

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

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Group of Negotiations on Goods (GATT)  
Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 6, 7 and 8 December 1989

1. The Negotiating Group on GATT Articles held its fourteenth meeting on 6, 7 and 8 December 1989 under the Chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2890 with the addition under "Other Business" of Article XXXV, and the Protocol of Provisional Application.

Agenda Item A: Consideration of issues arising from the examination of specific Articles

Article II:1(B)

2. The Chairman recalled that at the twelfth meeting of the Group, when it had been agreed to initiate a period of intensive work on the proposal that "other duties or charges" maintained on bound tariff items under Article II:1(b) should be recorded in tariff schedules, it had further been agreed that at its December meeting the Group would attempt to draw conclusions on this subject. Two documents relevant to the discussion had been circulated since the last meeting: the draft decision which was considered by the Group on 18 October; and a secretariat note on two legal issues raised at the last meeting (NG7/W/61).

3. The Chairman expressed the view, on the basis of the discussions at the last meeting, and of consultations which he had held, that there was a real possibility that the Group would be able to reach a decision in this meeting. Although some participants still had concerns about the manner in which ODCs should be recorded, the desirability of transparency as to the level and nature of these charges had not been questioned. There also seemed to be agreement that it would simplify administration in capitals and increase the value of the information recorded if it were decided to use a uniform "applicable date", as of which ODCs would be bound. Bearing this in mind there were two questions pertaining to the draft decision which needed to be considered separately: (i) the substance of the decision, and (ii) the legal form it should take. As to the latter question, the Group had had some discussion of the legal form of such a decision - whether it should be put into effect through an amendment protocol, a decision of the CONTRACTING PARTIES, or some other procedure. The secretariat note NG7/W/61 had made it clear that there was nothing in

GATT law or practice to prevent the decision being taken by the CONTRACTING PARTIES. It was not essential to follow the formal amendment procedures of Article XXX. Further discussion of this issue was certainly welcome but he suggested that it was not necessary for the Group to reach any firm decision on this at the present stage: the legal incorporation of all agreements reached in the negotiations was a matter for subsequent decision in the context of the conclusion of the Round.

4. The Group's discussion was concentrated on the issues indicated by square brackets in the draft decision: first, whether the recording of ODCs should be made in schedules or in their annexes; second, the date as of which ODCs would be bound; third, whether the recording should be made in respect of all tariff bindings; fourth, for how long it should be possible to challenge the consistency of ODCs as recorded with previous bindings; and fifth, whether some short period of time should be provided for the rectification of information relating to ODCs.

5. Regarding the first point most participants expressed preference for the recording of ODCs in schedules of concessions since the alternative formulation "in Annexes to the schedules" was less transparent. The point was made that it was necessary to provide for some flexibility as to the manner of recording in those cases where an ODC applied to a large number of tariff items. As to the second point, all speakers agreed that the date of the Uruguay Round Tariff Protocol should be used as the applicable date as of which ODCs should be bound and recorded.

6. Regarding the third point most participants expressed preference for the recording of ODCs in respect of all tariff bindings, rather than only of those bindings renegotiated or assumed for the first time in the Uruguay Round, in order to achieve maximum transparency and to preserve balance between all participants.

7. Regarding the fourth point - the length of time for which it should be possible to challenge the consistency of a recorded ODC with previously bound levels - most participants favoured a period of three years: it was argued that a very short period would make it very difficult for third countries to detect inconsistent charges while an indefinite period would perpetuate uncertainty as to the legality of ODCs and would render the notifying country liable to indefinite challenge. Regarding the fifth point - the provision of a period after recording in which information could be rectified or supplemented - participants agreed in favour of six months.

8. Following consideration of a draft revised in the light of this discussion, the Group provisionally adopted the decision reproduced in the Annex to this note. This was done on the basis of an understanding that (i) the decision would remain provisional pending the outcome of the negotiations as a whole and (ii) the eventual legal form of the decision would be decided at a later stage, in the context of the conclusion of the Uruguay Round. The decision was adopted subject to reservations by some participants needing further time for consultations with their capitals;

it was agreed that unless a reservation were confirmed by 19 December the decision would be transmitted to the Group of Negotiations on Goods.<sup>1</sup>

9. The representative of Switzerland indicated that for his delegation it was understood that the decision to record ODCs in schedules had no legal effects on the nature of the commitments contained in Article II and did not modify in any way existing rights and obligations of contracting parties under articles, provisions, or disciplines of the General Agreement. It must also be understood that for Switzerland final acceptance of the decision would depend on progress made in this Group, in the market access Groups, and in the negotiations in the Uruguay Round as a whole, and more particularly on whether future bindings would correspond to the high expectations of his delegation.

10. The representative of the EEC also said that final acceptance of the decision would be subject to the following conditions; the decision should be accepted by all contracting parties, there should be a significant increase during the Uruguay Round in the number of tariff bindings accepted by contracting parties, and account should be taken of the results in the Negotiating Groups having a bearing on the decision provisionally adopted by this Group. The representative of the EEC also placed on record a statement made in earlier discussion, to the effect that in those cases, exclusively in the agricultural part of the tariff, where charges applied in addition to the customs duty, these were variable charges. Their existence was currently indicated in column three of the schedule of concessions by means of a footnote or symbol. The Community would continue this practice after adoption of the decision on the recording of ODCs. The charges applicable in addition to the bound duty constituted a condition or qualification of the concession, in terms of Article II:1(b), first sentence.

