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GENERAL AGREEMENT ON TARIFFS AND TRADE

COUNCIL
1 October 1982

MINUTES OF MEETING

Held in the Centre William Rappard on 1 October 1982

Chairman: Mr. B.L. Das (India)

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1. United States tax legislation (DISC)
- Follow-up on the report of the Panel (C/W/389 and Suppl.1, C/W/391, C/W/392, L/4422, L/5271)

The Chairman recalled that at its meeting on 21 July 1982 the Council had agreed to revert to this item at its next meeting.

The representative of the European Communities said that his delegation had submitted two draft decisions, the first requesting that the DISC legislation be brought into conformity with provisions of the General Agreement (C/M/157, page 16), and the second seeking authorization by the Council for appropriate countermeasures (C/W/392). He reaffirmed that if the Council authorized such countermeasures, the EEC had no intention to act in a precipitous manner.

The representative of the United States did not believe that either of the proposals were justified by the circumstances nor by the decision (L/5271) adopting the Panel's report (L/4422). Nevertheless, the U.S. Government had decided to propose to the Congress an amendment to its DISC legislation to address the concerns which had been expressed by the members of the GATT Council. The necesary governmental processes for such action had been initiated. The U.S. Treasury Department was currently preparing an analysis of the various proposals that had been made for amending the DISC legislation. This analysis would serve as the basis for a Cabinet decision on a specific proposal to be put forward by the Administration to the Congress.

The representative of Canada said that since 1977 his delegation had continued to believe that the DISC Panel decision was clear and that the United States was in contravention of its GATT obligations. He said that the proposed United States action was a step in the right direction, and urged that it be taken expeditiously.

The representative of Australia welcomed the statement by the representative of the United States and urged that an appropriate decision be taken as soon as possible. He considered that the United States should report to the Council on any progress in this respect.

The representative of Brazil welcomed the statement by the representative of the United States. He expressed the expectation that the United States action would be taken expeditiously and that the United States would keep the Council informed about the progress in this matter.

The representative of the European Communities said that the statement by the representative of the United States was encouraging. His delegation, however, wished to see what concrete action would be taken in this respect, and pending further developments, would maintain the two proposed decisions before the Council.

The representatives of Japan, Chile and Sweden also welcomed the statement by the representative of the United States.

The Council took note of the statements and that the two proposals by the EEC were maintained, and agreed that it might revert to this item at a meeting after its next meeting.

2. United States - Import duty on vitamin B12 - Report of the Panel (L/5331)

The Chairman recalled that in June 1981 the Council had agreed to establish a panel to examine the complaint by the European Economic Community. The Panel had submitted its report in document L/5331, which had been before the Council at the meeting on 29-30 June 1982 and again at the meeting on 21 July 1982. At that meeting the Council had agreed to revert to this item at its next meeting.

The representative of the United States recalled that the report had been discussed in detail at previous meetings of the Council and said that it should now be adopted.

The representative of Brazil supported the suggestion made by the representative of the United States concerning the adoption of the report. He added that, according to Article XXIII, when adopting a panel report, the Council had to make a ruling or recommendations. He believed that the report under consideration could serve as an example in which the Council would take a clear-cut decision, and that sub-paragraph 22(h) of the report would be the ruling or recommendation by the Council.

The representative of the European Communities asked whether, in expressing his agreement for the adoption of the report, the delegation of the United States was ready to reply to the invitation of the Panel to accelerate the results of the Tokyo Round.

The representative of Australia drew attention to what he considered a somewhat unusual procedure whereby, despite the conclusions in favour of the United States, the Panel had exhorted the United States to accelerate the implementation of its Tokyo Round concessions on feedgrade vitamin B12. His delegation also questioned the use in this case of a weighted average of tariffs when converting from an ad valorem rate under the former American Selling Price (ASP) system. This action raised questions in terms of its conformity with the provisions of Article II, paragraph 1(a) and (b), and paragraph 3. However, the question of whether or not the United States had breached a binding to the EEC was clouded by the somewhat unconventional procedures, including the non-use of Article XXVIII, evidently agreed to bilaterally by the parties under the particular circumstances prevailing in the final phase of the Tokyo Round.

Notwithstanding these points of concern, his delegation had no intention to block the adoption of the report but wished to make it clear that, in its view, the particular procedures outside Article XXVIII adopted by the parties concerned would not constitute a precedent in such future cases.

The representative of Canada stated that his delegation could support the adoption of the report on the understanding that the use of trade-weighted averages would not constitute a precedent for, inter alia, the incorporation of the Harmonized System nomenclature into GATT bindings.

