MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG7/22
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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 1, 15 and 19 October 1990

1. The Negotiating Group on GATT Articles held its twenty-second meeting on 1, 15 and 19 October 1990 under the chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/3094 and 3120.

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

- NG7/21 dated 25 September which contained the note of the last meeting of the Group;

- Article XXIV - Note by the Chairman, dated 24 September which contained a draft decision on this Article. A revised version, dated 5 October, was made available for the deliberations starting on 15 October. A further revision dated 18 October (p.m.) was considered at the final session;

- Article XXXV - Note by the Chairman, dated 5 October which contained a draft decision on this Article; this document was considered at the 15 October session; a revised draft dated 19 October was considered at the final session.

Agenda Item A: Stocktaking and finalisation of work on all provisions under consideration in the Group.

Article II:1(b)

3. The Chairman recalled that the Group had 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 would remain in suspense pending the outcome of the Round as a whole, had been transmitted to the GNG (MTN.GNG/23) and reproduced in Annex 1 of his report to the GNG - NG7/W/73. Apart from the question of the legal form of the decision referred to below, there was nothing else to be done by the Group in respect of this provision. (Annex 1).

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Articles XII, XIV, XV, and XVIII

4. The Chairman recalled that in his letter to the Chairman of the TNC, dated 4 October, he had made the point that the positions of the various parties in regard to the Balance-of-Payments provisions remained essentially as described in his July report to the GNG (NG7/W/73). It also contained an indication that he intended to "maintain contacts with delegations in the hope of bringing about an understanding". The position had not changed since 4 October and he proposed to report accordingly, making it clear that he was prepared to continue offering his services if delegations would find this helpful.

5. The representative of the United States recalled that at the last meeting his delegation had made a statement clarifying its objectives in seeking reform of the Balance-of-Payments provisions. The initial proposals of the United States, and the joint proposal submitted with Canada in June, had been substantially moderated to take account of concerns raised in discussions; it had been made clear for example that negotiations should focus on the clarification of the 1979 Declaration, not on Articles XII and XVIII, and that the rights of countries in balance-of-payments difficulty were not to be called in question. The US was fully prepared to work on the basis proposed by the Chairman in his informal consultations. It was most unfortunate that some participants still refused to negotiate, since while the objectives of those seeking negotiation were modest, it still remained true that improvements in the area of the Balance-of-Payments provisions remained an essential part of the Uruguay Round package. Ministers in Brussels must be provided with a clear basis for decision in this area, as in all others. His delegation had avoided making specific linkages between progress on this subject and in other areas, but continued deadlock would be bound to affect positions elsewhere. Constructive negotiations for a reasonable reform should begin immediately.

Article XVII

6. The Chairman drew to the attention of participants that in July the Group had reached agreement, ad referendum in the case of one delegation, on a decision regarding the notification and surveillance of state trading enterprises under Article XVII. The Chairman proposed that the Group should now transmit the Draft Decision to the GNG. It was so agreed. (Annex 2).

Article XXIV

7. The Chairman reported that following intensive consultations on Article XXIV he had submitted to participants a draft decision dated 18 October (p.m.). This seemed to him to represent a reasonable balance as between the different interests which had been expressed, and also a useful clarification of the operation of Article XXIV. He invited comments on this draft. (Annex 7).

8. The representative of the European Communities said that after careful consideration his delegation was unable to accept the text in its present form. On the second paragraph they needed time to consider certain technical implications and must therefore put down a waiting reserve. On paragraph 5, however, dealing with negotiations under Article XXIV:6, the Communities proposed the following amendments:

(i) In the first sentence, the words "achieving mutually satisfactory compensatory adjustment" should be replaced by "maintaining a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that existing before formation of the customs union";

(ii) The words "or new bindings" should be added at the end of the third sentence;

(iii) The fourth sentence should read "Such an offer shall be taken into consideration as an acceptable way to achieve these objectives by the contracting parties having negotiating rights in the binding being modified or withdrawn and should be fully evaluated having regard to their export interest in the tariff items involved.";

(iv) The fifth sentence should be deleted.

9. Referring to the paragraphs in the draft decision dealing with Article XXIV:12, the representative of the European Communities indicated that it was the understanding of his delegation that they referred exclusively to the General Agreement and not to the Tokyo Round Codes.