#### Article II

11. The Chairman recalled that at the last meeting the United States had introduced a proposal that contracting parties should be permitted to levy a uniform import fee, not exceeding 0.15 percent, for trade adjustment purposes. The text of the statement made by the United States on that occasion, together with an explanation of the proposal, had been circulated in document NG7/W/57. Some participants had also made preliminary comments and these were reflected in the note of the meeting (NG7/13).

12. Several participants expressed concerns both of principle and of a practical nature over the implications of the proposal. It was said that a fee as proposed would conflict with Article II:2 as it would affect bindings and commitments negotiated in previous rounds, contrary to the

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<sup>1</sup>On 19 December two delegations informed the Chairman that they were not yet in a position to lift their reservations. The decision is therefore not yet adopted.

expectations created when these commitments were negotiated. It would also undermine the trade liberalisation objectives being pursued in the Uruguay Round. Furthermore it appeared to be based on the view that competition from international trade was inherently bad and that domestic companies must be compensated for its negative effects. It was suggested that there were alternatives to levying an import fee: exchange rate policy was also available, and there were provisions in the GATT which provided for industries affected by imports; these provisions could be strengthened. If funds for adjustment were needed, a tax applied both on imports and domestic production could be used.

13. The comment was also made that the proposal would affect more heavily export-dependent countries, and that for smaller countries the costs of collecting the fee would probably outweigh the amount collected: it would entail a substantial administrative burden and would also require the creation of some kind of international surveillance to ensure that receipts from the fee would not be used partially or totally for fiscal purposes, or as hidden subsidies.

14. The question was asked whether the proposed fee would be applied as a substitute for or in conjunction with Article XIX, and also what kind of criteria would be applied to determine the GATT-consistency of adjustment measures.

15. The representative of the United States expressed surprise at the lack of enthusiasm for the proposal and hoped that upon further study its merits would become clear. One of its positive elements was that workers assisted by the programmes financed by the fee would recognise the benefits of international trade and protectionist measures would be weakened. As to the question of the GATT-consistency of such a fee, the purpose of the proposal was precisely to make it consistent, by including in Article II:2 a provision which in the view of his delegation should have been there from the beginning.

#### Article XVII

16. The Chairman recalled that at the last meeting the Group had had a first discussion of the recent submissions on Article XVII by the EEC (NG7/W/52) and the United States (NG7/W/55). He noted that the areas in which action was suggested in these proposals could be summarised as: (a) coverage of Article XVII and interpretation of its provisions, (b) notifications and the adequacy of the existing questionnaire, and (c) possible review mechanisms.

17. The representative of the United States said that his proposal suggested that the contracting parties should explicitly agree that state-trading enterprises, including all kinds of marketing boards, were subject to all GATT disciplines. It further proposed that a working party should be set up to develop an illustrative list of practices associated with state-trading, to review the existing questionnaire and make any necessary revisions, to conduct periodic comprehensive reviews of notifications and to provide a forum for discussion and clarification of state-trading issues and problems.

18. The representative of the EEC said that his delegation had also encountered difficulty in arriving at a workable definition of STEs and therefore had some sympathy with the idea of the creation of a working party and the setting up of an illustrative list. This approach could perhaps be combined in some way with the process of notification and review proposed in the Community's submission. He asked whether it was the United States intention to modify in any way the obligations of contracting parties under Article XVII. On this matter another participant was of the opinion that the idea was to clarify the provisions rather than to expand them although he did not exclude the latter possibility. The United States representative responded that they were seeking to clarify the relationship of Article XVII to other Articles; the best way of doing this was through the understanding they were proposing and not through a modification of the Article.

19. Some participants supported the general thrust of the proposals and suggested that elements of the two might be merged. Another participant however suggested that in general Article XVII had not given rise to serious problems and that no significant changes appeared to be called for except perhaps in the area of notifications.

#### Coverage and Interpretation of Provisions

20. The Chairman recalled that the EEC proposal suggested that an adequate interpretation of the term "state trading enterprise" might be developed from the work pursued by the Panel on Notifications of State Trading Enterprises (1959-60) and the 1970-71 Committee on Industrial Products. The US proposed agreement that all GATT disciplines, and especially the national treatment obligation of Article III, the prohibition of quantitative restrictions in Article XI, and the subsidy disciplines in Articles VI and XVI, applied to state trading enterprises, including marketing boards.

21. One delegation supporting the thrust of the proposals before the Group said that it was essential to clarify the nature of the obligations under Article XVII so as to prevent contracting parties escaping their obligations merely by establishing a state trading operation.

22. Some delegations suggested that it would be very difficult to reach agreement on the interpretation of the disciplines applying to state trading enterprises in the absence of a clear definition of the activities and enterprises to be covered; it would therefore seem necessary to make such a definition, or to elaborate the illustrative list proposed by the US, before serious consideration could be given to the interpretation of disciplines. In this light one delegation said that it might be inappropriate to begin the elaboration of the illustrative list only after the end of the Uruguay Round, as proposed by the US. In reply the United States representative said that they were prepared to begin this work without delay, but had proposed deferment until after the Round out of

consideration for the resource problems of delegations and other priorities.

