GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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UNITED STATES - RESTRICTIONS ON THE IMPORTATION OF SUGAR AND SUGAR-CONTAINING PRODUCTS APPLIED UNDER THE 1955 WAIVER AND UNDER THE HEADNOTE TO THE SCHEDULE OF TARIFF CONCESSIONS

Report of the Panel

1. INTRODUCTION

1.1 The EEC held consultations on 12 July and 1 September 1988 with the United States under Article XXIII:1 concerning restrictions on the importation of agricultural products applied by the United States under the Decision of the CONTRACTING PARTIES of 5 March 1955 (the 'Waiver') and the Headnote to the Schedule of tariff concessions (Schedule XX - United States) concerning Chapter 10 (the 'Headnote') (C/M/224). As these consultations did not lead to a satisfactory settlement, the EEC, in a communication circulated as L/6393 of 12 September 1988, requested the establishment of a panel to examine the matter pursuant to Article XXIII:2 (C/M/224).

1.2 At its meeting in June 1989, the Council was informed by both parties that they had agreed that the panel requested by the EEC should deal with the EEC complaint regarding United States sugar quotas and with the implementation of the Waiver for import restrictions on sugar and sugar products. The Chairman of the Council noted that there was a certain overlap between the matter in this case and that examined in the panel report on Australia's complaints against the United States Restrictions on Imports of Sugar (L/6514) which had been adopted by the Council at the same meeting. The Chairman of the Council further stated that, following consultations with the parties concerned in the two cases, an agreement had been reached that the Panel set up in the present case would not re-address the findings set out in L/6514 (C/M/234).

1.3 Having taken note of these statements, the Council agreed (C/M/234) to establish a panel as follows:

A. Terms of Reference

"To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the European Economic Community in document L/6393 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

B. Composition:

Chairman: Mr. Felipe Jaramillo

Members: Mr. Pekka Huhtaniemi
Mr. Darry Salim

1.4 The representatives of Argentina, Australia, Brazil, Canada, Chile, Korea, Jamaica, Japan, India, New Zealand, Nicaragua, Pakistan, Uruguay and Yugoslavia reserved their right to make submissions to the Panel (C/M/234). Argentina, Australia, Canada, Chile and Japan exercised their right before the Panel.

1.5 The Panel held meetings with the parties to the dispute on 25 July and 2 November 1989, met with interested contracting parties on 13 October 1989 and submitted its conclusions to the parties on 5 January 1990.

2. FACTUAL ASPECTS

2.1 Section 22 was originally enacted as an amendment to the Agricultural Adjustment Act of 1933, by the Act of 24 August 1935. As enacted, Section 22 requires that restrictions in the form either of fees or of quantitative limitations must be imposed on the importation of any article whenever the President of the United States (the 'President') finds, on the basis of advice from the Secretary of Agriculture and in connection with an investigation by the United States International Trade Commission (USITC), that such articles are being imported, or are practically certain to be imported into the United States, under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, certain agricultural programmes or operations with respect to any agricultural commodity or product thereof, or as to reduce substantially the amount of any product processed in the United States from a commodity or product included in such programmes or operations. The agricultural programmes protected under Section 22 include, inter alia, any loan, purchase or other programme (including price supports) undertaken by the Department of Agriculture or an agency under its direction. Under Section 22, whenever the Secretary of Agriculture has reason to believe that the criteria of Section 22 are met, he must advise the President, and if the President agrees that there is reason for such belief, he must request an investigation by the USITC (formerly called the United States Tariff Commission). On the basis of the investigation, the Commission submits its advice to the President. When the President finds that the statutory criteria are met, he must by proclamation impose import fees or quantitative limitations.

2.2 When a condition exists which is deemed to require emergency treatment, the President may take immediate action under Section 22 without waiting for the recommendations of the USITC and such action will continue to be in effect pending the report and recommendation and action thereon of the President. Section 22 also provides for the suspension, termination or modification of import regulations established under its terms, whenever the President finds and proclaims: (i) that the circumstances requiring the proclamation or provision thereof no longer exist; (ii) that changed

circumstances require such modification to carry out the purpose of the Section.

2.3 An amendment to Section 22 adopted in 1951 provides that "no trade agreements or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this Section". The United States requested a waiver in order to remove any possible inconsistency between its obligations under the General Agreement and those under Section 22. The United States request was examined by a Working Party in the Ninth Session of the CONTRACTING PARTIES (BISD 3S/141).

2.4 By a Decision of 5 March 1955, the CONTRACTING PARTIES acting jointly under Article XXV:5(a), waived the obligations of the United States under the provisions of Articles II[1] and XI of the General Agreement to the extent necessary to prevent a conflict with such provisions of the General Agreement in the case of action required to be taken by the Government of the United States under Section 22 (BISD 3S/32-38).

2.5 A price support programme for sugar was introduced by the United States Congress under Section 902 of the Agriculture and Food Act of 1977. This programme is currently implemented under Section 201 of the Agricultural Act of 1949, as amended by Section 901 of the Food Security Act of 1985.

2.6 On 11 November 1977, by Proclamation No. 4538, the President, pursuant to his authority under Section 22, established fees on imports of sugars covered by TSUS headings 155.20 and 155.30. These fees were originally set at 1.58 cents per pound on imported raw sugar and 1.67 cents per pound on imported refined sugar. Following a series of adjustments, these fees are currently fixed at zero cents per pound on imported raw sugar and at 1 cent per pound on imported refined sugars. These rates have applied since October 1982, except for a three-month period in 1985.

2.7 On 28 June 1983, by Proclamation No. 5071, the President, pursuant to his authority under Section 22, established, on an emergency basis, quotas on imports of certain blends and mixtures of sugar products falling under TSUS headings 155.75, 156.45, 183.01 and 183.05.[2] These quotas were fixed, and currently remain, at a level of zero tonnes.

2.8 On 28 January 1985, by Proclamation No. 5294, the President, pursuant to his authority under Section 22, established, on an emergency basis,

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[1]The reference to Article II was intended to cover the cases where a fee would be imposed under Section 22 on an item on which the United States had assumed an obligation under that Article, in excess of the rate of duty set forth in the Schedule of the United States (Schedule XX).

[2]These articles are currently classified under sub-headings 99.04.50.20 and 99.04.50.40 of the Harmonized Tariff Schedule of the United States.

quotas on imports of additional sugar-containing products classified under TSUS headings 156.45, 183.01 and 183.05[3], and made final the emergency quotas established by Proclamation No. 5071 (cf. paragraph 2.7). These quotas are currently as follows: TSUS 156.45 (2.721 metric tonnes); TSUS 183.01 (6.350 metric tonnes); TSUS 183.05 (76.203 metric tonnes).[4]

2.9 On 19 May 1985, by Proclamation No. 5340, the President modified Proclamation No. 5294 (cf. paragraph 2.8) by exempting certain specific traditionally trade sugar-containing items and classes of such items from the quota restrictions on the basis of consultations with other contracting parties and with United States importers.

2.10 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 term, condition or qualification 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.

2.11 This provision, enlarged to authorize the President to proclaim a rate of duty and quota limitation on imported sugars if the Sugar Act of 1948 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. On 16 December 1967, by Proclamation 3822, the President added to the TSUS the Headnote reflecting this provision.

2.12 The Sugar Act of 1948 expired on 31 December 1974. On 16 November 1974, by Proclamation 4334, the President established an import quota and rates of duties on raw and refined sugar on the basis of the Headnote. Subsequent Presidential Proclamations modified the applicable duties and quota amount.

2.13 On 5 May 1982, by Proclamation 4941, the President, in conformity with the Headnote, modified the 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.

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[3]These articles are currently classified under HTS sub-headings 99.04.60.20, 99.04.60.40 and 99.04.60.60 respectively.

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

2.14 United States imports of sugar have declined from 5.3 million metric tonnes (raw value) in 1977 to 1.2 million metric tonnes (raw value) in 1987. During the same period, United States production of sugar (beet and cane) rose from 5.8 million metric tonnes (raw value) in 1977 to 6.6 million metric tonnes (raw value) in 1987.

3. MAIN ARGUMENTS

Findings and recommendations requested by the Parties

3.1 The EEC requested the Panel to find that: (1) The measures applied by the United States on imports of sugar and sugar-containing products were inconsistent with Articles II and XI of the General Agreement and that accordingly they impaired benefits accruing to the Community under the General Agreement, adversely affected the interests of the contracting parties in general and of the EEC in particular - all consequences which hamper attainment of the objectives of the General Agreement. (2) If the measures under reference are taken under the 1955 Waiver, the EEC requested the Panel to confirm that a waiver granted in the context of GATT does not confer consistency on a measure that is not consistent with the General Agreement. The waiver merely released the party concerned from having to bring the measures it covered into conformity with the General Agreement, regardless whether they had been taken prior to or after the grant of that waiver. Pending the withdrawal of these measures, the EEC requested the Panel to find that recourse to compensation should be envisaged as a temporary measure. (3) Furthermore, and regardless of the legality or illegality of the measures in question, i.e. of the fact the United States is applying a "measure, whether or not it conflicts with the provisions of this Agreement", as stipulated in Article XXIII:1(b), the Community requested the Panel to confirm that nullification and impairment of benefits under the Agreement had already been established by the waiver granted by the CONTRACTING PARTIES, and that the United States had not adduced any satisfactory proof that the measures in question did not constitute cases in which nullification of benefits had been established. (4) Lastly, the Community requested that Panel to find that the measures in question were no longer consistent with the waiver granted by the CONTRACTING PARTIES in 1955. The Community accordingly requested the Panel to recommend in this case that the measures maintained by the United States on sugar and sugar-containing products be brought into conformity with the General Agreement.

3.2 The United States requested the Panel to find that: (1) the Waiver decision of 1955 provides for recourse to Article XXIII by "affected contracting parties", and the EEC has not demonstrated that it is actually affected by United States measures on the import of sugar and sugar-containing products applied under Section 22; (2) resort to Article XXIII necessarily must be with reference to Article XXIII:1(a), (b), or (c); (3) the effect of a waiver decision under Article XXV is to relieve a contracting party of its GATT obligations to the extent specified in the Waiver decision, measures consistent with such a waiver cannot constitute failure to carry out such obligations in the sense of Article XXIII:1(a); (4) since the Waiver decision of 1955 states that "the obligations of the United States under the provisions of Articles II

and XI of the General Agreement are waived to the extent necessary to prevent a conflict with such provisions", therefore measures consistent with the 1955 Waiver cannot be found to be "incompatible with", "inconsistent with", or "illegal under", the provisions of Article II or XI. Neither this Waiver or any other waiver establishes nullification or impairment automatically. (5) United States measures on the import of sugar and sugar-containing products applied under Section 22 are consistent with the Waiver decision of 1955, and therefore do not constitute such a violation of Article XXIII:1(a); (6) recourse may be had to Article XXIII:1(b) or (c) to make a claim of "non-violation nullification or impairment" concerning measures that are in conformity with a waiver; but (7) the EEC had failed to present the information required for such non-violation complaints. The United States asked the Panel to reject the EEC's complaint.

