GENERAL AGREEMENT ON
TARIFFS AND TRADE

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ASSOCIATION OF OVERSEAS TERRITORIES

Report by Sub-Group D

1. The Sub-Group examined, in the light of the provisions of the General Agreement on Tariffs and Trade, and of the discussion in the Committee on the Rome Treaty, the provisions of the Treaty relating to the association with the Common Market of the overseas territories.

A. Simultaneous establishment and co-existence of customs unions and free-trade areas

2. Some members stated that under the terms of the General Agreement, it was not contemplated that the same group of countries should belong at the same time to a customs union and a free-trade area. This argument was developed in a note submitted by the delegation of Ceylon, which is reproduced in Annex I.

3. One member of the Sub-Group stated that under paragraph 5 of Article XXIV, in the case of a customs union, the custom duties in the external tariff might differ under certain conditions from the duties previously applied in the constituent territories provided they were not on the whole higher or more restrictive than the general incidence of the duties in force before the establishment of the union; but when a free-trade area was formed under paragraph 5(b), it was necessary to maintain, in respect of third countries, duties not greater than those which were previously in force. As the Customs Union of the Six involved certain increases in those duties, the free-trade area could not be constituted without infringing the provisions of paragraph 5(b).

4. This inconsistency between the provisions relating to the establishment of a customs union and the formation of a free-trade area is a fact which gives rise to a legal position. The fact that the obstacle thus created can be easily circumvented does not prove anything against this legal situation. On the other hand, the existence of this inconsistency and the very fact that it can be circumvented show that the authors of Article XXIV did not contemplate the creation at the same time of a customs union and of a free-trade area. Moreover, it is not so obvious that the Six might have overcome the difficulty as easily as they seem to believe.

5. The representative of the Six and some other members could not accept this view. The report of the Six pointed out that the provisions of the General Agreement relating to customs unions and free-trade areas should be considered together. If the authors of the Havana Charter had intended to oppose the simultaneous establishment and the co-existence of the two systems, they would have included appropriate provisions in the text which they had drafted. Here again, one could not introduce into the Agreement restrictive provisions which it did not contain, and limit the rights of sovereign States on points which they had not accepted. It seemed to him that the theory of the incompatibility of co-existence was even less justified than that of the incompatibility of simultaneous establishment, and therefore the representative of the Six wished to reply to the latter principally. There was an additional objection to it: if the text of Article XXIV only prevented the simultaneous formation of the customs union and the free-trade area, that obstacle could be very easily and automatically overcome by staggering the establishment of the two systems over a period of time. However short the intervening period (whether a month or a day), the establishment of the two systems would no longer be simultaneous. The representative of the Six considered that it could not be maintained that the authors of the General Agreement, if they had intended to avoid the simultaneous establishment of a customs union and a free-trade area: (a) would have omitted provisions referring to such an important inconsistency, and (b) would have included provisions which could so easily be circumvented.

6. With regard to the argument based on tariff changes that might possibly result, the representative of the Six pointed out that the tariff increases which might result from the Treaty of Rome for certain countries in the free-trade area were not the legal consequence of the provisions establishing that area, but of those which established the customs union. Therefore, since the formation of the free-trade area was not in itself the legal cause of any increase in a national tariff, but that increase resulted only from the customs union, the free-trade area was consistent with the provisions of the relevant paragraph of Article XXIV.

7. The representative of a country which in 1947 was already a party to a customs union stated that at that time his country's representatives had sought an assurance that the article which had later become Article XXIV of the General Agreement really permitted the association of a customs union and a free-trade area, and the reply had been in the affirmative. Another member of the Sub-Group pointed out that France, which had strongly proposed the inclusion of provisions relating to free-trade areas, had a customs union arrangement with the Principality of Monaco and would certainly not have accepted a text which would have prevented it from joining such an area.

8. The Sub-Group felt that the question of the co-existence of a customs union and a free-trade area was an important question which the CONTRACTING PARTIES would have to study further with a view to reaching a decision on this point.

B. Consistency or otherwise of the provisions of the Treaty of Rome regarding the association with the rules of GATT

9. Most members of the Sub-Group considered that for the reasons set forth below the provisions of the Rome Treaty relating to the Association of the Overseas Teritories (Part Four and Implementing Convention) are incompatible with Article XXIV of the General Agreement and that such Association extended the preferences authorized under paragraph 2 of Article I of the General Agreement to territories which were not entitled, under the Agreement, to deviate from the most-favoured-nation provisions of GATT.