23. It was suggested that if it were not possible to define the activities subject to Article XVII disciplines it might be best to base notifications on a clear understanding of the term "state trading enterprises", and that this might be defined as "governmental bodies which have the power to make purchases or sales involving imports or exports or which by means of public policy instruments are otherwise able to influence the level or direction of imports or exports". Another delegation suggested that a definition should include any state trading enterprises which receive production subsidies. The question was asked why the EEC, in its proposed interpretation of the term state trading enterprise, had added to the concepts of buying and selling the term "or otherwise influence the level or direction of imports or exports", which seemed to lack precision. The representative of the Community accepted that the term might be wide in its application but thought that this should not create significant problems. In any case, the only substantive obligation flowing from his proposal would be that of notification and review. The definition could be refined and perfected through the notification and review process.

24. On the question of definitions it was suggested that STEs had been evolving with the passage of time, not only in centrally-planned economies, and that attention should be concentrated on the functions these enterprises fulfilled rather than on their form of ownership. Another participant suggested that it should be recognised that state ownership in itself did not confer special powers or privileges on any enterprise. The representative of the EEC accepted that a distinction could be made between ownership and special privileges.

25. On the question of disciplines governing the activities of STEs some delegations stated that Article XVII provisions were clear, and that together with its interpretative note they provided sufficient guidance. One participant said that the first substantive obligation in the Article was non-discriminatory treatment, which was associated with MFN treatment; the second was contained in Article II:4, according to which if a contracting party had undertaken a commitment to bind the import duty chargeable on a product on which it maintains a monopoly of importation, the combined total of the actual import tariff charged and the protective element of the mark-up on resale must not exceed the bound level; the third obligation was that contained in the interpretative note to Articles XI, XII, XIII, XIV, and XVIII, which stated that throughout these Articles the terms "import restrictions" or "export restrictions" included restrictions made effective through state trading operations. The implication of this note was that the disciplines contained in these Articles in respect of QRs applied also to restrictions made effective through state trading. As to the argument suggesting that the national treatment obligation applied to state trading, negotiating history had shown that by non-discriminatory treatment was meant an MFN obligation; and furthermore, that wherever an obligation was relevant to the functioning of STEs the precise obligation had been elaborated in this context. There were thus specific provisions relating to STEs in respect of non-discrimination, QRs, preservation of the value of

concessions and transparency; there was no such provision applying a national treatment obligation to STEs. It seemed very doubtful whether the national treatment obligation was really relevant to the functioning of STEs. The argument that it did apply to them could lead to some curious anomalies; for example, if a state trading enterprise provided some service such as transport or credit to domestic exports or exporters, would it seriously be argued that the national treatment principle required it to offer the same services to imports? The only case in which national treatment might be relevant to the functioning of a STE was when such enterprise enjoyed a monopoly of distribution in the domestic market, but the relevance of Article III in that particular case was not derived from the functioning of STEs as entities which were conducting international trade.

26. Another delegation said that it was important to remember a crucial distinction between Articles III and XVII; whereas Article III referred to the obligations of states, Article XVII dealt with the operations of enterprises which were entrusted with certain powers by the state. The inclusion of Article XVII in the General Agreement aimed at preventing trade disruption through various instrumentalities of government, and this underlined the importance of the MFN principle. Another participant disagreed with the United States perception that Article XI:1 applied to STEs; drafting history had made it clear that this was not the case.

27. The United States representative said that he realised that certain disciplines were more relevant to the activities of STEs than others; however, all GATT disciplines applied to them and different Articles might become more relevant over time and in the light of increasing numbers of notifications.

28. It was said that most STEs dealt with agricultural products, and that in the Negotiating Group on Agriculture discussion was being carried out on all measures affecting market access and export competition: the Negotiating Group on GATT Articles should not prejudge the work of other Groups. The United States pointed out that Article XVII was of general application and clearly the responsibility of the GATT Articles Group; there were many STEs operating in sectors other than agriculture.

#### Notifications and Questionnaire

29. The Chairman said that under this heading the EC proposal suggested: reliance for notification purposes on the 1960 questionnaire; conduct of reviews of notification policy at the domestic level with a view to increasing transparency; establishment of a counter-notifications mechanism according to which contracting parties could notify the existence of STEs affecting their own trade interests, or having an impact on international trade. The US had suggested review of the existing questionnaire by a Working Party leading to its revision, as necessary.

30. Many delegations considered the two papers complementary in this area and supported the desire to enhance transparency. It was also mentioned that many problems in the area of notification stemmed from lack of clarity regarding the obligations and enterprises covered under Article XVII.

31. While agreeing that the notification obligation should be reaffirmed, since compliance was poor, one participant expressed scepticism on the usefulness of counter-notifications, suggesting that the same objective could be served by questions raised during the review of notifications. Another delegation suggested that frivolous counter-notifications could be avoided by restricting their scope to situations where significant trade interests were affected. It was suggested that the acceptance of counter-notifications where a contracting party had "reason to believe" that the operations of an STE were having an impact on international trade would lead to a proliferation of counter-notifications, and that evidence of real impact should be required. The representative of the EEC accepted the counter-notification should only take place where a real trading interest was involved, but suggested that it should be possible for counter-notifications to be made before serious damage was caused - that is, on an ex ante basis. He expressed willingness to clarify the point further.

