1.5 The representatives of the contracting parties which had spoken on the matter in the Council were asked by the Chairman of the Panel, in letters dated 20 December 1982, whether they wished to have an opportunity to be heard

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the government has taken a decision have been judged to be of significant benefit to Canada and have, therefore, been allowed. The Panel asked questions about the frequency with which the various types of undertakings have been given. In order to answer these questions the Canadian government reviewed a sample of 181 investments allowed in the month of November in the years

3. Main Arguments

3.1 The United States requested the Panel to find that the written undertakings obtained by the Government of Canada under the Foreign Investment Review Act which oblige

reliability of supply and the like. A firm subject to an undertaking with such a proviso was therefore likely to purchase Canadian goods even when they were less attractive than imported goods

[1]. Once the investment proposal had been approved, the undertaking became legally binding on the investor, who was then no longer free to modify his purchase undertaking without the permission

[1]Proceedings of the House of Commons Standing Committee on Finance, Trade and Economic Affairs of 26 May 1981.

of the government of Canada, regardless of changed circumstances. In the current economy it was

3.10 The United States replied that Canada was asking the Panel to decide that a provision in a draft agreement which never entered into force be interpreted to override specific obligations of the GATT. The Havana Charter provisions on investment, had they entered into force, would most likely not have been interpreted to override the Charter's

Nations", which served as a basis for the London Conference in October-November 1946, state-trading enterprises were to accord "non-discriminatory treatment, as compared with the treatment accorded to the commerce of any country other than that in which the enterprise is located." At the London Conference 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… ". The formulation of the non-discrimination obligation contained in Article XVII went back to a draft adopted at the 1947 Geneva Conference. If the drafting changes introduced then had been intended to include the national treatment obligation in the provisions on state-trading, this fundamental change would have been referred to in the extensive records of the drafting sessions. One reference to the Article on state-trading in the records of the Geneva Conference (E/PC/T/A/SR/10, page 34) confirmed in the view of Canada that this Article was understood to establish only a most-favoured-nation obligation: a delegate had said in a discussion on government procurement that the Article on state-trading referred only "to most-favoured-nation treatment and not to national treatment" and had then proposed that, in drafting rules on government procurement, "you have got to stick to most-favoured-nation treatment as you have in state-trading."

3.15 The United States stated that it disagreed with the Canadian interpretation for two reasons. First, paragraph 1(a) spoke of principles of non-discriminatory treatment. Were the most-favoured-nation principle the only principle intended to be covered, the word principle

(b) Undertakings to manufacture in Canada goods

compatibility with the General Agreement on the one hand, and Canada's investment legislation as such on the other. While the former subject

the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. The Panel therefore found that the word "requirements" as used in Article III:4 could be considered a proper description of existing undertakings.

5.5 The Panel could not subscribe to the Canadian view that the word "requirements" in Article III:4

that the alternative qualification "reasonably available" which is used in some cases, is a fortiori inconsistent with Article III:4, since the undertaking in these cases implies that preference has to be given to Canadian goods also when these are not available on entirely competitive terms.

5.10 The Panel then turned to the undertakings to buy from Canadian suppliers. The Panel did not consider the situation where domestic products are not available, since such a situation is not covered by Article III:4. The Panel understood the choice under this type of requirement to apply on the one hand to imported goods if bought through a Canadian agent or importer and on the other hand to Canadian goods which can be purchased either from a Canadian "middleman" or directly from the Canadian producer. The Panel recognized that these requirements might in a number of cases have little or no effect on the choice between imported or domestic products. However, the possibility of purchasing imported products directly from the foreign producer would be excluded and as the conditions of purchasing imported products through a Canadian agent or importer would normally be less advantageous, the imported product would therefore have more difficulty in competing with Canadian products (which are not subject to similar requirements affecting their sale) and be treated less favourably. For this reason, the Panel found that the requirements to buy from Canadian suppliers are inconsistent with Article III:4.

5.11 In case undertakings to purchase from Canadian suppliers are subject to a "competitive availability" qualification, as is frequent, the handicap for the imported product is alleviated as it can be obtained directly from the foreign producer if offered under more competitive conditions than via Canadian sources. In those cases in which Canadian sources and a foreign manufacturer offer a product on equivalent terms, adherence to the undertaking would entail giving preference to Canadian sources, which in practice would tend to result in the purchase being made directly from the Canadian producer, thereby excluding the foreign product. The Panel therefore found that requirements to purchase from Canadian suppliers, also when subject to competitive availability, are contrary to Article III:4. As before (paragraph 5.9), the Panel considered that the qualification "reasonably available" is a fortiori inconsistent with Article III:4.

