to the domestic market. In particular, the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping. Therefore, when allowing foreign investments on the condition that the investors export a certain amount or proportion of their production, Canada does not, in the view of the Panel, act inconsistently with any of the principles of non-discriminatory treatment prescribed by the General Agreement for governmental measures affecting exports by private traders. Article XVII:1(c) is for these reasons not applicable to the export undertakings at issue”.²⁷

The 1988 Panel Report on “Japan - Trade in Semi-conductors” includes the following treatment of a claim under Article XVII:1(c):

“The Panel ... turned to the contention of the EEC that the measures by the Japanese Government were contrary to Article XVII:1(c), according to which “no contracting party shall prevent any enterprise under its jurisdiction from acting in accordance with the general principles of non-discriminatory treatment prescribed in [the General] Agreement”. The Panel considered that, once a measure had been found to be inconsistent with a specific provision of the General Agreement, it was no longer meaningful to address the question of whether or not the measure was also contrary to principles underlying that Agreement and therefore the Panel, having already found the Japanese measures to be inconsistent with Article XI, did not consider it necessary to examine them in the light of Article XVII:1(c)”.²⁸

(8) *State trading enterprises in countries maintaining a complete monopoly of their import trade*

The US Draft Charter contained a separate Article 28 concerning expansion of trade by any Member establishing or maintaining a complete or substantially complete monopoly of its import trade. This Article envisaged the negotiation by each such Member of an arrangement providing for a minimum periodic value of imports from the other Members. This Article was kept with the same wording provisionally in the London and New York Draft Charters, and was deleted at Geneva. The Geneva Report states that the Preparatory Committee believed that the text of the revised Article 31 (requiring negotiations to limit or reduce protection afforded by import or export monopolies) would be sufficiently flexible to permit any appropriate negotiations with a Member which maintained a complete or substantially complete monopoly of its external trade, and that since no representative of such a country had attended the sessions of the Committee, the matter remained open for the Havana Conference.²⁹

The Report of the Working Party on the “Accession of Poland” noted “that the foreign trade of Poland was conducted mainly by State enterprises and that the Foreign Trade Plan rather than the customs tariff was the effective instrument of Poland’s commercial policy. The present customs tariff was applicable only to a part of imports effected by private persons for their personal use and it was in the nature of a purchase tax rather than a customs tariff”. The Working Party agreed “that due consideration had to be given to these facts in drawing up the legal instruments relating to Poland’s accession”.³⁰ The Working Party further noted that “Poland would grant to each contracting party, in respect of imports into Poland and purchases by Polish agencies, treatment no less favourable than that accorded to any other country”.³¹ Paragraphs 5 through 7 and Annex A of the Protocol of Accession of Poland provide for annual consultations with the CONTRACTING PARTIES with a view to reaching agreement on Polish targets for imports from the territories of the contracting parties as a whole in the following year; for an annual review of trade in the preceding year between contracting parties and Poland; and for a bilateral consultation mechanism.³² Schedule LXV and the Polish

²⁷L/5504, adopted on 7 February 1984, 30S/140, 163, paras. 5.15-5.18.

²⁸L/6309, adopted on 4 May 1988, 35S/116, 159-160, para. 123.

²⁹London Report, p. 18, New York Report p. 29, Geneva Report p. 29. See also Secretariat Note of 1988 on this issue in MTN.GNG/NG7/W/15/Add.1 p. 1-3. The USSR was appointed as a member of the Preparatory Committee for the ITO Charter by the ECOSOC Resolution which called the UN Conference on Trade and Employment, but according to the Geneva Report (p. 6) the USSR “indicated that it did not feel able to participate in the work of the Preparatory Committee as it had not found it possible to devote sufficient preliminary study to the important questions which were the subject of the Committee’s discussion”.

³⁰L/2806, adopted on 26 June 1967, 15S/109, 110, para. 7.

³¹*Ibid.*, 15S/110, para. 9.

