GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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MINUTES OF MEETING

Held in the Centre William Rappard
on 8-9 February 1989

Chairman: Mr. John M. Weekes (Canada)

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Following a brief procedural debate, the Council agreed to a suggestion by the European Communities that prior to the approval of the Agenda, there be a general discussion on the subject of unilateral measures.

Following the discussion[1], having already been informed from the floor at the outset of the meeting of items proposed for inclusion under "Other Business", the Council approved the Agenda.

1. Committee on Balance-of-Payments Restrictions
- Proposed programme of consultations for 1989 (C/W/577)

Mr. Boittin (France), Chairman of the Committee on Balance-of-Payments Restrictions, introduced C/W/577 which contained the Committee's proposed schedule of consultations for 1989. Full consultations were anticipated for Pakistan, Korea, India and Israel, and simplified consultations for Ghana, Colombia, Brazil, Peru and Sri Lanka. As customary, the proposed dates had been set with the agreement of the parties concerned as well as that of the Committee and the International Monetary Fund.

The representative of the United States said that his delegation had no problem with the proposed schedule. He recalled that Korea had agreed at its last consultation to undertake another full consultation in the first part of 1989 and noted that, at Korea's request, its next consultation had been scheduled for the last week of June. His delegation welcomed Korea's willingness to consult in accordance with the agreed schedule, but recalled that the Committee had encouraged Korea to take action to remove its balance-of-payments import restrictions, thus obviating the need for another consultation. His delegation expected that, in view of Korea's very strong balance-of-payments situation, Korea would no longer have recourse to Article XVIII:B and would comply promptly with the Committee's recommendation at the last consultation that it establish a program for the early, progressive dismantling of its import restrictions formerly justified on balance-of-payments grounds.

The representative of the European Communities said that in accepting the proposed schedule, his delegation, too, had noted the delay in Korea's consultation. It had also been his intention to remind Korea of the Committee's conclusions at the previous consultation, and he associated his delegation with the statement by the United States.

The representative of Canada said that his delegation supported the statements by the United States and the European Communities. As the prevailing view of the Committee's members was that Korea no longer had balance-of-payments problems, trade restrictions maintained under Article XVIII could no longer be justified. If the maintenance of import quotas and other restrictions were thought necessary by Korea, then they should be justified under other GATT provisions. The delay of consultations until June 1989 would enable the Korean authorities to indicate concrete liberalization steps which they intended to take.

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[1]The discussion is reflected in document C/163.

The representative of Korea said that the date of 28 June did not constitute a delay since the Committee had agreed to hold the consultation in the first half of 1989. Moreover, with regard to the disinvocation of Article XVIII, one should not prejudge the deliberations of the Committee, which was entrusted with reviewing Korea's balance-of-payments situation.

The representative of Sweden, speaking on behalf of the Nordic countries, said that they agreed with the statements by the United States, the European Communities and Canada, and hoped that the late date would provide enough time to avoid the need for the proposed consultation.

The Council took note of the statements and of the information in C/W/577.

2. United States - Section 337 of the Tariff Act of 1930 - Panel report (L/6439)

The Chairman recalled that in October 1987, the Council had established a panel to examine the complaint by the European Economic Community. The Panel's report (L/6439) was now before the Council.

Mr. Fortune, Chairman of the Panel, introduced the report, which had been submitted to the parties on 24 November 1988. The Panel had subsequently been asked by both parties to delay its circulation until 16 January 1989. He regretted that the delay had meant that the report had been prematurely projected into the public domain before the CONTRACTING PARTIES had been able to consider it.

Four contracting parties -- Canada, Japan, Korea and Switzerland -- had made both written submissions and oral presentations to the Panel, as summarized in Section IV of the report.

The case before the Panel was complex. It had been necessary to compare two sets of legal procedures applicable where goods were challenged on grounds of patent infringement in the United States, namely those used by federal district courts when goods of US origin were concerned, and those under Section 337 when the goods were imported. The Panel had then assessed the differences between these two sets of procedures against the standards provided for in Article III:4 and Article XX(d) of the General Agreement. The length of the Panel's report reflected the breadth of the issues raised and the thoroughness with which the parties had argued their respective cases.

The Community's original complaint had referred both to the application of Section 337 in general and to its application in a specific case concerning certain aramid fibres. The Community had later withdrawn the latter request. Section 337 had subsequently been amended by the US Omnibus Trade and Competitiveness Act of 1988; the Panel's findings, however, were based on Section 337 as it was in October 1987. The main changes made to Section 337 by the 1988 Act were summarized in Annex II to the report, and cross references to these changes had been included in the findings where the changes might have had a significant impact.

The Panel's findings and conclusions were limited to the application of Section 337 to patent-based cases. The Panel had concluded (Section VI) that Section 337 was inconsistent with Article III:4 of the General Agreement, in that it accorded to imported products challenged as infringing US patents, treatment less favourable than that accorded to products of US origin similarly challenged, and that these inconsistencies could not be justified in all respects under Article XX(d). The Panel had recommended that the CONTRACTING PARTIES request the United States to bring its procedures applied in patent infringement cases bearing on imported products into conformity with its obligations under the General Agreement.

The representative of the European Communities said that this was an important, well-reasoned and sound report in a legally complex case, established by a particularly competent Panel. The Community could only welcome the report and recommend it for adoption. In this case it would be wrong to speak of winners or losers. The report did much to clarify certain fundamental GATT principles; if there were to be a winner, it would be the multilateral system and the GATT which would come out strengthened.

The matter referred to the Panel was the GATT consistency of certain rules and procedures applied under Section 337 of the US Tariff Act of 1930 in cases of alleged patent infringements involving imported goods. The dispute had resulted from a complaint by a private firm which had felt it had been subjected to GATT-inconsistent procedures in a patent litigation before the US International Trade Commission. However, the matter before the Panel was the application of Section 337 in general. In fact, following the settlement of the particular patent dispute between the private parties concerned, the Community had withdrawn its original request that the Panel also make specific findings with respect to the application of Section 337 in that case.

The Community's request to examine Section 337 as such had been maintained, and the Panel had proceeded in accordance with its terms of reference. The Panel had first examined whether the US International Trade Commission's procedures did in fact violate a primary obligation under the General Agreement and in particular the national-treatment requirement of Article III:4. In so doing, the Panel had based itself on well-established interpretations of this fundamental principle, in accordance with past practice of contracting parties. It had noted (paragraph 5.11) that "the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4." What mattered was whether such differences might lead in certain cases to a treatment of imported products which was less favourable than that accorded to products of US origin. On this basis, the Panel had found six aspects of the Section 337 procedure to be inconsistent with Article III:4, namely differences in treatment concerning the choice of forum, tight and fixed time-limits, inadmissability of counter-claims, general exclusion orders, automatic enforcement and the possibility of

double proceedings. Two further aspects raised by the Community, namely the treatment of confidential information and the decision-making process as such under Section 337, had not been found inconsistent with Article III.

The Panel had then examined whether the features it had found to be inconsistent with Article III could be justified in terms of Article XX(d), in particular under the criterion of necessity. It had accepted such a justification with respect to limited in rem exclusion orders and with respect to the fact that Section 337 exclusion orders were automatically enforced by the US Customs Service. The Panel had not seen any justification for the other inconsistencies.

Study of the report revealed that all arguments advanced by the parties and by intervening third countries had been examined with great care. The Community -- even though the Panel had not followed its line of reasoning with respect to certain features of Section 337 procedures -- was therefore in a position to accept the Panel's conclusions and to agree to the recommendation suggested.

The representative of the United States said that his authorities had begun analyzing the Panel's report, which was extremely complex and far reaching. It included interpretations of Articles III and XX that had implications that went far beyond Section 337 or even the enforcement of intellectual property rights at the border. He asked that each delegation present do three things as consideration of this report began: first, to examine the legal basis of the decision -- the Panel's interpretation of GATT provisions -- not merely the result; second, to consider the implications of the interpretations of GATT provisions for its own laws, practices, and procedures that might affect trade; and third, before expressing a final view on the report, to complete a thorough analysis, by both experts and policy officials, of the legal basis of the report and its far-reaching implications for all GATT contracting parties. There were areas of particular concern to his delegation, which it would have regardless of the outcome of the Panel's application of them to a provision of US law.

The United States had three serious concerns about the Panel's having established a standard for national treatment under Article III:4 that was not only expansive but was also a demanding one to apply. First, the report (paragraph 5.11) would require that a contracting party ensure de facto equality of treatment for imports as compared to domestic products. This meant that every law, rule, regulation and procedure had to be drafted and applied in a way that ensured at least equal, or in some cases, preferential treatment for imports. Second, absolute equality of effect had to be ensured not only for all laws, regulations, rules and procedures directly or indirectly affecting imports, but also for each individual element of every law, regulation, requirement and procedure. Were contracting parties prepared to adopt a report that found that the underlying objective of the "no-less-favourable-treatment" standard was to guarantee equality of treatment with respect to every last detail of every law, regulation, rule or procedure that had an indirect effect on imported

goods? And was this to be required where a complex regulatory scheme had been crafted to have a neutral effect on imported goods? Third, the United States was troubled by the application of Article III:4 to persons (paragraph 5.10). The Panel had done so because it believed that "the factor determining whether persons might be susceptible to Section 337 proceedings or federal district court procedures is the source of the challenged products." Its findings clearly applied Article III:4 to persons, since persons chose between fora, raised counterclaims and received confidential information. There was a connection to imported goods, but many of the procedures examined applied to persons rather than goods. Under this standard, anyone who imported anything had to receive equal or better treatment under any law, rule, regulation or procedure that could in any conceivable way affect the sale, purchase, transportation, distribution or use of imported goods.

The United States' concerns with respect to the Panel's findings on Article XX(d) were primarily with the interpretation and application of the word "necessary" in the phrase "necessary to secure compliance" with a law or regulation that was not inconsistent with the GATT. The report stated (paragraph 5.26) that "a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions." He asked delegations to think of the implications of this.

He noted that this was the second GATT panel report on Section 337, recalling that on 26 May 1983, the Council had adopted the report concerning Imports of Certain Automotive Spring Assemblies.[2] That earlier panel had found that Section 337 was necessary in the spring assemblies case and that in many cases of alleged patent infringement, an exclusion order under Section 337 would be the only effective remedy available under existing US law. The present Panel had reached quite different conclusions. The United States had two major concerns with the way the present Panel had applied the interpretation of whether alternative measures were reasonably available. First, the Panel had found that because other governments had adopted a certain law or procedure, it was reasonably available to the United States. The report (paragraph 5.28) stated in this regard that the Panel had not considered that a different scheme for imports alleged to infringe process patents was necessary, since many countries granted to their civil courts jurisdiction over imports of products manufactured abroad under processes protected by patents of the importing country. Were other contracting parties prepared to interpret "reasonably available" primarily in terms of what other governments did? A second problem with the panel's interpretation of "reasonably available" was the small consideration given to a particular requirement of a

[2] BISD 30S/107.

contracting party's governmental system. For example, the Panel had found (paragraph 5.29) that Presidential review of Section 337 orders -- a provision which benefitted importers and imported products and which allowed the Executive branch to consider the conformity of actions with international obligations -- was not necessary to secure compliance with US patent legislation and that therefore, differences in procedures which were required to permit this benefit could not be justified as necessary under Article XX. The report essentially required governments to tailor their legal systems to ensure that they always resulted in blind equality for importers and imported goods. He urged contracting parties to consider carefully the implications of the Panel's restrictive view of what might be considered necessary under Article XX.