10. The representative of the United States said that the text before the Group was satisfactory; his delegation could accept it as it stood. In their view it was a useful and neutral text that would clarify and give precision to the operation of Article XXIV. The amendments proposed by the EEC, which would entail the inclusion of the Community's position on issues which had long been in dispute, would destroy the neutrality of the text and make its acceptance impossible. It would be regrettable if this last-minute proposal meant that the effort and concessions made by many delegations were to be wasted. The United States had not sought to include in the text its own position regarding the difference over interpretation with the Community: this would have been along the lines: "Compensation for the broken bindings will consist of products requested by the contracting parties whose bindings have been unilaterally broken in a manner inconsistent with Article II." and "Compensation unilaterally chosen by a customs union for its own reasons will not be considered unless a contracting party whose bindings have been broken chooses to do so".

11. The representative of Australia explained that while the draft decision before the Group did not address all the concerns of his delegation he believed that it represented a useful, albeit modest, outcome on Article XXIV. His delegation was therefore ready to join the consensus in accepting the text, it being Australia's understanding that the part of

the proposed decision referring to Article XXIV:12 did not change existing obligations under that provision, and that paragraphs 13, 14 and 15 of the proposed decision applied equally to supranational levels of government. Australia could not accept the amendments suggested by the European Communities. His delegation was very disappointed over this last-minute development and would strongly urge the European Communities to reconsider its position.

12. The representative of Canada said that with much hard work the Group had come very close to agreement on a decision which would usefully clarify the interpretation of Article XXIV. It would be very disappointing if agreement could not be reached; he appealed to the EEC to reconsider its position in the interest of the Round and the trading system. With respect to Article XXIV:6, Canada had a clear position - where a binding was broken as a result of the formation or enlargement of a customs union, compensatory adjustment was to be paid in a manner satisfactory to the contracting parties whose rights were affected by the modification of the binding. The unilateral determination of compensation by the customs union was not provided for in Article XXIV:6. The current text was an attempt to provide a neutral, but useful, description of how an Article XXIV:6 negotiation would proceed. It did not in the view of Canada prejudge the position of any party in these negotiations. What the EC was proposing was not an acceptable basis for concluding negotiations on this issue.

13. With respect to Article XXIV:12, Canada considered that the draft decision contained the essential elements of an interpretation of this provision which would make it clear that each contracting party was responsible under the GATT for the observance of the provisions of the General Agreement within its territory and should take such reasonable measures as might be available to it to ensure such observance by regional and local governments. The agreement would also confirm the application of the dispute settlement provisions to questions arising from the observance of the General Agreement in this context. It would apply equally to unitary and federal states, and to the European Economic Community.

14. Canada continued to have one concern with the current draft of paragraph 13 of the text, where the use of the word "fully" to qualify the responsibility of each contracting party seemed unnecessary and ambiguous; contracting parties were either responsible or not.

15. The representative of Japan expressed disappointment over the recent developments which had impeded agreement on the text before the Group. Paragraphs four and five of that text did not reflect the position of Japan on the provisions of Article XXIV:6. However, they constituted a neutral description which his delegation supported. Accordingly, his delegation also urged the EEC to re-examine their position. Japan accepted the formulation on Article XXIV:12 on the understanding that it did not create any new obligations on contracting parties. Referring to the fourth preambular paragraph Japan was of the view that the term "enlargement" should be deleted since in all other parts of the draft decision the term "formation" included both existing and new agreements.

16. The representative of India expressed disappointment that the draft decision on Article XXIV failed to address the growing problem of regionalism and the relative decline of multilateralism and of the share of mfn trade. These problems were exacerbated by ambiguities in Article XXIV which had given rise to widely divergent interpretations and had prevented the development of effective disciplines. The deficiencies of this Article had been summarized in the secretariat documents NG7/W/13 and its Addendum, and some were listed in the Indian submission in document NG7/W/38. They included the need to clarify the coverage of the term "duties and other restrictive regulations of commerce", particularly as regards fiscal duties with a differential impact on imports; the need for a clear interpretation of the term "substantially all the trade"; the need for confirmation that in taking Article XIX action a member of a customs union or free trade area could not exempt other members from the measure, particularly when imports from these countries contributed to injury. Worthwhile proposals had been made on these points but none had been accepted, and a proposal that serious adverse effects on non-members should be avoided had been reduced to a "best endeavours" clause. The draft decision also did not clarify the legal situation of Article XXIV agreements on whose conformity with GATT no agreement had been reached.

17. Given the likelihood of an increase in the number and scope of agreements under Article XXIV, and in view of the Ministerial mandate to preserve and strengthen the multilateral trading system, participants owed it to Ministers to draw attention to the danger that the growth of regional blocs might put an end to multilateralism. Since the draft decision would not contain alternative formulations which would have enabled Ministers to focus on these questions, India wished to place a reserve on the draft decision, with the request that their reasons for doing so should be made clear to the GNG and the TNC.

