

TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER
THE GATT AND THE WTO:

PROCEDURES AND PRACTICES

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PREFACE

1. The procedures and practices to implement the provisions relating to tariff negotiations and renegotiations have evolved considerably since the GATT was established in 1947. The provisions themselves have undergone some changes in the last fifty-two years. This study reviews the evolution of these provisions and of the procedures adopted and practices followed by the contracting parties to GATT 1947 and the Members of the WTO. The first chapter outlines the legal framework of tariff negotiations and renegotiations as it exists at present. The second deals with tariff negotiations held in the context of multilateral trade negotiations and includes accession negotiations. The third takes up bilateral and plurilateral negotiations held under GATT 1947 as well as under the WTO outside the context of tariff conferences and rounds of multilateral trade negotiations. The fourth is devoted to renegotiations under the various provisions of the General Agreement, and particularly Article XXVIII and Article XXIV:6. In the fifth chapter some issues on such technical aspects as rectification, consolidation and implementation of the Harmonized System are explored. The last chapter offers some conclusions and recommendations.

2. The source used for the research has been mainly the original records available in the archives of the WTO Secretariat and Secretariat notes.

3. I have benefited greatly from the comments made on the first draft by Mr. Ake Linden, Dr. Frieder Roessler, Mr. William Davey and Miss Yvette Davel, former staff members of the Secretariat. I have also had very useful suggestions from Mr. Heinz Opelz, Director, Market Access Division and Mr. Alberto Campeas, Director, Textiles Division, who was Director of the Tariff Division during the Uruguay Round. I am also very grateful for the help received from Mrs. Suja Rishikesh-Mavroidis and Ms. Nimala Liyanapatabendi, both from the Market Access Division, in finding and selecting the necessary resource material and in ensuring the correctness of the references quoted in the study. I must also acknowledge with thanks the secretariat assistance rendered by Miss Mary McCormack. However, I would like to take full responsibility for any errors of fact or analysis that might have remained and to emphasize that the opinions expressed are entirely mine and do not reflect the views of the WTO Secretariat.

Anwarul Hoda

CHAPTER I

LEGAL FRAMEWORK FOR TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER GATT 1994¹

1. Several articles of the General Agreement have a bearing on the process of tariff negotiations and renegotiations. An analysis of all these articles and the ways in which the provisions impinge on the commitments made during tariff negotiations and renegotiations is outside the scope of this work. We take up only those articles which have a direct bearing on the subject of our study.

A. Provisions relating to Tariff Negotiations

2. While GATT 1947 (like GATT 1994) prohibited quantitative restrictions as a general rule, it allowed the use of "duties, taxes or other charges" for the regulation of trade. Furthermore, the national treatment provision which required that, once goods had been imported, they should be treated on equal terms with domestically-produced goods, served to ensure that all discriminatory taxes (i.e. tariffs) aimed at protection were applied in a transparent manner only at the border. The plan envisaged in 1947 for the liberalization of world trade was to prohibit the application of quantitative restrictions, to allow regulation of import (and export) through transparently-administered non-discriminatory tariffs applied at the border, and then to work for the progressive reduction of these tariffs through successive rounds of negotiations.

Periodic tariff negotiations

Article 17 of the Havana Charter provided, *inter alia*, as follows:

"Each Member shall, upon the request of any other Member, or Members, and subject to procedural arrangements established by Organization, enter into and carry out with such other Member or Members, negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16, on a reciprocal and mutually advantageous basis."

3. The desiderata contained in this provision provided the basis for the initial rounds of tariff negotiations held under GATT 1947. It was not until the Review Session of 1954-55 that the present Article XXVIII *bis* was introduced, entering into force on 7 October, 1957. This Article envisages that from time to time the Ministerial Conference may sponsor negotiations directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities. The report of the Working Party, on the recommendation of which this Article was added to GATT 1947, noted that "(t)he article

¹ The WTO Agreement provides that references to "contracting party" shall be deemed to read "Member". As for the term "CONTRACTING PARTIES" which refers to contracting parties acting jointly, it provides that, in the case of certain provisions (which are not of relevance in this study) the reference shall be deemed to be references to the WTO while, in the case of other provisions (which are of relevance in this study) the functions of the CONTRACTING PARTIES shall be allocated by the Ministerial Conference. No such allocation has, however, been decided upon so far.

In describing the provisions of GATT 1994, therefore, we have substituted "contracting party" by "Member" and the "CONTRACTING PARTIES" by the "Ministerial Conference". Since the functions of the Ministerial Conference are carried out by the General Council in the intervals between meetings of the Ministerial Conference, for all practical purposes references to the Ministerial Conference should be deemed to be references to the General Council. References to contracting party and CONTRACTING PARTIES occur only when an account is being given of what happened during the operation of GATT 1947.

would impose no new obligations on contracting parties. Each contracting party would retain the right to decide whether or not to engage in negotiations or participate in a tariff conference." Thus, under GATT 1947, participation in tariff negotiations was optional. The position remains unchanged in the WTO Agreement, even though the requirement for original membership of the WTO that contracting parties to GATT 1947 should have Schedules of Concessions and Commitments annexed to GATT 1994 besides Schedules of Specific Commitments annexed to GATS, made participation in the tariff negotiations (as well as the negotiations for specific commitments in GATS) obligatory during the Uruguay Round.

Principle of reciprocity

4. A central requirement of Article 17 of the Havana Charter and Article XXVIII *bis* of the General Agreement is that the negotiations be held on a reciprocal and mutually advantageous basis. There is no provision on the manner in which reciprocity is to be measured and even the rules of various rounds of negotiations did not spell out any guidelines on the issue. The understanding has always been that governments participating in negotiations should retain complete freedom to adopt any method for evaluating the concessions.

Modalities of tariff negotiations

5. On the modalities of tariff negotiations, Article XXVIII *bis* leaves it to participants to decide whether the negotiations should be carried out on a selective product-by-product basis or by the application "of such multilateral procedures as may be accepted by the contracting parties concerned". It envisages that the negotiations could result in the reduction of duties, the binding of duties at existing levels or commitments not to raise duties on particular products beyond specified levels. It stipulates further that "(t)he binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties".

6. Article XXVIII *bis* also provides for the negotiations to take into account the diversity of situations of individual participating countries "including the fiscal, developmental, strategic and other needs" and the needs of developing countries for tariff protection to assist their economic development and to maintain tariffs for revenue purposes.

Concept of non-reciprocity

7. In the 1960s and 1970s the concept of non-reciprocity was developed for trade negotiations between developed and developing countries and was embodied in paragraph 8 of Article XXXVI, which was introduced in Part IV of the General Agreement and became effective on 27 June 1966. This paragraph states that "(t)he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties". An interpretative note adds that the developing countries "should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments". The interpretative note also extends the applicability of the concept of non-reciprocity to renegotiations under Article XVIII or XXVIII.