The United States also noted that the report did not deal with any particular application of Section 337. As the Panel had noted (paragraph 1.6), the private parties involved had settled the specific case giving rise to this dispute in May 1988. In the US legal system and in that of many other contracting parties, this rendered a case moot and eliminated the basis for action. The Panel had not, in fact, addressed the issue of whether the procedures that it had found to be inconsistent with GATT obligations were decisive in this or any other case. The Panel had recognized (paragraph 5.13) the difficulties presented in attempting to anlayze specific cases and the effect that any of the procedures under discussion might have on the issuance of a particular order. The Panel had also recognized (paragraph 5.16) that the preferential treatment accorded imports under Section 337 could be decisive in certain cases.

The United States believed that contracting parties should give additional and careful consideration to the report in its entirety before taking any action on it. His delegation intended to circulate a more detailed analysis thereof for consideration prior to the next Council meeting.

The representative of Canada said that his Government had been able to examine carefully this report and its implications, and had come to the conclusion that it was well reasoned and clearly presented. The decision of the Panel was sound. Canada urged the Council to adopt the report promptly and the United States to move expeditiously to implement the Panel's findings. As for the earlier panel report referred to by the United States, he recalled that Canada had encountered serious difficulty with that panel report, which in fact had been adopted by the Council with the qualification that "its adoption shall not foreclose future examination of the use of Section 337 to deal with patent infringement cases from the point of view of consistency with Articles III and XX of the General Agreement". He noted that the present report referred (paragraph 5.6) to this qualification.

The representative of Brazil said that the most important finding of the Panel was the identification of incompatibilities between some aspects of a domestic law of a contracting party and the General Agreement itself. Section 337 exacerbated the element of discrimination which had already existed in the previous trade legislation. The new US law did not even

require, for instance, an injury test in order for a product to be embargoed. Thus, a suspensive order could be enforced even when imports did not cause any injury to the domestic industry. Brazil had always favoured the multilateral settlement of trade disputes. Once again, it was its view that the GATT, as an institution, had a very relevant rôle to play in the identification and removal of trade barriers, including those established by national legislation.

Brazil wished to express its recognition of the efforts of the panelists, who had identified in a contracting party's trade law, barriers to international trade in goods which were incompatible with the General Agreement. This was particularly relevant because issues pertaining to trade-related aspects of intellectual property rights constituted one of the unresolved subjects of the ongoing consultations conducted by the Chairman of the Trade Negotiations Committee following the Montreal Ministerial meeting in December 1988. In fact, the work done by independent and well-respected panelists confirmed once more that the text of the General Agreement contained no obligations related to the level of protection that contracting parties should accord to patents or to the effectiveness of procedures related to the enforcement of such protection. It was therefore Brazil's view that the Panel's conclusions should be adopted by the Council.

The representative of Japan said that Japan had made written and oral submissions to the Panel, in which it had maintained that the procedures applied under Section 337 and the orders issued by the US International Trade Commission went beyond what was "necessary" to secure compliance with laws or regulations in terms of Article XX(d) of the General Agreement and were inconsistent with Articles III and XI. The Panel's conclusion shared this basic thrust of Japan's arguments, and Japan supported adoption of the report. Since it was very comprehensive, Japan might wish to express further views on the report at a future Council meeting. He underlined the urgent need to rectify the existing state of the international rules on protection of intellectual property rights, both at the domestic level and at the border. For this purpose, further progress was essential in the negotiations on the trade aspects of intellectual property in the Uruguay Round.

The representative of Switzerland said that his authorities had carefully studied the report, which was very substantial and well written. Switzerland had made a written submission to the Panel. It would continue its examination of the report and would address some aspects thereof at a later date. Switzerland recommended adoption of the report. It believed, as Japan, that the question of intellectual property was not new to GATT but that not all aspects were covered by it. Therefore it was urgent that negotiations on all these aspects be pursued.

The representative of Korea said that his Government had submitted its views to the Panel as an interested third party. The Panel's findings were in agreement with those views, and Korea accordingly supported adoption of the report.

The representative of Norway, speaking on behalf of the Nordic countries, said that they had not completed their examination of the report, but that it seemed that the Panel had drawn the right conclusions

in finding that Section 337 was inconsistent with GATT rules on national treatment. Against this background, the Nordic countries recommended adoption of the report.

The representative of Hong Kong recalled that when the Panel had been established, Hong Kong had expressed concern about the general GATT compatibility of Section 337 -- a complex issue to which the Panel had given very careful consideration. The report clearly indicated that some aspects of Section 337 were inconsistent with the General Agreement, and therefore recommended that the United States be asked to bring its procedures into GATT conformity. While his authorities had not yet had an opportunity to look in detail at all the implications, his delegation's preliminary reading of the report was much in agreement with the Panel's recommendations. However, given the complexity of the matter, his delegation felt that more time was needed for a full examination, and therefore supported the suggestion to revert to this item at the next Council meeting.

The representatives of Australia, Egypt, Austria and Israel said their delegations believed that, given the complexity of the matter, more time was needed to examine the report.

The representative of Egypt said that his authorities were studying the report thoroughly.

The representative of Austria said that the statements at the present meeting would be very helpful for his authorities' consideration of the report.

The representative of Israel said that this report and its implications were important issues for his country.

The representative of Nicaragua supported the suggestion that the Council revert to this matter at its next meeting.

The representative of the European Communities said that his delegation was very much encouraged by the positive statements which had been made by many contracting parties concerning this important report. The Community agreed that it was a complex one and fully understood that delegations needed more time to examine it in detail. The Community was confident that this continued study would lead to the adoption of the report at the next Council meeting. His delegation would refrain from commenting on the specific points raised by the United States, some of which had been dealt with by the Panel. One was not here to retry the case. However, the Community did not agree with the more general assertion that the Panel had interpreted Article III:4 in an expansive manner, or that it had interpreted Article XX(d) in a restrictive way. Both provisions, in the Community's view, had been interpreted on the basis of well-established principles and precedents. Careful reading of the report would reveal that it would be difficult to arrive at substantially different interpretations of these provisions without considerably weakening the fundamental national-treatment principle of the GATT.

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

3. United States - Import Restrictions on certain products from Brazil - Recourse to Article XXIII:2 by Brazil (L/6386 and Add.1)

The Chairman recalled that at its December 1988 meeting, the Council had agreed to revert to this item at the present meeting.

The representative of Brazil referred to the discussion on unilateral measures prior to approval of the Agenda, and said that so many arguments had been made which reinforced Brazil's case under the present item that he was faced with a difficult choice. Paraphrasing the Director-General's statement at the end of that earlier discussion[3], he said that the General Agreement stated that discriminatory import tariffs were illegal and that there was no exception to this rule. Furthermore, the cornerstone of the General Agreement was the mechanism it provided for the settlement of trade disputes through an agreed procedure; all contracting parties should demonstrate their willingness to submit to it.

There was no need to restate the facts behind this agenda item, since the points of substance concerning the unilateral and discriminatory imposition of United States' restrictions on Brazil's exports had already been made by his delegation on several occasions. It was worth pointing out, though, that six months had elapsed since Brazil had first denounced the United States' intentions on 26 July 1988. In August, Brazil had requested consultations with the United States under Article XXIII:1, since commercial damage was already being inflicted on Brazilian exports through the mere announcement by the United States that it would impose restrictions. These consultations, however, had been held only two months later, after the United States had formally applied 100 percent ad valorem duties on certain Brazilian exports. The United States' unwillingness even to consider removing the restrictions had left Brazil with no alternative but to request, at the December 1988 Council meeting, the establishment of a panel under Article XXIII:2 to examine the issue (L/6386 and Add.1), namely the violation of Articles I and II by the unilateral US decision, which constituted a prima facie case of nullification and impairment of Brazil's rights under those Articles.

At that meeting, 23 delegations, representing 38 contracting parties, had supported Brazil's request; he could not recall a more eloquent and meaningful demonstration of the priority and importance attributed to a single issue raised in the Council in the recent past. The interesting and lengthy discussion had been a clear sign of the serious concern of a great number of contracting parties with the growing threat that unilateralism was posing to the multilateral trading system. As had been mentioned by

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[3]See C/163, page 14.

some of the contracting parties which supported Brazil's request for a panel, the recourse to unilateral and illegal measures had a profound de-stabilizing effect on the whole multilateral framework of trade, and the developments in the case at hand would therefore have a significant influence on the survival of the system represented by the GATT. Apart from the very important question of principle involved, Brazil's commercial interests were being severely nullified or impaired by the United States' action. That contracting party had, however, blocked the establishment of a panel in December, alleging that it was not prepared to respond to Brazil's request at that meeting but expected to be able to respond more fully at the next Council meeting. Given the importance of the issue and its repercussions, Brazil considered that it was no longer justifiable or tolerable to delay any further the enforcement of the dispute settlement procedures. Backed by the expressed and virtually unanimous wish and concerns of the contracting parties, and in order to protect its interests and rights, Brazil therefore reiterated its request that a panel be set up immediately.

The representative of the United States said that the area of intellectual property was of paramount importance to the United States. His authorities were continuing their consideration of this matter and were not prepared to accept the establishment of a panel at the present meeting.

The representatives of Austria, Argentina, Pakistan, Nicaragua, Canada, Peru, Korea, Australia, Kuwait, Hong Kong, the European Communities, India, Japan, Mexico, Thailand on behalf of the ASEAN contracting parties, Uruguay, Chile, Turkey, Colombia, Hungary, Egypt, Poland, Cuba, New Zealand, Norway on behalf of the Nordic countries, Yugoslavia, Nigeria, Jamaica, Switzerland, Czechoslovakia, Israel and Morocco supported Brazil's request for the establishment of a panel.

The representative of Austria said that his country's position was that a contracting party which believed that its GATT benefits and rights had been impaired or nullified was entitled to a panel, and that establishment of such a panel should not be hindered. His authorities further believed that the case at hand clearly demonstrated the need for international rules in the field of intellectual property rights. Unilateral measures were not an appropriate means to resolve problems. He added that in the light of the history of the present case, both parties should remove mutually their unilateral measures.