In replying to the intervention by the representative of the European Communities, the representative of the United States pointed out that, as noted on previous occasions, the Panel had clearly found that the United States had not infringed its commitments under the General Agreement or under the ASP Chemical Products Understanding. In these circumstances, it was obvious, as the Panel had found, that the United States was under no obligation to do anything. In an attempt to be conciliatory the Panel had suggested that the Council could invite the United States to advance implementation of the Tokyo Round concessions on vitamin B12 to such an extent that imported vitamin B12 could regain its competitive position in the U.S. market. As pointed out previously, the EEC had already largely regained its traditional competitive position in the U.S. market. In these circumstances, his delegation thought that it would be anomalous for the Council to decide to extend such an invitation. In any case, his delegation would not be prepared to request the Congress to accelerate the staging on this item as a unilateral action by the United States, in circumstances where it had been found under no obligation to do so. However, in a spirit of conciliation, his delegation was prepared to discuss a possible deal with the EEC if it wished to make concessions in return.

The representative of the European Communities stated that his delegation would also be prepared to accept the adoption of the report. He thanked the delegations which had supported the EEC's views concerning weighted averages which, under no circumstances, should create a precedent when the time would come for transposing existing bindings into the new system of nomenclature. In the light of the statement by the representative of the United States, he said that the EEC reserved its GATT rights, which it fully intended to exercise in a balanced and reasonable way.

The Chairman stated that in adopting the report, the Council might agree to follow its prevailing practice regarding the consequences of the adoption of panel reports, and that at any stage a contracting party could bring to the notice of the Council any suggestion or any fact in respect of the decision by the Council.

The Council took note of the statements and adopted the report.

The representative of Brazil sought clarification as to whether, in adopting the report, the Council had given the ruling that the United States had not infringed its commitments, and had invited the United States to take certain action as specified in the report.

The Chairman reaffirmed that by adopting the report, the Council had followed its usual practice concerning the consequences of adoption of panel reports. The Council had taken due note of the views expressed by certain representatives on various aspects of the report. Any representative would have the right in future to bring to the notice of the Council any fact related to the adoption of the report.

The representative of Brazil said that the Chairman's statement reflected the inherent rights of contracting parties under the General Agreement.

The Council took note of the statement.

3. Consultation on trade with Romania
- Establishment of Working Party

The Chairman recalled that the Protocol for the Accession of Romania provided for biennial consultations to be held between Romania and the CONTRACTING PARTIES in a working party to be established for this purpose, in order to review the development of reciprocal trade and the measures taken under the terms of the Protocol.

The Council agreed to establish a working party with the following terms of reference and membership:

Terms of Reference

> "To conduct, on behalf of the CONTRACTING PARTIES, the fourth consultation with the Government of Romania provided for in the Protocol of Accession, and to report to the Council."

Membership

Membership would be open to all contracting parties indicating their wish to serve on the Working Party.

Chairman: The Chairman of the Council was authorized to designate the Chairman of the Working Party in consultation with the delegations principally concerned.

4. European Economic Community - Imports of citrus fruit and products - Recourse to Article XXIII:2 by the United States (L/5337, L/5339)

The Chairman recalled that at the meeting of the Council on 21 July 1982 it had been suggested that further consultation and, if possible, conciliation take place using the good offices of the Director-General. The Council had agreed to revert to this item at its next meeting.

The Director-General stated that he had met with the delegations of the United States and European Communities, separately and jointly, on 3 and 11 August 1982. Pursuant to these discussions, it had been agreed that the good offices of the Director-General would not be concerned with the procedural question of the right of a contracting party to the establishment of a panel upon request, but rather, would be carried out "with a view to the conciliation of the outstanding differences between the parties". It had been agreed that, during at least the initial stage of the good offices, the Director-General would be working only with the two delegations. It had further been agreed that both delegations, while reserving their respective legal positions, would concentrate for the time being on the possibility of working out a practical solution to the matter.

He stated that he had met with the parties on 6 and 27 September in order to clarify the technical factors affecting the access of U.S. citrus exports into the EC market. At the meeting of 27 September, he had made a proposal on the basis of which the parties might open negotiations. The Director-General had stressed that his proposal was one of several possible solutions that could be envisaged to the dispute, and in no way prejudiced the parties from coming up with any other solution. He had recalled that the GATT was a permanent negotiating institution. On the basis of the response to his proposal, the Director-General stated that he had concluded that no purpose would be served to continue the process of good offices, as it did not appear to be possible to conciliate the outstanding differences between the parties.

The representative of the United States expressed regret that the EEC could not agree to try to negotiate a solution as suggested under the Director-General's good offices. In these circumstances, the United States requested that the Council establish a panel forthwith.

