

## ARTICLE II

### SCHEDULES OF CONCESSIONS

---

|     |   |    |
|-----|---|----|
| I.  | TEXT OF ARTICLE II, INTERPRETATIVE NOTE AD ARTICLE II, AND UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(B) OF THE GATT 1994..... | 64 |
| II. | INTERPRETATION AND APPLICATION OF ARTICLE II .....  | 67 |
| A.  | SCOPE AND APPLICATION OF ARTICLE II .....   | 67 |
| 1.  | Paragraph 1(a): “treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule”.....          | 67 |
| (1) | “Treatment” and interpretation of the scope of concessions in Schedules.....  | 67 |
| (a) | Tariff escalation .....   | 68 |
| (b) | Replacement of quantitative restrictions by tariffs .....   | 69 |
| (2) | Maintenance of “treatment” versus modification of a concession.....   | 69 |
| (a) | Alteration in tariff nomenclature .....   | 70 |
| (b) | Alteration of the basis for levying duties .....  | 70 |
| (c) | Conversion of rates to reflect change in customs valuation.....   | 71 |
| (d) | Imposition of a variable import duty on bound items.....  | 72 |
| (e) | Tariff reclassification .....   | 72 |
| (3) | “Treatment”: Schedule concessions other than duties on importation .....  | 73 |
| (a) | Export duties .....   | 73 |
| (b) | Schedule commitments by certain contracting parties .....   | 73 |
| (c) | Other non-tariff concessions .....  | 74 |
| (4) | Withholding or withdrawal of concessions .....  | 75 |
| 2.  | Paragraphs 1(b) and (c) .....   | 75 |
| (1) | “products of territories of other contracting parties” .....  | 75 |
| (a) | Origin of goods for the purposes of most-favoured-nation treatment .....  | 75 |
| (b) | Direct consignment requirements.....  | 75 |
| (2) | “subject to the terms, conditions or qualifications set forth in that schedule” .....   | 75 |
| (3) | “ordinary customs duties” .....   | 78 |
| (4) | “other duties or charges of any kind” .....   | 78 |
| (a) | Import surcharges .....   | 79 |
| (b) | Deposit schemes .....   | 80 |
| (c) | Revenue duties and import taxes .....   | 81 |
| (d) | Charges on transfer of payments .....   | 81 |
| (e) | Charges imposed by import monopolies .....  | 82 |
| (5) | “imposed on or in connection with importation” .....  | 82 |
| (6) | “date of this Agreement” (paragraphs 1(b), 1(c) and 6(a)) .....   | 83 |
| (7) | “directly and mandatorily required to be imposed ... by legislation” .....  | 85 |
| (8) | Paragraph 1(c): “preferential treatment” .....  | 85 |
| 3.  | Paragraph 2 .....   | 86 |
| (1) | Paragraph 2(a): “a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III” .....   | 86 |
| (2) | Paragraph 2(b): “any anti-dumping or countervailing duty applied consistently with the provisions of Article VI” .....                  | 86 |
| (3) | Paragraph 2(c): “fees or other charges commensurate with the cost of services rendered” .....   | 87 |
| 4.  | Paragraph 3: impairment of concessions by alteration in valuation or currency conversion .....  | 87 |
| 5.  | Paragraph 4 .....   | 88 |
| (1) | “a monopoly of the importation of any product described in the appropriate Schedule” .....  | 88 |
| (2) | “except as provided for in that Schedule or as otherwise agreed”: concessions on the operations of import monopolies .....              | 89 |
| (3) | “in the light of the provisions of Article 31 of the Havana Charter” .....  | 90 |
| (a) | Application of the Interpretative Note .....  | 90 |
| (b) | Article 31 .....  | 91 |
| (c) | Interpretative Note Ad Article II:4 .....   | 92 |
| (4) | “protection on the average in excess of the amount of protection provided for in that Schedule” .....                                   | 93 |
| 6.  | Paragraph 5 .....   | 96 |
| 7.  | Paragraph 6 .....   | 97 |
| (1) | “currency at the par value accepted or provisionally recognized” .....  | 97 |
| (2) | Adjustment of specific duties in accordance with paragraph 6(a).....  | 98 |
| (3) | “date of this Agreement” .....  | 98 |
| (4) | Article II:6(b) .....   | 99 |
| 8.  | Paragraph 7: “an integral part of Part I of this Agreement” .....   | 99 |
| B.  | RELATIONSHIP BETWEEN ARTICLE II AND OTHER GATT ARTICLES .....   | 99 |

|      |   |     |
|------|---|-----|
| 1.   | Article III .....   | 99  |
| 2.   | Article VIII .....  | 99  |
| 3.   | Articles XI and XIII .....  | 100 |
| 4.   | Article XXIII .....   | 101 |
| 5.   | Article XXVIII .....  | 101 |
| C.   | EXCEPTIONS AND DEROGATIONS .....  | 101 |
| 1.   | Article II:2 .....  | 101 |
| 2.   | Protocol of Provisional Application .....   | 101 |
| 3.   | Other Protocols of accession .....  | 101 |
| 4.   | Waivers under Article XXV:5 .....   | 102 |
| 5.   | Coexistence of the GATT 1947 and the WTO Agreement .....  | 103 |
| D.   | TARIFF PROTOCOLS, SCHEDULES OF CONCESSIONS, AND NATIONAL TARIFF SCHEDULES .....                   | 103 |
| 1.   | Schedules in general .....  | 103 |
| 2.   | Protocols of concessions .....  | 104 |
| 3.   | Consolidated Schedules .....  | 105 |
| 4.   | Loose-leaf Schedules .....  | 105 |
| 5.   | Implementation of the Harmonized System .....   | 106 |
|      | (1) <i>Conversion of schedules to Harmonized System nomenclature</i> .....                        | 106 |
|      | (2) <i>Implementation in GATT schedules of amendments to Harmonized System nomenclature</i> ..... | 108 |
| 6.   | Concessions in schedules .....  | 110 |
|      | (1) <i>Authentic texts of Schedules</i> .....   | 110 |
|      | (2) <i>Description of concessions</i> .....   | 110 |
|      | (3) <i>Legal basis for determining initial negotiating rights (INRs)</i> .....                    | 110 |
| 7.   | Application of concessions .....  | 111 |
|      | (1) <i>National tariff schedules</i> .....  | 111 |
|      | (2) <i>Changes in tariff nomenclature</i> .....   | 112 |
|      | (3) <i>Provisional accession to the General Agreement</i> .....                                   | 112 |
| 8.   | Modification of concessions .....   | 112 |
| 9.   | Modification and rectification of Schedules .....   | 112 |
|      | (1) <i>Procedures for modification or rectification of Schedules</i> .....                        | 112 |
|      | (2) <i>Certifications of rectifications and modifications</i> .....                               | 113 |
|      | (3) <i>Legal effect of certification</i> .....  | 114 |
|      | (4) <i>Application of rectification procedures in other agreements</i> .....                      | 115 |
| 10.  | Withholding or withdrawal of concessions .....  | 115 |
| 11.  | Notification of national tariff schedules, the Tariff Study and the Integrated Data Base .....    | 115 |
| III. | PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS .....   | 116 |
| IV.  | RELEVANT DOCUMENTS .....  | 118 |
| V.   | SCHEDULES OF CONTRACTING PARTIES TO THE GATT 1947 .....   | 119 |

**I. TEXT OF ARTICLE II, INTERPRETATIVE NOTE AD ARTICLE II, AND UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(B) OF THE GATT 1994**

Article II

*Schedules of Concessions*

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III\* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;\*
- (c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.\*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *Provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

Interpretative Note *Ad* Article II from Annex I

*Paragraph 2 (a)*

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.<sup>1</sup>

*Paragraph 2 (b)*

See the note relating to paragraph 1 of Article I.

*Paragraph 4*

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

**UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(b)  
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994**

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, 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 concessions annexed to GATT 1994 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 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules 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 appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 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 appropriate Schedule shall not be higher than the level obtaining at the time of the first incorporation of the concession in that Schedule. It will be open to any Member 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 date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.
5. The recording of "other duties or charges" in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.
6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply.
7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and 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 date of deposit of the instrument.
8. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).

---

## II. INTERPRETATION AND APPLICATION OF ARTICLE II

### A. SCOPE AND APPLICATION OF ARTICLE II

#### 1. Paragraph 1(a): “treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule”

##### (1) “Treatment” and interpretation of the scope of concessions in Schedules

The 1981 Panel Report on “Spain - Tariff Treatment of Unroasted Coffee”, which examined the tariff treatment of imports of unroasted coffee into Spain, states:

“The Panel found that there was no obligation under the GATT to follow any particular system for classifying goods, and that a contracting party had the right to introduce in its customs tariff new positions or subpositions as appropriate”.<sup>1</sup>

This finding was subject to the following footnote: “Provided that a re-classification subsequent to the making of a concession under the GATT would not be a violation of the basic commitment regarding that concession (Article II:5)”.

The 1982 Report of the “Panel on Vitamins” (see below at page 71) provides, *inter alia*: “The Panel considers that the United States did not have an obligation to maintain the de facto tariff rate differentiation between feedgrade and pharmaceutical quality vitamins, provided that the method used for the conversion of the previous common bound rate was neutral and did not involve any arbitrary increase”.<sup>2</sup>

At the special meeting of the Council in October 1988 to review developments in the trading system, the Director-General informed the Council that in April 1988, Canada and the EC had asked him, with reference to paragraph 8 of the 1979 Understanding, to render an advisory opinion on whether a tariff concession granted by Portugal to Canada in 1961 was applicable to wet salted cod. This issue had arisen in tariff negotiations between Canada and the EC under Article XXIV:6. He had agreed on 15 April to render such an opinion and on 15 July had made it available to the two parties concerned.<sup>3</sup>

The 1989 Panel Report on “Canada/Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber” examined Canada’s claim that Japan’s application of an 8 per cent tariff on imports of SPF dimension lumber was inconsistent with Article I:1 because SPF dimension lumber and dimension lumber of other types, which benefited from a zero duty rate, were “like products” within the meaning of Article 1:1.

“... The Panel considered it impossible to appreciate fully the Canadian complaint if it had not in a preliminary way clarified the meaning of some principles of the GATT system in relation to tariff structure and tariff classification.

“The Panel noted in this respect that the General Agreement left wide discretion to the contracting parties in relation to the structure of national tariffs and the classification of goods in the framework of such structure (see the report of the Panel on Tariff Treatment of Unroasted Coffee, BISD 28S/102, at 111, paragraph 4.4). The adoption of the Harmonized System, to which both Canada and Japan have adhered, had brought about a large measure of harmonization in the field of customs classification of goods, but this system did not entail any obligation as to the ultimate detail in the respective tariff classifications. Indeed, this nomenclature has been on purpose structured in such a way that it leaves room for further specifications.

“The Panel was of the opinion that, under these conditions, a tariff classification going beyond the Harmonized System’s structure is a legitimate means of adapting the tariff scheme to each contracting

---

<sup>1</sup>L/5135, adopted on 11 June 1981, 28S/102, 111, para. 4.4.

<sup>2</sup>L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(e).

<sup>3</sup>C/M/225, p. 2.

party's trade policy interests, comprising both its protection needs and its requirements for the purposes of tariff- and trade negotiations. ...

"Tariff differentiation being basically a legitimate means of trade policy, a contracting party which claims to be prejudiced by such practice bears the burden of establishing that such tariff arrangement has been diverted from its normal purpose so as to become a means of discrimination in international trade. Such complaints have to be examined in considering simultaneously the internal protection interest involved in a given tariff specification, as well as its actual or potential influence on the pattern of imports from different extraneous sources ...<sup>4</sup>

"The Panel considered that the tariffs referred to in the General Agreement are, quite evidently, those of the individual contracting parties. This was inherent in the system of the Agreement and appeared also in the current practice of tariff negotiations, the subject matter of which were the national tariffs of the contracting parties. It followed that, if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, such a claim should be based on the classification of the latter, i.e. the importing country's tariff."<sup>5</sup>

In Council discussion when this panel report was adopted, Canada raised the concern that "this interpretation could lead to pre-eminence being given to the tariff classification of a contracting party when determining 'like products' under Article I ... Tariff classification systems cannot identify specifically each and every possible product which may be imported. In the tariff classification system of contracting parties it is regularly the case that an individual tariff line or description will cover a wide range of different products, particularly in the example of lines which read 'other' or 'not elsewhere specified'. Additionally, there are new products continually entering the marketplace which are not identified in tariff schedules".<sup>6</sup>

See also the material on Greek reclassification of gramophone records below at page 96.

(a) *Tariff escalation*

The Ministerial Decision of 29 November 1982 on "Tariffs" provides, *inter alia*, that "prompt attention should be given to the problem of escalation in tariffs on products with increased processing with a view to effective action towards the elimination or reduction of such escalation where it inhibits international trade, taking into account the concerns relating to exports of developing countries".<sup>7</sup>

See also various Secretariat Notes from 1981-85 on the theory and practice of measurement of tariff escalation.<sup>8</sup> See also records of discussions in the Committee on Trade and Development and the Committee on Tariff Concessions, on the basis and methodological issues involved in studies on tariff escalation.<sup>9</sup>

<sup>4</sup>L/6470, adopted on 19 July 1989, 36S/167, 197-198, paras. 5.7-5.10.

<sup>5</sup>*Ibid.*, 36S/199, para. 5.13.

<sup>6</sup>L/6528; see also C/M/232, p. 9-12; C/M/234, p. 44-49; C/M/235, p. 15-18.

<sup>7</sup>L/5424, 29S/9, 18, para. 1.

<sup>8</sup>"Tariff Escalation", COM.TD/W/315, dated 4 July 1980; "Measurement of Tariff Escalation", TAR/W/18, dated 5 March 1981; "Study by the Secretariat on the Copper Producing and Copper Consuming Industries", Note dated 7 April 1982 issued as TAR/W/26 and COM.TD/W/361; "Tariff Escalation", Note dated 8 June 1982 issued as TAR/W/29 and COM.TD/W/369; and "Tariff Escalation", COM.TD/W/425, dated 22 March 1985. See also Report of Group of Governmental Experts on "Measures Affecting the World Market for Copper Ores and Concentrates", L/6167, adopted on 2 December 1987, 34S/168, and Note by the Director-General on "Measures Affecting the World Market for Copper Ores and Concentrates", L/6456, 36S/199.

<sup>9</sup>COM.TD/108; L/5253, 28S/53, 64-65, para. 36; L/5401, 29S/66, 73, para. 25; TAR/34, 28S/68, 70-71, para. 9; TAR/63, 29S/75, 76-77, para. 7. Tariff escalation affecting tropical products was also discussed in 1965-66 in the Expert Group on Trade and Aid Studies of the Committee on Trade and Development: see "Secretariat Note on the Effects of Differential Tariffs" (estimating effective protection of groundnuts and cocoa), Spec(65)144 dated 17 December 1965.

(b) *Replacement of quantitative restrictions by tariffs*

The Report of the Review Session Working Party on “Schedules and Customs Administration” notes as follows:

“Some members of the Working Party proposed that it should be recognized that when quantitative restrictions imposed for balance-of-payments reasons are removed an increase of customs duties or other charges on imports, having the effect of impairing the benefits which might reasonably be expected from removal of the restrictions, could be referred to the CONTRACTING PARTIES by a contracting party having a substantial interest in the export of the products affected. They admitted that the CONTRACTING PARTIES when considering any such reference, should take account of all relevant considerations including the fiscal, developmental, strategic and other needs of the contracting party concerned, and also the relative progress of both parties in the reduction of tariffs and other obstacles to trade. This proposal was supported by some other members, but the majority of the Working Party opposed it mainly on the ground that it might result in an extension of control of the CONTRACTING PARTIES over unbound rates of duty. The majority decision, however, is without prejudice to the operation of Articles XXII and XXIII with respect to such cases as could appropriately be brought under those Articles”.<sup>10</sup>

See also the unadopted panel report of 1994 on “EEC - Import Régime for Bananas”.<sup>11</sup>

(1) *Maintenance of “treatment” versus modification of a concession*

The 1984 Report of the “Panel on Newsprint” examined the claim of Canada concerning the application of a tariff concession on newsprint established by the European Communities. The concession in the EC’s Schedule LXXII provided for an annual tariff quota of 1.5 million tonnes duty-free, leaving the bound duty rate at 7 per cent for imports exceeding that quota. Under agreements between the EC and the EFTA countries, newsprint imports from EFTA countries became duty-free as from 1 January 1984, and the EC then opened a duty-free tariff quota for m.f.n. suppliers of 500,000 tonnes for newsprint for the year 1984.

“The Panel could not share the argument advanced by the EC that their action did not constitute a change in their GATT tariff commitment. It noted that under longstanding GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an ad valorem duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations. By the same token, the EC action would, in the Panel’s view, have required the EC to conduct such negotiations. The Panel also noted that in granting the concession in 1973, the EC had not made it subject to any qualification or reservation in the sense of Article II:1(b) although at the time the concession was made, it was known that agreement had already been reached that the EFTA countries would obtain full duty-free access to the Community market for newsprint from 1 January 1984 onward. The Panel therefore found that although in the formal sense the EC had not modified its GATT concession, it had *in fact* changed its GATT commitment unilaterally, by limiting its duty-free tariff quota for m.f.n. suppliers for 1984 to 500,000 tonnes. ...

“Taking all factors mentioned above into account, the Panel concluded that the EC, in unilaterally establishing for 1984 a duty-free quota of 500,000 tonnes, had not acted in conformity with their obligations under Article II of the GATT. The Panel shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement”.<sup>12</sup>

<sup>10</sup>L/329, adopted 26 February 1955, 3S/205, 220 para. 40; for discussion and rejection of the proposed interpretation by majority vote, see SR.9/37 p. 7-9.

<sup>11</sup>DS38/R, dated 11 February 1994, para. 136.

<sup>12</sup>L/5680, adopted on 20 November 1984, 31S/114, 131-132, paras. 50, 52.

(a) *Alteration in tariff nomenclature*

The 1954 Report of the Ninth Session Working Party on Schedules, on “Transposition of Schedule XXXVII (Turkey)” notes that “The adoption of the Brussels nomenclature presents no basic problem so far as schedules to the General Agreement are concerned. At their Fifth Session, the CONTRACTING PARTIES agreed that a contracting party wishing to change the nomenclature of its schedule could resort to the normal rectification procedures. ... In the event of an objection being lodged concerning the change in nomenclature of any time, consultations should be held between Turkey and the governments concerned”.<sup>13</sup>

The Decision of 12 July 1983 on “GATT Concessions under the Harmonized Commodity Description and Coding System” notes, *inter alia*:

“... The fact that one bound tariff line is divided up into a number of new lines, without changing the content of the original line, will not create any problem for the maintenance of the concession. Since, however, the introduction of the Harmonized System will result in a considerable number of cases where tariff lines with different bound rates are combined or bound rates combined with unbound rates, renegotiations under Article XXVIII will in many cases be necessary”.<sup>14</sup>

(b) *Alteration of the basis for levying duties*

The 1953 Report of the Working Party at the Eighth Session on “Rectifications and Modifications of Schedules” notes:

“The Working Party also concerned itself with the proposal of the Greek Government to introduce a minimum *ad valorem* rate in certain specific rates and came to the conclusion that such changes could not be considered rectifications to be dealt with by the Working Party. It decided therefore to refer the question to the CONTRACTING PARTIES so that such changes could form the object of consultations and negotiations with the parties having an interest in those items. After the conclusion of the negotiations, the changes agreed upon could be embodied in a protocol of rectifications and modifications”.<sup>15</sup>

In approving this report, the CONTRACTING PARTIES authorized the Government of Greece to enter into consultations and negotiations with the interested contracting parties.<sup>16</sup>

The 1955 Report of the Ninth Session Working Party on Schedules, on “Transposition of Schedule XXXVII (Turkey)” notes:

“... The Working Party considered the proposals [of Turkey] in relation to the provisions of the Agreement and to the practices of the CONTRACTING PARTIES which deal with the modification of schedules. It was found that there is no provision in the General Agreement which authorizes a contracting party to alter the structure of bound rates of duty from a specific to an *ad valorem* basis.

“The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions”.<sup>17</sup>

<sup>13</sup>L/294, adopted on 20 December 1954, 3S/127, 128, para. 2. For Fifth Session decision on modification of schedules consequent to adherence to the Brussels Convention for Tariff Nomenclature, see GATT/CP.5/7 (Secretariat proposal), GATT/CP.5/SR.3 p. 1-3 (discussion).

<sup>14</sup>L/5470/Rev.1, 30S/17, 18-19, para. 3.1.

<sup>15</sup>G/62, adopted on 24 October 1953, 2S/63, 2S/66, para. 8. See also similar decision at Fifth Session, GATT/CP.5/45, II/144, 145, section (3).

<sup>16</sup>SR.8/20, p. 5.

<sup>17</sup>L/294, adopted on 20 December 1954, 3S/127, 128, paras. 3-4; see also SR.9/4 p. 12.



The 1958 Working Party Report on “Conversion of Specific Duties in the Norwegian Schedule” cites this passage in discussing the proposal of Norway to establish simplified procedures for the conversion of specific to ad valorem duties, and observes that “It was obvious, therefore, that the relevant procedures were those of Article XXVIII which related to modifications of concessions in the Schedules”.<sup>18</sup>

The 1954 Report of the Ninth Session Working Party on Schedules on the “Fourth Protocol of Rectifications and Modifications” discusses whether, even in the case where the existing (specific duty) concession reserved the right to convert specific duties into *ad valorem* rates, the retention of the former specific rate would constitute a modification of that concession:

“... Among the rectifications requested by the Austrian Government were those relating to Items 140 to 144 of the Austrian Tariff which were being made under the authority of the Note to these items included in the Austrian Schedule XXXII which granted the Austrian Government freedom to change the specific into ad valorem rates. The Austrian Government felt that it would not be impairing the value of the concessions if it retained beside the ad valorem duty the old specific rate as a minimum rate.

