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on 24 April 1991

Chairman: Mr. Lars E.R. Anell (Sweden)

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1. Committee on Balance-of-Payments Restrictions

(a) Consultation with Yugoslavia (BOP/R/191)

Mr. Boittin, Chairman of the Committee, said that at the full consultation on 19 March, the Committee had welcomed Yugoslavia's action to liberalize its economy and trade in spite of a difficult international environment and domestic problems, and had expressed the hope that pressures on Yugoslavia's balance of payments would not jeopardise this action. It had also appreciated Yugoslavia's regular notifications of its trade measures and had expressed the hope that, in conformity with existing procedures, all subsequent modifications to the measures currently in force would also be notified with a minimum of delay. The Committee had also noted Yugoslavia's expectation that market-opening measures in favour of products of its export interest would contribute to improving its trade and financial system.

The Council took note of the statement, and adopted the report in BOP/R/191.

(b) Simplified consultations with Nigeria, the Philippines, Tunisia and Turkey (BOP/R/190)

Mr. Boittin, Chairman of the Committee, said that at its meeting on 19 March, the Committee had agreed to hold full consultations under Article XVIII:12(b) with Nigeria, the Philippines, Tunisia and Turkey at dates to be established in consultation with the parties concerned.

With regard to Nigeria, the Committee had welcomed the liberalization of its trade and exchange restrictions but had noted that a certain number of restrictions originally instituted for balance-of-payments reasons remained in effect. In welcoming Nigeria's willingness to hold full consultations, the Committee had noted that the Council would be reviewing Nigeria's trade policy in September 1991, and that a good part of the same documentation could be used in preparation of both meetings.

The Committee had congratulated the Philippines for putting its liberalization program into effect under very difficult economic circumstances. Concern had been expressed, however, regarding uncertainties created by a recently imposed 9 per cent import surcharge, and the Committee had invited the Philippines to notify this surcharge to the GATT as soon as possible. It had been decided to hold full consultations keeping in mind these circumstances, and also the fact that the previous full consultation had been held in 1986.

In respect of Tunisia, the Committee had welcomed the new contracting party's efforts to continue its liberalization program despite a difficult economic environment. However, the Committee had noted that a substantial list of restrictions, already notified to GATT, remained in effect, and also that the previous full consultation with Tunisia had been held in 1979. For these reasons, the Committee had welcomed Tunisia's willingness to hold full consultations.

Finally, with regard to Turkey, the Committee had noted that despite substantial liberalization undertaken since that country's previous consultation, certain measures affecting imports gave rise to questions that called for a full consultation.

The Council took note of the statement, and adopted the report in BOP/R/190.

(c) Note on the March meeting (BOP/R/192)

Mr. Boittin, Chairman of the Committee, said that at its meeting on 19 and 21 March, the Committee had discussed the possible need for consultations with India under Article XVIII:12(a), and that he had agreed to continue informal consultations on this matter. He informed the Council that India was now prepared to hold consultations with the Committee under Article XVIII:12(a) in November 1991, according to the normal procedures followed for full consultations (BISD 18S/48). It was understood that the following consultation under Article XVIII:12(b) with India would be held in two years' time, according to the normal rhythm.

The Council took note of the statement and of the information in BOP/R/192.

2. Korea - 1992-1994 Program of liberalization (L/6834)

The Chairman said that this item was on the Agenda at the request of the United States, Australia, New Zealand and Canada.

The representative of the United States said that his Government was deeply disappointed with the scope, substance and quality of Korea's announced liberalization program under its 1989 balance-of-payments (BOP) commitments. While the 1992-1994 liberalization program contained 133 products -- roughly half of the products which had been subject to BOP cover in GATT -- the value of trade in these products was limited, and over 75 per cent of the products on the list were of little or no trade interest to Korea's major trading partners. It appeared that Korea had not complied with its 1989 undertaking to "give all due consideration in drawing up its programs to the interests of other contracting parties in a balanced manner"[1]. Moreover, among the items of importance to the United States which appeared on Korea's list, liberalization of most had been delayed until 1993 and 1994. He said that Korea should provide specific details as to how it would implement its BOP commitment under the 1992-1994 program, specifically as to the applicable tariff rates for the products included. The United States expected Korea to maintain tariffs on these products either at the GATT bound rate, or at the existing level if the rates were unbound. In the light of past problems associated with recently liberalized agricultural products, the United States urged Korea to refrain from imposing other restrictions on the newly liberalized products. It expected Korea to ensure that any phytosanitary, quarantine and food-safety regulations were implemented well before the products were liberalized, and that such restrictions were scientifically justified, in accordance with internationally accepted practices and arrived at in a transparent process. He reiterated the United States' understanding, as also that of the BOP Committee, that the disinvocation schedule did not cover items already covered by dispute settlement proceedings, such as beef.

Noting that Korea had drawn a connection between the handling of trade measures subject to the BOP disinvocation and the results of the Uruguay Round, he said that Korea was obliged under its 1989 commitment to bring its GATT-inconsistent measures into conformity by 1997, irrespective of ongoing efforts in the GATT or the Uruguay Round. The United States strongly urged Korea to consider additional consultations with interested trading parties with a view toward improving the quality of the recently published list, and to provide comprehensive information addressing all aspects of its implementation of its BOP commitment. Pending further clarification from Korea, his Government reserved its GATT rights on this issue, including the right to pursue dispute settlement.

The representative of New Zealand expressed his Government's disappointment with the product list notified by Korea. A number of contracting parties, including New Zealand, had provided Korea with a list of priority items of trade interest to them, to assist Korea to give "all due consideration" to the interests of other contracting parties as it was required to do under its 1989 undertaking. New Zealand was concerned that

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[1] BOP/R/183 and Add.1.

key items of trade interest to it, such as dairy products, frozen squid, and apples, had been either omitted from the list or would be liberalized in a form in which they were not normally traded. The precise definition of an item to be liberalized in 1994 -- frozen lamb -- was also unclear.

He noted that in its communication, Korea had stated that the liberalization program was designed to "phase out restrictions". It was unclear, however, as to how this would be done. New Zealand also did not accept that the liberalization program should have direct linkage to the outcome of the Uruguay Round. Korea's commitment to liberalize all of its remaining BOP restrictions by 1 July 1997 had to remain intact.

New Zealand looked forward to further discussion with Korea on these matters and hoped that it would be possible to expand the content of the announced liberalization program to take into account products of key trade interest to New Zealand, so that the program could truly be described as a phase-out of the restrictions in a generally even manner as required by Korea's undertaking. Pending further discussions and clarification from Korea, New Zealand reserved its GATT rights on this issue and would revert to it at a future meeting, if necessary.

The representative of Australia said that Korea's timely submission of its 1992-1994 liberalization program was a sign of its preparedness to implement its BOP undertaking. He recalled that Korea had undertaken, first, to "phase out its remaining restrictions in a generally even manner" and, second, to "give all due consideration in drawing up its programs to the interests of other contracting parties in a balanced manner". It was on this basis that other contracting parties had agreed to exercise due restraint in the application of their GATT rights in respect of Korea's GATT-inconsistent measures.

He noted that the 1992-1994 program included roughly half of the remaining items for which Korea had BOP cover. It could therefore be argued that Korea had met the first element of its BOP undertaking in a numerical sense. However, Australia was dissatisfied with the low proportion of the items on its own request list that appeared in the program. For example, dairy products, honey and numerous categories of fresh fruit and meat were excluded. In view of the program's inadequate product coverage, Australia considered that it did not meet the second element of Korea's undertaking. Moreover, since Korea's program was presented in furtherance of its undertaking to other contracting parties, Australia believed that Korea should provide greater detail of its intentions than had been the case in the unilateral liberalization programs announced prior to 1989. Contracting parties were entitled to know, in respect of each item, what steps Korea had in mind and the nature of the import régime that would be in place at the conclusion of the process.

Australia was also concerned at Korea's reference to bringing the remaining restrictions "into conformity with the final results of the Uruguay Round agricultural negotiations, including tariffication".[2] There

[2] L/6834, para.3.

should be no confusion between any liberalization obligations Korea might accept in the Uruguay Round and its existing obligation to bring its GATT-inconsistent measures into conformity. Under the latter obligation, Korea had to fully remove all its previous BOP restrictions by 1 July 1997. Australia hoped to consult with Korea to seek further clarification on these matters and an improvement in the product coverage of the announced program. In the interim, Australia reserved its relevant GATT rights, and would revert to this matter at a future meeting, if necessary.

The representative of Canada registered his Government's disappointment with Korea's liberalization program. While efforts had been made to meet Canada's interests, the coverage of the program was not fully consistent with either the letter or the spirit of the 1989 BOP agreement. Canada had expected that more items of interest to it would be included in the program and that they would be liberalized more evenly through the three-year period. He hoped that the door was not closed to improvements in this regard.

