Terms of reference and membership

1. The Panel was appointed by the Council in February 1962 on the instructions of the CONTRACTING PARTIES given at the nineteenth session. Its terms of reference were:

"In the light of the written submissions of Uruguay and in consultations with the contracting parties concerned, to examine the cases referred to it by Uruguay, in accordance with the provisions of paragraph 2 of Article XXIII, and to report thereupon to the Council."

2. It will be recalled that in October 1961 the representative of Uruguay drew the attention of the Council of Representatives (L/1572) to the trade problems concerning temperate primary producers such as Uruguay, both as regards the limited marketing opportunities available to them and the failure of the prices of their products to be maintained at a satisfactory level. He made certain proposals to overcome these problems, and distributed a table (Spec(6l)294), showing the extent to which Uruguayan exports were confronted by restrictive measures in force in nineteen industrialized countries.

3. At the nineteenth session of the CONTRACTING PARTIES in November 1961, the representative of Uruguay stated that Uruguay would have recourse to Article XXIII in respect of fifteen countries (L/1647). The CONTRACTING PARTIES were informed that Uruguay had, during 1960, held a consultation with the Federal Republic of Germany under Article XXIII:1 and, in 1961, with France and Italy under Article XXII. In a further statement during the nineteenth session in December 1961 (L/1679), the representative of Uruguay informed the CONTRACTING PARTIES that consultations under Article XXIII:1 had been held with twelve other countries. At the request of Uruguay the CONTRACTING PARTIES authorized the Council of Representatives to take up the matter of the Uruguayan recourse under paragraph 2 of Article XXIII should Uruguay so request.

4. On 11 and 13 December 1961 the delegation of Uruguay addressed a communication to each of the fifteen Governments concerned, reiterating the representations already made, to the effect that consideration should be given to the abolition of their restrictive measures, which had been the subject of the consultations referred to above (cf. paragraph 9 of C/W/33). In February 1962, the delegation of Uruguay formally submitted to the Council of Representatives a request that they take action in accordance with the provisions of Article XXIII:2. The Council in February 1962 (L/1739), accordingly appointed the present Panel.
5. The original membership of the Panel, as recorded in C/M/9 and L/1739, comprised seven members in addition to the Chairman. Some of these members, owing to practical difficulties (such as transfer of duty station away from Europe, urgent duties elsewhere, etc.) found themselves unable to participate in this work and requested that their names be withdrawn from the Panel. In two cases, the Chairman of the CONTRACTING PARTIES, in accordance with established practice, has appointed a substitute. The actual membership of the Panel, resulting from these changes, is as follows:

   Chairman: Mr. R. Campbell Smith (Canada)
          Mr. E.J. Biermann (the Netherlands)
          Mr. N. Itan (Israel)
          Mr. S.L. Portella de Aguiar (Brazil)
          Mr. A. Schnebli (Switzerland)

6. When the Panel was appointed, it was agreed that the Chairman should select among it four members to examine each case. This arrangement having been rendered impracticable by the reduced membership, it was agreed that the Panel should sit in plenary sessions, except that, in deference to their wishes, Mr. Campbell Smith, Mr. Schnebli and Mr. Biermann would not be required to participate, respectively, in the consideration of the cases of Canada, Switzerland and the EEC countries; they are therefore in no way responsible for the conclusions which the Panel has drawn with regard to the respective countries.

Proceedings of the Panel

7. Immediately after its appointment the Panel sought to determine the scope of its work by requesting the Uruguayan delegation definitely to identify the contracting parties, the products and the restrictive measures with respect to which action under Article XXIII:2 was taken. Uruguay was also requested to supply information on the circumstances which it considered had justified the invocation of Article XXIII:2, its view of the consistency or otherwise of the restrictive measures in question with the provisions of the General Agreement, the effects of the measures on Uruguay's exports and the extent to which it considered benefits accruing to it under the General Agreement had been nullified or impaired.

8. In response to this request, the Uruguayan delegation submitted in June a general note in which it confirmed that the Uruguayan submissions related to all the fifteen contracting parties named by it at the Council meeting, stated that it would wish the Panel to review all the measures enumerated in document L/1662 (which were of twelve different types and applied to over thirty different products or groups of products), and generally reiterated the position it had taken as noted in the various previous statements. Subsequently,

   1Namely, Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland and the United States of America.
the Uruguayan delegation also supplied fifteen separate papers concerning the representations and consultations under Article XXII or XXIII:1 which had led to the cases being brought under Article XXIII:2. The receipt of these papers enabled the Panel to commence its consultations with the fifteen contracting parties concerned and Uruguay. These took place from 17 to 28 July. During these consultations the Panel examined each restrictive measure, the manner in which it was applied and its relationship with the provisions of the General Agreement and the relevant protocol. The Panel also discussed with the delegations of Uruguay and the contracting parties concerned the question of nullification or impairment of benefits accruing to Uruguay under the Agreement as it was alleged to have arisen from the application of each measure. The records of these consultations were immediately transmitted to the delegations of Uruguay and of the contracting parties concerned in order that the Panel's recommendations might be drawn up after the records had been examined and accepted by both sides.