8. The concept was further elaborated in the Tokyo Round Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", also known as the "Enabling Clause", which was adopted on 28 November 1979. This clause provided, *inter alia*, as follows:

"The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade

needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs....Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.¹²

Supplementary negotiations

9. In the years before Article XXVIII *bis* was introduced into GATT 1947, the practice had been established for negotiations to take place for tariff concessions even outside of general tariff conferences or rounds of negotiations. In fact, while adopting the procedures for the Torquay Tariff Conference, the CONTRACTING PARTIES had also established procedures³ for negotiations between two or more contracting parties at times other than during general tariff conferences. These procedures require notification to other contracting parties about the date and place of negotiation and circulation of the request lists exchanged between contracting parties proposing negotiations. Other contracting parties are given the right to join in these negotiations. The procedures provide for a selective, product-by-product basis for the negotiations. These bilateral and plurilateral negotiations are known as supplementary negotiations and their results as supplementary concessions.

Tariff negotiations during accession

10. Although tariff negotiations are a substantial component of the process of accession of governments, neither Article XXXIII of GATT 1947 (which is now no longer relevant) nor Article XII of the WTO Agreement gives any guidelines on how such negotiations are to be conducted. The latter article provides simply, as the former had done until it ceased to be in force, for the accession to take place on "terms to be agreed" between the applicant government and the full membership. One of the terms is in every case commitments for market access, including reduction and binding of tariffs. The negotiations for securing tariff commitments are made on a bilateral basis between the applicant-government and its main trading partners.

Tariff commitments on behalf of dependent territories

11. The Protocol of Provisional Application of GATT 1947 provided for the acceptance of the Protocol by the contracting parties in respect of their metropolitan territories as well as on behalf of their dependent territories. Article XXVI 5(c) of GATT 1947 provided that when these dependent territories acquired full autonomy in the conduct of their external commercial relations they would become contracting parties when the responsible contracting parties certified that such autonomy had been acquired. The States which became contracting parties through the succession route of Article XXVI 5(c) were bound by the tariff commitments made earlier on their behalf. On their becoming new contracting parties, a new schedule was established for them on the basis of the corresponding entries in the schedules of the contracting parties which had made the commitments on their behalf. The provision has not been carried forward into the WTO Agreement.

² GATT, BISD, Twenty-sixth Supplement, p.204

³ GATT, BISD, Vol. I, p.116

Non-application

12. Article XXXV of GATT 1947 provided for non-application of either the full Agreement or of Article II of the Agreement between two contracting parties if:

- (a) the two contracting parties had not entered into tariff negotiations with each other, and
- (b) either of the contracting parties, at the time either became a contracting party, did not consent to such application.

13. The prerequisites for non-application of GATT 1947 were so formulated as to provide for such non-application only at the outset (in January 1948) or at the time of accession of a new contracting party. The contracting party invoking the article had the option of providing for the non-application of the entire agreement or only of tariff concessions.

14. Article XIII of the WTO Agreement has a corresponding provision on non-application. However, it can be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force of the WTO Agreement.

B. Provisions relating to Tariff Renegotiations

1. Article XXVIII is the principal provision of GATT 1994 on renegotiations of tariff concessions. It provides for the possibility of modification or withdrawal of tariff concessions after negotiation (renegotiation) with:

- (i) Members with which the concession was initially negotiated; and
- (ii) Members which have a principal supplying interest; and consultation with Members which have a substantial interest.

Such modification or withdrawal can be done:

- (i) on the first day of each three-year period, the first of which began on 1 January 1958;
- (ii) at any time in special circumstances on authorization; or
- (iii) during the three-year period referred to above, if the Member concerned has, before the beginning of the period, elected to reserve the right to renegotiate.

In the negotiations the Member seeking modification or withdrawal is expected to give compensatory concession on other products. If agreement is not reached, the affected Members get the right to withdraw substantially equivalent concessions initially negotiated with the Member making the changes.

Initial negotiating rights (INRs)

2. In the early days of GATT 1947, for every individual concession there were one or more contracting parties with INRs. When at a subsequent negotiation a concession was negotiated at a lower level of tariff on the same product, the contracting party or parties acquiring INRs could be the same or different depending on whether in the meantime there had been changes in the market shares of the product. Thus for each tariff line figuring in successive rounds of negotiations, there could be several layers of INRs held by the same or different contracting parties. The INRs other than those resulting from the latest negotiations are referred to as historical INRs.

3. In the first five rounds of tariff negotiations the technique used was that of item-by-item negotiations on a bilateral request-offer basis. In these negotiations, before the tariff concessions were consolidated in a Schedule, there used to be bilaterally agreed lists of concessions exchanged by participants. In these negotiations, therefore, it was easy to identify the contracting party which had initial negotiating rights (INRs). However, there was no such clarity when, in the Kennedy Round, important trading nations decided to adopt a linear reduction approach. The CONTRACTING PARTIES, therefore, adopted a decision on 16 November 1967 which provided as follows:

"In respect of the concessions specified in the Schedules annexed to the Geneva (1967) Protocol, a contracting party shall, when the question arises, be deemed for the purposes of the General Agreement to be the contracting party with which a concession was initially negotiated if it had, during a representative period prior to that time, a principal supplying interest in the product concerned."⁴

During the discussions of this decision in the Trade Negotiating Committee it was emphasized that the words "that time" referred to "when the question arises". Following the Tokyo Round in which a formula approach was also followed, a similar decision⁵ was adopted on 28 November 1979 in respect of INRs. While another similar decision⁶ was taken in 1988 in connection with the introduction of the Harmonized System, no such decision was adopted for the concessions agreed in the Uruguay Round.

4. As we shall see in the account of the practices and procedures adopted during the tariff negotiations, INRs have also become a bargaining chip and sometimes they are granted in bilateral negotiations as a reward for important reciprocal concessions or used as an element for topping-up in the exercise for bilateral balancing of reciprocal concessions. There have been other instances during accession negotiations in which INRs were specifically excluded in respect of items figuring in bilaterally-agreed lists of concessions. INRs are presumed to exist if any concession is mentioned in a bilateral list drawn up in rounds of negotiations, bilateral or plurilateral negotiations, accession negotiations or renegotiations unless indicated otherwise. Where there are no bilateral lists it is presumed not to exist unless specifically indicated in the Schedule.

5. The Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994 made an addition to the concept of INRs. It is provided that, when a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' statistics are not available), a Member having initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The Understanding also adds the requirement that any Member having a principal supplying interest in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of concession is agreed by the Member concerned.

