

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

**RESTRICTED**

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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 27-28 February and 1 March 1990

1. The Negotiating Group on GATT Articles held its fifteenth meeting on 27-28 February and 1 March under the Chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2930 with the addition under item A of the Protocol of Provisional Application and Article XXV:5.

2. The Chairman informed the Group that the following documents had been circulated since the last meeting:

- W/41/Rev.2 of 16 February; an updated version of the secretariat's checklist of documents;
- W/63 of 22 December; submission from Japan on the pre-emptive raising of tariffs on new products in the context of Article XXVIII;
- W/64 of 3 January; US statement on the US/Canada balance-of-payments proposal;
- W/65 of 22 December; statement by Switzerland on Article XXVIII;
- W/66 of 22 December; submission by Japan on Article XXIV;
- W/67 of 21 February; submission by Switzerland on Article XXVIII;
- W/68 of 16 February and W/68/Corr.1 of 22 February; communication from the EEC on the balance-of-payments provisions;
- W/69 of 22 February; communication from the EEC on Article XXV:5.
- W/70 of 26 February; communication from the EEC on the Protocol of Provisional Application;

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

Article II

3. The Chairman said that there were two issues to be considered under this Article, the first being the draft decision on the recording of other duties or charges in schedules of concessions under Article II:1(b), and the second the proposal by the United States in favour of a uniform import fee for trade adjustment purposes.

GATT SECRETARIAT

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4. On the first point, he informed participants that of the two delegations that had maintained reservations on the draft decision on Article II:1(b) one - the United States - had lifted their reservation. He hoped that by the next meeting of the Group the remaining reservation could also be removed; it would then be his intention to transmit the draft decision, which would remain provisional pending the outcome of the negotiations as a whole, to the GNG.

5. Responding to points made in earlier discussions on his delegation's proposal contained in NG7/W/57 (see documents NG7/13 and 14), the representative of the United States said that the proposal was consistent with the spirit of the Uruguay Round and with trade liberalisation for many reasons: public support for trade liberalisation would be stronger if funding for adjustment were tied to secure sources independent of the budget process; existence of adjustment programmes would reduce pressures for protective measures, and any trade distortion would be de minimis with a ceiling of 0.15 percent for the fee. As to the allocation of funds collected, a notification requirement could be incorporated so that countries using the fee would provide contracting parties with information on the utilisation of funds. Recourse to the fee would be optional, not obligatory. The proposal sought to facilitate liberalisation and adjustment by asking those who gained from trade liberalisation to partially compensate those who bore the burden of adjustment.

6. In response to the question whether the US would be required by its domestic legislation to apply such a fee, the representative of the United States said that if the Group did not reach agreement on the proposed import fee, Congress would take up the issue in August, after which the normal legislative process would apply, including the possibility of Presidential veto of a Congressional decision, followed by a return of the matter to Congress.

#### Article XVII

7. Discussion on Article XVII took place on the basis of an informal note prepared by the secretariat which reflected the areas of convergence and divergence that had emerged during the Group's discussion of the proposals tabled on this Article (see also NG7/14, paragraphs 16-35). The Chairman suggested that the discussion be organized under the three headings used in the informal note beginning with notifications and review, followed by disciplines and definitions.

#### Notifications and Review

8. A participant said that hitherto the definition of STEs for the purposes of notification had been too closely linked to the definition that would apply in respect of the substantive disciplines under Article XVII. As a starting point, and in order to facilitate progress in the negotiations, his delegation would be in favour of considering a wider

coverage in respect of the STEs and their activities that had to be notified, without prejudging the question of what this would imply for the substantive disciplines under this Article. The scope of such a coverage should be decided now, on a pragmatic basis, leaving open the possibility that a permanent working machinery (see paragraph 9 below) might refine and elaborate on this definition in the future. Some delegations said that the existing questionnaire could form the basis for deciding on an acceptable working definition of STEs for the purposes of notification. It was suggested that the preparation of an illustrative list of STEs and their activities would be useful for the purpose of notification. A participant expressed doubts about broadening, even for the purposes of notification, the scope of the definition to include regulatory activities of STEs. However, his delegation would prefer that the question of definition in relation to notification be decided by the Group now rather than in a working party later. Another participant made the point that the volume of notifications must be kept within manageable limits. Some delegations emphasized the importance they attached to the provision of counter-notification; it kept open the possibility of enquiry in the future in order to respond to the needs and doubts of contracting parties on the issues of definitions and disciplines. A participant said that the possibility of counter-notification was already implied in Article XVII:4. The point was made that under existing provisions counter-notification was only possible in certain circumstances and it was therefore necessary to retain the idea that significant trade interests had to be involved if counter-notifications were to be made. Another view was that counter-notifications should only be made in respect of the inadequacy or absence of information notified by contracting parties.

9. With respect to the review mechanism, a participant said that the establishment of a permanent working machinery was not necessary. An ad hoc mechanism could be envisaged whose membership should be as wide as possible and which could meet as necessary. Some delegations said that they were open-minded on the question whether the machinery envisaged should be permanent or ad hoc and on the periodicity of the review to be undertaken. A participant drew attention to ongoing work in the FOGS Group that could be of relevance in this regard. In regard to the nature of the work that such a review mechanism should undertake a participant said that it should be confined to addressing the adequacy of the information notified by contracting parties; accordingly, he proposed that the phrase "in particular" on the top of page 6 of the secretariat's informal note should be deleted. Other more general issues referred to in paragraph 11 of the same note should be raised in other bodies in the GATT. Another participant said that although his delegation was willing to consider a certain enlargement of the scope of the review, it should not become open-ended and should focus on relevant trade aspects. To facilitate this task and to help to focus the review process, the establishment of some criteria was necessary.