10. Some members considered that the concept of a free-trade area did not allow of the conciliation of the divergent interests of industrailized countries with the interests of territories which exported only raw materials, and which had scarcely yet embarked on the subsequent stages of economic development. They contended that the preparatory work showed that those who drafted the Havana Charter did not have that idea in mind when they inserted in the Charter the provisions at present embodied in Article XXIV of the General Agreement. One member pointed out that the Havana Conference had not envisaged an exception to Article I of the General Agreement which would cover nearly a quarter of world trade; according to this member the Havana Conference had only envisaged a possible customs union between France and Italy, and one between Argentina and Chile. For those reasons, those members thought that there was a fundamental incompatibility between the principles of Article XXIV of the General Agreement and the proposed association provided for in the Rome Treaty which, in any case, nowhere indicated that such an association would constitute a free trade area, and whose language structure references and technique are those of an extension of preferences.

11. A member of the Sub-Group observed that in his opinion the Rome Treaty gave rise to the following misgivings. The attempt to give Europe in association with the overseas territories a large degree of self-sufficiency would have restrictive effects on world trade as a whole. It would also be prejudicial to Europe itself, considering that Europe has to obtain its raw materials at reasonable prices in order to maintain a flow of exports of manufactured goods to other parts of the world, and the common tariff would allow a high preference to be granted to the associated territories. Finally, the diversions of trade resulting from the implementing of the Rome Treaty might outweigh its beneficial effects if the Common Market were not to follow a competitive policy allowing of a reduction in the export prices in the Member countries.

12. A member of the Sub-Group also stressed the danger, from the point of view of the application of the fundamental principles of the General Agreement as laid down in Article I, that could result from the extension of preferential systems under cover of the Rome Treaty, whether the provisions of that Treaty were in conformity with the rules of the General Agreement or not. When the under-developed countries which had not belonged to any preferential system had become parties to the General Agreement, they had obviously understood as other

contracting parties had that the existing systems which the Agreement as an exception authorized to be maintained would not be further extended. They now found that the facts were contrary to what they had hoped. The new preferences would lead to substantial damage insofar as their trade and the rhythm of economic development are concerned. The Association of the Overseas Territories therefore constituted a new fact and gave rise to the question whether the time had not come to envisage a revision of the General Agreement, under the provisions of Article XXX.

13. It was pointed out that measures intended to promote the economic expansion of the under-developed territories certainly deserved the greatest sympathy, but the steps taken to implement such measures should not become detrimental to other under-developed territories. It was common knowledge that one of the causes of the inadequate economic development of certain countries was the limitation of the world demand for certain primary commodities. In that respect, the associated territories would be favoured, since their exports would be admitted free of duty to the vast importing market constituted by the Six. The demand for the products of those territories would therefore increase and production in their territories be artificially stimulated to the detriment of producers as a whole. On the other hand, entry into the market of the Six would remain subject, for exports of the same products when originating in the other under-developed countries, to the payment of customs duties. The system which benefited some would therefore be prejudicial to others; it was therefore fundamentally contrary to the rules of the General Agreement.

14. Other arguments of a legal nature were also advanced by one or more members. Paragraph 4 of Article XXIV provided that the purpose of a customs union or free-trade area should be to facilitate trade between the constituent territories. The Rome Treaty nevertheless recognized that certain aspects of the Association of the Overseas Territories might have a contrary effect, in view of the fact that Article 134 authorized the Six to prevent, by means of appropriate measures, diversions of trade which might be caused to their detriment by the duties on imports applied by a Member territory of the free-trade area to goods coming from a third country.

15. Under paragraph 8(b) of Article XXIV, it was necessary for the formation of the free-trade area to be accompanied by the elimination of the duties and restrictive regulations of commerce on "substantially all the trade" of the constituent territories. Paragraph 8(b), however, authorized, where necessary, the maintenance of the restrictions permitted under Articles XI, XII, XIII, XIV, XV and XX of the General Agreement. The Rome Treaty deviated from that rule, as it did not provide that the associated territories should eliminate their export duties, which were considerable, on exports to the territory of the Six. Further, the associated territories would be empowered under Article 133, paragraph 3, to levy import duties on products originating in the territory of the Six when such duties correspond to their fiscal requirements or to the needs of their economic development. Some representatives noted that for certain territories the Six were debarred permanently by prior international obligations from reducing duties discriminatorily in respect of trade

between thses territories and the Customs Union of the Six, which meant that to that extent a free trade area could not be fully established. Moreover, there is no clear provision in the Treaty for the complete and permanent elimination of quantitative restrictions against imports from the Six into the overseas territories.

