MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Negotiating Group on GATT Articles

STATUS OF WORK IN THE NEGOTIATING GROUP

Chairman's Report to the GNG

1. The Negotiating Group has been working on the provisions of the General Agreement listed below. This note briefly describes the purpose and state of the work. The annexes to the note contain where appropriate the results achieved to date, in the form of texts, and otherwise describe the state of work; in certain cases proposals are only now being received and analysed.

Article II:1(b)

2. The Group has reached agreement on a decision requiring the recording in schedules of tariff concessions of all other duties or charges on importation applied to bound items in addition to the ordinary customs duty. The decision, which will remain in suspense pending the outcome of the Round as a whole, has been transmitted to the GNG and circulated in MTN.GNG/23. The text of the decision is at Annex 1.

Article II

3. Consideration has been given to a proposal that contracting parties should be permitted to levy a uniform import fee, not exceeding 0.15 per cent ad valorem, in order to fund programmes to assist adjustment to import competition. So far the proposal has received no support.

Balance-of-Payments Provisions

4. Proposals have been made regarding the clarification and strengthening of the disciplines attached to the use of trade restrictions for balance-of-payments purposes. These have been discussed at length, but the Group has not been able to reach agreement that the question of trade measures taken for balance-of-payments purposes should be subject to negotiation. The proposals made and the Group's discussions are described at Annex 2.

Article XVII

5. The Group has reached agreement on a decision regarding the notification and surveillance of state trading enterprises under Article XVII. A participant indicated that his delegation was accepting the decision ad referendum. The text of the decision is at Annex 3.

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Article XXIV

6. A number of proposals have been made regarding the clarification or interpretation of specific provisions in Article XXIV and regarding the examination and surveillance of regional agreements, notably with reference to their possible effects on third countries. The Group's consideration of these proposals has not yet reached the stage at which it is possible for me to present a text which would have the character of a profile of an agreement. But there is a general readiness to engage in intensified negotiations with a view to reaching a decision on this Article. The proposals and the discussions to which they have given rise are described in Annex 4.

Article XXV:5

7. The Group has developed a draft decision which would subject all future waivers granted under Article XXV:5 to clearer conditions and disciplines than have applied hitherto. The text, which is at Annex 5, would also have the effect of terminating by an agreed date existing waivers without time limits. Some contracting parties have indicated that their ability to accept this provision will depend upon the results of negotiations in other Negotiating Groups.

Article XXVIII

8. The Group has developed a draft decision concerning the modification of tariff schedules under Article XXVIII. The draft, at Annex 6, is agreed by the Group with the exception of paragraph 1. An alternative formulation of this paragraph, presented in square brackets, has been proposed by some participants. The point at issue has been discussed at great length and in my view the possibilities of negotiation have been exhausted. It is therefore not my intention to reopen the discussion, but rather to maintain the two alternatives in order to allow participants the time necessary to make the choice between them. I have made clear in the Group my view that agreement is unlikely to be possible except on the basis of the unbracketed text.

Article XXXV

9. The Group has recently begun consideration of a suggestion that under this Article contracting parties should be able to enter into tariff negotiations with a country negotiating its accession to GATT, without impairing the right of either party to invoke Article XXXV and thus decline to apply the General Agreement to the other, if it is not satisfied with the results of the tariff negotiations. It has been indicated that a formal proposal to this effect will shortly be tabled.

Protocol of Provisional Application

10. The Group has developed a draft decision (Annex 7) whose effect would be to eliminate the derogation provided by paragraph 1(b) of the Protocol of Provisional Application and the corresponding provisions in accession protocols (the "grandfather clause"). Some contracting parties have indicated that their ability to accept such a decision will depend on results of negotiations in other Negotiating Groups.

Annex 1

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

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).

Annex 2

Balance-of-Payments Provisions

1. The Group has discussed at considerable length a number of proposals for negotiations on trade measures taken for balance-of-payments reasons. It has not however been able to agree to engage in negotiations on this subject. In these circumstances it is not possible for me to present a text which would have the character of a profile of an agreement. This note therefore describes the main positions taken in the Group's discussions to date.