Principal supplying interest and substantial interest

6. Article XXVIII provides for the Ministerial Conference to determine the Members having a principal supplying interest or substantial interest. However, the procedures adopted for renegotiations with which we shall deal in detail in Chapter IV provide that, if a Member makes a claim of principal supplying interest or substantial interest and the Member invoking Article XXVIII recognizes the claim, "the recognition will constitute a determination by the CONTRACTING PARTIES of the interest in the sense of Article XXVIII:1".⁷

⁴ GATT, BISD, Fifteenth Supplement, p.67

⁵ GATT, BISD, Twenty-sixth Supplement, p.202

⁶ GATT, BISD, Thirty-fifth Supplement, p.336

⁷ GATT, BISD, Twenty-seventh Supplement, pp.26-28

7. An interpretative note to paragraph 1 of Article XXVIII provides that a Member should be determined to have a principal supplying interest if it "has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated, or would...have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party". The interpretative note envisages that generally there would not be more than one or, in those exceptional cases where there is near equality in supplying status, two contracting parties with a principal supplying interest.

8. Another interpretative note mentions one other category of Member with a principal supplying interest: where the concession to be modified affects a major part of the total exports of a country. One more category of countries with a principal supplying interest has been created (and the possibility of consideration being given to yet another category on a future date has been envisaged) in the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994, paragraph 1 of which provides as follows:

"For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is, however, agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question."

9. The Uruguay Round Understanding has clarified two aspects relevant for the determination of principal supplying or substantial interest. First, in the determination of principal supplying interest or substantial interest, only trade which has taken place on an MFN basis is required to be taken into consideration. However, trade which has taken place under non-contractual preferences (such as the GSP) will also be taken into account if the preferential treatment has been withdrawn at the time of the renegotiations or will be withdrawn before the conclusion of the renegotiations. Second, if a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available), for the determination of principal supplying and substantial interests and the calculation of compensation, production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand in the importing Member, have to be taken into account.

10. There is no criterion laid down for determining substantial interest. The Interpretative Notes acknowledge that the concept is not capable of precise definition, but suggest that those Members could be construed as having a substantial interest when they have a significant share in the market. In practice, contracting parties (Members) having 10 per cent or more of the trade share have been recognized as having a substantial interest. Article XXVIII requires Members to negotiate modification or withdrawal with Members having initial negotiating rights or a principal supplying interest and to reach an agreement with them, and the Members with a substantial interest have only the right to consultation. But if there is no agreement with Members with INRs or a principal supplying interest, or if the Member with a substantial interest is not satisfied with the agreement reached among them, all have an equal right to withdraw substantially equivalent concessions initially negotiated with the applicant Member.

Types of renegotiations: open season, special circumstance and reserved renegotiations

11. As already mentioned, there are three types of renegotiations envisaged in Article XXVIII: three-year (open season) renegotiations; special circumstance renegotiations; and reserved renegotiations. Article XXVIII:1 provides that on the first day of each three-year period (the first period having begun on 1 January 1958 and the next one at the time of writing beginning on 1 January 2000) any Member may modify or withdraw a concession after negotiation and agreement with Members having initial negotiating rights and a principal supplying interest and consultation with those with a substantial interest. Any other period may also be specified by a decision of the Ministerial Conference. The second type of renegotiations are those authorized in special circumstances by the Ministerial Conference under Article XXVIII:4. If no agreement is reached within the prescribed period, the applicant Member has the right to refer the matter back to the Ministerial Conference for its examination and recommendations. If no settlement is still reached, the Member concerned is free to modify or withdraw the concession unless it is determined that it has "unreasonably failed to offer adequate compensation". The third type of renegotiations envisaged in Article XXVIII:5 are those that may be held at any time before the end of the three-year period if any Member elects to reserve the right before the beginning of the period. In such cases other Members also get the right to hold renegotiations on concessions initially negotiated with the Member which has reserved the right.

12. The substantive requirements in all three types of renegotiations are essentially the same. However, there is a major difference in regard to time limits. In the three-year renegotiations the notification about the intention to withdraw or modify has to be made no later than three months (but no earlier than six months) before the first day of the period and the whole process has to be completed before that date. The modification or withdrawal (whether or not after agreement) takes effect on that date. Thus in the three-year negotiations normally the request has to be made during the period from 1 July to 30 September, the renegotiations have to be completed before 31 December and the modification and withdrawal take effect on 1 January of the following year. Time limits are also prescribed for special circumstance negotiations. A decision on a request for such renegotiations has to be made within thirty days of its submission. The applicant Member has the right to refer the matter back to the Ministerial Conference within sixty days of authorization, although longer periods could be prescribed if a large group of Members is involved. Any determination in such renegotiations that a Member has unreasonably failed to offer adequate compensation must also be made within thirty days of the submission of the matter. As for reserved renegotiations, there are no time limits at all regarding when they are to be begun or concluded.

Compensation and retaliation

13. The central requirement underlying the negotiation for compensatory concessions by the Member proposing a modification or withdrawal is the maintenance of "a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations". When a developing country Member needs to modify or withdraw a concession, the provision in Article XXXVI:8 regarding the concept of non-reciprocity has to be taken into account. No other guidance is provided on the level of compensation. Some clarity is provided in the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994 in respect of those renegotiations which involve the replacement of an unlimited tariff concession by a tariff rate quota. Paragraph 6 of the Understanding provides as follows:

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

"(a) the average annual trade in the most recent representative three-year period, increased by the average annual growth rate of imports in that same period, or by 10 percent, whichever is the greater; or

"(b) trade in the most recent year increased by 10 percent.

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

14. The right of a Member to modify or withdraw a concession is absolute, provided the prescribed procedures are followed. It is not dependent on an agreement being reached with the Members with INRs and a principal supplying interest. However, as mentioned already, if the Member seeking a modification or withdrawal does go ahead without having reached an agreement with the Members with INRs or a principal supplying interest, these Members get the right to withdraw "substantially equivalent concessions" initially negotiated with the applicant Member. The Member with a substantial interest also gets the same right either when no agreement is reached, or even if an agreement is reached with the Members having INRs or a principal supplying interest but the Member with substantial interest is not satisfied with it. However, there are two time limits to be respected: first, the retaliatory withdrawal must take place within six months of the withdrawal or modification of the concession; and second, a thirty-day period should be allowed after notification by the retaliating Member.

15. An Interpretative Note to Article XXVIII makes an important point regarding the date of entry into force of the compensatory concession. When a modification or withdrawal of a concession is made, the legal obligation of the Member changes. The implication is not that the actual level of applied tariff is changed on that day: the Member may choose to delay the implementation of the applied level in light of the new commitment. If a tariff change following renegotiation is delayed, the Member concerned has the right to similarly delay the entry into force of the compensatory concession.