16. In that connexion, it should be recalled that paragraph 8(b) mentioned above was absed on the principle of elimination of duties which contemplated an elimination of existing duties. This elimination should apply to substantially all trade. Now, Article 133, paragraph 3, of the Treaty ran counter to those principles since it did not provide for elimination of existing duties and further it permitted the associated territories to levy new duties unrestrictedly over the whole tariff field, depending upon the need to protect their industry or to contribute to their budgets and to maintain such duties in force without any time limit. As already mentioned, paragraph 8(b), in derogation of the rule regarding the elimination of internal obstacles, made provision for certain restrictive trade regulations authorized under certain Articles of the General Agreement; the list of these did not, however, include Article XVIII, concerning governmental assistance to economic development. The application of the customs duties and of the restrictions instituted under Article XVIII did not therefore benefit from the exception for which provision was made in Article XXIV. The latter did not make provision for allowing one constituent territory of a free-trade area, in order to protect its industry, to levy import duties on imports from another constituent territory.

17. One member of the Sub-Group asked the Six to indicate what proportion of trade (a) between each overseas territory and the metropolitan territory and (b) between the overseas territories as a whole and the metropolitan territory as a whole would be subject to protective or fiscal tariffs. It was suggested that this proportion would be much greater than a proportion based on a total volume of trade which includes the intra-European trade of the Six.[1]

18. It was to be expected that the provisions of Article 133, paragraph 3 of the Rome Treaty would make it possible to increase import duties in the associated territories to such an extent that it would be impossible to claim that substantially all the trade of the area was not subject to any customs levy. The Association of the Overseas Territories, which opened up vast prospects for them both in the field of investment and as regards outlets for their exports, would give a strong impetus to the industrialization of those territories. It was natural that such development should require increasing customs protection, particularly in view of the difference between the productivity of the Six and that of the territories in question. Moreover, the increased autonomy which these territories must be presumed to be likely to attain will prevent the metropolitan government from exercising control over the degree of protection introduced by these territories.

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[1] The representative of the Six indicated that this latter proportion would amount to 1.4 per cent (see paragraph 30.)

19. Paragraph 9 of Article XXIV stipulated that the formation of a customs union or of a free-trade area should not affect the preferences authorized in paragraph 2 of Article I of the General Agreemant: those preferences might, however, be eliminated or adjusted by means of negotiations, in particular the preferences of which the elimination was required to conform with the provisions of paragraph 8(a)(i), and paragraph 8(b). The Association of the Overseas Territories provided for in the Rome Treaty ran counter to this rule since it strengthened the preferences referred to in paragraph 9 and established new preferences in favour of imports originating in the associated territories. The interpretative note of this paragraph moreover states that it is understood the provisions of Article II require that "when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory". Certain members pointed out that this note indicated the course which should have been followed in order to link the preferential systems existing between Belgium, France and the Netherlands on the one hand, and the overseas territories, on the other, with the Customs Union provided for in the Treaty.

20. Most of the representatives were of the opinion that the proposed arrangements were an extension of the preferential systems already existing between some of the metropolitan countries of the Six and their associated overseas territories and were, therefore, contrary to Article II. They pointed out that when the General Agreement had been concluded the system then existing between France and the French overseas territories has been deemed to be a preferential system, and it seemed strange to argue that that system constituted a free-trade area, at a time when the overseas territories were being granted a higher degree of protection against imports from the metropolitan territories of the Common Market. In 1955, moreover, the CONTRACTING PARTIES had considered that the compensation tax levied in France introduced an increase in the margin of preferences in excess of the maximum margins permissible under Article I of the General Agreement.

21. To sum up, most of the representatives thought that substantial barriers to the free movement of goods between the various constituent units would remain after the full implementation of the overseas territories provisions of the Treaty of Rome (e.g. on export duties) and that barriers to trade would increase progressively in view of the need to protect the industrial development of the overseas territories. For this and the other reasons set out in the other paragraphs of this Section of the report, and taking into account the whole of the discussion of the Sub-Group, they remained of the view that the proposals did not conform to Article XXIV, but constituted an extension of existing preferential systems contrary to Article I:2 of the General Agreement.

22. On the other hand, the representatives of the Six considered that the rules of the Rome Treaty concerning the Association of the Overseas Territories (Part Four) were in conformity with the provisions of the General Agreement concerning free-trade areas. The arguments put forward in support of this view-point can be summarized as follows:

23. At the time when the Havana Charter was drawn up, the concept of an integrated Europe was already familiar. The Charter could not have placed any limitation on the realization of such aspirations. None of the provisions of the Charter limited the creation of customs unions or free-trade areas to cases where such institutions would relate to only a very small proportion of international trade, or to the case of a free-trade area established between countries at a comparable stage of industrialization.

24. The fact that the Treaty did not call the Association a "free-trade area" in no way altered the nature or legal structure of the Association. While the provisions of the Treaty related to various questions connected with trade, they also concerned other matters (such as investments) which did not fall within the normal framework of a free-trade area; the latter term had therefore not been used because it did not provide a legal short-cut covering all aspects of the Association of the Overseas Territories.