³²15S/46, 49, 51-52. For Reviews under this Protocol see 16S/67; 17S/96; 18S/188; 18S/201; 19S/109; 20S/209; 21S/112; 22S/63; 24S/139. See also L/5396, C/W/401 and discussion at SR.38/1 p. 8-10, C/M/165, C/M/167. See also references to this Protocol under

import commitment were modified on 5 February 1971.³³ In December 1989, Poland announced its intention to request renegotiation of its terms of accession in view of the entry into force 1 January 1990 of laws establishing a market economy for which the customs tariff would be the effective instrument of commercial policy.³⁴ At the February 1990 Council meeting a Working Party was established to examine the request of the Government of Poland to renegotiate the terms of accession of Poland.³⁵

The Report of the Working Party on the "Accession of Romania" notes that "Romania stressed that the Romanian producing units and foreign trade enterprises operated on international markets like similar enterprises in market-economy countries, in accordance with criteria of an exclusively commercial character. It was agreed that because of the absence of a customs tariff in Romania the main concession to be incorporated in its Schedule would be a firm intention of increasing imports from contracting parties at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plans".³⁶ This commitment is included in Annex B of the Protocol of Accession of Romania, which also provides for biennial consultations, and for a bilateral consultation mechanism.³⁷ In 1991, Romania was granted a temporary waiver of its obligations under Article II in order to enable it to implement a new customs tariff in the context of measures for transition to a market economy, and pending renegotiation of its Schedule; Romania also requested renegotiation of its accession protocol in the light of, *inter alia*, the abolition of its former system of central planning.³⁸ At the February 1992 Council meeting a Working Party was established to examine the request of the Government of Romania to renegotiate the terms of accession of Romania.³⁹

The Report of the Working Party on the "Sixth Review of Trade with Hungary under the Protocol of Accession" records, *inter alia*, the question of the Canadian representative why Hungary made no notifications under Article XVII and what it considered to be state trading and the observation that at the very least foreign trade enterprises under administrative supervision would qualify for notifications under Article XVII.⁴⁰ In response

"the representative of Hungary said that the trade pattern was shaped by the competitive position of firms, that it was not decided or organized by the State and that it was not under any administrative supervision. Article XVII referred to state-owned enterprises or private enterprises having exclusive privileges in foreign trade matters; it referred to enterprises not to countries. At the preparatory phase of the Havana Charter negotiations, there had been proposals to draw up special provisions for countries with a complete monopoly of foreign trade, but these proposals died away and were not discussed in Havana. The GATT consequently did not contain any special provision for countries with complete monopoly of foreign trade; there was no such category as state-trading country in the GATT legal system and any existing legislation based on this notion was not in conformity with the GATT. The monopoly of foreign trade in Hungary or the form of ownership of production means had no relevance to Article XVII".⁴¹

3. Paragraph 2

Article 8 of the US Draft Charter (the most-favoured-nation clause) included within its scope "all matters relating to internal taxation or regulation referred to in Article 9" (the national treatment clause of the US Draft Charter, which included in turn "laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment"). The last sentence of

Article II.

³³L/3416 (notification by Poland of intent to renegotiate); C/M/64, p. 17-18; L/3475, "Third Review under the Protocol of Accession", adopted on 2 February 1971, 18S/188, section C, "Renegotiation of Schedule LXV - Poland", 18S/198-200 (noting adoption 5 February 1971 of modification of Schedule LXV by postal ballot).

³⁴SR.45/ST/11, L/6634, C/M/238 p. 10-13.

³⁵C/M/239, p. 5. The Working Party has not yet presented its report.

³⁶L/3557, adopted on 6 October 1971, 18S/94, 95, paras. 6-7.

³⁷18S/5, 7-8, 10. For reviews under this Protocol see 20S/217, 24S/149, 27S/166, 30S/194, 32S/85, 35S/337. See also references to this Protocol under Article II.

³⁸L/6967, Decision of 4 December 1991, 38S/80.