#### Disciplines

10. A participant said that a distinction had to be made between the disciplines on contracting parties arising from other provisions of the GATT and those from Article XVII. Contracting parties were subject to all GATT disciplines in respect of governmental action or influence

irrespective of whether these affected STEs or private enterprises. Article XVII was a complementary discipline in that it provided for additional obligations on contracting parties in respect of the activities of STEs. In order to make this distinction clear, he suggested that the phrase "governmental action or influence with respect to" should replace "the activities of" in the first indent of paragraph 5 of the secretariat note. Some delegations expressed the view that Article XVII was not a complementary provision; the General Agreement envisaged different types of disciplines for STEs such as those in Article XVII:1(a) and XVII:3, as they operated in a different environment. A participant said that it would not accept any attempt to redefine the disciplines under Article XVII. The view was expressed that the question whether Article XVII was an exception to other provisions of the GATT was a complex one. In the General Agreement, wherever a general obligation applied to STEs, this was explicitly spelt out: the mfn obligation in Article XVII(a) and (b); the obligation on bindings in Article II:4; the prohibition on QRs in the interpretative notes to Articles XI, XII, XIII, XIV and XVIII; and the transparency obligation in Article XVII:4. However no such reference to STEs existed in relation to Article III, and it would therefore appear doubtful whether the national treatment obligation applied. A delegation reiterated its view that the activities of STEs were subject to all GATT provisions; if they were not STEs could be used as policy instruments by governments to distort international trade. A participant cautioned against increasing the disciplines in Article XVII given the disagreement in the Group on the magnitude and nature of existing disciplines.

#### Definitions

11. A participant asked if the definition proposed in paragraph 3 of the secretariat note could be accepted as a working definition of STEs for the purpose of the notification requirements. Commending this approach, another participant said that, in addition, the secretariat should be asked to prepare an illustrative list indicating the types of relationship between STEs and governments, and of activities by STEs, that could be covered by a possible definition. In the light of the understanding gained through such a list, the proposed working definition could be suitably refined. In relation to the definition proposed in paragraph 3, participants recalled the comments recorded in paragraph 4. A participant emphasized that its support for any working definition and the preparation of an illustrative list would hinge on the understanding that the grant of exclusive or special privileges rather, than ownership per se, was the essential criterion for notification of STEs. In his view the illustrative list should only address, as had been proposed, the nature of exclusive or special privileges by virtue of which an enterprise would be regarded as an STE in terms of Article XVII. It was said that further thought ought to be given to the treatment of STEs operating in a competitive environment. Another participant expressed the view that the definition proposed in the first indent of paragraph 3 relating to governmental bodies was too broad because of the phrase "otherwise influence the level or direction of imports or exports"; at the same time, it was too narrow in specifying that the power to make purchases or sales should "involve" imports or exports; for example, it would appear to exclude from the coverage an STE

which might have the power to affect imports even though it only made domestic purchases. The definition proposed by the 1960 Panel had stipulated that "countries should notify enterprises which have the statutory power of deciding on imports or exports, even if no imports or exports in fact have taken place". His delegation would favour broadening this definition, but in a manner that was sufficiently precise. In relation to the second indent, he said that the proposed definition in seeking to include all types of marketing boards, went too far: the interpretative note to Article XVII had specified that the regulatory activities of marketing boards were not required to be notified; similarly, non-governmental bodies awarding licences were governed by the notification requirements under other GATT provisions. On the other hand the definition was also too narrow in specifying that the exclusive or special privileges granted should be related to the trading activities of STEs. He recalled that the 1960 Panel on notifications had not thus qualified the exclusive or special privileges conferred on non-governmental bodies. In the view of another participant, the existing distinction between governmental and non-governmental bodies had to be maintained, and the definition of STEs should focus in both cases on trading activities rather than on manufacturing activities or those related to the exploitation of natural resources. In regard to governmental bodies there were perhaps two categories of STEs, both of which should be included in any definition - those which had the statutory power to import and export and others which, though not possessing such power, engaged in international trade. In regard to non-governmental bodies, it was easier to specify which bodies should not be included in the definition by reference to what did not constitute exclusive or special privileges: two such examples were identified in the interpretative note to paragraph 1(a) of Article XVII; a third was an understanding recorded at the Geneva session of the Preparatory Committee that government exemption of an enterprise from certain taxes as compensation for its participation in the profits of the enterprise did not constitute an exclusive or special privilege. The Group might identify further such examples in order to make precise the definition of what constituted an STE for the purpose of Article XVII. A participant proposed the following definition of STEs: "The term "state trading enterprise" covers: entities established by government which with acquiescence of government actually possess or are vested with exclusive or special foreign trade privileges or are entitled to administration of public policy measures by means of which they are able to influence the level, conditions or direction of imports or exports; other entities to which the government granted such privileges or powers; every entity making imports or exports on command of government in order to secure fulfilment of its international obligations or for State policy and the like reasons."