32. Comments were made on the importance of drawing a distinction between state enterprises which were competitive in the trade field and which received no special privileges from government such as subsidies, and those enterprises which received special privileges giving them the power to influence trade in violation of GATT principles. It was suggested that enterprises operating in a competitive environment, with no subsidies or special privileges, should be assimilated to private firms and consequently should not fall under the notification obligation. One participant thought that this had been accepted by the Panel on Notifications of STEs, whose findings suggested that enterprises having no ability to influence the level or direction of imports and exports need not be notified. Matters such as this could be clarified by drawing on the work of this panel.

#### Review Mechanism

33. The Chairman recalled that the EEC proposal suggested provision for multilateral discussion of notifications and counter-notifications; proposed that the secretariat be invited to provide analytical background information on developments in the area of state-trading and its impact on international trade; and sought recommendations from the CONTRACTING PARTIES with regard to the adequacy of notifications and the need for further information. The US proposed the establishment of a Working Party, to convene no later than 31 December 1991, which would develop an illustrative list of practices associated with state trading, thereby clarifying definitions, and which would conduct periodic comprehensive reviews of notifications while providing a forum for discussion and clarification of state trading issues and problems.

34. While agreeing with the periodic review of notifications one delegation stated that the objective of the reviews should be only to examine the adequacy of the notifications and the sufficiency of the information provided. More substantive aspects, such as the effects of the operations of STEs on international trade, should be taken up in the TPRM. Some other speakers, while not opposing the establishment of a review



mechanism, doubted the necessity of creating a permanent body to carry out the function. Other delegations were sympathetic to the idea of setting up a Working Party, though one of them said his delegation had not yet reached a final position as to the form of the reviews. It was also suggested that such a Working Party should report annually to the CONTRACTING PARTIES.

35. Closing the debate the Chairman said that the Group had had a good review of the proposals put forward by the EEC and the United States and a useful discussion which had helped to clarify the position of delegations. It seemed to him that there was a large measure of support for the idea of pursuing work on Article XVII, and although the discussion had to some extent focused on the differences of view, for instance on the applicability of GATT provisions to STEs, there was a considerable amount of convergence on a number of the issues discussed. He suggested that the secretariat might be asked to produce a text which would reflect the areas of convergence and divergence which had emerged in the discussion. He envisaged that this paper might first be discussed informally: in the light of such a discussion, the Group would be better placed to decide how to proceed. It was so agreed.

#### Article XXVIII

36. The Chairman recalled that the Group had received a joint communication from the delegations of Argentina, Canada, Colombia, Czechoslovakia, Hong Kong, Hungary, Korea, Mexico, New Zealand and Singapore (NG7/W/59). The Chairman further mentioned that Bangladesh had recently circulated a communication containing proposals on behalf of the least developed countries (NG7/W/60), which contained a specific suggestion on the criteria for the determination of suppliers' rights.

37. The representative of Hungary, speaking on behalf of the co-sponsors of the proposal, introduced the communication contained in NG7/W/59. He said that the aim of the proposal was to make Article XXVIII more operational and responsive to present needs in the trading environment. It did not amount to a modification of the Article for it was not in contradiction with present provisions; rather, it sought to give precision to certain provisions, in line with the intentions of the original drafters of the Article. It was hoped that it would ultimately serve as a basis for a negotiated agreement. The main elements of the proposal as introduced by the representative of Hungary are reflected under the five headings below.

38. During the course of the meeting the delegation of Japan tabled a proposal dealing with the the question of "the pre-emptive raising of tariffs on new products in the context of Article XXVIII" (NG7/W/63, see below). A statement by the delegation of Switzerland on Article XXVIII has also been circulated as NG7/W/65.

Criteria for determination of suppliers' rights

39. The representative of Hungary said that under this heading the proposal in NG7/W/59 was that an additional right of principal supplier should be granted to the contracting party with the highest ratio of exports of the affected product to the market concerned to its total exports. The intention here was to take account of the relative importance of the trade to affected countries and bring about a more equitable distribution of negotiating rights. Many participants indicated support for the proposal in general terms, while wishing to consider the details further. For example, as to the choice of a criterion for the determination of additional rights, there was some agreement with the suggestion in NG7/W/59 that further consideration should be given to the question whether the trade in the affected product should be compared with total exports or with exports of the affected product to all markets. However, some doubt was expressed as to the availability of reliable statistics for the calculation of these ratios, and particularly for "exports of the affected product to all markets". The representative of Hungary said that the joint proposal should give rise to no difficulty as to the availability of statistics.

40. The representative of Switzerland suggested that the criterion for the definition of a substantial interest might be a function of the relationship between the share of exports of the affected product in total exports and the share of total exports in Gross Domestic Product. He also suggested however that the additional right to be granted should be a right to consultation rather than a negotiating right and that all parties for which the effects of an unbinding exceeded an agreed threshold should receive an additional consultation right.

41. Participants asked who would be required to prove that the ratio, however defined, had been met and asked if practical examples could be provided of the effects of the criteria proposed, as compared with the current criteria. Another participant suggested that the burden of proof should lie on the exporting country.