The representative of the European Communities recalled that, in willingly accepting the good offices, the Community had made it clear that it attached fundamental importance to associating in the consultations of the Director-General - especially when the good offices reached the multilateral stage - all the countries concerned, whether or not contracting parties, that were directly or indirectly interested in the case, including the aspect of principles. The Community had the feeling that there was something incomplete about the good offices, in that other

interested contracting parties could not be associated in the consultations. It agreed with the concept that GATT was a forum of permanent negotiation. To negotiate, however, parties should be in a position to make bearable sacrifices; but the Community was not the only party concerned in the matter, for others would be affected. That was why it had not felt comfortable about reacting hastily when the Director-General had envisaged a solution. In principle, the Community had no basic objection to the establishment of a panel if that was the wish of the United States. The Community would, however, have to hold consultations with other parties interested in the case.

The representative of Tunisia said that, as an interested party, his country remained convinced that there was no basis for the United States' complaint. His delegation did not oppose the principle of establishing a panel to examine the question. Nevertheless, it agreed with the representative of the European Communities that some time was needed for consultations.

The representative of Spain said that any contracting party had the inalienable right to ask for the establishment of a panel, but that other contracting parties also had the right to ask for the establishment of a working party. Accordingly, Spain requested the establishment of a working party instead of a panel, to examine this matter, which appeared to be a specific sectorial problem, but had, in fact, more far-reaching and in-depth consequences as it concerned agreements which had already been examined under Article XXIV. At that time, the CONTRACTING PARTIES had made no recommendations concerning the agreements and had not wished to reject them. In his view, a panel might have a contrary opinion; and this could raise serious problems. Moreover, since the matter not only affected two parties but many others, a working party would allow for an in-depth discussion with all points of view expressed.

The representative of Israel said that when the Agreement between Israel and the European Economic Community had been examined under Article XXIV, no recommendations had been made by CONTRACTING PARTIES pursuant to paragraph 7 of that Article. In his view, the Agreement had accordingly been accepted, recognized, and approved by the CONTRACTING PARTIES. His delegation did not object to the establishment of a panel in the present case, but wished to point out that the Understanding[1], made it clear that the purpose of a panel was to give assistance to the CONTRACTING PARTIES in making recommendations or in giving rulings as envisaged in Article XXIII:2, and not, for instance, Article XXIV. For Israel, the terms of reference of the panel would have to conform strictly to the provisions of the Understanding. Pending further knowledge and proposals on the terms of reference, his delegation reserved its position.

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[1]Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/210)

The representative of Turkey expressed the view that it was too early to proceed to the establishment of either a panel or a working party. Were any body to be created, however, his delegation would favour the latter.

The representative of the United States stated that, with respect to the proposal for the establishment of a working party, paragraph 10 of the Understanding as well as standing GATT practice gave to the complaining party the choice of requesting either a panel or a working party. Any contracting party having an interest in the matter would have an opportunity to present its views to the panel, as specifically provided for in paragraph 15 of the Understanding. In the view of his delegation, it was likely that debate in a working party would be very similar to the debates in other previous working parties, and a fresh perspective from persons acting in their personal capacity as members of a panel could contribute better to resolution of this matter.

The representative of Malta supported the suggestion that the interested parties should be given time for consultations.

The representative of Canada supported the establishment of a panel in this case. The fact that no recommendations had been made by the earlier working parties which had looked at the successive preferential arrangements entered into by the EEC, did not indicate the unconditional acceptance of the agreements by the CONTRACTING PARTIES, contrary to the views expressed by the representative of Israel.

The representative of Australia stated that for reasons already explained by his delegation at a previous Council meeting, Australia supported the United States' request for the establishment of a panel to examine this matter. His delegation also supported the statement by the representative of Canada.

The representative of Brazil recalled that his delegation had supported the request for a panel at the Council meeting of 21 July 1982 and had notified the Council of its interest in this matter. His delegation considered the request to be fully based on paragraph 10 of the Understanding.

The representative of Switzerland said that he was a little puzzled about the logic involved in dealing with the establishment of a panel or of a working group, which, of itself, could be quite legally requested. The panel would have to look into the treatment given to a specific tariff heading in connection with a liberalization agreement that had previously been exmained in GATT. If the EEC had withdrawn a tariff reduction accorded under such an agreement, he would better understand the United States' request, for that could call into question the degree of conformity with Article XXIV, of the agreement concerned. However, from the way the request for the formation of a panel was formulated, he failed to see what was ultimately at issue: the treatment given to citrus fruit or the contractual framework under which it was given. By that, he was not

expressing any view on the validity under GATT of the contractual instrument of liberalization concerned. If, on the other hand, following the conclusions that might be arrived at by a panel, the EEC were led to withdraw the tariff reduction in question, in the opinion of his delegation the agreement covering that reduction might well no longer cover substantially all the trade and consequently become itself open to question under the General Agreement, and more precisely its Article XXIV. The representative of Switzerland wondered whether that was what had motivated the United States.