Echoing Australia's concern, he said that it was unclear from Korea's intention to "phase out restrictions" what the situation in market-access terms would be for items on the list. As to Korea's reference to bringing the remaining restrictions into conformity with the final results of the Uruguay Round agricultural negotiations, including tariffication, Canada believed that Korea's BOP disinvocation commitment was separate from the Uruguay Round process. It therefore expected Korea to have implemented fully its BOP undertaking by the agreed date of 1 July 1997. His delegation urged Korea to consult on these questions as soon as possible with interested parties. The 1989 BOP agreement was a balanced one, reached after give and take on all sides. In Canada's view it would be fully appropriate for Korea to consult with its trading partners about what it proposed to do, in order to ensure that all concerned were aware of where matters stood. Hopefully, such consultations could obviate further action in the Council.

The representative of the European Communities welcomed Korea's notification. Procedurally, Korea had lived up to its 1989 undertaking. As to substance, the Community believed this was a limited first step and one that lacked clarity. The Community shared others' concerns as to the actual trade régime that would apply to the products for which liberalization had been announced, and agreed that consultations should be held to clarify these issues. The Community reserved all its rights in view of such clarification.

The representative of Iceland said that his Government found encouraging signs regarding Iceland's interests in Korea's 1992-1994 program. Iceland was disappointed, however, that some very important items had been left out and urged Korea to give further due consideration to the other products of Iceland's interest, with the aim of their early liberalization.

The representative of Korea said that the product coverage reflected in the 1992-1994 program was the result of Korea's best and maximum efforts to meet the obligation in its 1989 undertaking. Korea had liberalized 243

agricultural products over the previous three years, which left 283 products, at the 10-digit HS level, to be liberalized in the period 1992-1997. Many of these products represented major sources of income for its farmers, and Korea had faced great difficulty in selecting products for further liberalization. In spite of serious domestic opposition by farmers and farm organizations, Korea had selected 133 products, or 47 per cent of the remainder, to be liberalized in the 1992-1994 period. Upon the full implementation of this program in 1994, 92 per cent of the remaining agricultural products would have been liberalized. Also, in accordance with Korea's undertaking to liberalize in a generally even manner, 43 products would be liberalized in 1992, 45 in 1993 and 45 in 1994. He noted that the program included 64 of the 138 products which interested contracting parties had notified to Korea as being of priority interest to them. His Government believed that the interests of major trading partners had been given all due consideration and reflected in the program. For certain politically sensitive items, such as dairy and meat products, liberalization was extremely difficult at this stage, and these would have to be carried over to the next liberalization program. Korea hoped that the efforts it had made in drawing up the current program would be recognized and appreciated.

As to the link between Korea's BOP undertaking and the Uruguay Round agriculture negotiations, he recalled that Korea had undertaken to eliminate its remaining BOP restrictions or otherwise bring them into GATT conformity by 1 July 1997. Therefore, bringing the remaining restrictions still in place at the time of completion of the Uruguay Round into conformity with the final results of the Round would not be contrary to Korea's undertaking. By proposing to link its 1992-1994 liberalization program, as well as the 1995-1997 program, with the Uruguay Round results, Korea had neither the intention to weaken the results of the 1989 BOP consultation nor to delay or reverse the trend of liberalization. Recalling that 150 products remained to be liberalized in the 1995-1997 period, he said this proposal would bring the import restrictions on those items into conformity with the Uruguay Round results within the first year of its implementation, and would contribute considerably to an earlier liberalization of Korea's agricultural market than that envisaged in the BOP consultation. He hoped all would understand that Korea's intention was to advance trade liberalization through tariffication, in line with the spirit of the Uruguay Round, and not to delay the liberalization process. If the Uruguay Round agriculture negotiations failed to produce any results, the original liberalization schedule would still be followed by Korea.

As to the import régime for the liberalized products, he said that under the current system, imports of products under restriction had to be approved by the authorities concerned and that a list of products under restriction was announced annually. Products covered by the liberalization program for each year would be imported free of such approval requirements and would not be subject to quantitative restrictions. If and when an importer opened a letter of credit with the correspondent bank, imports would be approved automatically.

With regard to requests for further consultations between Korea and other interested contracting parties on these issues, he emphasized that his Government had faced various obstacles and difficulties in establishing this program and that the number of products covered therein was virtually a maximum outcome at the present stage. He would, however, convey the requests to his authorities, together with the comments made at the present meeting.

In conclusion, he said that since joining the GATT, Korea had fully supported the multilateral trading system by fulfilling its obligations under the General Agreement. Its decision in 1989 to disinvoke BOP cover was one of the important steps in fulfilling its commitment to trade liberalization. While a transition period had been accorded Korea to phase out its remaining restrictions, eliminating them would be a painful process, especially as after a brief period with a BOP surplus, Korea was now being faced with a sizeable trade deficit. Moreover, agriculture continued to be a politically sensitive sector in Korea, coupled with an inherent structural weakness. Despite these obstacles, Korea would nevertheless do its best to abide by its GATT commitments; it was, in fact, already contributing to the world agricultural trade by importing 60 per cent of its domestic consumption.

The Council took note of the statements.

3. Romania - Reform for transition to a market economy
- Communication from Romania (L/6838)

The representative of Romania said that his Government's reform process was aimed at putting into effect its firm and irreversible option for a market economy to be implemented in the context of a politically, socially and economically democratic society. Hence the global character of the Government's reform program. In spite of the extremely critical economic situation inherited from the communist dictatorship, and the costs and contradictions generated by the process, Romania remained committed to its objective as evidenced by the fast-paced elaboration and application of the program.

At the basis of this pragmatic program -- designed over a period of only months -- lay a comprehensive process of enterprise reform and the expansion of the private sector in the economy, as well as accelerated land reprivatization. An important factor fuelling the reform process was the inflow of foreign investment, and a new law promulgated in April was designed to make such investment attractive and contribute to the restructuring of important sectors of the economy. Another notable element was the liberalization of prices and salaries. Furthermore, comprehensive rethinking of the financial, fiscal, banking and credit systems was also underway.

Romania was totally committed to GATT rules and disciplines in building its new trade policy, which would be based on an effective customs tariff with a modern structure, a liberal import and export régime based on a flexible licensing system, and a meaningful mechanism of export

incentives. Romania viewed trade policy as the driving force in the structural adjustment of the economy through enhanced competition, and as a pre-requisite for a market economy. Romania hoped soon to acquire the needed experience and results in order to consider the renegotiation of its Protocol of Accession. The transition to a market economy was a complex, difficult and painful process, and Romania hoped to count on the goodwilled assistance of the international community to facilitate the process.

The representative of the European Communities encouraged Romania to continue the announced reform process, the success of which would depend on how credible the actual implementation of the program appeared to be in achieving a market-based system. The democratization of the society, which went hand in hand with this process, was also an important element. These reforms would enable Romania to strive towards economic well-being to the benefit of its population.

The Council took note of the statements.

4. Harmonized system
- Request by Chile for extension of waiver (C/W/669, L/6840)

The Chairman recalled that the CONTRACTING PARTIES had granted Chile a waiver in December 1989 in connection with its implementation of the Harmonized System (HS). He drew attention to Chile's request for an extension of the waiver until 31 December 1991 (L/6840), and to a draft decision which had been circulated to facilitate consideration of the matter (C/W/669).

The representative of Chile said that his Government was working intensively to complete the preparation of the documentation required under the procedures of Article XXVIII. Technical difficulties had prevented Chile from completing this work and distributing the document to contracting parties. For these reasons, Chile requested an extension of its waiver until 31 December 1991.

The representative of the United States said that, while not opposed to the extension, the United States noted that Chile had some below-ceiling bindings and a number of initial negotiating rights in its Schedule which required transposition to the HS nomenclature. Chile had not, however, circulated the documentation necessary to complete the transposition, and his delegation was pleased that Chile had indicated its intent at the present meeting to do this without further delay.

The representative of the European Communities said that the Community reluctantly agreed to the extension. As Chile had offered to circulate the necessary documentation rapidly, he suggested that this be done before the next meeting of the Committee on Tariff Concessions, so that one would have a date to aim at for examining that documentation.

The representative of Chile said that his Government would respect its GATT commitments and do everything within its power to conclude the preparation of the required documentation as soon as possible. Chile was

not, however, in a position to set an early date for completing this process and had, for this reason, requested an extension of its waiver until 31 December 1991.

The Chairman stated that the documentation still to be submitted and any negotiation or consultations that might be required should follow the special procedure relating to the transposition of the current GATT concessions into the HS, adopted by the Council on 12 July 1983 and contained in BISD 30S/17.

The Council took note of the statements, approved the text of the draft decision in C/W/669 and recommended its adoption by the CONTRACTING PARTIES by postal ballot.

5. United States - Extension of marketing orders to kiwis

The Chairman recalled that this matter had been discussed at the Council meeting in October 1990 under the heading "United States - Proposed legislation concerning marketing orders on kiwis, plums, nectarines and apples". It was on the agenda of the present meeting at Chile's request.

The representative of Chile recalled that at the October 1990 Council meeting, some representatives had stated that Chile was bringing draft US legislation before the Council. The ideas in that draft bill had now become law. The US Federal Register of 13 March 1991 contained a notice that marketing orders were being extended to kiwis. This meant that imported kiwis, including those from Chile, would be subject to inspections to control their shape, appearance, size and other arbitrary matters totally unrelated to the price of kiwis or to the US consumer's freedom of choice.