9. The Panel reconvened early in October immediately after comments on the records were received from the contracting parties concerned and Uruguay. In the course of the meeting the Uruguayan delegation made it known that it wished to raise further questions with the fifteen contracting parties, and a second round of consultations were accordingly held from 30 October to 5 November 1962 with the fifteen delegations.

General considerations

10. Paragraph 2 of Article XXIII provides that the CONTRACTING PARTIES shall promptly investigate any matter referred to them under that paragraph. From the context it is obvious, however, that before a "matter" can be so referred to the CONTRACTING PARTIES it must have been the subject of representations or proposals made pursuant to paragraph 1 of the Article which has not resulted in a "satisfactory adjustment" (unless the difficulty is of the type described in paragraph 1(c) of the Article). Under paragraph 1 representations or proposals can be made by a contracting party if it considers:

(i) that a benefit accruing to it directly or indirectly under the General Agreement is being nullified or impaired, or

(ii) that the attainment of any objective of the Agreement is being impeded.2

1However, at least in respect of quantitative import restrictions applied inconsistently with the General Agreement, it has been agreed by the CONTRACTING PARTIES that the holding of a consultation under paragraph 1 of Article XXII would fulfil the conditions of paragraph 1 of Article XXIII (cf. 9S, pp.19-20 of BISD).

2The paragraph goes on to enumerate the circumstances under which either of these two contingencies could arise, under the three sub-headings (a), (b) and (c).
In referring the cases to the CONTRACTING PARTIES the Uruguayan delegation maintained that they had fulfilled those conditions for the invocation of paragraph 2 of Article XXIII.

11. Paragraph 2 of Article XXIII provides, apart from promptly investigating any matter so referred to them, for two kinds of action by the CONTRACTING PARTIES, namely:

(i) they shall make appropriate recommendations or give a ruling on the matter;

(ii) they may authorize the suspension of concessions or obligations.

The action stated under (i) is obligatory and must be taken in all cases where there can be an "appropriate" recommendation or ruling. The action under (ii) is to be taken at the discretion of the CONTRACTING PARTIES in defined circumstances.

Recommendations and ruling

12. The paragraph states that the CONTRACTING PARTIES "shall make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter, as appropriate". Whilst a "ruling" is called for only when there is a point of contention on fact or law, recommendations should always be appropriate whenever, in the view of the CONTRACTING PARTIES, these would lead to a satisfactory adjustment of the matter. In the Uruguayan cases the CONTRACTING PARTIES are therefore free to make any recommendations which they consider to be appropriate in the circumstances, whether or not the case involves the nullification or impairment of benefits under the General Agreement; a recommendation can sometimes aim at the furthering of the attainment of the objectives of the Agreement. The Panel has accordingly proposed recommendations in many instances where nullification or impairment is not or has not yet been established. Recommendations of this nature are set forth in paragraph (b) of Section 4 of each of the attached reports.

Authorization of suspension of obligations or concessions

13. The latter part of paragraph 2 of Article XXIII states that "if the CONTRACTING PARTIES consider the circumstances are serious enough to justify such action they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances". In the view of the Panel the requirement that the situation must be serious enough limits the applicability of the provision to cases where there is nullification or impairment; it would at any rate be difficult to conceive a situation in which the suspension of concessions or obligations could be appropriate where nullification or impairment was not involved.
Nullification or impairment

14. In most cases Uruguay claimed that the maintenance of the trade measures by the other contracting parties had nullified or impaired benefits accruing to Uruguay under the General Agreement. The Panel thought it essential to have a clear idea as to what would constitute a nullification or impairment. In its view impairment and nullification in the sense of Article XXIII does not arise merely because of the existence of any measures, however seriously they might be affecting the trade of a contracting party; the nullification or impairment must relate to benefits accruing to the contracting party "under the General Agreement".

15. In implementing the compensation provision of Article XXIII:2 the CONTRACTING PARTIES would therefore need to know what benefits accruing under the Agreement, in the view of the country invoking the provisions, had been nullified or impaired, and the reasons for this view. In cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, prima facie, constitute a case of nullification or impairment and would ipso facto require consideration of whether the circumstances are serious enough to justify the authorization of suspension of concessions or obligations. Where such infringement is not established, it would be incumbent on the invoking country to demonstrate the grounds and reasons of its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgment to be made under this Article.