The representative of Chile supported the request for a panel to examine the matter, for reasons of principle and in accordance with the Understanding.

The representative of Austria referred to the statement by the representative of Spain that when the agreements in question had been examined by the GATT no recommendations had been made. He agreed that the right of a contracting party to request a panel was inalienable. However, there could be no confidence in an international agreement if it were questioned years afterward. He said that any injury claimed by one party, would be a matter for negotiation and not for a panel.

The Council took note of the statements and agreed to revert to this item at its next meeting.

The representative of the United States stated that he believed, that at the next meeting of the Council, the decision should be taken to establish a panel.

The Council took note of this statement.

5. Preparations for the Ministerial meeting - Progress report of the Preparatory Committee

Ambassador McPhail (Canada), Chairman of the Preparatory Committee, said that the Committee had met in late July and again in September. The latest meeting had taken place on 1 October 1982 to review the progress made so far for the Ministerial meeting. He said that in July and September the Committee had considered a draft text which could become the output of the Ministerial meeting. Following extensive discussions and informal consultations, new proposals had been put forward to define better the purpose of the Ministerial meeting and to provide a diagnosis of the international economic and trade situation within which the Ministerial meeting would take place. He said that Part I of the draft text, dealing with political commitments, was still under discussion. He emphasized the interconnection between this Part and Parts II and III, which contained policy and operational decisions, respectively. Discussion had also taken place in small groups on some major subjects, such as agriculture, safeguards and dispute settlement. He mentioned the time constraints faced

by the Committee, whose objective was to draw these parts together in a final consolidated text by 20 October 1982 so that it could be considered by the Council in early November.

The Chairman referred to the time constraints and urged contracting parties to do their utmost to expedite the work of the Committee.

The representative of the European Communities expressed his delegation's concern in view of the limited time left to complete the work.

The Council took note of the statements.

6. United States - Imports of certain automotive spring assemblies - Report of the Panel (L/5333)

The Chairman recalled that in December 1981 the Council had established a panel to examine the complaint by Canada. The Panel had submitted its report in document L/5333, which had been before the Council at the meetings on 29-30 June and again on 21 July 1982, at which the Council had agreed to revert to this item at its next meeting.

The representative of Canada[1] said that his authorities considered that the Panel had erred fundamentally in interpreting its terms of reference, and as a result had not directly addressed the real issue put to it. The essence of the Canadian complaint had been that the use by the United States of the special adjudicative process under Section 337 for determining patent infringement by imports, as well as any exclusion order emanating from this process, represented treatment of imported products clearly less favourable than that accorded to products of national origin and was "not necessary" in terms of the relevant GATT exception. However, the Panel had focused its examination on the GATT status of an exclusion order per se. He said that Canada would have had no objection to an exclusion order against imports from a specified foreign producer if it were issued under the same legal process to which domestic producers were subject. Such an order would simply be the equivalent of an injunction against a party located within the jurisdiction. Instead of confining itself to the question of whether it was necessary for the United States to issue an exclusion order to enforce its patent laws against foreign products, the Panel ought to have addressed the question of whether it was necessary for the United States to maintain a discriminatory adjudicative process for patent cases involving imported products. The answer to that question, in the Canadian view, would clearly have had to be in the negative. His delegation was not aware of any contracting party other than the United States which found it necessary to have such a discriminatory

[1]The text of the statement by the representative of Canada was subsequently circulated in document C/W/396.

system for enforcing its patent laws. And this was not just a theoretical concern, for the denial of national treatment inherent in the Section 337 process could have very practical consequences in terms of inhibiting imports and subjecting foreign producers to harassment.

He drew attention to the fact that the Panel had focused on the GATT status of exclusion orders issued by the U.S. International Trade Commission (USITC) under both the first and second headings of its terms of reference, the latter having been intended not only to permit examination of the general issue of using Section 337 in cases other than the particular one of spring assemblies, but also to consider the GATT consistency of this process, whether or not it resulted in an exclusion order. In the view of his authorities, the Section 337 process itself was not consistent with Article III, was "not necessary" in terms of Article XX(d), and a Section 337 investigation was a measure contrary to the GATT as soon as it was initiated.

He also noted that the Panel had qualified its conclusions by emphasizing that it was under existing U.S. law that Section 337 orders would often be necessary. This seemed to suggest that if a contracting party elected not to equip itself with effective enforcement procedures with respect to imports for its law of general application, then it was free to deny national treatment, even to the extent of having a discriminatory adjudicative process. Such a conclusion would have unfortunate implications for the future of the national-treatment principle under GATT.