5.12 The Panel considered the Canadian view expressed in paragraph 3.9 above that the word "requirements" in Article III:4 of the General Agreement should be interpreted in the light of Article 12 of the Havana Charter, the general principles of which the contracting parties, in Article XXIX of the General Agreement, agreed to observe to the fullest extent of their executive authority. The Panel noted that the deletion of Article XXIX of the General Agreement was proposed in 1955 and accepted by all but one contracting party[1], and that - although this Article is technically still in force - it refers to an instrument which itself has never been implemented and the acceptance of which is no longer pending as is assumed in Article XXIX. This leaves considerable doubt as to the manner in which its provisions would have been interpreted if they had entered into force. The Panel further noted that paragraph l(c) of Article 12 of the Charter was to apply "without prejudice to existing international agreements to which Members are parties", and that paragraph 1(a), (b) and (d) as well as paragraphs 2 and 3 of this Article tended to encourage international investments (including international co-operation in this field). It is therefore doubtful whether paragraph l(c) which reserved the rights of Members to prescribe "reasonable requirements" should by itself be considered as a "general principle" in the sense of Article XXIX:1 of the General Agreement. The wording of this latter provision suggests that it was not the intention of its drafters that contracting parties should "undertake to observe to the fullest extent of their executive authority" what they would in any case judge to be in their own interest, nor that they should invoke the Charter to detract from their obligations under the General Agreement, but rather that they should observe general principles which reinforced or added to these obligations.

[1]Protocol Amending Part I and A0 0 1 215.04 132.72 ilETBT1 0 0 1 448.8 294.96 Tm/F8 11 Tf(ma9 TjETE

In the light of the foregoing facts and considerations the Panel could not subscribe to the assumption that the drafters of Article III had intended the term "requirements" to exclude requirements connected with the regulation of international investments and did not find anything in the negotiating history, the wording, the objectives and the subsequent application of Article III which would support such an interpretation.

5.13 Article III:5. The Panel then considered the United States contention that purchase undertakings which obliged the investor to purchase in Canada a specified amount or proportion of his requirements were also contrary to Article III:5. The Panel noted that these cases had been characterized by both parties as purchase undertakings (paragraph 2.5) and had also been presented as such by the United States (paragraphs 3.l(a) and 3.12). In this regard the Panel noted that in paragraph 5 of Article III the conditions of purchase are not at issue but rather the existence of internal quantitative regulations relating to the mixture, processing or use of products (irrespective of whether these are purchased or obtained by other means). On the basis of the presentations made, the Panel (which was unable to go into a detailed examination of individual cases where purchase undertakings referred to percentages or specific amounts) therefore did not find sufficient grounds to consider the undertakings in question in the light of Article III:5, but came to the conclusion that they fell under the purchase requirements that had been found inconsistent with Article III:4.

5.14 Article XI. The United States further asked the Panel to find that the purchase undertakings operate as restrictions on the importation of products into Canada and are therefore contrary to Article XI:1. The Panel shares the view of Canada that the General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products", which are dealt with in Article III. If Article XI:1 were interpreted broadly to cover also internal requirements, Article III would be partly superfluous. Moreover, the exceptions to Article XI:1, in particular those contained in Article XI:2, would also apply to internal requirements restricting imports, which would be contrary to the basic aim of Article III. The Panel did not find, either in the drafting history of the General Agreement or in previous cases examined by the CONTRACTING PARTIES, any evidence justifying such an interpretation of Article XI. For these reasons, the Panel, noting that purchase undertakings do not prevent the importation of goods as such, reached the conclusion that they are not inconsistent with Article XI:1.

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

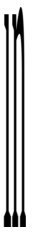
5.16 The Panel takes the view that, through its reference to sub-paragraph (a), paragraph l(c) of Article XVII of the General Agreement imposes on contracting parties the obligation to act in their relations with state-trading and other enterprises "in a manner consistent with the general principles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

However, the Panel did not consider it necessary to decide in this particular case whether the general reference to the principles of non-discriminatory treatment referred to in Article XVII:1 also comprises the national treatment principle since it had already found the purchase undertakings at issue to be inconsistent with Article III:4 which implements the national treatment principle specifically in respect of purchase requirements.

(c) Undertakings to export specified quantities or proportions

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

5.18 As explained in paragraph 5.16 above, Article XVII:1(b) does not establish a separate obligation to allow enterprises to act in accordance with commercial considerations but merely defines the obligation of the enterprises, set out in sub-paragraph (a) of Article XVII:1, to "act in a manner consistent with the general principles of non-discriminatory treatment" prescribed in the G8 11 Tf(principles) TjET2 Tf0 0 1 (the) T



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6.4 The Panel recognizes that purchase requirements may reflect plans which the investors would have carried out also in the absence of the undertakings; that undertakings with such provisos as "competitive availability" have an adverse impact on imported products only in those cases in which imported

On the face of it, this statement and the above-mentioned considerations seem to suggest that there may be scope for adapting the administration of the Foreign Investment Review Act in such a way as to remove the implication that imported products are treated less favourably than domestic products. The Panel notes that in a previous case another Panel had been confronted with a somewhat similar situation and had suggested a solution along these lines.[1] In the case at issue, the Panel considers that the Canadian authorities might resolve the