³⁹C/M/254 p. 5-6; see also L/6838 and Add.1, L/6981, SR.47/2 p. 15-16. The Working Party has not yet presented its report.

⁴⁰L/5977, adopted on 22 May 1986, 33S/136, 147-148, para. 36.

⁴¹*Ibid.*, 33S/148, para. 37.

paragraph 1 of the proposed Article 8 provided: “The principle underlying this paragraph shall also extend to the awarding by Members of governmental contracts for public works, in respect of which each Member shall accord fair and equitable treatment to the commerce of the other Members.” During the first session of the Preparatory Committee in London, it was agreed to change the most-favoured-nation clause, the national treatment clause and the provisions on state trading as follows.

“Under the revision recommended by the Preparatory Committee [the awarding of government public works contracts and the purchase of supplies for governmental use] are removed from the scope of the most-favoured-nation clause.”⁴²

“The Preparatory Committee is of the opinion that the awarding of public works contracts is more closely related to the question of the treatment of foreign nationals and corporations than to the treatment of the trade in goods. It is considered that Chapter V of the Charter should be confined to matters affecting trade and that questions relating to the treatment of nationals, etc., should be the subject of future agreements developed under the auspices of the International Trade Organization ...”⁴³

“The Preparatory Committee considered the provision in Article 9 of the United States Draft Charter for national, as distinct from most-favoured-nation, treatment in respect of governmental purchases of supplies for governmental use. Such provision would require the elimination of the many ‘buy-national’ laws under which national governments are required to give preference to domestic products in purchasing their administrative supplies. As it appears to the Preparatory Committee that such a commitment would lead to exceptions almost as broad as the commitment itself, the Preparatory Committee has omitted this commitment.”⁴⁴

“Since paragraph 1 of Article 8 of the United States Draft Charter had been amended by deletion of the provision relating to governmental contracts, it was felt necessary to insert a new paragraph in Article 31 dealing with the subject. A distinction was made as between governmental purchases for resale, which are covered by this paragraph, and purchases for governmental use and not for resale. The discussion on this latter point was prompted by the consideration that in some countries purchases of industrial and other equipment of various types from abroad might well be effected through the medium of state enterprise and that, while it might be difficult in certain circumstances to observe the rule of ‘commercial considerations’ for such purchases, it was at least necessary to provide that the rule of ‘fair and equitable treatment’ should apply but that in applying it full regard should be given to all relevant circumstances.”⁴⁵

The 1952 Panel Report on “Belgian Family Allowances” notes: “As regards the exception contained in paragraph 2 of Article XVII, it would appear that it referred only to the principle set forth in paragraph 1 of that Article, i.e. the obligation to make purchases in accordance with commercial considerations and did not extend to matters dealt with in Article III.”⁴⁶

See also generally the 1979 Agreement on Government Procurement as amended.⁴⁷

(1) “imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale ...”

Concerning the definition of “governmental” and “resale”, see the material collected under Article III:8(a).

⁴²London Report, p. 9, Chapter III para. A.1((d)(i). See also discussion at EPCT/C.II/PV/13 p. 50-52.

⁴³*Ibid.*, para. A.1(d)(ii).

⁴⁴*Ibid.*, para. A.1(d)(iv).

⁴⁵London Report, p. 17, para. 1(a)(v).

⁴⁶G/32, adopted on 7 November 1952, 1S/59, 60, para. 4.

⁴⁷26S/33, as amended by Protocol of amendment done on 2 February 1987, which entered into force on 14 February 1988, 34S/12.

(2) “goods”

The US Draft Charter provisions regarding non-discriminatory administration of State trading enterprises applied to “purchases or sales of any product or service”. It was considered during discussions at the London session of the Preparatory Committee that this article, in conformity with certain others in the Charter, should refer to goods only and not to services. This point is made clear in the interpretative note.⁴⁸

(3) “fair and equitable treatment”

During discussions at London, the US delegate explained the original draft of this clause by saying:

“that most-favoured-nation treatment should also apply to the awarding of government contracts. But it could not be applied to government purchases with the same precision which was possible in the case of fiscal measures. That was why the phrase ‘fair and equitable treatment’ had been used in the Draft Charter”.⁴⁹

4. Paragraph 3

See the Interpretative Note, as well as paragraph 4 of Article II and its Interpretative Note. See also the discussion below at page 486 of the addition of paragraph 3 in the 1954-55 Review Session.