“The Working Party took the view that such changes would constitute modifications of Austria’s obligations and that it could not recommend their acceptance as rectifications. Such modifications could only be inserted in a protocol of rectifications and modifications after negotiations authorized by the CONTRACTING PARTIES in accordance with the proper procedures ...”.<sup>19</sup>

The 1978 Panel Report on “Canada - Withdrawal of Tariff Concessions”, which examined a withdrawal resulting from negotiations concerning the EC’s conversion to ad valorem duties of specific duties on unwrought lead and unwrought zinc, notes that:

“The Panel based its consideration of the case on Article XXVIII of the GATT which, as both parties agreed, was the applicable provision, *inter alia*, for negotiations which are undertaken with the aim of converting specific rates of duty into ad valorem rates”.<sup>20</sup>

Concerning the application of Article II to a conversion from ad valorem rates to specific duty rates, see the unadopted panel report on “EEC - Import Régime for Bananas”.<sup>21</sup>

See further under Article XXVIII.

(c) *Conversion of rates to reflect change in customs valuation*

The 1982 Report of the “Panel on Vitamins” examined the application of the Kennedy Round concession on feed-grade and pharmaceutical-grade Vitamin B12 by the United States. While the nominal bound duty rate for both qualities of Vitamin B12 was the same, this rate was subject to the “American selling price” (“ASP”) method of tariff valuation applied by the United States under the Protocol of Provisional Application. Under the ASP method, the dutiable value imputed to feed-grade Vitamin B12 (and thus its effective duty rate) was lower than that on pharmaceutical-grade Vitamin B12. The granting of the concession had been subject to a general note reserving the ability of the US to adjust the duty rate in the event of elimination of ASP valuation. In the Tokyo Round, the US agreed to eliminate “ASP” valuation and to incorporate the extra duties charged as a result of this valuation method into the new base rate for Tokyo Round duty reductions. In the conversion, the effective rates of duty for both qualities of Vitamin B12 were converted together on the basis of a trade-weighted average, resulting in a single concession rate for Vitamin B12. The Panel Report provides, *inter alia*:

“The Panel considers that the United States did not have an obligation to maintain the de facto tariff rate differentiation between feedgrade and pharmaceutical quality vitamins, provided that the method used for the conversion of the previous common bound rate was neutral and did not involve any arbitrary increase.

<sup>18</sup>L/913, adopted on 14 November 1958, 7S/112, para. 3.

<sup>19</sup>L/335, adopted on 3 March 1955, excerpted at 3S/130, para. 1-2.

<sup>20</sup>L/4636, adopted on 17 May 1978, 25S/42, 47, para. 14.

<sup>21</sup>DS38/R, dated 11 February 1994, paras. 134-135.

The Panel believes the method used by the United States for the calculation of the level of the base rate - the weighted average of actual duties collected for feedgrade and pharmaceutical quality vitamins - to be in conformity with that proviso".<sup>22</sup>

In the Council discussion of this report, several contracting parties stated their view that the use of a trade-weighted average in conversion of tariffs should not constitute a precedent for future cases such as transposition of existing bound tariffs into the Harmonized Commodity Description and Coding System nomenclature, in view of the particular procedures outside Article XXVIII that had been adopted by the parties to the dispute.<sup>23</sup>

See also the discussion below of Schedules of Concessions.

(d) *Imposition of a variable import duty on bound items*

In 1961 Uruguay requested a ruling from the CONTRACTING PARTIES concerning whether the application of variable import duties was compatible with the GATT. A 1961 Note by the Executive Secretary on "Questions relating to Bilateral Agreements, Discrimination and Variable Taxes" states, *inter alia*:

"The General Agreement contains no provision on the use of 'variable import duties'. It is obvious that if any such duty or levy is imposed on a 'bound' item, the rate must not be raised in excess of what is permitted by Article II of the Agreement. ... It should be noted that if a variable levy system should be accompanied by the imposition of restrictions by specified volume, or a prohibition, of imports such measures would of course be subject to the examinations and considerations referred to in sections (a) and (b) above [relating to Articles XI, XIII, XII, XVIII:B and XIV]".<sup>24</sup>

See also the discussion of this Note in summary records of the Nineteenth Session.<sup>25</sup> The 1962 Panel Report on the "Uruguayan Recourse to Article XXIII" notes as follows:

"The Panel was faced with a particular difficulty in considering the status of variable import levies or charges. It noted the discussion which took place at the nineteenth session of the CONTRACTING PARTIES on this subject during which it was pointed out that such measures raised serious questions which had not been resolved. In these circumstances the Panel has not considered it appropriate to examine the consistency or otherwise of these measures under the General Agreement".<sup>26</sup>

In the Agriculture Committee in 1984, it was stated that where a variable levy was applicable to a product in respect of which the tariff duty rate was bound, the bound tariff rate constituted a maximum upper limit for the levy.<sup>27</sup>

(e) *Tariff reclassification*

Concerning tariff reclassification, see various notes by the Secretariat and the minutes of the Committee on Tariff Concessions<sup>28</sup> discussing the legal consequences of reclassification, and methods for maintaining GATT bindings in cases of tariff reclassification. In one discussion of this subject in the Committee on Tariff Concessions in 1980, it was noted by the representative of Austria that "The problem only arose directly in respect of [bound] items but it affected indirectly all items, since when transferring a GATT bound item from one heading to another with the same rate of duty, there might be a difference with respect to the so-called 'other charges'".<sup>29</sup>

<sup>22</sup>L/5331, adopted on 1 October 1982, 29S/110, 117, para. 22(e).

<sup>23</sup>C/M/160, 161.

<sup>24</sup>Note dated 21 November 1961, L/1636, paras. 7-8.

<sup>25</sup>SR.19/8, p. 111-120.

<sup>26</sup>L/1923, adopted 16 November 1962, 11S/95, 100, para. 17.

<sup>27</sup>AG/M/3, p. 63.

<sup>28</sup>TAR/W/14, TAR/W/19, TAR/M/3, TAR/M/4.

<sup>29</sup>TAR/M/3, p. 12, para. 5.3.

**(3) "Treatment": Schedule concessions other than duties on importation****(a) Export duties**

The United Kingdom Schedule XIX, Section D (Malayan Union) attached to the 30 October 1947 text of the General Agreement contained a concession on export duties on tin ore and tin concentrates, to the effect that "The products comprised in the above item shall be assessed for duty on the basis of their tin content; the rate to be levied on such tin content being the same as the rate chargeable on smelted tin, *Provided* that the rate of duty on this item may exceed the rate chargeable on smelted tin in the event that and so long as the United States of America subsidised directly or indirectly the smelting of tin in the United States".

**(b) Schedule commitments by certain contracting parties**

The US "Suggested Charter for an International Trade Organization" contained a separate Article 28 concerning expansion of trade by any Member establishing or maintaining a complete or substantially complete monopoly of its import trade. This Article envisaged the negotiation by each such Member of an arrangement providing for a minimum periodic value of imports from the other Members. This Article was kept with the same wording provisionally in the London and New York Draft Charters, and was deleted at Geneva. The Geneva Report states that the Preparatory Committee believed that the text of the revised Article 31 (requiring negotiations to limit or reduce protection afforded by import or export monopolies) would be sufficiently flexible to permit any appropriate negotiations with a Member which maintained a complete or substantially complete monopoly of its external trade, and that since no representative of such a country had attended the sessions of the Committee, the matter remained open for the Havana Conference.<sup>30</sup>

The Report of the Working Party on the "Accession of Poland" records that

"The Working Party noted that the foreign trade of Poland was conducted mainly by State enterprises and that the Foreign Trade Plan rather than the customs tariff was the effective instrument of Poland's commercial policy. The present customs tariff was applicable only to a part of imports effected by private persons for their personal use and it was in the nature of a purchase tax rather than a customs tariff. The Working Party agreed that due consideration had to be given to these facts in drawing up the legal instruments relating to Poland's accession to the General Agreement. The representative of Poland stressed that, as a result of possible changes in the economic system of Poland, a different situation might arise enabling Poland to renegotiate its position towards the provisions of the General Agreement.

"It was agreed that in view of the nature of the foreign trade system of Poland its main concession in the negotiations would be commitments relating to an annual increase in the value of its imports from contracting parties".<sup>31</sup>

Paragraph 1 of Poland's Schedule LXV, as set out in Annex B to the Protocol for the Accession of Poland, provides: "Subject to paragraph 2 below, Poland shall, with effect from the date of this Protocol, undertake to increase the total value of its imports from the territories of contracting parties by not less than 7 per cent per annum".<sup>32</sup> Schedule LXV and the Polish import commitment were modified on 5 February 1971.<sup>33</sup> In December 1989 Poland announced its intention to request renegotiation of its terms of accession in view of the entry into force 1 January 1990 of laws establishing a market economy for which the customs tariff would be the effective instrument of commercial policy.<sup>34</sup> At the February 1990 Council meeting a Working Party was established to

<sup>30</sup>London Report, p. 18, New York Report p. 29, Geneva Report p. 29. See also Secretariat Note of 1988 on this issue in MTN.GNG/NG7/W/15/Add.1 p. 1-3.

<sup>31</sup>L/2806, adopted on 26 June 1967, 15S/109, 110, paras. 7-8.

<sup>32</sup>15S/52. Paragraph 2 provides, *inter alia*, that Poland may modify the commitment under paragraph 1 by negotiation and agreement, on 1 January 1971 and thereafter on the "open season" dates specified in Article XXVIII:1.

<sup>33</sup>L/3416 (notification by Poland of intent to renegotiate); C/M/64, p. 17-18; L/3475, "Third Review under the Protocol of Accession", adopted on 2 February 1971, 18S/188, section C, "Renegotiation of Schedule LXV - Poland", 18S/198-200 (noting adoption 5 February 1971 of modification of Schedule LXV by postal ballot).

<sup>34</sup>SR.45/ST/11, L/6634, C/M/238 p. 10-13.

examine the request of the Government of Poland to renegotiate the terms of accession of Poland.<sup>35</sup> This working party did not conclude its work before 1 January 1995.

The Working Party Report on "Accession of Romania" records that "It was agreed that because of the absence of a customs tariff in Romania the main concession to be incorporated in its Schedule would be a firm intention to increase imports from contracting parties at a rate not lower than the growth of total Romanian imports provided for in its Five-Year Plans".<sup>36</sup> Accordingly, paragraph 1 of Romania's Schedule LXIX provides that "Subject to paragraph 2 below, Romania, on the basis of mutual advantage which is inherent in the General Agreement, will develop and diversify its trade with the contracting parties as a whole, and firmly intends to increase its imports from the contracting parties as a whole at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plans".<sup>37</sup> In 1974 a working party was established to examine the customs tariff introduced by Romania from 1 January 1974.<sup>38</sup> In 1991, Romania was granted a temporary waiver of its obligations under Article II in order to enable it to implement a new customs tariff in the context of measures for transition to a market economy, and pending renegotiation of its Schedule; Romania also requested renegotiation of its accession protocol in the light of, *inter alia*, the abolition of its former system of central planning.<sup>39</sup> At the February 1992 Council meeting a Working Party was established to examine the request of the Government of Romania to renegotiate the terms of accession of Romania.<sup>40</sup> This working party did not conclude its work before 1 January 1995.

(c) *Other non-tariff concessions*

See material at page 89 on concessions made on monopoly markups and minimum importation by monopolies, and material under Article IV regarding screen quota concessions made during the period 1947-1950. Concessions have also been made with respect to mixing requirements.<sup>41</sup> In recent years certain governments acceding to the GATT have included in their Schedules, in addition to tariff concessions, such non-tariff commitments as minimum import quotas<sup>42</sup>, or commitments for elimination of import permit requirements, import licensing schemes, or import prohibitions.<sup>43</sup>

The Review Working Party on "Other Barriers to Trade" which considered proposals for strengthening the provisions of the Agreement on subsidies and state trading, "also agreed that there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement".<sup>44</sup> In this context the 1989 Panel Report on "United States - Restrictions on Imports of Sugar" found that "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement, but not acts diminishing

<sup>35</sup>C/M/239, p. 5.

<sup>36</sup>L/3557, adopted on 6 October 1971, 18S/94, 95, para. 7.

<sup>37</sup>18S/10.

<sup>38</sup>L/3989 (notification of tariff by Romania); C/M/94. The working party did not make a report.

<sup>39</sup>L/6967, Decision of 4 December 1991, 38S/80.

<sup>40</sup>C/M/254 p. 5-6; see also L/6838 and Add.1, L/6981, SR.47/2 p. 15-16.

<sup>41</sup>Benelux Schedule II (1947), Items ex 68 and 75 (binding on mixing requirement for imported wheat and wheat flour).

<sup>42</sup>Schedule XXXII - Austria, Part III, non-tariff concessions (1979); Schedule XX - United States, note 2 to chapter 2, unit B.

<sup>43</sup>See Schedule LXXVII - Mexico (indication in Column 7 of items to be exempt from prior import permit requirement); Schedule LXXXVI - Venezuela (indication in Column 7 of items for which certain notes to Venezuelan tariff to cease to apply); Schedule LXXXVIII - Guatemala (indication in Column 7 of items to be exempt from prohibitions, licensing and restrictive permits, and other quantitative import restrictions); Schedule LXXXV - Costa Rica (indication in Column 7 of items to be exempt from licensing or quantitative restrictions or from duties and charges inconsistent with Articles III and VIII); Schedule LXXXVII - El Salvador (indication in Column 7 of items to be free from quantitative restrictions except to protect health or morals or national security, and free from charges and taxes inconsistent with Article III); Schedule LXXXIV - Bolivia (exemption from import licensing or quantitative restriction for items for which US has initial negotiating rights); Schedule LXXXIII - Tunisia (indication of exemption from import licensing or other quantitative restrictions for certain items).

<sup>44</sup>L/334, and Add., adopted on 3 March 1955, 3S/222, 225, para. 14.

obligations under that Agreement”<sup>45</sup> and that “Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement”.<sup>46</sup> See below at page 76.

Concerning negotiations on concessions other than on tariffs, see Article XXVIII *bis*.

**(4) *Withholding or withdrawal of concessions***

See below at page 115 and see the material under Article XXVII.

**2. Paragraphs 1(b) and (c)**

The 1988 Panel Report on “United States - Customs User Fee” notes generally with respect to paragraph 1(b): “... Paragraph 1(b) of Article II establishes a general ceiling on the charges that can be levied on a product whose tariff is bound; it requires that the product be exempt from all tariffs in excess of the bound rate, and from all other charges in excess of those (i) in force on the date of the tariff concession, or (ii) directly and mandatorily required by legislation in force on that date”.<sup>47</sup>

**(1) *“products of territories of other contracting parties”***

**(a) *Origin of goods for the purposes of most-favoured-nation treatment***

In discussions on the General Agreement at the Geneva session of the Preparatory Committee it was decided that it was unnecessary to add the words “originating in” to the phrase “products of territories of other contracting parties” (1(b) and (c)).<sup>48</sup> It was agreed that “it is within the province of each importing member country to determine, in accordance with the provisions of its law, for the purpose of applying the most-favoured-nation provisions whether goods do, in fact, originate in a particular country”.<sup>49</sup>

Concerning work done in the GATT on rules of origin and origin of imported goods generally, see Article VIII; concerning rules of origin applied in the context of regional trade agreements see Article XXIV.

**(b) *Direct consignment requirements***

The last sentence of paragraph 1(c) preserves the ability of a contracting party to maintain “its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty”. (See also the reference in Article V:6 to “requirements of direct consignment existing on the date of this Agreement” as a condition for eligibility for entry at preferential rates.) However, in discussions on the draft text of the General Agreement during the Geneva session of the Preparatory Committee it was agreed that “direct shipping requirements would not be permitted” as a condition of granting the most-favoured-nation rate of duty.<sup>50</sup>

**(2) *“subject to the terms, conditions or qualifications set forth in that schedule”***

The 1981 Panel Report on “European Economic Community - Imports of Beef from Canada” examined a 10,000-ton levy-free tariff quota for fresh, chilled or frozen high quality grain-fed beef included within a global tariff quota of 21,000 tons in the EEC schedule of concessions annexed to the Geneva (1979) Protocol. In a footnote to the concession it was provided that “Entry under this subheading is subject to conditions to be determined by the competent authorities”. The concession was implemented through Commission Regulations which provided for a certificate of authenticity; Annex II of one of these Regulations listed the issuing authorities

<sup>45</sup>L/6514, adopted on 22 June 1989, 36S/331, 342, para. 5.2.

<sup>46</sup>*Ibid.*, para. 5.3.

<sup>47</sup>L/6264, adopted on 2 February 1988, 35S/245, 273, para. 70.

<sup>48</sup>EPCT/TAC/PV/23, p. 23.

<sup>49</sup>EPCT/TAC/PV/23, p. 31-33.

<sup>50</sup>EPCT/TAC/PV/23 p. 31.

for such certificates; and the sole such agency listed for high-quality grain-fed beef was the US Department of Agriculture.

“The Panel found that the European Economic Community had, by virtue of the footnote in the Schedule reserved its right to set conditions for the entry under the levy-free tariff quota in question. The Panel further found that the right to set conditions was presupposed in Article II:1(b) of the General Agreement. The Panel found, however, that the words ‘terms, conditions or qualifications’ in paragraph 1(b) of Article II could not be interpreted to mean that countries could explicitly or by the manner in which a concession was administered actually limit a given concession to the products of a particular country. The Panel further found that the fact that in Annex II there was only one certifying agency for the meat in question and that this agency only certified meat of United States origin in effect prevented access of high quality meat ... from other countries.

“Consequently, the Panel concluded that the manner in which the EEC concession on high quality beef was implemented accorded less favourable treatment to Canada than that provided for in the relevant EEC Schedule, thus being inconsistent with the provisions of paragraph 1 of Article II of the General Agreement”.<sup>51</sup>

In the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, the Panel examined quantitative restrictions by the US on the importation of raw and refined sugar. The United States claimed that the proviso “subject to the terms, conditions or qualifications set forth in that Schedule” in Article II:1(b) permitted contracting parties to include qualifications relating to quantitative restrictions in their Schedule; in a headnote to the tariff concession on raw and refined sugar in Schedule XX the United States had reserved the right to impose quota limitations on imports of sugar under certain circumstances.

“The Panel first examined the issue in the light of the wording of Article II. It noted that ... the words ‘subject to the ... qualifications set forth in that Schedule’ are used in conjunction with the words ‘shall ... be exempt from ordinary customs duties in excess of those set forth in [the Schedule]’. This suggests that Article II:1(b) permits contracting parties to qualify the obligation to exempt products from customs duties in excess of the levels specified in the Schedule, not however to qualify their obligations under other Articles of the General Agreement. The Panel further noted that the title of Article II is ‘Schedules of Concessions’ and that the ordinary meaning of the word ‘to concede’ is ‘to grant or yield.’ This also suggests, in the view of the Panel, that Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement, but not acts diminishing obligations under that Agreement.

“The Panel then examined the issue in the light of the purpose of the General Agreement. It noted that one of the basic functions of the General Agreement is, according to its Preamble, to provide a legal framework enabling contracting parties to enter into ‘reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade.’ Where the General Agreement mentions specific types of negotiations, it refers to negotiations aimed at the reduction of barriers to trade (Articles IV(d), XVII:3 and XXVIII bis). This supports in the view of the Panel the assumption that Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.

“The Panel then proceeded to examine the issue in the context of the provisions of the General Agreement related to Article II. It noted that negotiations on obstacles to trade created by the operation of state-trading enterprises may be conducted under Article XVII:3 and that a note to that provision provides that such negotiations

---

<sup>51</sup>L/5099, adopted on 10 March 1981, 28S/92, 99, paras. 4.5-4.6.

‘may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of *any other mutually satisfactory arrangement consistent with the provisions of this Agreement* (see paragraph 4 of Article II and the note to that paragraph).’ (emphasis added).

“The negotiations foreseen in Article XVII:3 are thus not to result in arrangements inconsistent with the General Agreement, in particular not quantitative restrictions made effective through state-trading that are not justified by an exception to Article XI:1. The Panel saw no reason why a different principle should apply to quantitative restrictions made effective by other means.

“The Panel then examined the issue in the light of the practice of the CONTRACTING PARTIES. The Panel noted that the CONTRACTING PARTIES adopted in 1955 the Report of the Review Working Party on Other Barriers to Trade, which had concluded that:

‘there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters, such as subsidies, which might affect the practical effects of tariff concessions, and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement.*’ (emphasis added) (BISD 3S/225).

“Whether the proviso in this decision is regarded as a policy recommendation, as the United States argues, or as the confirmation of a legal requirement, as Australia claims, it does support, in the view of the Panel, the conclusion that the CONTRACTING PARTIES did not envisage that qualifications in Schedules established in accordance with Article II:1(b) could justify measures inconsistent with the other Articles of the General Agreement.

“The Panel finally examined the issue in the light of the drafting history. It noted that the reference to ‘terms and qualifications’ was included in a draft of the present Article II:1(b) during the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. The original draft had referred only to ‘conditions’. This amendment was proposed and adopted ‘in order to provide more generally for the sort of qualifications actually provided in the form of notes in the specimen Schedule. A number of these notes are, in effect, additional concessions rather than conditions governing the tariff bindings to which they relate’ (E/PC/T/153 and E/PC/T/W/295). Schedule provisions qualifying obligations under the General Agreement were not included in the specimen Schedule nor was the possibility of such Schedule provisions mentioned by the drafters. The Panel therefore found that the drafting history did not support the interpretation advanced by the United States.

“For the reasons stated in the preceding paragraphs, the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1.<sup>52</sup>

The 1990 Panel Report on “United States - Restrictions on the Importation of Sugar and Sugar Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions” examined the claim by the EEC that US import fees and import restrictions on sugar under Section 22 of the US Agricultural Adjustment Act were inconsistent with Articles II and XI interpreted in the light of the 1989 Panel Report on “United States - Restrictions on Imports of Sugar”, and were not justified by the waiver accorded to the United States in 1955 for actions taken under Section 22.