His authorities were also concerned by the Panel's having accepted that it was consistent with the General Agreement for a contracting party to employ "general" as opposed to "specific" exclusion orders. The Panel had found that general exclusion orders might be the only effective way for a contracting party to enforce its patent laws against imports, since otherwise foreign producers who were not a party to the proceedings might start to infringe the patent. The Panel had not taken into account that the same problem might exist with respect to domestic producers and that most countries, including the United States, did not deal with this problem in the internal market by authorizing the use of general injunctions against the production or use of designated products rather than against named parties. To do so would be taken to be an offence against principles of natural justice. There was no compelling reason why, when a domestic firm could not be deprived of its right to produce or sell goods without due process, the same principle should not apply to foreign producers and importers. He said that Canada considered it important for the contracting parties to have a fuller assessment of the implications of general exclusion orders before approving a conclusion which could constitute an unfortunate precedent.

The approach taken by the Panel resulted in the issue of national treatment not being addressed as an integral part of its conclusion regarding the use of exclusion orders. However, the Panel had taken note

of the U.S. system of dual procedures and had observed that there might be merit in consideration being given to simplifying and improving the legal procedures for patent infringement cases. In the Canadian view the United States could make its system consistent with the General Agreement by removing patent-based cases from the ambit of Section 337 and empowering the U.S. courts to issue specific exclusion orders against imports.

He said that Canada believed that it was neither necessary nor desirable for the Council to adopt the report or to take a substantive decision on this item for the following reasons: (1) since the report did not directly address the fundamental issue it did not provide an adequate basis for the CONTRACTING PARTIES to make a ruling; (2) since the Canadian firm had taken the only course open to it to be able to continue to supply its customers by transferring production of spring assemblies to the United States, and was unlikely to move it back to Canada even if the exclusion order were rescinded, there was now no urgency in further pursuing this particular case; and (3) since there had been no finding on the main issue, it would be open to Canada or any other contracting party to initiate a new dispute settlement proceeding if required. In these circumstances it would suffice for the record to show that the Council had taken no decision in the matter, and this particular item would be dropped from the agenda.

The representative of Brazil stated that the Council had before it a case where too broad a mandate seemed to have made it difficult for the Panel to carry it out fully. Dealing with the use of Section 337 of the U.S. Tariff Act of 1930, both in a specific patent-based case and in patent-based cases in general, might have been the reason for that.

His delegation found it unfortunate that, as a result, a number of aspects of this case, as presented in the report, had not been entirely clarified. It was not clear, for instance, on what grounds the USITC had dismissed the Wallbank request to suspend the investigation in light of the ongoing court action (paragraph 10). The terms of Section 1338 of Title 28 of the U.S. Code, in providing that the jurisdiction of the States courts in patent cases shall be exclusive, did seem to convey the sense that such action, once initiated, should take precedence over any other, including an adjudicative proceding before the USITC.

He said that it would also have been useful to indicate the grounds on which the USITC had found (paragraph 11) that the patents were valid and infringed, when the court action regarding the very issue of patent validity and infringement remained suspended, and therefore such essential elements to the case remained unresolved. Likewise, since no patent infringement suits had been brought against the other domestic manufactures of the patented product, it would be of interest to know why it had been found that their products did not have the effect or tendency to substantially injure the patentee.

As regards the conclusions of the Panel, his delegation had noted the methodology described in the second half of paragraph 50. The methodology itself could be debated, as it could not be established that the Preamble to Article XX covered all aspects of the other GATT provisions invoked. But even if such methodology were to be accepted, his delegation would be bound to dispute the central element of the conclusions, namely that in the specific case under consideration, the USITC use of Section 337 was necessary to secure compliance with U.S. patent law.

U.S. patent law was one of the strictest in protecting the rights of the patent-holder. Title 35, Chapter 28, Section 271(a), stated that "Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent". And Section 281 stated that "A patentee shall have remedy by civil action for infringement of his patent". It was only natural, therefore, that the representative of the United States recognized, in paragraph 43 of the Panel's report, that enforcement of the patent law was possible before the U.S. courts under Section 1338 of Title 28 of the U.S. Code. It could hardly be otherwise. In fact, the Panel recognized in paragraph 59 that, if Kuhlman had pursued the court action it could have, once the patent had been found to be valid by the court, prevented known users of the product from utilizing the spring assemblies produced by Wallbank. And this was precisely what the remedial action was aimed at, in this specific case.

He said that what did not seem warranted was the conclusion that "the same remedy would not have been effective against other possible foreign infringers of the United States patent and potential users of the infringing product in the United States". The Council was dealing here with a specific case, involving the product manufactured by Wallbank, and not a hypothetical product manufactured by imaginary producers abroad, or the even more imaginary potential users of such a non-existent product.