42. Some participants indicated that Article XXVIII had worked well over the years and that consequently the case for its revision was not clear. Furthermore, issues raised in the proposal were related to work in other Groups, and notably to the acceptance of more tariff bindings in the course of the Round. One participant said that although the stated intention of the proposal relating to suppliers' rights was to make interpretative note 5 to Article XXVIII:1 more operational, and not to modify the Article, in effect it would come close to a modification of the note, which said that the CONTRACTING PARTIES might "exceptionally" recognise a principal supplying interest if the trade affected constituted a "major part" of total exports of the supplying country. Since this possibility existed already, he wondered if it was necessary or desirable to provide for an automatic entitlement. If any such provision were to be made, the criterion used should preserve the requirement that a major part of total

exports should be involved. The representative of Hungary pointed out in reply that interpretative note 5 had never been used in GATT's history and suggested that it was therefore not operational.

43. The representative of Bangladesh introduced a proposal according to which the special position of least developed countries should be taken into consideration in formulating additional criteria for the determination of negotiating rights (NG7/W/60). He reminded the Group that the special needs and characteristics of the least-developed countries had been recognised by the contracting parties on several occasions, for example in 1979 with the adoption of the Enabling Clause, and in the Ministerial Declarations of 1982 and 1986.

#### Preferential trade

44. The representative of Hungary introduced the proposal that only MFN trade should be taken into account in the calculation of suppliers' rights: however, further consideration should be given to whether trade under GSP schemes should be taken into account. He explained that countries with negotiating rights, if they benefitted from preferences, were often not interested in exercising their negotiating right following changes in the MFN rate, so that such rates could be increased with impunity. The character of GSP trade, however, was different in that it was not contractual and could therefore be withdrawn at any time; in addition that GSP concessions were often subject to quantitative limitations, above which the MFN rate applied. A number of delegations supported the idea that only trade at MFN rates should be used in determining suppliers' rights, arguing that if the subject of a concession was a tariff rate applied on a MFN basis it was logical to expect that only MFN trade be used in the determination of rights. Without denying the logic in the proposal some participants indicated that the matter needed further study for it raised important questions relating to Article XXIV, Rules of Origin, bilateral tariff negotiations and the overall balance of negotiations in the Round. It was also pointed out that even between preferential trading partners there may be important MFN trade flows which could not be ignored. One delegation said that GSP trade should be included in the calculations.

#### Compensation in the absence of adequate or any past trade flows

45. The representative of Hungary introduced the proposal that in the case of tariff increases on new products or products with no significant trade performance the calculation of compensation should take into account factors indicating the potential for export growth, such as the existence of new or additional capacity to sustain exports and the growth rate of affected exports to the importing country concerned. He explained that in the great majority of cases the situation would continue to be that compensation would be based on previous trade flows. Several delegations expressed interest in this proposal though some had doubts as to the possibility of defining objective criteria for the quantification of potential trade and as to the availability of the necessary statistics. One delegation asked what time-frame was envisaged for the calculation of trade growth of a new product.

46. Introducing the proposal contained in NG7/W/63 dealing with the pre-emptive raising of tariffs on new products, the representative of Japan suggested the application of the following three rules to these cases: determination of the parties to the negotiation on the basis of actual production, future export estimates, investment, forecast demand for the product in the importing country, etc; calculation of compensation on the basis of these factors together with the level of imports of substitutes, if any, their rate of growth and demand forecast in the applicant contracting party; and provision for review and for renegotiation on request after an agreed period of time - e.g. when three years' trade data became available. To illustrate problems in this area, he recalled that in 1983 a group of contracting parties had increased the tariff on compact disc (CD) players, which had recently been introduced, from 9.5 percent to 19.5 percent, offering in return compensation on open-reel tape recorders by reducing the tariff from 7.6 per cent to nil. The inadequacy of this compensation was demonstrated by the fact that despite the tariff increase, exports of CD players rose from very little in 1983 to 298 million dollars in 1986, and trade in open-reel tape recorders shrank from 16 to 13 million dollars over the same period. In other terms while the tariff increase amounted to an extra cost of nearly 40 million dollars, the tariff compensation amounted only to a benefit of 2 million dollars. Their proposal constituted a concrete attempt to address such problems.

47. The representative of Switzerland suggested that these cases might be met by the creation of a tariff line for a new product on the basis of the similarity between the new product and a like product. The tariff rate to be assigned to the new product should not be higher than that of the like product bearing the lowest rate, and should not be increased within three years. After this period the rate of growth of trade for the product in question should be taken into consideration in a tariff renegotiation (NG7/W/65). A number of participants welcomed the new proposals, but one expressed concern as to their practicability and about the desirability of constructing special rules for the category of new products. Another delegation asked for confirmation that the right to invoke Article XIX would not be lost during the period of establishment of a new product on the market.

#### Tariff rate quotas (TRQs)

48. The representative of Hungary introduced the proposal that in cases where an unlimited tariff binding is replaced by a tariff rate quota, the calculation of compensation should take into account the factors proposed for compensation in the absence of past trade flows. The representative of Switzerland agreed that the best way to discourage the substitution of tariff rate quotas for unlimited tariff bindings was to require adequate compensation: compensation should therefore exceed the amount of trade actually affected by the partial unbinding but should not be so high as to make it more advantageous to unbind the entire tariff heading. He suggested that the calculation of compensation should therefore take into account an agreed proportion of the trade not affected by the quota, as well as the quota itself.