The representative of Argentina emphasized his delegation's total opposition to the use of unilateral and discriminatory measures, especially if taken for reasons which fell outside GATT's competence, as in the case at hand. If any doubt existed in this respect, the earlier discussion under another agenda item had shown that GATT articles did not impose obligations in that area. For that reason, the United States should have had recourse to GATT's dispute settlement mechanism. In the case at hand, it was Brazil's right to request the establishment of a panel. As this request was being made for the second time, his country urged the United States to accept it.

The representative of Pakistan said that his authorities viewed with concern the use of unilateral measures by the United States because this would undermine the character and strength of the multilateral trading system. His delegation had noted that the United States had not invoked GATT provisions to justify its discriminatory action against Brazil, which had nevertheless been taken in contempt of GATT provisions. His delegation commended Brazil's decision to follow the GATT course and urged the Council to establish a panel, thereby strengthening the multilateral trading system.

The representative of Nicaragua said that the United States had not invoked any GATT provision to justify its measure, which blatantly violated Article I. The measure also constituted a nullification or impairment of Brazil's benefits under Articles I and II. Not only Brazil but also the multilateral trading system was being affected. It was the Council's duty not to allow unilateral measures to undermine the basis of the system that all contracting parties had undertaken to preserve and enhance. The United States had not followed the normal Article XXII and XXIII procedure to seek satisfaction, and the measure it had taken had not been authorized by the CONTRACTING PARTIES. Thus there was no legal basis to apply it, and the US action was a clear violation of GATT obligations. The measure also contravened the Uruguay Round standstill commitment. His delegation reaffirmed all contracting parties' right to a panel, an issue which had been left pending at the December 1988 meeting of the Trade Negotiations Committee in Montreal, and which would hopefully be settled in April. Nicaragua had two main concerns with the case at hand: the clear absence of GATT justification for the US measure, and the implications for the Uruguay Round, if not its influence upon them, in particular with regard to the trade aspects of intellectual property rights. Recalling a US proposal in the context of the negotiation of new dispute settlement rules for a 15-month limit, he pointed out that many months had already elapsed in the present case and no panel had been set up. The Council thus had to decide accordingly, with full respect to precedents and to the established practice.

The representative of Canada added his delegation's support for the use of the dispute settlement system to resolve problems of this nature. His delegation was disappointed at the United States' response, given the amount of time this issue had been before the Council. He reiterated Canada's concerns with any contracting party's taking unilateral measures circumventing GATT procedures and with the possible destabilizing effect of such measures on third countries' trade.

The representative of Peru reaffirmed his country's concern over unilateral measures.

The representative of Korea said that prior to approval of the Agenda for the present meeting, the Council had held a most constructive debate on the wide-ranging implications of unilateral measures for the multilateral trading system. Based on the conviction that all trade disputes should be solved through the GATT dispute settlement system, his delegation urged the Council to establish a panel at the earliest possible opportunity.

The representative of Australia noted that this matter was before the Council for the second time. He said that some form of precedent had been established whereby, although a panel did not have to be established at the first meeting when it was requested, it was customary to accede to the request at the second meeting. Australia therefore supported Brazil's request.

The representative of Kuwait said that his delegation had already expressed its opposition to unilateral measures taken in violation of GATT, and hoped that the United States would not oppose Brazil's request for a panel.

The representative of Hong Kong said that like the United States, Hong Kong had a close interest in the Uruguay Round intellectual property rights negotiations, but Hong Kong was also very concerned that unilateral action by contracting parties would seriously undermine the multilateral trading system. That position had been clearly shared by many delegations present. Hong Kong also supported the right of any contracting party to use the GATT dispute settlement procedures.

The representative of the European Communities said that delegations were registering their opposition to unilateral measures. The Community was one of those. His delegation, too, believed that intellectual property was a matter of paramount importance which had to be dealt with in the context of the Uruguay Round negotiations, but this could in no way justify measures which cut across the normal GATT rules. The Community was only reiterating what it had already said at the Council meeting in December 1988. There had been no notification by -- and no authorization given to -- the United States for its unilateral discriminatory action. It was disappointing that six weeks later, when the United States was under new management, there had been no move in the direction of setting up a panel as requested by Brazil.

The representative of India recalled the discussion of the deeper ramifications of unilateral measures which had been held prior to approval of the Agenda. It was disturbing that a contracting party took measures, which it claimed to be retaliatory, without having sought authorization, and then on the question of prima facie nullification of benefits, did not seek to give GATT cover for its action and furthermore did not agree to the establishment of a panel.

The representative of Japan said that the lack of sufficient protection of intellectual property rights in many contracting parties was a serious problem which required prompt attention. There was an urgent need for rules in this area. Brazil's case was a clear example thereof, and the importance of the Uruguay Round negotiations on this subject could not be over-emphasized. It was important that all contracting parties, including Brazil, participate actively in those negotiations with a view to producing agreed rules in the field of standards and enforcement. Japan considered that Brazil's case did not justify the US unilateral measures.

The representative of Mexico said that three reasons compelled him to speak. First, the United States had unfortunately said it could not accept Brazil's rightful request for a panel; second, Mexico wanted to support that request and third, --perhaps most importantly -- it was becoming clear that the discussion initiated by the European Communities prior to approval of the Agenda had been a preambular session for the present Council meeting. During that earlier discussion, his own delegation had listened with interest to the numerous statements to the effect that nothing should be done which undermined the GATT, that unilateral measures contrary to GATT should be avoided and that there seemed to be consensus on the necessity of respecting its dispute settlement mechanism. One could see a difference, however, in the way matters had been presented in the morning and what was happening under the present Agenda item. His delegation was disappointed with the United States' response; 13 delegations had already supported Brazil's request and others would do so. Mexico hoped that the United States would reconsider its position and agree to the establishment of a panel.

The representative of Thailand, speaking on behalf of the ASEAN contracting parties, reiterated their concern over the use of unilateral measures to settle trade disputes. Such measures would weaken the efforts to improve and strengthen the multilateral trading system, which alone provided the necessary security in trade relations.

The representative of Uruguay said that to his knowledge, the US action had been taken because the United States objected to Brazil's intellectual property law, which Brazil contended was in total conformity with all its international obligations. At no time had the United States denied this contention. On the other hand, Brazil had not succeeded in solving its problem through consultations. After six months, one could ask where was the right of contracting parties to a panel -- a right which had been so widely discussed in the relevant Uruguay Round negotiating group; and where were the short delays and timetables which had been put forward? He noted that in the Uruguay Round negotiations, the United States had been the delegation which had the most strongly reaffirmed a contracting party's right to a panel and the need for strengthening the dispute settlement procedures.

The question at hand was to determine, through a panel, whether there had been a violation of Brazil's rights under Articles I and II. The US action could only be interpreted as a measure to counter Brazil's refusal to discuss with the United States a question of great importance to the latter, namely, the lack of sufficient protection of intellectual property rights for pharmaceutical and chemical products. That was a unilateral interpretation. The United States, moreover, had not denied that Brazil's legislation conformed to international conventions in this area. Intellectual property was not a GATT matter and could only be so at the end of the Uruguay Round. No action taken because of alleged violations of such rights had a place in GATT.

He said that bearing in mind the earlier discussion prior to approval of the Agenda, it was difficult to carry out a negotiation while standing under a Damocles' sword represented by the threat of unilateral measures

which totally denied any possibility of compromise as envisaged in GATT. One of his major concerns arose from a recent statement by the new US Trade Representative, who had said that "finally, on the unilateral front [she] would not hesitate to act, when necessary and appropriate, to fight unfair trading practices of foreign governments. Retaliation cannot be the goal of our policy, in fact it signals the failure of our policy to open foreign markets, but the credible threat of retaliation provides essential leverage in our market-opening efforts. Thus actual retaliation will be used, albeit reluctantly, to preserve the credibility of the threat." This statement caused great concern to his delegation, which wondered when such a unilateral measure would also strike Uruguay.

The representative of Chile recalled that his delegation had already expressed its support of Brazil's position at the Council meeting in December 1988. The two questions of GATT dispute settlement and intellectual property had recently been under scrutiny, and in some ways both were evident in the present case. On the one hand, the United States had applied trade retaliatory measures to Brazil on the grounds of an alleged non-respect of intellectual property legislation, and on the other, Brazil, faced with this unilateral action, was seeking establishment of a panel under the GATT dispute settlement system. He emphasized that the Council was not dealing with the question of whether GATT regulated intellectual property rights -- the proof thereof was that this was being currently negotiated in the Uruguay Round -- but with the United States' resort to trade retaliation outside GATT. No GATT provision authorized trade retaliation for reasons of intellectual property rights; such retaliation was illegal and had to be stopped immediately. Moreover, at issue was a unilateral measure based on domestic US legislation and not on GATT rules, which should prevail. Indeed, at stake here again was the right of any contracting party to put the dispute settlement system to work.

The representative of Turkey said that without taking a position on the substance of the matter, his delegation believed that in the circumstances, the establishment of a panel seemed to be the only alternative left for a multilateral solution of this dispute.

The representative of Colombia said that he would not discuss the principles involved in this case as others had already done so, but he wanted to offer a brief summary of the particulars of the case: (1) the US measure was unilateral; (2) the US retaliation had not been authorized by GATT; (3) the standstill commitment was being violated; (4) access to the normal dispute settlement procedures was being denied and (5) recent Council practices for establishing panels were not being honoured.

The representative of Hungary said that without taking a position on the substance of the matter, his delegation considered that the right of a contracting party to a panel should be recognized.

The representative of Egypt recalled that the discussion prior to approval of the Agenda had been focussed on unilateralism and the use of GATT. The case at hand was a clear-cut example of a unilateral measure. His delegation believed that there was an urgent need to establish a panel.

The representative of Cuba said that the US unilateral measures were not justified under GATT. Moreover, they had been adopted against a developing country for reasons which were extraneous to GATT. Considering the massive support for Brazil's request at the December 1988 Council meeting and the fact that six months had elapsed since the matter had been brought before the Council for the first time, it was high time that the United States assume its responsibility in the dispute settlement process and agree to the establishment of a panel.

The representative of New Zealand reiterated New Zealand's support of Brazil's right to a panel.

The representative of Norway, speaking on behalf of the Nordic countries, reiterated their support of Brazil's right to a panel.

The representative of Jamaica recalled that at the December 1988 Council meeting, the United States had not agreed to the establishment of a panel. The question now was how the Council could help Brazil and the United States to resolve their dispute, and how the CONTRACTING PARTIES -- acting collectively -- could send the message that the GATT was alive and opposed to discriminatory actions. As to the case before the Council, it would be useful if the United States could indicate how much more time was required for its further examination. A panel could be established at the present meeting, and its internal mechanism would take some time to be set in motion. If in the meantime a settlement were reached, the matter referred to the panel could still be withdrawn.

The representative of Switzerland reiterated Switzerland's position that the Council should not oppose the establishment of a panel, but at the same time, substantial progress should be accomplished in the negotiations on the trade-related aspects of intellectual property rights in order to avoid recurrence of such cases in the future.