2. Those participants who have pressed for negotiations on the balance-of-payments provisions have argued that the exceptions from normal GATT disciplines provided in Articles XII and XVIII are an important element in the trading system and should be addre in the Uruguay Round like other issues arising from GATT rules. The rgued further that there is a lack of effective discipline on me n under these provisions, particularly concerning the most stortive measures, which effectively results in their becoming a p ent derogation from GATT obligations, has made them unnecessarily costly both to the countries applying them and to their trading partners, and represents a weakness and a source of discord in the multilateral system. The 1979 Declaration on Trade Measures Taken for Balance-of-Payments Purposes is said to have produced little appreciable change in the use or the surveillance of these measures.

3. The Negotiating Group has received from the European Economic Community (NG7/W/68) and from Canada and the USA (first in NG7/W/58 and subsequently in NG7/W/72) proposals containing draft legal texts of a new Declaration on Trade Measures Taken for Balance-of-Payments Purposes, which would replace the 1979 Declaration. There are many differences between these proposals and I do not intend to describe them in detail. However, they have a number of broad objectives in common, which may be summarised as follows:

- A strengthened commitment by developed contracting parties to avoid imposing trade restrictions for balance-of-payments purposes, and stricter disciplines in the event that measures under Article XII are found unavoidable.

- Trade measures, whether under Article XII or XVIII:B, should be proportional to the seriousness of the payments problem giving rise to them and should not be used for protectionist purposes but only as a temporary measure to allow time for domestic adjustment policies to take effect.

- Trade measures should be transparent, non-discriminatory and limited in time, subject to an announced schedule for their elimination and progressive relaxation, such a schedule being shorter for developed countries than for developing countries. The EEC proposal calls for the announcement of a "reasonable" time schedule, rather than proposing a generally applicable fixed schedule for the elimination of restrictions.

- Preference should be given to price-based over quantitative measures, applied as uniformly as possible, and where quantitative restrictions are inescapable they should be phased out more quickly than or replaced by price-based measures, and should be subject to agreed time-limits. It is suggested that a different time frame for the elimination of quantitative restrictions should apply to least developed countries.

- Consultations in the Balance-of-Payments Committee should be held within four months of the application or intensification of restrictions. The proposals differ somewhat as to the conditions under which simplified as opposed to full consultations should be held but each suggests that full consultations should be held every two years, that simplified procedures should be limited to cases where a developing country is applying measures consistently with the announced schedule for liberalisation, and that no more than two successive consultations should be held under simplified procedures, except in the case of least developed contracting parties. Full information should be provided to the Committee to permit meaningful consultations.

- The Balance-of-Payments Committee should seek to make specific recommendations to the Council concerning the consistency and where appropriate the modification of the measures under review.

- The Committee should consider and may propose actions which might be taken by the CONTRACTING PARTIES to facilitate expansion of the export earnings of the consulting contracting party.

In addition, Canada and the United States have proposed to define more clearly, in the light of current practice, the role of the International Monetary Fund in consultations held in the Balance-of-Payments Committee, whereas the EEC provides for no change in its role. They have also suggested that where the Committee is unable to agree on a specific recommendation the question of the consistency of the measures is unresolved, and affected contracting parties can if they wish pursue the matter through GATT dispute settlement procedures. The EEC makes no specific reference to these procedures considering the status quo to be appropriate. The European Economic Community has proposed a declaration on trade measures taken to promote the establishment of a particular industry according to which the criteria for invocation of Article XVIII:C would be made more flexible, by facilitating the raising of bound tariffs while limiting the possibility of retaliation by contracting parties affected by measures taken under this provision. The EEC has however said that its proposal on Article XVIII:C is part of a single package including reform of the balance-of-payments provisions.

4. The general thrust of these proposals has been supported by a substantial number of developed contracting parties, though some have said that while being prepared to negotiate stronger disciplines in Article XII, it would be difficult for them, at this stage, to commit themselves to avoid recourse to it.