The conclusion appearing in the first phrase of paragraph 60 of the Panel's report was inconsistent with the Panel's own finding in the preceding paragraph, since the "infringing product" could only be taken to mean the Wallbank product, that is, the product in relation to which the Panel thought (in paragraph 59) that remedy by the court would have been effective.

In conclusion, his delegation found it hard to accept the Panel's view that the USITC measure was necessary under the terms of Article XX(d) of the General Agreement. It followed from that that his delegation considered that an examination of the measure in the light of the other GATT provisions referred to in paragraph 49 would have been required, and should have been carried out. Had this examination been carried out, he had the strong feeling that the conclusion would have been that the measure represented a denial of national treatment under Article III of the General Agreement.

The representative of the United States said that his authorities disagreed with Canada's views concerning the report of the Panel. At the same time, he pointed out that no Canadian paper had been circulated which would enable the United States to prepare a response or enable all contracting parties to make a timely and balanced assessment. He said that the lack of timely notice from Canada created particular difficulty because patent law and patent enforcement were hardly familiar issues for most representatives to the GATT Council. The United States believed the report was correct in its essential legal findings and should be adopted.

He said that Canada's basic argument before the Panel had been that it was never permissible under the General Agreement to have a different body adjudicate allegations of patent infringement by imports than the body which adjudicated such allegations in the case of domestic products. The United States considered that the Panel had followed an analysis that was logical and in the GATT tradition, examining first whether the application of Section 337 in the specific case of spring assemblies was contrary to the General Agreement. It had concluded that the United States had not contravened its obligations in that case, since the United States action fell within the delineated Article XX(d) exception. In the United States view it was amply clear that the Panel had considered the whole process by which the order had been issued. The Panel's conclusion on the spring assemblies case had also provided an answer to the Canadian contention that Section 337 could never be used in patent infringement cases, consistently with GATT. Obviously, a finding that the application of Section 337 was not inconsistent with the General Agreement in the spring assemblies case meant that it was not true that the separate adjudicative procedure of Section 337 was never permissible under GATT.

He stated that beyond this clear answer, the Panel had been cautious on the question of the use of Section 337, and had not given a blanket approval to any use of Section 337 in terms of the General Agreement, although it had noted that the finding on spring assemblies would, in principle, apply to many cases. His authorities recognized that it was sound practice for any panel to be careful in the sweep of its ruling on a law which was applied on a case-by-case basis.

The United States had noted that Canada would disagree with a panel finding that a separate body was ever permissible, asserting that no other contracting party had found it necessary to have a law analogous to Section 337 to enforce its patent laws of general applicability. He said that the United States did not know if that was the case, but did know that other countries had laws providing for a separate body to make enforcement determinations in other areas. It was also known that under the U.S. legal system and under the constraints of international law, the U.S. courts could not by themselves effectively enforce patent laws with respect to imports.

He said that there might have been created the erroneous impression that the Canadian firm in question had been able to sell the infringing spring assemblies with impunity by moving to the United States. In fact, this firm had been immediately sued in U.S. courts as soon as it had started to produce and sell in the United States. As the pertinent U.S. appeals court had since affirmed the USITC decision that the Canadian firm had infringed a patent, the firm was also very likely to lose the new law suit.

He noted that Canada sought to shelve this case precisely so that it could bring the same sort of case again to a panel. The United States recognized that the Panel decision was not carte blanche on issues not presented in this case, but it did not fear another panel examination since it was convinced that another panel would reach the same conclusion. However, the United States was of the view that it should not be harassed by cases that presented no materially different GATT issues and requested, therefore, the adoption of the Panel's report.

The representative of the European Communities agreed with the representative of Canada that the Panel had failed to address the question of whether it was essential or necessary for the United States to maintain a discriminatory adjudicative process. His authorities considered that the USITC procedure was arbitrary, and shared Canada's concern regarding the use of a general exclusion order.

The representative of Norway, speaking for the Nordic countries, said that those countries also considered that the problem relating to procedures discriminating against imported goods had not been sufficiently addressed by the Panel. The report could, therefore, not be taken as a precedent in future concrete cases nor as concerned the consistency of the United States procedures with the General Agreement.

The representative of Australia said that the Panel had been requested first to examine the specific issue in question, and second the general conformity of Section 337 in cases of alleged patent infringement, with the provisions of the GATT. His delegation believed that the first point had been answered in paragraphs 64 and 66 of the Panel report in that the use of Section 337 of the U.S. Tariff Act was justified in some, but not all, cases of alleged patent infringement and as such was covered by Article XX(d). The nature of these findings answered also the second point. In the view of his authorities, the Panel report provided an acceptable interpretation of Article XX(d) and, to that extent, was a useful precedent for future cases involving the use of Section 337 or similar legislation. Australia supported the adoption of the report.