Renegotiation for promoting the establishment of a particular industry

16. Article XVIII:7 of GATT 1994 is another provision for renegotiation of concessions, but it is open only to developing countries and can be used only for the purpose of promoting the establishment of a particular industry. This provision may be invoked by a developing country at any time and no authorization is needed. The Article requires the Member seeking to modify or withdraw the concession to enter into negotiations with Members with INRs and those having a substantial interest. It would be noted that, unlike in Article XXVIII, there is no reference to Members with a principal supplying interest and the requirement is to negotiate equally with Members with INRs and a substantial interest. In substance, however, these differences are of no consequence. In the event of disagreement the matter may be referred to the Ministerial Conference for prompt examination. The Member invoking Article XVIII:7 may proceed with the modification or withdrawal if it is found that the compensatory adjustment offered is adequate, or when it is not adequate if it is determined that the Member has made every reasonable effort to offer adequate compensation. The right of affected Members to withdrawal of substantially equivalent concessions is the same as in Article XXVIII.

Renegotiations in the context of formation of customs unions

17. Article XXIV:6 stipulates that if, in the process of the formation of a customs union the duties have to be raised beyond the bound level in one or more of the constituent territories, the procedures for renegotiations in Article XXVIII are to be followed. In providing for compensatory adjustment in such renegotiations, due account has to be taken of the reduction brought about in the corresponding duty by other constituents of the union, sometimes referred to as internal compensation. The Uruguay Round Understanding on the Interpretation of Article XXIV of GATT 1994 adds little of substance to the provision in Article XXIV:6. On the question of a time-frame for the renegotiations, it reaffirms that the

procedures must be commenced before tariff concessions are modified or withdrawn. If the renegotiations cannot be concluded within a reasonable period of time, the customs union can proceed with the modification or withdrawal of the concession, giving the affected Members the right to withdraw substantially equivalent concessions.

Withdrawal of concessions

18. The last provision for modification or withdrawal is contained in Article XXVII of GATT 1994. This Article allows a Member to withhold or withdraw a concession which was made during general tariff conferences or during multilateral rounds of trade negotiations if the participating government with which the concession was negotiated does not eventually become a Member or, having become a Member, ceases to be one. There is no time limit for the invocation of the Article but the Member concerned has to consult with Members which have a substantial interest in the product concerned. This provision has been generally incorporated in the Protocols embodying the results of tariff negotiations, including the Marrakesh Protocol on the Uruguay Round concessions.

C. Other Provisions relating to Tariff Negotiations and Renegotiations

Most-favoured-nation treatment

1. Tariff negotiations under the General Agreement are to be held on a non-discriminatory basis as provided for in Article I, on general most-favoured-nation treatment. This article requires that in all matters connected with imports and exports, including customs duties and similar charges, international transfer of payments, method of levying such duties and charges, rules and formalities, internal taxes or charges and regulations affecting internal sale, purchase, transportation, distribution and use of imported products,

"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in, or destined for, any other country shall be accorded immediately and unconditionally to the like product originating in, or destined for, the territories of all other contracting parties".

2. Thus, a WTO Member has not only to treat all other Members equally, but has to extend to each of them the best treatment it accords to any trading partner. An important element of the obligation is that the extension of any concession or favour to all Members has to be immediate and unconditional. All tariff concessions made by Members in the course of negotiations and renegotiations have to be extended to all other Members on a non-discriminatory basis. It follows also that all modifications and withdrawals of tariff concessions, including retaliatory withdrawals, must be applied on a non-discriminatory basis.

3. Although the MFN clause barred the grant or maintenance of any tariff preference, an exception was made for the "historical" preferences which were listed in Article I and Annexes A to F of GATT 1947. The most extensive of the excepted preferences were those of the Commonwealth countries and of France. While these preferences were allowed to be maintained, an important advance was made in keeping with the spirit of the MFN clause, insofar as margins of preference were frozen at the levels indicated in the schedules of tariff concessions, or, where such a margin had not been indicated in the schedules, at the historical level that existed on the dates mentioned in the text of, or annexes to, GATT 1947.

4. Article I exceptions were of considerable economic importance at the time GATT 1947 came into being, but their importance rapidly dwindled. Preferential margins were eroded as the MFN tariffs were reduced in successive negotiations and in most cases preferential tariffs were not. Moreover, other developments, such as the formation of the European Economic Community, led to the absorption of some of the preferences in such arrangements as the Lomé Convention, for which now waivers, and not the

historical preferences, provide the legal basis. When the UK acceded to the EEC, the Commonwealth preferences were largely withdrawn. Some residual preferences continue to exist even now, but their economic importance is very small. Still smaller are the lists of preferential concessions on which commitments continue in schedules of WTO Members.

Schedules of concessions

5. After tariff negotiations have taken place, the results are incorporated in the schedules of concessions of the participant concerned. Each WTO Member has a schedule of concessions unlike in GATT 1947, when several contracting parties which had followed the route of succession under Article XXVI:5(c) did not have any schedules. The schedule of each Member is given a number in Roman numerals by order of accession. Under GATT 1947 at the outset the schedules had two parts: Part I for MFN concessions and Part II for preferential concessions. Two more parts have been added since then: Part III lists concessions on non-tariff measures and Part IV lists the specific commitments made during the Uruguay Round on domestic support and export subsidies in agriculture. The obligations in respect of concessions and commitments incorporated in the schedules are contained in Article II of the General Agreement. The fundamental aim of this article is to ensure the predictability and security of tariff commitments contained in the schedules. The most important implication of a tariff concession is that there is a commitment not to apply customs duty upon the importation of the product above the level indicated in the schedule. This tariff level is thus "bound" against an increase.

Other duties or charges (ODCs)

6. Article II provides for the products listed in the Schedules, on their importation, to be "bound" against an increase not only in the ordinary customs duty but also in respect of all "other duties or charges of any kind" (ODCs) beyond those (i) imposed on the date of this Agreement, or (ii) directly or mandatorily required to be imposed thereafter by legislation in force in the importing country on that date. The level and the nature of the ODCs which a contracting party to GATT 1947 could levy on tariff items subject to concessions consistently with its obligations were not recorded in any international instrument. If and when a dispute were to arise on the issue, the contracting party concerned would have had to produce evidence from its national records to show that the ODCs were indeed in force at the particular level on the date of the Agreement or were "directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date". The Uruguay Round Understanding on the Interpretation of Article II:1(b) of GATT 1994 brought about a major change in respect of this provision. Now all ODCs have to be recorded in the Schedules and, where no such entry has been made in the relevant column of the Schedule, it is presumed that there are no ODCs on the tariff item. The Uruguay Round Understanding provides as follows:

"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 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".

7. The reference date in Article II of the General Agreement in respect of ODCs is "the date of this Agreement". For the purposes of the concessions negotiated in 1947, the date of the Agreement is 30 October 1947, as provided for in Article XXVI:1. For subsequent negotiations under GATT 1947, the reference date is the date of the Protocol to which the relevant schedules are annexed, be they accession negotiations or rounds of multilateral trade negotiations or other negotiations. Thus the date applicable to any concession for the purposes of Article II is the date of the instrument by which the concession was first incorporated into the General Agreement. The Uruguay Round Understanding specifies a particular date as the reference date for the concessions negotiated during the Round and makes the position clear about the future negotiations and renegotiations:

"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".