The representative of Israel said that without taking a position on the substance, his delegation supported the right of a contracting party to a panel. He added that this issue clearly demonstrated the need for negotiations on the trade aspects of intellectual property rights.

The representative of Morocco said that his delegation wished to put forward a position of principle that unilateral measures were regrettable and that any contracting party had the right to a panel.

The representative of Brazil said that he was profoundly disappointed that the United Stated had not put forward any reason whatsoever for refusing to agree to a panel. To say that the matter was important was not a reason. He noted that the United States had not responded more fully, as promised at the December 1988 Council meeting. Apart from the lack of any justification for the delay in accepting the panel, it was not as if the case raised by Brazil were new to the US authorities; the matter had been raised formally more than six months earlier. The question was neither controversial nor disputed, nor was it a complex and arcane matter which required lengthy study.

It was crystal clear, from the almost unanimous feeling in the Council, that the US Administration had quite simply to decide whether or not to adhere to the procedures laid down in Article XXIII:2. At the December 1988 Council meeting, representatives had spoken almost in unison in favour of setting up the panel; the appropriateness and legitimacy of Brazil's request had been recognized in the light of the undeniable nullification and impairment of its GATT rights. It was also worth recalling that the sole party blocking the dispute settlement procedures was the same one which had, on innumerable occasions in the past, complained in strong terms of delays in the establishment and work of panels. Indeed, the United States had even put forward, in the context of the Uruguay Round negotiations, proposals that would expedite even more the dispute settlement process and make it less susceptible to diversionary and dilatory tactics by the party whose commercial actions were being questioned. This failure to comply with normal GATT procedures was even more surprising when coming from a country that had always advocated -- and prided itself on -- the respect of the rule of law. The current US action, however, was quite incompatible with this tradition and, in reality, evoked more the image of stalling or filibustering manoeuvres, devoid of legal arguments and incompatible with the responsibilities of a major partner in international relations. In the light of the eloquent and unequivocal message behind the statements of the quasi-unanimity of Council members, which his delegation deeply appreciated and which could be called a tidal wave of support, it was Brazil's understanding that the United States should reconsider its position and not stand in the way of a consensus on this matter. Another solution would be for the Council to rule that the US measures were illegal.

The representative of the United States said that all the comments by representatives would be reported to his authorities. He reiterated that the United States would not be prepared at the present meeting to agree to the establishment of a panel or to any kind of unilateral statement by the Council.

The representative of Brazil said that the GATT system was confronting a most serious challenge. Practically all contracting parties present, with the sole exception of the United States, had supported Brazil's request, but a decision had not yet been taken that would allow the dispute settlement procedure to follow its normal course, thus demonstrating that the system had the means to combat unilateralism in an effective way. Where did one go from here? Should the next meeting of the Council be devoted to a repetition of the present meeting's debate? How was Brazil going to proceed in order to protect its legitimate GATT rights and interests without resorting to measures that would themselves violate the rule of law? When could one expect a decision, given that this was already the second Council meeting at which Brazil's request for a panel was being considered? His delegation sought guidance from the Chairman on how to move the Council out of this impasse. He urged the Chairman to bear in mind both the fundamental GATT rights involved and the disruptive effect of the US measures upon Brazil's exports.

The representative of Nicaragua reiterated the points made in his previous statement. He added that the Council should now establish a panel as not doing so would be tantamount to granting the United States a veto right, which had no place in GATT.

The representative of Brazil suggested that any decision be postponed overnight in order to allow the representative of the United States to consult his authorities.

The Chairman, recalling the earlier statement by the United States that internal consultations were going on, asked whether the US representative could provide an indication of how long that process would take.

The representative of the United States replied that he could not, and emphasized that the United States could not accept a panel at the present meeting. Although he appreciated Brazil's effort to move this question forward and the latest suggestion, his delegation was not in a position to accept it.

The Chairman pointed out that a very large number of delegations had spoken in favour of establishing a panel at the present meeting. The record of the meeting would reflect this situation very clearly. A number of delegations had linked the discussion of this item to the earlier discussion prior to approval of the Agenda. He hoped that by the Council's next meeting, the situation would have improved. He suggested that the Council take note of the statements and agree to revert to this item at its next meeting.

The representative of Brazil said that his delegation had taken due note of the Chairman's suggestion. However, taking into account the Council's 10-day rule, Brazil was requesting the convening of an earlier meeting of the Council.

The Chairman said that it had been his intention to announce at the close of the present meeting that the next meeting would be held on 8 March, but that was open to discussion. As to Brazil's request for an earlier meeting, his own use of the words "next meeting" clearly implied that the Council would revert to this item on 8 March or earlier.[4]

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

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[4]Just prior to closing the meeting the following day, the Chairman proposed, on the basis of the above statement by Brazil, that an additional meeting of the Council be held on 21 February unless he was informed that such a meeting was not required, in which case contracting parties would be so notified. He confirmed that the Council would meet in March in any case.

4. Harmonized System - Transposition by the United States

The Chairman recalled that at the December 1988 Council meeting, the European Communities had raised this matter under "Other Business", and the Council had agreed to revert to it at the present meeting.

The representative of the European Communities recalled that the Community had raised this matter to suggest that a particular procedure be followed to resolve the difficulty between the United States and the Community, which should have been resolved in the context of the Harmonized System (HS) negotiations themselves, the previous year, before the implementation of the HS by the United States. That had unfortunately not been the case and the Community was obliged to give notice that its Article XXVIII negotiations with the United States in this respect could not be considered as terminated. Making all due allowances for the difficulties which the Community recognized the United States had faced in moving from its TSUS to the HS, it was difficult if not impossible for the Community to see how the United States could justify certain upward adjustments of its tariffs particularly in the textiles sector, which had resulted from that transposition. The Community was saying this having regard to the principle set out in document L/5470/Rev.1 containing the guidelines for the manner in which the transposition should have been made. Those guidelines had not been respected, particularly in the textiles sector. The Community reiterated formally its proposal to submit its differences with the United States to the Director-General for arbitration, in the belief that this was the best course to follow for the time being.

The representative of the United States said that the United States had concluded Article XXVIII negotiations on its HS conversion, which had resulted in an overall balance and also a balance in the textiles sector. Throughout the HS negotiations, the United States had negotiated in good faith and its actions had been consistent with its GATT obligations and with the agreed objectives of the conversion exercise. The Community had asked for arbitration on the US textile conversion after a bilateral and an overall balance had been achieved. The United States believed that such individual conversion problems should have been settled before, not after, balances had been achieved. Since both the Community and the United States had achieved a balance, any examination of the conversion should review the overall balance of concessions on both sides. He noted that the United States had also expressed serious concerns with the Community's conversion, which had remained unresolved in the HS negotiations. In any examination of the HS conversions, the overall balance of concessions on both sides had to be examined; that was the nature of the exercise undertaken by all. The United States did not believe that arbitration was a tool well suited for such broad-gauged evaluations and found the Community's suggestion inappropriate in this situation.

The representative of Japan said that Japan believed it was an established premise of the HS transposition that no substantial increase on any of the bound tariffs could be made without prior agreement through Article XXVIII negotiations. Japan considered this to be of fundamental importance and wanted to register its keen interest in the issue.

The representative of Canada said that Canada believed that the US conversion of tariff schedules into the HS should result in no more than a minimum number of cases where effective rates of duty were raised. Consequently, his delegation urged the United States to take steps to ensure that the US conversion as it affected wool textile apparel be restored to a more neutral tariff-rate structure.

The representative of Singapore said that the basic principles set out in L/5470/Rev.1 clearly required that HS transposition should be a neutral, technical exercise which should not be used to raise the level of effective tariff protection. His delegation hoped that the United States and the Community would resolve their differences as soon as possible. However, any solution reached should not affect or prejudice third parties' interests.

The representative of Chile said that his Government's concern in this case was to preserve Chile's interests. Chile therefore reserved all its rights under Article XXVIII with respect to the HS transposition by the United States.

The representative of Hong Kong said that he thought it was relevant that the introduction of the Harmonized System was a particularly complex exercise, subject to special negotiating procedures. The problem before the Council seemed to have arisen because, although both the United States and the Community had accepted the special procedures and the objectives for the negotiations, there were differing perceptions as to whether the United States had met its obligations. In the circumstances, and given the complex nature of the exercise, Hong Kong saw merit in an impartial, objective assessment as requested by the Community, and therefore urged the United States to reconsider its position. If arbitration was unacceptable, there were of course other dispute settlement procedures available.

The representative of the European Communities expressed regret that the United States had replied negatively to his request for arbitration by the Director-General. The Community could not agree that balance had been achieved, particularly with regard to the sensitive area of the textiles chapter, which had been at least partly recognized by the United States. On the basis of the 1986 trade figures, the Community would indeed have incurred payment of US$5 million of extra duties because of the US transposition. Thus the Community had no other choice than to fall back on its Article XXVIII rights. At this stage, and in preparation for the exercise of those rights, the Community would undertake the necessary internal calculations.

The Council took note of the statements and of the European Communities' request for arbitration by the Director-General and agreed to revert to this item at a future meeting.

5. Philippines - Establishment of a new Schedule LXXV
- Request for a waiver under Article XXV:5 (C/W/578, L/6461)

The Chairman drew attention to the request by the Philippines in L/6461 for a waiver from the provisions of Article II of the General Agreement and to the draft Decision in document C/W/578, which had been circulated to facilitate consideration of this item by the Council.

The representative of the Philippines said that his country stood ready to enter into consultations and negotiations with any interested contracting party regarding the Philippines' implementation of the Harmonized System on 19 October 1988. Due to time constraints, it had not been possible to carry out consultations under the procedures of Article XXVIII before that implementation. The Philippines therefore requested the CONTRACTING PARTIES to grant an exemption from its Article II obligations until 31 December 1989.

The Council took note of the statement, approved the text of the draft Decision in C/W/578, and recommended its adoption by the CONTRACTING PARTIES by postal ballot.

6. Australia - New Zealand Closer Economic Relations Trade Agreement
- Biennial report (L/6460)

The Chairman drew attention to document L/6460, containing information given by the parties to the Agreement referred to in that biennial report.

The Council took note of the report.

7. Canada - United States Free-Trade Agreement
- Establishment of a working party (L/6464)

The Chairman drew attention to L/6464 containing a joint communication from Canada and the United States.

The representative of Canada said that his Government confirmed to the CONTRACTING PARTIES that it and the Government of the United States had formed a free-trade area. The formal notification to this effect was contained in L/6464 of 26 January 1989. Detailed information, including the Canadian tariff schedule for implementation of the Agreement's tariff cuts, as well as copies of Canada's domestic implementing legislation and consequent amendments to existing regulations, had already been deposited with the Secretariat. Canada and the United States were partners in the largest two-way trading relationship in the world. Their Agreement had been signed on 2 January 1988, and the GATT had been advised of this signature at the 2 February 1988 Council meeting. Following completion of the necessary domestic legal procedures in both countries, the Agreement had entered into force on 1 January 1989. While the Agreement was designed to facilitate trade between the two countries by eliminating all duties and

reducing or eliminating other trade barriers, it was anticipated that its implementation would lead to the expansion of the national economies of both countries and stimulate demand for products from sources both within and outside the free-trade area. The Agreement would, therefore, be trade-creating rather than trade-diverting. It did not create new barriers to the two countries' trade with third countries. The Agreement was a concrete manifestation of the commitment of both countries to general trade liberalization and would, it was hoped, serve as a catalyst for the treatment of a range of issues in the Uruguay Round.