5. A considerable number of developing countries, on the other hand, have argued that no convincing case has been made out as to why it is necessary to address this issue in the Round, given that as recently as 1979 the CONTRACTING PARTIES approved the Declaration on Trade Measures Taken for Balance-of-Payments Purposes. It has been argued, notably in submissions by Egypt (NG7/W/29) and Peru (NG7/W/62) that since that time the external economic environment facing a large number of developing countries has deteriorated in many ways, including an increasing burden of foreign debt and a decline in capital inflows, deteriorating terms of trade, and growing instability of exchange and interest rates. It was suggested that the negotiations on agriculture in the Uruguay Round itself would aggravate the payments difficulties of net food importing countries. The payments situation of many developing countries therefore remains critical: if there were to be negotiations regarding trade measures taken under Article XVIII:B, the objective should be to provide greater flexibility in its use rather than to impose more stringent conditions. This applied in particular to countries undertaking major economic reforms. In general, however, these participants have taken the view that the existing provisions and the related procedures in the Balance-of-Payments Committee have worked well and that any perceived problems in their functioning should be addressed in the Committee rather than in the context of the Round.

6. It has also been argued that the flexibility accorded to developing countries under Article XVIII:B is an essential element of the balance of rights and obligations in the GATT system and that these provisions cannot be regarded as constituting an exception or derogation from the normal rules of the GATT. These provisions were agreed by the CONTRACTING PARTIES in recognition of the structural and persistent nature of the payments problems of developing countries and the flexibility accorded by them is a necessary condition for effective management of national development programmes. The fact that trade restrictions may be maintained over a long period reflects the structural nature of the problem, and also the often inadequate access of developing countries to major export markets.

7. The specific proposals which have been advanced have been discussed in detail; the main points made by developing countries in response to them have been as follows.

- The proposal of a strengthened commitment to avoid recourse to Article XII would have little significance, since in recent years the Article has hardly ever been used.

- Trade restrictions imposed under Article XVIII:B have, in practice, been relaxed or removed as soon as circumstances permit, since the contraction of imports necessitated by shortage of foreign exchange imposes heavy costs on the importing economy. Standard time-frames for elimination of measures would be inconsistent with the basic criterion for the maintenance of trade restrictions, which was the existence of a BOP problem. So long as the problem persisted the measures would continue to be necessary. The unpredictability of the balance-of-payments situation would normally make it meaningless to announce in advance a schedule of liberalisation.

- A strengthened commitment to use price-based measures alone would also often be inappropriate, because of their delayed impact and inflationary effects and because they do not permit the effective allocation of scarce foreign exchange resources to priority uses, especially where income distribution is skewed. Nor would macroeconomic measures be adequate in all cases; a developing country heavily dependent on exports of primary commodities, for example, could not correct a current account imbalance through currency devaluation, since demand for its major imports and exports is inelastic.

- While measures taken for balance-of-payments reasons might have incidental protective effects, these could not be a ground for change in the BOP provisions or procedures, which must be addressed to the central problem of payments imbalance. Any specific problems relating to trade effects could be taken up in the Balance-of-Payments Committee.

- It has been argued that changes that would affect the balance of rights and obligations, for example through the proposed time schedule for the termination of trade measures, could not be regarded simply as questions of improving the Committee's procedures. With respect to procedures it was recalled that simplified consultations had been introduced to alleviate the burden on the Committee and on consulting countries of frequent full consultations with countries whose situation and policies were relatively stable. Furthermore, difficulty in reaching consensus in the Committee reflected different views on substance and should not be seen as evidence of weakness in the procedures.

- It has been suggested that the proposal to give greater operational force to paragraph 12 of the 1979 Declaration, on measures that contracting parties might take to facilitate expansion of the export earnings of the consulting country, has little substantive value since it is cast in the form of a best endeavours commitment. It was also said that changes in balance-of-payments disciplines should not be linked with the proposed relaxation of disciplines in Article XVIII:C.

8. All of the proposals and arguments referred to above have been developed in much greater detail, and this is fully reflected in the records of the Group's meetings. The divergence of views is such that it is not possible for me to suggest a text or any other basis for agreement, even though it is clear that there are certain fundamental points which are not in dispute.