“... As to the fees on refined sugar, the Panel noted that the United States made its concession for sugars, and covering refined sugar, subject to the existence of Title II of the Sugar Act of 1948 or substantially equivalent legislation. The United States considers that, given the lapse of the Sugar Act and the absence of substantially equivalent legislation, its tariff rates for sugars are presently not bound. In the view of the United States, Article II:1(b), which allows contracting parties to make the tariff bindings in

---

<sup>52</sup>L/6514, adopted on 22 June 1989, 36S/331, 342-343, paras. 5.2-5.7.

their Schedule of Concessions ‘subject to ... terms, conditions or qualifications’, allows contracting parties to make tariff concessions subject to the existence of domestic legislation. The EEC considers this qualification of the tariff concession to be inconsistent with the General Agreement and consequently not a valid limit of the concession.

“The Panel examined the EEC’s claim in the light of Article II:1(b) and the above-mentioned report. The Panel noted that the report states that ‘Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to qualify their obligations under other articles of the General Agreement’ (L/6514, page 13). The Panel found that the United States assumed in its Schedule of Concessions a commitment additional to the commitments already contained in the General Agreement, namely the avoidance of import duties beyond specified levels, and qualified this additional commitment by making it dependent on the existence of certain domestic legislation. This qualification does not constitute a qualification of a commitment of the United States under provisions of the General Agreement other than Article II; it merely qualifies the commitment under Article II not to impose import duties in excess of the rates set forth in the Schedule. Although the granting of concessions conditional upon the discretion of the concession-granting government may not be meaningful because of the obvious legal uncertainty thereby created, the General Agreement does not oblige contracting parties to make concessions and specifically allows them in Article II:1(b) to subject to conditions the concessions they decide to make. The fact that the United States subjected the effectiveness of the tariff rates for sugars to the existence of domestic legislation is for these reasons not inconsistent with the General Agreement. The Panel recognized that a concession cannot validly be subjected to a qualification that is inconsistent with the General Agreement. Such a qualification would be contrary to the principle recognized by the contracting parties that the results of negotiations included in a Schedule of Concessions must be consistent with the General Agreement (BISD 3S/225). The Panel however found that the evidence submitted to it by the parties did not permit it to conclude that legislation equivalent to Title II of the Sugar Act of 1948 would necessarily be inconsistent with the General Agreement, in particular Article XI:2. The Panel therefore concluded that, while sugars are subject to tariff concessions in the United States’ Schedule of Concessions, the maximum rates for sugars set forth in that Schedule are, in the absence of legislation substantially equivalent to Title II of the expired Sugar Act of 1948, presently not effective. The imposition of the fees on refined sugar therefore does not entail the imposition of duties in excess of those set forth in the United States’ Schedule of Concessions”.<sup>53</sup>

### (3) “ordinary customs duties”

The word “ordinary” was used to distinguish between the rates on regular tariffs shown in the columns of the schedules (in French: “*droits de douane proprement dit*”) and the various supplementary duties and charges [imposed on imports] such as *primage* duty.<sup>54</sup>

### (4) “other duties or charges of any kind”

The Council Decision of 26 March 1980 on “Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions” states with regard to the term “other duties or charges” that “such ‘duties or charges’ are in principle only those that discriminate against imports”<sup>55</sup> – i.e., they do not include charges applied to imports and domestic goods alike. The Decision further states that “As can be seen from Article II:2 of the General Agreement, such ‘other duties or charges’ concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered”.<sup>56</sup>

In 1953, the United States brought a complaint that a French statistical tax of 0.4 per cent *ad valorem* of imports and exports was inconsistent with Article II:2(c) and thus with Article II:1(b). The French government

<sup>53</sup>L/6631, adopted on 7 November 1990, 37S/228, 255-256, paras. 5.7-5.8.

<sup>54</sup>EPCT/TAC/PV/23, p. 24-25.

<sup>55</sup>C/107/Rev. 1, adopted on 26 March 1980, 27S/22, 24, para. 9.

<sup>56</sup>*Ibid.*



“agreed that it did infringe the provisions of the General Agreement” and took steps to abolish the tax.<sup>57</sup> In 1955, the United States brought a complaint against the increase in the rate of stamp tax on customs duties in France, which was stated to be inconsistent with Article II and Article VIII as revised at the Review Session. “The CONTRACTING PARTIES took note of the undertaking of the French Government to cancel the measure ... which was inconsistent with the obligation of the French Government under the General Agreement”.<sup>58</sup>

(a) *Import surcharges*

In a Decision of 17 January 1955 on a “French Special Temporary Compensation Tax on Imports”, which had been stated by the French Government to be a temporary and transitional device designed to facilitate the removal of quantitative restrictions on imports from OEEC member countries, and an alternative to action under Article XII, the CONTRACTING PARTIES ruled that “whatever may have been the reasons which motivated the French Government’s decision ... the tax has increased the incidence of customs charges in excess of maximum rates bound under Article II ...”.<sup>59</sup> Similarly, in a Decision of 21 November 1958 on “Peruvian Import Charges”, the CONTRACTING PARTIES decided that Article XII could not be invoked to justify, as an alternative to the imposition of import restrictions, the imposition of surcharges on products described in schedules to the General Agreement.<sup>60</sup> The CONTRACTING PARTIES then granted a waiver to the Government of Peru covering the levying of such surcharges as an emergency measure designed to overcome a threat to Peru’s monetary reserves and to ensure the success of its programme of monetary stabilization. The Decision on “Canadian Import Surcharges” adopted by the CONTRACTING PARTIES on 15 November 1962 states that the import surcharges are “inconsistent with Article II of the General Agreement”.<sup>61</sup> The Report of the Working Party on the “United States Temporary Import Surcharge”,<sup>62</sup> and the Report of the Working Party on the Danish Temporary Import Surcharge,<sup>63</sup> each “noted that the surcharge, to the extent that it raised the incidence of customs charges beyond the maximum rates bound under Article II, was not compatible with the provisions of the General Agreement”.<sup>64</sup> The Declaration on “Trade Measures taken for Balance-of-Payments Purposes” adopted on 28 November 1979 provides in its paragraph 1 that “The procedures for examination stipulated in Articles XII and XVIII shall apply to all restrictive import measures taken for balance-of-payments purposes ...” but also provides that “The provisions of this paragraph are not intended to modify the substantive provisions of the General Agreement”.<sup>65</sup>

The Understanding on the Balance-of-Payments Provisions of GATT 1994, which is incorporated into GATT 1994, provides in paragraph 2 with respect to “price-based measures” (defined as including “import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods”) that

“... It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound duty clearly and separately under the notification procedures of this Understanding. ”

In each of the three 1989 Panel Reports on “Republic of Korea - Restrictions on Imports of Beef” - Complaints by Australia, New Zealand and the United States<sup>66</sup>, the Panel examined the “contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be

<sup>57</sup>SR.8/7, p. 10; G/46/Add.4; L/64; SR.9/28.

<sup>58</sup>SR.10/5 p. 52; see also L/410, SR.9/28 p. 4, L/1412.

<sup>59</sup>3S/27, Preamble para. 3.

<sup>60</sup>7S/37.

<sup>61</sup>11S/58.

<sup>62</sup>L/3573, adopted on 16 September 1971, 18S/212.

<sup>63</sup>L/3648, adopted on 12 January 1972, 19S/120, 129.

<sup>64</sup>18S/223, para. 41; 19S/129, para. 37.

<sup>65</sup>L/4904, adopted on 28 November 1979, 26S/205.

<sup>66</sup>L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

examined under Article II:4 since it was the more specific provision applicable to the restriction at issue ... It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).<sup>67</sup>

(b) *Deposit schemes*

See also the discussion of import deposit schemes under Article XII. See also the reference directly above to the Understanding on the Balance-of-Payments Provisions of GATT 1994.

In 1978, an import deposit scheme was examined by the Panel on “EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables”. The EC Commission Regulation in dispute provided that importation of certain products would be conditional on production of a certificate; the issue of the certificate would be conditional on the lodging of a security to guarantee that the imports in question would be made, and an additional security to guarantee that the imports would be made at a minimum price. The United States argued that the minimum import price system operated as a charge on imports, and that charges in excess of bound duties were levied through lost interest, debt servicing, and clerical and administrative costs associated with the provision of security deposits, and through the forfeiture of security deposits if the importation did not occur within the 75-day validity of the licence or if the minimum import price was not respected.<sup>68</sup> The Report of the Panel notes:

“The Panel ... examined the status of the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article II:1(b). The Panel noted the argument by the representative of the United States. ... The Panel further noted that the minimum import price and additional security system for tomato concentrates had not been found to be consistent with Article XI, nor had any justification been claimed by the Community under any other provision of the General Agreement. The Panel considered that these interest charges and costs were ‘other duties or charges of any kind imposed on or in connection with importation’ in excess of the bound rate within the meaning of Article II:1(b). Therefore, the Panel concluded that the interest charges and costs in connection with the lodging of the additional security associated with the minimum import price for tomato concentrates were inconsistent with the obligations of the Community under Article II:1(b).”<sup>69</sup>

With regard to the provision that all or part of the additional security associated with the minimum import price for tomato concentrates would be forfeited if the minimum import price were not respected, the Report notes that “The Panel considered that such a forfeiture should be considered as part of an enforcement mechanism and not as a charge ‘imposed on or in connection with importation’ within the purview of Article II:1(b) ...”.<sup>70</sup> With regard to the provision that the security associated with the import certificate would be forfeited if the goods covered by a certificate were not imported during the certificate’s period of validity, “The Panel considered that such a forfeiture could not logically be accepted as a charge ‘imposed on or in connection with importation’ within the meaning of Article II:1(b), since no importation had occurred, but only as a penalty to the importer for not fulfilling the obligations which he had undertaken when he applied for the certificate. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a charge imposed on or in connection with importation within the purview of Article II:1(b) ...”.<sup>71</sup>

The 1978 Panel Report on “EEC - Measures on Animal Feed Proteins” examined the complaint by the United States that an EEC regulation requiring domestic producers or importers of certain feed proteins to purchase and denature surplus skimmed milk powder from intervention stocks, and an associated certificate and security deposit requirement, constituted ‘charges of any kind’ in excess of the bound duty rates within the meaning of Article II:1(b). The Panel “concluded that the EEC measures should be examined as internal measures under Article III and not as border measures under Article II” in view of the Panel’s findings “that (a) the EEC measures applied to both imported and domestically-produced vegetable proteins (except in the case of

<sup>67</sup>*Ibid.* at 36S/230, para. 107; 36S/267, para. 123; 36S/305, para. 129.

<sup>68</sup>L/4687, adopted on 18 October 1978, 25S/68, 87-88, para. 3.56.

<sup>69</sup>*Ibid.*, 25S/103, para. 4.15.

<sup>70</sup>*Ibid.*, 25S/104, para. 4.16.

<sup>71</sup>*Ibid.*, 25S/98, para. 4.7.

corn gluten); (b) the EEC measures basically instituted an obligation to purchase a certain quantity of skimmed milk powder and, as an internal quantitative regulation fell under Article III:1; (c) the EEC security deposit and protein certificate were enforcement mechanisms for the purchase obligation”.<sup>72</sup>

(c) *Revenue duties and import taxes*

The Report of the Working Party on the “Accession of the Democratic Republic of the Congo” discusses Zaire’s “Tariff of Import Duties” which was composed of two elements: the customs duty, and the revenue duty. It was pointed out that the rates bound in the schedule as proposed by the Congo would relate to the customs duty only, which would be bound at a higher level than the current applied rate. “After discussion of the nature and effect of the revenue duties, the Working Party considered that the revenue duties in the tariff of the Congo were not internal charges in the sense of Article III but should be considered as other duties or charges, in the sense of Article II:1(b). Following the discussion that ensued on the subject of the potential effect of shifts in the rates of revenue duties on the value of the bound customs duties, and taking into account the particular structure of the customs tariff, the representative of the Democratic Republic of the Congo agreed to make a Declaration of Intent ... concerning the level of the aggregate import duties ... [which] would be referred to by a Note in the Schedule”.<sup>73</sup>

The Report of the Working Party on “Accession of Morocco” notes the existence of a special import tax, and notes the undertaking of Morocco that “Morocco will apply the special import tax system in full accordance with the relevant GATT provisions”.<sup>74</sup> In February 1987 the Council agreed that the CONTRACTING PARTIES would carry out a review of this commitment in 1990. In November 1990 Morocco brought to the attention of the Council that this import tax, as well as the stamp tax, had been replaced by a single ad valorem levy on imports as part of a fiscal reform; Morocco had requested authorization under Article XXVIII:4 to renegotiate the four bound tariff headings affected by this levy.<sup>75</sup>

See also the reference to the accession of the United Arab Republic at page 101 below.

See also references to revenue duties in Working Party Reports on regional trade agreements, listed under Article XXIV:8.

(d) *Charges on transfer of payments*

The Report of the Review Session Working Party on “Schedules and Customs Administration” notes that:

“The wording of sub-paragraphs 1(b) and (c) of the existing text is the same as that used in the most-favoured-nation clause in Article I, but it does not go on to include, as does Article I, ‘charges ... imposed on the international transfer of payments for imports.’ Thus sub-paragraphs (b) and (c) could be construed as meaning that the provision does not apply to charges on transfers. But clearly the value of tariff concessions would be impaired if contracting parties were free to introduce additional levies on imports in the form of transfer charges. It is considered that the language of this sentence is all-inclusive for it speaks of ‘... all other duties or charges of any kind imposed on or in connection with importation’ and paragraph 2, which sets out the special charges which do not fall under paragraph 1, does not refer to charges on transfers. The insertion of the words ‘including charges of any kind imposed on the international transfer of payments for imports’ will remove any possibility of misunderstanding. It is the understanding of the Working Party that ‘charges of any kind’ do not include ordinary commercial charges for effecting the international transfer of payments for imports”.<sup>76</sup>

---

<sup>72</sup>L/4599, adopted on 14 March 1978, 25S/49, para. 4.17.

<sup>73</sup>L/3541, adopted on 29 June 1971, 18S/89, discussion at 18S/90-92 paras. 8-10; passages cited at 18S/92-93 paras. 11-12; Declaration of Intent appears at 18S/93-94.

<sup>74</sup>L/5967, adopted on 22 May 1986, 33S/87, 91, para. 13.

<sup>75</sup>C/M/246, p. 26-27; L/6326.

<sup>76</sup>L/329, adopted on 26 February 1955, 3S/205, 209, para. 7.

An amendment to this effect was provided for in the Protocol Amending Part I and Articles XXIX and XXX which did not gain the requisite unanimous approval and was abandoned on 31 December 1967.

See the discussion of the difference between trade and exchange measures under Article XV.

(c) *Charges imposed by import monopolies*

The three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”<sup>77</sup> each dealt with a claim regarding alleged import charges by the Livestock Products Marketing Organization, an import monopoly in Korea:

“The Panel ... examined [Australia’s/New Zealand’s/the United States’] contention that Korea imposed surcharges on imported beef in violation of the provisions of paragraph 1(b) of Article II and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings [see these findings below at page 90] ... It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).”<sup>78</sup>

(5) *“imposed on or in connection with importation”*

The 1990 Panel Report on “European Economic Community - Regulation on Imports of Parts and Components” examined the legal nature in relation to the GATT of Article 13:10 of the EEC anti-dumping regulations, which provided for levying of anti-dumping duties on products “introduced into the commerce of the Community after having been assembled or produced in the Community” under certain circumstances; the Panel referred to such duties as “anti-circumvention duties”.

“... The Panel noted that Japan argued that the anti-circumvention duties could be considered to be *either* duties imposed on or in connection with importation within the meaning of Article II:1(b) *or* internal taxes within the meaning of Article III:2. The EEC considered that the duties do not fall under Article III:2. The Panel recalled that the distinction between import duties and internal charges is of fundamental importance because the General Agreement regulates ordinary customs duties, other import charges and internal taxes differently: the imposition of ‘ordinary customs duties’ for the purpose of protection is allowed unless they exceed tariff bindings; all other duties or charges of any kind imposed on or in connection with importation are in principle prohibited in respect of bound items (Article II:1(b)). By contrast, internal taxes that discriminate against imported products are prohibited, whether or not the items concerned are bound (Article III:2). The Panel therefore first examined whether the duties constitute customs or other duties imposed on or in connection with importation falling under Article II:1(b) or internal taxes falling under Article III:2.

“The Panel noted that the anti-circumvention duties are levied ... ‘on products that are introduced into the commerce of the Community after having been assembled or produced in the Community’. The duties are thus imposed, as the EEC explained before the Panel, not on imported parts or materials but on the finished products assembled or produced in the EEC. They are not imposed conditional upon the importation of a product or at the time or point of importation. The EEC considers that the anti-circumvention duties should, nevertheless, be regarded as customs duties imposed ‘in connection with importation’ within the meaning of Article II:1(b). The main arguments the EEC advanced in support of this view were: firstly, that the purpose of these duties was to eliminate circumvention of anti-dumping duties on finished products and that their nature was identical to the nature of the anti-dumping duties they were intended to enforce; and secondly, that the duties were collected by the customs authorities under procedures identical to those applied for the collection of customs duties, formed part of the resources of the EEC in the same way as customs duties and related to parts and materials which were not considered to be ‘in free circulation, within the EEC.

<sup>77</sup>L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

<sup>78</sup>*Ibid.*, 36S/230, para. 107, 36S/267, para. 123, 36S/305, para. 129.

“In the light of the above facts and arguments, the Panel first examined whether the *policy purpose of a charge* is relevant to determining the issue of whether the charge is imposed in ‘connection with importation’ within the meaning of Article II:1(b). The text of Articles I, II, III and the Note to Article III refers to charges ‘imposed on importation’, ‘collected ... at the time or point of importation’ and applied to an imported product and to the like domestic product’. The relevant fact, according to the text of these provisions, is not the policy purpose attributed to the charge but rather whether the charge is due on importation or at the time or point of importation or whether it is collected internally. This reading of Articles II and III is supported by their drafting history and by previous panel reports (e.g. BISD 1S/60; 25S/49, 67). A recent panel report which has examined the provisions of the General Agreement governing tax adjustments applied to goods entering into international trade (among them Articles II and III) stated that

*‘the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products; they do not distinguish between taxes with different policy purposes’.* (BISD 34S/161, emphasis added).

The Panel further noted that the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2. The Panel therefore concluded that the policy purpose of the charge is not relevant to determining the issue of whether the charge is imposed in ‘connection with importation’ within the meaning of Article II:1(b).

“The Panel proceeded to examine whether the mere *description or categorization of a charge under the domestic law* of a contracting party is relevant to determining the issue of whether it is subject to requirements of Article II or those of Article III:2. The Panel noted that if the description or categorization of a charge under the domestic law of a contracting party were to provide the required ‘connection with importation’, contracting parties could determine themselves which of these provisions would apply to their charges. They could in particular impose charges on products after their importation simply by assigning the collection of these charges to their customs administration and allocating the revenue generated to their customs revenue. With such an interpretation the basic objective underlying Articles II and III, namely that discrimination against products from other contracting parties should only take the form of ordinary customs duties imposed on or in connection with importation and not the form of internal taxes, could not be achieved. The same reasoning applies to the *description or categorization of the product subject to a charge*. The fact that the EEC treats imported parts and materials subject to anti-circumvention duties as not being ‘in free circulation’ therefore cannot, in the view of the Panel, support the conclusion that the anti-circumvention duties are being levied ‘in connection with importation’ within the meaning of Article II:1(b).

“In the light of the above, the Panel found that the anti-circumvention duties are not levied ‘on or in connection with importation’ within the meaning of Article II:1(b), and consequently do not constitute customs duties within the meaning of that provision”.<sup>79</sup>

**(6) “date of this Agreement” (paragraphs 1(b), 1(c) and 6(a))**

Article XXVI:1 provides that the “date of this Agreement” shall be 30 October 1947. For the purposes of Article II, the date of 30 October 1947 is still the applicable date for those concessions made in the round of tariff negotiations held in 1947.

When the modalities of accession to the General Agreement were considered for the first time at the Third Session in Annecy in 1949, the Working Party on this subject decided that in the Annecy Protocol of Terms of Accession, the “date of this Agreement” for the purposes of Article II would be changed “with the object of placing acceding governments in a comparable position to that in which the present contracting parties were at

<sup>79</sup>L/6657, adopted on 16 May 1990, 37S/132, 37S/191-3, paras. 5.4-5.8.

Geneva”<sup>80</sup>. The Annecy Protocol of Terms of Accession in October 1949 therefore provided that “In each case in which Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of the Schedules annexed to this Protocol shall be the date of this Protocol”.<sup>81</sup> This approach has guided subsequent protocols of accession and tariff protocols. Provisions on Schedules in Protocols of Accession contain the following standard formula:

“(a) In each case in which paragraph 1 of Article II of the Agreement refers to the date of the Agreement, the application date in respect of each product which is the subject of a concession provided for in the Schedule annexed to this Protocol shall be the date of this Protocol.

“(b) For the purpose of the reference in paragraph 6(a) of Article II of the General Agreement to the date of that Agreement, the applicable date in respect of the Schedule annexed to this Protocol shall be the date of this Protocol”.<sup>82</sup>

The 1958 Report of the Working Party on “Rectification and Modification of Schedules and Consolidation of Schedules” discussed the preparation of consolidated Schedules, and noted in this connection:

“A problem arises with respect to the date applicable to each concession for the purposes of Article II:1(b) of the Agreement: the most important purpose being the date as of which ‘other duties and charges’ are bound. Article II:1(b) specifies that this date shall be the date of the Agreement, and protocols of accession and of supplementary concessions have in each case specified that for the schedules annexed to each protocol, the date should be the date of that protocol. The Working Party *recommends* that the date applicable to any concession in a consolidated schedule should be, for the purposes of Article II, the date of the instrument by which the concession was first incorporated into the General Agreement”.<sup>83</sup>

The Council Decision of 26 March 1980 on the introduction of a loose-leaf system for the schedules of tariff concessions provides that the instrument by which the concession was first incorporated into a GATT schedule (and thus its date) will be indicated in a special column of the loose-leaf schedules.<sup>84</sup>

The various tariff protocols to the General Agreement have provided that “In each case in which paragraph 1(b) and (c) of Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of each product which is the subject of a concession provided for in a schedule of tariff concessions annexed to this Protocol shall be the date of this Protocol, but without prejudice to any obligations in effect on that date”.<sup>85</sup> The Geneva Protocols of 1990 and 1992 in connection with the introduction of the Harmonized System provide that the “date of this agreement” in respect of each product that is the subject of a concession “shall be the date of acceptance of that Protocol by the contracting parties concerned, but without prejudice to any obligations in effect on that date”. These Protocols also provide that the applicable date for the purpose of the reference in paragraph 6(a) “shall be the date of acceptance of the Protocol by the contracting parties concerned”.<sup>86</sup> A Secretariat Note of 1987 on “Harmonized System Negotiations Under Article XXVIII” notes that “The words ... ‘but without prejudice to any obligations in effect on that date’ make it clear that the relevant cut-off date beyond which additional duties or charges may not be imposed remains the date at which the concession was initially granted ... for specific duties

<sup>80</sup>Report of the Working Party on “Accession at Annecy”, GATT/CP.3/37, adopted 9 June 1949, II/148, 153-154, para. 26.