8. It may be added that the new rule does not affect the position of ODCs with respect to pre-Uruguay Round concessions. The WTO Member retains the right as envisaged in Article II:1(b) with respect to such concessions. However, earlier concessions do have an implication for the level of ODCs to be recorded in future. Where a tariff item has previously been the subject of a concession, the Uruguay Round Understanding requires the level of ODCs recorded in the Schedule not to be higher than the level obtaining at the time of the first incorporation of the concession. A three-year time limit after the date of entry into force of the WTO Agreement, or after the date of deposit of the instrument incorporating the Schedule into GATT 1994, whichever is later, was given to any Member to challenge the existence of an ODC on the grounds that no such ODC existed at the time of the original binding, as well as the consistency of the recorded level with the previously bound level, but no such challenge was made.

9. As a broad definition of "other duties or charges" it has been accepted that only those levies that discriminate against imports are covered, e.g. stamp duty, development tax, revenue duty etc.. In GATT 1947 panels, import deposit schemes and charges on transfer of payments imposed by governments have also been found to be covered by the limitation on imposition of ODCs in respect of the products on which tariff commitments have been made.

10. Article II of the General Agreement allows the introduction of terms, conditions or qualifications in the Schedules in respect of tariff commitments. Yet it has been recognized in practice that Article II creates for the Members "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 the General Agreement".

Levies that do not impinge on bound concessions

11. Article II clearly itemizes the categories of levies on imports which do not impinge on bound concessions. Thus, notwithstanding bound concessions in the Schedules, contracting parties (Members) have the freedom to impose the levies mentioned below:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III regarding national treatment;
- (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.

12. Article VIII of the General Agreement separately stipulates that all fees and charges imposed on or in connection with importation or exportation shall be limited to the approximate cost of the services rendered. Thus, if fees are imposed in respect of bound tariff items which are disproportionate to the services rendered, they will infringe the obligations under both Articles VIII and Article II.

13. It needs to be mentioned here that any additional duty imposed pursuant to the special safeguard provisions of the Agreement on Agriculture and price-based measures imposed for balance-of-payments reasons under the Understanding on the Balance-of-Payments provisions of GATT 1994, also do not affect Article II commitments.

Import monopolies

14. Tariff concessions incorporated in the schedules have an implication not only for customs duties and ODCs but also for the pricing practices of import monopolies. Article II provides that such monopolies shall not "operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule". Of course, specific arrangements can be negotiated and inscribed in the Schedules. An interpretative note to Article II, paragraph 4, states that the paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter. This provision envisaged that Members of the ITO would negotiate "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". In fact, in the 1947 Geneva negotiations and the 1950 Torquay negotiations, the Benelux countries and France made concessions on monopoly duties, minimum imports by an import monopoly or domestic selling prices of products subject to a monopoly. In such cases, the specific entries in the Schedules with respect to the operations of the monopoly determine the extent of the commitment.

Domestic court ruling on classification

15. Paragraph 5 of Article II provides for consultation and negotiations for compensatory adjustment in the event domestic courts or quasi-judicial authorities in a Member rule on a classification question in a manner which is at variance with the concession embodied in the Schedule. This paragraph is really a provision for renegotiation of commitments made already. However, an important difference from other renegotiation provisions which we consider later is that here the renegotiation can be done after the change in tariff, as against the requirement in Article XXVIII for renegotiation to be completed before the modification or withdrawal of the concession.

Specific duties and depreciation of currency

16. Tariffs can be bound in *ad valorem* or specific terms. In cases in which they are expressed in specific terms the real incidence of tariffs can be affected by a depreciation of the currency. In the days of fixed exchange rates 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 US dollars of a fixed gold value. A change in the par value of a member's currency could be made only after consultation with the Fund. Paragraph 6 of Article II of GATT 1947 provided that in cases in which the par value was reduced consistently with the Articles of Agreement of the International Monetary Fund (from such value prevailing on "the date of this Agreement") by more than 20 percent, the specific duties could be adjusted to take account of such reduction, provided that the CONTRACTING PARTIES concurred that such adjustments would not impair the value of the concessions. The "date of this Agreement" here has the same connotations as the "date of this Agreement" with reference to Article II:1(b) described earlier. Pursuant to this provision certain contracting parties were authorized to make adjustments nine times between 1950 and 1975.

17. After the system of fixed exchange rates was abandoned, Article IV of the IMF Articles was revised so as not to require the stating of par values but instead to stipulate 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". Some members of the Fund have floating exchange rates, while others maintain the exchange rate against one other currency, a basket of currencies or an international unit of account. To take into account this change in the international monetary system, a decision was adopted by the CONTRACTING PARTIES in 1980 providing as follows:

"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 the 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 the concession...."⁸

Schedules of concessions an integral part of GATT 1994

18. Article II makes the annexed Schedules of Concessions an integral part of Part I of the General Agreement, which consists of Articles I and II of the Agreement. One of the consequences of this in GATT 1947 was that amendments to Schedules required acceptance by all contracting parties, as required in Article XXX of GATT 1947. The position has not changed in the WTO Agreement as it is provided that, in respect of certain articles (including Articles I and II of GATT 1994), amendments shall take effect only upon acceptance by all Members. We shall examine later the pragmatic ways in which GATT contracting parties dealt with the requirement of unanimity for the amendment of Schedules.

⁸ GATT, BISD, Twenty-seventh Supplement, pp.28-29

CHAPTER II

TARIFF CONFERENCES AND ROUNDS OF MULTILATERAL TRADE NEGOTIATIONS

A. Overview

1. Eight tariff conferences and rounds of multilateral trade negotiations were held between 1947 and 1994 within the legal framework outlined in Chapter I. These were the Geneva Tariff Conference (1947), the Annecy Tariff Conference (1949), the Torquay Tariff Conference (1950-51), the Geneva Tariff Conference (1956), the Geneva Tariff Conference (1960-1961), also known as the Dillon Round, the Kennedy Round (1964-1967), the Tokyo Round (1973-1979) and the Uruguay Round (1986-94). The first four conferences, which are also referred to as rounds, are known by the place where they were held, the next two after individuals who had provided the inspiration for the negotiations (US Under Secretary of State, Douglas Dillon and the US President, J.F. Kennedy). The last two rounds have been known by the place where the Ministers adopted the Declaration launching the negotiations.