In the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”

“The Panel ... 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”.⁵⁰

5. Paragraph 4**(1) “Contracting parties shall notify the CONTRACTING PARTIES”**

During the 1954-55 Review Session, when it recommended the addition of paragraph 4 requiring contracting parties to provide the CONTRACTING PARTIES with information concerning trade by State enterprises, the Review Session Working Party on Other Barriers to Trade agreed that “a contracting party would not be expected to supply information which it is unable to obtain without amending its legislation existing at the time of the adoption of this amendment”.⁵¹

The CONTRACTING PARTIES agreed that the first notifications under paragraph 4 should be submitted not later than 1 February 1958 and any new notifications, or information to bring prior notifications up to date, annually thereafter.⁵² In 1958 the CONTRACTING PARTIES appointed a Panel to examine the notifications

⁴⁸London Report, p. 17, para. 1(a)(i).

⁴⁹EPCT/C.II/25, p. 5. See also EPCT/C.II/PV/13, p. 50-51.

⁵⁰L/6514, adopted on 22 June 1989, 36S/331, 342, para. 5.4.

⁵¹L/334 and Addendum, adopted on 3 March 1955, 3S/222, 228, para. 28.

⁵²6S/23, para. (a).

received from governments and to consider improvements in the procedure for notification. Paragraphs 8(c) and 20 to 23 of the 1960 Final Report of the Panel, reproduced above on page 473, discuss the scope of notification. That Report also drew up the questionnaire on state trading notifications under Article XVII:4(a) which is still in force.⁵³ The presently used procedures for notifications and reviews under Article XVII were adopted on 9 November 1962. Under these procedures, contracting parties have been invited to submit by the end of January 1963, and subsequently every third year, new and full responses to the questionnaire at 9S/184, and to notify changes to the basic notifications in the intervening years.⁵⁴

The Committee III Report in 1962 on “Obstacles to Trade of Less-developed Countries” set out a “Supplementary Questionnaire on State-Trading Enterprises” in order to elaborate aspects of State trading operations relevant to the work of Committee III for the liberalization of trade barriers to exports of less-developed countries.⁵⁵

Notification obligations under Article XVII were subsequently discussed in the Committee on Trade in Industrial Products in 1970 and 1971,⁵⁶ and in the Council in 1986.⁵⁷

The Uruguay Round Understanding on the Interpretation of Article XVII of the GATT 1994 provides *inter alia* for improvements in notification under Article XVII:

“Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

“Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 ... it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.

“Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.”⁵⁸

See also the notification requirements under the Resolution of 4 March 1955 on “Liquidation of Strategic Stocks”.⁵⁹

(2) “import mark-up”

See the Interpretative Note. A 1987 Note by the Secretariat on “Article XVII (State-trading Enterprises)” notes with regard to Article XVII:4(b) that this provision has been rarely used, and with regard to Article XVII:4(c) that this provision does not appear to have been used.⁶⁰

⁵³9S/184.

⁵⁴IIS/58. The most recent full notifications under this procedure can be found in the addenda to L/7161 of 11 January 1993 (updates in addenda to L/7374 of 11 January 1994 and L/7623 of 11 January 1995). A list of notifications received by the CONTRACTING PARTIES under the 1962 procedure up to 1987 can be found in Annex V of the Note by the Secretariat on Article XVII dated 11 August 1987, MTN.GNG/NG7/W/15. The CONTRACTING PARTIES to GATT 1947 decided in December 1994 that if a measure is subject to a notification obligation both under the WTO Agreement and the GATT 1947, the notification of such a measure to the WTO shall, unless otherwise indicated in the notification, be deemed to be also a notification of that measure under the GATT 1947 (L/7582).