<sup>81</sup>Annecy Protocol, dated 10 October 1949, I/79, 81, para. 5(a).

<sup>82</sup>See, e.g., the Protocols for the Accession of Mexico (L/6036, 33S/3, para. 7(a) and 7(b)), Bolivia (L/6562, 37S/5, 6, para. 4(a) and 4(b)), Costa Rica (L/6626, 37S/7,8, para. 6(a) and 6(b)), El Salvador (L/6795, 37S/27, 28, para. 4(a) and 4(b)), Tunisia (L/6656, 37S/41, 42, para. 4(a) and 4(b)) and Venezuela (L/6717, 37S/72, 73, para. 4(a) and 4(b)).

<sup>83</sup>L/934, adopted on 22 November 1958, 7S/113, 116, para. 9.

<sup>84</sup>27S/22.

<sup>85</sup>See, e.g., Geneva (1967) Protocol to the General Agreement on Tariffs and Trade, 15S/5, 6, para. 4; Geneva (1979) Protocol to the General Agreement on Tariffs and Trade, L/4812, 26S/3, 4, para. 4; Para. 2 in each of the Geneva (1987), Geneva (1988), and Geneva (1989) Protocols to the General Agreement on Tariffs and Trade in connection with the Harmonized System introduction, L/6112, L/6222 and L/6292), 34S/5; L/6363, 35S/3; L/6466, 36S/3.

<sup>86</sup>L/6728, BISD 37S/3; L/6987.

paragraph 2(b) of the draft Protocol contains the same idea relating to the depreciation of the currency in which the concession is expressed”.<sup>87</sup>

Thus, in the GATT 1947, each concession would have its own “date of this Agreement” for the purpose of the binding on “other duties and charges” under Article II:1(b) or the adjustment of specific duties under Article II:6, and in a Schedule with a number of concessions there could be a number of different and coexisting such “dates of this Agreement”.

The Understanding on the Interpretation of Article II:1(b) of the GATT 1994, which is incorporated into the GATT 1994, provides that each

“ ... the nature and level of any ‘other duties or charges’ levied on bound tariff items shall be recorded in the Schedules of concessions annexed to GATT 1994 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’.

“The date as of which ‘other duties or charges’ are bound, for the purposes of Article II, shall be 15 April 1994. ‘Other duties or charges’ shall therefore be recorded in the Schedules 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 appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.

...

“The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).”<sup>88</sup>

**(7) “directly and mandatorily required to be imposed ... by legislation”**

The words “directly and mandatorily” were inserted during the negotiation of the General Agreement in 1947 “to eliminate the case where the rate may be varied by some kind of administrative order under a law in force and to make it necessary that it shall be a direct requirement of the law that that change shall be made”. However, the addition of the words “at specified fixed rates” after “imposed thereafter” was not accepted. The main argument against this addition was that this sentence “was designed to deal with measures such as anti-dumping duties and countervailing duties and, for example, marking duties or penalty duties with the effect that it would simply require the administration to impose a penalty which may vary ... if certain violations take place”.<sup>89</sup>

The Report of the Sub-Committee on Schedules of the Tariff Agreement Committee during the Geneva session of the Preparatory Committee in 1947, which recommended the inclusion of paragraphs 1(b) and (c) in the text of Article II, noted that this inclusion “would not affect the right of any Delegation to require any other Delegation with which it has entered into negotiations to provide lists or details of legislation referred to in ... each of these paragraphs”.<sup>90</sup>

**(8) Paragraph 1(c): “preferential treatment”**

Under paragraph 1(c) the preferential commitments in Part II of a Schedule may only relate to products “entitled under Article I to receive preferential treatment”: i.e. products of those territories listed in Annexes A through F, or of territories benefitting from preferences under Article I:3. The historical preference provisions of

<sup>87</sup>TAR/W/65/Rev.1, dated 14 January 1987, para. 4.

<sup>88</sup>Understanding on the Interpretation of Article II:1(b) of the GATT 1994, paras. 1, 2, 8.

<sup>89</sup>EPCT/TAC/PV/23, p. 28.

<sup>90</sup>EPCT/201, p. 2.

paragraphs 2 through 4 of Article I permit certain contracting parties to accord tariff preferences to the products of certain other territories even on unbound items, and set a ceiling on the margin of preference that may be accorded, but do not specify any particular preferential duty rate and do not require that such preferences be accorded. On the other hand, the preferential schedules under Article II:1(c) provide a means for the participants in those historical preference schemes to bargain for commitments enforceable under GATT on the level of the preferential tariff for particular products.

A number of the Schedules negotiated at Geneva in 1947 included a Part II: Australia, Canada, Cuba, India, New Zealand, Pakistan, South Africa, Sri Lanka, the United Kingdom, the United Kingdom for Newfoundland, and the United States. However, none of the contracting parties listed in Annexes B, C, E or F of the General Agreement included a Part II in its Schedule. The United Kingdom Schedule, including its Part II, was withdrawn upon UK accession to the EEC.

See also the discussion under Article I of historical preferences and the effect of m.f.n. duty reductions on the permissible margin of preference; see also under Article XXIV:9. See also the discussion above at page 75 of direct consignment requirements.

### 3. Paragraph 2

**(1) Paragraph 2(a): “a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III”**

See Interpretative Note ad Article II, paragraph 2(a).

During the Geneva session of the Preparatory Committee the Legal Drafting Committee agreed that the word “equivalent” means that “for example, if a [charge] is imposed on perfume because it contains alcohol, the [charge] to be imposed must take into consideration the value of the alcohol and not the value of the perfume, that is to say the value of the content and not the value of the whole”.<sup>91</sup>

See also the discussion of border tax adjustments under Article III:2.

**(2) Paragraph 2(b): “any anti-dumping or countervailing duty applied consistently with the provisions of Article VI”**

In the 1962 Panel Report on “Exports of Potatoes to Canada”, the Panel examined the complaint of the United States concerning the imposition by Canada of a charge in addition to the specific duty on potatoes bound in 1957, as a result of the application under the Canadian Customs Act (as revised in 1958) of “values for duty” on potatoes imported below a certain price.

“The Panel ... did not consider that the provisions of Article VII were relevant in the context of its examination.

“... The Panel concluded that the imposition of an additional charge could not be justified by Article VI of the General Agreement, since the main requirement laid down in paragraph 1(a) of the Article was not satisfied, namely that the price of the product exported from one country to another was less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

“The Panel came to the conclusion that the measure introduced by the Canadian Government amounted to the imposition of an additional charge on potatoes which were imported at a price lower than Can.\$2.67 per 100 lbs. The Panel considered that this charge was in addition to the specific import duty which had been bound at a rate of Can.\$0.375 per 100 lbs. Since no provisions of the General Agreement had been brought forward for the justification of the imposition of an additional charge above the bound

---

<sup>91</sup>EPCT/TAC/PV/26, p. 21; see also reference to this passage in the Panel Report on “United States - Taxes on Petroleum and Certain Imported Substances”, adopted on 17 January 1987, 34S/136, 162, para. 5.2.7.



import duty, the Panel considered that the Canadian Government had failed to carry out its obligations under paragraph 1(a) of Article II”.<sup>92</sup>

**(3) Paragraph 2(c): “fees or other charges commensurate with the cost of services rendered”**

The 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licences and Security Deposits for Certain Processed Fruits and Vegetables” (referred to above at page 80) found that the interest charges and costs connected with the security deposit associated with the import certificate were limited in amount to the approximate costs of administration in accordance with the provisions of Article VIII:1(a). “The Panel considered that the term ‘fees or other charges commensurate with the cost of services rendered’ in Article II:2(c) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs in connection with the lodging of the security associated with the import certificate were not inconsistent with the obligations of the Community under Article II”.<sup>93</sup>

The 1988 Panel Report on “United States - Customs User Fee” examined a fee charged for processing of commercial cargo by the U.S. Customs Service, in relation to Articles II:2(c) and VIII:1(a). The Panel noted that:

“Article II:2(c) is a rather extraordinary exception. It authorizes governments to impose new charges on imports in excess of the ceiling established by a tariff binding. Given the central importance assigned by the General Agreement to protecting the commercial value of tariff bindings, any such exceptions would require strict interpretation. The exception stated in Article II:2(c) requires particularly strict interpretation, however, because it does not conform to the policy justification normally given for such exceptions. In the words of an explanation of Article II:2 contained in a 1980 proposal by the Director-General (27S/24), the policy justification for the three types of border charges permitted by Article II:2 was that they did not “discriminate against imports”. If the import fees authorized by Article II:2(c) were in fact fees for beneficial services, this justification would be valid. But given the reality that most such fees are simply an ordinary tax on imports, it cannot be said that such fees do not disadvantage imports vis-a-vis domestic products. In simple terms, Article II:2(c) authorizes governments to impose new protective charges in addition to the bound tariff rate. As such, it is an exception which should be doubly guarded against enlargement by interpretation”.<sup>94</sup>

See also below at page 99 regarding the relationship between Article II:2(c) and Article VIII:1, and see further under Article VIII concerning fees for services.

**4. Paragraph 3: impairment of concessions by alteration in valuation or currency conversion**

In June 1953, Czechoslovakia gave notice that in conjunction with its May 1953 revaluation of the Czechoslovak crown, the Government of Czechoslovakia had decided to reduce its bound specific duties by an amount equivalent to the revaluation, in order “not [to] impair the value of any of the concessions provided for in the Schedule and thus afford protection in excess of the amount of protection provided for in the Schedule”. The Working Party which examined the case reported that it had “considered the question of the adjustments of the Czechoslovak specific duties from the angle of the provisions of paragraph 3 of Article II” and that it had “noted that no contracting party offered any objection on the basis of those provisions to the alterations made by the Czechoslovak Government. In view of the fact that these changes do not modify the legal position which is defined in the first sentence of Article II:6(a) ... the Working Party felt that it would be sufficient for the CONTRACTING PARTIES to take note of the adjustments made ...”.<sup>95</sup>

<sup>92</sup>L/1927, adopted on 16 November 1962, 11S/88, 93, paras. 16-18.

<sup>93</sup>L/4687, adopted on 18 October 1978, 25S/68, 97-98, para. 4.6.

<sup>94</sup>L/6264, adopted on 2 February 1988, 35S/245, 278, para. 84.

<sup>95</sup>G/62, 2S/64, 66, discussed at SR.8/20 p. 4-5; see also request of Czechoslovakia and Secretariat note, L/100, L/136, and Sec/53/126 and Rev.1-2. In the case in question the revaluation had not been approved by the International Monetary Fund.

See also the material under Article XXIV:8(a)(ii) concerning the 1978 EEC change in the unit of account for specific duties in its common customs tariff, which was stated to be consistent with Article II:3.

See also the material from the 1962 Panel Report on “Exports of Potatoes to Canada” on application of a “value for duty” statute, at page 86.

The 1980 Report of the Working Party on “Specific Duties” notes that

“The Working Party examined the question of whether the application of Article II:6(a) should in the present monetary situation be symmetrical, that is whether contracting parties whose currency appreciated should be required to reduce their specific duties. ... The Working Party decided not to pursue this matter noting that ... contracting parties could resort to Article XXII and XXIII of the General Agreement if they considered that an appreciation impaired in a particular case the value of specific duty concessions”.<sup>96</sup>

## 5. Paragraph 4

The text of this paragraph was drafted by a Sub-Committee of the Tariff Agreement Committee during the Geneva session of the Preparatory Committee. In introducing the text, the chairman of the Sub-Committee stated:

“... the Sub-Committee primarily aimed at covering three points. First ... where there had been tariff negotiations between the two parties and where one of the two parties had an import monopoly and where the parties agreed to a very definite and exact agreement as to any price margin, whether in percentages or in amounts ... That was case number 1. This is provided for in the text ... where it says ‘except as provided in the Schedule or as otherwise agreed between the parties [which initially negotiated] the concession’.

“The second case we had in mind was the one where there is an import monopoly, but where the negotiations for tariff binding or reduction had only resulted in the binding of the tariff but not in any concrete arrangement regarding the margin for the sale of the goods in question in domestic markets. In that case, the Committee considered that the principles of the Charter would apply, especially the rules laid down in Article 31 of the Charter.

“Thirdly, we had in mind the case where an import duty has been fixed in a case where, at present, there is no import monopoly, but where ... an import monopoly might be established in the future. There the Sub-Committee considered that the tariff duty already fixed should ... stand, and that all sales in the domestic markets of products covered by that tariff item should be covered by the principles of the Charter especially, of course, Article 31.

“... in the last sentence ... by the reference to ‘this Agreement’ we had in mind the General Agreement, and also the Protocol, and especially ... we had in mind Article 31 of the Charter”.<sup>97</sup>

### ***(1) “a monopoly of the importation of any product described in the appropriate Schedule”***

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined the practices of provincial liquor boards with respect to alcoholic beverages. Noting that “Canada’s Schedule of Concessions includes tariff bindings on all imported alcoholic beverages”, the Panel “recalled that Canada and the European Communities agreed on the fact that Canada had, through the Importation of Intoxicating Liquors Act, authorized a monopoly of the importation of alcoholic beverages. The Panel noted therefore that the amount of protection admissible under Article II:4 was thus either the amount provided for in the Canadian Schedule or ‘as otherwise agreed between the parties which had initially negotiated the concession’”.<sup>98</sup>

<sup>96</sup>L/4858, adopted 29 January 1980, 27S/149, 154, para. 14.

<sup>97</sup>EPCT/TAC/PV/16 p. 35-37, discussing Sub-Committee report at EPCT/191; see further discussion at EPCT/TAC/PV/16 p. 37-49..

<sup>98</sup>L/6304, adopted on 22 March 1988, 35S/37, 85, paras. 4.3-4.4.

Three Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”<sup>99</sup> examined challenges by Australia, New Zealand and the United States of Korean beef import restrictions on the ground, *inter alia*, that these contravened Article II:4. All three applicant contracting parties argued that the application of the price mark-up on imports by the Korean Livestock Products Marketing Organization (LPMO) was in contravention of Article II:4 and in excess of the amount of protection provided for in Korea’s schedule under which a protective import tariff on beef was bound at 20 per cent ad valorem; in Korea’s view, the operation of the LPMO was consistent with the provisions of Article II:4. Each Report provides that “The Panel noted that the LPMO was a beef import monopoly ... with exclusive privileges for the administration of both the beef import quota set by the Korean Government and the resale of the imported beef to wholesalers or in certain cases directly to end users such as hotels”.<sup>100</sup>

**(2) “except as provided for in that Schedule or as otherwise agreed”: concessions on the operations of import monopolies**

The Schedules of Benelux and France negotiated at Geneva in 1947 and at Torquay in 1950 contained certain concessions on monopoly duties, minimum imports by an import monopoly, or domestic selling prices of products subject to a monopoly.<sup>101</sup>

The 1988 Panel Report on “Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies” examined the application of Article II:4 in relation to a “Provincial Statement of Intentions with Respect to Sales of Alcoholic Beverages by Provincial Marketing Agencies in Canada” (which was negotiated by Canada on behalf of its provinces in the Tokyo Round and set out specific undertakings with respect to mark-ups, listing and distribution practices) and related letters exchanged between Canada and the EC.

“... The Panel examined ... whether the parties had, by a Provincial Statement of Intentions and the related exchange of letters, ‘otherwise agreed’ in the sense of Article II:4, as claimed by Canada, on an amount of protection different from that provided for in the Canadian Schedule.

“The Canadian Government’s letter of 5 April 1979 made it clear that the Provincial Statement of Intentions was put forward on behalf of the provincial authorities. The title and wording of the Provincial Statement of Intentions indicated that it expressed ‘intentions’ and was, as confirmed in the letter, ‘necessarily non-contractual in nature’. The only undertaking expressed by the Government of Canada in the letter of 5 April 1979 was that it ‘will be prepared to use its good offices with the provincial authorities concerned regarding any problem which may arise with respect to the application of provincial policies and practices set forth in the statement’. Canada’s emphasis on the non-binding nature of the undertaking seemed to indicate that it was not meant to affect Canada’s rights and obligations under Article II:4. Nor did the letters of the EC Commission, dated 5 April and 29 June 1979, express an acceptance of an agreement concerning its rights and obligations under Article II:4. The first of these letters restricted itself to acknowledging the receipt of the Canadian letter and the second only expressed ‘some disquiet’ concerning the terms ‘normal commercial considerations’ in the Provincial Statement of Intentions.

“The Panel noted that the Provincial Statement of Intentions and related letters had not been included among the texts listed in the Procès-Verbal embodying the results of the Tokyo Round, that the letters were classified as confidential and had not been notified to the CONTRACTING PARTIES. While the Council has stated in the terms of reference of the Panel that the Provincial Statement had been ‘concluded in the context of the Tokyo Round of Multilateral Trade Negotiations’ it appeared to the Panel that for the Statement to satisfy the conditions of Article II:4, it would have had to be binding to the same extent as the concession in the Schedule which it was intended to supersede.

<sup>99</sup>L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

<sup>100</sup>*Ibid.*, at 36S/228-229, para. 102; 36S/266, para. 118; 36S/304, para. 124.

<sup>101</sup>Benelux: binding of monopoly duties for various food-related items (59, 70, 75, 84, ex 100, etc.); France: Note Ad item 235A (minimum imports of leaf tobacco and cigarettes by SEITA; selling price of foreign cigarettes).

“The Panel therefore *concluded* that the Provincial Statement of Intentions and the related exchange of letters could not be held to constitute an agreement in terms of Article II:4 and did not, therefore, modify Canada’s obligations arising from the inclusion of alcoholic beverages in its GATT Schedule”.<sup>102</sup>

**(3) “in the light of the provisions of Article 31 of the Havana Charter”**

**(a) Application of the Interpretative Note**

The Panel Report on “Japan - Restrictions on Imports of Certain Agricultural Products” examined, *inter alia*, the import quota maintained by Japan on prepared beef products and administered by the Livestock Industry Promotion Corporation (LIPC), a state corporation holding an import monopoly.

“The Panel noted the view of Japan that Article XI:1 did not apply to import restrictions made effective through an import monopoly. According to Japan, the drafters of the Havana Charter for an International Trade Organization intended to deal with the problem of quantitative trade limitations applied by import monopolies through a provision under which a monopoly of the importation of any product for which a concession had been negotiated would have “to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product” (Article 31:5 of the Havana Charter). Japan contended that that provision had not been inserted into the General Agreement and that quantitative restrictions made effective through import monopolies could therefore not be considered to be covered by Article XI:1 of the General Agreement ...

“The Panel examined this contention and noted the following: Article XI:1 covers restrictions on the importation of any product, ‘whether made effective through quotas, import ... licences or other *measures*’ (emphasis added). The wording of this provision is comprehensive, thus comprising restrictions made effective through an import monopoly. This is confirmed by the note to Articles XI, XII, XIII, XIV and XVIII, according to which the term ‘import restrictions’ throughout these Articles covers restrictions made effective through state-trading operations. The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading operations. This purpose would be frustrated if import restrictions were considered to be consistent with Article XI:1 only because they were made effective through import monopolies. The note to Article II:4 of the General Agreement specifies that that provision ‘will be applied in the light of the provisions of Article 31 of the Havana Charter.’ The obligation of a monopoly importing a product for which a concession had been granted ‘to import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product’ is thus part of the General Agreement. The Panel could therefore not follow the arguments of Japan based on the assumption that Article 31:5 of the Havana Charter was *not* included in the General Agreement. The Panel found for these reasons that the import restrictions applied by Japan fell under Article XI independent of whether they were made effective through quotas or through import monopoly operations.”<sup>103</sup>

In the three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”:<sup>104</sup>

“In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the paragraph was to be applied ‘in the light of the provisions of Article 31 of the Havana Charter’. Two provisions of the Havana Charter, Article 31:4 and 31:5, were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would ‘import and offer for sale such quantities of the product as will be *sufficient to satisfy the full domestic demand* for the imported product...’ (emphasis added). In the view of the panel, Article 31:5 clearly implied that Article 31:4 of the Havana Charter and by implication Article II:4 of the General

<sup>102</sup>L/6304, adopted on 22 March 1988, 35S/37, 85-86, paras. 4.5-4.8.

<sup>103</sup>L/6253, adopted on 2 February 1988, 35S/163, 229, paras. 5.2.2.1-5.2.2.2.

<sup>104</sup>L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

“Bearing in mind Article 31:5 of the Havana Charter, the Panel considered that in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO’s mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel ... this price premium would disappear.

“The Panel stressed, however, that in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4 of the General Agreement. Furthermore, in the absence of quantitative restrictions, an import monopoly was not to charge on the average a profit margin which was higher than that ‘which would be obtained under normal conditions of competition (in the absence of the monopoly)’.... The Panel therefore expected that once Korea’s quantitative restrictions on beef were removed, the operation of the LPMO would conform to these requirements”.<sup>105</sup>

(b) *Article 31*

The Interpretative Note *ad* Paragraph 4 refers to Article 31 of the Havana Charter, which provides as follows:

“*Article 31*

*Expansion of Trade*

“1. If a Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation or exportation of any product, the Member shall, upon the request of any other Member or Members having a substantial interest in trade with it in the product concerned, negotiate with such other Member or Members in the manner provided for under Article 17 in respect of tariffs, and subject to all the provisions of this Charter with respect to such tariff negotiations, with the object of achieving:

- “(a) in the case of an export monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic users of the monopolized product, or designed to assure exports of the monopolized product in adequate quantities at reasonable prices;
- “(b) in the case of an import monopoly, arrangements designed to limit or reduce any protection that might be afforded through the operation of the monopoly to domestic producers of the monopolized product, or designed to relax any limitation on imports which is comparable with a limitation made subject to negotiation under other provisions of this Chapter.