Scope of the dispute

3.3 The EEC recalled that several kinds of restrictions were applied by the United States on imports of sugar and sugar-containing products. These included import quotas on sugar maintained under the Headnote; additional fees over and above the bound duties on raw and refined sugar established under Section 22; and import restrictions and prohibitions on certain sugar-containing articles also applied under Section 22. Although it had agreed with the United States to limit the scope of the Panel proceeding (cf. paragraph 1.2), the EEC maintained that the various restrictive measures should be examined jointly in order to determine their adverse consequences on world sugar markets and thus their prejudicial effects to contracting parties, including EEC member states.

3.4 The EEC recalled the serious economic consequences of the measures taken by the United States on sugar and underlined the adverse effects of these measures on the contracting parties and on the Community in particular. Thus, as a consequence of these import measures, United States imports of sugar declined sharply, from 5,291,000 tons in 1977 to 1,222,000 tons in 1987. The EEC quoted United States official declarations underlining the negative effect of this reduction of imports on the sugar world market. In addition, through the use of high domestic prices, the United States sugar policy stimulated sugar production in the United States (between 1977 and 1987: +12 per cent), and in order to prevent any increase in the stocks, United States authorities limited imports, therefore increasing the ratio of self-sufficiency of the United States in sugar. Also, through the application of these high domestic prices, the United States policy has stimulated the production of sweeteners other than sugar (as for example HFCS). In addition, because of the increase in offer of other sweeteners, consumption of sugar in the United States decreased at the same time. The EEC also quoted the side-effects of the development of United States production of sweeteners. The EEC noted the negative effects of these measures and the above-mentioned trends on the other contracting parties. In addition, the EEC being one of the largest producers and exporters of sugar, the measures are damaging in particular for the Community. The EEC added that European exporters are also directly affected by the United States restrictions on sugar imports, as there is no quota for EEC suppliers. With regard to the fees on sugar, if the present

levels are zero cent per pound for raw sugar and one cent per pound for refined sugar, it must be taken into account that these rates can be always increased, as they are still in force. The EEC quoted figures showing that from 1974 to 1977, i.e. when the United States were not applying import restrictions, the EEC was in a position to export sugar to the United States market. The EEC also underlined the negative effects of the import restrictions of certain sugar containing products, due to the restrictive nature of these quotas and to the fact that the EEC is a major world producer of these products. With regard to the prohibition applied on the importation of other sugar containing products, the EEC noted the inconsistency of this prohibition with the terms of the Waiver. The EEC concluded therefore that it is adversely affected by the United States measures on sugar imports.

3.5 The United States pointed out that the EEC's complaint referred to two separate sets of measures each taken on a separate legal authority. The first, and by far the most important, was the import quota maintained under the Headnote. The second set of measures was that implemented under Section 22. The United States considered that the understanding set out in paragraph 1.2, that the panel would not readdress the findings of the Panel on United States Restrictions on Imports of Sugar (L/6514), confined the Panel's examination of the matter to the implementation of the Waiver in the case of sugar and sugar-containing products. The United States therefore maintained that the only measures at issue in the present case were: (i) import fees on refined sugar; and (ii) import quotas on certain sugar-containing products. The United States stressed that all of the trade effects alleged by the EEC were actually caused by the EEC's own agricultural subsidy programmes, or by the quota under the Headnote, not by actions under Section 22. The United States stated that it had agreed to adoption of L/6514, and had already stated that it would bring United States practices into conformity with the General Agreement. If the Panel in the present dispute were to take into account trade effects caused by the Headnote quota (which implicitly pertained to the Headnote dispute), it would place the United States in the position of paying twice over for the Headnote quota, and could jeopardize the rights of the complainant in the prior dispute. With regard to the Section 22 measures taken on sugar-containing products, the United States argued that the EEC was required to povide a detailed justification for its claim of nullification or impairment, but had failed to do so. The United States provided data which indicated that EEC trade in these products had actually improved, despite imposition of the United States restrictions.

Consistency with Articles II and XI

3.6 The EEC claimed that, regardless of the domestic legal authority on which they were established, the measures maintained by the United States on imports of sugar and sugar-containing products constituted quantitative restrictions within the meaning of Article XI. As the United States did not justify these measures on the basis of Article XI:2, the EEC concluded that they were contrary to Article XI.

3.7 With respect to the sugar import quota under the Headnote, the EEC noted that an earlier panel had already found it to be inconsistent with

the General Agreement and that the CONTRACTING PARTIES had adopted this finding (L/6514). With respect to import quotas on certain sugar-containing products under the Waiver, the EEC argued that these measures could no longer have any justification as they had been taken by the United States solely in order to strengthen the implementation of the sugar quota under the Headnote which had been found to be inconsistent with the General Agreement. With respect to import fees on sugar, the EEC noted that they were payable in addition to duties. As total additional fees plus customs duties exceeded the maximum bound rate, they were inconsistent with Article II.

3.8 The United States recalled that the CONTRACTING PARTIES had already ruled on the subject of the sugar quota under the Headnote. Any party wishing to address the trade effects of that quota might do so in the context of the implementation of the report of that panel. The United States therefore considered that the EEC's references to the Headnote, and to effects caused only by the sugar quota maintained under the Headnote, were out of place and fell outside the terms of reference of the Panel.

3.9 The United States argued that import fees on refined sugar were required under Section 22 as a matter of United States domestic law. The United States recalled that the non-recourse loan programme in force in the United States required the Secretary of Agriculture to guarantee certain minimum prices to producers of cane and beet sugar, in a manner which would result, if possible, in no cost to the United States taxpayer. This programme constituted a "loan, purchase or other programme or operation undertaken by the Department of Agriculture, or any agency under its direction, with respect to any agricultural commodity or product thereof ..." within the meaning of Section 22. The Secretary of Agriculture had determined, as he was required to do under Section 22, that raw and refined sugar was being "imported into the United States under such conditions and in such quantities as to render or tend to render ineffective or materially interfere with" [this programme], he was thus required by law to report to the President and recommend the imposition of import restrictions. The President, operating under the emergency provision of Section 22(b) was required to impose restrictions which would remain in effect pending an USITC investigation. The USITC investigation undertaken had supported the President's action.

3.10 Similarly, the quotas established under Section 22 on certain sugar-containing products were required by United States domestic law. The non-recourse loan programme in force in the United States required the Secretary of Agriculture to support producer prices at specified levels, if possible, without cost to the taxpayer. Because of the differential between the domestic support price and world sugar prices, the United States had experienced a flood of new blended sugar products and, subsequently, large increases in certain types of sugar-containing products. The Secretary of Agriculture had determined that these imports would displace domestic sugar-containing products in the market place, reduce demand in the United States for domestically-produced cane and beet sugar, and lower the market prices for raw and refined sugar below the loan rate which supported the domestic price. Having made this determination, and faced with the imminent threat of large and costly forfeitures by sugar

producers under the loan programme, the Secretary of Agriculture was required by law to report to the President that these imports would "render or tend to render ineffective, or materially interfere with" the non-recourse loan programme. Having been so advised, the President agreed with these findings and accordingly was required to take action to impose emergency quotas on these products pursuant to Section 22, and to maintain these quotas until he had received the findings and recommendations of the subsequent USITC investigation. The United States stressed that the invocation of Section 22 with regard to sugar-containing products was not linked to the Headnote quota, but was based on a Presidential finding of fact, as required under Section 22, that imports were materially interfering with the operation of the domestic sugar price support programme.

3.11 The United States further recalled that the text of the Waiver stated:

> "subject to the conditions and procedures set out hereunder the obligations of the United States under the provisions of Articles II and XI of the General Agreement shall be waived to the extent necessary to prevent a conflict with such provisions of the General Agreement in the case of action required to be taken by the Government of the United States under Section 22 as annexed to this Decision ..."

The text of Section 22 annexed to the Waiver Decision had remained unchanged since the time of the Decision. The United States therefore concluded that when an action was required under Section 22 and the conditions in the text of the Waiver had been complied with, the obligations of Articles II and XI were waived and the Section 22 action could not be considered to "conflict with " (or violate or infringe or be inconsistent or incompatible with or illegal under) the provisions of Article II or XI.

Justification of the restrictions on the basis of the Waiver

3.12 The EEC noted the United States had claimed that the measures it maintained on sugar under Section 22 did not conflict with the General Agreement as they were taken in conformity with the Waiver. The EEC denied that the measures at issue were taken in conformity with the Waiver as the United States had failed to fulfil both the assurances and the conditions attached by the CONTRACTING PARTIES to the granting of the Waiver. The EEC recalled that a condition attached to the Waiver provided that "the United States will remove or relax each restriction permitted under this Waiver as soon as it finds that the circumstances requiring such restriction no longer exist or have changed so as no longer to require its imposition in its existing form" (BISD 3S/36). In the case of sugar-containing products, the USITC, to which the matter was referred in 1985 by the President in accordance with Section 22, did not formally conclude that imports took place under conditions or in quantities which tended to render ineffective the United States sugar price programme. Accordingly, the measures in question should have been discontinued as the circumstances justifying their application did not exist.

3.13 As to the additional fees on sugar, the EEC noted that they were reduced to zero cents per pound for raw sugar and to 1 cent per pound for refined sugar on 29 March 1985. It also noted that the United States had explained this change by claiming that the system of import duties no longer enabled the price of sugar and imports to be stabilized. But more to the point, in the meantime the United States had found a more effective way of controlling imports, namely through a restrictive quota system introduced under the Headnote. As the circumstances justifying the introduction of the additional fees had ceased to exist, those restrictions should have been lifted in accordance with the conditions attached to the Waiver.

3.14 With respect to its binding obligations under the Waiver, the United States claimed that it had fully complied with all the conditions and procedures of the Waiver. The United States maintained that it was a misinterpretation of the respective roles of the USITC and the President under Section 22 to assert, as the EEC did, that the quotas on sugar-containing products should have been discontinued in 1985 because the USITC "did not formally conclude that imports took place under conditions or in quantities which tended to render ineffective the United States sugar price support programme". The statutory role of the USITC was to conduct, in an advisory capacity, an investigation and report its findings and recommendations to the President. However, the President was not in any measure bound by the conclusions or recommendations of the USITC or a majority of its members. Subsection (e) of Section 22 made clear that the final decision on whether or not the criteria of Section 22 had or had not been met was the President's. Thus, in 1985, the President did not accept the advice of a majority of the USITC recommending that additional import quotas be imposed on other types of sugar-containing products.

3.15 The United States further rejected the EEC claim that the one cent per pound fee should have been removed in 1985 when the fee on raw sugar was reduced to zero and the sugar quota under the Headnote had eliminated the justification for the fees. The United States argued that the flexible fee system was eliminated in 1985 because the world sugar price had fallen so far that the fees could not discourage importation of sugar. A fixed, one-cent fee on refined sugar was retained because of the differential in net selling prices between refined beet sugar and raw cane sugar. The fee on refined sugar was necessary to discourage importers from shifting to imports of refined sugar and thus materially interfering with the price support programme or reducing substantively the amount of sugar processed in the United States from sugar beets or sugar cane as provided for in Section 22.