12. In conclusion the Chairman said that discussion on this Article had reached a point where further work would be assisted by a more precise draft text, which the secretariat should prepare. This draft would be based on the earlier informal note, and discussions in the Group on that note; it would be prepared on his responsibility and would not commit delegations.

Article XXVIII

13. The Chairman said that in addition to the three proposals on this subject (NG7/W/59, 60 and 63) which had been discussed at the last meeting, a submission had been received from Switzerland (NG7/W/67). The representative of Switzerland, introducing this submission, said that it was motivated by the need, at a time when additional commitments were expected of contracting parties in the form of more bindings, lower duties and tariff harmonisation, to provide countries willing to expose their economies to competition in this way with the means to defend themselves in Article XXVIII negotiations and to participate fully in the system. The changes proposed would have negligible effects on Switzerland's own position; the proposal was made in the interest of the multilateral trading system. Specific proposals in the Swiss submission are introduced under the relevant headings below.

Criteria for the determination of suppliers' rights

14. Introducing the discussion, the Chairman said that in the light of the proposals before the Group, it should consider the following questions: (a) whether the additional rights to be accorded should be negotiation or consultation rights; (b) whether these should be accorded to one or more contracting parties; (c) what criteria should be used to determine the countries to which these rights should be granted; (d) what should be the procedures for making available trade statistics and verifying claims to negotiating rights; (e) whether special provision should be made for least-developed countries.

15. The representative of Switzerland said that the formula proposed by his delegation for the determination of negotiating rights was intended to capture the importance of the trade sector for the exporting country; the more open the economy, and the greater its dependence on exports, the greater was its vulnerability to the unbinding of tariffs. The proposed formula, though seemingly complicated because it contained a square root, was very easily applied and was intended to reflect the degree of export-dependence of an economy without giving it undue weight.

16. Most participants favoured the provision of an additional negotiating right, rather than consultation rights, on the grounds that this would provide a better guarantee that adequate compensation would be negotiated. These participants were ready to contemplate the provision of new negotiating rights to two countries, though on grounds of practicability one seemed preferable. Others made the point that the effective difference between negotiation and consultation rights was slight, since countries with consultation rights also had the right to withdraw concessions in retaliation for inadequate compensation, and could not therefore be ignored. This being so, there was a case for granting additional consultation rights in order to avoid complicating the negotiating process. Another participant said that there was a clear difference between negotiating rights and consultation rights; the latter were automatically conferred by a 10% market share. The Group should therefore concentrate on additional negotiating rights.

17. The question was raised whether the additional negotiating right should be subject to a threshold, in terms of the amount of trade involved, below which claims would be regarded as de minimis. Some participants however took the view that agreement on an appropriate threshold would be very difficult, since what was negligible for one country would not necessarily be so for another.

18. Regarding the formula to be used for the determination of negotiating rights, the point was made that the ratio "exports of the affected product to the market concerned to total exports" could easily be derived from available statistics and was very close to the existing interpretative note 5. The proposed ratio of "affected exports to exports of the product to all markets" could be considered but could give rise to problems in terms of the availability of statistics. Other participants, pointing out that the availability of statistics would improve over the next few years, said that the share of the importing country in the exporter's total exports of the affected product should be taken into account. The improvement of statistics would also make it easier to operate a criterion based on total exports of the product to all markets.

19. Some concern was expressed with the apparent complexity of the formula proposed by Switzerland. Some participants said that they did not necessarily favour the creation of new automatic rights to participate in Article XXVIII negotiations, but were favourably disposed towards the autonomous grant of such rights where the exporting country was heavily dependent on the trade concerned, more especially where it was a developing country. The rights granted in this way would be initial negotiating rights. However, this possibility would be conditional on satisfactorily wide participation in negotiations on tariffs and market access generally, and in new bindings. Another speaker said that his country invariably consulted with any country expressing an interest and tried to provide appropriate compensation wherever possible. Other participants, however, said that reliance on the autonomous grant of negotiating rights by importing countries would provide no security, and some added that this question should not be linked with the negotiations on market access.

20. There was general agreement that the burden of proof, in establishing a claim to a negotiating right, should lie on the exporting country, and that the claim should be substantiated within a short period from the announcement of the intention to renegotiate a binding. It was agreed that the secretariat might assist in verifying claims or by providing statistics. It was suggested that the general improvement in statistics might in future enable the importing country to indicate which countries were most likely to qualify for negotiating rights.

21. With reference to the interests of least-developed countries, one delegation expressed willingness to consider any proposal but asked if their needs would not be met by proposals intended to give weight to the interests of small suppliers.

Preferential Trade

22. The Chairman recalled that in NG7/W/59 it was proposed that only mfn trade should be taken into account in the determination of suppliers' rights and that further consideration should be given to whether trade under GSP schemes should be taken into account. The representative of a group of participants informed the Group that his delegation supported the proposal that only mfn trade should be taken into account.

Compensation in the absence of adequate or any past trade flows

23. The representative of Japan recalled that the proposal of his delegation on the "pre-emptive raising of tariffs on new products", containing three main elements, had been tabled at the last meeting; in light of the accelerating speed of technological innovation there was a clear a need to provide for clear rules in this area.