The representative of Japan stated that he shared some of the concerns expressed by Canada. For instance, in his view the explanation given in paragraph 45 of the Panel report concerning national treatment was not convincing. His authorities considered that more time was needed to reflect on the report.

The representative of Chile said that the Panel report gave rise to certain doubts which had to be clarified. In his view, very complex issues were at stake, and some more time was needed for reflection.

The Chairman stated that it appeared that more time for reflection was needed.

The Council took note of the statements and agreed to revert to this item at its next meeting.

The representative of the United States asked that the views of delegations be made available to other interested delegations prior to the next meeting of the Council so that representatives could examine all the arguments put forward.

The Council took note of the statement.

7. European Economic Community - Quantitative restrictions on imports of certain products from Hong Kong
- Recourse to Article XXIII:2 by the United Kingdom on behalf of Hong Kong (L/5362)

The representative of the United Kingdom, speaking for Hong Kong, said that since his delegation had raised this matter at the meeting of the Council on 7-8 December 1981, a number of consultations had taken place under the provisions of Article XXIII:1. As these consultations had shown regrettably that there was no possibility for a satisfactory adjustment to the matter, his authorities therefore requested the Council to establish a panel under the provisions of Article XXIII:2 (L/5362).

The representative of the European Communities said that his delegation was not opposed to setting up a panel. He expressed regret that the conciliation attempts had not led to a satisfactory solution for this matter.

The representatives of Japan, Canada, Korea, Singapore and Pakistan supported the request for the establishment of a panel.

The representative of Hungary said that his delegation supported the request for the establishment of a panel to examine the complaint under Articles I and XIII. His delegation would have a great interest in the work of the panel not only because the measures in question touched upon the principle of non-discrimination but also because one objective of the forthcoming session at ministerial level would be to strengthen the GATT system.

The representative of India supported the request for the establishment of a panel, and stated that there was a need to reaffirm the provision that a request for the establishment of a panel should be granted expeditiously for the effective functioning of the dispute settlement procedures.

The representatative of the United States supported the request. His delegation srongly supported the statement by the representative of India.

The representative of the United Kingdom, speaking for Hong Kong, referred to paragraph 9 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (BISD 26S/210) and recalled that requests for conciliation and the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts.

The Council agreed to establish a panel with the following terms of reference:

Terms of Reference

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by the United Kingdom on behalf of Hong Kong in document L/5362 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."

The Council authorized the Chairman of the Council to designate the Chairman and members of the Panel, in consultation with the parties concerned.

8. Trade restrictions affecting Argentina applied for non-economic reasons

The Chairman recalled that at the meeting of the Council on 21 July 1982 the Council had agreed to revert to this item at its next meeting.

The Council agreed that the Chairman might hold informal consultations with the interested delegations starting in the near future with a view to arriving at some suggestions as to how this matter might be resolved.

9. Accession of Thailand

The Chairman said that bilateral negotiations between Thailand and contracting parties were in the final stages and that, as decided by the Council in July 1982, ballot papers would be distributed by the secretariat to contracting parties as soon as the Schedule of Thailand had been received. He pointed out that the representative of Thailand had sent a

letter to other representatives requesting that delegations be prepared to cast their votes as soon as possible in order that Thailand's accession could become effective in time for it to participate in the thirty-eighth session as a contracting party to the GATT. He expressed the hope that delegations would take due note of the letter from the delegation of Thailand.

The representative of Thailand reaffirmed that Thailand hoped soon to be a contracting party.

The representative of New Zealand said that his authorities had completed the tariff negotiations with Thailand and that signatures would be affixed to the results of the negotiations during the following week.

The representative of Finland, speaking on behalf of the Nordic countries, said that the tariff negotiations between Thailand and the Nordic countries had been concluded and that the results would be supplied to the secretariat shortly.

The representative of Switzerland said that the bilateral negotiation with Thailand had not yet been concluded. However, he expected that a mutually satisfactory conclusion of the negotiation would be reached in the immediate future.

The representative of the European Communities said that the EEC's negotiations with Thailand had been concluded, and that the results of the negotiations would be signed later in the day.

The Council took note of the statements.

10. United States - Agricultural Adjustment Act

The Chairman recalled that in June 1982 the Council had agreed to establish a working party in relation with the annual report submitted by the United States concerning the Agricultural Adjustment Act, and had authorised the Chairman of the Council to decide on appropriate terms of reference and to designate the Chairman of the Working Party in consultation with the delegations principally concerned.