3.16 The EEC recalled that another condition attached to the Waiver stipulated that the CONTRACTING PARTIES were to examine each year any action taken by the United States under the Waiver by means of a report setting out in particular "the reasons why such restrictions (regardless of whether covered by this Waiver) continue to be applied and any steps [the United States] has taken with a view to a solution of the problem of surpluses of agricultural commodities" (BISD 3S/36). The EEC pointed out that in the latest reports on the Waiver by the United States, under the chapter heading "Steps taken to balance agricultural production with

demand", mention was made of measures taken for other products covered by the Waiver, but nothing was said with respect to sugar. The EEC therefore concluded that the United States did not fulfil the conditions attached to the Waiver.

3.17 Regarding the fact that the recent annual reports had not addressed steps to resolve the problem of surpluses of sugar, the United States said that the reason was that no such surpluses existed in the United States in the period under report. Moreover, the annual reports had not repeated the reasons for continuation of Section 22 measures concerning sugar because the reasons had not changed. These issues had been repeatedly addressed in earlier reports and during working party sessions.

3.18 The EEC pointed out that the Waiver was accompanied by a number of assurances which the CONTRACTING PARTIES noted, and that the Decision to grant the Waiver was taken "in consideration of [these] assurances". The EEC noted that this language resulted from an amendment proposed by Australia (GATT/W.9/183) and subsequently adopted by the CONTRACTING PARTIES which was meant to provide "more safeguards in the event that the CONTRACTING PARTIES should decide to grant the requested Waiver" (BISD 3S/141). These assurances were therefore a fundamental element of the balance of the Waiver granted by the CONTRACTING PARTIES. The EEC noted that the question of the legality of assurances was taken into account by a previous panel (BISD 3S/87).

3.19 The EEC argued that these assurances could only be understood in the context of the agricultural programmes in force in the United States in 1955 and in relation with the United States statement in support of its Waiver request that the United States Government had taken "a number of positive steps designed to help solve the surplus problem" and that it intended to take similar measures in future as "tools are at hand to reduce the need for action under Section 22 and they are being used". Consequently, the EEC maintained that when the United States declared that it intended to continue to seek a solution to the problem of surpluses of agricultural commodities the CONTRACTING PARTIES were entitled to expect the measures referred to above to be applied, especially since the United States had referred to the positive steps it had taken under these programmes for the 1955 crop year. Furthermore, when the United States in 1977 first invoked Section 22 to establish fees on raw and refined sugar, it stated that it had taken "steps to balance supply and demand" (L/4727). In addition, the United States stated that "under existing legislation and programmes affecting sugar production, the respective shares of domestic and foreign suppliers is expected to continue without fundamental change". It also stated that "domestic production is being supported at non-expansionary levels" (L/4727). The United States Government thus indicated in 1977 that it had the means to ensure compliance with the assurances noted by the CONTRACTING PARTIES in 1955. However, the failure to fulfil these assurances was glaringly obvious simply from the trends in economic data for the sugar sector in the United States, notably with respect to sugar production, acreage allotments, sugar consumption and support levels. Rather, an analysis of the current United States sugar policy would suggest that the Waiver was diverted from its initial aim and

no longer served to accompany supply reduction measures but to develop production capacity.

3.20 The United States recalled that the text of the Waiver provided that the Waiver was "subject to the conditions and procedures set out hereunder" and that the decision to waive is pursuant to paragraph XXV:5(a) "and in consideration of the assurances recorded above". Clearly the conditions were intended to, and did, impose legal obligations, and action under Section 22 was "subject to" these conditions. The assurances referred to by the EEC were instead part of the Waiver preamble and corresponded to those subparagraphs under "Noting". To transform mere descriptive statements in a preamble into substantive obligations, as the EEC urged the Panel to do, was unprecedented and contrary to basic legal principles of treaty interpretation. It would set a precedent for interpretation of other preambles - even the general statements regarding reciprocity in the preamble to the General Agreement itself. Such a precedent would also create severe difficulties for negotiation and drafting of agreements and preambles in the Uruguay Round.

3.21 Furthermore, the United States argued that the text and the background of the preamble in itself demonstrated that the EEC claim that these measures "comprised an undertaking to maintain agricultural programmes similar to those existing in 1955 in force during the application of the Waiver" was also unfounded. The text of the preamble showed no intention by the United States or the CONTRACTING PARTIES to create in the preamble binding substantive obligations for the future. The creation of binding obligations in the operative text of the Waiver, in the conditions and procedures, further argued (through the principle of expressio unius est exclusio alterius) that the parties did not intend to give rise to substantive obligations elsewhere, in the preamble. The matters "noted" in the Waiver preamble referred to actions which the United States had been taking in 1955 in order to face the problem of surpluses, but this could not be interpreted as a promise or assurance to take any specific action in a subsequent year. Moreover, the United States did express its intention to continue to seek a solution to the problem of surpluses of agricultural commodities, but this statement of intention was not described as an assurance, and no specific promise was made, particularly no promise to use specific methods to pursue the declared intention. This was unequivocally made clear by the United States in the proceedings of the Working Party on the Waiver (BISD 3S/142, paragraph 3). The only specific obligation that the Waiver imposed on the United States regarding steps to solve the problem of surpluses was that the annual report due under the sixth paragraph of the "Conditions and Procedures" should show "any steps [the United States] has taken with a view to a solution of the problem of surpluses of agricultural commodities". The United States had complied with this condition and the annual reports had detailed numerous steps that have been and continue to be taken by it to reduce or avoid surpluses of agricultural commodities. These reports had been accepted by the CONTRACTING PARTIES since 1956 without any indication that the CONTRACTING PARTIES believe that only the measures in use in 1955 were sufficient, or were uniformly required, to establish United States compliance with the requirements of the Waiver.

3.22 Regarding an alleged United States assurance that it would apply acreage allotments or marketing quotas to crops subject to price support programmes whenever such crops were protected by measures under Section 22, the United States pointed out that when requesting the Waiver, it had clearly stated that Section 22 actions could be taken in the absence of any production or marketing controls (L/315). In fact, in 1955 not all programmes establishing guaranteed prices were accompanied by compulsory production control measures. Moreover, the notion that the Waiver would be conditional upon the use of production or marketing controls was a contradiction in terms because waivers under Article XXV were only available to cover cases "not covered by the other escapes" in the General Agreement (EPTC/C.V/PV/9/p.8). If, in 1955, the United States had been able to agree to tie all the United States price support programmes to production or marketing restrictions, the Article XI:2(c) escape would have been sufficient, and a waiver from Article XI would have been unnecessary and legally impossible. The United States had sought a waiver because not all its support programmes met the criteria of Article XI:2(c). Nor could the statement cited by the EEC in the United States Twenty-First Annual Report on Section 22 (L/4727) that domestic production of sugar was being supported at non-expansionary levels be considered an indication that the United States would use 1955-model production control methods. The United States Government could only apply the measures provided for in current legislation, and no legislative authority for domestic production controls existed in 1977. The precedent cited by the EEC (BISD 3 S/87) was of dubious relevance. It concerned an exchange of explicit promises in the Torquay round of tariff negotiations, whereas the Waiver process in 1955 was one in which the United States had refused to make any promises (other than the conditions and procedures in the Waiver text). The EEC was simply attempting to spin obligations out of thin air; its allegations regarding "assurances" were an attempt to reopen the Waiver consideration of 1955 with a claim of rebus sic stantibus, and to achieve retroactive insertion of additional conditions that the CONTRACTING PARTIES had never agreed to.

3.23 The EEC maintained that the measures applied by the United States on sugar-containing products were not consistent with the terms of the Waiver. Regarding zero quotas maintained on certain products, such as syrups and molasses, the EEC recalled that the text of the Waiver only exempted the United States from bringing import restrictions, and not import prohibitions, into conformity with the General Agreement. The EEC also recalled that the text of the Waiver specifically provided that the United States might apply, for a given product, either quotas or fees.

3.24 The United States replied that the EEC argument that the Waiver permits only import restrictions, and not import prohibitions, was mistaken and based on a false analogy to the interpretation of Article XI:2(c) which was not relevant here. The United States recalled that the word "restriction" as it appears in the Waiver encompasses both fees and quantitative limitations as provided for in Section 22. This was made clear in paragraph (b) of the recital in the Waiver of the statement received from the United States and in the Report of the Working Party on the waiver request (3S/141, 143). There could be no doubt that a prohibition is a quantitative limitation or that a prohibition is not inconsistent with Section 22 or the Waiver if trade in the relevant article

did not exist during the representative period. Under such circumstances, the statute did not permit a quota larger than zero. The United States added that the quotas on imports of certain sugar-containing products were required in order to prevent the importation of such products from rendering ineffective, or materially interfering with, the domestic price support programme for sugar cane and sugar beets. The United States had never claimed that the import quotas on these products were authorized by the Headnote. The United States further recalled that Section 22 provided that the President should impose either fees or quantitative limitations under the circumstances set forth therein. Successive administrations and the courts had interpreted Section 22 as preventing the President from proclaiming both import fees and import quotas under Section 22 authority at the same time on the same article. The Courts had also confirmed the administrative interpretation that the President could proclaim separate restrictions or fees under separate legal authority. The quota on raw and refined sugar was imposed under the authority of the Headnote, not Section 22. The only Section 22 measure that the United States had ever maintained on raw and refined sugar was an import fee, not an import quota. As for the sugar-containing products that were currently under a Section 22 import quota, they had never been subject to a fee imposed under Section 22 authority. Accordingly, the limitation in Section 22 that the President should proclaim fees or quantitative restrictions had not been violated.

Tariff bindings on raw and refined sugar

3.25 The United States maintained that, regardless of the Waiver, imposition or maintenance of the Section 22 import fee on refined sugar did not violate Article II, because the maximum import duty on raw and refined sugar was not currently bound under the General Agreement. The United States recalled that ever since the original tariff concessions made at Annecy in 1949, the duty on raw and refined sugar had been subject to the terms of the Headnote which provided that the bound rates "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 ...". At that time, the Headnote became part of the United States Schedule of concessions under Article II:1(b) which provides that tariff bindings are subject to "terms, conditions or qualifications set forth in [the] Schedule" of each contracting party. The Sugar Act of 1948, including Title II, expired on 31 December 1974 and was not replaced by similar legislation. Accordingly, the tariff binding on raw and refined sugar had not been in effect since that date and would not come into effect unless legislation substantially equivalent to Title II of the Sugar Act of 1948 is enacted by the United States.

3.26 The EEC claimed that the argument advanced by the United States regarding the status of its tariff concessions on sugar was contradicted by the finding of the panel which had examined the United States restrictions on import of sugar. The EEC recalled that with regard to the scope of the words "terms, conditions or qualifications set forth in that Schedule", the panel stated the following:

> "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 tariff and other barriers to trade'. ... 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." (L/6514, paragraph 5.3)

It was thus clear that the terms, conditions or qualifications could only refer to commitments additional to the tariff commitment and therefore could not limit over time the tariff reduction commitment. That panel also noted that provisions which might have a practical effect on tariff concessions may be incorporated in the Schedule of concessions "provided that the results of such negotiations should not conflict with other provisions of the Agreement" (L/6514, paragraph 5.5). Obligations under Article II therefore could not be limited by a condition that was not consistent with the General Agreement.