25. The Rome Treaty fulfilled the conditions laid down in Article XXIV of the General Agreement for free-trade areas, in that:

> substantially all trade was liberalized;
>
> the duties and restrictive regulations maintained by each constituent territory - in the case of a free-trade area including also a customs union - would not, on the whole, be higher or more restrictive than were the general incidence of the duties and regulations in force before the formation of the area; and there was a plan and schedule for the formation of the area within a reasonable length of time.

26. There was no reference to Article XVIII either in the Treaty of Rome or in the official memoranda which the Interim Committee had addressed to the CONTRACTING PARTIES. It had merely been stated, during the general discussion, that paragraph 3 of Article 133 corresponded to the same concern for the under-developed countries that had led to the inclusion in the General Agreement of Article XVIII. But the Treaty of Rome did not make any legal use of Article XVIII. Furthermore, the argument which had been drawn *a contrario* from the fact that Article XVIII was not one of those referred to in Article XXIV:8(b) did not take into account the fact that Article XXI was not mentioned either. It would be difficult, however, to dispute the right of contracting parties to avail themselves of that provision which related, *inter alia*, to traffic in arms, fissionable materials, etc., and it must therefore be concluded that the list was not exhaustive. In any case, the only question at issue was whether the protective duties that were authorized applied to a proportion of the trade of the area consistent with the requirement that duties should be eliminated on substantially all the trade.

27. Among the import duties authorized by Article 133 were fiscal duties. They were non-discriminatory, however, and were compensated by internal levies when there was local production. They should therefore not be taken into consideration.

28. The principle of the progressive elimination of customs duties was clearly stated in Article 133, paragraph 2. It was therefore appropriate to examine only those duties that should be considered, i.e. protective duties. With regard to them, the representative of the Six pointed out that the elimination of duties within the area - as required by paragraph 8(b) - could not be interpreted as meaning that a duty could not be reimposed or introduced. In the absence of any precise provision to that effect, such a restrictive interpretation could not be accepted. The General Agreement merely provided that the duties in force at a given moment should not affect more than a fraction of the trade, so as not to jeopardize the requirement that substantially all the trade should be liberalized.

29. The General Agreement did not specify what that fraction must be and it now had to be determined. Some delegations had requested proof of the existence of a free-trade area, but the representative of the Six was justified in asking first for a precise definition of the constituent features of such an area and in particular of the fraction which constituted "substantially all" the trade. The representative of the Six stated that, for his part, he could provide:

- a definition of the liberalization of substantially all trade as referred to in Article XXIV;

- information regarding the minimum percentage of liberalization which would exist at the moment when the Treaty entered into force;

- the reasons why the present percentage should not increase unduly;

- an undertaking in case the percentage in question should fall short of "substantially all" the trade as he had defined it.

30. The representative of the Six said that the annual volume of trade between the territories constituting the free-trade area (including the trade between the individual members of the Customs Union) was approximately $ 7,868 million, and the fraction which might be subjected to the protective duties provided for in Article 133, paragraph 3 of the Treaty amounted to barely $ 108 million, namely 1.4 per cent of the trade between the European and overseas territories constituting the free-trade area. (The products which might be affected by these duties are listed in Annex II to this report.) The representative of the Six considered that this liberalization of 98.6 per cent certainly fulfilled the requirements of the Article in question, and even went beyond those requirements. He was surprised to hear it contended that the liberalization did not apply to "substantially all" the trade while at the same time no definition of the term "substantially all" was forthcoming. For their part, the Six had proposed the following definition: a free-trade area should be considered as having been achieved for substantially

all the trade when the volume of liberalized trade reached 80 per cent of total trade. As long as no counter definition was brought forward, it seemed to them logically and legally unacceptable that they should be charged with infringing a rule, the exact contents of which the competent body refused to define.

31. In reply to the criticism that he was fitting the legal structure of the Association of Overseas Territories into the concept of Article XXIV, ex post facto, the representative of the Six said that for his part he was afraid that the counter definition of "substantially all the trade" which would be brought forward might be adapted retrospectively to the percentage of liberalization which they had quoted. Therefore, taking into account the figures which he had already supplied, he would refrain from providing figures concerning the percentage of trade liberalization in regard to trade between the European territories of the Community, on the one hand, and the associated overseas territories, on the other. The representative of the Six added that if his answer seemed incomplete, he would point out that, for his part, he had not obtained any answer at all to his request concerning a definition of "substantially all" the trade.