24. On the basis of the proposals before the Group, the Chairman said that the proposal to include the calculation of future trade prospects in the determination of rights to compensation and the level of compensation gave rise to the following questions: (a) In what cases should an indicator of future trade prospects be taken into account in deciding whether compensation was due? For example, would this be done only when a new tariff line was created? (b) In cases where future trade prospects were agreed to be relevant, would the Group wish to recommend that some indicator or indicators should be taken into account in negotiations on compensation (perhaps providing some examples of what these indicators might be) while leaving it to the negotiating countries to agree how to give quantitative meaning to these indicators? (c) Or alternatively, would the Group wish to give explicit and detailed guidance on the indicators to be used and the manner in which they should be quantified and applied?

25. In his introduction the representative of Switzerland explained that his proposal had been guided by three factors: difficulties with present regulations, the need to find a solution that excluded subjective judgement, and the need to regulate the creation of new tariff positions while making sure that the mechanism would not be used for protectionist purposes. Accordingly his delegation suggested that the creation of tariff line for a new product should be 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. It was true that the proposal would temporarily preclude use of the right to raise bound tariff levels in these very unusual cases where no adequate import data existed, but this seemed justifiable since recourse to Article XIX would remain possible.



26. Some participants, while agreeing that Article XXVIII provides inadequate guidelines for cases involving new products, expressed doubt as to whether any of the proposals tabled would be helpful. It was suggested that some of the criteria proposed were subjective and that the procedures involved, including the verification of data, would be complicated. To tip the balance in favour of the exporting country might give rise to a temptation to use less desirable alternatives to Article XXVIII. The matter should perhaps be left to negotiations between the parties concerned. In reply to a question whether it would be prepared to accept an undertaking to negotiate in these cases, without precise guidelines, one of these delegations said it would be prepared to examine the possibility but saw little room for manoeuvre in Article XXVIII itself.

27. Other participants said that the general recognition of the existence of a problem to which current provisions offered no solution indicated the need for action by the Group. The proposal in NG7/W/59 was intended to cover not only situations in which a new tariff line was created but all cases in which potential trade should be taken into account because existing data were inadequate. It was a modest proposal, based on the view that to provide detailed guidelines would be too difficult and that a commitment to negotiate on the basis of general indicators of potential trade would be sufficient. The representative of Switzerland said that, rather than suggesting new disciplines or guidelines for the negotiation of compensation, his proposal sought greater discipline on the withdrawal of concessions and the creation of new tariff lines, which in his view was a much simpler approach.

#### Tariff rate quotas (TRQs)

28. In its submission NG7/W/67, Switzerland proposed that in order to ensure that the introduction of TRQs in this context remained exceptional, compensation should exceed the amount of the trade actually affected by the partial unbinding. The basic data to be used in calculating compensation should therefore consist of all the affected trade, together with the growth rate over a representative three year period, plus 50% of the trade not affected by the quota.

29. Replying to questions, the representative of Switzerland explained that the rationale for their proposal was not to forbid the use of TRQs or to question their GATT consistency, but rather to correct the existing bias in favour of TRQs by making sure that adequate compensation would be paid; the figure of 50% of "trade not affected by the quota" was open to discussion but had been indicated as a reasonable compromise. Asked whether compensation was envisaged within the same tariff line, by increasing the quota to take account of the compensation calculated, the representative of Switzerland said that compensation on another tariff line was envisaged. A number of participants welcomed the Swiss proposal and it was suggested that some way should be found of combining these ideas with those in NG7/W/59.

Maintenance of supplier rights

30. The Chairman recalled that in NG7/W/59 it was proposed that negotiating rights should also be accorded on compensatory concessions, unless the parties concerned agreed otherwise. However, at the last meeting the secretariat had made the point that it was standard practice in Article XXVIII negotiations to confer negotiating rights on compensatory concessions. Could this problem therefore be regarded as resolved, or would the Group wish to reaffirm or underline the existing practice?

31. One participant said that if the granting of negotiating rights on compensatory concessions was standard practice in tariff renegotiations his delegation would like this to be confirmed as part of the work of the Negotiating Group. In reply to a question on the logic behind the term "otherwise mutually agreed" in NG7/W/59 it was explained that in certain cases both parties preferred to agree compensation on a larger number of items rather than to attach negotiating rights to the compensatory concessions.

Retaliatory Action

32. The Chairman said that Switzerland had 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 when there was disagreement on the amount of compensation. The contracting party taking retaliatory action would inform the CONTRACTING PARTIES but would not need to request their approval.

33. The representative of Switzerland said that his delegation understood that some contracting parties felt that bilateral retaliation might constitute a step towards the legalisation of selectivity. Switzerland strongly opposed the legalisation of selectivity in GATT, which was contrary to the essence of the multilateral trading system. However, bilateral retaliation was accepted and obviously logical in cases involving unfair trade, and in the case of Article XXVIII negotiations the possibility of bilateral retaliation was necessary to prevent the abuses which could result from the excessive difficulty, and inherent illogicality, of retaliation on an erga omnes basis. Retaliation should still be seen as a last resort.

34. A number of participants welcomed this proposal as a means of enabling smaller countries to defend their interests and of ensuring that innocent third countries were not damaged by erga omnes retaliation, as often happened at present. Other participants said that this proposal would further weaken the mfn principle, and it was suggested that the introduction of bilateral retaliation might in fact weaken the position of smaller countries, since it would be equally open to the largest trading countries.