3.27 The United States replied that the validity of the Headnote as a term, condition or qualification to the United States concessions on sugar duties had not been examined by the report of the panel referred to by the EEC (L/6514). That panel did not find that the Headnote was invalid, but merely that the Headnote could not serve as a legal justification for measures inconsistent with Article XI. It did not examine, or make findings on, the status of United States tariff bindings on raw and refined sugar. Moreover, the passage quoted by the EEC from that Panel confirmed that it was a legitimate practice to put limits to a tariff concession, so long as these limits were not inconsistent with any article of the General Agreement other than Article II. For instance, contracting parties could and did provide tariff concessions seasonally, or for a limited time, or contingent on implementation of concessions by others. The United States recalled that with regard to the meaning of the phrase "terms, conditions or qualifications," the preceding paragraph of the same Panel report cited by the EEC had stated:

> "[The Panel] 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." (L/6514, paragraph 5.2)

Accordingly, the term, condition, or qualification limiting the United States' tariff concession on ordinary customs duties on imports of sugar to the duration of Title II of the Sugar Act of 1948 was permitted by

Article II and did not conflict with any other provision of the General Agreement.

Article XXV

3.28 The EEC stressed that a waiver granted under Article XXV did not alter the status of the waived measure, notably as regards its compatibility or incompatibility with the General Agreement. In the EEC's view, waiving obligations did not signify bringing them into conformity. The obligation laid down, in the event that a measure was inconsistent with the General Agreement, that it must be eliminated or modified so as to make it compatible. A waiver of obligations was only signified exemption from having to ensure such compatibility. Thus, in the present case, the United States had simply been exempted from having to bring itself into conformity with the General Agreement when applying illegal measures, provided that such measures complied with the Waiver. The EEC added that this above mentioned point is supported by both the history and the letter of the Waiver. With regard to the history, it was recalled that the Netherlands were authorized by the CONTRACTING PARTIES to apply a withdrawal of concessions afterwards the Waiver was granted on the basis of recommendations submitted by working parties on the annual examination of the Waiver (BISD 4S/99). This authorization was due to the non-conformity of United States import restrictions with the Article XI.

3.29 The EEC considered that this view had been endorsed by the report of the panel established pursuant to the recourse by Uruguay to Article XXIII which stated that "It may be noted in this connection that the status of a measure (that is, whether or not it is consistent with GATT) is not affected by a waiver decision taken subsequently" (BISD 11S/100). Therefore, irrespective of whether the measures adopted under the Waiver were compatible or incompatible with the Waiver itself, those measures constituted a case of nullification or impairment of benefits accruing under the General Agreement. This was also made clear in the text of the Waiver by two declarations in which affected contracting parties maintain their rights to have recourse to Article XXIII, and in which the CONTRACTING PARTIES "regret that circumstances make it necessary for the United States to continue to apply import restrictions which, in certain cases, adversely affect the trade of a number of contracting parties, impair concessions granted by the United States and thus impede the attainment of the objectives of the General Agreement" (BISD 3S/35).

3.30 The United States stated that Article XXV:5 was an essential part of the GATT system for furthering trade liberalization. Even the earliest proposals for the Havana Charter provided for analogous provisions, because the drafters recognized that waivers provided a measure of flexibility indispensable if it were to be possible to accommodate the problems of individual contracting parties in a multilateral agreement. The United States argued that Article XXV:5 gave the CONTRACTING PARTIES almost unlimited power to waive the obligations of the General Agreement, subject only to the voting requirement and the requirement that the circumstances be extraordinary and not covered elsewhere in the General Agreement. This power was not qualified by any requirement that the waiver be temporary. The CONTRACTING PARTIES had chosen on a number of occasions to grant

waivers with no expiry date. The waiver power was supreme, and could only be exercised or reconsidered by the CONTRACTING PARTIES. For instance, the 1956 Decision on Guiding Principles for Waivers of Article I and other important GATT obligations (BISD 5S/25) stated that "any decisions granting a waiver would include procedures for future consultations or action taken under the waiver". In other words, dispute settlement concerning the operation of a waiver could extend to any action taken under the waiver, but could not decide whether the waiver itself was to be maintained, because that question was within the exclusive competence of the CONTRACTING PARTIES.

3.31 The United States rejected the EEC's interpretation of the Netherlands-United States dispute on dairy quotas, and argued that a closer examination of this dispute, on the contrary, supported the United States view of the effect of waivers on remedies. The United States recalled that in 1951, the CONTRACTING PARTIES found that tariff concessions granted by the United States in 1947 on certain dairy products had been nullified or impaired by imposition of import quotas under Section 104 of the Defense Production Act of 1950. The CONTRACTING PARTIES also found that the import restrictions in question constituted an infringement of Article XI (BISD II/16). In 1952, the CONTRACTING PARTIES confirmed both findings, recommended that the United States Government secure the repeal of Section 104, and authorized the Netherlands to retaliate (BISD 1S/31,32). These findings would seem to indicate that the evidence established the elements of both an Article XXIII:1(a) "violation" complaint and an Article XXIII:1(b) "non-violation" complaint. By 1953, Section 104 had been repealed, but substantially equivalent import quotas had been adopted pursuant to Section 22. The CONTRACTING PARTIES did authorize continued retialiation by the Netherlands but did not make additional findings and did not recommend that the United States eliminate the Section 22 quotas (BISD 2S/28). In 1954, the reasoning behind the 1953 resolution became apparent. The CONTRACTING PARTIES, in reauthorizing retaliation by the Netherlands, noted only that tariff concessions had been impaired; the CONTRACTING PARTIES made no finding that the Section 22 dairy import quotas were inconsistent with Article XI (BISD 3S/46). In reauthorizing retaliation subsequent to the grant of the Waiver, the CONTRACTING PARTIES relied on the recommendations of the Working Parties examining the Section 22 annual reports, which recognized the same impairment of tariff concessions (BISD 4S/31, 99; 5S/28, 142; 6S/14,157; and 7S/23, 128). The history of this dispute shows that the CONTRACTING PARTIES considered the "violation" case, i.e. the infringement of Article XI, to have terminated upon the repeal of the Defense Production Act even though substantially similar import restrictions had been adopted under Section 22. It is clear that the Section 22 quotas were not found to be inconsistent with Article XI. What remained of the Netherlands' dispute was the "non-violation" case, which presumably satisfied all of the criteria that had been identified in 1950 by the panel examining the Australian Subsidy on Ammonium Sulphate (BISD II/188) and in 1952 by the panel examining the Treatment by Germany of Imports of Sardines (BISD 1S/53). Clearly, the consistency or inconsistency with the GATT of the Section 22 measures would not have been relevant under a "non-violation" theory of nullification or impairment. Moreover, the

Waiver granted in 1955 would not have resolved the Netherlands' claim under Article XXIII:1(b) or mandated the termination of retaliation.

3.32 The United States referred to the passage that the EEC had cited from a footnote to the report of the Panel on the Uruguayan Recourse, and stressed that the question raised by this footnote was not the nature of the measures taken but the nature of any claim raised under Article XXIII. If conduct within the limits of a waiver were still to give rise to a valid claim under Article XXIII:1(a), then the Waiver and Article XXV:5(a) would be a nullity. For this reason the United States had argued that in order to avoid an interpretation that throws two GATT provisions in conflict, the only Article XXIII claim possible was a claim under Article XXIII:1(b) or (c). The documentary record also indicated that the drafting of this footnote was prompted by the ambiguous legal position taken by Germany, which had obtained a waiver but still insisted that its import restrictions were legally sheltered under the Torquay Protocol. The United States argued that, read literally, this footnote dealt only with the situation in which a measure was put in place and a waiver was granted afterwards. So it was not relevant to the Section 22 measures on sugar, which started well after the Waiver. Moreover, the footnote was incorrect in implying that all waivers provided explicitly for recourse to Article XXIII: in fact, only nine of over two hundred waivers so provided. As for the declaration of regret cited by the EEC, this referred to "certain cases", and so by implication, there were certain other cases in which Section 22 measures did not cause nullification or impairment. Thus, the EEC's conclusion that all Section 22 measures nullify and impair benefits was completely unwarranted. Moreover, the declaration of regret related to restrictions which were in effect at the time of the Waiver, and the Section 22 measures on sugar did not begin until long afterward.

3.33 The EEC disagreed with the way in which the United States interpreted the waiver power under Article XXV. The EEC recalled that at the tenth session of the CONTRACTING PARTIES, the Executive Secretary of the GATT, at the request of the CONTRACTING PARTIES, had given his opinion as to the applicability of this Article. He stated in particular that: "The words 'in exceptional circumstances not elsewhere provided for in this Agreement' are clearly designed to limit the use of the waiver provision to individual problems to which the Agreement as written does not provide an adequate solution and where an amendment would result in a modification both broader in its application and more permanent than is required" (L/403). In the EEC's view, this opinion rules out the possibility of the Waiver being permanent or constituting a kind of amendment or substantive modification of the text of the Agreement. On the contrary, as a waiver was a clause providing an exception to the application of the General Agreement, the exception must be interpreted narrowly in accordance with the interpretation of exceptions recently confirmed by a panel report (L/6513) adopted by the CONTRACTING PARTIES.

3.34 The United States answered that it had not claimed that the Waiver was an amendment to the text of the Agreement. The note by the Executive Secretary supported the United States interpretation that the Waiver power saved the CONTRACTING PARTIES from having to amend the General Agreement to deal with a pressing problem of one or a few contracting parties. However,

before and after the note cited by the EEC, the practice of the CONTRACTING PARTIES was in fact to grant waivers of indefinite duration in certain cases; the note listed a number of such waivers. The United States also argued that it was inappropriate to require that waivers be interpreted narrowly. A waiver was not the same as an exception to the General Agreement; the rationale, basis and procedures for waivers were fundamentally different. Any contracting party could freely avail itself of the exceptions in the GATT, but to obtain a waiver, it had to undergo rigorous examination of its case and obtain support from a two-thirds majority of the CONTRACTING PARTIES. Waivers were a fundamental exercise of the decisional powers of the CONTRACTING PARTIES acting on a case-by-case basis. The provisions of each waiver were determined by the CONTRACTING PARTIES, and to narrow them after the fact would be to impose limits on the powers of the CONTRACTING PARTIES. There had been waivers, such as the GSP Waiver, which could be described as having been intended to be applied broadly.

Article XXIII

3.35 The United States stressed that the Waiver provides recourse to Article XXIII, but limits such recourse to "affected" contracting parties. This was consistent with the general practice of waivers granted under the General Agreement under which compensation for contracting parties whose trade is negatively affected has been viewed as an essential part of any waiver, except those cases where it was found expressly that a waiver would have no, or negligible, effects on trade.