32. Regarding the way in which that percentage might change in the future, the representative of the Six pointed out that the industrialization of the overseas territories should normally only result in the levy of protective duties to the extent that the newly-established industries produced for the domestic market and not for export. Furthermore, any increase in the volume of trade subject to protective duties (constituting the numerator of the fraction) would only result in an increase in the percentage if it was not cancelled out by a corresponding increase in total trade (constituting the denominator). There were therefore reasons for thinking that the amount of trade affected would continue to be only a small proportion of the total trade. Lastly, if that was not the case at a given moment in the evolution of the free-trade area, and more precisely if the percentage subject to protective duties reached 20 per cent, the institutions of the European Economic Community would then, but only then, be entitled, using their prerogatives and in virtue of Article 234 of the Treaty, to apply for such waivers as they deemed necessary. Consequently, not only were third countries assured that the free-trade area had already been achieved in respect of substantially all the trade, but also they were safeguarded against any subsequent development which might impair that "achievement in respect of substantially all the trade".

33. The Sub-Group considered whether or not the CONTRACTING PARTIES should specify the proportion of trade on which duties could be maintained within a free-trade area. The representatives of the Six proposed that the percentage of trade on which duties should be eliminated be fixed at 80 per cent.

34. Many members of the Sub-Group said that each case of a proposed customs union or free-trade area had to be considered on its merits and that it was, therefore, inappropriate to fix a general figure of the percentage of trade which could be subjected to internal barriers without running counter to the definition in paragraph 8(b) of Article XXIV. A matter to be considered was

whether the provisions of a free-trade area pointed towards a gradual increase of barriers affecting the trade between the constituent parties or a gradual reduction of such barriers. Moreover, any calculation of the percentage of trade not freed from barriers would need to take account of the fact that this trade would be, or would have been, larger if the trade has been allowed to flow freely. Some members of the Sub-Group thought that it would be unrealistic to apply the same criterion to a free-trade area such as that existing between Nicaragua and El Salvador and to a free-trade area the members of which were highly industrialized countries accounting for a large percentage of world trade.

35. It was pointed out by some members of the Sub-Group that the question which the CONTRACTING PARTIES had to consider was whether the Association of the Overseas Territories with the Customs Union of the Six constituted a free-trade area. It was therefore necessary to determine whether the restrictions applied in the overseas territories on trade with the Six were compatible with the existence of a free-trade area, in the sense of Article XXIV. These members noted that the representatives of the Six had supplied no information to show what proportion of the trade between the Six and the overseas territories would continue to be restricted by duties or quotas. Any calculations of the percentage of trade affected should, however, in the view of these members be based solely on the trade between the Six as a whole and the associated overseas territories.

36. The representative of the Six replied that in any case, irrespective of the method by which it was computed, a percentage was only useful and meaningful if it could be compared with a definition of "substantially all the trade" in Article XXIV. From that point of view it seemed to him logically and legally unacceptable that the CONTRACTING PARTIES should pass judgment on the legality of a juridical structure within the terms of a rule while at the same time refusing to define the terms of that rule. More precisely, it was not acceptable to judge whether the volume of trade on which protective duties were levied jeopardized conformity with "substantially all" as required by Article XXIV, when no definition of "substantially all" had been accepted beforehand.

37. A member of the Sub-Group also stressed that not only the statistical aspect but also the economic aspects of the question must be considered. The extent of the distortion of trade which might result from the establishment of the free-trade area must be weighed against the positive effects which the institution of that area might have on international trade as a whole. To view the problem from this angle was quite in keeping with Article XXIV, which authorized such structures only to the extent that they contributed to an expansion of world trade.

38. The representative of the Six asked the Sub-Group to note in its report that owing to lack of time he had been unable to reply to the numerous criticisms which members of the Sub-Group had made. Other members also felt that they had not had sufficient time to develop all their arguments.

C. The problems which Association of the Overseas Territories raises for the trade of other contracting parties to the General Agreement

39. A member of the Sub-Group referred to the statement made to the Committee by a representative of the Six, to the effect that the Six were prepared to consider as and when it occurred any prejudice which the Association of the Overseas Territories might cause to the trade of third countries.

40. The representative of the Six pointed out that it was necessary to determine whether any prejudice which might be caused was to be attributed to any inconsistency as between the Treaty and the rules of the General Agreement, or whether it was merely inherent in a situation resulting from a group arrangement that was consistent with the provisions of the General Agreement.

41. A number of delegations wanted special consideration to be given to the practical problems that the Association of the Overseas Territories with the Common Market would cause for third countries, and wished such problems to be examined on a product-by-product basis, due account being taken of the production programmes of individual countries and of foreseeable trends in world consumption. In view of the short time available, however, and without prejudice to studies that might be made by the intersessional machinery established by the CONTRACTING PARTIES, however, the delegations agreed to the following proposals:

(a) The delegations of countries outside the Association would transmit to the secretariat a memorandum summarizing their problems.

(b) The delegations would also transmit to the secretariat a list of the products of interest to each country whose trade would be affected by the Association of the Overseas Territories. This list would not be limitative since the common tariff of the Six is not completely known.