He informed the Council that following such consultations, the terms of reference of the Working Party were as follows:

Terms of Reference

> "To examine the twenty-fourth annual report (L/5328) submitted by the Government of the United States under the Decision of 5 March 1955, and to report to the Council."

Chairman

Ambassador Inan (Turkey).

The Council took note of this information.

11. Nigeria - Restrictive measures on imports

The representative of the United States, speaking under "Other Business", said that in April 1982 Nigeria had instituted a wide range of import restrictions, including inter alia, a prohibition of certain imports, advance deposits for most imports and tariff increases. He urged the authorities of Nigeria to notify these measures promptly to the GATT.

The representative of Nigeria said that the measures referred to were legitimate and that he would transmit the statement made by the representative of the United States to his authorities.

The Council took note of the statements.

12. Uruguay - Supplementary rebate on exports and supplementary surcharge on imports

The representative of the United States, speaking under "Other Business", said that in document L/5355 Uruguay had notified certain measures, including a 10 per cent supplementary rebate on exports and a 10 per cent supplementary surcharge on imports. His delegation was of the opinion that the measures notified were not authorized by the GATT provisions cited by Uruguay, but rather should be considered under the provisions of Article XVIII, which required, inter alia, consultations with the CONTRACTING PARTIES. He urged Uruguay to initiate the consultations as soon as possible.

The Council took note of the statement.

13. Finland - Internal regulations having an effect on imports of certain parts for footwear (L/5369)

The representative of the European Communities, speaking under "Other Business", drew attention to a communication from his delegation in document L/5369. He said that on 26 January 1982 the Board on Export and Import Licensing of Finland had decided that for 1983 the leather soles used for footwear to be exported to the Soviet Union had to be of Finnish origin. This was, in his view, a violation of certain provisions of the General Agreement, particularly of Article III, which had resulted in a substantial disruption of the EEC's exports of leather soles to Finland, having serious economic and social consequences. Bilateral consultations under the provisions of Article XXIII:1 in September 1982 had not led to satisfactory results, and the possibilities for bilateral contacts appeared

to have been exhausted. He stressed that if no solution could be found to the problem before the Helsinki Fair, to be held in the first week of October 1982, the factory supplying the product in question to Finland might be forced to close down. The EEC reserved all its rights and requested the establishment of a panel.

The representative of Finland confirmed that the matter had been the subject of bilateral discussions, but that Finland considered the EEC claim to be without legal justification. The economic rationale of restricting third country participation in bilateral clearing trade in non-convertible currencies with a non-contracting party ought to be evident as well. The consultations held so far had not been sufficient to settle the dispute. Although Finland did not agree that the matter in question fell within the competence of the GATT, Finland was prepared to accept the establishment of a panel. As for the Helsinki Fair, it was not expected that orders would be placed during the coming weeks since Finland had not yet completed the relevant trade negotiations.

The representative of the United States said it was his understanding that the Council did not take decisions under "Other Business". He said that when the Council would properly take up this item, his delegation would support the request for the establishment of a panel.

The representative of the European Communities said that the aim of his authorities was to bring this matter to the attention of the Council. The EEC intended to exercise its rights in a responsible and considered fashion, and hoped that further reflection on the part of Finland would make it possible to arrive at a solution for this matter.

The Chairman said that there would be a need for flexibility on whether the Council should take action on items raised under "Other Business", since matters of extremely urgent action might arise. In the present case, however, he suggested that delegations might need additional time to consider the matter referred to in document L/5369, which had only very recently been circulated.

The Council took note of the statements and agreed to revert to this item at its next meeting.

14. European Economic Community - Sugar régime

The representative of Colombia, speaking under "Other Business" recalled that Argentina, Australia, Brazil, Colombia, Cuba, Dominican Republic, India, Nicaragua, Peru and Philippines had sought recourse to Article XXIII in respect of the EEC common sugar régime (L/5309). On behalf of the joint complainants he reported briefly on the results of the

consultation which had been held on 14 September 1982 with a view to finding a satisfactory adjustment. He regretted to advise that it had not achieved this end. Accordingly the joint complainants wished to reserve their rights under the General Agreement.

The representative of the European Communities said that his delegation did not feel the same dissatisfaction after the consultations with the ten countries, and believed that these countries had in fact understood that the EEC could not bear the whole responsibility for the crisis in the world sugar market. He expressed the hope that the Director-General would be able to hold consultations with all countries interested in the world sugar market in order to remedy the situation.

The representative of Colombia stated that the countries had also presented their complaint under the provisions of the International Sugar Agreement, but that the EEC did not want to carry out the consultations in that organization.

The Council took note of the statements.