3.36 Therefore, the United States argued that before even considering whether or to what extent nullification or impairment had occurred, a panel dealing with a claim under the Waiver must determine whether the complaining party was an "affected contracting party" with respect to each product for which nullification or impairment had been alleged. Because of the extraordinary nature of waivers, and the fact that they were an expression of the will of the CONTRACTING PARTIES, the burden should be on the complaining party to show it was "affected" commercially. Thus, the EEC would have to come forward with a positive showing of real commercial effect which was caused by the Waiver and not by extraneous factors. However, the EEC's sugar exports had not been affected by actions taken under the Waiver in the sugar area. The effects claimed by the EEC on its sugar trade related to the quota maintained under the Headnote, not Section 22 measures. With regard to refined sugar, the EEC, a high-cost producer of sugar, maintained sugar prices well above United States prices, and could only export to the United States market with export subsidies or by dumping. EEC exports of sugar to the United States increased even after imposition of the Section 22 fees in 1977. In 1978, the United States imposed a countervailing duty to offset subsidies, and from 1979 onward, EEC sugar entirely lost its place in the United States market to other, non-subsidizing exporters. Thus, any effect on EEC exports of refined sugar was caused by its own export subsidies and the GATT-consistent countervailing duty, not the imposition of Section 22 fees on sugar in 1977. Also, the United States provided statistics indicating that EEC exports to the United States under tariff headings subject to the

Section 22 import limitations on sugar-containing products had actually increased following imposition of those measures.

3.37 The United States recalled that the Section 22 Waiver provided that affected contracting parties are to have recourse to the appropriate provisions of Article XXIII. Non-specific recourse under Article XXIII as a whole was inconsistent with present GATT practice in the field of dispute-settlement, which stressed clarity and specificity in defining the scope and rules of disputes. Recourse to Article XXIII:1(a) was also not appropriate in the case of measures within the scope of any waiver. In this instance, while Article XXIII:1(a) spoke of "the failure of another contracting party to carry out its obligations under this Agreement", the Waiver decision of 1955 stated that "the obligations of the United States under the provisions of Articles II and XI of the General Agreement are waived to the extent necessary to prevent a conflict with such provisions". By process of elimination, therefore, the only complaint that could be raised against conduct that had thus been authorized by the CONTRACTING PARTIES was a non-violation nullification or impairment complaint under Article XXIII:1(b) or (c). The United States referred to a recent analysis by the Secretariat stating that since the purpose of waivers is precisely to authorize action that would otherwise be inconsistent with the Agreement, the reference in waivers to recourse to Article XXIII was presumably a reference to Article XXIII:1(b) or (c). Moreover, the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (L/4907) provided that if a contracting party claims that measures which do not conflict with the provisions of the General Agreement have nullified or impaired benefits accruing to it under the General Agreement, it would be called upon to provide a detailed justification. The elements of a non-violation case were well known to the EEC; as the EEC had failed to come forward with the required information, the United States concluded that the EEC had also failed to show nullification or impairment under Article XXIII:1(b) or (c).

3.38 The EEC considered that the United States interpretation that under the Waiver recourse to Article XXIII was limited to "affected" contracting parties was mistaken. The report of the Working Parties set up to examine the United States request for a waiver stated: "The right of other contracting parties to have recourse to the provisions of Article XXIII (...) applies to the Decision as a whole" (BISD 3S/144). This statement pointed to the right of recourse to Article XXIII without any possibility of limiting it by a restrictive interpretation to affected parties. Moreover, the text of the Waiver itself provides that the Waiver "shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII" (BISD 3S/35). This wording did not limit the right of recourse but preserved it, notably in the case of measures that were not consistent with the General Agreement. So long as these measures remained in force, the use of the term "affected" was not intended to limit recourse to Article XXIII to certain contracting parties. The term was there to specify the cases in which contracting parties were entitled to obtain the authorization to suspend concessions provided for in Article XXIII:2.

3.39 The EEC also recalled that the CONTRACTING PARTIES, when granting the Waiver, had formally noted that the measures taken under the Waiver constituted, in certain cases, a nullification or impairment of benefits under the General Agreement. A contracting party therefore no longer had to prove them, nor did a panel have to determine them. However in the present case compensation could be envisaged because the measures maintained under the Waiver remained illegal measures for which the obligation to bring them into conformity with the General Agreement had been suspended. This was explicitly recognized in the Annex to the 1979 Understanding which states: "The provision of compensation should be resorted to only if the immediate withdrawal of the measures is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement" (BISD 26S/216). In these circumstances, in the EEC's view, the Panel had only to recommend the extent to which authorization for the suspension of concessions or some other measure, such as compensation, should be envisaged. The EEC also pointed out that the United States have not demonstrated that the measures taken under the Waiver do not constitute, in the present case, a nullification or impairment of benefits accruing under the General Agreement.

3.40 The United States also recalled that the declaration of regret mentioned by the EEC stated that measures existing at the time of the Waiver decision constituted nullification or impairment in certain cases. By inference, there were some cases in which no nullification or impairment was found. Thus, a blanket conclusion of nullification or impairment was unwarranted, especially in the case of sugar, since there were no Section 22 measures in the sugar area at the time of the declaration of regret. The United States noted that the statement quoted by the EEC from the Annex of the 1979 Understanding only referred to the situation when measures were found to be "inconsistent with the General Agreement", that is a complaint under Article XXIII:1(a). However, as the United States had already pointed out, a dispute under Article XXIII:1(a) concerning measures within the scope of a waiver granted by the CONTRACTING PARTIES was a contradiction in terms. The United States maintained that the only dispute that could be raised concerning measures within the scope of a waiver was a dispute under Article XXIII:1(b) or (c), under which the United States agreed that, if non-violation nullification or impairment were established, it might have an obligation to pay compensation. However, the United States noted that the EEC had avoided invoking such provisions of Article XXIII:1 and it had failed "to provide a detailed justification" as provided for in such cases by paragraph 5 of the Annex of the 1979 Understanding (BISD 26/216). The United States recalled the Panel decision on the EEC complaint against certain aspects of a bilateral arrangement between the United States and Japan concerning trade in semiconductors in which that Panel rejected a non-violation claim because evidence submitted by the EEC was simply insufficient (L/6309, paragraphs 69, 131).

4. SUBMISSIONS BY INTERESTED THIRD PARTIES

Argentina

4.1 Argentina recalled the serious economic and social consequences, in particular for its regional economies, which had followed the imposition by the United States of restrictive sugar import quotas as from May 1982. Argentina's receipts from sugar exports to the United States market dropped from US$210 million in 1981 to US$14 million in 1987. In terms of volume, United States sugar imports declined from roughly 5 million short tons on average for 1979/81 to about 1 million short ton in 1988. At the same time Argentina's share declined from an average of about 300 thousand short tons in 1977/81 to 29 thousand short tons in 1988. While a larger global quota had been announced for 1989 (1.2 million short tons), this remained a seriously depressed level.

4.2 Argentina considered that the quantitative restrictions imposed by the United States on sugar imports were contrary to the provisions of Article XI and did not fulfil the conditions laid down by that Article for maintaining such restrictions. Furthermore, these restrictions could be justified neither by reference to the Headnote nor to the Waiver. As sugar was an item on which a binding was negotiated by the United States, if the hypothesis of a possible application of unlimited restrictions under the Headnote or under the Waiver were accepted, the United States, in contradiction with the criterion of reasonable expectation, would have the right to reduce its imports to zero. The concessions granted would then be totally meaningless. The mere possibility that a contracting party could unilaterally modify a concession, besides jeopardising the reliability of the benefits expected from the concession, would give the contracting party which granted the concession an advantage with respect to other contracting parties that complied strictly with the rules of the General Agreement.

4.3 Moreover, Argentina maintained that as part of the conditions for the grant of the Waiver, the United States had referred to positive steps taken to reduce 1955 crop supplies by lowering support price levels or imposing marketing quotas at minimum levels permitted by its legislation. The United States had also expressed its intention to continue to seek a solution to the problem of surpluses of agricultural commodities. The quantitative restrictions which had reduced sugar imports from 3.7 million short tons in 1955 to 1.2 million short tons in 1987, while sugar production in the United States rose from 4.3 million short tons to 6.7 million short tons during the same period, did not appear, therefore, to be consistent with the conditions of the Waiver.

Australia

4.4 Australia noted that the terms of reference of the Panel encompassed restrictions maintained by the United States on the importation of agricultural products justified by the United States under both the Headnote and the Waiver. However, having recalled that the issue of the conformity with the General Agreement of quotas maintained under the Headnote by the United States on imports of raw and refined sugar had been

recently settled (L/6514), Australia confined its submission to arguing certain aspects of the restrictions justified under the Waiver.

4.5 Australia maintained that the CONTRACTING PARTIES were fully aware that the granting of the Waiver in 1955 would result per se in the nullification or impairment of benefits to other contracting parties. This was reflected in both the wording of the Decision of the CONTRACTING PARTIES and of the report of the Working Party which examined the United States request for the Waiver by making explicit references to the right of contracting parties to have recourse to Article XXIII.

4.6 Australia further maintained that nullification or impairment of benefits accruing to other contracting parties because of the imposition by the United States of import restrictions under the Waiver occurred regardless of whether or not the import restrictions involved were being applied strictly in accordance with the Waiver and its conditions and procedures. This was explicitly provided for under Article XXIII:1(b). Moreover, the specific reference to Article XXIII in the text of the Decision was a recognition that the granting of the Waiver disturbed the balance of benefits accruing to the United States and other contracting parties under the General Agreement. This also meant, in Australia's view, that contracting parties taking action under Article XXIII against restrictions imposed by the United States pursuant to Section 22 did not need and were not obliged to prove nullification or impairment, as this was already established. The only thing to be decided in such cases would be the extent of the nullification or impairment suffered by the contracting party involved and the extent to which authorization would be given to suspension of concessions or other obligations, as allowed for in Article XXIII. Australia asked the Panel to make a finding endorsing this interpretation.

Canada

4.7 Canada maintained that the restrictions applied by the United States on sugar and sugar-containing products contravened Articles II and XI of the General Agreement and that they were inconsistent with the conditions and assurances of the Waiver granted in 1955 pursuant to Article XXV:5. It was Canada's view that in seeking to justify these restrictions as an exception under Article XXV:5, the United States accepted that they would otherwise contravene Articles II and XI of the General Agreement. Canada also noted that the Waiver had no effect on contracting parties' rights with respect to other GATT articles, including in particular Articles XIII or XXIII.

4.8 Canada recalled various actions on sugar imports implemented by the United States under its domestic legislation. In particular, Canada referred to import prohibitions imposed in 1983 under Section 22 on certain sugar-containing products falling under TSUS headings 155.75, 156.45, 183.01 and 183.05 and to quotas imposed in 1985 under the same authority on imports of all sugar-containing products not already subject to import prohibition provided for in TSUS headings 156.45, 183.01 and 183.05. Canada noted that the United States had sought to justify its action on these products with respect to its obligations under the General Agreement

as falling within the terms of the Waiver. Canada pointed out that, as an exception to the application of the General Agreement, waiver provisions must be given narrow interpretation and that the burden of proving application of the exception lay with the party relying on its provisions. It was Canada's view, therefore, that the burden was on the United States to establish that it had followed all of the conditions and assurances attached to the Waiver with respect to action taken on sugar and sugar-containing products and that the United States could not do so. In particular, Canada stressed that these actions had been taken without proper notification, consultation or transparency, and had been maintained in spite of evidence that the measures introduced should be terminated.