At the October 1990 meeting, Chile had presented arguments which had proven without doubt the protectionist nature of the marketing orders and their GATT-illegality. Indeed, the US International Trade Commission (USITC) had also recognized these arguments in a recent report on the likely impact on the United States of a free-trade agreement with Mexico (USITC Inv. No. 332-297), by stating that "non-tariff measures such as marketing orders" would affect agricultural trade with Mexico, and more clearly elsewhere that non-tariff measures "such as the US marketing orders" would "also have a constraining effect on bilateral trade." Thus, the United States itself recognized the protectionist nature of these measures.

He briefly recounted the arguments which showed the GATT-inconsistency of the US marketing orders. First, these measures violated Article III:1 by protecting domestic production. They limited the supply of imported products on the domestic market by applying specific quality requirements, increasing prices, and maximizing the returns for local producers. Moreover, domestic producers themselves initiated and promoted the marketing orders as well as changes in their requirements.

Second, these measures violated Article III:4, since the imported product received less-favourable treatment than like domestic products. In effect, the controls under the measures did not apply to the totality of domestic production, although they applied to all of the imported products. This simply meant that Chilean fruit, for example, which did not enter the US market, had to be destroyed or redirected to other markets. On the other hand, domestic US production could be sent to another US destination where the marketing orders did not apply, or sent to US processing industries, or even exported. There was thus a clear discrimination. Moreover, even if the totality of domestic production was to be inspected, marketing orders would still violate Article III:4 because imported fruit subjected to marketing orders were given less-favourable treatment than the like domestic products in their manner of inspection. For example, Chilean fruit subject to the marketing orders was inspected at the port of disembarkation, i.e., after having been packaged and transported nearly 9,000 kilometres, while domestic production was inspected at the packaging plant shortly after being harvested and before being packaged and shipped. Beyond the matter of percentage of domestic and imported products subject to inspection, however, marketing orders also impaired the value of specific US tariff concessions initially granted irrespective of a particular product's size, quality or other characteristics.

Third, the measures violated Articles 2.1, 5.1.1 and 5.1.2 of the Standards Code[3] by illegally hampering trade with a technical regulation and by granting a less favourable treatment to imported products.

Fourth, differences in the permitted inspection sites violated both Article I of the General Agreement and also violated the Standards Code. Indeed, by virtue of a special agreement with Canada and Mexico, the US Department of Agriculture authorized inspection of products subject to marketing orders in Canada and Mexico respectively. However, despite Chile's repeated requests for similar treatment, its fruit continued to be inspected at US ports of entry.

For all these reasons, US marketing orders were GATT-inconsistent. They were protectionist measures which had been recognized as such by the United States. Furthermore, they contradicted the objective of free trade and the Uruguay Round standstill and rollback commitments. Despite all this, the United States had recently extended their application to kiwis. His delegation called on the United States to bring these measures into GATT conformity, and hoped that the United States would dismantle these measures, or find alternative ways of satisfying Chile's trade problem, thus making it unnecessary for Chile to take recourse to other GATT provisions.

The representative of the United States said that his Government had no reason to believe that the marketing order amendment incorporated in the 1990 farm legislation had, or would have, any adverse trade impact for

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

Chile or any other country supplying kiwis to the US market. Nor did it believe that the marketing orders applied through that legislation were in any way inconsistent with GATT provisions or those of other Agreements under GATT auspices. Marketing order standards had long been used in the United States to improve the average quality of the product brought to market. A higher quality product should face a higher demand and thus command a higher price and larger returns both for foreign and domestic producers. If Chile could show where its trade had been damaged, the United States was prepared to work with it to correct the problem. The United States had explained this to Chile bilaterally, and to the Council in October 1990. There was nothing in the marketing orders extension that was specific to Chile's products or that treated imports differently from domestic products.

Chile had just made several allegations as to US violations of its GATT and Code obligations, but had not requested consultations under Article XXIII or under the dispute settlement provisions of the Standards Code. If Chile believed it had a legitimate case that these standards were applied in a discriminatory manner, or were otherwise inconsistent with US obligations in the GATT, then it should make that case under the dispute settlement provisions of the GATT and the Standards Code.

The representative of Brazil, recalling that this matter had also been brought to the attention of the Uruguay Round Surveillance Body, regretted that no action had been taken to remedy the situation. Chile's complaint merited full support, and his delegation encouraged both parties to reach a common solution to the problem. He registered his Government's concern that other unilateral measures in the field of agriculture by the main trading partners were adversely affecting competition in third countries to the detriment of export interests of more efficient producers.

The Council took note of the statements.

6. United States - Countervailing duties on fresh, chilled and frozen pork from Canada
- Panel report (DS7/R, DS7/3)

The Chairman recalled that at their Forty-Sixth Session the CONTRACTING PARTIES had referred this item back to the Council for further consideration. At its meetings in February and March, the Council had considered the Panel report (DS7/R), and in March had agreed to revert to it at the present meeting.

The representative of Canada noted that the United States had now had more than seven months in which to consider the Panel's findings and conclusions, and Canada had thus far requested adoption of this report on five occasions. At the Forty-Sixth Session, the United States had indicated that it was unable to agree to adoption without offering any substantial or procedural justification within the GATT dispute settlement context for not doing so. It had since continued to resist adoption without offering any valid basis for its position. He said that Canada's

views on this matter were well known, as summarized in its recent communication (DS7/3). The United States' refusal to agree to adoption could only serve to undermine the integrity of the GATT dispute settlement system. Contracting parties did not need to be reminded of the dangers inherent in any single contracting party's action which frustrated the effective prosecution of a dispute in accordance with GATT rules and procedures. The US action was to be disapproved not only because it jeopardized Canada's GATT rights but also because it encouraged a dangerous precedent and posed a threat to the dispute settlement mechanism. The US explanation that its failure to adopt the report was justified because a similar issue was the subject of a domestic US administrative procedure related to the prosecution of a dispute between Canada and the United States under their Free-Trade Agreement (FTA), could have no bearing in the case at hand. There could be no linkage between adoption of a GATT panel report and the progress of a separate dispute under the provisions of the FTA. He requested that the United States agree to adoption at the present meeting.

The representative of the United States recalled that on several earlier occasions, his delegation had requested deferral of discussion on this report on the grounds that the recommendations thereof were not then ripe for consideration. As had been indicated at the February and March Council meetings, the determination of both subsidization and of threat of material injury in this case were under challenge pursuant to the dispute settlement mechanism established between the United States and Canada under their FTA. While the matters at issue in those cases were not the same as the issue before the GATT Panel, the outcome of those cases could affect the US response to the Panel report.

On 12 February, the responsible US administering authority had reversed its earlier determination and had concluded that there was, in fact, no injury to domestic industry in the countervail case against Canadian pork. At present, the matter of the injury determination was being examined by a special three-judge binational committee to determine whether there were grounds to reverse the injury finding, and whose work was expected to be completed at the beginning of June. At that time the United States would know if the countervailing duty case would terminate and whether it would even need to address the substance of the GATT Panel report. In light of these considerations, the United States was not prepared to agree to adoption at the present meeting. He reiterated that no duties had actually been collected by the United States on Canadian pork imports, and that if the determination that there was no injury stood, all cash deposits of estimated duties would be returned automatically with interest.

The representative of Canada said that the United States had not stated anything new. The US position could only be qualified as an extraordinarily disturbing one. It marked both an untimely and inauspicious retreat from the US position in the Uruguay Round negotiations on improvements to the dispute settlement system. The United States could not continue to refuse adoption of a report and at the same time expect adherence to the dispute settlement system by other contracting parties in good faith.

The representative of Japan agreed that nothing new had been heard from the United States at the present meeting. He reiterated his Government's concern over the long delay in the adoption of this report. Reference by the United States to bilateral and domestic procedures did not constitute any justification for further delay in this regard. The GATT Panel stood on its own, and Japan strongly urged the United States to agree to adoption at the present meeting.

The representative of the European Communities said that the Community could not help but observe a striking lack of coherence in the US position with respect to the functioning of the GATT dispute settlement mechanism. The United States always insisted on immediate action where it suited its own interests, but put forward any excuse for delaying, if not preventing, action where it did not. This lack of coherence could only have very negative implications for the functioning of the GATT system.

The representative of Argentina recalled that his delegation had on several previous occasions referred to the matter of non-adoption or non-implementation of panel reports. At the present meeting, there were once again several agenda items dealing with the very same panel reports that had repeatedly been discussed in the Council. While contracting parties might sometimes have difficulty in implementing panel recommendations, he noted that the panel reports before the Council at the present meeting had either not been adopted for several months or their implementation had been linked to the results of the Uruguay Round. It was important to draw the Council's attention to this point once again because the credibility of the GATT dispute settlement mechanism, and of the institution itself, was at stake. If this practice continued, other contracting parties involved in dispute settlement cases would also have the right not to adopt panel reports, or to adopt but not implement them, thus paralysing the system. Argentina's position was not based on any one case in particular, but rather on its general position as regards the dispute settlement mechanism, which it considered to be one of the GATT's central pillars. For this reason, his delegation's remarks applied also to the matters under Agenda items 7, 8 and 9.