2. The Geneva Tariff Conference (1947) was held during the course of preparations for the Charter for the International Trade Organization, when 23 members of the Preparatory Committee appointed by the Economic and Social Council of the United Nations accepted the invitation of the United States to negotiate concrete arrangements for the reduction of tariffs and trade barriers. The idea was for the principal trading nations to take action "to enter into reciprocal and mutually advantageous negotiations directed to the substantial reduction of tariffs and to the elimination of preferences". Once the negotiations had taken place, these members wanted to give effect to the results without waiting for the Organization to come into existence. For this purpose they drew up the General Agreement on Tariffs and Trade (GATT 1947). The Annecy Tariff Conference was convened to enable negotiations to take place between the existing contracting parties and eleven governments which had requested accession, of which nine eventually became contracting parties (Denmark, Dominican Republic, Finland, Greece, Haiti, Italy, Nicaragua, Sweden and Uruguay). At Torquay, negotiations took place not only between the contracting parties and the six governments which had applied for accession (Austria, Federal Republic of Germany, Korea, Peru, the Philippines and Turkey), but also among the contracting parties themselves for additional concessions. Two out of the six governments, viz. Korea and the Philippines, which negotiated for accession at Torquay, became contracting parties after fresh accession negotiations many years later.

3. The Geneva Tariff Conference of 1956 was somewhat unique. Only 25 out of 39 contracting parties agreed to participate in the negotiations and concessions were made only by 22. These negotiations were held under the procedures established by the CONTRACTING PARTIES for negotiations to be held at any time between two or more contracting parties. However, since all the major trading nations participated in the negotiations and exchanged concessions, this tariff conference is normally listed as a round of multilateral negotiations.

4. The Geneva Tariff Conference (1960-61), or the Dillon Round, was convened in the context of the formation of the European Economic Community with the initial six members. The first part of the Conference was devoted to conducting renegotiations under Article XXIV:6 with the EEC and the second to holding a general round of negotiations among contracting parties for new concessions. During the second part, governments negotiating accession were also given the opportunity to carry out tariff negotiations for their accession.

5. The Kennedy Round was a major attempt to reduce tariffs on an across-the-board basis. A plurilateral agreement on anti-dumping practices was also negotiated. Attempts were made, albeit unsuccessfully, to negotiate broader agreements on agricultural protection going beyond tariffs. The focus, however, remained very much on tariff negotiations.

6. In the Tokyo Round, while tariff negotiations were important, the negotiations on non-tariff measures were given equal, if not greater, importance. No tariff conference under GATT 1947 was confined purely to tariffs and even the early rounds envisaged negotiations on quotas and the protection afforded through the operation of import and export monopolies. But it was during the Tokyo Round that a successful attempt was made to negotiate agreements on a range of non-tariff measures. Understandings were also reached during the Round on such basic or "framework" issues as differential and more favourable treatment of developing countries, dispute settlement and balance-of-payments safeguards.

7. In the Uruguay Round, negotiations on trade in services and trade-related aspects of intellectual property rights attracted greater attention at the outset than trade in goods. In the area of trade in goods, agricultural negotiations held centre stage throughout the round. Tariff negotiations relating to industrial products, although not regarded as the main achievement of the round, did contribute to the success of the negotiations as a whole.

B. Modalities of Tariff Negotiations

The early rounds

1. The rules and procedures adopted for the first three rounds of negotiations were guided by the provisions of the ITO Charter. The rules for the Geneva Tariff Conference mentioned that, since the results of the negotiations would need to be fitted into the framework of the International Trade Organization after the Charter had been adopted, the negotiations must proceed in accordance with the relevant provisions of the Charter as already provisionally formulated. The rules and procedures for these negotiations had the following common elements which were based on the provisions of the Charter:

- (i) The negotiations were to be conducted on a selective product-by-product basis;
- (ii) The requests for reduction of tariff on a product could be made in principle only in respect of products of which the requesting countries were individually or collectively the principal suppliers to the countries from which the concessions were asked;
- (iii) Each participating government had full flexibility on granting concessions on individual products; it was free not to grant concessions on individual products; or if it chose to grant a concession, it could reduce the duty or bind it at the existing or a specified higher level;
- (iv) The binding against increase of low duties or of duty-free treatment was in principle recognized as a concession equivalent in value to the substantial reduction of high duties or the elimination of preferences;
- (v) The negotiations were to proceed strictly on the basis of reciprocity and no government was to be required to grant unilateral concessions, or to grant concessions to other governments without receiving adequate concessions in return.

2. During the early years of GATT 1947, the CONTRACTING PARTIES attached particular importance to the objective of the gradual elimination of preferences. The rules and procedures of the first three tariff conferences were designed to achieve this objective. For this purpose, the rules for the Ancey and Torquay negotiations reproduced paragraph (c) of Article 17 of the Havana Charter, as noted below :

- 1. "In negotiations relating to any specific product with respect to which a preference applies,
 - (i) when a reduction is negotiated only in the most-favoured-nation rate, such reduction shall operate automatically to reduce or eliminate the margin of preference applicable to that product;

(ii) when a reduction is negotiated only in the preferential rate, the most-favoured-nation rate shall automatically be reduced to the extent of such reduction;

(iii) when it is agreed that reductions will be negotiated in both the most-favoured-nation rate and the preferential rate, the reduction in each shall be that agreed by the parties to the negotiations; and

(iv) no margin of preference shall be increased."⁹

2. Discussions after the Torquay Conference: the problem of low-tariff countries

3. While the Geneva and Annecy negotiations were considered to be great successes, the results at Torquay were not as broad or as extensive as had been hoped initially. One of the problems arose from the difficulty encountered by low-tariff countries in entering into tariff negotiations. The issue is best summarized in the report of the ICITO published in January 1952 after the conclusion of the Torquay negotiations:

"Another inhibiting factor was the problem presented by the disparities in the levels of tariffs. A number of European countries with a comparatively low level of tariff rates considered that they had entered the Torquay negotiations at a disadvantage. Having bound many of their rates of duty in 1947 and 1949, what could these low-tariff countries offer at Torquay in order to obtain further concessions from the countries with higher levels of tariffs? The rules adopted by the CONTRACTING PARTIES for their negotiations stipulate that the binding of a low duty or of duty-free treatment is to be recognized as a concession equivalent in value to the substantial reduction of high tariffs or the elimination of tariff preferences. Some thought that, in observance of this rule, the high-tariff countries should make further reductions in their duties in exchange for the prolongation of binding of low duties. But although the high-tariff countries were sometimes willing to offer concessions without expecting comparable reductions from countries with low tariffs, they were not prepared to grant what they considered to be unilateral and unrequited concessions. No general solution was found at Torquay, but the question will be further explored in the near future. Meanwhile, the area of negotiations between some of the European countries was restricted by this divergence of view."¹⁰