4.9 Canada further argued that the granting of the Waiver was to be interpreted in light of the representation and circumstances leading to the Decision of 1955. Canada maintained that the intention of contracting parties was neither to amend the General Agreement by incorporating Section 22 nor to maintain its provisions in perpetuity. Rather the intention was to waive, only to the extent necessary, certain obligations in view of the particular problem created where larger than normal imports were generated in response to and supported by United States price support programmes. In Canada's view, the measures maintained by the United States on sugar and in particular those on sugar-containing products, which were in place to support quotas on sugar (which had been found by a previous panel to have no valid GATT justification) were an abuse of the Waiver provisions and an attempt to extend those provisions to an extent never intended by the CONTRACTING PARTIES in 1955.

4.10 Canada considered that with respect to fees applied to sugar, the United States had failed to fulfil its assurances given in 1977. Domestic production rose from 5.9 million short tons in 1982 to 7.3 million short tons in 1987 while imports had fallen dramatically from 6.1 million short tons in 1977 to 1.3 million short tons in 1987. In view of the United States assurances and pursuant to the condition of the Waiver that restrictions be removed or relaxed when changed circumstances made doing so possible, Canada argued that the fees applied to sugar should be terminated. For the same reasons the United States could not justify the imposition of quotas under Section 22 for sugar.

4.11 Canada argued that insofar as the imposition of restrictions on sugar could not be justified under the Waiver, then subsequent Section 22 action could not be justified as necessary to support the United States sugar price support programme under the Waiver. The 1983 import prohibition on sugar-containing products was taken without notification and without the opportunity to consult. Moreover the United States had not shown that the action was necessary to support United States price support programmes. In addition, Canada argued that while the 1955 Waiver permitted restrictions in certain circumstances, it did not permit the use of prohibitions. The United States could not justify its prohibitions on sugar-containng products under the Waiver. Canada argued that the import restrictions introduced in 1985 were imposed without notice and were applied to products containing minimal amounts of sugar, the import of which could not conceivably have been considered to be undermining the United States sugar programme. Canada considered that the CONTRACTING PARTIES, in granting the

Waiver, did not intend that it would allow for the restriction of imports of manufactured grocery products. Canada also considered that the United States lack of transparency, given their refusal to release a subsequent USITC investigation although Canada has requested access to this report, was an abuse of the conditions of the Waiver and of the assurances given by the USA and contrary to the intent of the Waiver. Canada also stressed that any resolution of the complaint should be on a MFN basis.

Chile

4.12 Chile considered that the Panel offered a very useful opportunity to examine whether the maintenance of the Waiver was justified. Chile shared many of the views contained in the last draft report of the Working Party set up to examine the annual report by the United States under the Waiver (Spec(88)14/Rev.4). Reference was made in that report to, inter alia, the fact that the circumstances in which in 1955 the Waiver was granted had changed; the adverse effects of the Waiver on agricultural trade and on the GATT system; and its very long duration. Chile recalled that its position of principle concerning waivers under Article XXV:5 was that these should be of limited duration; indefinite duration gave rise to virtually permanent privileges, thus impairing the balance of rights and obligations among contracting parties.

4.13 Moreover, Chile considered that while the Waiver had the effect of allowing the United States to maintain measures that were incompatible with the General Agreement, that did not in any way change the incompatible character of such measures. In other words, the maintenance of these measures would be a prima facie case of injury which, ipso facto, might lead to authorization by the CONTRACTING PARTIES to suspend concessions or obligations or recommend some other appropriate measures for restoring the balance of rights and obligations between the United States and other affected contracting parties.

Japan

4.14 Japan considered that import restrictions imposed by the United States under the Waiver had the same adverse effects on trade as other trade restrictive measures. Japan recognized that the Waiver had an indefinite duration and an unspecified coverage of product, but argued that the CONTRACTING PARTIES had granted it on the ground that restrictions should be either relaxed or removal promptly when the circumstances requiring such restrictions no longer existed. However, the Waiver had been maintained for as long as over thirty years without being reviewed.

4.15 Japan maintained that this situation could not be considered as normal either from the viewpoint of promoting international trade which should be conducted on the basis of equity, or from the viewpoint of maintaining the credibility of the GATT system. Japan was aware that the United States was prepare to discuss the issue of the Waiver in the course of the Uruguay Round. However, Japan's view was that in the light of the various problems involved in the Waiver, the United States should relinquish it on its own initiative so as to place all its trade restrictive measures presently allowed by the Waiver on the same ground as the similar trade restrictive

measures maintained by other countries, and then take part in the joint work of finding new GATT rules and disciplines for agricultural trade.

Remarks by the United States

4.16 The United States noted that, in general, the submissions by third interested parties were instructive because they revealed the level of confusion about United States sugar trade policy, which was indeed a very complex subject. For instance, the quota, whose impact on its sugar trade with the United States Argentina was complaining about, was maintained under the Headnote and had nothing to do with the Waiver, while there were no Section 22 restrictions on raw sugar, the form in which sugar was normally traded.

4.17 Regarding Japan's argument that the Waiver was granted on condition that Section 22 restrictions should be promptly removed or relaxed when the circumstances requiring them "no longer exist", the United States considered that the references in the Waiver to removal of restrictions were conditioned on a finding by the United States that circumstances had changed. The United States disagreed with Japan's view that the Waiver was granted as a temporary relief measure; the record showed that the drafters of the Waiver had consciously decided not to include an expiry date. The United States also disagreed with Japan's statement concerning lack of review. The Waiver required annual reviews, and Japan had participated in a number of working parties for the Waiver annual review.

4.18 The United States further noted that the comments submitted by Chile did reflect a more accurate picture of the Waiver and contained a number of interesting assertions, notably that an indefinite waiver altered the balance of rights and obligations under the General Agreement. The United States maintained that the balance of rights and obligations in the General Agreement had always included Article XXV:5(a) and the possibility to grant a waiver, even one of unlimited duration. Moreover the Untied States recalled that the decision to grant a waiver was not a unilateral action by one contracting party, but a decision of the CONTRACTING PARTIES as a whole, acting on a two-thirds majority.

4.19 Regarding the point raised by Australia concerning the application of Article XXIII to measures where the obligations of the General Agreement had been waived, the United States agreed that this would amount at most to a reconfirmation that in certain cases where non-violation nullification or impairment existed, there was a right to recourse, specifically under Article XXIII:1(b). However, the Australian arguments left significant questions unanswered, such as what significance was to be given to waiver decisions by the CONTRACTING PARTIES in this context, and what evidentiary burden was to be placed on the complaining party under Article XXIII:1(b). Furthermore, the United States rejected Australia's interpretation of Article XXV:5(a) which implied that an invocation of provisions under that Article required formal rebalancing of concessions as the price for a waiver. The United States noted that nothing in the negotiating history of Article XXV supported that interpretation; if the drafters had intended rebalancing they would have said so.

4.20 The United States noted Canada's argument that the invocation of the Waiver constituted an acceptance by the United States that its actions would otherwise contravene Articles II or XI. The United States had never agreed that all of its actions were inconsistent with Articles II or XI simply because the Waiver had been invoked. The text of the Waiver, the report of the Working Party on the Waiver and the United States request for the Waiver made clear that the reason for the Waiver was that action required by Section 22 might, not would, violate the General Agreement. The United States recalled that the only other panel that had examined measures maintained under Section 22, the Panel on the Uruguayan Recourse to Article XXIII, found that Section 22 quotas on wheat and wheat flour were consistent with Article XI and the Protocol of Provisional Application (BISD 11S/148).

4.21 The United States argued that in a number of instances in its submission, Canada had considered waivers to be analogous to the exceptions provided under Article XI:2. The United States disagreed with this interpretation. Exceptions in the General Agreement were a general license that could be utilized freely by any contracting party, subject to the possibility of a dispute at some later time; waivers were subject to case-by-case scrutiny in advance by the CONTRACTING PARTIES. The United States maintained that waivers were a fundamental exercise of the decisional powers of the CONTRACTING PARTIES acting on a super-majority of two thirds, forming part of their practice under the General Agreement. Waivers were exactly as broad or as narrow as they said they were; to narrow them after the fact was to impose a limit on the powers of the CONTRACTING PARTIES. The United States noted that there had in fact been waivers, such as the GSP waiver (enabling clause), which could be described as having been intended to be applied broadly. Similarly, the contention that the Waiver allowed for restrictions but not prohibitions was again a false analogy to the distinction in Article XI:2 between prohibitions and restrictions. Section 22 referred to "quantitative limitations" which indeed could include prohibitions, particularly when, as in the case at issue, trade in a product did not exist during the representative period referred to in Section 22.

4.22 Regarding the Section 22 actions on sugar-containing products, the United States reiterated that import quotas on these products had been introduced simply to prevent their import from interfering with the price support programme for sugar, not to enforce the quota under the Headnote. Moreover, with respect to their implementation the United States pointed out that it must be understood that the President was the decisionmaker on Section 22, not the USITC. The Commission's findings and recommendations were provided to the President to aid in his decision, but the President might disregard them if he so wished (on factual, policy or any other grounds). Release of such findings and recommendations of the USITC were not a condition of the Waiver and were released to the public only after the President had made his final determination, which he had not yet made in the case referred to by Canada. The United States pointed out that it had complied with the requirement of the second condition of the Waiver by notifying the CONTRACTING PARTIES whenever the President requested an investigation by the USITC. It had also complied with the requirement in the third condition to give due consideration to representations submitted

to it; for instance, the quotas on sugar-containing products imposed in 1985 had been promptly modified on the basis of representations made by other contracting parties.

4.23 The United States further recalled that when requesting the waiver in 1955, the United States representative steadfastly refused to accept as a condition for the Waiver the limiting of actions under Section 22 to the case of abnormal imports due to a United States price support programme. Nevertheless, the actions on sugar and sugar-containing products were exactly of the nature for which Canada itself considered the Waiver valid as they were necessary to limit larger than normal imports which were being attracted to the United States because of the price support programme in force.

4.24 The United States further recalled that neither the text of the Waiver, nor Section 22 (which was attached to the Waiver) supported Canada's assertion that the Waiver was not intended to apply to manufactured grocery products. Section 22 required the President to impose restrictions on any imported "article " when he finds that the statutory criteria are met. The term "article" was very broad, and clearly applied to downstream products such as sugar mixtures. The actions taken on sugar-containing products in 1983 and 1985 were taken under the emergency provisions of Section 22(b), which were referred to in the Waiver preamble in the summary of the United States waiver request. All such actions had been taken on a provisional basis only, and ample opportunity had been provided for consultations after the emergency proclamation and before any final action by the President; this was fully consistent with conditions (2) and (3) of the Waiver. Very large profits could be made in the sugar trade and commodity markets due to the difference in the United States and world sugar prices. An advance announcement that import restrictions are being considered could be very disruptive, encouraging imports and increasing pressure on the price support programme; Section 22 was intended to protect such programmes against just such disruption. In these cases, immediate action was appropriate and emergency measures had to be kept secret.