42. The Sub-Group was of the opinion that the CONTRACTING PARTIES should give consideration, inter alia, to the effects of the Association of the Overseas Territories on the trade of third countries, and that in view of the possible effects of the Treaty of Rome, such examination should commence in January and deal first with products as the following: cocoa, coffee, bananas, oilseeds and vegetable oils, wood and timber, tobacco, hard fibres and cotton, sugar and tea. A further examination should relate to the possible effects of the provisions regarding the overseas territories in respect of:

(i) products exported to the Six from the overseas territories;

(ii) products imported into the overseas territories from the Six;

(iii) products involved in trade between the overseas territories.

Particular consideration should be given to the effects upon the trade of countries having a similar trade and similar development problems. It would be appropriate, in this connexion, to examine the non-tariff preferences which the Six are empowered by the Treaty to accord, both during and after the transitional period, to the products of the associated overseas territories as well as the tariff preferences accruing from the level of the Common Tariff; it would also be necessary to take into account the provisions of the Treaty of Rome concerning such matters as the organization of the agricultural market. The representative of the Six said that the fact that the Six had agreed to the study could not impose on them obligations additional to those under the General Agreement.

43. As no definite conclusions were arrived at concerning the Association of the Overseas Territories, and as it did not seem possible either at the present juncture to commence tariff negotiations with the Six, several members of the Sub-Group asked the Six to agree to refrain until the end of 1958, by which time they felt that final decisions would have been taken by the CONTRACTING PARTIES on this question, from applying, as authorized under Article 133, paragraph 1 of the Treaty of Rome, any tariff reductions in respect of products originating in the overseas territories. The representative of the Six said that the difficulty concerning negotiations only arose in regard to the Common Tariff, but that he could not give an answer to the above request without first consulting the Interim Committee for the Common Market.

D. Procedures which might be established for further discussion of these problems with the signatories of the Rome Treaty and eventually the institutions of the Common Market

44. The Sub-Group supported the Chairman's proposals regarding the procedure which should be adopted for further discussion of any questions relating to the Treaty of Rome which it might not be possible to settle by the end of the Twelfth Session. When the Committee was established, it was clear that the work relating to the Treaty of Rome would have to continue after the end of the current session, and the Committee had been instructed to report on that matter. Moreover, it was apparent that the body that would take action during the intersessional period would have to take up all the questions which the Sub-Groups had not been able to settle, and it was preferable that the Committee should be in a position to recommend the establishment of a body which would deal with all outstanding questions listed by the various Sub-Groups.

45. Some members of the Sub-Group pointed out that the Committee should be informed that a majority had advanced the view that the Association of the Overseas Territories under the Treaty was not consistent with the provisions of Article XXIV of the General Agreement, and that such intersessional machinery as might be established should include in its consideration the above question. The representative of the Six stated that in his opinion, in accordance with

the terms of reference of the Committee, the Treaty could only be examined (or reported upon) as a whole by whatever body was instructed to carry out that examination.

46. The Sub-Group considered that all the points referred to it deserved further study. But it was principally on the points covered in Section C above that the discussion in the Sub-Group had been incomplete. The Sub-Group therefore suggested that in considering the question of establishing an inter-sessional machinery and fixing its programme of work, the Committee should give priority to questions connected with Section C of this report.

THE ROME TREATY AND THE OVERSEAS TERRITORIES ASSOCIATED WITH IT

Note submitted by the Delegation of Ceylon

This paper has been prepared at the request of Sub-Group D appointed by the Committee of the Whole to consider and report on the proposals in the Rome Treaty for the association with it of Overseas Territories. This question has an economic as well as a legal aspect and it has been discussed from both these points of view by the Working Group. This paper, however, confines itself as far as possible to an examination of the legal position arising from the proposal to associate the Overseas Territories.

It may be noted that nowhere in the Treaty is there any mention of the intention to create or of the actual creation of a Free Trade Area between the Customs Union countries and the Overseas Territories. It is, however, now claimed that the association creates a Free Trade Area. The question, has, therefore, to be examined on that basis.

Article I of the General Agreement embodies and enshrines the fundamental principle of the GATT and forms its very foundation. Article XXIV of the General Agreement is a departure from this principle and was intended to provide an exception. It is, therefore, essential that any proposal to establish a Customs Union or a Free Trade Area should be carefully examined in order to see whether it is strictly in compliance with Article XXIV.

In the same way the Article itself should be interpreted strictly and construed according to its wording to obtain its clear intent and purpose. The fact that such a strict legal interpretation of the Article is necessary cannot be challenged especially as we find that the Delegate of France has relied on occasion on highly legalistic interpretation of the GATT text, for example when he asked for a precise definition of "substantially all the trade" in para. 8 (a)(i) of clause XXIV.