“2. In order to satisfy the requirements of paragraph 1(b), the Member establishing, maintaining or authorizing a monopoly shall negotiate:

- “(a) for the establishment of the maximum import duty that may be applied in respect of the product concerned; or

---

<sup>105</sup>L/6504, 36S/229, paras. 104, 105, 106; L/6505, 36S/266, 267, paras. 120, 121, 122; L/6503, 36S/305, paras. 126, 127, 128.

“(b) for any other mutually satisfactory arrangement consistent with the provisions of this Charter, if it is evident to the negotiating parties that to negotiate a maximum import duty under sub-paragraph (a) of this paragraph is impracticable or would be ineffective for the achievement of the objectives of paragraph 1; any Member entering into negotiations under this sub-paragraph shall afford to other interested Members an opportunity for consultation.

“3. In any case in which a maximum import duty is not negotiated under paragraph 2(a), the Member establishing, maintaining or authorizing the import monopoly shall make public, or notify the Organization of, the maximum import duty which it will apply in respect of the product concerned.

“4. The import duty negotiated under paragraph 2, or made public or notified to the Organization under paragraph 3, shall represent the maximum margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article 18, transportation, distribution and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) may exceed the landed cost; Provided that regard may be had to average landed costs and selling prices over recent periods; and Provided further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provision may be made for adjustment to take account of wide fluctuations or variations in world prices, subject where a maximum duty has been negotiated to agreement between the countries parties to the negotiations.

“5. With regard to any product to which the provisions of this Article apply, the monopoly shall, wherever this principle can be effectively applied and subject to the other provisions of this Charter, import and offer for sale such quantities of the product as will be sufficient to satisfy the full domestic demand for the imported product, account being taken of any rationing to consumers of the imported and like domestic product which may be in force at that time.

“6. In applying the provisions of this Article, due regard shall be had for the fact that some monopolies are established and operated mainly for social, cultural, humanitarian or revenue purposes.

“7. This Article shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Charter.

*Ad Article 31*

*“Paragraphs 2 and 4*

“The maximum import duty referred to in paragraphs 2 and 4 would cover the margin which has been negotiated or which has been published or notified to the Organization, whether or not collected, wholly or in part, at the custom house as an ordinary customs duty.

*“Paragraph 4*

“With reference to the second proviso, the method and degree of adjustment to be permitted in the case of a primary commodity which is the subject of a domestic price stabilization arrangement should normally be a matter for agreement at the time of the negotiations under paragraph 2 (a).”

Concerning Article 17 of the Charter, see the material under Article XXVIII*bis* of this Index.

(c) *Interpretative Note Ad Article II:4*

During the Review Session of 1954-55, the Review Working Party on Other Barriers to Trade considered proposals for amending the state trading provisions of the General Agreement either by consolidating them or by adopting Articles 29-31 of the Havana Charter. The Report of the Working Party notes: “The conclusion reached by the majority of the Working Party, however, was in general to retain the present structure of the Agreement with respect to state trading. ... The Working Party undertook to redraft the existing interpretative note to

paragraph 4 of Article II, both so as to eliminate the cross reference to the Havana Charter and so as to clarify the meaning ...".<sup>106</sup> The interpretative note would have been replaced by the following text:

"The provisions of this paragraph will be applied in the light of the following:

"1. The protection afforded through the operation of an import monopoly in respect of products described in the appropriate schedule shall be limited by means of:

"(a) a maximum import duty that may be applied in respect of the product concerned; or

"(b) any other mutually satisfactory arrangement consistent with the provisions of this Agreement; any contracting party entering into negotiations with a view to concluding such arrangement shall afford to other interested contracting parties an opportunity for consultation.

"2. The import duty mentioned in 1(a) above shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes conforming to the provisions of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost; *Provided* that regard may be had to average landed costs and selling prices over recent periods; and *Provided* further that, where the product concerned is a primary commodity which is the subject of a domestic price stabilization arrangement, provisions may be made for adjustment to take account of wide fluctuations or variations in world prices, subject to agreement between the countries parties to the negotiations".

However, this change was effected through the Protocol Amending Part I and Article XXIX and XXX, which failed to gain the requisite unanimous approval, and was abandoned.<sup>107</sup>

**(4) "protection on the average in excess of the amount of protection provided for in that Schedule"**

The 1988 Panel Report on "Canada - Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies" examined the application of Article II:4:

"The Panel then proceeded to examine whether the mark-ups imposed on imported alcoholic beverages plus the import duties, which were collected at the bound rate, afforded protection on the average in excess of the amount of protection provided for in Canada's Schedule contrary to Article II:4, as claimed by the European Communities. The Panel noted that according to the interpretative note to Article II:4 the paragraph was to be applied 'in the light of the provisions of Article 31 of the Havana Charter.' ...

"The Panel noted that Article II:4, applied in the light of Article 31:4, prohibited the charging of prices by the provincial liquor boards for imported alcoholic beverages which (regard being had to average landed costs and selling prices over recent periods) exceeded the landed costs; plus customs duties collected at the rates bound under Article II; plus transportation, distribution and other expenses incident to the purchase, sale or further processing; plus a reasonable margin of profit; plus internal taxes conforming to the provisions of Article III. ...<sup>108</sup>

"The Panel considered that differential mark-ups could be justified to offset any additional costs of transportation, distribution and other expenses incident to the purchase, sale or further processing, such as storage, necessarily associated with importing products and that such calculations could be made on the basis of average costs over recent periods.

"The Panel noted Canada's statement that, in some instances, the differential mark-ups also reflected a policy of revenue maximization on the part of the provincial liquor boards, which charged higher mark-ups on imported than on domestic alcoholic beverages because they marketed imported products as

<sup>106</sup>L/334 and Addendum, adopted on 3 March 1955, 3S/222, 228, para. 26.

<sup>107</sup>15S/65.

<sup>108</sup>35S/86, paras. 4.9, 4.10.

premium products and exploited less price elastic demand for these products, and that this policy was in accordance with the General Agreement because revenue maximization was justified by normal commercial considerations.

“The Panel considered that a monopoly profit-margin on imports resulting from policies of revenue maximization by provincial liquor boards could not normally be considered as a ‘reasonable margin of profit’ in the sense of Article II:4, especially if it were higher on imported products than on domestic products.

“The Panel considered that the phrase ‘a reasonable margin of profit’ should be interpreted in accordance with the normal meaning of these words in their context of Article II and Article 31 of the Havana Charter and that ‘a reasonable margin of profit’ was a margin of profit that would be obtained under normal conditions of competition (in the absence of the monopoly). The margin of profit would have on the average to be the same on both domestic and the like imported products so as not to undermine the value of tariff concessions under Article II.

“The Panel also noted Canada’s argument that the drafting history implied that a reasonable margin of profit was a margin which ‘should not be so excessive as to restrict the volume of trade in the product concerned’, and that since the volume of imports from the European Communities of the products in question had not declined, the margin of profit was a reasonable one. The Panel noted that the fact that these imports had not declined did not say anything about what they would have been in the absence of a policy of monopolistic profit maximization by the provincial liquor boards.

“The Panel examined Canada’s reference to normal commercial considerations and noted that the term ‘commercial considerations’ was mentioned in Article XVII:1(b). It considered that this reference was not relevant to its examination of Article II:4 as the context in which the term ‘commercial considerations’ had been used was different.

“The Panel therefore *concluded* that the mark-ups which were higher on imported than on like domestic alcoholic beverages (differential mark-ups) could only be justified under Article II:4, to the extent that they represented additional costs necessarily associated with marketing of the imported products, and that calculations could be made on the basis of average costs over recent periods. The Panel also *concluded* that the burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products”.<sup>109</sup>

In Council discussions on the adoption of the Panel Report the representative of Canada stated that “with respect to the Panel’s conclusions in paragraph 4.16 of the report, Canada could not agree that the margin of profit would on average have to be the same on both the domestic and the like imported product so as not to undermine the value of tariff concessions under Article II. His authorities considered that the Panel’s interpretation did not accord with normal conditions of competition or reflect the realities of the market place”.<sup>110</sup>

In the 1992 Panel Report on “Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies”, the same Panel again examined the practices of provincial liquor boards in Canada.

“The Panel noted that the Panel which had examined in 1988 the practices of the Canadian liquor boards had concluded that ‘mark-ups which were higher on imported than on like domestic alcoholic beverages (*differential mark-ups*) could only be justified under Article II:4, to the extent that they represented *additional costs necessarily associated with marketing of the imported products*, and that calculations could be made on the basis of average costs over recent periods’. That Panel had also concluded that ‘the burden of proof would be on Canada if it wished to claim that additional costs were necessarily associated with marketing of the imported products’. The Panel noted that the United States

---

<sup>109</sup>35S/87, paras. 4.13 - 4.19.

<sup>110</sup>C/M/218, p. 5.



and Canada did not agree on which costs incurred by the liquor boards constituted ‘additional costs necessarily associated with marketing of imported products’ and requested guidance from the Panel on this issue.

“The Panel considered that, in determining which costs were ‘additional costs necessarily associated with the marketing of imported products’, four situations had to be distinguished. The costs could be ‘additional’ because they were incurred as a result of activities of the liquor boards that were specific to imported products; such costs were, for instance, the expenses arising from customs clearance or warehouse handling (e.g. palletization). The costs could also be ‘additional’ because, although they arose both for imported and domestic products, they were higher for imported products; such costs were, for instance, storage or imputed inventory finance costs, where inventory turnover for imported products was slower than for domestic products. On the other hand there were costs, such as general or administrative expenses, which could not be considered ‘additional’, since they were not necessarily associated with the marketing of the imported product, but rather with the overall operation of the liquor monopoly. Nor could costs be considered ‘additional’ which were incurred in respect of services prescribed for imported products but not for domestic products inconsistently with the General Agreement.

“Taking into account the four situations outlined above, the Panel also recalled that, in view of Article 31:4 of the Havana Charter, import monopolies were authorized to charge for transportation, distribution and other expenses incident to the purchase and sale of imported products. The Panel then considered how the liquor boards could and should compute the ‘differential mark-up’ i.e. the difference in the mark-ups on imported and domestic products. It believed that the liquor boards, as commercial enterprises, were entitled to recover both variable and fixed costs arising from their commercial activities incident to the purchase and sale of imported products. Thus, in line with the categorization in the previous paragraph, the Panel considered that the differential mark-up on imported beer should allow the recovery of those costs that were directly associated with the handling of imported beer (variable costs), and of charges for fixed assets employed that were calculated in proportion to the use of these assets by the imported product. All other expenses (e.g. general or administrative expenses) would have to be recovered through mark-ups uniformly applied to both domestic and imported beer.

“The Panel noted in this context that the disagreements between the United States and Canada appeared to arise primarily from the fact that Canada regarded as additional costs all costs arising from services performed by the liquor boards for imported beer that they did not perform for domestic beer, such as the cost of delivering imported beer to the points of sale. The Panel recalled its finding in paragraphs 5.12-5.16 above that, under Article III:4 of the General Agreement, Canada would have to apply the same delivery system to both domestic and imported beer or permit imported beer to be delivered privately if it had done so for domestic beer. In this context the Panel had noted that, in the situation in which the liquor boards authorized the private delivery of domestic beer to the points of sale but prohibited the private delivery of imported beer, a charge on imported beer for delivery to points of sale which corresponded to their actual costs of delivering such beer was not necessarily consistent with Article III:4. The Panel considered that strict observation of the national treatment principle in respect of the services performed by the liquor boards (i.e. identical treatment of imported and domestic beer) would, to a large extent, eliminate the uncertainties as to the proper allocation of the costs of the liquor boards. The Panel considered further that application of the national treatment principle in terms of affording effective equality of opportunities (i.e. permitting imported beer to be treated in the same way as domestic beer) would eliminate any problems with respect to liquor board charges for the services performed; in this situation, the foreign brewers’ choice of distribution system would be made on purely commercial grounds.

“The Panel then examined the mark-up practices of the liquor boards in the light of the principles set out above. The Panel noted that most liquor boards had, subsequent to the adoption of the 1988 Panel report, introduced so-called ‘cost-of-service charges’ and that the cost-of-service differential between imported and domestic products was in fact equivalent to the differential mark-up defined in the 1988 Panel report. It further noted that, in seven of the 10 provinces, the differential mark-ups as computed on the basis of cost-of-service charges did not conform to the principles set out above and included additional costs incurred by the liquor boards not necessarily associated with the marketing of imported beer. Two provinces, New Brunswick and Newfoundland, did not introduce separate cost-of-service charges but

maintained differential mark-ups. In New Brunswick, this differential again included costs that were not necessarily associated with the marketing of imported beer. In the case of Newfoundland, no audit of the mark-ups had been provided. Only in Prince Edward Island, where no beer was brewed, no differential mark-up was maintained. The Panel therefore *concluded* that the differential mark-ups currently levied by the liquor boards (with the exception of Prince Edward Island), including differential mark-ups based on cost-of-service charges, were inconsistent with Article II:4 of the General Agreement.

“The Panel then considered how Canada could best meet its burden of proving that the differential mark-ups consisted only of additional costs necessarily associated with the marketing of imported beer. The Panel considered that one possibility was for Canada to submit audited cost-of-service accounts prepared by independent reputable auditors who were made aware of Canada’s obligations under the General Agreement in respect of mark-ups, in particular the obligation under Article II:4 not to afford protection on the average in excess of the amount of protection provided for in Canada’s Schedule of Concessions. The Panel noted in this context that, in respect of wine and distilled spirits, the United States and Canada had agreed to rely on audited cost-of-service accounts. The Parties might, therefore, wish to agree on the instructions to be given to the auditors or, alternatively, to entrust an independent expert with the task of drawing up such instructions”.<sup>111</sup>

See also the reference to “protection, on the average, in excess of the amount of protection provided for” in the three parallel Panel Reports in 1989 on the complaints of Australia, New Zealand and the United States regarding “Republic of Korea - Restrictions on Imports of Beef”<sup>112</sup> excerpted above at pages 96.

Concerning “other charges and fees” charged by import monopolies, see the finding from the same Panel Reports excerpted above at page 82.

See also the definition of the term “import mark-up” in the Interpretative Note ad Article XVII, paragraph 4(b).

## 6. Paragraph 5

In 1956, Germany complained that the Greek government had imposed a tariff rate of 40 to 60 per cent ad valorem on long-playing gramophone records, despite the fact that “gramophone records” were bound in the Greek Schedule with a per-kilogram specific duty.<sup>113</sup> Greece considered the introduction of the new long-playing records as the creation of a completely new item since they were made of a different material. A Group of Experts that considered the complaint found that when granting the specific duty concession on “gramophone records” the Greek government had not attached any qualification to the description of the product; the experts considered that long-playing records fell within that item and were covered by the concession. “The Group agreed that the practice generally followed ... was to apply the tariff item ... that specified the products by name, or, if no such item existed, to assimilate the new products to existing items in accordance with the principles established by the national tariff legislation ...”.<sup>114</sup> The case was ultimately settled bilaterally.<sup>115</sup>

The only instance in which the Secretariat has been informed of negotiations completed under Article II:5 was in 1969, involved Canada and the European Communities and concerned “compensatory adjustment in connection with the impairment of the concession on flash guns in Schedule V (Canada) resulting from the decision of the Tariff Board of 17 May 1965, on the classification of electronic flash apparatus”.<sup>116</sup> A 1980 Note by the Secretariat for the Committee on Tariff Concessions on reclassification issues observes that “It would seem that questions of this kind have come up from time to time in connexion with reclassification questions by the

---

<sup>111</sup>DS17/R, adopted on 18 February 1992, 39S/27, 80-82, paras. 5.17-5.22.

<sup>112</sup>L/6503, L/6504, L/6505, adopted on 7 November 1989, 36S/202, 234, 268.

<sup>113</sup>L/575; SR.11/12 p. 115-116.

<sup>114</sup>L/580, SR.11/16 p. 168-170.

<sup>115</sup>L/765.

<sup>116</sup>SECRET/193, TAR/W/14.

Customs Co-operation Council, but up to now they have presumably been settled bilaterally or did not involve changes of substance”.<sup>117</sup>

See also the discussion above of the difference between maintenance of “treatment” and modification of a concession; see generally the chapter on Article XXVIII; and see paragraphs 4 and 5 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994.

## 7. Paragraph 6

### (1) “currency at the par value accepted or provisionally recognized”

Article IV of the original Articles of Agreement of the International Monetary Fund required each member of the Fund to state a par value for its currency in terms of gold or U.S. dollars of a fixed gold value, as part of a system of fixed exchange rates. A change in the par value of a member’s currency could be made only after consultation with the Fund. The words “or provisionally recognized” were inserted in paragraph 6(a) during the Geneva session of the Preparatory Committee to meet the case of Brazil, which had not established a par value at the time when the paragraph was drafted.<sup>118</sup>

During the Review Session of 1954-55 the CONTRACTING PARTIES agreed to amend paragraph 6(a) by using the words “... at the par value accepted or at the rate of exchange recognized by the Fund” on the ground that “these words correspond more closely to the Fund’s practices under its Articles of Agreement and cover cases not provided for in the present text”. The Working Party Report on these changes noted that in the case of Canada, for example, the established par value accepted by the Fund was no longer the effective rate, and the Fund recognized the fluctuating rate for its own accounting purposes. The wording was also changed so as to refer to “the” par value instead of “this” par value, in order to permit an adjustment of duties after a second devaluation of a currency. However, this amendment was included in the Protocol Amending Part I and Articles XXIX and XXX, which did not enter into force.<sup>119</sup>

As revised in 1978, Article IV of the IMF Articles no longer requires the stating of par values and instead provides that “each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates”.<sup>120</sup>

In 1978-80 the Working Party on Specific Duties examined the modalities for the application of Article II:6(a) in the monetary situation of increased flexibility of exchange rates.

“The Working Party noted that the rules for the adjustment of bound specific duties in Article II:6(a) of the General Agreement were drafted on the assumption that the members of the International Monetary Fund maintain par values for their currencies. However, under the present Articles of Agreement of the Fund, as amended on 1 April 1978, Fund members are no longer obliged to maintain par values but have the right to adopt exchange arrangements of their choice. Some Fund members have floating exchange rates, and other maintain the exchange rate against one other currency, a basket of currencies or an international unit of account. The Working Party concluded that the right to adjust specific duties in the present monetary situation could not be called into question but that the modalities for the application of

<sup>117</sup>TAR/W/14, dated 29 August 1980, para. 5.

<sup>118</sup>EPCT/TAC/PV/24, p. 43-44.

<sup>119</sup>L/329, Report of the Review Working Party on “Schedules and Customs Administration”, adopted on 26 February 1955, 3S/205, 209-210, para. 8; *ibid.*, 3S/214, para. 18. The Protocol Amending Part I and Articles XXIX and XXX was abandoned due to lack of the requisite unanimous acceptance; see 15S/65. Concerning the Review Session amendments to Article II:6 see further SR.9/16 and W.9/109+Rev.1, 163, 193, 200 and 212.

<sup>120</sup>Section 4 of Article IV as revised provides that “The Fund may determine, by an 85 per cent majority of the total voting power, that international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. ... Upon making such determination, the Fund shall notify members that the provisions of Schedule C [on Par Values] apply”. Articles of Agreement of the International Monetary Fund, 2 UNTS 39 (1947) as amended 1 April 1978.

Article II:6(a) needed to be adjusted to take into account the changes in the international monetary system”.<sup>121</sup>

The Working Party on Specific Duties drafted “Guidelines for Decisions under Article II:6(a) of the General Agreement”, which were adopted on 29 January 1980. See also the material under Article XXIV:8(a)(ii) concerning the 1978 EEC change in the unit of account for specific duties in its common customs tariff.

**(2) Adjustment of specific duties in accordance with paragraph 6(a)**

The Decisions of the CONTRACTING PARTIES under Article II:6 before 1980 are listed in the accompanying table.

The “Guidelines for Decisions under Article II:6(a) of the General Agreement”, adopted on 29 January 1980, provide that:

“In the present monetary situation the CONTRACTING PARTIES shall apply the provisions of Article II:6(a) as set out below unless they consider that this would not be appropriate in the circumstances of the particular case, for example because it would lead to an impairment of the value of a specific duty concession ...

“If a contracting party, in accordance with Article II:6(a) of the General Agreement, requests the CONTRACTING PARTIES to concur with the adjustment of bound specific duties to take into account the depreciation of its currency, the CONTRACTING PARTIES shall ask the International Monetary Fund to calculate the size of the depreciation of its currency and to determine the consistency of the depreciation with the Fund’s Articles of Agreement. ...

“The CONTRACTING PARTIES shall be deemed to have authorized the contracting party to adjust its specific duties ... if the International Monetary Fund advises the CONTRACTING PARTIES that the depreciation calculated as set out above ... is in excess of 20 per cent and consistent with the Fund’s Articles of Agreement and if, during the sixty days following the notification of the Fund’s advice to the contracting parties, no contracting party claims that a specific duty adjustment to take into account the depreciation would impair the value of a concession ...”.<sup>122</sup>

**Decisions of the CONTRACTING PARTIES  
under Article II:6(a) to authorize  
adjustment of specific duties**

|         |   |                              |
|---------|---|------------------------------|
| Benelux | Decision of 15 December 1950  | II/12                        |
| Finland | Decisions of 3 March 1955,<br>15 November 1957,<br>20 November 1967 | 3S/28,<br>6S/22,<br>15S/66   |
| Greece  | Decision of 24 October 1953   | 2S/24                        |
| Israel  | Decision of 3 February 1975   | C/M/103,<br>124, 125,<br>138 |
| Turkey  | Decision of 10 April 1959   | 8S/24                        |
| Uruguay | Decisions of 18 May 1961,<br>25 March 1965                          | 10S/34,<br>13S/20            |

The 1980 Decision provides rules for calculating the size of the depreciation, in the case of one contracting party or in the case of contracting parties members of a customs union which define their common specific duties in terms of a unit of account composed of the currencies of the members.