The Council took note of the statements[4] and agreed to revert to this item at a future meeting.

7. Japan - Restrictions on imports of certain agricultural products - Follow-up on the Panel report (BISD 35S/163, L/6810)

The Chairman recalled that this item had been considered by the Council at its meetings in February and March. In March, many representatives had strongly supported a US request that Japan hold plurilateral consultations on this matter under the provisions of Article XXII:1 and the procedures adopted on 10 November 1958 (BISD 7S/24). He had been informed that a plurilateral consultation had been held on 19 April, and that the participants had agreed to continue the consultation.

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[4] See also the Chairman's statement at the end of item 9.

The representative of Japan confirmed that a plurilateral consultation had been held on 19 April with the United States and several other interested parties, and that the participants had agreed to hold another round of consultations in the near future. These would probably be held towards the end of May.

The representative of the European Communities said that when this report had been adopted in February 1989, Japan had indicated it had problems in the areas of dairy products and starch. However, at the February 1991 Council meeting, Japan had linked implementation in these two areas to the outcome of the Uruguay Round, saying that it would decide on measures regarding dairy products and starch following the outcome of the negotiations on the interpretation of Article XI:2, and had also established a linkage with other restrictive measures, namely those under the US Agriculture Waiver[5] and variable levies.

In this connection, he noted that there were at least four other instances in which panel reports had been adopted but not implemented because of some link with Uruguay Round results, and said that the remainder of his statement on the present item applied to them as well. Two of these reports were being considered under agenda items 8 and 9, and the others were those on Canada's restrictions on ice cream and yoghurt[6] and the Community's "screwdriver plant" regulation[7].

The linkage between implementation and Uruguay Round results raised problems that increased as the negotiations were protracted. However, to deal with all these cases and the issues involved in the same manner and from a formalistic point of view -- that the dispute settlement system protected existing rights and obligations while the Uruguay Round was about the revision or establishment of rules -- would be simplistic. It was necessary to look at each of the cases on its merits in the light of the different positions taken and the justifications given.

Four categories of cases could broadly be distinguished: first, when the recommendation on implementation concerned the respect of existing and essentially clear rules that were not subject to renegotiation, such as Article III. In this case the Uruguay Round outcome might indeed not even be relevant to the manner in which an existing GATT-inconsistent measure was brought into GATT-conformity. Second, when the relevant rule was being renegotiated and the result of the negotiations was likely to affect the manner in which the panel recommendations should be implemented, such as Article XI:2. The relevant question was whether it was appropriate to examine the reasonableness of postponing implementation in view of the need to avoid having to request changes in the domestic legislation twice. Third, when a particular real and new issue was raised which had not been

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[5]BISD 3S/32.

[6]Canada - Import restrictions on ice cream and yoghurt (BISD 36S/68).

[7]EEC - Regulation on imports of parts and components (L/6657).

addressed and solved in the existing GATT rules, and the panel gave no indication as to how a domestic regulation could be brought into GATT-conformity, such as the "screwdriver plant" case. The question here was whether the concerned party had another choice than to await the results of the negotiations. Fourth and finally, when the issue related to the re-establishment of a proper balance of concessions, and proper adjustment depended on the outcome of global negotiations in the context of the Round, such as a case of non-violation impairment of tariff concessions. Here, it might be impossible to make the necessary adjustments without knowing all the parameters of the new balance. The questions that arose, therefore, were whether it was reasonable to insist on earlier adjustment in such a situation, and whether the need for an equitable result could simply be ignored where the basis of the case was specific frustrated expectations created over many years and where other elements, such as the US Waiver, had affected the global balance?

The Community believed that while one could not avoid examining the impact of the prolongation of the Round on the implementation of existing panels, one had to look at the cases on their merits. His delegation suggested that the Council Chairman hold informal consultations with contracting parties including those primarily concerned -- Canada, United States, Japan and the Community -- to see what one could expect about the implementation of these various types of panel reports.

The Chairman said that he would respond to Argentina's[8] and the Community's remarks following the Council's consideration of the present item as well as items 8 and 9.

The representative of the United States said that at the 19 April consultations with Japan, a number of the participants, including the United States, had strongly reiterated that Japan had an obligation to comply with current GATT rules and to eliminate its remaining dairy and starch quotas. The United States had also stated that elimination of the starch quotas would remove any justification for Japan's trade-distorting policies that constrained imports of corn and sorghum for both animal feeding and industrial use -- policies that were directly linked to Japan's starch sector protection. Japan had argued that it should be able to maintain its remaining import restrictions and review these policies in light of the outcome of the Uruguay Round. The United States believed that Japan should reconsider this position, and had asked Japan to acknowledge its obligations as they concerned current GATT rules and to provide, prior to the next Council meeting and in the second Article XXII consultation, a plan for liberalization in the immediate future of the remaining two categories of import restrictions.

With regard to the Community's comments in respect of this and other dispute settlement cases, it might be asked what lesson one might draw from them. His delegation believed it should not be the self-serving,

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[8] See under item 6.

artificial categorization approach that the Community had just put forward. Rather, one should draw the lesson to try whenever politically possible to observe strictly the existing GATT dispute settlement provisions, including those agreed at the Uruguay Round Mid-Term Review (BISD 36S/61), and to attempt through the Uruguay Round mechanism to improve other areas of dispute settlement so that the GATT was not entangled in similar problems in the future.

The representative of Australia said that his delegation's concerns on this matter, expressed on several occasions since 1989, had been set out in detail at the February and March Council meetings. Australia had since sought consultations with Japan and had participated in the 19 April plurilateral consultation initiated by the United States. As some three years had elapsed since the Panel report had been adopted, Australia believed that Japan now had an obligation to take urgent steps to bring its remaining measures into GATT-conformity. Australia could accept neither partial or selective implementation based on Japan's disagreement with the Panel's findings, nor further delay on grounds that agricultural trade barriers were being addressed in the Uruguay Round. Australia looked forward to the further round of consultations scheduled for late May. It expected Japan at that time to come forward with a program, commencing in 1991, to bring into GATT conformity measures found inconsistent three years earlier, and on which Japan had disinvoked balance-of-payments cover some thirty years earlier.

The representative of New Zealand said that his Government had also participated in the plurilateral consultations with Japan and had set out in detail its questions and concerns about continued non-implementation of the Panel's recommendations. Although the consultations had been useful, Japan's responses to these concerns were still awaited. A further round of consultations was therefore clearly warranted. New Zealand looked forward to having a clear acknowledgment from Japan of its commitment to implement fully the Panel's recommendations, to be backed up with a detailed proposal, including a timetable, as to how the implementation was to be achieved. In the interval, New Zealand would wish to see market access opportunities progressively improve for dairy products and starch which would take account of the concerns of all contracting parties with a legitimate trading interest. Pending a mutually satisfactory conclusion to the plurilateral consultations, New Zealand fully reserved its GATT rights with respect to the products concerned. Concerning the wider issue that had been raised under the present item, as indeed under the other items involving dispute settlement, New Zealand's views on linkage between implementation of panel reports and the Uruguay Round results were well-known.

The representative of Chile said that his delegation was also participating in these consultations and that it shared others' concerns on this matter. With regard to the broader issue raised by the Community, one should not speak of a crisis in the dispute settlement mechanism without bearing in mind the very sensitive issue of how the decisions concerning panels and panel reports were taken. He noted that Article XXV provided for the possibility of adopting decisions by a majority vote, not simply by

consensus. While consensus was and always had been an excellent process and one which Chile supported, it should constantly be borne in mind that when a consensus was not reached, it was possible to resort to a vote in dispute settlement cases. Indeed, this provision of the General Agreement, should not be overlooked, and contracting parties should not be afraid to apply it.

The representative of Japan, suggested that the following classification of panel reports pending implementation could be borne in mind, instead of the Community's: (a) reports whose recommendations had not been implemented at all; (b) reports in respect of which action in the opposite direction had been taken; and (c) reports in respect of which nearly all or the vast majority of recommendations had been implemented, or were planned to be implemented in good faith.

The Council took note of the statements[9] and agreed to revert to this item at a future meeting.

8. United States - Section 337 of the Tariff Act of 1930 - Follow-up on the Panel report (BISD 36S/345)

The representative of Japan recalled that at the March Council meeting, his delegation had expressed concern about the United States' initiation of an investigation of an alleged infringement of intellectual property rights by a Japanese company under Section 337 of the US Tariff Act of 1930, some elements of which had been determined by a panel to be GATT-inconsistent. He reiterated Japan's concern with this situation and asked that the United States report on its intention to take positive action to comply with the Panel's recommendations. Japan viewed the initiation of an investigation under Section 337 as a negative action that was tantamount not only to non-implementation but to a refusal of the Panel's recommendations. He asked the United States how it reconciled this situation with the GATT dispute settlement process.