18. The representative of Mexico said that the draft under consideration was a balanced text that was acceptable to his authorities. He exhorted participants proposing amendments to reconsider them, since they would oblige his delegation and perhaps others to reconsider their positions.

19. The representative of Morocco sought confirmation that the last sentence in paragraph eight of the draft decision - "It may be necessary to provide for further review of the agreement" - covered only future and not past agreements. In response, the secretariat said that it had understood the intention of the negotiators to be that this sentence would apply to future agreements, and not to those which had already been examined by working parties.

20. The representative of Yugoslavia expressed concern over the paragraphs relating to Article XXIV:12, particularly the last sentence of paragraph fourteen, and placed a reserve on Yugoslavia's acceptance of the text.

21. The representative of New Zealand said that the Group had come close to agreement on the text presented by the Chairman but that the dramatic changes proposed by the EEC, restating long-held views on which it was

clear that there could be no meeting of minds, had put such agreement out of reach for the present.

22. In response, the representative of the European Communities said that the text lacked balance in failing to recognise the benefits to third countries deriving from the tariff reductions associated with the formation and enlargement of customs unions - which in recent cases had predominated over tariff increases. However, his delegation would consider further the comments made by participants in this discussion.

23. The Chairman said that in the light of this discussion it was evident that it would not be possible to conclude negotiations on Article XXIV within the prescribed time frame. In these circumstances he intended to send the text in its present form to the Chairman of the TNC, on his own responsibility, explaining that the Group had in his view exhausted the possibilities of negotiation. He would also indicate that he regarded the draft decision as representing a reasonable balance between the interests which had been brought to bear on this difficult question, and as a useful clarification of the way in which Article XXIV was or should be applied, and that he believed it might yet be possible to reach agreement on this text. Such a decision would now have to be taken in the context of the GNG/TNC.

24. Referring to Article XXIV:12 the Chairman confirmed that paragraphs 13, 14 and 15 of the proposed Draft Decision were intended only to clarify paragraph 12 of Article XXIV of the General Agreement.

25. Referring to the status of the EEC under Article XXIV:12 the Chairman said that the provisions of Article XXIV:12, and of paragraphs 13, 14 and 15 of the proposed Draft Decision, applied to the European Economic Community.

26. In relation to a number of concerns raised by contracting parties which have a written constitution governing relations between the central government and sub-central levels of government, the Chairman said that it was the clear understanding of the Group that nothing in the proposed Draft Decision, as it related to Article XXIV:12, would require the government of a contracting party, in seeking to ensure observance of GATT provisions within its territory, to exceed its constitutional authority.

Article XXV:5

27. The Chairman recalled that on this provision the Group had completed work on a draft decision but that as mentioned in his report to the GNG (NG7/W/73) "some contracting parties have indicated that their ability to accept this provision will depend upon the results in other Negotiating Groups". It was his understanding that this situation was not likely to change until later in the Round. Furthermore, a decision still had to be taken on the time limit for the termination of existing waivers, that is on the date to be inserted in paragraph 4. The Chairman proposed that the Group transmit the Draft Decision to the GNG, with the necessary explanation. It was so agreed. (Annex 3).

28. One participant stated his understanding that the Draft Decision was without prejudice to the voting system under Article XXV.

Article XXVIII

29. The Chairman invited delegations to inform the Group about their position on the alternative formulations to paragraph one of the draft decision in Annex 6 of NG7/W/73.

30. Referring to this paragraph the representative of Argentina said that his delegation, in a desire to be constructive, would not oppose the consensus if it were the general view in the Group that the first formulation of paragraph one should be retained. However, his delegation continued to believe that the ratio "exports affected by the concession to exports of the product in question to all markets" constituted, for small and medium-sized exporting countries, a better measure of the importance of the product whose binding was being modified or withdrawn. As to the statistical problems associated with this formulation, it had been the understanding of his delegation that it would be possible to resolve these when the Integrated Data Base (IDB) was introduced.

31. A number of participants indicated that the second alternative to paragraph one was also their preferred choice because it favoured smaller parties, but that in a spirit of compromise they were prepared to accept its deletion so as not to block consensus. The point was made that the assistance of the secretariat and experienced gained with the IDB would be of great use when the time came to evaluate whether the retained criterion had worked satisfactorily in securing a redistribution of rights in favour of small and medium-sized developing countries.

32. Another participant noted that it had not been possible in the draft decision to deal with the concerns expressed by his delegation and others about the effects of automatic invocation of Article XXVIII:5 on the stability of tariff concessions, on which a number of proposals had been made. Though this was regretted, his delegation would not stand in the way of consensus.