**(3) “date of this Agreement”**

See the discussion of “date of this Agreement” at page 83 above.

<sup>121</sup>L/4858, adopted on 29 January 1980, 27S/149, 150, para. 5.

<sup>122</sup>L/4938, adopted on 29 January 1980, 27S/28-29.

**(4) Article II:6(b)**

The Working Party on “Specific Duties” also examined which procedures should apply to requests submitted under Article II:6(a) by contracting parties that are not members of the Fund. It noted that this matter was dealt with in Article II:6(b) and in accession protocols of contracting parties that were not members of the Fund, and considered that no proposals were necessary, it being understood that all contracting parties have access to Article II:6(a).<sup>123</sup>

**8. Paragraph 7: “an integral part of Part I of this Agreement”**

The Schedules were included in Part I of the General Agreement as it was intended that Part II would be immediately superseded by the Charter provisions when the Charter entered into force. See Section III below.

In 1949, Cuba challenged the reduction of most-favoured-nation tariff rates by the United States on products with respect to which Cuba benefited from preferential tariff rates under bilateral trade agreements with the US. Cuba argued, *inter alia*, that the inclusion of a rate of duty in Part I of any Schedule legally prevented the reduction of that rate otherwise than by an amendment in accordance with Article XXX requiring acceptance by all the contracting parties as a condition of its becoming effective.<sup>124</sup> So as to clarify that the wording of Article II meant that the rates of duty contained in the Schedules were only maximum, and not also minimum, rates of duty, the CONTRACTING PARTIES, in a Decision of 9 August 1949, ruled,

“The reduction of the rate of duty on a product, provided for in a schedule to the General Agreement, below the rate set forth therein, does not require unanimous consent of the CONTRACTING PARTIES in accordance with the provisions of Article XXX”.<sup>125</sup>

See also the term “in excess of” in paragraph 1(b); see also the material on modification and rectification of Schedules below and under Article XXX.

**B. RELATIONSHIP BETWEEN ARTICLE II AND OTHER GATT ARTICLES**

**1. Article III**

See under Article III.

**2. Article VIII**

In the 1988 Panel Report on “United States - Customs User Fee” the Panel examined the general meaning, drafting history and differences in wording in Articles II:2(c) and VIII:1(a).

“Two questions of general interpretation had to be answered before addressing the specific issues raised by the complainants. First, it was necessary to decide whether there was any legal significance in the slight difference in wording between the two ‘cost of services’ limitations stated in Articles II:2(c) and VIII:1(a), i.e. ‘commensurate with the cost of services rendered’ and ‘limited in amount to the approximate cost of services rendered.’ The words themselves suggested no immediately apparent difference in meaning. After reviewing both the drafting history and the subsequent application of these provisions, the Panel concluded that no difference of meaning had been intended. The difference in wording appears to be explained by the somewhat different paths by which each provision entered the General Agreement. The text which was to become Article VIII:1(a) appeared in the very first draft submitted to the negotiating conference by the United States, whereas the text of Article II:2(c) originated as a standard term to be

<sup>123</sup>L/4858, adopted on 29 January 1980, 27S/149, 156, para. 18.

<sup>124</sup>CP.3/59, CP.3/SR.34-38; Working Party Report on “Accession at Annecy”, GATT/CP.3/37, II/148, 152-153, para. 25.

<sup>125</sup>Vol. II/11.

incorporated in each contracting party's schedule of concessions (see E/PC/T/153) and was not raised to the text of Article II until some time later (E/PC/T/201)".<sup>126</sup>

A footnote to this paragraph provides:

"A collateral issue which the Panel considered but was not required to answer was whether the form of words utilized in Article II:2(c) might not have been intended as a reference to exactly the same fees permitted by Article VIII:1(a) - in other words, whether Article II:2(c) incorporates all three of the criteria in Article VIII:1(a). The following considerations had raised the issue: (i) The text of Article II:2(c) was in fact developed after the draft text of Article VIII:1(a) had been established. (ii) Article II:2(c) sets the standards for determining when 'service' fees may be imposed in excess of tariff bindings, whereas Article VIII:1(a) is a general provision relating to fees on all products. (iii) At least two Article XXIII complaints in the past had claimed that an import fee used for a 'fiscal purpose' had constituted a violation of Article II, and in both cases the contracting party complained against had agreed and had withdrawn the fee (L/64; SR.8/7 (page 10); L/410; SR.10/5 (pages 51-52)".<sup>127</sup>

See the material from this Panel Report cited *in extenso* under Article VIII.

### 3. Articles XI and XIII

In a dispute concerning EEC restrictions on imports of apples from Chile, Chile maintained that the EEC quantitative protective measure against Chile contravened Article II:1(a) and (b), in that the EEC measure involved treatment less favourable than that provided for in tariff concessions granted by the EEC for apples and had the effect of being an absolute or infinite duty completely nullifying the concession granted. In the 1980 Panel Report on "EEC Restrictions on Imports of Apples from Chile",

"the Panel considered that the EEC import suspension did affect the value of the EEC tariff binding to Chile on apples. With reference to II:1(b), however, the Panel considered that the EEC measure was not strictly speaking a duty or charge in excess of the tariff concession provided in the EEC schedule. Therefore, the Panel considered that it was more appropriate to examine the EEC measure in the context of Article XI".<sup>128</sup>

The 1984 Panel Report on "United States - Imports of Sugar from Nicaragua" concluded, *inter alia*, that:

"Having found the reduction of the quota to be inconsistent with the obligations of the United States under Article XIII, the Panel did not deem it necessary to examine whether the action was also inconsistent with any other obligations on quota allocations which the United States might have assumed under Article II in its schedule of concessions".<sup>129</sup>

In the 1984 Report of the "Panel on Newsprint", the Panel did not share the argument advanced by the EC that their opening of a duty-free tariff quota of 500,000 tonnes for newsprint, whereas the commitment of the EC in its GATT Schedule LXXII provided for an annual duty-free tariff quota of 1.5 million tonnes, was merely a change in the administration or management of the tariff quota which was permissible under Article XIII of the GATT.

"The Panel considered the arguments advanced by the EC relating to Article XIII, but concluded that the conditions for its application had not been fulfilled. In examining the EEC Regulation 3684/83, the Panel found that it did not in fact constitute a change in the administration or management of the tariff quota from a global quota system to a system of country shares, as had been asserted by the EC. The Regulation in its Article 1.1 simply opens a quota of 500,000 tonnes and stipulates in Article 1.3 that imports shall not be charged against this quota if they are already free of customs duties under other

<sup>126</sup>L/6264, adopted on 2 February 1988, 35S/245, 275, para. 75.

<sup>127</sup>*Ibid.*, footnote 1 at 35S/275.

<sup>128</sup>L/5047, adopted on 10 November 1980, 27S/98, 112, para. 4.2.

<sup>129</sup>L/5607, adopted on 13 March 1984, 31S/67, 74, para. 4.5.

preferential tariff treatment. It does not provide an allocation of country shares to individual m.f.n. suppliers, nor has a separate quota (global or otherwise) for the EFTA countries been established, as Article XIII requires ... It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an m.f.n. duty-free quota.”<sup>130</sup>

#### 4. Article XXIII

See under Article XXIII:1(b) on non-violation cases and the relevance of tariff concessions.

#### 5. Article XXVIII

Concerning the relationship between Article XXVIII negotiations and the status of tariff bindings, see the unadopted panel report of 1994 on “EEC - Import Régime for Bananas”.<sup>131</sup>

### C. EXCEPTIONS AND DEROGATIONS

#### 1. Article II:2

See pages 86-87 above. The 1988 Panel Report on “United States - Customs User Fee” notes that “Paragraph 1(b) of Article II establishes a general ceiling on the charges that can be levied on a product whose tariff is bound; it requires that the product be exempt from all tariffs in excess of the bound rate, and from all other charges in excess of those (i) in force on the date of the tariff concession, or (ii) directly and mandatorily required by legislation in force on that date. Article II:2 permits governments to impose, above this ceiling, three types of non-tariff charges, of which the third, permitted by sub-paragraph (c), is ‘fees or other charges commensurate with the cost of services rendered’.”<sup>132</sup>

#### 2. Protocol of Provisional Application

The Note Ad Article I:1 provides that “The obligations incorporated in ... paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application”. An identical provision is included in the standard text of accession Protocols.

#### 3. Other Protocols of accession

The Report of the Working Party on “Accession of the United Arab Republic” notes that “The Working Party discussed the 10 per cent ‘consolidation of economic development tax’ imposed on imports into the United Arab Republic. ... The Working Party noted that this tax was not to be considered as a charge for services rendered. Nor, in the view of the representative of the United Arab Republic, were the provisions of Article III applicable, since there was no question of national treatment. The tax was applied only on imports and as such had an effect equivalent to that of a customs duty”.<sup>133</sup> The accession protocol of the United Arab Republic provided that “The temporary ‘consolidation of economic development tax’ may be maintained in effect, at rates not exceeding the rates in force at the date of this Protocol, on bound duties until 31 December 1975, by which time, if the measure is still in effect, the matter shall be reviewed by the CONTRACTING PARTIES”.<sup>134</sup> This deadline was extended to 31 December 1980,<sup>135</sup> to 31 December 1985,<sup>136</sup> and to 31 December 1990<sup>137</sup> and has expired.

<sup>130</sup>L/5680, adopted on 20 November 1984, 31S/114, 31S/131-2 para. 51, 31S/133 para. 55.

<sup>131</sup>DS38/R, dated 11 February 1994, para. 133.

<sup>132</sup>L/6264, adopted on 2 February 1988, 35S/245, 273, para. 70.

<sup>133</sup>L/3362, adopted on 27 February 1970, 17S/33, 37, para. 16.

<sup>134</sup>17S/2, 4, para. 6.

<sup>135</sup>L/4264, Decision of 26 November 1975, 22S/8.

<sup>136</sup>L/5083, Decision of 25 November 1980, 27S/16.

<sup>137</sup>L/5923, Decision of 26 November 1985, 32S/15.

#### 4. Waivers under Article XXV:5

For a list of waivers of Article II, see the table of waivers following Article XXV. Recent supplements to the BISD have included a list of waivers related to implementation of the Harmonized System and other schedule-related waivers.<sup>138</sup>

The CONTRACTING PARTIES have decided on a number of occasions to grant waivers suspending the application of Article II of the General Agreement to enable a contracting party to implement a modified Schedule in advance of completion of negotiations under Article XXVIII, subject to specified conditions. In recent years, typical conditions have included:

- “1. The Government of [contracting party] will as soon as possible enter into negotiations or consultations pursuant to paragraphs 1 to 3 of Article XXVIII.
- “2. The negotiations or consultations mentioned above shall be completed not later than [date].
- “3. Pending the entry into force of the results of the negotiations or consultations mentioned above, the other contracting parties will be free to suspend concessions initially negotiated with [contracting party] to the extent that they consider that adequate compensation is not offered by the Government of [contracting party]”.<sup>139</sup>

See also discussion of such waivers under Article XXVIII.

During 1993 the matter of renewal of waivers of Article II associated with the introduction of the Harmonized System was raised in the Council. The 1993 Report of the Committee on Tariff Concessions notes that the Committee at its December 1993 meeting agreed to the following proposal:

“The Committee shall report twice a year on its activities to the Council. Under the item related to ‘Ongoing negotiations and submission of HS documentation by contracting parties under waivers’, the following factual information shall be included:

- “– Date of original waiver.
- “– Date of submission of documents relevant to the HS implementation (if no documents have been circulated, reasons therefor).
- “– Number of extensions and dates when granted.
- “– Number of countries with which Article XXVIII negotiations have been initiated.
- “– Number of countries with which Article XXVIII negotiations have been concluded.
- “– Status of outstanding Article XXVIII negotiations as well as a general outline of relevant problems, if any.
- “– Outlook for concluding the process.”<sup>140</sup>

<sup>138</sup>See, e.g., 37S/295, 38S/78.

<sup>139</sup>See, e.g., Waiver decisions on “Indonesia - Establishment of a new Schedule XXI”, L/6331, Decision of 22 April 1988, 35S/347; “Bangladesh - Establishment of a New Schedule LXX”, L/6374, Decision of 18 July 1988, 35S/348; “Mexico - Establishment of a New Schedule LXXVII”, L/6377, Decision of 18 July 1988, 35S/351.

<sup>140</sup>TAR/243, adopted on 25-26 January 1994, Annex II. See also Council discussion at C/M/264 and proposal at TAR/W/88.



## 5. Coexistence of the GATT 1947 and the WTO Agreement

On 8 December 1994, the Preparatory Committee for the WTO, meeting on the occasion of the Implementation Conference, adopted a Decision on “Coexistence of the General Agreement on Tariffs and Trade 1947 and the World Trade Organization”. The CONTRACTING PARTIES meeting in Special Session on the same date also adopted this decision, which provides *inter alia*:

“The CONTRACTING PARTIES to the General Agreement on Tariffs and Trade (hereinafter referred to as ‘GATT 1947’),

“*Noting* that not all contracting parties to the GATT 1947 meeting the conditions for original membership in the World Trade Organization ... will be able to accept the Marrakesh Agreement Establishing the WTO ... as of its date of entry into force, and that the stability of multilateral trade relations would therefore be furthered if the GATT 1947 and the WTO Agreement were to co-exist for a limited period of time;

“*Considering* that, during that period of co-existence, a contracting party which has become a Member of the WTO should not be under a legal obligation to extend the benefits accruing solely under the WTO Agreement to contracting parties that have not yet become WTO Members and should have the right to act in accordance with the WTO Agreement notwithstanding its obligations under the GATT 1947; ...

“*Decide as follows*:

“1. The contracting parties that are Members of the WTO may, notwithstanding the provisions of the GATT 1947,

“(a) accord to products originating in or destined for a Member of the WTO the benefits to be accorded to such products solely as a result of concessions, commitments or other obligations assumed under the WTO Agreement without according such benefits to products originating in or destined for a contracting party that has not yet become a Member of the WTO; and

“(b) maintain or adopt any measure consistent with the provisions of the WTO Agreement.”<sup>141</sup>

Concerning the transition to the WTO, see further in the chapter on Institutions and Procedure in this book.

## D. TARIFF PROTOCOLS, SCHEDULES OF CONCESSIONS, AND NATIONAL TARIFF SCHEDULES

### 1. Schedules in general

The “Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee”, which were drawn up during the London session of the Preparatory Committee, provided:

“It is contemplated that the tariff negotiations among the members of the Preparatory Committee will be multilateral, both in scope and in legal application. Thus, there would result from the negotiations a total of sixteen schedules of tariff concessions, each schedule setting forth a description of the products and of the maximum (concession) rates of duty thereon which would be applicable in respect of the imports into a particular country. In this way each member of the Committee would be contractually entitled, in its own right and independently of the most-favoured-nation clause, to each of the concessions in each of the schedules of the other members.

<sup>141</sup>PC/12, L/7583, preamble and para. 1.

“The multilateral form of the schedules is designed to provide more stability than has existed in the past under bilateral tariff agreements, to assure certainty of broad action for the reduction of tariffs and to give to countries a right to tariff concessions on particular products which such countries might wish to obtain, but could not obtain under bilateral agreements, because of their relatively less important position as a supplier of the product concerned. The multilateral form also gives expression to the fact that each country stands to gain when another country grants tariff reductions on any product, even though primarily supplied by a third country ...”<sup>142</sup>

## 2. Protocols of concessions

A 1985 Secretariat Note for the Committee on Tariff Concessions on “Loose-leaf Schedules Based on Harmonized System Nomenclature” notes as follows:

“*Tariff protocols* which were established at the end of multilateral rounds of trade negotiations have, subsequent to 1959, been signed only by those contracting parties whose schedules were annexed to the protocol. This applied not only to those cases where the new schedules contained exclusively tariff reductions, but also to a case such as the Dillon Round Protocol in which both tariff reductions and tariff increases (resulting from Article XXVIII and Article XXIV:6 negotiations) were embodied.

“Contracting parties have as a general rule submitted the results of their tariff negotiations for inclusion in a protocol at a time when they had concluded all, or at least most, of their bilateral negotiations. The results of negotiations which had not yet been terminated at that time, as well as improvements in the concessions initially granted, were incorporated in supplementary protocols established after the end of a tariff conference. In the context of a Harmonized System exercise ... supplementary protocols would become necessary as not all contracting parties changing over to the Harmonized System will be ready to submit their new schedules at the time the main protocol is opened for signature.

“It should be recalled that annexing schedules to a protocol is only binding on the contracting parties in question which thereby commit themselves to apply in the future the new (normally reduced) rates of duty. This does not, on the other hand, commit other contracting parties which, in the case of increased duty rates and in the absence of an agreement, retain their right to withdraw substantially equivalent concessions (e.g. under Article XXVIII:3 in the case of the Dillon Round or in the Harmonized System negotiations).

“It follows from the above that a protocol (together with the schedules attached) does not require the approval or signature of other contracting parties than those that have schedules annexed to it. The rights of these other contracting parties are, as mentioned above, protected in all cases where agreement could not be reached. However, in order to avoid that technical errors find their way into the new schedules, the practice has been to provide countries which have participated in the negotiations the opportunity to verify that the results of the negotiations have been correctly incorporated into the schedules that are to be annexed to the protocol. In the Tokyo Round, for instance, contracting parties were invited to circulate their draft schedules to the countries with which they had negotiated not later than 1 June 1979, the period of verification having been limited until 22 June, by which date the contracting parties in question had to transmit to the secretariat the necessary number of copies of their final schedules for distribution to all MTN participants; the Geneva (1979) Protocol was opened for signature on 30 June 1979 by the contracting parties having annexed their schedules to it”<sup>143</sup>

See also a 1990 Secretariat Note on the “Uruguay Round Tariff Protocol”, concerning technical issues such as timetable, opening for signature, schedule format, preparation of revised loose-leaf schedules, and issues to be

<sup>142</sup>London Report, Annexure 10, p. 49-50, “Form of Tariff Schedules”. See also generally the records of the Sub-Committee on Procedures, EPCT/C.II/PRO/PV/5-15 and summary records in the series EPCT/C.II/W/2-31.

<sup>143</sup>TAR/W/55/Add.1, dated 28 November 1985, paras. 1-4.

decided concerning implementation of the tariff concessions<sup>144</sup>, as well as a 1993 Note on “Preparation of the Uruguay Round Schedules of Concessions on Market Access”.<sup>145</sup>

See also the material below on certifications of rectifications and modifications.

### 3. Consolidated Schedules

The inclusion of successive concessions in Schedules and in tariff protocols has meant that in order to determine the applicable concession rates for a given tariff line, it was often necessary to examine a number of instruments. However, there have been a number of efforts to reform this system. In the early years of the GATT, the proposal was made that, for each contracting party, its successive Schedules of concessions would be replaced by one consolidated Schedule. A consolidation was carried out in 1951 incorporating the results of the Geneva (1947), Annecy and Torquay Rounds. The question of giving legal status to consolidated Schedules was discussed at the Thirteenth Session in 1958. At that time, the Working Party on Schedules recommended as follows:

“(a) any contracting party, wishing to prepare a consolidated schedule to replace its separate schedules annexed to the various Protocols, may do so, provided a draft consolidated schedule is submitted to the CONTRACTING PARTIES for approval under the normal rectification procedures;

“(b) such a contracting party should give due notice of its intention and should submit copies early enough before the usual protocol of rectifications and modifications is prepared, to allow for adequate checking by all contracting parties;

“(c) the contracting party to which the consolidated schedule relates, should be expected to accept the understanding that earlier schedules and - as has always been the case in the past - negotiating records, would be considered as proper sources in interpreting concessions contained in legal consolidated schedules”.<sup>146</sup>

A number of contracting parties submitted Consolidated Schedules under these rules, and updated Schedules were certified in a number of instances. The introduction of the loose-leaf system and the conversion of Schedules to the Harmonized System nomenclature have each entailed a consolidation of past Schedules, and consolidated Schedules are now submitted under the rules and practices pertaining to these two exercises.

### 4. Loose-leaf Schedules

On 26 March 1980 the Council adopted a proposal by the Director-General on the introduction of a loose-leaf system for the Schedules of Tariff Concessions.<sup>147</sup> The proposal stated:

“... the existing system for the publication of the tariff concessions has become outdated. There are at present more than forty legal instruments (Protocols, Certifications) containing valid tariff concessions. Extensive and time-consuming efforts are necessary under the present system to find out the status of a particular concession.

“In view of this, I suggest that henceforth the schedules of tariff concessions be published in the form of a loose-leaf system which can continuously be kept up to date when rectifications, modifications, withdrawals and new concessions are made ...

“... The basis for the creation of a loose-leaf system for the schedules of tariff concessions must be a general consolidation of tariff schedules. I would consequently propose that the *Council agree that*

---

<sup>144</sup>MTN.GNG/NG1/W/56, dated 24 October 1990..

<sup>145</sup>MTN.GNG/MA/W/25, dated 22 December 1993.

<sup>146</sup>L/934, Report on “Rectification and Modification of Schedules and Consolidation of Schedules”, adopted on 22 November 1958, 7S/113, 115-116, para. 8.

<sup>147</sup>27S/22; see also discussion at C/M/138 p. 10-11, C/M/139 p. 4-6.