4. To resolve the above difficulties experienced during the Torquay negotiations, the Benelux countries put forward a proposal which involved the unilateral reduction of duties by high-tariff countries. Subsequently France suggested a plan which was to be applied by all contracting parties and which envisaged an agreement among governments to reduce their tariff levels by a fixed percentage. The French plan was refined and improved by a Sub-Group of 11 industrialized countries whose report¹¹ was adopted by the CONTRACTING PARTIES on 13 October 1953. The broad features of the improved plan, which came to be known as the GATT Plan, were the following:

(i) Bilateral negotiations between contracting parties on a selective product-by-product basis were to be replaced by the adoption of a common plan for reduction of duties across-the-board; each participating country was to reduce by 30 per cent the average incidence of its duties in each of the ten sectors into which import trade was divided; the reduction was to be achieved in three years through annual cuts of ten per cent each;

⁹ GATT Doc. GATT/CP.2/26 and GATT, BISD, Vol. I, p. 104

¹⁰ ICITO, GATT in Action: Third Report on the Operation of the General Agreement on Tariffs and Trade, 1952, pp.9-10

¹¹ GATT, BISD, Second Supplement, pp.67-92

- (ii) The balance for any particular contracting party was to be measured not by setting off specific concessions obtained against specific concessions granted but by setting off the overall concessions made by it under the common plan and those made by its trading partners;
- (iii) The plan required efforts proportionate to each contracting party's tariff level; a demarcation line was calculated for this purpose on the basis of a weighted average of the weighted averages of the tariffs of ten European and North American countries, after exclusion of the revenue component of these duties; if, for any sector the average incidence of the duties of a participating country was lower than a demarcation line, the reduction to be effected was to be proportionately decreased; if the average incidence was equal to or lower than a floor (say 50 per cent) of the rate at the demarcation line, the participating country was to be exempted from the requirement to reduce the average incidence of its duties for that sector;
- (iv) There was an obligation to reduce individual rates of duty which exceeded given levels; ceiling levels were prescribed for raw materials (5 per cent), semi-manufactures (15 per cent), finished manufactures (30 per cent) and agricultural products (27 per cent), and the individual rates of duty had to be brought down to the level of the ceiling;
- (v) Each contracting party was free to vary the reduction to be made on individual items (except to the extent required in respect of rates above the stipulated ceiling rates), but the aggregate average reduction for each sector was to be the percentage required on the basis of the demarcation line;
- (vi) Specific provisions were to apply to "countries and customs territories in the process of economic development"; the reduction of the average incidence was to be computed on the tariff as a whole and not by the sectors; there was to be a common demarcation line of say 10 per cent; the duties affecting products included in their programme of economic development were to be excluded from reduction of the average tariff incidence as well as reduction of high tariffs (above the ceiling level) for individual items.

1956 Geneva Tariff Conference

5. Despite the broad support for the GATT plan for tariff reduction, when the next tariff conference was convened in 1956, there was no consensus on proceeding on that basis and, in adopting the rules and procedures¹² for the new round, the CONTRACTING PARTIES reverted to the selective product-by-product technique. These negotiations were held on the basis of Article XXIX of the revised General Agreement which was later to be re-numbered as Article XXVIII *bis*. The new Article provided for negotiations to be carried out either on a selective product-by-product basis or "by the application of such multilateral procedures as may be accepted by the contracting parties concerned". But the rules adopted for the negotiations mentioned only the selective product-by-product basis.

1960/61 Geneva Tariff Conference: (Dillon Round)

6. The bilateral item-by-item negotiation procedures were also generally adopted in the rules for the 1960/61 Geneva Tariff Conference, which came to be known as the Dillon Round. The rules of the negotiations¹³ mentioned that the negotiations would be held on the basis of the principles of Article XXVIII *bis*. Taking advantage of the reference in this article to "such multilateral procedures as may be accepted by the contracting parties concerned", the European Economic Community tabled an

¹² GATT, BISD, Fourth Supplement, p.81-82

¹³ GATT, BISD, Eighth Supplement, p.115

offer of a linear 20 per cent tariff reduction with certain exceptions. While the United Kingdom matched this offer, other contracting parties adhered to the selective product-by-product technique.

Kennedy Round (1964-67)

7. During the Kennedy Round (1964-67), which was launched with the adoption by the Ministers of a Resolution¹⁴ on 21 May 1963, two major departures were made in the negotiating modalities. First, it was agreed that the tariff negotiations among industrialized countries in respect of industrial products, would be based upon a plan of "substantial linear tariff reductions". Second, while the principle of reciprocity remained the general rule guiding the negotiations, it was agreed that "the developed countries cannot expect to receive reciprocity from the less-developed countries". Further details of the concept of non-reciprocity are given later in the section below on developing countries.

8. Two main considerations led to the adoption of the linear approach. First, the item by item, request-offer method adopted in past negotiations, with its dependence on the extent to which the principal supplier was willing to reciprocate the reduction of duty in a particular product, had led to very small reductions which were in some cases worthless in commercial terms. Second, with the increase in the number of contracting parties the traditional method had become increasingly cumbersome and unwieldy.

9. During the negotiations the participants agreed that the rate of 50 per cent would be used "as a working hypothesis for the determination of the general rate of linear reduction". Exceptions to the linear reduction were envisaged, but it was stipulated that there would be a bare minimum of exceptions "which would be subject to confrontation and justification". They had to be justified on the basis of "overriding national interests" and could not be based on sectoral interest or bargaining considerations. The process of confrontation and justification was carried out in a body attended by the governments participating in the negotiations on the basis of the linear offer.

10. The Ministerial Resolution which had launched the Kennedy Round had envisaged that criteria would be developed during negotiations for "determining significant disparities in tariff levels and the special rules applicable for tariff reductions in these cases". The resolution had also recognized the problem of "certain countries with a very low average level of tariffs or with a special economic or trade structure such that equal linear tariff reductions may not provide an adequate balance of advantage". On the problem of tariff disparity, several proposals were made designed to secure larger reductions in products on which the tariff levels were high, but no consensus could be reached on the criteria. In the end the European Economic Community received satisfaction in the reciprocal balancing exercise in bilateral negotiations by applying a set of criteria that resulted in the reduction of its tariff by less than 50 per cent on items on which the existing duties were significantly lower in the EEC than in the United States and the United Kingdom. It was also agreed that Canada was a country with a special economic or trade structure and further that Australia, New Zealand and South Africa, by virtue of their very large dependence on exports of agricultural and other primary products, also fell in the same category. All four countries were therefore allowed to make item-by-item offers of the traditional type instead of adopting the approach for linear reduction. However, in the case of these countries, the expectation remained that they would grant concessions of equivalent value.