9. First, all participants agree that there should be no change in the text of Article XII or Article XVIII:B and that the right of recourse to trade measures in times of balance-of-payments difficulty cannot be denied. It is also recognised that long-term balance-of-payments problems need to be addressed at the national level by a combination of domestic and macro-economic policies and trade-related measures, and at the international level by removal of barriers to trade and adequate provisions regarding debt problems and financial flows.

10. Secondly, it is recognised that restrictive trade measures, while they may be inescapable in some circumstances, are in general an inefficient means to maintain or restore balance-of-payments equilibrium, that they should not be taken for the purpose of protecting a particular industry or sector, and that in applying them contracting parties should give preference to the measure which has the least disruptive effect on trade, in the case of developing countries taking account of their individual development, financial and trade situation.

11. It is my view that if there is to be any further useful work on this subject in the Uruguay Round, it is now necessary for the participants to decide whether to engage in a process leading to a common understanding which would obviate disagreements over the interpretation of the provisions and the functioning of the Balance-of-Payments Committee.

Annex 3

State-Trading Enterprises

Decision

Noting that Article XVII provides for obligations on contracting parties in respect of the activities of the state trading enterprises referred to in Article XVII:1, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in the General Agreement for governmental measures affecting imports or exports by private traders;

Noting further that contracting parties are subject to their GATT obligations in respect of those governmental measures affecting state trading enterprises;

Recognising that this decision is without prejudice to the substantive disciplines prescribed in Article XVII;

1. It is agreed that in order to ensure the transparency of the activities of state trading enterprises, such enterprises shall be notified to the CONTRACTING PARTIES, for review by the working party to be set up under paragraph 5 below, in accordance with the following working definition:

> "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. It is agreed that each contracting party shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the CONTRACTING PARTIES, taking account of the provisions of this decision. In carrying out such a review, each contracting party should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the 1960 questionnaire on state trading (BISD, 9S/184), it being understood that contracting parties shall notify the enterprises referred to in paragraph 1 above whether or not imports or exports have in fact taken place.

4. Any contracting party which has reason to believe that another contracting party has not adequately met its notification obligation may raise the matter with the contracting party concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the CONTRACTING PARTIES, for consideration by the working party set up under paragraph 5 below, simultaneously informing the contracting party concerned.

5. A working party shall be set up, on behalf of the CONTRACTING PARTIES, to review notifications and counter-notifications. In the light of this review and without prejudice to Article XVII:4(c), the CONTRACTING PARTIES may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the 1960 questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1 above. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the GATT secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all contracting parties indicating their wish to serve on it. It shall meet before the end of 1991 and thereafter at least once a year. It shall report annually to the CONTRACTING PARTIES.

Annex 4

ARTICLE XXIV

The Negotiating Group's consideration of proposals which have been made concerning the interpretation or clarification of Article XXIV has not yet reached the stage at which it is possible for me to present a text which would have the character of a profile of an agreement. Although all participants are prepared to negotiate on this subject, the proposals, some of which have been received very recently, need to be further explored before joint drafting can begin. This note therefore summarises the main issues raised and the positions taken in the discussions to date.

Those participants who have submitted proposals have made it clear that it is not their intention to amend Article XXIV but rather to clarify its provisions, notably in paragraphs 5, 6, 7, and 8. Their intention in doing so would be to avoid future disagreements over interpretation and to render more effective the assessment of the effects and of the GATT-consistency of regional agreements. Some participants have also expressed concern about the possible adverse effects on third countries of the formation or enlargement of regional agreements and have proposed measures intended to minimize such effects. Other participants have maintained that Article XXIV does not constitute an exception to the General Agreement and that negotiations must also take account of the positive, trade-creating effects of regional agreements.

Proposals have also been made regarding the clarification of Article XXIV:12, dealing with the obligations of contracting parties respecting regional and local governments and authorities within their territories.

The main positions on specific provisions are described below.

Paragraph 5. Some participants have called for clarification of the methodology to be used in the assessment of customs unions and interim agreements under Article XXIV:5(a). It has been suggested that there should be agreement on whether this methodology should be based on duties collected or on average tariff rates and that trade volumes should also be taken into account in the assessment. It has been further suggested that a detailed assessment on a product-by-product and country-by-country basis should be undertaken in particular cases if countries believed this to be necessary. In reply it has been argued that the language of this provision, in providing that the duties or other regulations of commerce "shall not on the whole be higher or more restrictive than the general incidence" applicable prior to the formation of a customs union, confirmed the view that paragraph XXIV:5 requires a global assessment. An approach based on a product-by-product, sectoral or country-by-country analysis amounted to a rewriting of Article XXIV depriving paragraph 6 of much of its meaning and would in any case be impracticable.