*contracting parties submit consolidated schedules of tariff concessions as soon as possible and not later than 30 September 1980 ...*

“... I would suggest that *the Council agree on a format for the schedules as set out in the Annex to document L/4821/Add.1.*

“The schedules should comprise a complete description of the products covered... the entries in the schedules should, as far as possible, correspond with the entries in the customs tariffs, not only for the descriptions but also in respect of the numeration used. For example, if a heading is only partially bound, then sub-headings should be created and should have their own numbers”.<sup>148</sup>

See also the minutes of the Committee on Tariff Concessions concerning discussions of the legal status of loose-leaf schedules and of initial negotiating rights regarding earlier bindings.<sup>149</sup>

The Secretariat has issued periodic Notes for the Committee on Tariff Concessions on the status of loose-leaf and other Schedules.<sup>150</sup>

## 5. Implementation of the Harmonized System

### (1) *Conversion of schedules to Harmonized System nomenclature*

The International Convention on the Harmonized Commodity Description and Coding System, established under the auspices of the Customs Co-operation Council, entered into force on 1 January 1988. The Convention requires each party thereto to conform its customs tariff and statistical nomenclature to the Harmonized Commodity Description and Coding System (“Harmonized System”) nomenclature and to any future amendments thereto.<sup>151</sup> The distinguishing feature of the Harmonized System nomenclature is its multi-functional design, which allows it to serve the needs of tariff classification and trade statistics, while providing a basis for future applications such as freight tariffs and production statistics.

The Ministerial Decision adopted 29 November 1982 on “Tariffs” provides, *inter alia*, that “The CONTRACTING PARTIES decide ...

“That wide acceptance of a common system for classifying products for tariff and statistical purposes would facilitate world trade and therefore recommend prompt action towards the introduction of such a system. They take note of the ongoing work to this end in the Customs Co-operation Council. They further agree that, if such a system is introduced, the general level of benefits provided by GATT concessions must be maintained, that existing concessions should normally remain unchanged and that any negotiations that should prove necessary should be initiated promptly so as to avoid any undue delay in the implementation of a system. They also agree that technical support shall be provided by the GATT secretariat to developing contracting parties in order to fully assist their participation in such a process”.<sup>152</sup>

On 12 July 1983 the Council approved a Decision on “GATT Concessions under the Harmonized Commodity Description and Coding System” which includes, *inter alia*, the following general principles:

“1.2 In addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would ensure greater uniformity among countries in customs

<sup>148</sup>C/107/Rev.1, 27S/22, 22-23, paras. 1-5.

<sup>149</sup>TAR/M/1 et seq., TAR/W/30, 33, 34.

<sup>150</sup>See TAR/W/23/Rev.21, “Status of Pre-HS Loose-leaf Schedules”, dated 4 October 1990 (or later revisions); TAR/W/40/Rev.13, “Tariff Information Available in the Secretariat”, dated 13 November 1994 (or later revisions); TAR/W/85, “Status of Schedules of Contracting Parties to the GATT”, dated 16 October 1992. See also notes referred to below on the Harmonized System schedules.

<sup>151</sup>Delayed application of these obligations is permitted for developing country parties to the Convention.

<sup>152</sup>L/5424, 29S/18, para. 2.

classification and thus a greater ability for countries to monitor and protect the value of tariff concessions. ...

“2.1 The main principle to be observed in connexion with the introduction of the Harmonized System in national tariffs is that existing bindings should be maintained unchanged. The alteration of existing bindings should only be envisaged where their maintenance would result in undue complexity in the national tariffs and should not involve a significant or arbitrary increase in customs duties collected on a particular product.

“2.2 In order to avoid complicating the introduction of the Harmonized System, contracting parties should endeavour to avoid modifying or renegotiating, in the context of the introduction of the Harmonized System, their bindings for reasons not associated with the System.

“2.3 In light of paragraphs 2.1 and 2.2 contracting parties should be ready to explain and discuss the reason for their proposed changes when requested. Interested contracting parties will be free to raise specific cases, which the party which has notified the change will examine, taking into account all relevant factors with a view to finding a mutually acceptable solution. If such agreement cannot be reached, the contracting party which has notified the change shall proceed under Article XXVIII ...

“2.4 To the extent that the value of existing concessions is not impaired, the conversion of present nomenclatures to the Harmonized System can be done through the rectification procedure.<sup>153</sup>

This Decision also specifies requirements for information to be provided to the GATT Secretariat by each contracting party adopting the Harmonized System; specifies rules to be used for conversion of duty rates if concessions must be modified if headings or parts of headings are combined in the process of implementing the Harmonized System; and provides for the procedures to be used in the event of renegotiation under Article XXVIII. See also material from this Decision in the chapter on Article XXVIII. Prior to the adoption of the Decision, it was stated “that, under this document, any contracting party was entitled to request the maintenance of particular tariff items of interest to it in the new nomenclature, whenever tariff lines with different bound rates were combined or whenever bound rates were combined with unbound rates. This understanding was in keeping with the basic principle stated in paragraph 2.1 [of the Decision,] namely that ‘existing GATT bindings should be maintained unchanged’”.<sup>154</sup> Procedures for the conversion of contracting parties’ schedules of concessions into the Harmonized System nomenclature were also discussed in the Committee on Tariff Concessions.<sup>155</sup>

As schedules under the Harmonized System have been finalized, they have been annexed to successive Protocols of tariff concessions: the First, Second, and Third Geneva (1987) Protocols; the Geneva (1988) Protocol; the Geneva (1989) Protocol; the Geneva (1992) Protocol; the Geneva (1993) Protocol; and the Geneva (1994) Protocol.<sup>156</sup> In addition, some HS conversions were completed during the Uruguay Round and the resulting schedules attached to the Marrakesh Protocol to the GATT 1994.

The minutes of the October 1994 meeting of the Committee on Tariff Concessions note that as of that date, all but a very few contracting parties had implemented the Harmonized System in their national tariffs and more than 90 percent of contracting parties’ trade was covered by the HS. However, of 84 GATT 1947 contracting parties with a GATT Schedule, only 25, plus the European Communities, had a certified schedule

---

<sup>153</sup>L/5470/Rev.1, 30S/17, 17-18.

<sup>154</sup>C/M/170, p. 15.

<sup>155</sup>TAR/M/4, point 7. For a list of documentation submitted by delegations in the context of Harmonized System negotiations and the certification of schedules, see the latest revision of TAR/W/67.

<sup>156</sup>First, Second, and Third Geneva (1987) Protocols, L/6112, L/6222, L/6292, 34S/5; Geneva (1988) Protocol, L/6363, 35S/3; Geneva (1989) Protocol, L/6466, 36S/3; Geneva (1992) Protocol, L/6987, 39S/3; Geneva (1993) Protocol, L/7195, L/7195/Corr.1 and L/7195/Add.1-5. A Geneva (1990) Protocol (L/6728, 37S/3) was done but no schedules were concluded during the relevant period. Concerning status of the Harmonized System Schedules, see the most recent revision of TAR/W/74.

in the nomenclature of the Harmonized System, and only 12 of these were complete, with all 12 columns completed.<sup>157</sup>

The Secretariat has issued periodic Notes for the Committee on Tariff Concessions on the status of Harmonized System Schedules and the associated Article XXVIII negotiations.<sup>158</sup> A Secretariat Note of 13 October 1994 on “Transposition of Schedules into the 1996 Harmonized System and Establishment of Loose-Leaf Schedules” assesses the status of schedules as of that date, grouping participants in the Uruguay Round into eight categories as follows. The number of participants is indicated after each category; since October 1994, a number of developing participants have submitted their Uruguay Round schedules which have been annexed to the Marrakesh Protocol.<sup>159</sup>

- A. Uruguay Round participants which have adopted the Harmonized System, including:
- (1) Participants which have an HS consolidated schedule annexed to the Marrakesh Protocol that is not in loose-leaf format and does not include the HS 1996 changes: (44)
  - (2) Participants which have a GATT pre-Uruguay Round schedule in loose-leaf format which has been certified, and also have a Uruguay Round HS schedule annexed to the Marrakesh Protocol: (21)
  - (3) Participants maintaining an HS schedule under waiver which have submitted required HS documentation for transposition of pre-UR GATT schedules into the HS, have not yet concluded Article XXVIII negotiations with respect to that schedule, but have a UR HS schedule annexed to the Marrakesh Protocol: (9)
  - (4) Participants which are under waiver, have not submitted the required HS documentation for transposition of pre-UR GATT schedules into the HS, but have a UR HS Schedule annexed to the Marrakesh Protocol: (10)
  - (5) Participants which have a GATT pre-UR schedule not in HS and a UR schedule in HS, and which have not taken any action concerning the transposition of their pre-UR schedules into HS: (11)
  - (6) Participants which have no GATT pre-UR schedule and have not submitted a UR schedule: (7)
- B. Participants where it is not certain that they have adopted the HS system
- (1) Participants which have a GATT pre-UR schedule and have not submitted a UR Schedule: (3)
  - (2) Participants which have no GATT pre-UR schedule and have not submitted a UR Schedule: (6)
- (2) *Implementation in GATT schedules of amendments to Harmonized System nomenclature***

On 8 October 1991 the Council adopted simplified “Procedures to Implement Changes in the Harmonized System”<sup>160</sup> to provide for changes to the Harmonized System planned to enter into force on 1 January 1992 and any changes in the future:

“Contracting parties to the GATT which are also contracting parties to the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System), in order to keep the authentic texts of their GATT schedules up to date and in conformity with their national customs tariffs, adopt the following procedures:

<sup>157</sup>TAR/M/38.

<sup>158</sup>See TAR/W/67/Rev.13, “Harmonized System and Article XXVIII Negotiations”, dated 28 September 1993 (or later revisions); TAR/W/74/Rev.10, “Status of the Harmonized System Schedules”, dated 27 September 1993 (or later revisions). See also notes concerning status of loose-leaf schedules referred to above.

<sup>159</sup>TAR/W/93.

<sup>160</sup>L/6905, 39S/300-301.

“1. The implementation of revisions of the nomenclature of the Harmonized System adopted by the Customs Co-operation Council (CCC) shall not involve any alteration in the scope of concessions nor any increase in bound rates of duty unless their maintenance results in undue complexity in the national tariffs. In such cases the contracting parties concerned shall inform the other contracting parties of the technical difficulties in question, e.g. why it has not been possible to create a new subheading to maintain the existing concession on a product or products transferred from within one HS 6-digit heading to another.

“2. No later than 120 days after the circulation by the secretariat of both

- (1) a communication concerning the acceptance by the CCC of a recommendation to revise the Harmonized System nomenclature made in accordance with Article 16 of the Harmonized System Convention, and
- (2) correlation tables prepared by the CCC secretariat,

contracting parties shall submit to the GATT secretariat a notification which includes the pages of their loose-leaf schedules containing proposed changes. The relevant pages of the loose-leaf schedules shall be presented as follows:

- (a) Items in relation to which the proposed changes do not, in the view of the contracting party in question, alter the scope of a concession (e.g. changes or other rectifications of a purely formal character) ...
- (b) Items in relation to which the proposed changes will, in the view of the contracting party in question, alter the scope of a concession (e.g. through an increase in the bound rate of duty or a change in the product description of the item) ...

“4. A proposed change in the authentic text of a GATT schedule described in paragraph 2(a) above shall be certified provided no objection has been raised by a contracting party within ninety days on the ground that the proposed change or rectification is not of a purely formal character. If such objection is raised and in the absence of agreement among the contracting parties concerned, the contracting party in question shall without delay submit to the secretariat, for circulation to all contracting parties, the documentation described in paragraph 2(b) above.

“5. A proposed change in the authentic text of a GATT schedule described in paragraph 2(b) above shall be certified provided no request for negotiation or consultation under Article XXVIII has been made to the contracting party in question within ninety days following the circulation of the documentation described in paragraph 2(b) above.

“6. In cases where an objection under paragraph 4 above is raised or where a request for negotiation or consultation under paragraph 5 has been made, the Procedures for Negotiations Under Article XXVIII (BISD 27S/26) shall apply. Any such objection or request shall at the same time be sent to the secretariat. After the completion of these procedures, a comprehensive list of all changes and the corresponding amended pages of the GATT schedule shall be sent to the secretariat for certification.”

A Secretariat Note of 13 October 1994 on “Transposition of Schedules into the 1996 Harmonized System and Establishment of Loose-Leaf Schedules” (TAR/W/93) notes these procedures and states that “It is expected that the whole of 1995 will be dedicated to the preparation of the new schedules, including the necessary Article XXVIII renegotiations. While it is hoped that this work will be completed during 1995, there is no time-limit set for carrying out Article XXVIII renegotiations. After the completion of the required procedures the new consolidated HS loose-leaf schedules will need to be submitted to the Secretariat for certification; the submission should be in printed form as well as on diskette in spreadsheet format (Lotus 1-2-3 or Excel).”

The Note also discusses the procedures required for participants in each of the eight categories listed at the end of in the preceding section.<sup>161</sup>

## 6. Concessions in schedules

### (1) *Authentic texts of Schedules*

During discussions on the draft General Agreement at Geneva in 1947 it was agreed that “each Schedule would be authentic in either English or French or in both languages, at the option of the country whose Schedule was concerned. The way it was decided to provide for this was to put in parentheses at the top of the Schedule the words: ‘Authentic in the English text only’ or ‘Authentic in the French text only,’ if it was to be authentic only in one of these two languages. For that reason it was not considered necessary” to refer to the language in which Schedules would be authentic, either in Article II or in the paragraph corresponding to the present Article XXVI:3.<sup>162</sup>

The standard text of accession protocols now provides that the English, French and Spanish texts of the protocol will each be authentic, “except as otherwise specified with respect to the Schedule annexed thereto”.<sup>163</sup> Tariff protocols such as the Geneva (1992) Protocol or the Marrakesh Protocol provide that “The Schedules annexed hereto are authentic in the English, French or Spanish language as specified in each Schedule”.<sup>164</sup>

### (2) *Description of concessions*

The Decision of 26 March 1980 on “Introduction of a Loose-leaf System for the Schedules of Tariff Concessions” provides that “The schedules should comprise a complete description of the products covered” and provides for submission of schedules in a specified format.<sup>165</sup> In discussion in the Committee on Tariff Concessions in 1987, the Chairman stated that “in supplying a schedule for annexation to a protocol, the minimum information required would be to complete the first four columns; concerning the fifth and seventh columns referring to current and historical INRs, it was understood that as long as the minimum information was provided in the schedules to be annexed to protocols, the schedules would be considered as authentic for the purpose of the protocols but incomplete as far as the requirements of the loose-leaf system were concerned. When countries would be in a position to provide the missing information, the matter could be dealt with under the certification procedure”.<sup>166</sup> In 1988, the Chairman confirmed that “in order to comply with the Council Decision of 26 March 1980 on the introduction of the loose-leaf system, all the columns of a schedule had to be completed”. The Chairman recalled that “the Harmonized System schedules annexed to the protocols which did not contain entries in all seven columns were considered as legally valid, but incomplete consolidated schedules”.<sup>167</sup>

### (3) *Legal basis for determining initial negotiating rights (INRs)*

The Director-General’s proposal adopted on 26 March 1980 on “Introduction of a Loose-leaf System for the Schedules of Tariff Concessions” provides:

<sup>161</sup>TAR/W/93, paras. 8-9; see also TAR/W/81: “Amendment of the Harmonized Commodity Description and Coding System 1992) - Note by the Secretariat”, dated 30 April 1991; TAR/W/81/Add.1 containing the correlation tables between HS 1988 and HS 1992”, dated 2 July 1991; L/6905: “Procedures to Implement Changes in the Harmonized System”, dated 20 September 1991; TAR/W/89: “Changes in the Harmonized System to be introduced on 1 January 1996 - Note by the Secretariat”, dated 4 May 1993; TAR/W/91: “Changes in the Harmonized System to be Introduced on 1 January 1996 - Correlation Tables”, dated 20 June 1994; and CCC document No. 38700: “Amendments to the Nomenclature appended as an Annex to the Convention accepted pursuant to the Recommendation of 6 July 1993 of the Customs Co-operation Council”.

<sup>162</sup>EPCT/TAC/PV/25, p. 13-14.

<sup>163</sup>See, e.g. Protocols for the Accession of Bolivia, L/6562, 37S/5, 6, para. 10, or Costa Rica, L/6626, 37S/7, 9, para. 12.

<sup>164</sup>L/6987, para. 5; Marrakesh Protocol, para. 8.

<sup>165</sup>C/107/Rev.1, 27S/22, 23, para. 5; format appears in Annex to L/4821/Add.1.

<sup>166</sup>TAR/M/25, p. 5-6, para. 7.4.

<sup>167</sup>TAR/M/26, p. 3, para. 4.1.



“So far, initial negotiating rights (INRs) have only been indicated in working documents on schedules in connexion with renegotiations or with consolidation of schedules. In the final, published schedules the indication of INRs has so far been deleted. In order to make the loose-leaf system as transparent as possible and to remove the need for contracting parties to consult underlying documents, I propose that *the INRs be indicated in the loose-leaf schedules* as foreseen in the fifth column of the proposed format annexed to L/4821/Add.1 ...

“There is an understanding in the GATT concerning consolidated schedules that earlier schedules and negotiating records should be considered as proper sources in interpreting concessions in consolidated schedules (7S/115-116). This understanding is valid *inter alia* for INRs regarding earlier bindings made at a higher level than the present bound rate on a certain item. ... I propose that *this understanding will cease to be valid as regards the previous INRs when the loose-leaf schedules have been established and that all these previous INRs must, in order to maintain a legal value, be indicated in the loose-leaf schedules*. As the incorporation of previous INRs into the Schedules will necessitate time-consuming research in old negotiating records, I suggest that ... earlier schedules and negotiating records will remain proper sources for interpreting concessions until 1 January 1987.”<sup>168</sup>

A Secretariat Note of 1982 on “Submission of Loose-leaf Schedules - Initial Negotiating Rights regarding Earlier Bindings” notes that “the way of presenting previous INRs is a purely bilateral matter” and states as follows:

“In the course of the preparation of loose-leaf schedules, it was found that a complete listing of previous INRs in respect of concessions given in different nomenclatures and at different rates could be very complicated and in some cases could amount to several pages of INRs in respect of one tariff line ...

“It appears ... that the best solution would be to permit a country submitting a schedule to examine bilaterally with countries having INRs in respect of earlier concessions if simplifications could be made in the presentation of the INRs. INRs at different levels and with different item descriptions could thus, for example, be condensed into only one INR at a level to be mutually agreed upon and expressed in the present nomenclature. Such a solution would, however, have to be agreed upon by the two sides. If the INR holder requests, the country submitting the schedule would have to fill in column 7 in full detail.”<sup>169</sup>

On 6 November 1986, the Council agreed, in response to a request from the Committee on Tariff Concessions, to change the wording of paragraph 8 of the decision of 26 March 1980 from “until 1 January 1987” to read “until a date to be established by the Council”.<sup>170</sup> The Council has not subsequently established any such date.

The Tariff Division of the Secretariat maintains a complete archive of all bilateral agreements regarding concessions since 1947.

Concerning the definition and application of initial negotiating rights, see Article XXVIII.

## **7. Application of concessions**

### **(1) National tariff schedules**

The Procedures for Rectification and Modification of Schedules agreed on 26 March 1980 provide that:

“... *Considering* the importance of keeping the authentic texts of Schedules annexed to the General Agreement up to date and of ensuring that they tally with the texts of corresponding items in national customs tariffs; ...

<sup>168</sup>C/107/Rev.1, 30S/22, 23-24, paras. 7-8.

<sup>169</sup>TAR/W/30, dated 23 June 1982, paras. 2, 4-5.

<sup>170</sup>Report by Vice-Chairman of the Committee to the Council on 6 November 1986, TAR/132, 33S/133, 135 para. 10.

“The CONTRACTING PARTIES decide that ...

“2. Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications. A draft of such changes shall be communicated to the Director-General where possible within three months but not later than six months after the amendment or rearrangement has been introduced in the national customs tariff ... .”<sup>171</sup>

The Secretariat has issued periodically for the Committee on Tariff Concessions lists of information available in the Secretariat on national tariff schedules.<sup>172</sup>

### **(2) Changes in tariff nomenclature**

It was agreed in 1955 that the adoption of the Brussels Tariff Nomenclature as such presented no basic problem so far as schedules to the General Agreement are concerned. Since such a change would not necessarily impair concessions, the contracting party wishing merely to change the nomenclature of its schedule could resort to the normal rectification procedures; see at page 70 above.<sup>173</sup> See also the material above on introduction of the Harmonized System.

### **(3) Provisional accession to the General Agreement**

The Declarations on the provisional accession of certain contracting parties to the General Agreement stated that the contracting party in question “shall not have any direct rights with respect to the concessions contained in the schedules annexed to the General Agreement either under the provisions of Article II or under the provisions of any other Article of the General Agreement”.<sup>174</sup>

See also the discussion of provisional accession under Article XXXIII.

## **8. Modification of concessions**

See Article XXVIII and the material above on paragraph 1 of Article II.

## **9. Modification and rectification of Schedules**

The General Agreement provides for various types of tariff negotiations among contracting parties (Article XXVIII *bis*) or with acceding governments (Article XXXIII) as well as for renegotiations (Article XXVIII:1, 4, 5, Article XVIII:7, XXIV:6), or withholding or withdrawal of concessions (Article XXVII). Each modification of concessions brings a corresponding modification of Schedules.

### **(1) Procedures for modification or rectification of Schedules**

In the early years of the GATT, modification and rectification of Schedules was carried out by means of Protocols. See the material on this subject under Article XXX.

<sup>171</sup>L/4962, 27S/25, para. 2.

<sup>172</sup>See TAR/W/40/Rev.13, “Tariff Information Available in the Secretariat”, dated 13 November 1994 (or later revisions); TAR/W/85, “Status of Schedules of Contracting Parties to the GATT”, dated 16 October 1992.

<sup>173</sup>Report on “Transposition of Schedule XXXVII - Turkey”, L/294, adopted on 20 December 1954, 3S/127, para. 2.

<sup>174</sup>See, e.g., 8S/10, 20S/9.

Procedures for modification and rectification of Schedules were agreed in the following decisions: Decision of 17 November 1959,<sup>175</sup> Decision of 19 November 1968,<sup>176</sup> Decision of 26 March 1980.<sup>177</sup> The latter Decision provides, *inter alia*, that:

“1. Changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII shall be certified by means of Certifications. A draft of such change shall be communicated to the Director-General within three months after the action has been completed.

“2. Changes in the authentic texts of Schedules shall be made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items. Such changes and other rectifications of a purely formal character shall be made by means of Certifications. A draft of such changes shall be communicated to the Director-General where possible within three months but not later than six months after the amendment or rearrangement has been introduced in the national customs tariff or in the case of other rectifications, as soon as circumstances permit.