4.25 Regarding the United States Twenty-First Annual Report on Section 22 (L/4727), the United States noted that the statements made in that report were purely descriptive; no promises were made or implied. Moreover, all statements in L/4727 were explicitly made within the context of domestic statutes in force at the time, which set a minimum support price for sugar and required that it be maintained at no cost to the government. The United States executive authorities had maintained the United States support price at the minimum level permitted by law.

5. FINDINGS

Introduction

5.1 The Panel noted that the issues before it arise essentially from the following facts: The United States maintains a domestic price support programme for sugar. To implement this programme the United States presently maintains restrictive import measures under two separate domestic

legal authorities. Under the authority of a Headnote to the Tariff Schedule of the United States (TSUS), it imposes an import quota on raw and refined sugar. This quota was found to be inconsistent with the General Agreement in a panel report adopted by the CONTRACTING PARTIES in June 1989, but it is still being applied. Under the authority of Section 22 of its Agricultural Adjustment Act, the United States further imposes quantitative limitations on imports of certain sugar-containing products and fees on imports of refined sugar. Section 22 obliges the President of the United States to impose either fees or quantitative limitations on imports of any article if he finds that its importation would render or tend to render ineffective, or materially interfere with, a domestic agricultural price support programme.

5.2 The United States' Schedule of Concessions contains tariff bindings on sugars also covering refined sugar. These concessions are subject to the condition that the bound rates "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" and that they "shall resume full effectiveness ... if legislation substantially equivalent to Title II of the Sugar Act of 1948 should subsequently become effective". The Sugar Act of 1948 expired in 1974. The quotas on imports of sugar that had been imposed under that Act were replaced by quotas imposed under the Headnote to the Tariff Schedule of the United States (TSUS).

5.3 The General Agreement proscribes import restrictions in Article XI:1 and import duties exceeding those bound in a Schedule of Concessions in Article II:1(b). In 1955 the CONTRACTING PARTIES, acting under Article XXV:5 of the General Agreement, decided to waive the obligations of the United States under Articles XI and II to the extent necessary to prevent a conflict with these provisions in the case of action required to be taken by the Government of the United States under Section 22. This decision (hereinafter referred to as the "Waiver") was taken in consideration of certain "assurances" by the United States recorded in the preamble of the Waiver and was subject to specified "conditions and procedures".

5.4 The EEC asked the Panel to find that the measures taken by the United States are inconsistent with Articles II and XI and are not justified by the Waiver. The EEC further asked the Panel to find that the measures, whether or not covered by the Waiver, nullify or impair benefits accruing to the EEC under Articles II and XI and to recommend, as a temporary measure, the grant of compensation by the United States.

Scope of the Panel's Findings: Quota on Raw and Refined Sugar

5.5 The Panel noted that the quota on imports of raw and refined sugar imposed under the authority of the Headnote to the United States Tariff Schedule has already been found to be inconsistent with the General Agreement in a panel report adopted by the CONTRACTING PARTIES and that it was agreed in the Council that the present Panel would not readdress the findings set out in this report (cf. para. 1.2 above). The Panel therefore decided not to examine the consistency of this quota with the United States' obligations under the General Agreement.

The EEC's Rights of Recourse to Article XXIII

5.6 The United States considers that, under the Waiver, recourse to Article XXIII is limited to "affected" contracting parties and that the EEC is not affected by the measures taken under the Waiver. The Panel noted that the text of the Waiver merely states that the Waiver "shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII". The words "does not preclude" clearly indicate that the Waiver does not limit the contracting parties' rights of recourse to Article XXIII; these words express the intention to reaffirm these rights. The report of the Working Party which examined the request by the United States for a waiver indicates that the purpose of the reference to the right of recourse to Article XXIII by affected contracting parties was "to re-emphasize that point in relation to the imposition of restrictions on additional products and the extension or intensification of restrictions" (BISD 3S/144). This confirms that the CONTRACTING PARTIES, when granting the Waiver, did not intend to limit the rights of recourse to Article XXIII but to reaffirm them in relation to potential problems of particular concern. The Panel therefore found that the EEC had the right to an investigation of its complaint in accordance with Article XXIII:2 without having to demonstrate that it is "affected" within the meaning of the Waiver.

Consistency of the Restrictions on Sugar-Containing Products with Article XI and of the Fees on Refined Sugar with Article II

5.7 Having made the above preliminary findings, the Panel examined the measures at issue in the light of the provisions of the General Agreement invoked by the EEC and found the following: The quantitative limitations on imports of sugar-containing products are inconsistent with Article XI:1, which proscribes import prohibitions and import restrictions made effective through quotas. As to the fees on refined sugar, the Panel noted that the United States made its concession for sugars, and covering refined sugar, subject to the existence of Title II of the Sugar Act of 1948 or substantially equivalent legislation. The United States considers that, given the lapse of the Sugar Act and the absence of substantially equivalent legislation, its tariff rates for sugars are presently not bound. In the view of the United States, Article II:1(b), which allows contracting parties to make the tariff bindings in their Schedule of Concessions "subject to ... terms, conditions or qualifications", allows contracting parties to make tariff concessions subject to the existence of domestic legislation. The EEC considers this qualification of the tariff concession to be inconsistent with the General Agreement and consequently not a valid limit of the concession. In support of this view the EEC cited the report of the panel which had examined the sugar import quota maintained by the United States under the Headnote of its Tariff Schedule.

5.8 The Panel examined the EEC's claim in the light of Article II:1(b) and the above-mentioned report. The Panel noted that the report states 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 qualify their obligations under

other articles of the General Agreement" (L/6514, page 13). The Panel found that the United States assumed in its Schedule of Concessions a commitment additional to the commitments already contained in the General Agreement, namely the avoidance of import duties beyond specified levels, and qualified this additional commitment by making it dependent on the existence of certain domestic legislation. This qualification does not constitute a qualification of a commitment of the United States under provisions of the General Agreement other than Article II; it merely qualifies the commitment under Article II not to impose import duties in excess of the rates set forth in the Schedule. Although the granting of concessions conditional upon the discretion of the concession-granting government may not be meaningful because of the obvious legal uncertainty thereby created, the General Agreement does not oblige contracting parties to make concessions and specifically allows them in Article II:1(b) to subject to conditions the concessions they decide to make. The fact that the United States subjected the effectiveness of the tariff rates for sugars to the existence of domestic legislation is for these reasons not inconsistent with the General Agreement. The Panel recognized that a concession cannot validly be subjected to a qualification that is inconsistent with the General Agreement. Such a qualification would be contrary to the principle recognized by the CONTRACTING PARTIES that the results of negotiations included in a Schedule of Concessions must be consistent with the General Agreement (BISD 3S/225). The Panel however found that the evidence submitted to it by the parties did not permit it to conclude that legislation equivalent to Title II of the Sugar Act of 1948 would necessarily be inconsistent with the General Agreement, in particular Article XI:2. The Panel therefore concluded that, while sugars are subject to tariff concessions in the United States' Schedule of Concessions, the maximum rates for sugars set forth in that Schedule are, in the absence of legislation substantially equivalent to Title II of the expired Sugar Act of 1948, presently not effective. The imposition of the fees on refined sugar therefore does not entail the imposition of duties in excess of those set forth in the United States' Schedule of Concessions.

Justification of the Restrictions on Sugar-Containing Products by the Waiver

5.9 Having found the quantitative limitations on imports of sugar-containing products to be inconsistent with Article XI:1, the Panel examined whether these measures are justified by the Waiver. The Panel first examined whether the United States had observed the terms, conditions and procedures subject to which the CONTRACTING PARTIES waived the United States' obligations under Article XI. The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in "exceptional circumstances", that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly. However, the Panel also had to take into account that, in the Waiver granted to the United States, the CONTRACTING PARTIES did not specify precisely which concrete measures the United States is authorized to take, but authorized the United States to implement a domestic law which gives the United States administration a wide scope of discretion to impose fees or quantitative limitations on any

agricultural commodity or product thereof and which is interpreted by the United States executive authorities and the United States courts.

5.10 The EEC claims that the imposition of zero quotas for sugar-containing products amounted to an import prohibition while the Waiver permitted only import restrictions. The Panel noted that the terms of Section 22 permit "quantitative limitations" as long as these do not reduce imports by more than 50 per cent relative to a past representative period. The Panel therefore concluded on the basis of the text of Section 22 attached to the Waiver that an application of Section 22 does not exclude the limitation of imports to zero whenever imports had been zero over a past representative period and that the United States is consequently not barred from imposing in such cases zero quotas on sugar-containing products. In reaching this conclusion, the Panel recognized however that the CONTRACTING PARTIES, when granting the Waiver in 1955, may not have expected that the United States would impose prohibitions on imports of sugar-containing products under Section 22 so as to avoid the circumvention of a quota on raw and refined sugar imposed under another legal authority inconsistently with the General Agreement nor may they have expected the use of zero quotas to prevent new or newly classified products, which obviously would have no recorded representative period, from entering the United States market.

5.11 The EEC takes the view that the United States acted inconsistently with the Waiver by imposing concurrently both fees on refined sugar and restrictions on raw and refined sugar as well as on sugar-containing products. The Panel noted that Section 22 permits only the imposition of either fees or quantitative limitations on the importation of any article, but that Section 22 does not limit actions under other domestic legal authorities, such as the Headnote to the Tariff Schedule. The Panel noted that the quota on raw and refined sugar is not imposed under Section 22 but under the Headnote, and that the fees and quantitative limitations imposed under Section 22 apply to different articles, the fees being imposed on refined sugar and the quantitative limitations on sugar-containing products. The Panel therefore concluded on the basis of the text of Section 22 attached to the Waiver that the United States has not imposed, inconsistently with Section 22, both fees and quantitative limitations on imports of the same article at the same time. The Panel recognized however that the CONTRACTING PARTIES, when granting the Waiver in 1955, may not have expected that the fees provided for in Section 22 would be imposed in conjunction with restrictions imposed under another domestic legal authority inconsistently with the General Agreement.

5.12 The EEC argues that the United States had not removed or relaxed Section 22 measures on sugar and sugar-containing products when circumstances permitted as required by Condition 5 of the Waiver. In particular, the EEC argues that the President of the United States had disregarded an opinion of the United States International Trade Commission that the requirements of Section 22 had not been met. The Panel noted that Section 22 provides that the President shall under specified circumstances cause an investigation to be made and that "if, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees ... " (BISD 3S/37). Section 22

further provides that "any decision of the President as to facts under this section shall be final" (BISD 3S/38). The Panel therefore concluded on the basis of the text of Section 22 attached to the Waiver that the final authority to impose Section 22 measures rests with the President notwithstanding the advice of the International Trade Commission. The Panel recognized however that the CONTRACTING PARTIES, when granting the Waiver in 1955, may not have expected that the United States President would ignore the opinion of the body advising him on actions under Section 22.

5.13 The Panel finally considered whether the United States had fulfilled its obligation under Condition 6 of the Waiver to show in its annual reports to the CONTRACTING PARTIES "any steps it has taken with a view to a solution of the problem of surpluses of agricultural commodities" (BISD 3S/36). The Panel noted that the United States is under that provision obliged to report only on any steps taken to solve the problem of surpluses not however to report on the absence of such steps. The Panel considered that it is for the CONTRACTING PARTIES, in their reviews of the annual reports of the United States, to draw conclusions from the absence of reports on such steps.