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1 It may be noted in this connexion that the status of a measure (that is, whether or not it is consistent with GATT) is not to be affected by a waiver decision taken subsequently. In fact, Decisions taken under Article XXV:5 granting waivers from GATT obligations have normally expressly provided for the continued validity of the procedures of Article XXIII in respect of the otherwise "waived" obligations (cf. inter alia, BISD, Third Supplement, pages 35 and 41; Eighth Supplement, page 22).
16. In a number of cases, the contracting party concerned maintained (a) that certain measures applied by it were consistent with the provisions of GATT, or (b) that the measures, while not consistent with the provisions of the General Agreement, were permitted under the terms of the Protocol of Provisional Application, the Annocry Protocol or the Torquay Protocol on account of their being applied pursuant to "existing legislation". In most of these cases, the contention was not questioned by the Uruguayan delegation. For practical purposes, the Panel has taken the position that, in cases where the contention has not been challenged and is not contradicted by the available records of the CONTRACTING PARTIES, it would be beyond its competence to examine whether the contention was or was not justified.

17. The Panel was faced with a particular difficulty in considering the status of variable import levies or charges. It noted the discussion which took place at the nineteenth session of the CONTRACTING PARTIES on this subject during which it was pointed out that such measures raised serious questions which had not been resolved. In these circumstances the Panel has not considered it appropriate to examine the consistency or otherwise of these measures under the General Agreement.

18. Whilst the Panel was conducting its consultations, the EEC introduced its Regulation on Cereals under the common agricultural policy, replacing the measures included in the original submission by Uruguay. The Panel noted the statement by the delegation of Uruguay that these new measures (which are described in COM.II/134) would have a significant impact on Uruguay's cereals trade. However, since these measures did not form part of Uruguay's original submission and since they were under consideration by the CONTRACTING PARTIES with the active participation of Uruguay, the Panel considered that it would not be appropriate for it to examine the compatibility or otherwise of the measures applied under that Regulation with the General Agreement. The Panel also noted that the measures applying to certain other products might be replaced shortly with the extension of the application of the common agricultural policy, but in the absence of any definite indication in this regard, the Panel deemed it advisable to treat such measures as they now existed.

1Those measures have been included in Section 1 of the relevant individual country reports merely in order to provide a complete list of measures which were considered by Uruguay to be confronting its export trade.
19. For the reasons given in paragraphs 16 to 18 above, the Panel has not found itself in a position to sustain Uruguay's claim regarding nullification or impairment in respect of a number of cases.

Recommendations based on nullification or impairment

20. Where the Panel finds that there is prima facie nullification or impairment of benefits accruing to Uruguay under the Agreement, it has proposed recommendations based on that finding. Where a measure affecting import is maintained clearly in contradiction with the provisions of the General Agreement (and is not covered by the "existing legislation" clause of a Protocol), the Panel has in all cases recommended that the measure in question be removed. Reference is made in these recommendations based on nullification or impairment to the possibility of further action, in the event of non-fulfilment, by the CONTRACTING PARTIES under paragraph 2 of Article XXIII. In respect of these particular cases the Panel proposes the following procedure for adoption by the CONTRACTING PARTIES:

The contracting parties concerned be asked to report on their action taken to comply with the CONTRACTING PARTIES' Recommendations or any other satisfactory adjustment (such as the provision of suitable concessions acceptable to Uruguay) by 1 March 1963. If by that date the Recommendations are not carried out and no satisfactory adjustment is made, the circumstances shall be deemed to be "serious enough" to justify action under the penultimate sentence of Article XXIII:2 and Uruguay shall be entitled immediately to ask for the authorization of suspension of concessions or obligations. The CONTRACTING PARTIES should make arrangements for prompt determination as to what concessions or obligations the suspension of which should be authorized.

21. In recommending this two-stage procedure, the Panel had principally in mind, once again, the requirements stated in Article XXIII:2 that the situation must be "serious enough" before suspension should be authorized. It noted, as a report of the ninth session (BISD, Third Supplement, pages 250-251) had made it clear, the action of authorization of suspension of concessions or obligations, should never be taken except as a last resort; it also noted that the aim of Uruguay at this stage was to seek the prompt removal of the measures in question.

General observations

22. In invoking the provisions of Article XXIII the Uruguayan delegation repeatedly referred to the general difficulties created for Uruguay by the prevalence of restrictive measures affecting its exports and to the resulting inequality in the terms on which temperate zone primary producers participate in world trade. The Panel noted that it was not charged with the examination of broader issues falling outside the purview of Article XXIII. It also noted that these broader issues are being actively discussed by the CONTRACTING PARTIES. The Panel is of the view that if the proposed recommendations, especially those relating to health regulations and those figuring in paragraph (c) of Section 4 of the individual reports, were fulfilled an important
contribution would have been made to the solution of the difficulties mentioned by Uruguay in bringing the cases before the CONTRACTING PARTIES under Article XXIII.

23. With those general considerations and observations, the Panel submits, for consideration and adoption by the CONTRACTING PARTIES, the attached fifteen reports on the Uruguayan recourse under Article XXIII with respect to the fifteen contracting parties.