It is therefore the intention of the Ceylon Delegation to view the Article in a strictly legal way with a view to extracting its clear meaning and intent, and this paper is devoted to the examination of that question alone. The views of the Ceylon Delegation on the economic aspects of the association

in relation to Article XXIV have been placed before Working Group D and its elaboration is not proposed in this paper.

In the interpretation of the document clarification can be found not only by a reference to its actual provisions but also to the history and philosophy underlying the agreement. It would, therefore, be useful to begin this examination with a reference to the earliest discussions which led finally to the incorporation of Article XXIV in its present form in the General Agreement.

Shortly stated, the original proposal was made in November 1945 by the United States allowing member countries to join a Customs Union subject to agreed criteria. This proposal underwent changes from time to time during its examination in London, New York and Geneva. But right up to the end of the Geneva meeting of 1947, the provisions referred only to a Customs Union. It was only at the Havana Conference, between November 1947 and March 1948 that the suggestion was first made to include references to the establishment of Free Trade Areas.

I have had recourse to this piece of history only to support my argument that the wording of paragraph V of Article XXIV of the General Agreement, providing an exception from the provisions of the General Agreement, is for the creation of either a Customs Union or a Free Trade Area. If the intention of the framers of Article XXIV had been otherwise, there would have been a reference to a Customs Union or a Free Trade Area or a combination of both. The very fact that the Havana proposal was only to add authority for the creation of a Free Trade Area in addition to a Customs Union, which had already been provided for, adds force to this argument. In the result, the argument of the Ceylon Delegation is that in Article XXIV itself when considered in the light of its history, it is clear that the intention is to provide an exception when a Customs Union or a Free Trade Area is created.

It is evident moreover that at the time of Havana no one visualised a Customs Union cum Free Trade Area, and certainly not one of the multitude and complexity of the type created by the Rome Treaty. What was in mind was rather simpler associations, such as those between Nicaragua and El Salvador or between the Benelux countries.

The ideas of many years thinking are now incorporated, so far as the minds of men working in common have been able to attain it, in the provisions of GATT. It will be generally agreed that the General Agreement is not a perfect instrument, but for all that it represents the law designed for the greater liberty of the Contracting Parties. When the language of a section is clear and is capable of only one meaning, there is no alternative but to follow this obvious meaning.

But as the very discussions on Article XXIV have revealed, there are lacunae in the text insofar as it does not always deal precisely with all possible situations. In such cases the Contracting Parties have to resort to

the provisions of Article I of Revised GATT which lays down the objectives of the Agreement itself. The importance of this Article is evident. It expresses in clear and concentrated form the philosophy of GATT, and helps to find solutions for problems not dealt with elsewhere in the Agreement. But in this paper I confine myself to an examination of Article XXIV alone.

The view of the Ceylon Delegation is that the association of the Overseas Territories with the Customs Union in Europe as contemplated in the Rome Treaty is incompatible with the provisions of Article XXIV.

We propose to support this position by the following arguments.

(1) The provisions of para. 3 of Article 133 of the Rome Treaty read thus:-

> "The countries and territories may, however, levy customs duties which correspond to the needs of their development and to the requirements of their industrialization or which, being of a fiscal nature, have the object of contributing to their budgets."

From this it is clear -

(a) that the Associated Territories constitute much more than follows from the definition of a Free Trade Area as laid down in Para. 8 (b), which reads:-

> "A free trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except where necessary those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated in substantially all the trade between the constituent territories in products originating in such territories."

(b) that it is not merely a question of preserving the status quo up to a point and eliminating duties gradually. The Article gives full power to the Member States to add new duties. This is contrary to the definition of a Free Trade Area already quoted.

(c) that the definition of the Free Trade Area which requires the elimination of even restrictions imposed under Article XVIII has been ignored. The definition presupposes that Article XVIII will not be applied to territories in a Free Trade Area, i.e. that ~~Article XXIV is inappropriate to underdeveloped countries.~~

(d) that there is in the Treaty of Rome itself no limit to the application of these tariffs. Assurances have been given that the "tariffs will be eliminated in respect to substantially all the trade", and that tariffs under Article 133 will be small. But this ignores many imponderables, the shape the future will take, the future political relations between the Six Member States and the Overseas Territories and the pressure which may be brought to bear by inhabitants of all Overseas Territories in years to come.

The first argument leads to the conclusion that the Rome Treaty now under discussion creates the formation not of a Free Trade Area as contemplated in Article XXIV but of a preferential area. Therefore, the Rome Treaty is not in conformity with Article XXIV.