Maintenance of supplier rights

49. The representative of Hungary said that compensation under Article XXVIII should be such as to maintain equivalency of negotiating rights. In general, however, countries taking Article XXVIII action did not accord negotiating rights on compensatory concessions, though the possibility of granting an initial negotiating right in such cases existed. It was therefore proposed in NG7/W/59 that negotiating rights should also be accorded on compensatory concessions, unless the parties concerned agreed otherwise. Another participant agreed that compensation on the basis of trade coverage alone - i.e. equivalency of customs revenue collections - caused loss of the right to negotiate in the event of withdrawal of the compensatory concession and was not in accordance with Article XVIII:2.

50. A number of delegations expressed support for this proposal. In answer to the question why provision should be made for bilateral agreement not to accord negotiating rights, the representative of Hungary explained that in some cases supplying countries might prefer to negotiate higher levels of compensation than to acquire negotiating rights.

Retaliatory Action

51. The representative of Switzerland proposed the introduction of an interpretative note to Article XXVIII:3 which would authorise contracting parties to take retaliatory action on a bilateral basis against a contracting party withdrawing a tariff concession under Article XXVIII. He explained that if the Article were interpreted as permitting retaliation only on an erga omnes basis, innocent third parties could be doubly damaged, first by the original withdrawal of the concession and secondly by the retaliation on the part of countries feeling that they had not received adequate compensation. Possible abuse of the right to retaliate bilaterally could be prevented by making the implementation of such measures subject to prior approval by the CONTRACTING PARTIES.

52. Several delegations expressed support for these views. One pointed out that insistence on MFN retaliation in many instances reduced the negotiating leverage of affected parties because of the difficulty of finding items of appropriate scope or effect to withdraw or modify without adversely affecting innocent third parties. The point was made that there was a precedent in other provisions of the General Agreement for actions to be taken on a bilateral basis subject to the consent of the CONTRACTING PARTIES.

53. Some other participants, however, cautioned against departure from the MFN principle in this matter. One suggested that acceptance of bilateral retaliation might make it more difficult for small and medium sized countries to invoke Article XXVIII and run counter to the Article's primary purpose of facilitating tariff negotiations.

Articles XII, XIV, XV and XVIII

54. The Chairman said three new submissions dealing with the Balance-of-Payments Articles had been circulated since the last meeting.

These were a joint submission by the United States and Canada entitled "Proposal for Reform of the GATT Balance-of-Payments Disciplines" (NG7/W/58); a submission from Peru on Article XVIII:B (NG7/W/62); and a communication from Bangladesh on behalf of the least-developed countries which also included proposals on Article XVIII:B. (NG7/W/60)

55. The Group had agreed that a period of intensive work on the BOP provisions should be launched at this meeting. It might be helpful to recall that Article XII, which dealt with the trade restrictions that a developed country can take to safeguard its Balance-of-Payments position, had been discussed very briefly and mainly with reference to differences between it and Article XVIII:B. Articles XIV - Exceptions to the rule of Non-discrimination, and XV - Exchange Arrangements, had not been discussed in detail.

56. The Negotiating Group had centred its attention on Article XVIII:B which dealt with the measures that could be taken by a developing country to safeguard its external position and to ensure a level of reserves which was adequate for the implementation of its programme of economic development. There had been no detailed discussion of these matters since 1988; points raised in earlier discussions had been reflected in the notes of the corresponding meetings.

57. In their introductory statements, the representatives of the United States and Canada said that their proposal was not intended to eliminate the right of contracting parties to restrict trade when faced with serious balance-of-payments difficulties; rather the aim was to provide clear guidelines so that the contracting parties could effectively ensure that trade restrictions taken for balance-of-payments reasons were the minimum necessary in terms of their duration and nature. It was recognised that increased disciplines over balance-of-payments-related measures must be part of an overall package of reforms which enhanced market access and limited derogations for all contracting parties. The rationale underlying the proposal was to minimise GATT surveillance when countries limited their balance-of-payments-related restrictions to temporary, least-disruptive measures, and to focus surveillance on more harmful measures. Thus guidelines, reflecting provisions in the balance-of-payments Articles and in the 1979 Declaration, were proposed for applying limited measures. Measures applied by countries in conformity with the guidelines would automatically be GATT-consistent and prior approval of the Balance-of-Payments Committee would not be required, the Committee performing in these instances a monitoring function. In this manner, the uncertainty facing both countries applying these measures and their trading partners would be minimized. However, where contracting parties felt the need to take restrictive action beyond that foreseen in the proposed guidelines, there would be a need for the Committee to determine its appropriateness in the light of the relevant rights and obligations. The proposal clarified the criteria based on which the Committee should arrive at such a decision including: the severity of the balance-of-payments problem, the nature of the overall economic adjustment effort and the extent to which the specific types of measures employed were consistent with GATT principles and obligations. The proposed role for the IMF would in no way diminish the decision-making function of the Committee. The proposal also clarified the kind of information that the invoking country

would be required to provide in order to allow for a meaningful consultation. In the light of this, the Committee would be asked to examine whether the measures taken by the invoking country were justified. In order to facilitate the achievement of consensus in the Committee the proposal provided the opportunity for measures to be accepted conditionally, that is, subject to fulfilment of specific Committee recommendations for reform of the measures. The GATT consistency of balance-of-payments measures would be established on their acceptance, unconditionally or conditionally, by the Balance-of-Payments Committee, and they could be challenged subsequently only on the grounds that the conditions for acceptance had not been fulfilled or that the balance-of-payments problems had been eliminated. A failure to reach consensus in the Committee would simply mean that the question of GATT-consistency of the measures had not been decided. In these cases, an adversely affected country could choose to pursue its interests under GATT dispute settlement provisions as amended by the Negotiating Group on Dispute Settlement and it would be up to a panel to decide the GATT-consistency of the measures taken. (An oral statement made by the representative of the US introducing the joint United States/Canada submission has since been circulated as document NG7/W/64).