Under the scope and content of this historic Agreement, Canada and the United States would eliminate all tariffs on each other's goods by 1 January 1998. A variety of other regulations of commerce would also be liberalized or removed. The Agreement provided for rules in areas such as trade in services, areas which were also being addressed multilaterally in the Uruguay Round. The Agreement also contained mechanisms for the resolution of disagreements regarding the interpretation of the Agreement and regarding the review of final determinations in anti-dumping and countervailing duty cases. The Agreement was among the most comprehensive of its type brought before the GATT, and the parties were confident of its compatibility with the requirements of Article XXIV. Furthermore, each party to the Agreement would maintain an independent policy with respect to issues affecting the management of its trade relations with other countries, including separate tariff schedules. Moreover, as had been made clear on numerous occasions, and most recently at the December 1988 Montreal Ministerial meeting of the Trade Negotiations Committee, negotiation of this Agreement had been part of a two-track trade policy for Canada. The Uruguay Round was very much the other part and was seen by Canada as the vehicle for achieving increased liberalization of trade with all of its GATT partners. Canada was prepared to support the establishment of a working party to examine this Agreement and would cooperate fully with it.

The representative of the United States said that his delegation was pleased to join Canada in notifying the Free-Trade Agreement between the two countries. The United States was confident that by creating a free-trade area, it would help economic growth in the two countries. Other countries could also benefit from that growth, since the Agreement did not raise barriers to the trade of other contracting parties with Canada or the United States. The United States planned to give its full cooperation to contracting parties in their review of the Agreement. In this context, the United States had already submitted considerable information to the Secretariat and would be making other information available as required. The United States believed that contracting parties would find that the arrangement between Canada and the United States fully conformed with the requirements of Article XXIV for a free-trade area; indeed the Agreement went beyond those requirements in several respects. Finally, the United States wished to make it clear to all contracting parties that conclusion of this bilateral free-trade area did not in any way alter the United States' firm commitment to the Uruguay Round of multilateral trade negotiations.

The representative of Japan said that Japan was concerned about the Agreement between Canada and the United States, especially in the context of problems related to bilateral and regional groupings. Japan strongly hoped that the Agreement would not only benefit both parties but would also strengthen the multilateral free-trading system. His delegation appreciated that both parties were willing to make available further information regarding the Agreement. It would be appropriate to follow the standard practice and set up a working party at the present Council meeting. In this connection, he said that deliberations in recent working parties concerning regional arrangements had tended to be a mere formality. Recent regional economic-integration arrangements such as the Canada - United States Free-Trade Agreement or developments in the unification of the European Common Market would have a great impact on the world economy and on the existing framework of the world trading system. Given the magnitude of the present Agreement, it should be thoroughly examined to decide whether it was in full conformity with the provisions of the General Agreement, and, inter alia, with the conditions stipulated in Article XXIV. As to the terms of reference and the chairmanship of the working party, Japan considered it appropriate that the Council Chairman conduct informal consultations with the contracting parties concerned. Japan wanted to serve on such a working party and to be involved in any consultations concerning its terms of reference.

The representative of Mexico said that Mexico was interested in the Agreement and wanted to be associated with any body that would be set up to examine its GATT conformity.

The Chairman said that if a working party were established at the present meeting, it would be open to all interested contracting parties. With regard to Japan's suggestion, the standard terms of reference for a working party of this type would be as follows: "To examine, in the light of the provisions of the General Agreement, the Canada - United States Free-Trade Agreement concluded on 2 January 1988 and which entered into force on 1 January 1989, and to report to the Council."

The representative of the European Communities said that the Community was pleased to see that two major contracting parties were reaching the age of maturity and were fully using GATT provisions to cooperate more closely, to the benefit of all contracting parties. The Community cautioned against playing with this instrument, which was difficult to handle. The Community was well suited to know how to do this and stood ready to provide the parties with technical assistance thereon, and even, without prejudging the outcome of the Chairman's consultations, to offer the services of someone from the Community to preside over the working party, which would face an enormous task. Indeed, only the tip of the iceberg was visible at this stage.

The representative of Israel said that Israel had a direct interest in this Agreement. Israel was a party to another agreement with the United States and welcomed Canada to the integration club. Israel favoured the establishment of a working party according to the standard GATT procedures and with standard terms of reference.

The representative of Switzerland said that Switzerland had taken due note of the Agreement. It was being thoroughly studied with regard to possible repercussions on Switzerland's relations with the parties to the Agreement and on international economic relations, especially the multilateral trading system. Switzerland welcomed any efforts made through economic integration, as long as such efforts were a fast track to trade liberalization and were consistent with efforts aiming at -- without substituting themselves for -- strengthening the multilateral trading system. For Switzerland, the Uruguay Round and the strengthening of the multilateral trading system were priorities. Switzerland would submit more substantial views in due course and would be interested in participating in a working party to examine the Agreement.

The representative of Chile recalled the objective set in Article XXIV:4 of the General Agreement and said that Chile was examining the Agreement with regard to identifying possible obstacles therein to Chile's trade. Chile entered a general reservation on the matter without prejudice to its desire to participate in a working party.

The representative of Brazil said that Brazil supported the establishment of a working party. This Agreement was of such magnitude and complexity that its GATT conformity had to be thoroughly examined. Brazil would be interested in participating in a working party that would ensure that this new instrument did not raise obstacles to the functioning of the multilateral trading system.

The Chairman suggested that the Council take note of the statements. As not all delegations were in a position to agree at the present meeting on terms of reference, he proposed that the Council agree to establish a working party and authorize him to draw up the terms of reference and to designate a chairman in consultations with the primarily interested contracting parties. The Working Party would, of course, be open to all contracting parties indicating their wish to serve on it.

The Council so agreed.

The Chairman suggested that contracting parties wishing to submit questions in writing to the parties to the Agreement be asked to do so not later than six weeks after receipt of copies of the Agreement, which would be furnished by the parties and forwarded to contracting parties by the Secretariat when they were available. The parties to the Agreement should supply written answers to these questions, as consolidated and forwarded by the Secretariat, within six weeks after receipt thereof.

This was agreed.

8. Export of Domestically Prohibited Goods (C/W/580, L/6459, L/6467)

In December 1988 in Montreal, the Chairman of the Trade Negotiations Committee had referred to trade in domestically prohibited goods and other hazardous substances and had suggested that "the GATT Council be requested

to take an early, appropriate decision for the examination of the complementary action that might be necessary in GATT, having regard to the work that was being done by other international organizations." At the December 1988 Council meeting, the Council Chairman had announced that this would be included on the Agenda of the present meeting.

The Chairman said that he had held an informal consultation on this subject the preceding day, in which participants had expressed considerable support for the "complementary action" that might be necessary in GATT in this area. There seemed to be a common view that the best way to move forward would be to set up a working group. However, as it appeared that more time would be needed to formulate a decision which the Council could adopt by consensus, he suggested that further informal consultations be held on this matter with a view to taking such a decision at the Council meeting in March.

The representative of Nigeria recalled the discussion at the CONTRACTING PARTIES' Forty-fourth Session and the statement by the Chairman of the Trade Negotiations Committee at Montreal on this matter. Useful consultations had recently been carried out among delegations, and the outcome of these consultations had shown that a large number of contracting parties were in agreement that the time had come for early action in GATT to ban or bring under control the trade in domestically prohibited goods and other hazardous substances. Indeed, the updated Secretariat documents (L/6459 and L/6467) left no doubt that GATT had a duty to take such early action. The organizations referred to in L/6459 had confined themselves to non-trade issues in domestically prohibited goods and hazardous substances. On previous occasions, he had emphasized the danger involved in trade in industrial and toxic wastes and the recent trend in such trade without due concern for human health, animal and plant life in the importing countries. Recent developments in the United Nations Environment Program meetings in Geneva and Luxembourg had given credence to concerns in this direction. He proposed that contracting parties remain faithful to the Ministerial mandate and decide to establish a working group to address this issue adequately and to recommend appropriate action. He noted that at the request of African delegations, a draft decision (C/W/580) had been circulated during the present meeting for the Council's consideration. He stressed his delegation's readiness to cooperate with every delegation to deal with this issue conclusively.

The representative of Cameroon said that his delegation fully supported the draft decision in C/W/580. The issue at stake was of crucial importance to his Government. It had been his intention to make a formal statement at the present meeting, but having heard the Chairman's remarks, and counting on the latter's personal engagement, he would refrain from doing so. He hoped and expected that at its next meeting, the Council would establish a working group, which was the only correct response to the concerns of countries such as his.

The representative of Nicaragua said that Nicaragua supported the draft decision in C/W/580 and consequently the earliest possible establishment of a working group to examine the issue at hand, taking into account the work done in other international organizations.

The representative of the United States said that his delegation had always felt that the substance of the domestically prohibited goods issue was important from an environmental, health and safety perspective, and had diligently worked in other international fora to arrive at workable proposals for dealing with these issues. With regard to the GATT, the United States was prepared to see the preliminary work continue within informal consultations, and agreed with the Chairman's assessment that contracting parties had yet to reach a consensus regarding the need to transform current GATT work on the domestically prohibited goods issue into some more formal context. His Government continued to study the proposals already made by other contracting parties, and more time was needed to consider the information supplied in recent Secretariat notes. The United States believed that further efforts by the Secretariat could be made to analyze the efforts being taken by contracting parties to address the domestically prohibited goods issue. If it came to the point where it would be productive to consider setting up a working group, the United States would insist that its task include an assessment of whether proposed measures to deal with trade in domestically prohibited goods, starting with those in place or under discussion in other international organizations, were consistent with GATT provisions, particularly Articles I and III. As further consultations on this issue proceeded, the United States would also be looking for cooperation on other issues which were perhaps of more direct interest to it.

The representative of Côte d'Ivoire expressed her delegation's satisfaction with the way in which discussion of this matter seemed to be going, as seen form the informal consultations, and despite the United States' reservation. As to the latter, her delegation thought that its formulation left some hope that the United States would revise its position and accept the establishment of a working group.

The representative of Cuba said that her delegation supported the establishment of a working group, which would be the appropriate place to conduct the preliminary work.

The representative of Nigeria said that his delegation was grateful for other delegations' support of his request and for the Chairman's good efforts. His delegation was nevertheless aware of the constraints on establishing a working group at the present meeting and had taken note of the United States' statement. It was Nigeria's understanding that the Council should be faithful to the Ministerial mandate. He hoped that the additional time requested would not go beyond the next Council meeting.