⁵⁵L/1768, adopted on 16 November 1962, IIS/176, 187.

⁵⁶L/3496.

⁵⁷L/5955, C/W/495, C/M/195 p. 24-25, C/M/196 p. 6-7, C/M/198 p. 11-12.

⁵⁸Paras. 2-4.

⁵⁹3S/51.

⁶⁰MTN.GNG/NG7/W/15 p. 10. For an instance of use of Article XVII:4(b) see C/M/205, p. 15-16; C/M/206, p. 15; L/5937/Add.2/Suppl.2.

B. RELATIONSHIP BETWEEN ARTICLE XVII AND OTHER GATT PROVISIONS

The report of discussions at the London session of the Preparatory Committee notes that “It was agreed that when marketing boards buy or sell they would come under the provisions relating to State-trading; where they lay down regulations governing private trade their activities would be covered by the relevant articles of the Charter. It was understood that the term ‘marketing boards’ is confined to boards established by express governmental action”.⁶¹ See the second Note *Ad* paragraph 1 of Article XVII, as well as Article 30 of the Havana Charter.

1. Article II

See the discussion of Article II:4 above.

2. Article III

See the discussion of “non-discriminatory treatment” above at page 475.

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies”

“... examined the contention of the European Communities that the practices complained of were contrary to Article III. The Panel noted that Canada did not consider Article III to be relevant to this case, arguing that the Interpretative Note to Articles XI, XII, XIII, XIV and XVIII made it clear that provisions other than Article XVII applied to state-trading enterprises by specific reference only. The Panel considered that it was not necessary to decide in this particular case whether the practices complained of were contrary to Article III:4 because it had already found that they were inconsistent with Article XI. However, the Panel saw great force in the argument that Article III:4 was also applicable to state-trading enterprises at least when the monopoly of the importation and monopoly of the distribution in domestic markets were combined, as was the case of the provincial boards in Canada”.⁶²

The 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies” examined the practices of Canadian provincial liquor boards with regard to the internal transportation of beer. The Report notes in this connection:

“The Panel ... turned to Canada’s argument that its right to deliver imported beer to the points of sale was an inherent part of Canada’s right to establish an import monopoly in accordance with Article XVII of the General Agreement which was not affected by its obligations under Article III:4. The Panel noted that the issue before it was not whether Canada had the right to create government monopolies for the importation, internal delivery and sale of beer. The Panel fully recognized that there was nothing in the General Agreement which prevented Canada from establishing import and sales monopolies that also had the sole right of internal delivery. The only issue before the Panel was whether Canada, having decided to establish a monopoly for the internal delivery of beer, might exempt domestic beer from that monopoly. The Panel noted that Article III:4 did not differentiate between measures affecting the internal transportation of imported products that were imposed by governmental monopolies and those that were imposed in the form of regulations governing private trade. Moreover, Articles II:4, XVII and the Note *Ad* Articles XI, XII, XIII, XIV and XVIII clearly indicated the drafters’ intention not to allow contracting parties to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies. Canada had the right to take, in respect of the privately delivered beer, the measures necessary to secure compliance with laws consistent with the General Agreement relating to the enforcement of monopolies. This right was specifically provided for in Article XX(d) of the General Agreement. The Panel recognized that a beer import monopoly that also enjoyed a sales monopoly might, in order properly to carry out its functions, also deliver beer but it did not for that purpose have to prohibit unconditionally the private delivery of imported beer while

⁶¹London Report, p. 17.

⁶²L/6304, adopted on 22 March 1988, 35S/37, 90, para. 4.26.

permitting that of domestic beer. For these reasons the Panel *found* that Canada's right under the General Agreement to establish an import and sales monopoly for beer did not entail the right to discriminate against imported beer inconsistently with Article III:4 through regulations affecting its internal transportation".⁶³

3. Article XI

See the Interpretative Note *Ad* Articles XI-XIV and XVIII.