58. Introducing the submission of his delegation (NG7/W/62), the representative of Peru said that Article XVIII:B contained rights for developing countries that were indispensable to maintain a balance between contracting parties and for the participation of developing countries in the multilateral trading system. Far from being curtailed, these rights should be strengthened in view of the prevailing international situation. The oil crisis in the 1970s and the debt crisis in the 1980s was reflected in the phenomenon of developing countries, in particular those of Latin America, actually transferring financial resources to the industrialised countries, and had reinforced the structural and persistent nature of the balance-of-payments problems of developing countries. It was in the context of this financial and development situation that balance-of-payments-related trade restrictions had to be viewed. While account had been taken of these problems in other fora, and plans were being made by international financial institutions to reduce the indebtedness of developing countries, it should be the role of GATT in general and the Balance-of-Payments Committee in particular to realise concrete measures to improve their external environment and secure market access for their exports.

59. Some delegations welcomed the joint United States/Canada submission as constituting a good basis for further work in the Group. They welcomed its emphasis on requiring trade measures to be temporary, degressive, transparent, price-based and imposed on an MFN basis, its forward orientation seeking progressive liberalisation, and its idea of providing procedural incentives by dividing balance-of-payment measures into two categories.

60. However, other delegations expressed reservations about the United States/Canada submission and said that they found large areas of agreement with the Peruvian submission. These participants addressed in turn the arguments put forward earlier in calling for changes to the

balance-of-payment disciplines. With regard to the changes in the international monetary system, in particular the changeover from the fixed to floating exchange rate system, some participants referred to the arguments in the Egyptian submission (NG7/W/29, paragraphs 10-15) which in their view suggested that such changes had not obviated the need for developing countries to use trade restrictions for balance-of-payments purposes. With regard to the general inefficiency of trade measures notably quantitative restrictions, in dealing with balance-of-payments problems, it was said that the 1979 Declaration had noted this, although it allowed a certain degree of flexibility in favour of developing countries as reflected in the Declaration's preambular paragraphs. This flexibility was important for developing countries which, given their market distortions and skewed income distributions, could not rely on macroeconomic measures alone to solve balance-of-payments problems; import restrictions were necessary, for example, to allocate some foreign exchange to priority imports. With regard to the perceived long-term use of trade restrictions, the comment was made that the balance-of-payments problems of developing countries remained structural and long-term in nature; their economies were often commodity-based and undiversified and remained vulnerable to external shocks including those relating to exchange rates, terms-of-trade and interest rates. This situation was worsened by the accumulation of external debt and by protectionism in developed country markets, the latter affecting in particular the export interests of countries in the areas of agriculture, textiles and tropical products.

61. With regard to the perceived inadequacies in the working of the Balance-of-Payments Committee, participants suggested that the record was a good one. In the view of some, the secretariat's document (NG7/W/46) showed that countries in the past had liberalized their trade restrictions as the balance-of-payments situation had improved and the examples of the recent disinvocation by the Republic of Korea and the proposed disinvocation by Ghana were cited as evidence in this regard. Consultation procedures had taken adequate account of alternative measures required to correct balance-of-payments disequilibrium, and had been used to draw the attention of countries to perceived deficiencies in transparency and to encourage the process of liberalisation in consulting countries. Barring a few exceptions, the Committee's conclusions had been a unanimous expression of the views of members. In any event, perceived problems could be taken up for consideration in the Committee itself.

62. In the light of these concerns, the view was expressed that there was no real need for considering changes in the rules or procedures relating to the balance-of-payments provisions. Furthermore, there did not exist a sufficient degree of convergence amongst participants for the Group to advance discussions to a second phase involving a detailed consideration of the proposals submitted. One participant said that it would not be opposed to imposing stricter disciplines on balance-of-payments-related trade measures provided other exceptions from the General Agreement, including waivers, reservations in accession protocols, and areas such as textiles, agriculture and safeguards were also addressed simultaneously and on the same footing.

63. A number of specific comments and questions were raised concerning the United States/Canada submission. Some delegations sought further



clarification as to how the sponsors saw the guidelines and on how the distinction made between the two kinds of balance-of-payments measures would operate in practice. Some participants argued that it did not provide adequate flexibility and autonomy for developing countries to deal with balance-of-payments problems. In the view of some, there was inadequate recognition of the links between trade, on the one hand, and development and finance on the other; no trade liberalisation could survive in the absence of complementary financial relief to developing countries, especially those that had accumulated large external debts. It was also suggested that the proposal paid inadequate attention to the trade measures imposed by other contracting parties which had a direct impact on the balance-of-payments situation of the consulting country. One participant saw the submission as seeking to reduce the rights and increase the obligations of countries that invoked Article XVIII:B.