33. The Group agreed to make minor drafting changes in the first paragraph of the draft decision in order to make precise the meaning of the phrases "exports affected by the concession" and "total exports of the product in question". With these amendments, the Chairman proposed that the Group transmit to the GNG the Draft Decision on Article XXVIII - Modification of Schedules, dated 19 October 1990, as revised. It was so agreed. (Annex 4).

Article XXXV

34. The Chairman recalled that at the last meeting the Group had received a proposal from the United States which had been circulated as document NG7/W/74, dated 31 August, and that the United States had suggested some amendments to this text in subsequent informal discussions. On 5 October

he had circulated a revised version of the US proposal in a note by the Chairman: following discussions in formal and informal mode this had been further revised. He invited participants to consider the further revision dated 19 October (Annex 5). He explained that the amendments made since 5 October, at the suggestion of the delegation of Chile, were simply intended to make it absolutely clear that the negotiations in question were for accession to the General Agreement on Tariffs and Trade.

35. The representative of the United States reiterated that the proposal was intended to make the accession process more efficient by allowing contracting parties and acceding governments to negotiate tariff concessions and the Accession Protocol simultaneously. The language proposed by the Chairman was acceptable to his delegation.

36. A number of participants said that while they were ready to agree that the draft decision should be transmitted to the GNG, it should be understood that they were still considering its legal and technical implications and that the final positions of their delegations were therefore reserved. The point was made that it must be understood that the Draft Decision was applicable only to the GATT and set no precedent for negotiations outside that Agreement. It was also pointed out that the final legal form of any decision - whether by a decision of the CONTRACTING PARTIES or by the amendment procedures of Article XXX - could not be decided at this stage. In reply to a question the secretariat confirmed that the existing procedures for accession to the General Agreement would not be changed by this decision whose effect would simply be to permit invocation of Article XXXV after engaging in tariff negotiations.

37. The Chairman proposed that, bearing in mind the reservations and other points made in the discussion, the Draft Decision should be transmitted to the GNG. It was so agreed.

Protocol of Provisional Application

38. The Chairman recalled that certain contracting parties had made it clear that their ability to accept the draft decision on the Protocol of Provisional Application as part of the final Uruguay Round package would be related to the results of the negotiations in other areas. It should also be recalled that the draft decision would need to be completed by the insertion of a date for the expiry of the derogation provided by the PPA. With these understandings, the Chairman proposed that the Draft Decision should be transmitted to the GNG. It was so agreed. (Annex 6)

Legal Form of the Draft Decisions

39. The representative of Chile explained that it was his delegation's understanding that the Group's decision to transmit all the Draft Decisions to the GNG was without prejudice to the legal form these decisions might take. The Chairman confirmed that this was the case.

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

40. The representative of Austria said that since this might be the last meeting of the Group his delegation wanted to share with participants some ideas on the protection of the environment. Problems relating to the environment and its protection had increased in importance, as witnessed by increasing international awareness and cooperation in various international fora. The task of preserving the environment as well as the healing of wounds already inflicted on it, could only be achieved through international cooperation encompassing developing and developed nations.

41. Had it not been so late in the actual work of the Group, his authorities would have proposed to add the term "the environment" in Article XX(b) which would have read: "necessary to protect environment, human, animal or plant life or health". His delegation was convinced that there was a close relationship between trade and the environment, which would become more important in the years to come. Therefore, this concern should be clearly reflected in the GATT itself at an appropriate place; Article XX(b) was just one possibility worth exploring. Austria would work actively towards having environmental concerns included in GATT and would support future attempts to this end. His delegation trusted that other contracting parties would be supportive of this idea. Ministers in Brussels might also wish to devote some time to this problem.

42. Many participants supported in general terms the thrust of the Austrian statement; several said that they did not exclude the possibility of its discussion by Ministers. Links between this subject and existing work in the GATT, for example on Domestically Prohibited Goods and on sanitary and phytosanitary measures in the agricultural context were mentioned by a number of speakers. It was also pointed out that it was already possible to invoke Article XX(b) with relation to environmental issues.

43. Other speakers suggested that the question should be debated in depth before any decision was taken on the inclusion of environmental questions in a GATT work programme. It was suggested that it would be easy to restrict legitimate trade on grounds of environmental protection. It was also pointed out, however, that a Working Party on Environmental Measures and International Trade was already in existence in GATT, though hitherto it had held no meetings.