(2) Paragraph 5 of Article XXIV begins as follows:-

"5. Accordingly the principles of this Agreement shall not prevent, as between the territories of Contracting Parties, the formation of a Customs Union or of a Free-Trade area or the adoption of an interim agreement necessary for the formation of a Customs Union of a Free-Trade area: Provided that"

The wording of the second part of the Agreement indicates that Customs Unions and Free Trade areas are alternative propositions for the territories of Contracting Parties as mentioned earlier. In other words, for the same territory, they are mutually exclusive.

The second argument leads to the conclusion that a Customs Union cannot exist within a Free Trade Area.

(3) Paragraph 8(a)(ii) of Article XXIV reads as follows:-

"(ii) subject to the provisions of paragraph 9 substantially the same duties and other regulations of commerce are applied by each of the members of the Union to the trade of territories not included in the Union."

This paragraph is perhaps more easily understood if substitutions are made to bring it into the present context. So amended it reads:-

"(ii) subject to the provisions of paragraph 9 substantially the same duties and other regulations of commerce are applied by Belgium, France, Germany, Italy, Luxemburg, Netherlands to the trade of all territories outside Belgium, France, Germany, Italy, Luxemburg, Netherlands."

Now, some of the Overseas Territories are outside Belgium, France, Germany, Italy, Luxemburg and the Netherlands. So are the territories of other contracting parties. It follows that the tariffs on imports to the European Customs Union from the Overseas Territories and from the territories of all other contracting parties should be substantially the same.

But the level of duties on imports from the Overseas Territories are going to be zero. Therefore, the level of duties of imports from the territories of other contracting parties must also become zero.

This argument is not vitiated by the definition of a Free Trade Area. In fact, it depends on and is sustained by the definition of a Free Trade Area. But it proves that if definitions are strictly adhered to, a Customs Union which is part of a Free Trade Area has to extend to all contracting parties the benefits of free trade in respect of its imports.

The third argument, therefore, leads to the conclusion that a Customs Union within a Free Trade Area has to extend the benefit of free trade to imports from all countries.

Summarizing the three arguments the following conclusions are reached:-

(i) The Associated Territories will not constitute a Free Trade Area in conformity with Article XXIV (First Argument).

(ii) Even if they do, a Customs Union cannot exist within a Free Trade Area (Second Argument).

(iii) Even if it can, the Customs Union must extend the benefit of free trade to the imports from territories of all countries (Third Argument).

ANNEX II[1]

Products of the overseas countries and territories on which, in the present situation, protective duties might be levied as provided in Article 133, paragraph 3 of the Treaty

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Fish, salted, dried or smoked
ex fresh fish, filleted fish
Cereal flour, wheat
Cereal meal, maize
Crude vegetable oils:
- groundnut oil
- palm oil
- palm kernel oil
- karite oil
- copra oil (copra)
- tung oil
- coconut oil

Refined or purified oils:
- groundnut oil
- palm oil
- Karite oil

Preserved meat
Preserved fish
Preserved crustaceans
Sugar
Sugar confectionery, not containing cocoa
Cocoa butter
Chocolate
Tapioca
Jams
Preserved fruit
Fruit juices
Aerated spa waters
Lemonade
Beer
Rum
Ex fish meal
Tobacco and cigarettes
Salt
Cement
Oxygen
Acetylene
Quinine and its salts, ethers, esters and other derivatives
Medicines with a quinine base
Fertilizers
Prepared colours and paints, and varnishes

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[1] All the industries mentioned in this annex do not necessarily exist in each of the associated countries and territories.

Soap
Candles
Matches
Articles of plastic materials
Saddlery and harness, travel goods, handbags and the like, of leather
Plywood, blockboard, laminboard, battenboard and veneered panels
Reconstituted wood
Wooden packing cases, boxes and crates
Builders' carpentry and joinery
Boxes and bags of paper or paperboard
Cotton yarn, not put up for retail sale
Woven fabrics of cotton
Twine, cordage, ropes and cables
Outer garments and other articles, knitted or crocheted, not elastic
Men's and boy's outer garments
Women's and girl's outer garments
Under garments
Travelling rugs and blankets
Tarpaulins
Jute sacks and bags
Footwear with soles of fabric or leather or rubber substitutes; footwear with soles of rubber and uppers of canvas
Articles of cement
Articles of cellulose fibre-cement
Bottles of dark glass
Tubes and pipes of iron or steel
Tube and pipe fittings of iron
Doors, window-frames, etc., of iron
Casks, drums, cans, boxes and similar containers, of sheet or plate, iron or steel
Nails and tacks of iron or steel
Bolts and nuts of iron or steel
Galvanized pails
Suitcases, trunks and chests of iron or steel
Copper wire
Articles of aluminium
Crown corks
Cycles and parts thereof
Ships, boats and other vessels for inland navigation
Gramophone records, recorded (other than for language courses)
Chairs and other seats
Furniture and parts thereof
Mattress supports, inner-spring mattresses, mattresses of foam rubber