The representative of Hong Kong said that her Government shared the concerns that despite adoption of this report in 1989, the United States had so far not implemented its recommendations. The United States had stated previously that implementation of the report would be dependent on progress in certain Uruguay Round issues. Hong Kong found such linkage uncalled for. Furthermore, with the current extension of the Uruguay Round negotiations, the maintenance of such linkages or indeed further resort to the present Section 337 procedures, which had been ruled by a panel to be GATT-inconsistent, would have a negative effect both on the negotiations and on the credibility of the dispute settlement mechanism. Hong Kong was also concerned to learn of an ongoing Section 337 case which could affect the access of certain of its products to the US market, and would closely

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[9]Including Argentina's statement under item 6. See also the Chairman's statement at the end of item 9.

watch the developments in this case. It joined others in urging the United States to expedite action to comply with the Panel's recommendations and to bring its practices fully into GATT-conformity.

The representative of Australia said that his delegation had supported adoption of this report following a careful analysis of the Panel's as well as the United States' arguments. Consistent with its approach to other adopted panel reports, including those under consideration at the present meeting, Australia urged that the United States implement the Panel's recommendations at an early stage. Australia shared others' concerns as to the implications of the continued application of this legislation. Moreover, it did not accept either the principle or the practice of linking a contracting party's Article XXIII implementation obligations to negotiated outcomes arising from the Uruguay Round.

The representative of Canada recalled the United States' statements in earlier Council meetings that it intended to await the outcome of the Uruguay Round before changing its legislation. Canada considered that, while awaiting Congressional action to change the legislation, the United States should not undertake any new actions inconsistent with its GATT obligations.

The representative of the United States recalled that when the Panel report had been adopted, the US President had reaffirmed the commitment both to the GATT dispute settlement mechanism and to the effective enforcement of intellectual property rights. The United States had given the highest priority to the development of an effective, GATT-consistent Section 337 mechanism. Referring to Japan's categorization of panel reports in item 7, he said that this panel report was certainly one where domestically the United States had taken important action toward implementation. Since January 1990, an inter-agency task force had worked diligently toward developing a consensus on how, within the constraints of the US Constitution, Section 337 could be amended to address the Panel's recommendations. At the same time, however, the United States could not condone or excuse totally the infringement of US patents by refusing to enforce existing US legislation.

In his policy statement, issued at the time the Panel report had been adopted, the US President had noted that enactment of legislation amending Section 337 could most effectively occur through Uruguay Round implementing legislation. Those familiar with the technicalities of the US "fast track" procedures would be aware of the procedural benefits of using the implementing legislation as a vehicle for amending Section 337. Finally, to avoid any possible misunderstanding, he reaffirmed his Government's commitment to developing and implementing a GATT-consistent Section 337 mechanism.

The representative of the European Communities said that as the complaining party in the original dispute, the Community was very interested in the speedy implementation of the Panel's recommendations. The Community had noted that the United States was taking steps towards implementation. However, pending the modification of its legislation, the

very least the United States could do was to exercise all possibilities of discretionary action to bring the concrete procedures as much as possible into conformity with Article III -- a fundamental GATT principle which was not under negotiation in the Uruguay Round.

The representative of Japan expressed disappointment with the United States' statement. Japan once again urged the United States to implement the Panel's recommendations quickly and at least to refrain in the meantime from taking action under Section 337 which would further aggravate the non-implementation. Japan would pursue this matter further in future Council meetings, and reserved all its GATT rights.

The Council took note of the statements[10] and agreed to revert to this item at a future meeting.

9. European Economic Community - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins - Follow-up on the Panel report (L/6627)

The Chairman recalled that the Panel report (L/6328) had been adopted on 25 January 1990. This item was on the Agenda of the present meeting at the request of the United States.

The representative of the United States recalled that the Panel had found that the European Economic Community's regulations providing for payments to oilseed processors conditional on the purchase of oilseeds originating in the Community were inconsistent with Article III:4 -- which, he noted, was not being negotiated in the Uruguay Round. The Panel had recommended that the Community bring these regulations into GATT conformity. The Panel had further found that benefits accruing to the United States under Article II in respect of the zero tariff bindings for oilseeds in the Community's Schedule had been impaired as a result of the introduction of production subsidy schemes which operated to protect Community oilseeds producers completely from the movement of import prices. The Panel had recommended that the Community consider ways and means to eliminate the impairment of its tariff concessions for oilseeds.

The Community was now planting the second oilseed crop since the Panel report had been adopted. In the 1991 price package, the Commission had proposed some changes to oilseeds-purchasing policies for soybeans, but not for rapeseed or sunflowerseed, which were the major oilseeds produced in the Community. The proposed change, therefore, did not come close to being sufficient to correct the Article III inconsistency. The Commission had also proposed a minor reduction in oilseeds support prices. Again such a minor price reduction did not begin to correct the injury to the United

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[10]Including Argentina's statement under item 6 and the European Communities' statement under item 7. See also the Chairman's statement at the end of item 9.

States by the impairment of the tariff binding. Although the Panel had recommended that the Community have a reasonable opportunity to adjust its regulations, no meaningful action had been seen in either the 1990 or proposed 1991 price-setting exercise. The Community's inaction was resulting in identifiable, continuing and significant harm to US trade.

His delegation understood from recent communications that the Community had now linked reform of its oilseeds policy to a successful conclusion of the Uruguay Round and/or reform of the Common Agricultural Policy (CAP). However, the absence of a successful conclusion to the Uruguay Round and the pending CAP reform were not valid reasons for delay. The Community had to proceed with a substantial reform package on oilseeds beginning in crop year 1991. In the absence of such reform, his Government intended to bring this matter to the Council's attention for consideration of appropriate measures.

The representative of Australia said that his country had a substantial trade interest in this matter and had been a third party to the dispute. When the Panel report had been adopted, Australia had clearly stated its views on the question of implementation, by drawing a distinction between the reasonable time that might be accorded a contracting party to introduce necessary policy changes, and any suggestions that the latter be used as negotiating coin in the Uruguay Round.

Australia continued to believe that the Community had an obligation, entirely unrelated to the ongoing negotiations, to remove its GATT-inconsistent measures. Australia could not accept that linkages drawn at the time of adoption of panel reports had any influence on a contracting party's obligations under the rules as they stood, or indeed that they distinguished one case from another. If this were the practice, the system would become unworkable, with qualifications and riders from all sides which frustrated the very rights under the system which the dispute settlement process was meant to protect. The Uruguay Round, therefore, should not be used as a pretext for deferring or avoiding implementation of Article XXIII obligations. In fact, it was worth recalling that the Punta del Este Declaration (BISD 33S/19) included a rollback undertaking which envisaged the removal of GATT-inconsistent measures during the course of the Round, not after, or as part of, its conclusion.

More than a year had passed since adoption of this Panel report, which was a reasonable time to pave the way for implementation. Australia looked forward to hearing the Community's report on the policy changes it would undertake to meet its existing GATT obligations. This would contribute much more to the health of the dispute settlement process and the multilateral trading system than the academic classification exercises mentioned during consideration of item 7, which would serve simply to delay the process further.

The representative of Canada said that his country had participated as an interested party in this Panel, and had held separate Article XXIII:1 consultations with the Community. Canada had been given assurances that the Community's measures would be applied on an MFN basis, and it looked forward to an early resolution of the issue on that basis.

The representative of the European Communities said his delegation was surprised that the United States had asked for consideration of this matter at the present meeting because it had requested consultations with the Community at Ministerial level which would be held in a few days' time. The Community had shown good faith in accepting these consultations and, pending their outcome, there was not much to be said as to substance. The Community's position was clearly set out in its communication of 26 January 1990 (L/6636) and in particular in paragraph 2 thereof which stated that "the Community will engage in the process for complying with [the Panel's] recommendations and will adopt the Community regulations in question in the context of the implementation of the results of the Uruguay Round". As the United States had just stated, the Community was engaged in the implementation process and complying with the Panel's recommendations. However, the Community's position of principle, as set out in the above-mentioned communication, remained clear.

The Chairman then commented on the proposals and remarks which had been made in the course of the discussion of items 6, 7, 8 and 9. The problem, as he had himself described it the previous day in the special Council meeting in the context of the TPRM, was that five panel reports[11] which had been adopted but not yet implemented had all been linked somehow to the outcome of the Uruguay Round. Another panel report discussed under item 6 at the present meeting had not yet been adopted. This was a serious situation in itself, and would be even more serious if the status quo remained unchanged and if the Round went on for quite some time. It was precisely in the perspective of what might happen in the future that he thought the situation took on even greater proportions. As Council Chairman, he had already seen it as his responsibility to hold private talks with the parties concerned, namely the four largest trading partners of GATT, which emphasized the seriousness of the problem. He intended to continue these private talks, primarily with the same parties, on the basis that the panel reports concerned had involved measures taken in relation to already existing treaty obligations. That was, in his opinion, the only starting point for such talks. He would thus attempt to find a solution, which he would, of course, then discuss with a large number of other contracting parties.

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[11] Canada - Import restrictions on ice cream and yoghurt (BISD 36S/68); EEC - Payments and subsidies paid to processors and producers of oilseeds and related animal-feed proteins (L/6627); EEC - Regulation on imports of parts and components (L/6657); Japan - Restrictions on imports of certain agricultural products (BISD 35S/163); United States - Section 337 of the Tariff Act of 1930 (BISD 36S/345).

The Council took note of the statements[12] and agreed to revert to this item at a future meeting.