The representative of Chile said that Chile supported the establishment of a working group. He considered, however, that a solution to the problem of trade in domestically prohibited goods and other hazardous substances already existed in the General Agreement. Article XX,

which provided for contracting parties' derogation from GATT obligations when it came to taking measures "necessary to protect human, animal or plant life or health", could throw considerable light on this question and deserved careful examination.

The representative of the European Communities said that the matter at hand was delicate and that the Council should avoid taking hasty decisions. Beyond that, the Council was a sovereign body which did not have to receive orders, especially if they emanated from a different process, and the CONTRACTING PARTIES alone, at their regular Session, could dictate what had to be done or taken into consideration. Anything else was merely wishful thinking, as the Council had no guideline or order to take from any outsider.

The Council took note of the information by the Chairman, of the statements and of the draft decision in C/W/580, and agreed to revert to this item at its next meeting.

9. United States - Increase in the rates of duty on certain products of the European Economic Community (Presidential Proclamation No. 5759 of 24 December 1987)
- Communication from the European Communities (L/6438)

The representative of the United States said that before the Council considered this item, he wanted to ask the representative of the European Communities if he had heard the latter use the word "condemnation" in the discussion prior to approval of the Council's Agenda for the present meeting.

The representative of the European Communities replied that he had not. He then said that in no case could an institution like GATT stand as a tribunal of justice and condemn any contracting party. Outside GATT, however, less diplomatic language was often used by politicians and statesmen. He reiterated that the Community was not embarked on a campaign against the United States; it was simply trying to ensure that all contracting parties acted correctly in order not to endanger the system. The Community had taken note of all that had been said in the earlier discussion prior to approval of the Agenda, in particular of the Director-General's statement to the effect that "there was no exception in the General Agreement which could justify discriminatory import tariffs imposed for the particular purpose of inducing another contracting party to bring its trade policies into conformity with the General Agreement. The CONTRACTING PARTIES could, however, -- in particular where it was found that a contracting party was maintaining measures contrary to the General Agreement -- be requested to authorize, in accordance with Article XXIII:2, the suspension of obligations towards a contracting party failing to observe its obligations under the General Agreement."[5] The Chairman had closed the discussion by pointing out that there were dispute settlement

[5] See C/163, page 14.

procedures in GATT and that these should be used and allowed to work. This was extremely important. The Community's position was guided by three elements which he quoted from a speech by the President of the European Commission: (1) the Community would be open but not given away; (2) it would continue to resort to GATT in cases of disputes and (3) it would not be intimidated.

In conformity with Article XXIII, the Community had formally asked the Council in December 1988 (L/6438) to make a ruling on the legal issues and to recommend appropriate action in the case of the US unilateral measures announced in the Presidential Proclamation No. 5759 of 24 December 1987. He was now asking the Council formally to take a decision. Such a procedure, even if not often used, was provided for in the General Agreement. Should the Council not be prepared to do this, the Community would be ready to go one step further, and to ask for the establishment of a panel under Article XXIII:2. If this could not be decided immediately, he would ask the United States to agree in principle to the establishment of a panel according to the procedures for cases of urgency as provided for in Paragraph 20 of the 1979 Understanding[6]. Perhaps a case might be made that the Community was as much at fault as the United States, but that was something to be discussed within a panel. If lessons were to be drawn from the earlier discussion prior to approval of the Agenda, it was clear that the least the United States could do would be to agree in principle to such action. Were the United States not to do so, he would have no grounds on which to prevent the Community from taking precautionary retaliatory measures itself, and no way to put a stop to the spiralling escalation of such measures. The Community was asking only for sober and thoughtful support from contracting parties in order to ensure GATT's survival. In his view, the earlier discussion on unilateralism had shaken up contracting parties in a healthy manner.

The representative of the United States said that his delegation welcomed the Community's having brought this matter to GATT and agreed that it should have sober and thoughtful consideration, not just in the Council but in the respective capitals -- including in the European Communities' Commission and in the 12 member States. He appreciated the Community's indication that it might be as much at fault as the United States; that was one of the points he had tried to make in the earlier discussion on unilateralism. In that light, the United States had great difficulty in agreeing to the Community's request, which was to set up a panel to examine only the US measures taken in response to what the United States considered to be an unjustified directive by the Community. The United States found itself in a bind, as its attempts to use GATT procedures -- to obtain a scientific judgement on the Community's directive under the Standards Code[7] -- had been foiled. The United States had found itself with no choice but to take the measures announced in December 1987. This was a difficult situation, but the United States had not given up the hope of resolving it

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

[7]Agreement on Technical Barriers to Trade (BISD 26S/8).

bilaterally, without bringing it to GATT. Thus, on both procedural and practical grounds, the United States felt that a decision at the present time to establish a panel was clearly premature and could unnecessarily complicate the possibility of a settlement.

The representative of Austria said that his delegation had not participated in the earlier discussion on unilateralism prior to approval of the Agenda because it preferred to express its views under the present item. According to the Community's communication in L/6438, the United States had neither requested nor received GATT authorization for measures which the Community believed to be contrary to Articles I and II of the General Agreement. His Government was seriously concerned about any unilateral measure introduced without prior authorization of the CONTRACTING PARTIES. Such measures infringed GATT disciplines and compromised the multilateral legal system. Austria was also concerned that the Uruguay Round negotiations were in a difficult stage at present. It was therefore of paramount importance that participants in those negotiations avoid all measures which could negatively affect the negotiating process. The dispute at hand should not create a climate which could damage the negotiations. Austria appealed to the parties concerned to use GATT's dispute settlement mechanism, which had often proved its value in providing for security and predictability in the multilateral trading system. In Austria's view, a contracting party which considered that its GATT benefits were being nullified or impaired had a right to a panel. His delegation supported the request for a panel if the consultation process had been exhausted without a mutually satisfactory solution.

The representative of the European Communities said he wanted to show that he was not a "mechanical" representative to GATT without soul or intelligence; he was trying to find a solution to this problem. The United States and Austria presumed in their statements that the Council had already decided not to grant the Community's request that it take a decision on the unilateral measures, but that was perhaps going a bit too fast. The Council should take a formal decision on this, so that he would have a line of reasoning to follow. He had expected such a reply from the United States and could modify somewhat his own scenario. He recalled that numerous bilateral discussions had been held on this matter, including at Ministerial level. Now was not the time to play procedural games. He would, if necessary, ask the Secretariat to comment on the following: there was no requirement in the General Agreement that formal consultations under Articles XXII or XXIII must be held prior to the establishment of a panel; Paragraph 6 of the 1979 Understanding said only that "contracting parties should attempt to obtain a satisfactory adjustment of a matter in accordance with the provisions of Article XXIII:1 before moving to Article XXIII:2" or requesting a Council ruling or recommendation. If contracting parties were not sufficiently flexible to be innovative and pragmatic, he suggested that the US line of reasoning be followed, and that the Council immediately suspend its meeting to allow the two parties to hold Article XXIII:1 consultations.

The representative of the United States said that his delegation was prepared to have the Council meeting suspended in order to allow for such consultations as long as they were scheduled after the parties' Ministers met at the end of the following week.

The representative of the European Communities said that since the United States could not agree to hold bilateral consultations at the present meeting, the Community was resigned to awaiting the outcome of this discussion. If, however, the Ministers on both sides reached agreement on this matter, the Community would withdraw its request for a panel. That request did not signify any prejudgement of this matter by the Community or endanger the meetings of Ministers aimed at resolving this problem.

The representative of Canada recalled that his country's position on the substance of this matter had been set out in the December 1988 Council meeting. It appeared that little had changed since then. Nevertheless, Canada wanted to clarify its views, especially since the Community had at one point suggested that the United States was the only contracting party objecting to the Community's ban. This was clearly not the case. Canada, for one, had an important trade interest in this issue, and considered the Community's ban to be inconsistent with its GATT obligations, as it constituted an excessive and unjustifiable approach to the problem of ensuring consumers hormone residue-free meat. His delegation had actively supported the US request that this issue be examined under the Standards Code, but this had been blocked by the Community. In his Government's view, and in that of the international scientific community, growth hormones currently approved for use in beef production, if properly used, were completely safe. Nevertheless, the United States had taken a unilateral trade action, and Canada had made it clear that it did not favour this type of action. Therefore, it supported in principle the Community's right to request a panel in this case, and supported the establishment of such a panel at the present meeting. Should such a panel be set up, Canada reserved its rights to make a submission to it. His delegation hoped that the scheduled meeting between Ministers would help to resolve this issue.

The representative of the European Communities, in response to Canada's statement, recalled that in discussions on dispute settlement at Montreal in December 1988, the United States alone had opposed the inclusion of references to unilateralism in the heading of the text.

The representative of Chile said that his delegation supported the establishment of a panel in this case. Chile's statement in the earlier discussion on unilateralism, prior to approval of the Agenda, applied equally to the item at hand.

The representative of Nicaragua said that the US unilateral measures did not affect the Community alone, but went against the very core of the multilateral trading system which all contracting parties wanted to maintain and improve. The taking of unilateral measures without first going through the GATT dispute settlement procedures was a clear-cut violation of GATT commitments. The Community had formally asked for a

panel to examine this matter, and Nicaragua had always supported the right of any contracting party to have a panel established, as well as all action being taken to improve dispute settlement within GATT. The United States had strongly supported time limits for dispute settlement, and should bear this in mind in the present situation and accept immediately the establishment of a panel. About 50 contracting parties had supported the establishment of a panel in the case of the unilateral measures taken by the United States against Brazil;[8] the United States alone had opposed this. The Chairman's conclusion that there was no consensus on that matter had been a tacit recognition of the right of one contracting party to a veto and to act outside GATT's rules and regulations. All contracting parties were supposed to be equal in their rights and obligations, but it seemed that some were more equal than others. The treatment of Brazil's request showed that GATT's dispute settlement procedures worked only when a large contracting party complained against a small one. When a smaller country complained against one of the large trading partners -- for example, Brazil or Nicaragua against the United States -- there seemed to be a right of veto for the more powerful. Nor did the system work when two large contracting parties complained against each other, as in the present case. All of this emphasized the need to improve the functioning of GATT and its dispute settlement system.

The representative of the United States said the statements by Chile and Nicaragua showed that they had heard only the Community's complaint about US retaliatory measures and nothing about the Community's action which had been the reason for those measures. To some extent, Canada had done the same thing. The United States appreciated the latter's strong support for its concerns about the Community's directive, but Canada seemed to have supported a solution which addressed only one half of this two-fold problem. There was wide-spread discussion within the United States concerning the world trading environment, with references to a "level playing field". He asked how the Council could expect him to tell his authorities that nothing could be done in GATT about the Community's ban but that the US measures, taken in reaction to that ban, would be scrutinized. That was a completely unacceptable solution to a complex problem. He repeated that it would be premature to set up a panel at the present meeting.