35. Commenting on the discussion of Article XXVIII as a whole, the representative of Hungary, speaking for the countries which had tabled NG7/W/59, pointed out that the working assumption for the negotiations on tariffs was that the number and extent of tariff bindings would be considerably increased. If this were to be so, it seemed essential to agree on more effective and equitable rules for the renegotiation of tariff concessions. He therefore urged all participants, and particularly those who were anxious to see a substantial increase in tariff bindings, to engage more fully in negotiations on Article XXVIII and requested the Chairman to take action to maintain momentum in these negotiations. The Chairman undertook to do so.

Articles XII, XIV, XV, XVIII

36. Introducing document NG7/W/68, the representative of the European Communities said that the proposal on the balance-of-payments provisions should be seen as part of a general effort by the Community to address all exceptions and special privileges in the GATT system, like the submissions it had presented on the PPA and the waiver provision of Article XXV:5. With regard to Article XVIII:B, it was not the intention to modify the provisions of the General Agreement or to deprive those countries experiencing serious balance-of-payments difficulties of appropriate policy instruments to control imports on a temporary basis. Rather the aim was to reach a common understanding on the criteria attached to the invocation of balance-of-payments provisions such as the preference for price-based measures, the avoidance of import prohibitions on a product, and the appropriate time frame for the phasing out of balance-of-payments restrictions. A further aim was to reinforce the surveillance role of the Balance-of-Payments Committee by giving it a more positive and forward-looking orientation, so that the Committee would devote greater attention to the liberalisation plans of countries invoking balance-of-payments restrictions. He underlined the Community's preference for achieving consensus in the workings of the Balance-of-Payments Committee as a key element of the submission. As for existing quantitative restrictions, he drew attention to the suggestions in footnote 4 of the submission.

37. The representative of the Communities went on to clarify other salient features of the submission. It envisaged a higher level of commitment for countries that had attained a higher level of development, which should undertake not to take restrictive measures for balance-of-payments purposes; operational meaning had been given to paragraph 12 of the 1979 Declaration (NG7/W/68, paragraph 14); the principle of special and differential treatment had been taken into account in providing for longer adjustment periods for countries at a low level of development. As for the indebtedness of developing countries, the Community would be prepared to examine appropriate ways of incorporating this in its submission. The lack of reference to the International Monetary Fund should be understood as maintaining that organisation's role as defined in Article XV of the General Agreement. As should be clear from the Community's proposal in the FOGS Group, there was no intention to introduce any notion of cross-conditionality or of cross-monitoring between international institutions. He invited discussion in the Group as to how to reconcile the non-convertibility of currencies with the principle of non-discrimination.

38. Turning to that part of the submission dealing with Article XVIII:C, the representative of the Communities said that it was time to consider whether some trade measures invoked in the past on balance-of-payments grounds should have been invoked under the infant industry provisions of Article XVIII:C. In order to encourage greater use of this Article the EEC proposed that its requirements should be relaxed in two significant ways - first, by shifting the focus away from compensation and retaliation and second, by allowing greater flexibility in the use of price-based measures by countries invoking Article XVIII:C. This flexibility was important in view of the expectation that there would be an increase in tariff bindings at the end of the Uruguay Round. However, the Community wished to ensure that this Article would not be misused for protectionist purposes, and had therefore specified the conditions that would serve to distinguish an infant industry eligible for protection under this Article from mature industries. In conclusion the representative of the Community expressed the hope that negotiations in the area would be engaged on the basis of its submission.

39. Some delegations reiterated their view that there was no need to consider changes in the rules or procedures relating to the balance-of-payments provisions. With regard to the claimed inadequacies in the working of the Balance-of-Payments Committee, some participants suggested that its record was a good one. In the view of some, the secretariat's document (NG7/W/46) showed that countries in the past had liberalised their trade restrictions as their balance-of-payments situation had improved; the recent disinvocation by the Republic of Korea and the proposed disinvocation by Ghana were cited as evidence in this regard. 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 scarce 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, which had increased in coverage, intensity and sophistication, affecting in particular the export interests of countries in the areas of agriculture, textiles and tropical products. The existing balance in rights and obligations between contracting parties should not be disturbed by any changes to the balance-of-payments provisions.

40. Some delegations referred to what they saw as a lack of balance in the Uruguay Round negotiations between the interests of developing and developed countries. In agriculture, where special sacrifices and contributions were being sought of agricultural exporters, proposals for reform, by increasing the world price of agricultural products, would worsen the balance-of-payments position of net food importers. In the area of tariffs, efforts to promote transparency in the modalities for negotiation were being frustrated. In the area of safeguards there were calls for legitimising selectivity or for an extension of the time frame for application of selective measures. In the area of tropical products, negotiations had not established minimum targets for liberalisation. In the subsidies field, Articles 8 and 14 of the Subsidies Code, which addressed the concerns of developing countries, were being challenged. In the light of this it was difficult to accept greater disciplines on the use of the balance-of-payments measures by developing countries. A participant also referred to the imbalance that would result if surveillance of balance-of-payments measures were strengthened, while actions in the form of voluntary export restraints and grey area measures remained largely exempt from any multilateral surveillance.