Several participants have called for clarification of the term "reasonable length of time" in paragraph 5(c) and have suggested that ten years might be used as the yardstick for defining such a period.

Paragraph 6. Some participants have called for agreement that renegotiations of tariff bindings by the members of a customs union should be strictly in accordance with Article XXVIII procedures, that there is no requirement on third countries to compensate the members of a customs union for reduction of tariffs consequent upon the formation of the customs union and that there is no legal basis for the withdrawal of concessions by the customs union for lack of such compensation. It has also been stated that when a member of a customs union provides compensation for increasing a duty on a bound item, third countries are only obliged to take into account tariff reductions on the same item by other members of the union. Other participants have stated that Article XXIV:6 is clear and adequate as it stands and have deemed these proposals unacceptable. They have also referred to the relationship between Article XXIV and XXVIII; in particular Article XXVIII:2 called for the maintenance of a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that existing before.

Paragraph 8. Divergent views have been expressed as to whether members of a customs union are free to exempt other members from an Article XIX action, and as to the determination of the source of serious injury caused by imports in such cases. It has been pointed out that this matter is also under consideration in the Negotiating Group on Safeguards.

Some participants have sought to clarify the requirement that duties and other restrictive regulations of commerce should be eliminated with respect to "substantially all the trade" by proposing criteria for the definition of this term. Others have expressed doubts as to the practicability of this approach.

General Review of Customs Unions and Free-Trade Areas. A proposal has been made that a standing Committee on Regional Agreements should be set up that would regularly review the overall macroeconomic and trade effects of such agreements on the basis of detailed information submitted by their members. It would also keep their consistency with Article XXIV under review. Some participants have expressed the view that such an overall review would be neither feasible nor appropriate. A number of delegations were opposed to the establishment of this Committee, considering it unnecessary in view of existing review requirements including the newly established Trade Policy Review Mechanism; ad hoc arrangements for this purpose could also be considered. It was also said that once the examination of a regional agreement by a working party had been completed the matter must be regarded as closed, any subsequent problems being taken up in the context of GATT's dispute settlement procedures. It has also been suggested that changes in agreements notified under Article XXIV which are likely to have a significant effect on international trade should be reported.

Serious Adverse Effects. A proposal has been made seeking agreement that the formation or enlargement of regional agreements should not result in serious adverse effects on non-members. It has been suggested that the standing Committee referred to above should examine claims by third countries that they have suffered such effects, and make recommendations for their redress where appropriate. Such recommendations might include the reduction of preferential margins between member and non-member countries, on affected or other products. Some participants have disagreed with the proposals, arguing that they would duplicate adequate mechanisms already existing in the GATT, such as the working parties which examine regional agreements and the dispute settlement procedures. Furthermore they have opposed the notion of recommendations for the reduction of preferential margins, which appeared to be based on a mistaken view of the nature of customs unions and free trade areas.

Paragraph 12. A proposal has been made regarding the clarification of Article XXIV:12. It is suggested that contracting parties have full responsibility for measures taken by regional or local governments or authorities within their territory to the extent permitted by their constitution. A number of proposals are made regarding transparency, providing for consultation and affirming the applicability of GATT dispute settlement provisions (including those governing compensation and withdrawal of concessions) with regard to the effects of measures taken by a regional or local government or authority. These proposals, and a number of questions to which they have given rise, will be taken up in intensified negotiations in September.

Annex 5

WAIVERS UNDER ARTICLE XXV:5

Draft Decision

1. It is agreed that a request for a waiver or for an extension of an existing waiver shall describe the measures which the contracting party proposes to take, the specific policy objectives which the contracting party seeks to pursue and the reasons which prevent the contracting party from achieving its policy objectives by measures consistent with its obligations under the General Agreement.