The representative of Jamaica recalled the chronology of consideration in GATT of the Community's ban. Jamaica's understanding was that signatories of the Standards Code had assumed even more stringent obligations than those assumed under the General Agreement. Why had the United States and the Community taken on these obligations if they did not respect them? While some contracting parties held that the Council had no authority to review the activities of the Tokyo Round Committees and Councils, the Council was now -- and quite rightly -- being asked to look at the case at hand. Perhaps there was a grey-area to be examined in the Community's case regarding the unilateral measures; thus it was not a question of the Council's making a ruling in a clear-cut case. Contracting

[8] Item no. 3.

parties had to find a way for the multilateral system to help the parties to this dispute to avoid doing damage to their own interests and to those of the system itself. In Jamaica's view, the Council had three options: (1) to refer the two parties back to the Committee on Technical Barriers to Trade; this would allow for a scientific examination of the justification for the Community's ban -- an important element in this dispute; (2) to make a legal ruling, as requested by the Community and (3) to establish a panel. There was no automaticity in establishing a panel; the Council had to agree to do so. Therefore, Jamaica suggested that the parties go back to the Committee on Technical Barriers to Trade and try to settle the matter there. Should those efforts fail, the matter could be brought back to the Council, perhaps in a more concrete form.

The representative of Nicaragua said that in practice, consensus seemed to mean that all the major contracting parties agreed -- a sort of sui generis concept of consensus. He recalled that in the first case Nicaragua had brought against the United States, the Panel[9] had made recommendations with which the United States had not complied. The second case, involving a unilateral and illegal trade embargo,[10] had received treatment in the Council similar to Brazil's complaint at the present meeting. In the case of the embargo, the United States had turned a deaf ear to arguments against its measure, which had been taken for political reasons having nothing to do with GATT. He reiterated that Nicaragua firmly condemned unilateralism and any measure which endangered the multilateral trading system. His country reaffirmed its belief in GATT's dispute settlement system, but believed that the system should be improved, as the cases which had arisen at the present meeting proved that it was not sophisticated enough to operate in all circumstances.

The representative of Chile recalled that in the earlier discussion on unilateralism prior to approval of the Agenda, his delegation had said that the matter at hand had two aspects. The Community had refused the establishment of a panel of experts under the Standards Code, and the United States had imposed unilateral retaliatory measures without the CONTRACTING PARTIES' prior authorization. Chile had supported the US request for a panel of experts in the Committee on Technical Barriers to Trade, and had supported the Community's request for a panel in the Council. There was nothing to prevent the establishment of both panels. Furthermore, many contracting parties were not signatories of the Standards Code and thus had the right to be informed in the Council of what happened on this issue.

The representative of Brazil recalled that much had been said about the present item during the earlier discussion prior to adoption of the Agenda. Brazil had been among those expressing concern about the

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[9]Panel on United States' Imports of Sugar from Nicaragua (BISD 31S/67).

[10]Panel on United States' Trade Measures Affecting Nicaragua (L/6053).

escalation of unilateral measures and the threat this posed to the multilateral system. The only way to solve disputes of this nature was through the appropriate mechanisms laid down in the General Agreement and related instruments. Therefore, Brazil would have preferred to have seen this matter examined in the Committee on Technical Barriers to Trade through the dispute settlement mechanisms of the Standards Code. Unfortunately, the Community had refused that. However, one mistake did not justify another. Brazil firmly deplored any unilateral and discriminatory action and could unequivocally support the establishment of a panel to examine this matter. His delegation reserved the right to make a submission to a panel should one be set up.

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

10. United States - Agricultural Adjustment Act
- Thirty-first Annual Report by the United States (L/6442)

The Chairman recalled that under the Decision of 5 March 1955 (BISD 3S/32) the CONTRACTING PARTIES were required to make an annual review of any action taken by the United States under the Decision, on the basis of a report to be furnished by the United States. The thirty-first annual report by the United States was now before the Council in document L/6442.

The representative of the United States said that the report was being submitted in compliance with the requirements of the Waiver. The United States would be willing to have it examined in the working party already established to review the issue.

The representative of the European Communities said that the Community requested a new working party to examine this new report. The Community was seriously concerned that the program of discussion of successive US annual reports was falling behind. A situation had already arisen in 1988 where two annual reports had to be examined, an innovation in itself which was now complicated by yet another report when not enough time had been found to examine the preceding two. It would appear that that matter was not treated with sufficient attention, or too lightly. The Community wanted to emphasize its serious concern that the attention given to this important matter was insufficient. He asked the Council to shoulder its responsibility in this area, and the United States to recall the obligations to which it had subscribed and the assurances it had given in relation to the Waiver granted in 1955.

The representative of Canada said that his delegation merely wanted to note that the United States had taken two major steps related to products covered under Section 22 since the circulation of the current report. The first had been the US agreement to undertake a review of its ice cream quota; the second involved the main product under Section 22, namely sugar. The sugar-containing products quota had been reclassified and placed under the restricted sugar quota and thereby under the Headnote

authority. Canada gave notice that it intended to raise these issues in the context of the working party to be established, and expected the United States to provide an update on them at that time.

The representative of Australia said that in order to solve the "mechanical" problem before the Council, his delegation would propose that consideration of the 31st annual report now before the Council be deferred until the current working party had completed its examination of the twenty-ninth and thirtieth reports.

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

11. United States - Restrictions on the importation of agricultural products applied under the 1955 Waiver and under the Headnote to the Schedule of tariff concessions (Schedule XX - United States) concerning Chapter 10
- Recourse to Article XXIII:2 by the European Economic Community (L/6393)

The representative of the European Communities recalled that at the December 1988 Council meeting, the Community had asked the Council to establish a panel to examine the matter at hand. He reiterated that request.

The representative of the United States said that the United States considered this issue as unfortunate because nothing had changed since it had first been brought to the Council. His Government's position had been articulated and it had not changed because there had been no change on the other side. The United States was not prepared to agree to the Community's request, as US concerns had still not been satisfactorily resolved. The Community had failed to clarify the basis for its complaint. Without such clarification, the United States saw it as a spurious action and was convinced that it was an unnecessary waste of resources.

The representative of the European Communities said that his delegation had taken some pains to set out the manner in which it was approaching this problem. The Community wanted a panel to examine the US waiver, its application made in the sugar sector being the most evident example of impairment or nullification of GATT benefits and rights accruing to the Community. In that sense, the Community had made it clear that the matter was sufficiently spelled out to allow the panel proceedings to go ahead, and found it regrettable that after all this time, the situation remained unchanged. The Community asked that the matter be brought back to the Council after the United States had had time to consider it further.

The representative of Jamaica said that his delegation did not agree with the United States' position. His delegation did not see a link between panel requests, which should be examined each on its own merit.

The representative of Nicaragua reaffirmed Nicaragua's position that any contracting party had the right to a panel, a position which had been highlighted at the December 1988 Ministerial meeting of the Trade Negotiations Committee in Montreal. His delegation hoped this view would be endorsed by that body's forthcoming meeting in April, with a view to enhancing GATT's multilateral dispute settlement system.

The representative of Australia said that he hoped it would be noted that the debate on some of the previous items had been treated by some delegations with deliberate silence.

The Chairman noted that in the earlier discussion on unilateral measures, before approval of the Agenda, many points had been made which were relevant to the present discussion.

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

12. United States - Import prohibition on ice cream from Canada - Recourse to Article XXIII:1 by Canada (L/6444)

The Chairman recalled that at its December 1988 meeting, the Council had considered this item and had agreed to revert to it at the present meeting.

The representative of Canada recalled the sequence of events and factors which had led to its recourse to Article XXIII:1 and which he had described at length at the December 1988 Council meeting. Canada expected that the review being carried out by the United States would find that the circumstances of the case had indeed changed. The United States had also advised in December that they would not change the allocation of the quotas before the completion of the review. Canada considered that the allocation was inconsistent with the United States' Article XIII obligations. At the Article XXIII:1 consultation in January 1989, Canada had requested the United States to provide details on the timing of the internal review. At that time, the United States had been unable to provide this information. Canada called upon the United States to provide this information at the present Council meeting.

The representative of the United States said that only two weeks earlier the United States had held consultations with Canada concerning the US import quota on ice cream. At that time it had indicated that a task force had been established within the US Department of Agriculture (USDA) to examine Canada's contention and concerns. Under US law, the USDA was required to examine whether there was reason to believe that a change in the quota could be accomplished without materially interfering with the US dairy price-support program. If the USDA determined that this was the case, the US International Trade Commission would then be charged with the task of conducting an investigation and making recommendations to the President. Only then could the President act on this matter. The United States was addressing the concerns raised by Canada in the consultations as expeditiously as possible.

The representative of Canada said that as the information his delegation had requested would not be forthcoming at the present meeting, and in the absence of a commitment by the United States as to when it might be provided, his delegation had no choice but to ask that the item be placed on the agenda for the next meeting.

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

13. Japan - Trade in semi-conductors
- Follow-up on the Panel report (L/6309)

The Chairman recalled that at its December 1988 meeting, the Council had considered this item and had agreed to revert to it at the present meeting.

The representative of Japan said that Japan had a clear record of having implemented all panel recommendations without undue delay, even though some of them had been politically and economically very sensitive and difficult. In fact, a report on Japan's implementation of the panel recommendations on customs duties, taxes and labelling practices on imported wines and alcoholic beverages would be submitted later at the present meeting.[11] As to the Panel report on trade in semi-conductors (L/6309), his Government was now studying concrete measures which it would implement following the recommendations of the Council. Since the adoption of the Panel report, Japan had been examining how GATT-inconsistent elements could be eliminated from the measures relating to third-country monitoring. However, because of the ambiguity of the Panel's conclusion, as he had pointed out at the Council meeting in May 1988, this was not an easy task.

More specifically, the Panel had not agreed to the European Community's contention that prevention of dumping was an exclusive right of importing countries, and had not denied, as such, actions taken by exporting countries in order to prevent dumping. At the same time, the Panel had concluded that Article VI did not justify restrictive measures which were inconsistent with Article XI, and that the complex of measures taken by Japan to implement third-country market monitoring constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below cost, and was thus inconsistent with Article XI:1. However, the Panel had failed to point out what specific aspect of each individual measure was inconsistent with GATT. For this reason, there were many points in the report which gave rise to various questions concerning the examination of specific measures, and, therefore, contacts with some countries involved had been found necessary. In spite of these difficulties, his Government intended to report to the Council at its meeting in March the concrete measures it would take for the implementation of the Panel report.

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[11] Item no. 21.

The representative of the European Communities said that his delegation welcomed Japan's statement that one could expect a full and detailed report at the March Council meeting, and a considered report in light of the internal discussion as to the manner in which Japan intended to implement the Panel's recommendations. The Community looked forward not only to hearing full explanations but indeed to speedy implementation of the recommendations thereafter.