5.14 Having found that the import restrictions on sugar-containing products have not been imposed in contradiction with the terms, conditions and procedures subject to which the CONTRACTING PARTIES waived the United States' obligations under Article XI, the Panel addressed the claim of the EEC that these restrictions are not justified by the Waiver because the United States has not observed the assurances in consideration of which the CONTRACTING PARTIES granted the Waiver. In this respect the Panel noted the following: The preamble to the Waiver records various statements by the United States, among others, "that it is the intention of the United States' Government to continue to seek a solution of the problem of surpluses of agricultural commodities". In the operative part of the Waiver, it is stated that the CONTRACTING PARTIES waive the obligations "in consideration of the assurances recorded above" (BISD 3S/34). The EEC claims that the Waiver is not being used to justify restrictive import measures accompanying domestic supply reductions but measures to promote domestic production and that the failure to observe the assurances recorded in the preamble constitutes a failure to observe the terms of the Waiver.

5.15 The Panel noted that the text of the Waiver clearly distinguishes between "assurances" and "conditions". It indicates that the Waiver is granted "in consideration of" the assurances and "subject to" the conditions (BISD 3S/34). The words "in consideration of" suggest that the assurances given by the United States are mentioned as grounds for the action of the CONTRACTING PARTIES; the words "subject to" suggest that the conditions referred to are requisites the United States has to meet to be able to take action under the Waiver. The report of the Working Party which examined the request by the United States for a waiver confirms that the United States did not consider the assurances to constitute legally binding commitments on its future domestic agricultural policies. This report states:

> "While agreeing to it being noted in the Decision that it was the intention of the United States Government to continue to seek a solution of the problem of surpluses of agricultural commodities, the United States representative was unable to accept the suggestion that, as a condition of the waiver, the United States Government should undertake to adopt measures to remove the underlying causes of the situation which necessitates the application of restrictions under Section 22" (BISD 3S/142-3).

The report further states that proposals for additional conditions had been made by members of the Working Party but that these conditions had not been included in the Waiver because the United States had explained that an amendment to Section 22 adopted by Congress in 1951 provided

> "that no international agreement entered into shall be applied in a manner inconsistent with the provisions of Section 22. The waiver was required in order to remove any possible inconsistency between the obligations of the United States under the General Agreement and that Section so as to permit the fulfilment of this Congressional mandate" (BISD 3S/142).

The Panel found for these reasons that the fulfilment of the assurances recorded in the preamble of the Waiver is not part of the legal requisites the United States has to meet to be able to take action under the Waiver.

5.16 The Panel, while concluding that the United States had not acted in contradiction with the terms, conditions and procedures of the Waiver by imposing quantitative limitations on imports of sugar-containing products, considered that the CONTRACTING PARTIES, when they granted the Waiver in 1955, may not have expected that the United States would make use of Section 22 in the manner described in paragraphs 5.10 to 5.12 above nor that the United States would pursue a sugar policy of the kind currently pursued, given the assurances analysed in paragraphs 5.14 to 5.15 above. The power of the CONTRACTING PARTIES to grant waivers under Article XXV:5 implies the power to withdraw or modify the waivers granted. The questions of whether the United States uses Section 22 in a manner expected by the CONTRACTING PARTIES when they granted the Waiver and of whether it acts in accordance with the assurances in consideration of which the CONTRACTING PARTIES granted the Waiver may be relevant for a decision of the CONTRACTING PARTIES to withdraw or modify the Waiver. However, it is not the mandate of panels established under Article XXIII:2 to propose changes in GATT provisions, but to make findings regarding the interpretation and application of the existing provisions (cf. BISD 35S/241; L/6568, page 21), and the Panel therefore did not address the question of a withdrawal or modification of the Waiver.

Nullification or Impairment of Benefits Accruing Under the General Agreement

5.17 The Panel next examined the claim of the EEC that the restrictions on imports of sugar-containing products, being inconsistent with Article XI, nullified or impaired benefits accruing to the EEC under the General Agreement, whether or not they meet the terms of the Waiver and that the

United States therefore owes compensation. The argument of the EEC on this point essentially is that a waiver does not alter the legal status of a measure; it merely suspends the obligation to implement provisions of the General Agreement. The presumption set forth in the Understanding on Dispute Settlement (BISD 26S/216) that a measure inconsistent with the General Agreement nullifies or impairs benefits accruing under that Agreement within the meaning of Article XXIII therefore applies independently of whether the measure is covered by a waiver. The EEC considers its position to be supported by a footnote in the panel report on the Uruguayan Recourse to Article XXIII which states that "... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision" (BISD 11S/100). The EEC, referring to a provision in the Understanding on Dispute Settlement which states that compensation should be resorted to only "as a temporary measure pending the withdrawal of the measures which are inconsistent with the General Agreement" (BISD 26S/216), further claims that it is entitled to compensation as a temporary measure pending the withdrawal of the restrictions on imports of sugar-containing products.

5.18 The Panel examined these arguments in the light of Article XXIII:1(a), which applies to claims of nullification or impairment of benefits accruing under the General Agreement as the result of "the failure of another contracting party to carry out its obligations under the General Agreement". The Panel found that the restrictions on sugar-containing products, though inconsistent with the obligations of the United States under Article XI:1, conform to the terms of a decision of the CONTRACTING PARTIES waiving that obligation in accordance with Article XXV:5. Since both Article XI:1 and Article XXV:5 form part of the General Agreement, the imposition of the restrictions in conformity with the Waiver cannot constitute a "failure of [the United States] to carry out its obligations under this Agreement" within the meaning of Article XXIII:1(a).

5.19 The Panel then examined the implication of the note in the report on the Uruguayan Recourse to Article XXIII, according to which "... the status of a measure (that is, whether or not it is inconsistent with GATT) is not affected by a waiver decision ...". The Panel noted that the panel which submitted this report had examined import restrictions imposed by Germany and that Germany had obtained a waiver for the restrictions but nevertheless insisted that they were covered by the existing legislation clause in the protocol by which it acceded to the General Agreement (BISD 8S/31 and 10S/126). Against this background the footnote can be understood to suggest that a decision by the CONTRACTING PARTIES to waive an obligation for a particular measure does not constitute a ruling by the CONTRACTING PARTIES that the measure is inconsistent with the General Agreement and that, consequently, a contracting party having obtained a waiver for a particular measure is not barred from arguing in proceedings under Article XXIII:2 that the measure would be consistent with the General Agreement even in the absence of the waiver. The footnote therefore does not support the conclusion that a contracting party imposing a measure inconsistent with a particular provision of the General Agreement but covered by the terms of a decision waiving the obligations under that provision in accordance with Article XXV:5 nevertheless fails to carry out its obligations under the General Agreement within the meaning of

Article XXIII:1(a). The footnote can in the view of the Panel however be taken as an indication of the fact that a measure inconsistent with a particular provision of the General Agreement remains inconsistent with that particular provision even if the CONTRACTING PARTIES authorized in accordance with Article XXV:5 in exceptional circumstances the maintenance of the measure subject to specified conditions.

5.20 The Panel then examined the EEC claim in the light of Article XXIII:1(b), which may be invoked in respect of the application of "any measure, whether or not it conflicts with the provisions of the General Agreement", and consequently also in respect of any measure covered by a waiver. The CONTRACTING PARTIES confirmed this right when they declared in the Waiver that their decision "shall not preclude the right of affected contracting parties to have recourse to the appropriate provisions of Article XXIII" (BISD 3S/35). The EEC considered that the CONTRACTING PARTIES had, when granting the Waiver, formally noted that measures taken under the Waiver constituted, in certain cases, an impairment of benefits under the General Agreement and that such impairment therefore does not have to be proven by it. The Panel noted that the CONTRACTING PARTIES, in the Waiver decision, declared that "they regret that the circumstances make it necessary for the United States to continue to apply import restrictions which, in certain cases, adversely affect the trade of a number of contracting parties, impair concessions granted by the United States and thus impede the attainment of the objectives of the General Agreement" (BISD 3S/35). This declaration alone does not, in the view of the Panel, give adequate guidance as to the nature of those specific cases where concessions are impaired and, therefore it needs to be determined for each measure taken under the Waiver whether it causes such an impairment. The Panel therefore concluded that the fact that the restrictions found to be inconsistent with Article XI:1 conform to the terms of the Waiver does not prevent the EEC from bringing a complaint under Article XXIII:1(b) of the General Agreement but it is up to the EEC to demonstrate that a nullification or impairment of benefits accruing to it under the General Agreement has resulted from these restrictions.

5.21 According to the 1979 Understanding on Dispute Settlement, a contracting party bringing a complaint under Article XXIII:1(b) is "called upon to provide a detailed justification" (BISD 26S/216). The Panel noted that Article XXIII:1(b), as conceived by the drafters and applied by the CONTRACTING PARTIES, serves mainly to protect the balance of tariff concessions (EPCT/A/PV6, page 5; BISD, Vol. II/188; 1S/53; 10S/209). The party bringing a complaint under that provision would therefore normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired. The EEC has not claimed that benefits accruing to it under a tariff concession made by the United States in accordance with Article II have been nullified or impaired as a result of measures taken under the Waiver. The main justification for its claim of nullification or impairment that the EEC presented to the Panel was that the restrictions, in spite of the Waiver, have remained inconsistent with the General Agreement. The Panel recognized that Article XXIII:1(b) does not exclude claims of nullification or impairment based on provisions of the General Agreement other than Article II. However, the Panel noted that Article XXIII:1(b) applies whether or not the

measure at issue conflicts with the General Agreement and that, therefore, the question of whether a measure inconsistent with Article XI:1 remains inconsistent with the General Agreement even if covered by a waiver cannot, by itself, determine whether it nullifies or impairs benefits accruing under the General Agreement within the meaning of that provision. A complaint under Article XXIII:1(b) must therefore be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the General Agreement.

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

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

6. CONCLUSIONS

6.1 In the light of the above findings, the Panel concluded that:

(a) the imposition of the fees on refined sugar does not entail the imposition of duties in excess of the duty rates presently effective under the United States' Schedule of Concessions; and

(b) the restrictions on imports of sugar-containing products are inconsistent with Article XI:1 but conform to the terms, conditions and procedures of the Waiver granted in 1955 in accordance with Article XXV:5 by the CONTRACTING PARTIES to the United States in connection with import restrictions under Section 22 of the United States' Agricultural Adjustment Act.

6.2 The Panel further concluded that the fulfilment of the assurances by the United States in consideration of which the CONTRACTING PARTIES granted the Waiver, while not forming part of the conditions the United States has to meet to take action under the Waiver, may be relevant for a decision of the CONTRACTING PARTIES to withdraw or modify the Waiver.

6.3 The Panel finally concluded that the EEC had not provided the detailed justification necessary to permit an examination of its complaint in the light of Article XXIII:1(b) but that the EEC is not precluded from bringing a complaint under that provision with the required detailed justification.