64. A participant presented some preliminary thoughts and indicated his delegation's intentions to elaborate on them in the future. He said further reflection was necessary on the link between Articles XII and XVIII, on whether participants should consider going beyond the best endeavours commitment not to apply trade restrictions for balance-of-payments reasons under Article XII, on the particular problems of the least-developed countries, on the possibility of modulating obligations on procedural commitments between contracting parties on the basis of their stage of development as was already inherent in Article XVIII and on the need for allowing flexibility in the rules and procedures guiding the operation of the balance-of-payments disciplines.

65. Replying to comments, the representative of Canada said that there appeared to be large areas of common ground among participants, for example, on the right to invoke trade restrictions for balance-of-payments reasons, on the persistent and particular nature of balance-of-payments problems for some countries, on the appropriateness of using quantitative restrictions in some instances by developing countries, on the need for flexibility in determining the appropriateness of invoking trade restrictions, on the importance of external causes in the balance-of-payments problems and hence on the need for overall liberalisation in alleviating these problems. This common ground should constitute the basis for further work in the Group. In response, a participant wondered whether any further work was called for as areas of common understanding were already reflected in the existing balance-of-payments-related disciplines.

66. In conclusion, the Chairman said that a number of important statements had been made. He urged greater informal contact between participants so that a better understanding of each other's positions could be achieved in an area that was clearly regarded as being sensitive. The understanding reached in the Group in July on initiating periods of intensive work was without prejudice to what such work might lead to; in the spirit of that understanding he suggested that the Group should now initiate such a period of intensive work and at its next meeting review the progress made thus far.

Article XXIV

67. The Chairman informed the Group that no new written submissions from participants on Article XXIV had been put forward. This being so the Group needed to consider whether it could in fact open a period of intensive work at this meeting.

68. The representative of Japan said his delegation would very shortly circulate a new submission on this Article. This would suggest inter alia that the procedures for the entry into force of regional arrangements were not working well; guidelines should be adopted and monitoring of agreements strengthened in order to ensure that negative effects on third countries were minimised and that the benefits of trade liberalisation were extended to them, since it was stated in Article XXIV:4 that the purpose of regional arrangements was to facilitate trade. The meaning of the term "interim agreement" should be clarified and consideration should be given to the implications for regional agreements of the possible extension of GATT disciplines to new areas. Another participant agreed on the need to reach agreed interpretations of a number of concepts in Article XXIV. The Article had given rise to many disputes, even as to the conformity of notified agreements; in the view of some countries conformity could be presumed to be established if no recommendations to the contrary were made, while others believed that the absence of recommendations left open the legal status of agreements. The Group decided to postpone launching a period of intensive work on this Article until its next meeting.

Agenda Item B: Any other Articles that delegations may wish to raise

69. The Chairman said that in the communication from the delegation of Bangladesh on behalf of the least-developed countries the attention of the Group was drawn to the possibility of making suitable improvements in the Enabling Clause (NG7/W/60).

Agenda Item C: Other Business

(i) Article XXXV

70. One participant requested the inclusion of this Article in the agenda of the next meeting of the Group as his authorities had the intention of making a submission in the coming weeks.

(ii) Protocol of Provisional Application (PPA)

71. Having informed the Group that his delegation had recently provided the secretariat with a response to their enquiry, and that they no longer invoked the so-called grandfather clause, one participant requested the inclusion of this provision in the agenda of the next meeting of the Group as his authorities had the intention of making a submission in the coming weeks.

(iii) Date of next meeting

72. The Group agreed that the next meeting would be held on 27 February and 1, 2 March 1990 and reserved the dates of 29, 30 March and 24-26 April for its subsequent meetings.

ANNEX

ARTICLE II:1(b): RECORDING OF "OTHER DUTIES OR CHARGES"  
IN THE SCHEDULES OF TARIFF CONCESSIONS\*

Draft Decision

1. It is agreed that in order to ensure transparency of the legal rights and obligations deriving from Article II:1(b), the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of tariff concessions against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be the date of the Uruguay Round Tariff Protocol. "Other duties or charges" shall therefore be recorded in the Schedules of concessions at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the Schedules of concessions. However, the date of the instrument by which a concession on any particular item was first incorporated into the General Agreement shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.
3. "Other duties or charges" shall be recorded in respect of all tariff bindings.
4. Where a tariff item has previously been the subject of a concession, the level of "other duties or charges" recorded in the Schedules of concessions shall not be higher than the level obtaining at the time of the first incorporation of the concession in the Schedules. It will be open to any contracting party to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the deposit with the secretariat of the Schedule in question.
5. It is agreed that the recording of "other duties or charges" in the Schedules of concessions is without prejudice to their consistency with rights and obligations under the General Agreement other than those affected by paragraph 4 above. All contracting parties retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.

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\*The legal form of this decision will be decided at a later stage.

6. For the purposes of this decision, the normal GATT procedures of consultation and dispute settlement will apply.

7. It is agreed that "other duties or charges" omitted from a Schedule at the time of its deposit with the secretariat shall not subsequently be added to it and that any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the deposit of the Schedule.

8. The decision in paragraph 2 above regarding the date applicable to each concession for the purposes of Article II:1(b) supersedes the decision regarding the applicable date taken by the GATT Council on 26 March 1980 (BISD 27S/22).