41. With respect to the proposal of the European Communities, several detailed comments were made. A participant viewed the tightening of the use of balance-of-payments measures by developed countries (paragraph 1, page 4, NG7/W/68) as something that could be achieved under existing disciplines and procedures. With respect to the greater use of price-based measures proposed by the European Communities, it was said that they were often not adequate to address the types of situations found in developing countries. If price-based measures were applied uniformly across product groups, inessential imports would not be curtailed sufficiently, leading to a rapid decline in foreign exchange reserves. Price-based measures lacked the focus of quantitative restrictions; some selectivity was necessary to channel scarce foreign exchange in a manner consistent with development needs as was provided for under Article XVIII:10, and also to boost the production and export capability of certain industries. A participant suggested that it was difficult to envisage how developing countries could announce in advance a time schedule for liberalisation given conditions of uncertainty, and vulnerability of the economy to exogenous shocks which could rapidly deplete a country's foreign exchange reserves. Referring to footnote 4 of the Community submission, a participant said that it was incongruous that standstill commitments were being sought in respect of the quantitative restrictions used by developing countries, while respect for the standstill commitment of the Punta del Este Declaration was far from evident. In one participant's view, the proposed reform of Article XVIII:C would impose even stricter disciplines on its use. Some participants expressed the view that in the light of a lack of consensus on the need for reform of the balance-of-payments provisions, it would not be appropriate to enter into a stage of intensive negotiations on these provisions. The Group could usefully devote its time to intensive discussion of other Articles on which there appeared to be a greater measure of consensus as to the need for reform.

42. A participant raised what he considered as specific difficulties in the interpretation of the balance-of-payments provisions such as the language of Article XVIII:10 which allowed invoking countries to give priority to essential imports, the level of foreign exchange reserves that could be deemed adequate, whether the IMF could pronounce on the justification of trade restrictions under Article XVIII:B, the relationship between special dispute settlement procedures under Article XVIII:12(d) and general dispute settlement procedures under Article XXIII, and the language of Article XVIII:19 relating to incidental protection.

43. Some delegations welcomed the submission presented by the Community and said that it provided a useful basis for further detailed discussion. Various delegations supported the emphasis placed on price-based measures, transparency, degressivity, mfn, temporary application, on the role of liberalisation plans, a greater role for the BOPS Committee, reinforcing the effectiveness of a consensual balance-of-payments consultation process, the special consideration accorded to the least developed countries, and the additional flexibilities regarding the application of Article XVIII:C. A participant made the point that there appeared to be a recognition of the validity of several of the principles underlying the submission of the European Communities. These could form the basis of further discussion while taking into account the concerns of participants for example on the inadequacy of uniformly applicable price-based measures. In his view participants should not refuse to embark on an exercise of collectively examining the validity of the principles and of ways of giving more concrete expression to them. With respect to concerns expressed regarding the lack of progress in other areas of the negotiation, he said that there ought to be a presumption that negotiations were headed in the direction of improved multilateral rules that would benefit the interests of all participants, and negotiations on the balance-of-payments provisions should be seen as part of such an overall package. Some participants expressed willingness to discuss further the proposals that had been submitted if the export interests of developing countries were adequately addressed in the Uruguay Round negotiations and if sufficient flexibility was provided to these countries in the use of balance-of-payments restrictions.

44. The following records the responses of the representative of the European Communities to the comments and questions of participants.

45. He said that the Community had not neglected considerations relating to the external economic environment, and referred participants to paragraph 14 of document NG7/W/68, which attempted to give operational meaning to paragraph 12 of the 1979 Declaration. Furthermore, the Community was actively participating in negotiations in other Groups that would improve market access for exports of developing countries. His delegation believed that the role of the IMF in balance-of-payments consultations should be as defined in Article XV. The discussion of domestic macroeconomic policies was not outside the scope of discussions in the Balance-of-Payments Committee, but it was not the intention that GATT should require an invoking country to abandon its trade restrictions because it considered the country's domestic policies to be inappropriate.

He said that concerns regarding the inadequacy of uniform price-based measures (see paragraph 41 above) had been taken into account by the Community and could be discussed further. Similarly, concerns regarding the announcement in advance of a time plan for liberalisation needed further discussion, although the Community had made some allowance in proposing that the time schedule for liberalisation should be "reasonable". Referring to the differing commitments on price-based measures and quantitative restrictions, he said that flexibility had been provided in the use of balance-of-payments restrictions. As for the criterion that would define countries at a high level of development, he drew attention to footnote 1 of the submission which specified that all OECD countries and those at an equivalent level of development should undertake the commitments proposed in paragraph 1 (page 4) of the submission. The reference in paragraph 14 to other international financial institutions was intended to create the possibility that such institutions should consider granting financial support to a country that had undertaken to liberalise its trade restrictions under the balance-of-payments procedures. The comment was made that the submission incorporated the notion of graduation, which was inappropriate in the context of the balance-of-payments provisions: for example the category of least developed countries was not based on criteria relating to balance-of-payments considerations. In reply, the representative of the European Communities said that Article XVIII itself distinguished different types of economies and the obligations applicable to each, as evidenced in paragraphs 4(a) and 4(b) of the Article. Responding to a request for clarification of the term "significant share" in paragraph 1.2 (page 10) of the submission, the representative of the Community said that this could be defined in detail or be interpreted on a case-by-case basis.