Date of next meeting

44. The Chairman said that he would not now propose any dates for further meetings of the Group, but that this should not necessarily be interpreted to mean that there would in no circumstances be a further meeting.

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

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 3

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 4

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 affected by the concession (i.e exports of the product to the market of the country modifying or withdrawing 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 five 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 affected by the concession to exports to all markets of the product in question.

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 5

ARTICLE XXXV

DRAFT DECISION

Preamble

The CONTRACTING PARTIES

Having regard to the linked provisions of paragraph 1 of Article XXXV of the General Agreement on Tariffs and Trade;

Noting that by invoking Article XXXV a contracting party on the one hand, or a government acceding to the General Agreement on Tariffs and Trade on the other, declines to apply the General Agreement, or alternatively Article II of that Agreement, to the other party;

Desiring to ensure that tariff negotiations between contracting parties and a government acceding to the General Agreement on Tariffs and Trade are not inhibited by unwillingness to accept an obligation to apply the General Agreement as a consequence of entry into such negotiations;

Agree as follows:

A contracting party and a government acceding to the General Agreement on Tariffs and Trade may engage in negotiations relating to the establishment of a GATT schedule of concessions by the acceding government without prejudice to the right of either to invoke Article XXXV in respect of the other.

ANNEX 6

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].

ANNEX 7

ARTICLE XXIV

Draft Decision

Preamble

The CONTRACTING PARTIES

Having regard to the provisions of Article XXIV of the General Agreement;

Recognising that customs unions and free trade areas have greatly increased in number and importance since the establishment of the GATT, and today cover a significant proportion of world trade;

Recognising the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements;

Recognising also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other contracting parties;

Convinced also of the need to reinforce the effectiveness of the role of the CONTRACTING PARTIES in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognising the need for a common understanding of the obligations of contracting parties under Article XXIV:12;

Agree as follows:

1. Customs unions, free trade areas, and interim agreements leading to the formation of a customs union or free trade area, to be consistent with Article XXIV, must satisfy the provisions of its paragraphs 5, 6, 7 and 8 inter alia.

Article XXIV:5

2. The evaluation under Article XXIV:5(a) of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff line basis and in values and quantities, broken down by GATT country of origin. The GATT secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognised that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in Article XXIV:5(c) should exceed ten years only in exceptional cases. In cases where contracting parties believe that ten years would be insufficient they shall provide a full explanation to the CONTRACTING PARTIES of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a contracting party forming a customs union proposes to increase a bound rate of duty. In this regard it is reaffirmed that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted by the CONTRACTING PARTIES on 10 November 1980 (27S/26) and in the 1990 Decision on Article XXVIII, Modification of Schedules, of the CONTRACTING PARTIES, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. It is agreed that these negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by Article XXIV:6, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the contracting parties having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII cannot be reached within a reasonable period from the initiation of negotiations, the customs union

shall, nevertheless, be free to modify or withdraw the concessions; affected contracting parties shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. The General Agreement imposes no obligation on contracting parties benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim agreement leading to the formation of a customs union, to provide compensatory adjustment to its members.

Review of Customs Unions and Free Trade Areas

7. All notifications made under Article XXIV:7(a) shall be examined by a working party in the light of the relevant provisions of the General Agreement and of paragraph 1 of this Decision. The working party shall submit a report to the CONTRACTING PARTIES on its findings in this regard. The CONTRACTING PARTIES may make such recommendations to contracting parties as they deem appropriate.

8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed timeframe and on measures required to complete the formation of the customs union or free trade area. It may if necessary provide for further review of the agreement.

9. Substantial changes in the plan and schedule included in an interim agreement shall be notified, and shall be examined by the CONTRACTING PARTIES if so requested.

10. Should an interim agreement notified under Article XXIV:7(a) not include a plan and schedule, contrary to Article XXIV:5(c), the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.

11. Customs unions and members of free trade areas shall report periodically to the CONTRACTING PARTIES, as envisaged by the CONTRACTING PARTIES in their instruction to the GATT Council concerning reports on regional agreements (18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.

Dispute Settlement

12. The dispute settlement provisions of the General Agreement may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas or interim agreements leading to the formation of a customs union or free trade area.

Article XXIV:12

13. Each contracting party is fully responsible under the General Agreement for the observance of all provisions of the General Agreement, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.

14. The dispute settlement provisions of the General Agreement may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a contracting party. When the CONTRACTING PARTIES have ruled that a provision of the General Agreement has not been observed, the responsible contracting party shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.

15. Each contracting party undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another contracting party concerning measures affecting the operation of the General Agreement taken within the territory of the former.