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies"

"... examined the contention of the European Communities that the application by provincial liquor boards of practices concerning listing/delisting requirements and the availability of points of sale which discriminate against imported alcoholic beverages was inconsistent with Canada's obligations under Articles III:4, XI or XVII of the General Agreement. ... The Panel observed that the Note to Articles XI, XII, XIII, XIV and XVIII provided that throughout these Articles 'the terms "import restrictions" and "export restrictions" include restrictions made effective through state-trading operations'. The Panel considered it significant that the Note referred to 'restrictions made effective through state-trading operations' and not to 'import restrictions'. It considered that this was a recognition of the fact that in the case of enterprises enjoying a monopoly of both importation and distribution in the domestic market, the distinction normally made in the General Agreement between restrictions affecting the importation of products and restrictions affecting imported products lost much of its significance since both types of restriction could be made effective through decision by the monopoly. The Panel considered that systematic discriminatory practices of the kind referred to should be considered as restrictions made effective through 'other measures' contrary to the provisions of Article XI:1".⁶⁴

The 1988 Panel Report on "Japan - Restrictions on Imports of Certain Agricultural Products" examined arguments by Japan responding to a claim by the United States regarding import restrictions maintained through the operation of a state enterprise.

"The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have 'to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product' (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement. ...

"The Panel examined this contention and noted the following: Article XI covers restrictions on the importation of any product, 'whether made effective through quotas, import ... licences *or other measures*' (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term 'import restrictions' throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision 'will be applied in the light of the provisions of Article 31 of the Havana Charter'. The obligation of a monopoly importing a product for which a concession had been granted 'to

⁶³DS17/R, adopted on 18 February 1992, 39S/27, 79-80, para. 5.15.

⁶⁴L/6304, adopted on 2 February 1988, 35S/37, 89, paras. 4.22, 4.24.

import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product' is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was *not* included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations".⁶⁵

See also the material excerpted from the 1989 Panel Report on "Republic of Korea - Restrictions on Imports of Beef - Complaint by the United States" above at page 472 on whether the maintenance of a producer-controlled import monopoly is as such a "restriction' under Article XI.

See also the material under Article II:4, and the material on State trading under Article III and Article XI.

4. Articles XII and XVIII

The use of State trading to administer balance-of-payments restrictions has been noted in a number of instances: see, for instance, certain of the measures examined in the 1962 "Uruguayan Recourse to Article XXIII". The 1970 "full consultation procedures" for balance-of-payments restrictions include "State trading, or government monopoly, used as a measure to restrict imports for balance-of-payments reasons" among the measures to be covered in the Basic Document for a full consultation under Articles XII:4(b) or XVIII:12(b).⁶⁶

5. Part IV

Article XXXVII:3 of the General Agreement provides:

"The developed contracting parties shall:

- (a) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels ...".

C. EXCEPTIONS AND DEROGATIONS

See Article XVII:2 and accompanying text.

III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

Provisions corresponding to Article XVII appear in Article 29 of the Havana Charter; in the US-UK *Proposals* in Chapter III-E; in the US Draft Charter in Articles 26-27; in the London and New York Drafts in Article 31; and in the Geneva Draft in Article 30. Provisions on State trading appear in Articles 29-32 of the Havana Charter; in the US Draft Charter in Articles 26-28; in the London and New York Drafts in Articles 31-33; and in the Geneva Draft in Articles 30-31. Article XVII in the 30 October 1947 text of the General Agreement consisted *mutatis mutandis* of the provisions of Article 29 of the Geneva Draft Charter and its interpretative notes, and corresponded to the present paragraphs 1 and 2 of Article XVII. The other provisions on State trading in the Charter were not taken into the General Agreement at that time.

Concerning the drafting history on treatment in the Charter of State trading by countries maintaining a complete or substantially complete monopoly of their import trade, see above at page 478.