10. United States - Denial of MFN treatment as to imports of non-rubber footwear from Brazil
- Recourse to Article XXIII:2 by Brazil (DS18/2)

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

The representative of Brazil reiterated his Government's request for a panel in accordance with the GATT dispute settlement procedures, including in particular the improvements agreed upon at the Uruguay Round Mid-Term Review in April 1989[13]. Brazil believed that all contracting parties had a basic obligation to implement the General Agreement in a non-discriminatory manner consistent with the MFN principle in Article I. The United States had violated this basic principle by implementing its Article VI obligation not to levy countervailing duties without an affirmative injury determination in a manner that treated Brazil differently vis-à-vis other parties. He underlined that Brazil's present request was not in any way an appeal of an earlier Subsidies Code[14] panel report (SCM/94), and that the issue before the Council was new and entirely different in that it referred exclusively to the MFN obligation of Article I, a matter that had not been adjudicated. The letter of understanding among the negotiators that was circulated by the Chairman of the Tokyo Round sub-group on subsidies and countervailing measures in 1979, to which he had referred at the March Council meeting, indicated clearly and unmistakably that "rights and obligations of the contracting parties under Article XXIII of the GATT are not limited" by recourse to dispute settlement provisions of the Subsidies Code. Consequently, the fact that the Code Panel had taken a stand on other aspects of the case could not be invoked against Brazil's Article XXIII rights, particularly on a fundamentally important issue which had not been adjudicated.

He recalled that at the March Council meeting, the United States had enquired about Brazil's position as to a contracting party's right to a panel under the improved dispute settlement rules and procedures. Further to Brazil's statement on that occasion, he wished to state that his Government adhered totally to the understanding that the improved rules granted contracting parties an extremely broad access to the dispute settlement mechanism, as embodied in paragraph F(a) of the April 1989 Decision and according to which the decision to establish a panel should be

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[12] Including Argentina's statement under item 6 and the European Communities' statement under item 7.

[13] Improvements to the GATT dispute settlement rules and procedures (BISD 36S/61).

[14] Agreement on Interpretation and Application of Articles VI, XVI and XXIII (BISD 26S/56).

taken at the latest at the second Council meeting following that at which the request first appeared on the agenda, unless at that meeting the Council -- not the complaining party -- decided otherwise. As Brazil had already stated in the Uruguay Round negotiations in this area, there was further room for improvement in the rules. For example, new formulations might be accepted on the understanding that an agreement might be reached concerning the compromise not to resort to unilateral measures. Brazil's case had been amply discussed and had received substantial support in the Council. He saw no reason for the matter to be postponed any further, and requested that the Council take a positive decision to establish a panel at its present meeting.

The representative of the United States recalled that at the March Council meeting, his delegation had asked Brazil to state clearly whether or not it unequivocally agreed to support the right of any contracting party to a panel if the procedural requirements for its establishment had been met. On that occasion, Brazil had not indicated its acceptance of this view of the April 1989 rules. His delegation therefore welcomed Brazil's statement at the present meeting that it shared the US view that there was a right to a panel pursuant to the improved rules at this stage of the process. It was important that there be a clear answer to this question from Brazil; in fact, all contracting parties had to have a clear and common understanding on this point. In order to put this issue to the test, and in order to allay the concerns of his authorities, he requested a ruling from the Chair to the effect that the April 1989 rules required a decision to establish a panel at this point in the dispute settlement process, unless the party which was the subject of the complaint obtained a consensus in the Council against the establishment thereof.

The Chairman said he was glad to see that the two parties had agreed on this matter. It was quite clear that the April 1989 Decision established the rule that unless there was a consensus not to establish a panel requested by contracting parties, a panel would have to be set up at the second Council meeting at which the matter was being discussed. He noted that this was the second Council meeting at which the present matter was being discussed.

The representative of Chile said that so as not to repeat what he had said under item 7, and because of the relationship between the present matter and the voting system in GATT, his delegation reserved formally all its rights.

The representative of India said that the present case should be dealt with on its own merits. At the March Council meeting, India had lent its support to Brazil's request on the merits of the issue. He noted that the United States had not been satisfied at that meeting with Brazil's response to its question as to the interpretation of the April 1989 Decision. Apparently, Brazil's explanation at the present meeting was now acceptable to the United States. He was somewhat surprised that the United States was asking the Chair to pronounce on this issue before some action -- as yet unclear -- would be taken. This aspect of the dispute settlement rules was still under negotiation in the Uruguay Round and he did not believe it

right for the Council to take a decision on the interpretation of those rules. Contracting parties should have reservations on the course presently being adopted; India believed that Brazil's request should be dealt with on its merits.

The representative of Mexico said that on this point, and in relation to the specific request made to the Chair, his delegation was of the view that the April 1989 improvements which had subsequently been formally included in the General Agreement, did not give rise to any doubts as regards their content. The terms of the last sentence of paragraph F(a) -- including the footnote -- of that Decision were very clear for Mexico.

The representative of the United States said that he had not asked the Chair to pronounce on how a matter still under consideration should operate, but rather for a ruling as to how the particular provision in question -- paragraph F(a) of the April 1989 Decision -- would operate in practice at the present Council meeting. His delegation was satisfied with the Chair's ruling and with Brazil's statement. On this basis his delegation accepted that a panel be established at the present meeting.

The Council took note of the statements and agreed to establish a panel with the following terms of reference unless, as provided for in the Decision of 12 April 1989 (BISD 36S/61), the parties agreed on other terms within the following twenty days:

> "To examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES by Brazil in document DS18/2 and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2".

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

11. United States - Measures affecting alcoholic and malt beverages - Recourse to Article XXIII:2 by Canada (DS23/2)

The representative of Canada said that his Government was requesting establishment of a panel to examine measures by the United States' federal and state governments which affected the pricing, distribution and sale of alcoholic and malt beverages, in particular beer, wine and cider. Canada considered that these measures provided more favourable treatment to domestic alcoholic and malt beverages than to the like imported products, and that this discrimination constituted a violation of the United States' obligations under Articles III:2, III:4, and XI of the General Agreement. On 6 February 1991, Canada had requested Article XXIII:1 consultations with the United States on these measures. Two rounds of consultations had been held, on 7 March and 16 April, which had not produced a satisfactory resolution of the matter.

Canada's complaint arose from concerns expressed by domestic producers of these products and from a number of Provinces. Canada was a substantial producer of beer, wine and cider. In response to an earlier GATT panel ruling[15], federal and provincial governments had been taking significant steps to meet Canada's GATT obligations. Since 1988, Canada's wine and beer industries had intensified their activities to enable them to adjust to increased competition on the domestic market and abroad, and were increasingly looking to export markets to enhance their competitive position; in particular, they sought fair opportunities in the US market. At the US federal level, Canada was concerned primarily with the provisions of Section 11201 of the Omnibus Budget Reconciliation Act of 1990, which had increased the excise tax on beer to US$18.00 per barrel. Under the legislation, however, more than 200 US beer producers whose annual production did not exceed two million barrels enjoyed a reduced excise tax rate of US$7.00 per barrel for 60,000 barrels of their production. Foreign brewers were not eligible for the reduced tax rate.

While the legislation also provided for an increase in the excise tax on wine of US$0.90 per wine gallon for wine, including cider, produced at qualified facilities in the United States -- described as those producing not more than 250,000 wine gallons per year -- it also provided for tax credit to these producers for the first 100,000 wine gallons of production per year provided they did not produce over 150,000 wine gallons annually. This credit was reduced by one per cent for every one thousand gallons produced over 150,000 gallons. Canada estimated that some 1,400 US wineries producing below 250,000 wine gallons per year were thus eligible for some or all of this credit, while foreign wineries and cider producers were not.

Canada, as well as the EC Commission in its 1991 Report on US Trade Barriers and Unfair Trade Practices, considered these measures to be in contravention of Article III:2. Moreover, the measures nullified or impaired GATT benefits accruing to Canada by preventing additional sales and exports to the United States. In their consultations, the United States had indicated that Congress would not be disposed to remove the discrimination in the absence of a GATT panel ruling. The United States had not provided any GATT justification for these measures, indicating instead that it would provide its views to a panel.

At the state level, a number of practices were in place involving the pricing, availability for sale and distribution of beer, wine and cider which discriminated against like imported products. These included the imposition of discriminatory taxes on imported beer and wine which were not applied to domestic products, or a lower tax rate for locally produced products than for imported products. Some states also granted in-state products excise tax exemptions or tax credits not available to imported products. Canada considered these measures also to be in contravention of Article III:2.

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[15]Canada - Import, distribution and sale of alcoholic drinks by provincial marketing agencies (BISD 35S/37).

With respect to distribution and availability for sale, imported products were treated less favourably than in-state products through a range of measures such as the following requirements: (a) exclusive transport of the imported product by common carrier into a state; (b) residency and citizenship in order to be able to import into a state; (c) measures restricting the availability for sale of beer based on alcoholic content; and (d) sale of the imported product only to licensed importers or to resident wholesalers whereas in-state products could be sold directly to retailers and at retail. Canada considered that these measures were contrary to Articles III:4 and XI in that they constituted laws, regulations or requirements which treated imported products less favourably than the like domestic product and/or limited import potential.