46. Responding to the comment that the balance-of-payments problems of developing countries were structural and persistent (see paragraph 39 above), a participant said that better trade policy solutions were required to address these problems. This consisted of, on the one hand, the reduction of barriers to the exports of developing countries which were being actively addressed in the Round; and, on the other, better and liberal trade policy choices by invoking countries, which a large body of economic research and practical evidence had shown to be the most effective in addressing balance-of-payments problems. As for comments asserting the adequacy of the existing disciplines and procedures (see paragraph 39 above), a participant said that the record of disinvocations did not support such an evaluation. Long-term use of balance-of-payments-related trade restrictions was the rule rather than the exception. The alleged adequacy of the disciplines and procedures had to be questioned in the light of the continued use of quantitative restrictions, application of price-based measures in addition rather than as an alternative to quantitative restrictions, application of multiple non-transparent measures, and non-compliance with the request to announce schedules for removal of trade restrictions. Furthermore, there was no coherent synthesis of all the criteria that Committee members were required to incorporate in their evaluation of trade restrictions. Consultations

frequently left unanswered the question as to the justification of balance-of-payments measures. Consensus was achieved at the cost of eliminating or diluting the substantive elements in the conclusions. Committee recommendations were limited to weak generic exhortations and even these were not effectively enforceable. On certain occasions countries had blocked requests for full consultations or had refused to provide the Committee with basic information necessary for effective consultations. For these reasons reform of the balance-of-payments provisions and procedures, along the lines proposed in NG7/W/58 was imperative.

#### Article XXIV

47. The Chairman proposed that since the delegation of Japan had circulated a proposal on Article XXIV in document NG7/W/66 of 22 December, the Group should now initiate a period of intensive work on this Article.

48. Introducing the proposal, the representative of Japan said that the growing number of derogations from the basic principle of MFN treatment in the form of Article XXIV agreements made it essential to re-examine Article XXIV, which had not worked well for a number of reasons. Lack of clarity in some of its provisions had permitted unilateral interpretations; there was no effective mechanism to ensure redress of adverse effects on third countries; the CONTRACTING PARTIES had failed to make recommendations under Article XXIV:7 on the entry into force of any regional agreement; interim agreements were subject to no effective discipline or surveillance; and there was wide divergence of views on procedures for the negotiation of external tariffs. Article XXIV was also directly affected by work in some other Negotiating Groups, for example on rules of origin and on technical standards, where it should be established that Article XXIV provided no derogation from general disciplines. The applicability of Article XXIV to the new areas also needed consideration; the view of Japan was that Article XXIV should not automatically apply in these areas.

49. A large number of participants supported the general thrust of this proposal, particularly on the need to clarify certain provisions of the Article and on the concern with protection of the interests of third countries, which was seen as requiring that regional agreements should on balance be trade creating rather than trade diverting in their effects. With regard to interpretations, the representative of India recalled his delegation's communication, NG7/W/38, in which the clarification of eight important concepts was proposed. A number of speakers expressed agreement with Japan's interpretations of paragraphs 5 and 6 of Article XXIV, notably on the lack of grounds for members of a customs union to claim compensation from third countries benefitting from the establishment of the union.

50. Doubt was however expressed as to the need to establish a new mechanism within the context of Article XXIV for the redress of injury caused to third countries by loss of market access, as was suggested in Japan's proposal. It was suggested that Article XXIII, and the provisions for renegotiation of tariff concessions in Article XXVIII, provided adequate means for redress of injury. In response the representative of



Japan said that some special machinery appeared essential, given the recognition in Article XXIV:4 that the purpose of a customs union or free-trade area should not be to raise barriers to the trade of other contracting parties, but that their suggestion envisaged an additional avenue for consultations and recommendations, which would be without prejudice to the present dispute settlement mechanism.

51. With regard to the suggested principles for the avoidance of adverse effects on third countries, questions were raised as to the meaning in the Article XXIV context of the concepts of serious injury, nullification and impairment and serious prejudice. The representative of Japan said that serious injury and nullification were familiar concepts - the latter relating to situations in which no breach of GATT obligations was involved - while "serious prejudice" was intended to refer to situations in which a regional arrangement had given rise to breach of a GATT obligation.

52. With regard to the absence of recommendations under Article XXIV:7, some participants agreed that this indicated a failure in the working of the procedures. Others, however, said that it was not necessarily significant; this paragraph did not require the CONTRACTING PARTIES to make recommendations but merely enabled them to do so if they deemed it appropriate.

53. The suggestion that there should be a strengthened mechanism under which members of regional arrangements would submit data which would assist the CONTRACTING PARTIES in assessing their economic and trade effects was supported by some participants. However, the point was made that the GATT surveillance system should not be overburdened, particularly bearing in mind the existence of the Trade Policy Review Mechanism, which was seen by some as the right place to review the effects of regional arrangements. The point was also made that whatever mechanism were used, it would seem inappropriate to consider such matters as income levels and employment rates in the GATT context. Reacting to these comments, the representative of Japan said that there was no intention to undo existing agreements, but regular review of their trade effects, which would require the provision of information on growth, investment and productivity as well as incomes and employment, should be undertaken, and this would require a mechanism different from the TPRM.