At Havana, paragraph 2 of the Geneva Draft Article 30 (corresponding to paragraph 2 of GATT Article XVII) was amended, (1) to conform the language to the wording of Article 18:8(a) (corresponding to Article III:8(a) of GATT) "to avoid difficulties of interpretation" and (2) to extend the "fair and equitable

⁶⁵L/6253, adopted on 22 March 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2.

⁶⁶L/3388, 18S/48, 53, Annex II.

treatment” rule to also cover “the laws, regulations and requirements referred to in paragraph 8(a) of Article 18”.⁶⁷ Also at Havana, the first two paragraphs of the Interpretative Note *Ad* paragraph 1 were transferred to the body of the Charter and became Article 30 on Marketing Organizations.⁶⁸ The third paragraph of that Note was amended at Havana “so as to include purchases as well as sales and to take account also of relevant factors other than supply and demand”.⁶⁹ The Interpretative Note *Ad* paragraph 1(a) was also revised at Havana,⁷⁰ and the interpretative notes to paragraphs 1(b) and 2 were deleted and do not appear in the Havana Charter. These drafting changes were not among those which were incorporated into the General Agreement in 1948.

In the 1954-55 Review Session, proposals were made to incorporate all or part of the other Havana Charter provisions on State trading into the General Agreement. The Working Party on “Other Barriers to Trade” considered a proposal “designed to apply to protection afforded through state monopolies the same principle with respect to negotiations as those that have been recommended for negotiation of tariffs”, and recommended addition of Article XVII:3 and the interpretative note thereto.⁷¹ The Working Party also recommended the addition of Article XVII:4 and the note thereto, as a result of its consideration of “proposals designed to provide the CONTRACTING PARTIES with information concerning state monopolies conducted by individual contracting parties and for the submission of pertinent information upon request”.⁷² A proposal was made to add a new article to the General Agreement, similar to Article 32 of the Charter, requiring that a contracting party consult with interested contracting parties before liquidation of non-commercial stocks; it was decided instead that the CONTRACTING PARTIES adopt a resolution on this subject.⁷³ The amendments to Article XVII were effected through the Protocol Amending the Preamble and Parts II and III of the General Agreement, and entered into effect on 7 October 1957.

IV. RELEVANT DOCUMENTS

London

Discussion: EPCT/C.II/36, 37;
EPCT/C.II/PV/5, 6, 13
EPCT/C.II/ST/PV/1, 2, 3 & 6
Reports: EPCT/C.II/52, 53

New York

Discussion: EPCT/C.6/23, 34, 105

Geneva

Discussion: EPCT/EC/PV.2/22
EPCT/A/SR.14, 15, 17, 18, 37
EPCT/TAC/SR.11
EPCT/TAC/PV/27, 28
Reports: EPCT/135, 160, 180, 183, 186, 212,
214/Add.1/Rev.1
EPCT/W/313
Other: EPCT/189, 196
EPCT/W/62, 65, 69, 70, 187, 191,
195, 197, 198, 239, 272, 301, 318

Havana

Discussion: E/CONF.2/C.3/SR.28
Reports: E/CONF.2/C.3/43;
E/CONF.2/C.6/45

Review Session

Discussion: SR.9/41, 47
Reports: W.9/122, 177, 218, 231; 236/Add.1,
L/334, 3S/222
Other: L/189, L/272/Add.1, 273
W.9/20/Add.1, 28, 70, 78, 99, 122

⁶⁷Havana Reports, p. 66, para. 73.

⁶⁸*Ibid.*, p. 115, para. 18.

⁶⁹*Ibid.*, p. 114, para. 13.

⁷⁰*Ibid.*, p. 115, paras. 15, 17.

⁷¹L/334, Report of the Working Party adopted on 3 March 1955, 3S/222, 228.

⁷²*Ibid.*

⁷³*Ibid.*, 3S/230 para. 36-40; see “Liquidation of Strategic Stocks”, Resolution of 4 March 1955, 3S/51.