Canada had provided the United States with a full list of measures which had been identified as discriminating against imported products. In addition, following the first round of consultations, Canada had provided on 15 March a complete list of citations, on a state-by-state basis, of the legislative or regulative provisions governing these measures. As the two consultations had not led to a satisfactory resolution of this matter, Canada had decided to proceed with its request for a panel to examine these measures.

The representative of Australia said that as a beer exporter, his country supported the establishment of a panel and reserved its right to intervene therein in the light of its substantial trade interest in the matter.

The representative of the United States said that his Government had viewed the consultations with Canada as constructive, in that they had served to clarify Canada's concerns in several important ways. However, the United States believed that in many instances Canada had still failed to document adequately its complaint, particularly in respect of its concerns regarding state practices that allegedly discriminated against imports from Canada. Canada had failed to provide appropriate evidence that several of the alleged practices actually existed, or an explanation as to why a particular provision violated GATT requirements. The United States had also identified a number of instances in which allegedly discriminatory practices were no longer in force at the federal or state level. The United States remained open to a resolution of this matter and believed that additional consultations would be helpful in further clarifying and resolving Canada's concerns. In addition, the United States had received the written request for a panel from Canada only a few days earlier. The practices at issue were primarily at the state level, rather than federal, and his authorities had not had a full opportunity to consult internally. For all of these reasons, the United States was not ready at the present meeting to agree to the establishment of a panel.

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

12. Trade and environment (Spec(91)20 and 21)

At its meeting in March, the Council had agreed to revert to this item at the present meeting.

The Chairman of the CONTRACTING PARTIES recalled that at its meeting in February, the Council had asked him to conduct informal consultations on the subject of international trade and the environment. He had held two broadly based consultations as well as several bilateral discussions, and was pleased to report that a consensus had emerged to hold a structured debate on this subject at the Council meeting in May. During the consultations, he had suggested, on a personal basis and on his own responsibility, an outline of some points[16] that delegations might wish to consider in structuring their views for the debate. The question of whether one Council debate on this subject would suffice, or whether it might be better to hold a second or perhaps a series of such debates, had been raised in the consultations. This would no doubt be taken up again in the light of the structured debate at the May Council meeting.

Regarding the initial proposal for reconvening the 1971 Group on Environmental Measures and International Trade (C/M/74, item 3), he had taken the liberty of dealing with the issue separately. He intended, in the period before the May Council meeting, to continue informal consultations focused on the institutional aspect with the aim of finding common ground on which to proceed. He intended also to consult delegations on the contribution that GATT might eventually make to the United Nations Conference on Environment and Development (UNCED) process.

The representative of the European Communities said that until the environment issue was brought into the GATT and there was a mechanism to deal with the problem, he was compelled to speak in the Council. The environment was becoming a priority issue for the Community and its member States. The Community wanted this priority to be clearly understood and, if possible, shared by all contracting parties. In the area of environmental policy, the Community was moving towards the application of the principle that polluters should pay. It also wanted priority given to preventive action, taking into account the conditions of the environment in various regions and reserving particular attention to international aspects of the environment. The Community intended to act as a pilot by diversifying and ensuring consistency and efficiency in environmental policies, thus strengthening even further the rules and regulations, which had to be supplemented. He conceded that this might seem strange in times of deregulation, but as there were still no rules in this area, that phase had first to be gone through.

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[16] Subsequently circulated in Spec(91)21.

The Community also intended to reinforce its control over the implementation of its guidelines -- this applied to the member States as well. The Community intended to set an example in tackling the roots of the problem, both at the Community level and externally at the world level. This would either be done by appropriate integration in all its policies, or by the application of specific measures in the field. In the Community there was a very well-determined political will behind all this.

Although environmental policy had not been provided for originally in the treaties establishing the European Communities, it had since become one of the most important of Community policies.[17] Recent amendments of the EEC Treaty through the Single European Act had provided that "environmental protection requirements shall be a component of the Community's other policies". This principle applied both to policies leading to the establishment of the internal market and to the Community's trade policies, and various policy instruments were increasingly being used to achieve environmental goals. The Community had also turned its attention to biotechnology. Two directives on the contained use of genetically-modified micro-organisms and on the deliberate release into the environment of genetically-modified organisms had been adopted in 1990, under which an environmental risk assessment had always to be carried out beforehand. New measures were also likely to be adopted in the near future on "eco-labelling", although its use would remain voluntary.

Noting the growing tendency worldwide to introduce trade restrictions for a number of environmental purposes, he said that such restrictions had mostly been adopted pursuant to obligations under international instruments that had been negotiated with the Community's active participation, and which had been or would be implemented through Community legislation. Moreover, the Lomé Convention contained specific provisions concerning the movement of hazardous and radioactive wastes. In addition, the Community had adopted some autonomous import bans or restrictions to ensure the protection of endangered species.

Furthermore, in June 1990, the European Council of Ministers had recognized that "the traditional 'command and control' approach should be supplemented, where appropriate, by economic and fiscal measures if environmental considerations are to be fully integrated into other policy areas, if pollution is to be prevented at source, and if the polluter is to pay". Accordingly, the development of new economic and fiscal measures was likely to be one of the main priorities of the Community's Fifth Action Program for the environment. Finally, in April 1991, the Commission had adopted guidelines aimed at increasing the already high standards of environmental protection called for by the EEC Treaty. In accordance with this new approach, tax incentives would be authorized to encourage early application of standards set up at Community level. The Community hoped that this information on its measures would be useful for the "structured debate" at the next Council meeting.

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[17] This and the following portions of the statement were subsequently circulated in Spec(91)20.

The representative of Mexico said that on the basis of the consultations by the CONTRACTING PARTIES' Chairman and previous Council discussions, it was clear that the environment was a very complex subject which required full attention. While Mexico was participating actively and constructively in the preparatory work for the UNCED in 1992, it did not object to a GATT discussion on the matter of trade and the environment. His delegation would welcome anything that could provide a more precise view on the scope and content of this subject and its various ramifications. Noting the reference by the Chairman of the CONTRACTING PARTIES to an outline of points for a structured debate at the next Council meeting, Mexico believed that in the first instance the discussion should necessarily be open so that each delegation could put forward any matter it considered relevant. Mexico believed that the basis for the deliberations should be the search for an appropriate reconciliation between ecological considerations on one hand, and contracting parties' contractual rights and obligations on the other. Careless examination of this subject should not lead to new trade barriers that would erode the General Agreement and dampen trade with developing countries.

The representative of Austria expressed general satisfaction with the consultations by the Chairman of the CONTRACTING PARTIES, which would lead to a structured debate at the May Council meeting. Austria looked forward to this, but was concerned with the slower pace of the consultations with respect to the institutional link of environment to the GATT. He recalled the EFTA countries' earlier request for the convening of the 1971 Group; he reiterated their view that this Group should be open-ended, and affirmed their willingness to draft new terms of reference, if necessary, to reflect current thinking more adequately. These efforts and related consultations should not, however, be used to postpone this issue indefinitely. Austria urged others to continue to work constructively towards the reconvening of the 1971 Group.

The Council took note of the statements and agreed that sufficient time would be made available at the next Council meeting for a structured debate on this matter.

13. Office of the Deputy Director-General
- Announcement by the Director-General

The Director-General, speaking under "Other Business", said that in accordance with the procedures for the appointment of the Deputy Directors-General (BISD 34S/173), he wished to inform the Council that he had been holding consultations, which he would continue, with a view to appointing a successor to Mr. M.G. Mathur, whose contract was due to expire on 31 July 1991. He also informed the Council that, in due time, there would be occasion to pay tribute to Mr. Mathur for the outstanding contributions he had made to the GATT. He said that Mr. Mathur's imminent departure, as well as that of a number of senior officials, implied the need for reorganizing the Secretariat. He assured the Council that the reorganization would take into account the immediate needs of the

CONTRACTING PARTIES and the participating governments in the Uruguay Round, whilst at the same time maintaining the flexibility necessary for making future adjustments.

The Council took note of this information.

14. Texts submitted for circulation as documents

Under "Other Business", the Secretary of the Council noted that numerous texts were regularly received by the Secretariat with the request that they be issued as GATT documents. He said that it would greatly facilitate the Secretariat's task if delegations using word processors -- either Macintosh or IBM-compatible systems -- could also provide copies of their texts in "machine-readable" form on diskettes.

The Council took note of this information.

15. Restrictions on exports from Peru following the cholera epidemic (Spec(91)12)

The representative of Peru, speaking under "Other Business", recalled that at the March Council meeting his delegation had drawn attention to the serious trade consequences for his country following cholera-related restrictions imposed on its exports by several contracting parties. His delegation had also expressed the hope that the guidelines to be used in the event of a trade-damaging act, adopted by the Council in October 1989[18], would be implemented by all contracting parties. Peru was very disappointed that contracting parties that had imposed such restrictions on its imports had not notified the Director-General. He noted that when these restrictions had first begun to be applied, Peru had made several bilateral and plurilateral contacts following which many of the restrictions had been withdrawn and replaced by reasonable sanitary controls approved by the World Health Organization. Several contracting parties, however, still maintained restrictions that Peru considered unjustified, in particular on fruit and vegetables. He reiterated the request that these governments notify their restrictions to the Director-General with a justification for their maintenance. His delegation would soon hold consultations in Geneva with those contracting parties that Peru believed still applied unjustified restrictions, with a view to a constructive bilateral dialogue which would lead to withdrawal of such measures. If these contracting parties did not withdraw their restrictions, his delegation would request the Council at its next meeting for a more active role in the settlement of this dispute.