2. A decision by the CONTRACTING PARTIES granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate.

3. Any waiver granted for a period of more than one year shall be reviewed by the CONTRACTING PARTIES not later than one year after it was granted, and thereafter annually until the waiver terminates. In each review, the CONTRACTING PARTIES shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The CONTRACTING PARTIES, on the basis of the annual review, may extend, modify or terminate the waiver.

4. Any waiver in effect on the date of this Decision shall terminate, unless extended in accordance with the procedures above, on the date of its expiry or [ ] year[s] from the date of this Decision, whichever is earlier.

5. Any contracting party considering that a benefit accruing to it under the General Agreement is being nullified or impaired as a result of

   (a) the failure of the contracting party to whom a waiver was granted to observe the terms or conditions of the waiver, or

   (b) the application of a measure consistent with the terms and conditions of the waiver

may invoke the provisions of Article XXIII.

Annex 6

Article XXVIII - Modification of Schedules

Draft Decision

1. For the purposes of modification or withdrawal of a concession, the contracting party which has the highest ratio of exports of the product affected by the concession to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in Article XXVIII:1. It is however agreed that this paragraph will be reviewed 5 years from the date of this decision by the Committee on Tariff Concessions with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting contracting parties. If this is not the case consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports of the affected product to total exports of that product.

[1. For the purposes of modification or withdrawal of a concession, the contracting party which has the highest ratio of exports of the product affected by the concession to its total exports of that product shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in Article XXVIII:1. This criterion will be implemented from 1 January 1995, it being understood that "total exports of that product" will be calculated at the highest possible level of disaggregation in the Harmonised System, but no less than the 6-digit level. Until such time the contracting party which has the highest ratio of exports of the product affected by the concession to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in Article XXVIII:1.]

2. Where a contracting party considers that it has a principal supplying interest in terms of paragraph 1 above, it should communicate its claim in writing, with supporting evidence, to the contracting party proposing to modify or withdraw a concession, and at the same time inform the secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" (BISD 27S/26) shall apply in these cases.

3. In the determination of contracting parties with a principal supplying interest (whether as provided for in paragraph 1 above or in Article XXVIII:1) or substantial interest, it is agreed that only trade in the affected product which has taken place on an MFN basis shall be taken into consideration. However, trade in the affected product which has taken place under non-contractual preferences shall also be taken into account if

the trade in question has ceased to benefit from such preferential treatment, thus becoming MFN trade, at the time of the renegotiation or will do so by its conclusion.

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the country possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall inter alia take into account production capacity and investment in the affected product in the exporting country and estimates of export growth, as well as forecasts of demand for the product in the importing country. For the purposes of this paragraph "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

5. Where a contracting party considers that it has a principal supplying or a substantial interest in terms of paragraph 4 above, it should communicate its claim in writing, with supporting evidence, to the contracting party proposing to modify or withdraw a concession, and at the same time inform the secretariat. Paragraph 4 of the "Procedures for Negotiations under Article XXVIII" (BISD 27S/26) shall apply in these cases.

6. When an unlimited tariff concession is replaced by a tariff rate quota, the amount of compensation provided should exceed the amount of the trade actually affected by the modification of the concession. The basis for the calculation of compensation should be the amount by which future trade prospects exceed the level of the quota. It is understood that the calculation of future trade prospects should be based on the greater of:

(i) the average annual trade in the most recent representative three year period, increased by the average annual growth rate of imports in that same period, or by ten per cent, whichever is the greater; or

(ii) trade in the most recent year increased by ten per cent.

In no case shall the liability for compensation exceed that which would be entailed by complete withdrawal of the concession.

7. Any contracting party having a principal supplying interest, whether as provided for in paragraph 1 above or in Article XXVIII:1, in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of compensation is agreed by the contracting parties concerned.

Annex 7

Protocol of Provisional Application

Draft Decision

It is agreed that the derogation provided for in paragraph 1(b) of the Protocol of Provisional Application of the General Agreement and in the corresponding provisions of the protocols of accession, according to which Part II of the General Agreement may be applied to the fullest extent not inconsistent with existing legislation, shall expire on [date].