ARTICLE XVII

STATE TRADING ENTERPRISES

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

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

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

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

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

Paragraph 1(b)

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

Paragraph 2

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

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4(b)

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

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

Members,

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

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

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

Hereby agree as follows:

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

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

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

2. Each Member shall conduct a review of it

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

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

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

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

2. Paragraph 1

(1) "State enterprise"

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

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

"In the opinion of the Sub-Committee, the term 'state enterprise' in the text did not require any special

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

(3) "involving either imports or exports"

The same Sub-Committee report also records that

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

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

Under Article 26 of the US Draft Charter, State enterprises were to accord to the commerce of other Members "non-discriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located". In the London Draft Charter, the non-discrimination obligation was reformulated to read: "the commerce of other Members shall be accorded treatment no less favourable than that accorded to the commerce of any country, other than that in which the enterprise is located".[15] At Geneva, the present words "act in a manner consistent with the general principles of non-discriminatory treatment" were inserted in order to allay the doubt that "commercial considerations" (in paragraph 1(b)) meant that exactly the same price would have to exist in different markets.[16] This point is covered in the third paragraph of the interpretative note to paragraph 1.[17]

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

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

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

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

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

(6) "commercial considerations"

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

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

"The Panel takes the view that, through its reference to sub-paragraph (a), paragraph 1(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-

non-discriminatory treatment prescribed in the General Agreement. The Panel found that there is no provision in the General Agreement which forbids requirements to sell goods in foreign markets in preference to the domestic market. In particular, the General Agreement does not impose on contracting parties the obligation to prevent enterprises from dumping. Therefore, when allowing foreign investments

received from governments and to cons

B. RELATIONSHIP BETWEEN ARTICLE XVII

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

3. Article XI

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

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

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

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

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

"The Panel examined this contention and noted the following: Article XI covers restrictions on the importation of any product, 'whether made effective through quotas, import ... licences or other measures' (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term 'import restrictions' throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot

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

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

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

4. Articles XII and XVIII

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

In the 1954-55 Review Session, proposals were made to incorporate all or part of the other Havana Charter provisions on State trading into the General Agreement. The Working Party on "Other Barriers to Trade" considered a proposal "designed to apply to protection afforded through state monopolies the same principle with respect to negotiations as those that have been recommended for negotiation of tariffs", and recommended addition of Article XVII:3 and the interpretative note thereto.[71]