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[18]Streamlined mechanism for reconciling the interests of contracting parties in the event of trade-damaging acts (BISD 36S/67).

He referred to a 1971 World Health Assembly resolution (WHA24.26) which, in the light of negative results of several long-term studies on the possibility of importation of cholera through contaminated foodstuffs, had called on member States of the World Health Organization (WHO) not to apply unjustified embargoes on food imports from countries with reported cases of cholera. In the twenty years since that resolution, the methods of sanitary analysis and control had improved substantially. Peru, therefore, did not understand the justification for the measures that were now being applied in contradiction of WHO recommendations, and once again urged that these restrictions be withdrawn.

The Council took note of the statement.

16. Hungary - Protocol of Accession

The representative of Hungary, speaking under "Other Business", recalled that at Hungary's recent review under the Trade Policy Review Mechanism (TPRM), his delegation had indicated that in light of the fundamental and comprehensive economic transformation taking place in the country, and the substantial progress already achieved in this process, Hungary intended to initiate formally the process leading to the elimination of all specific provisions of its Protocol of Accession.

While Hungary had acceded to the GATT on the basis of tariff concessions, its Protocol of Accession (BISD 20S/3) contained a number of specific provisions which had become outdated in light of the basic changes in the country's economic and trade policies, including those in its foreign trade régime. He requested that at its next meeting, the Council initiate the process leading to the elimination of the specific provisions of Hungary's Protocol of Accession. He also requested that the Chairman hold informal consultations so as to enable the Council at its next meeting to take the necessary decisions on the establishment of a working party, its terms of reference and its chairmanship.

He hoped that the comprehensive report prepared by his Government for its recent TPRM review (C/RM/G/11) would be used as the basis for the working party's deliberations. Hungary would, of course, submit additional written information reflecting the further changes that had taken place in the period between the completion of that report and the establishment of the working party.

The Chairman said that he was prepared to undertake such consultations.

The Council took note of the statements.

17. Accession of El Salvador

The representative of El Salvador, speaking as an observer under "Other Business", recalled that at their Forty-Sixth Session, the CONTRACTING PARTIES had approved El Salvador's Protocol of Accession to the General Agreement (L/6795) which had been signed by her Government on 13 December 1990. She informed the Council that her country's legislative assembly had ratified the Protocol and that El Salvador would become a contracting party on 22 May 1991.

The Council took note of this information.

18. Agreement between Argentina, Brazil, Paraguay and Uruguay (MERCOSUR)

The representative of the European Communities, speaking under "Other Business", recalled that at the February Council meeting, his delegation had raised the matter of a recently concluded agreement known as the MERCOSUR or Southern Cone Common Market. While the Community supported this agreement, it wished to examine the details thereof. The scope of this agreement appeared to be quite broad and it could be likened to the Rome Treaty, which established the European Economic Community, in its general objectives of achieving integration and stability in the region, something which the Community considered of particular importance. The Community regretted that the MERCOSUR agreement had not yet been notified to GATT, and considered this to be a lack of courtesy on the part of the signatories and a failure to meet their obligations as contracting parties. His delegation intended to discuss this matter further at a future meeting on the basis of a notification by the signatories to the agreement. The Community believed this agreement deserved and required a Council debate, and it urged the signatories to submit a full notification which would allow a thorough examination.

The representative of the United States said that his Government fully supported efforts to liberalize trade through regional arrangements which expanded trade opportunities rather than artificially distorted trade flows. It believed that the MERCOSUR represented a positive potential for enhancing economic growth and development in the Southern Cone region. However, although MERCOSUR members had concluded similar agreements and treaties in the previous five years, with the goal of economic integration and regional free trade, they had in each case neglected to notify these to the GATT or to contracting parties.

The establishment of MERCOSUR was an opportunity to alter this pattern definitively. GATT provisions and mechanisms addressing such agreements had been established to ensure that the trade preferences established in customs unions and free-trade areas were trade liberalizing and trade creating, and that they were administered in a transparent manner that protected other GATT contracting parties' rights. The United States believed that adherence to these provisions by contracting parties participating in such arrangements was a fundamental obligation of membership in the GATT system. It constituted the minimum countries could do to mitigate the consequent effects of departing from the Article I mandate of unconditional most-favoured-nation treatment.

His Government believed that the recent treaty signed by the four countries on 26 March in Asuncion, which formally initiated the process of creating the South American quadripartite common market, or MERCOSUR, by the end of 1995, was a significant development in the trading system. Therefore, it merited formal notification and review in the GATT.

The representative of Argentina said that his country -- a signatory to the MERCOSUR -- had noted the interest shown by the United States and the Community, and possibly others, in the integration process which was being initiated through this agreement. He assured the Council that the agreement would be notified to the Committee on Trade and Development through the Secretariat of the Latin American Integration Association, which oversaw the overall integration process in Latin America.

The Council took note of the statements.

19. "Forum shopping" within the GATT dispute settlement systems

The representative of the European Communities, speaking under "Other Business", said that the Community was seriously concerned about the manner in which the US complaint about the German exchange rate guarantee scheme concerning the privatization of the Deutsche Airbus GMBH[19] had been handled within the GATT system. In the Community's view, this had been a deliberate attempt to deprive the Community of its right to invoke applicable provisions of the Civil Aircraft Agreement[20] through a misuse of procedural possibilities and forum shopping. As a result, a panel had been established on an inadequate and incomplete legal basis and the Community had had to reserve its position regarding the outcome of the case. The Community raised this matter because the CONTRACTING PARTIES were the guardians of the proper functioning and coherence of the multilateral trading system. Pending the outcome of the Uruguay Round negotiations, which should lead to a reinforced and more coherent dispute settlement mechanism in the context of a Multilateral Trade Organization, the Council needed to address the problem of forum shopping urgently in order to avoid that the fragmentation of the GATT system and the consequences of incomplete reforms of the dispute settlement mechanism led to inappropriate results. The Community invited either the Council Chairman or the Chairman of the CONTRACTING PARTIES to hold consultations to find an appropriate general solution to the problems raised in cases such as the one mentioned.

The representative of the United States said that the Community's statement might have given the erroneous impression that it was the Community itself that had suffered a breach of its rights. What the Community was in fact complaining about, however, was that the United States was asserting its own GATT rights. The essential element in the Airbus dispute, one the Community had skipped over, was that EEC member

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[19] See SCM/108 and SCM/M/50.

[20] Agreement on Trade in Civil Aircraft (BISD 26S/162).

States had provided, and were providing, massive export subsidies to their aircraft industry; Germany's subsidy alone under the exchange rate guarantee program amounted to approximately US$2.5 million per delivered Airbus aircraft. The United States had asserted its right to challenge this massive breach of the Community's obligations under the provisions of the Subsidies Code[21], where the United States believed this case belonged. The Community found this forum inconvenient and, therefore, was seeking to create a new GATT right -- the right of a responding party to shape a complainant's dispute in a manner more convenient to the former. The Community was asserting a right under the Civil Aircraft Agreement that it did not have, in order to reserve a right it should not have, namely the right, announced in advance, to refuse to allow adoption of an adverse panel report. The United States urged the Community to rethink its position and to allow the Airbus dispute to proceed without further damage to the credibility of the GATT dispute settlement system.

The representative of the European Communities said that the Community was not debating the merits of the Airbus case, nor whether that case should be handled under one or another of the Tokyo Round Codes. The Community was, however, raising a point of principle, illustrated by this case, that given that the GATT system was a fragmented one, contracting parties could well differ as to what they considered to be the relevant forum for a particular dispute. In the Airbus case, the Community believed that the Civil Aircraft Agreement applied while the United States did not. There should be a possibility, if there were a third-party or panel procedure, that all arguments relating to the applicability of all Agreements under the GATT system be heard. This was a matter of principle and of general concern related to the consequences of a fragmented system where one could select the dispute settlement mechanism one deemed most relevant. This question itself deserved examination by an appropriate panel. The Community raised this matter with a view to inviting consultations aimed at finding a better and more appropriate agreement thereon in line with international law concerning dispute settlement. A general exchange of opinion would be useful in this respect, and would avoid such situations in the future with their negative and dangerous impact.

The representative of Chile said that the solution to the difficult problem of deciding which dispute settlement system applied in a particular case was the exclusive competence of the CONTRACTING PARTIES, and not that of the Council Chairman or the Chairman of the CONTRACTING PARTIES. The case put forward by the Community resembled that put forward by Brazil under item 10 and it was for the Council or the CONTRACTING PARTIES to resolve the matter.

The Council took note of the statements.

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[21] Agreement on Interpretation and Application of Articles VI, XVI and XXIII (BISD 26S/56).