The Council took note of the statements and agreed to revert to this matter at a future meeting.

14. Accession of Bulgaria
- Consultations on procedural aspects of the Working Party

The Chairman recalled that at the Council meeting on 20 October 1988, it had been indicated that further consultations on this matter would be held. He informed the Council that such consultations had taken place and it was his view that further consultations were needed. He suggested that the Council revert to this item at its March meeting.

The Council took note of this information and so agreed.

15. Communication from the United States concerning the relationship of internationally-recognized labour standards to international trade

The Chairman recalled that at the December 1988 Council meeting, the Director-General had made a statement on this matter under "Other Business". He said that the Director-General's discussions with delegations principally concerned had not been concluded, and suggested that the Council revert to this item when the Director-General had completed those discussions.

The representative of Nicaragua congratulated the United States for its concern for workers' rights and compliance with international labour standards. Nevertheless, Nicaragua believed that the GATT was not adequate to deal with this matter and that there was an older and more experienced organization -- the International Labour Organization (ILO) -- which had been dealing with it since 1919 when the Organization's first convention had been approved. He drew the Council's attention to the fact that the United States, which was now showing its concern in this area, was the country that had ratified the least number of ILO conventions.

The representative of the United States said that the United States remained committed to seeing this issue examined in GATT and looked forward to the message or contribution that the Director-General might have at a future Council meeting.

The Council took note of the information from the Chairman and of the statements.

16. Appointment of presiding officers of standing bodies

The Chairman recalled that at the December 1988 Council meeting, he had announced his intention to carry out consultations, open to all delegations, regarding the appointment of presiding officers of standing bodies for the current year. He said that at his consultations, Mr. de la Peña (Mexico) had been proposed as Chairman of the Committee on Tariff Concessions, Mr. Tuusvuori (Finland) as Vice-chairman of the same Committee, Mr. Broadbridge (Hong Kong) as Chairman of the Committee on Budget, Finance and Administration, and Mr. Boittin (France) to continue as Chairman of the Committee on Balance-of-Payments Restrictions.

The Council took note of the proposed nominations and agreed to appoint the above-named persons to those offices.

17. United States - Countervailing duties on non-rubber footwear from Brazil

The representative of Brazil, speaking under "Other Business", said that on 6 October 1988, following a request from Brazil,[12] the Committee on Subsidies and Countervailing Measures[13] had established a panel to examine the imposition of countervailing measures by the United States on certain imports of Brazilian footwear.[14] On 13 December 1988, the Panel's Chairman had requested both parties to present their written submissions no later than 25 January 1989. In conformity with that request, Brazil had forwarded its written submission on that date, but the United States had not done so nor had it provided Brazil with an early warning of its difficulties in meeting the time limit. In the light of such an unexpected attitude, his delegation wished to inform the Council of this unfortunate development in the hope that the United States would comply promptly with its obligation and thereby allow for the speedy conclusion of the Panel's work. In bringing this matter to the Council's attention, Brazil wanted to underscore that the United States' behaviour was neither conducive to an expedited dispute settlement nor to the strengthening of those procedures.

The Council took note of the statement.

18. United States - Taxes on petroleum and certain imported substances - Follow-up on the Panel report (L/6175)

The representative of Canada, speaking under "Other Business", recalled that the "Superfund" Panel report (L/6175) had been adopted

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[12] SCM/87.

[13] SCM/40/Add.1.

[14] SCM/Spec/21.

in June 1987. This was far from the first time that the question of its implementation had been before the Council, and yet no clear indications had been received from the United States of its plans for implementing the Panel's recommendations. His delegation wanted to hear from the United States at the present meeting as to the concrete measures it intended to take in this respect.

The representative of Mexico said that his delegation could not remain silent when a question of such great interest was discussed. Mexico, too, was very much interested to hear answers to Canada's request for information.

The representative of the European Communities said that this point had been on the Council's agenda at the Community's request on a number of ealier occasions. The last time it had come up, the Community had said it would not go on pressing the United States, in order to allow for consultations to proceed and to allow the parties concerned to find an amicable solution. While these consultations were leading to an amicable solution, the Community supported Canada's request for information so that the matter be kept before the Council.

The representative of Nigeria said that this Panel report was also of interest to his delegation. He joined the request to the United States to submit information.

The representative of Kuwait said that his delegation also wanted to join the request for information.

The representative of the United States said that at recent hearings of the Ways and Means Committee of the US House of Representatives, the Administration's witness had urged the Congress to enact remedial legislation for this important issue. The newly appointed US Trade Representative continued her predecessor's efforts to bring the United States into conformity with its international obligations with regard to this issue.

The Council took note of the statements.

19. United States - Customs User Fee
- Follow-up on the Panel report (L/6264)

The representative of Canada, speaking under "Other Business", recalled that the Customs User Fee Panel report (L/6264) had been adopted at the Council meeting in February 1988. More than a year had gone by, yet the US Customs Service was still collecting fees in amounts that had been found inconsistent with the provisions of the General Agreement. His delegation wanted to hear from the United States at the present meeting as to the concrete measures it intended to take to implement this Panel report.

The representative of Mexico said that his delegation, too, was very interested to hear answers to Canada's request for information.

The representative of the European Communities said that the Community supported Canada's request for information, so that the matter be kept before the Council.

The representative of the United States said that at recent hearings of the Ways and Means Committee of the US House of Representatives, the Administration's witness had urged the Congress to enact remedial legislation for this important issue. The newly appointed US Trade Representative continued her predecessor's efforts to bring the United States into conformity with its international obligations with regard to this issue.

The Council took note of the statements.

20. Canada - Measures on exports of unprocessed salmon and herring - Follow-up on the Panel report (L/6268)

The representative of the United States, speaking under "Other Business", said that his delegation had to raise again the issue of compliance by Canada with the findings of a panel report adopted by the Council. He recalled that the Panel in question had found Canada's export restrictions on unprocessed fish to be inconsistent with its GATT obligations. The United States had expressed its concern before the Council that Canada would replace this illegal restriction with a landing requirement having the same effect. Canada proposed to implement a landing requirement which would create a new trade barrier. The United States wanted to be on record that it could not accept a régime of a landing requirement that replaced and, in effect, expanded GATT-illegal export restrictions. To do so would be unfair to US processors, would make a mockery of the dispute settlement process and would undermine domestic support for improvements to the GATT system which were sought in the Uruguay Round. In addition, the beginning of a new fishing season was fast approaching. If the issue were not resolved quickly, the damage done by these measures to US fish-processing interests would again be magnified. His delegation sought Canada's reaction to its concerns.

The representative of Canada said that his delegation had informed the Council that Canada would consult closely with the United States as to the measures Canada would put into place to implement the Panel's recommendations. Those bilateral consultations were still going on and Canada would inform the Council of the results of these consultations as soon as possible. He assured the Council that whatever action Canada took, it would be in conformity with Canada's obligations under the General Agreement.

The Council took note of the statements.

21. Japan - Customs duties, taxes and labelling practices on imported wines and alcoholic beverages
- Follow-up on the Panel report (L/6216, L/6465)

The representative of Japan, speaking under "Other Business", informed the Council of the enactment by the Diet on 24 December 1988 of a tax reform package which included a revision of the Liquor Tax Law, effective 1 April 1989. This revision had been made in order to implement the recommendations in the Panel report (L/6216) adopted by the Council on 10 November 1987. The main points of the revision were (1) to abolish the ad valorem tax on whiskies/brandies, wines and certain other alcoholic beverages, and to abolish the "grading system" for these beverages as well as taxation according to the extract content of "liqueurs", etc.; and (2) to reduce considerably the existing differences between taxes on whiskies/brandies and "shochu" by reducing the rate of the specific tax, based on quantity, on whiskies/brandies, and by raising that on "shochu". For more detailed information, he referred contracting parties to Japan's recent notification in L/6465.

The representative of the European Communities said that the Community appreciated Japan's considerable efforts to bring its tax laws into conformity with its GATT obligations. However, the measures announced did not amount to a full implementation of the Council's recommendations, in particular regarding the treatment of directly competitive and substitutable products, where differences in treatment remained which were not, in the Community's view, de minimis. The Community expected that this aspect of the situation would, in due course, also be rectified.

The representative of Finland said that his delegation had taken note of Japan's statement and might want to come back to this matter at a future Council meeting.

The representative of Japan said that Japan's view differed from the Community's regarding interpretation of "de minimis" in relation to competitive products.

The representative of Jamaica asked whether Japan felt that other alcoholic beverages derived from tropical raw materials could be included in the list of items subject to the tax reform.

The representative of Japan suggested that Jamaica take up its request bilaterally with Japan.

The representative of Jamaica said that his delegation would do so. He recalled that in the Tokyo Round negotiations Jamaica had requested concessions on rum and rum liqueurs.

The Council took note of the statements.

22. Japan - Early implementation of offer on tropical products

The representative of Japan, speaking under "Other Business", informed the Council that, in view of the importance of trade in tropical products

for a large number of developing countries, and of the suggestion that each participant in the Uruguay Round implement its offers on tropical products prior to the meeting of the Trade Negotiations Committee (TNC) in April, his Government had decided to implement, as of 1 April 1989, its offers on tropical products, subject to the necessary domestic procedures including the approval of the Diet. These offers involved 179 items on a tariff-line basis. Many were tariff cuts, but tariffs were to be eliminated on 63 items. The main offered items included fresh bananas, coffee, palm-kernel oil, coconut oil and rattan furniture.

The Director-General said that the TNC Chairman's interpretation of the Ministers' decision in Montreal was that the first week of April was the last date for the TNC's meeting, but that this did not mean that a package could not be completed earlier.

The representative of Thailand, on behalf of the ASEAN contracting parties, welcomed and appreciated Japan's announcement, which they saw as a move in the right direction. They looked forward to early implementation of offers on tropical products by other countries, in line with the 1986 Punta del Este Declaration.

The Council took note of the statements.

23. Hungary - Recently adopted legislative changes and economic measures (C/W/583)

The representative of Hungary, speaking under "Other Business", provided information on certain recently-adopted legislative changes and economic measures in his country. He said that these steps constituted a part of his Government's overall economic reform program aimed at accelerating the structural adjustment process and increasing the efficiency in the economy. It was expected that the new measures would effectively contribute to the streamlining of the economy by ensuring equal competitive conditions for all economic operators, irrespective of the form of ownership or nationality. These changes also brought about the phasing out of previously-held special privileges and monopolistic positions in all sectors of the economy. He referred to the measures directly affecting foreign trade, namely, to the statutory right of any enterprise to engage directly in foreign trading activities and to the substantial reduction of the number of products which were exempted from this general rule. He said that the previously-declared state monopoly of foreign trade had thus ceased to exist in practical terms. He also referred to other important legislative changes which would widen the possibilities for foreign direct investments in Hungary. Hungary believed that these steps would contribute to the strengthened market orientation of its economy.

The Council took note of the statement.[15]

[15] See C/W/583.