“3. The draft containing the changes described in paragraphs 1 and 2 shall be communicated by the Director-General to all the contracting parties and shall become a Certification provided that no objection has been raised by a contracting party within three months on the ground that, in the case of changes described in paragraph 1, the draft does not correctly reflect the modifications or, in the case of changes described in paragraph 2, the proposed rectification is not within the terms of that paragraph.

“4. Whenever practicable Certifications shall record the date of entry into force of each modification and the effective date of each rectification.

“5. The procedure of Certification under this Decision may be applied for the establishment of consolidated Schedules or of new Schedules under paragraph 5(c) of Article XXVI, wherein all changes are modifications or rectifications referred to in paragraphs 1 or 2.

“6. This Decision supersedes the Decision of 19 November 1968.”

The following certifications of changes to Schedules have been issued:

|  |                  |         |
|--|------------------|---------|
| First Certification of Changes to Schedules  | 12 July 1969     | 17S/12  |
| Second Certification of Changes to Schedules | 9 January 1974   | 21S/19  |
| Third Certification of Changes to Schedules  | 23 October 1974  | 21S/20  |
| Fourth Certification of Changes to Schedules | 20 April 1979    | 26S/198 |
| Fifth Certification of Changes to Schedules  | 7 August 1981    | 28S/10  |
| Sixth Certification of Changes to Schedules  | 28 November 1987 | 35S/4   |

Since the Sixth Certification, changes to schedules have been made and certified on an ad hoc basis: see directly below.

## ***(2) Certifications of rectifications and modifications***

Certifications are governed by the Decision of 26 March 1980 on “Procedures for Modifications and Rectifications of Schedules of Tariff Concessions”. A 1985 Secretariat Note on “Loose-leaf Schedules Based on Harmonized System Nomenclature” describes practice with regard to certifications.

<sup>175</sup>8S/25.

<sup>176</sup>16S/16.

<sup>177</sup>27S/25.

“The general practice for *certifications* ... has been that notifications received (at irregular intervals) from contracting parties concerning changes in tariff schedules are circulated to all contracting parties in a TAR- document. In this document it is indicated that if no objection is notified to the secretariat within three months, the respective change in the tariff schedule (modification or rectification) will be deemed to be approved and will be included in the next certification of changes to schedules. When a sufficient number of notifications have been approved, a (collective) draft certification is prepared and circulated by the secretariat to all contracting parties. This draft certification contains a proviso to the effect that if no objection is raised by a contracting party within three months from the date of its circulation on the ground that the draft does not correctly reflect modifications which have (already) entered into force, or that the rectifications (included in the draft) are not of a purely formal character, the draft will become a draft certification under paragraph 3 of the 1980 Decision ...

“In the context of the discussions leading to the establishment of a loose-leaf system of tariff schedules ... it was understood ... that in order to simplify and accelerate the certification process, a consolidated loose-leaf schedule - and subsequent amendments to it - would be certified if, upon its initial circulation in a TAR- document, no objections had been raised within the three-month period mentioned above, thus obviating the need for a second circulation of a (collective) draft certification ...

“... *Certifications* ... require the tacit approval of all contracting parties before being approved, by virtue of the (first) three-month period during which objections against proposed changes in tariff schedules can be raised. A contracting party with which agreement concerning the proposed changes has not been reached can thus indefinitely block the entry into force of the certification.”<sup>178</sup>

The most recent Certification to enter into force is the Sixth Certification of Changes to Schedules to the General Agreement on Tariffs and Trade, of 28 November 1987.<sup>179</sup>

Since the Sixth Certification was issued, it was agreed that because of the introduction of the loose-leaf system, changes to schedules would be made on an ad hoc basis. These changes are circulated in documents in the TAR/ series under the Decision of 26 March 1980 on Procedures for Modifications and Rectifications of Schedules of Tariff Concessions, and are certified through documents in the Let/ series.<sup>180</sup>

### **(3) Legal effect of certification**

The Sixth Certification provides that “it is hereby certified (i) that the authentic texts of Schedules to the General Agreement are changed to reflect the rectifications of a purely formal character or the modifications resulting from action taken under paragraph 6 of Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII of the General Agreement as set out in Annex A; and (ii) that Schedules in Annex B are established in conformity with paragraph 5 of the Decision [of 26 March 1980] and that, in each case in which Article II of the General Agreement refers to the date of the Agreement, the applicable date in respect of any concession contained in these Schedules shall be the date of the instrument by which the concession was first incorporated in the relevant Schedule to the General Agreement ...”.<sup>181</sup>

A 1987 Secretariat Note on “Harmonized System Negotiations under Article XXVIII” states that: “Although the uncertified loose-leaf schedules represent important sources of information and bases for negotiations, they have no legal status. It follows that past protocols and other legal instruments continue to

<sup>178</sup>TAR/W/55/Add.1, p. 2-3, paras. 5-7.

<sup>179</sup>TAR/138, and Add.1 & 2, 35S/4; for a list of all previous Protocols and Certifications of rectifications and modifications, see the index to the annual Supplements to the BISD under “Schedules”.

<sup>180</sup>See, for instance, TAR/172, dated 5 January 1989 (notification by Austria of results of Article XXVIII negotiations with Japan and modification of Schedule XXXII - Austria, together with sets of replacement loose-leaf pages), and Let/1631 dated 5 June 1989 (transmission of certified true copy of Certification of Modification and Rectifications relating to Schedule XXXII - Austria, done at Geneva on 31 May 1989).

<sup>181</sup>TAR/138 and Add.1 & 2, 35S/4-5.

keep their legal status until the time of certification of the respective loose-leaf schedules or their entry into force by means of a Protocol".<sup>182</sup>

#### **(4) Application of rectification procedures in other agreements**

On 16/17 December 1980, the Committee on Trade in Civil Aircraft decided to apply the Council's Decision of 26 March 1980 on Modification and Rectification of Schedules (27S/25) in respect of the Annex to the Agreement on Trade in Civil Aircraft.<sup>183</sup> The Agreement on Government Procurement provides simplified procedures for rectifications of a purely formal nature and minor amendments relating to Annexes I-IV, and a more elaborate procedure for modifications to lists of entities.<sup>184</sup> On 27 April 1982, the Government of Switzerland added the "Government of the Principality of Liechtenstein" to its list of covered entities annexed to the Agreement on Government Procurement. A Secretariat legal opinion of 12 June 1992 concluded that since this addition would not appear to add new obligations for other Parties, no re-establishment of the balance of rights and obligations would be necessary; since the purpose of the more elaborate procedures in subparagraph (b) was to permit re-establishment of this balance, the case in question would fit more appropriately under the simplified procedures of subparagraph (a). At its meeting of 26 June 1992 the Committee on Government Procurement noted that the addition in question had been correctly notified under Article IX:5(a).<sup>185</sup>

### **10. Withholding or withdrawal of concessions**

Tariff protocols concluding rounds of multilateral trade negotiations in which one or more governments have negotiated accession to the GATT have included provisions regarding the application of Article XXVII. For instance, both the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade and the Protocol Supplementary to the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade included the following provision on withholding or withdrawal of concessions.

"After the schedule of tariff concessions annexed to this Protocol relating to a participant has become a Schedule to the General Agreement pursuant to the provisions of paragraph 1, such participant shall be free at any time to withhold or to withdraw in whole or in part the concession in such schedule with respect to any product for which the principal supplier is any other participant or any government having negotiated for accession during the Multilateral Trade Negotiations, but the schedule of which, as established in the Multilateral Trade Negotiations, has not yet become a Schedule to the General Agreement. Such action can, however, only be taken after written notice of any such withholding or withdrawal of a concession has been given to the CONTRACTING PARTIES and after consultations have been held, upon request, with any participant or any acceding government, the relevant schedule of tariff concessions relating to which has become a Schedule to the General Agreement and which has a substantial interest in the product involved. Any concessions so withheld or withdrawn shall be applied on and after the day on which the schedule of the participant or the acceding government which has the principal supplying interest becomes a Schedule to the General Agreement."<sup>186</sup>

### **11. Notification of national tariff schedules, the Tariff Study and the Integrated Data Base**

The "IDB User Reference Manual" issued by the Secretariat on 19 April 1994 notes that:

"The GATT Secretariat has maintained a data base on tariffs and trade since the early seventies. The first GATT data base, known as the Tariff Study, contained information on customs tariffs and imports of eleven OECD markets (including the European Communities counted as one market). The Tariff Study was designed to analyze the tariff situation in the developed markets after the Kennedy Round. Under the guidance of a group of technical experts from governments, the Secretariat prepared several analyses of the

<sup>182</sup>TAR/W/65/Rev.1, dated 14 January 1987, para. 1.

<sup>183</sup>L/5094, L/5225, 28S/43, para. 4; see also AIR/41, AIR/M/3 and AIR/M/9.

<sup>184</sup>26S/33, 53, Article IX:5. For examples see, e.g., GPR/46-52, 54-55, 58-59.

<sup>185</sup>GPR/68, dated 13 July 1992, referring to Secretariat opinion in GPR/W/114 dated 12 June 1992.

<sup>186</sup>26S/4. See also corresponding provisions in the Geneva (1967) Protocol to the General Agreement, 15S/6, para. 3.

tariff situation during the early seventies. A final analysis was published before the Tokyo Round in four volumes known as 'the Basic Documentation for the Tariff Study'.

"During the Tokyo Round, the Tariff Study exercise was continued to assist the participants in the negotiations. Access to the Tariff Study data was restricted to the 11 contracting parties participating in the exercise. However, during and after the Tokyo Round, the participants authorised the Secretariat to provide developing countries with summary information extracted from the Tariff Study files concerning products of export interest to them.

"Between 1980 and 1987, the Tariff Study files continued to be updated on an annual basis to follow the application of the Tokyo Round concessions which were implemented in eight annual stages starting 1 January 1980.

"In 1983, a group of technical experts from governments was convened to analyze the feasibility of establishing a data base containing information to be used in Article XXVIII negotiations which were necessary before the Harmonized System could be implemented. ... The Secretariat established, in parallel with the Tariff Study, the HS common data base in which only the five major developed markets participated.

"From 1986, the Group of experts on the HS data base studied the feasibility of replacing the Tariff Study exercise by a new data base in which all GATT Contracting Parties would be invited to participate and which would cover not only customs tariffs and imports but also non-tariff measures and, if feasible in the future, any additional statistics which could be "integrated" with the above three areas.

"In November 1987, the GATT Council launched the Integrated Data Base (IDB) and the Group of experts on the HS data base became the Informal Advisory Group (IAG) on the IDB in which experts from *all contracting parties* were invited to participate with a view to guiding the Secretariat in the preparation of the IDB and reporting to the Council on the progress of the work. ..."<sup>187</sup>

On 10 November 1987 the Council agreed to a Decision on an "Integrated Data Base", providing that the Secretariat would begin work on setting up an integrated data base, and noting that the information would initially be restricted to three categories of data, each at the tariff line level: imports, tariffs and quantitative restrictions. The Decision noted as well that "with respect to the data elements ... contracting parties have already agreed to notification requirements affecting quantitative restrictions ... and bound tariffs. [The Council a]grees that, for the purposes of the integrated data base, contracting parties should also submit annually to the secretariat, by tariff line, tariff data for unbound items and import data for all bound and unbound items."<sup>188</sup> The Council decision also recommends that, when the IDB is operational, all contracting parties will have access to the data base, including the tariff study data base. The IDB User Reference Manual notes that as of April 1994, 45 contracting parties (the EC being counted as one) participated in the IDB, accounting for over 97 percent of total merchandise trade of GATT contracting parties.<sup>189</sup>

### III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

*Differences from Havana Charter text:* The Havana Charter did not itself provide for the scheduling of tariff concessions. Article 17 of the Charter on "Reduction of Tariffs and Elimination of Preferences" obligated each ITO Member to negotiate on request concerning reduction of tariffs, other charges and preferences; paragraph 3 provided that the Geneva negotiations leading to the GATT would be deemed to be negotiations under Article 17. Concessions made in Article 17 negotiations would be incorporated in the

<sup>187</sup>IDB/URM/1, dated 19 April 1994.

<sup>188</sup>L/6290, 34S/66, para. 3, referring to: Decision of 30 November 1984, L/5754/Rev.1, 31S/12, adopting *inter alia* recommendations in para. 44 of the Report on "Quantitative Restrictions and Other Non-Tariff Measures", L/5713, 31S/211; and Director-General's proposal adopted 26 March 1980 on "Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions".

<sup>189</sup>IDB/URM/1, dated 19 April 1994.

GATT on terms to be agreed with the GATT contracting parties. Hence, the scheduling provisions of the GATT were located in Part I, which under Article XXIX:2 would not be superseded by the Charter when the Charter entered into force.

*Preparatory work of Article II:* During the London session of the Preparatory Committee, the Procedures Sub-Committee of Committee II drew up a “Resolution Regarding the Negotiation of a Multilateral Trade Agreement Embodying Tariff Concessions”<sup>190</sup>, and “Procedures for Giving Effect to Certain Provisions of the Charter of the International Trade Organization by Means of a General Agreement on Tariffs and Trade Among the Members of the Preparatory Committee”.<sup>191</sup> The Resolution, noting that the United States government had invited the members of the Preparatory Committee “to meet to negotiate concrete arrangements for the relaxation of tariffs and trade barriers of all kinds and the invitation has been accepted”, recommended “that the meeting envisaged by the invitations ... should be held under the sponsorship of the Preparatory Committee in connection with, and as a part of, the Second Session of the Committee”. The Procedures provided negotiating rules, as well as specific provisions on the use of the principal supplier rule in negotiations, the form of tariff schedules (see page 103 above) and the status of preferential rates of duty; they also provided a draft outline of a General Agreement on Tariffs and Trade, of which Article III provided that “Each signatory government shall accord to the commerce of the customs territories of the other signatory governments the treatment provided for in the appropriate Schedule annexed to this Agreement and made an integral part thereof”.<sup>192</sup>

The General Agreement was then discussed at the Drafting Committee in New York. Article VIII of the draft of the General Agreement in the Drafting Committee Report included paragraphs corresponding to the present paragraphs 1(a), 3 and 4 of Article II; a footnote to Article VIII stated that it was contemplated that at an appropriate place in each schedule of concessions, notes would be included, the text of which corresponded to the present paragraphs 1(b), 2(a) and 5 of Article II. There were no provisions on renegotiation of concessions.

At the Geneva session of the Preparatory Committee, the text of the General Agreement was principally negotiated in the meetings of the Tariff Agreement Committee, which discussed (*inter alia*) scheduling provisions, the contents of schedules, and formalities for putting the General Agreement into effect. The headnote to the first draft model schedule included the provisions now in paragraphs 1(b) and (c) and 2 of Article II, which were later moved into the Article.<sup>193</sup>

Article II has been amended only once, in 1948, when the reference to Article III in paragraph 2(a) was altered as a conforming change associated with the replacement of the original text of Article III by the text of Article 18 of the Havana Charter. This change was effected by the Protocol Modifying Part I and Article XXIX, which entered into force on 24 September 1952.

During the Review Session of 1954-55, it was agreed to amend paragraphs 1(b) and 1(c) to include references to charges on the transfer of payments (see page 81); to amend paragraph 6(a) (see page 97); to delete the interpretative note to paragraph 2(a) as outdated; and to redraft the interpretative note to paragraph 4 (see page 92). However, these amendments were made in the Protocol Amending Part I and Articles XXIX and XXX, which failed to gain the requisite unanimous approval and was abandoned.<sup>194</sup>

---

<sup>190</sup>London Report, Annexure 7, p. 47-48.

<sup>191</sup>London Report, Annexure 10, p. 48-52. See also generally the verbatim records of the Sub-Committee on Procedures, EPCT/C.II/PRO/PV/5-15 and its summary records in the series EPCT/C.II/W/2-31.

<sup>192</sup>*Ibid.* p. 52.

<sup>193</sup>EPCT/153; discussion at EPCT/TAC/PV/21, p. 16ff; EPCT/201; discussion at EPCT/TAC/PV/23 p. 15ff.

<sup>194</sup>15S/65.

**IV. RELEVANT DOCUMENTS***New York*

Reports: EPCT/C.6/74, 79  
Other: EPCT/C.6/W.58

*Geneva*

Discussion: EPCT/TAC/PV/8, 9, 16, 21, 23, 24, 26, 27, 28  
Reports: EPCT/135, 153, 191, 201, 208, 211, 214/Add.1/Rev.1  
Other: EPCT/189+Corr.2, 196, 238  
EPCT/W/272, 287, 312, 318, 321, 341

*Review Session*

Discussion: SR.9/16, 18, 20, 36  
Reports: W.9/124, 177, 193, 200, 212+Corr.1, 217+Corr.1, 236  
Other: L/189, 261/Add.1  
W.9/45, 70, 109/Rev.1, 113, 118, 223  
Spec/4/55, 85/55, 94/55



## V. SCHEDULES OF CONTRACTING PARTIES TO THE GATT 1947

| Contracting party               | Schedule | Contracting party                     | Schedule |
|---------------------------------|----------|---------------------------------------|----------|
| Argentina                       | LXIV     | Myanmar                               | IV       |
| Australia                       | I        | Namibia                               | XC       |
| Austria                         | XXXII    | Netherlands                           | (EC)     |
| Bangladesh                      | LXX      | New Zealand                           | XIII     |
| Belgium                         | (EC)     | Nicaragua                             | XXIX     |
| Benelux (Part D only)           | II       | Niger                                 | LIII     |
| Part D - Netherlands Antilles   |          | Nigeria                               | XLIII    |
| Benin                           | XLVIII   | Norway                                | XIV      |
| Bolivia                         | LXXXIV   | Pakistan                              | XV       |
| Brazil                          | III      | Paraguay                              | XCI      |
| Burkina Faso                    | XLVI     | Peru                                  | XXXV     |
| Burundi                         | LV       | Philippines                           | LXXV     |
| Canada (E/F)                    | V        | Poland                                | LXV      |
| Chile (E/S)                     | VII      | Portugal                              | (EC)     |
| Colombia (E/S)                  | LXXXVI   | Romania                               | LXIX     |
| Costa Rica                      | LXXXV    | Rwanda                                | LVI      |
| Côte d'Ivoire                   | LII      | Senegal                               | XLIX     |
| Cuba                            | IX       | Singapore                             | LXXIII   |
| Czech Republic                  | XCII     | Slovak Republic                       | XCIII    |
| Denmark                         | (EC)     | Slovenia                              | XCVI     |
| Djibouti                        | CXXXVII  | South Africa                          | XVIII    |
| Dominican Republic              | XXIII    | Spain                                 | (EC)     |
| European Communities            | LXXX     | Sri Lanka                             | VI       |
| (E/F) (12)                      |          | Surinam                               | LXXIV    |
| Egypt                           | LXIII    | Sweden                                | XXX      |
| El Salvador                     | LXXXVII  | Switzerland (including Liechtenstein) | LIX      |
| Finland                         | XXIV     | Thailand                              | LXXIX    |
| France                          | (EC)     | Trinidad & Tobago                     | LXVII    |
| France (Parts E, H, K, M only)  | XI       | Tunisia                               | LXXXIII  |
| Part E - French Establishments  |          | Turkey                                | XXXVII   |
| in Oceania                      |          | United Kingdom                        | (EC)     |
| Part H - Indo-China             |          | United Kingdom (Part B only)          | XIX      |
| Part K - New Caledonia and      |          | Part B - Bahamas                      |          |
| Dependencies                    |          | United States                         | XX       |
| Part M - St.Pierre and Miquelon |          | Uruguay                               | XXXI     |
| Gabon                           | XLVII    | Venezuela                             | LXXXVI   |
| Germany                         | (EC)     | Yugoslavia                            | LVII     |
| Greece                          | (EC)     | Zaire                                 | LXVIII   |
| Guatemala                       | LXXXVIII | Zambia                                | LXXVIII  |
| Guinea                          | CXXXVI   | Zimbabwe                              | LIV      |
| Haiti                           | XXVI     |                                       |          |
| Honduras                        | XCIV     |                                       |          |
| Hong Kong                       | LXXXII   |                                       |          |
| Hungary                         | LXXI     |                                       |          |
| Iceland                         | LXII     |                                       |          |
| India                           | XII      |                                       |          |
| Indonesia                       | XXI      |                                       |          |
| Ireland                         | (EC)     |                                       |          |
| Israel                          | XLII     |                                       |          |
| Italy                           | (EC)     |                                       |          |
| Jamaica                         | LXVI     |                                       |          |
| Japan                           | XXXVIII  |                                       |          |
| Korea, Republic of              | LX       |                                       |          |
| Luxembourg                      | (EC)     |                                       |          |
| Macau                           | LXXXIX   |                                       |          |
| Madagascar                      | LI       |                                       |          |
| Malawi                          | LVIII    |                                       |          |
| Malaysia                        | XXXIX    |                                       |          |
| Mali                            | XCIV     |                                       |          |
| Mauritania                      | L        |                                       |          |
| Mexico                          | LXXVII   |                                       |          |
| Morocco                         | LXXXI    |                                       |          |

**Notes:**

A summary of the status of Schedules of contracting parties appears in TAR/W/85 dated 16 October 1992.

1. Schedule II - Benelux, Part D (Netherlands Antilles) remains in force.
2. The concessions in Schedule XI - France, Parts E, H, K, M (French Establishments in Oceania, Indo-China, New Caledonia and Dependencies, St.Pierre and Miquelon) remain in force. Part H was terminated for Laos and Vietnam upon expiry of their *de facto* application of the General Agreement but is applied *de facto* by Cambodia pending decision on accession to the General Agreement.
3. The status of Schedule XLVII - Gabon is uncertain, Gabon not having recognized the concessions in the former Schedule XI - France, Part B when it acceded under Article XXVI:5(c) in 1963; see L/2169, 12S/75-76.
4. The concessions in Schedule XIX - United Kingdom, Part B (Bahamas) are applied by the Bahamas *de facto* pending decision on accession to the General Agreement.
5. (EC) signifies that the original Schedule was withdrawn and replaced by the Schedule of the European Communities.