54. With regard to Japan's proposal that "interim agreements" leading to the formation of a customs union should be subject to a time limit such as ten years, a number of delegations agreed in principle. One participant said that time limits should be fixed on a case by case basis and that interim agreements should be reviewed every two years, not annually as Japan had suggested. In this context, and in reply to a question as to the meaning of the proposal's reference to special consideration for developing countries, the representative of Japan said that such consideration might take a form of greater flexibility in the time agreed for the transformation of interim agreements into customs unions.

55. The point was made that most of Japan's proposals seemed to be relevant to customs unions rather than to free trade areas. The representative of Japan said that this was not intended - where relevant the proposals also applied to free trade areas. There was a difference however in that XXIV:5 and XXIV:6 apply by definition to customs unions and not necessarily to free trade areas.

56. Some participants said that the applicability of Article XXIV to the new areas merited consideration, and could not automatically be ruled out. One participant said that this debate was premature, since the negotiations on services were taking place outside GATT and there were strong reservations as to the relevance of GATT obligations to TRIPS and TRIMS.

57. Some participants said they regretted the emphasis in Japan's communication on the negative effects of regional arrangements, and pointed to their trade creation effects, which might be particularly important at the present time. If it were true that there was a growing trend towards regional arrangements, any review of Article XXIV should be carried out with special care. The fact that existing arrangements were not to be called in question was welcomed, and it was assumed that Japan's proposal concerning calculation of the general incidence of duties was directed towards future agreements, not existing ones. The concepts of "serious injury" and "serious prejudice" seemed to be new to Article XXIV. Problems arising from standards and rules of origin were better dealt with in the relevant Negotiating Groups, but it should be said that no proposal was being made in NG2 for the creation of preferential origin rules.

58. The representative of Japan finally said that the proposal was not so ambitious as some feared and was in his view fully in line with the intent of GATT. He agreed that account should be taken of the positive effects of regional arrangements, but it must also be borne in mind that of necessity they distort trade and that an appropriate balance must be found. Regional arrangements were to be regarded as legitimate only when their benefits, to all, outweighed their negative effects.

#### Protocol of Provisional Application (PPA)

59. Introducing a communication on the Protocol of Provisional Application the representative of the EEC said that their submission, contained in NG7/W/70, was part of an effort, manifested throughout the Round, to strengthen the multilateral system by reducing or bringing under greater discipline exceptions to the normal rules of GATT; the Community's proposals on Article XXV:5 and the balance-of-payments provisions should be seen in the same light. The EEC's proposal was that the derogation in paragraph 1(b) of the PPA, under which GATT-inconsistent legislation was "grandfathered", should be phased out over a short period, after which any such legislation or measures would become subject to challenge under the dispute settlement process. This was a simple and indeed modest proposal; the PPA had never been intended as a permanent exception from GATT obligations and the survival of inconsistent legislation was wholly anachronistic. Equivalent provisions in accession protocols should be treated likewise, so that inconsistent legislation predating accession would also be phased out.

60. Some participants supported the proposal as being consistent with the general concern for transparency and the elimination of exceptions. The point was also made that such a decision would bring to an end the difficulty of identifying and recording legislation maintained under the PPA. Other participants undertook to study it further. One asked if the proposal would also cover special derogations in accession protocols, as his delegation would wish; the representative of the EEC replied that this was not the intention.

61. The Chairman reported that only 17 contracting parties had so far replied to the Group's enquiry on legislation and measures maintained under the PPA or under accession protocols; 11 of these had notified that they had no such legislation. If the Group seriously intended to pursue this enquiry, the information requested must be submitted as soon as possible.

Article XXV:5

62. Introducing a communication on Article XXV:5 (NG7/W/69) the representative of the EEC said that this too addressed the problem of persistent exceptions from GATT disciplines and was aimed at strengthening the multilateral trading system. The proposal that all future waivers should be subject to a time limit, to be agreed in each case, was in effect a confirmation of what was now normal practice. The remainder of the proposal, as it affected waivers to be granted in the future, was intended to ensure proper multilateral control, notably by requiring that waivers should not remain in force after the conditions which justified them had ceased to exist. It was not intended to prevent recourse to waivers or to question the policy objectives of governments. The fifth of the six principles in the submission proposed that existing waivers which were not subject to time limits should be eliminated or replaced with GATT-consistent measures within an agreed period.

63. A large number of participants supported the proposal. The question was asked how a determination would be made, under the fourth principle in the proposal, that the conditions which had justified the granting of the waiver had ceased to exist, since the requesting contracting party would certainly maintain that the circumstances which had necessitated the waiver still applied. The representative of the EEC agreed that an element of judgement would be involved here, which was why it was essential that the criteria on which the decision to grant the waiver had been based should be made very clear at the outset. One participant, supporting the proposal to phase out or replace existing waivers, pointed out that it would be possible for the country involved to seek a new waiver if it were necessary. One delegation wondered whether under the second principle it would be possible to establish general criteria of economic justification for the granting of waivers. The EEC representative replied that this was not the intention, but rather that the specific criteria justifying the grant of a particular waiver should be clearly set out in the decision, so that it would later be possible to judge whether those conditions still obtained. As to the form of a decision on this matter the EEC was open to suggestions, but a decision by the CONTRACTING PARTIES would appear to be appropriate.

Dates of future meetings

64. The Group agreed that the next two meetings would be held on 29, 30 March and 24-26 April, and reserved the dates of 21-23 May, 19-21 June and 17-19 July for its subsequent meetings.