Tokyo Round (1973-79)

11. The Ministerial Declaration¹⁵ which launched the Tokyo Round (1973-79) envisaged that the negotiations should aim, *inter alia*, to "conduct negotiations on tariffs by employment of appropriate

¹⁴ GATT, BISD, Twelfth Supplement, pp.47-49

¹⁵ GATT, BISD, Twentieth Supplement, p.19

formulae of as general application as possible". In the negotiations, a number of proposals were made in respect of industrial tariffs as indicated below:

(a) Canada proposed that duties lower than 5 per cent should be abolished, those between 5 and 20 per cent reduced by 50 or 60 per cent, and those higher than 20 per cent brought down to 20 per cent;

(b) United States suggested that there should be a linear reduction formula with an element of harmonization, subject to a maximum reduction of 60 per cent. The proposal was to cut tariffs by an amount equal to one and a half times the amount of the tariff plus 50 per cent, up to a maximum cut of 60 per cent. The formula proposed was $y = 1.5x + 50$ where y was the rate of reduction and x the initial rate of duty;

(c) The EEC's harmonization formula was $y = x$ (4 times) where y = rate of reduction and x = initial rate of duty. With a base rate of 20 per cent, the result obtained is 10.28 per cent, as explained below:

1st stage (20% of 20% = 4%) 20% - 4% = 16%
 2nd stage (16% of 16% = 2.56%) 16% - 2.56% = 13.44%
 3rd stage (13.44% of 13.44% = 1.81%) 13.44% - 1.81% = 11.63%
 4th stage (11.63% of 11.63% = 1.35%) 11.63% - 1.35% = 10.28%

This formula reduced the higher tariffs by a much larger margin than the lower tariffs. In respect of tariffs over 50 per cent, the proposal was that the final tariff would be 13 per cent, which was the rate calculated for a tariff level of 50 per cent (12.91 per cent rounded up to 13 per cent);

(d) Japan proposed a linear reduction formula of 70 per cent with a permanent harmonization element of 3.5 per cent *ad valorem*. Where the base rate is 20 per cent, a reduction by 70 per cent gives a rate of 6 per cent. Adding 3.5 per cent, the final rate comes to 9.5 per cent. The reduction obtained is about 50 per cent. Where the base rate is 50 per cent, a reduction by 70 per cent gives a rate of 15 per cent. Adding 3.5 per cent, the final rate comes to 18.5 per cent. The reduction obtained is about 63%. Thus, the higher the base rate the greater the reduction;

(e) Switzerland suggested the following harmonization formula:

$$Z = \frac{AX}{A + X}$$

A = coefficient (14 or 16)

X = initial rate of duty

Z = resulting rate of duty

Application of this formula to different base rates brings about a progressively larger reduction for higher duties.

12. The Swiss formula was eventually accepted by most industrialized countries as a working hypothesis for reduction of tariffs on industrial products. The United States, Japan, Switzerland and Czechoslovakia made their offers on the basis of the coefficient of 14, whereas the European Community, the Nordic countries, Australia, Austria and Hungary used the coefficient of 16, which resulted in slightly lower reductions. Canada applied a different formula and New Zealand, South Africa and Iceland carried out negotiations according to the item-by-item technique. Negotiations among the main developed countries were concluded in June 1979 and it was only later that a number of developing countries engaged in serious negotiations and obtained additional concessions from Canada and the EEC. For negotiations on

agricultural tariffs, the item-by-item technique continued to apply even in negotiations among the industrialized countries.

13. The rules adopted for the negotiations on industrial tariffs did not contain any reference to exceptions. In actual fact, however, the governments which made their offers on the basis of the accepted formula exempted many product groups from its application. They made either shallower cuts or excluded products altogether from reduction. Such exceptions or exclusions were then compensated by deeper than formula reductions on other products or groups of products.

Uruguay Round

14. The Punta del Este Ministerial Declaration¹⁶ which launched the Uruguay Round did not stipulate whether the tariff negotiations would follow the linear or formula approach or would revert to the earlier practice of product-by-product approach. The following paragraph was included in the Declaration on the subject of tariffs:

"Negotiations shall aim, by appropriate methods, to reduce or, as appropriate, eliminate tariffs, including the reduction or elimination of high tariffs and tariff escalation. Emphasis shall be given to the expansion of the scope of tariff concessions among all participants."

Main proposals for tariff reduction

15. When the discussion began in the negotiating group on tariffs, the modality of negotiations was the main question addressed. The following paragraphs summarize some of the key proposals that were made.

16. The United States advocated the adoption of a request-and-offer approach. It argued that, after the previous rounds, the tariff regimes of countries which had participated in the formula cuts had already been substantially liberalized and little overall protection remained to justify a linear approach. Further, modern data processing techniques made it possible to conduct request-offer negotiations efficiently. Moreover, such procedures were best suited to address tariff peaks and tariff escalation, the reduction of which was an objective of the negotiations.

17. The proposal made by the EC was designed to ensure that higher tariffs were subjected to deeper cuts in the industrialized countries and that there was effective participation by the developing countries. For industrialized and more advanced developing countries, the EC made the following proposal for reduction of duties:

- base rate of 40% or higher: reduction to a ceiling of 20%
- base rate of less than 40%: reduction on the following basis:
 - rates between 0% and 29%
 - $R = D + 20$
 (where R is the percentage reduction and D the base rate of the customs duty);
 - rates between 30% and 40%
 - $R = 50$
 (flat rate reduction of 50%).

For other developing countries (other than the least-developed) the approach proposed was as follows:

- base rate of more than 35%: reduction to a ceiling of 35%
- base rate of 35% or less: possibility of bilateral negotiations with a view to reducing and harmonizing the rate of duty.

For the least-developed countries it was proposed that contributions would be made within the limits of their capabilities.

¹⁶ GATT, BISD, Thirty-third Supplement, p.19

18. Thus the EC proposed a formula approach with a modicum of a bilateral element. One of the matters on which the EC had initially taken a strong view was elimination of tariff rates below 3 per cent. While some participants regarded such tariffs as having only a nuisance value with little protective effect, the EC was opposed to their elimination as even low tariffs gave participants a certain negotiating leverage. In its final proposal, the EC expressed willingness to consider eliminating such tariffs on the condition that "no compensation or credit is claimed" for such action.

19. In the beginning, Japan proposed the elimination of tariffs on all industrial products without exception. Subsequently, it proposed that developed countries eliminate a certain proportion of their tariffs. Tariffs which were not eliminated were to be subject to reductions under a harmonization formula such as the one used in the Tokyo Round.

20. Canada suggested the adoption of the following formula:

$$R = 32 + \frac{D}{5}$$

where R is the rate of reduction and D is the base rate. In performing the calculation "D over 5" the result had to be rounded down to the next full number. The maximum figure for R was to be 38 per cent. The proposal also involved eliminating rates which fell below 3 per cent after applying the formula. Canada suggested also that the request and offer approach would supplement the tariff reduction formula approach with a view to providing the maximum possible reduction or elimination of tariffs and NTBs.

21. Switzerland proposed the following harmonization formula, which was similar to the one used in the Tokyo Round:

$$Z = \frac{15x}{15 + x} \text{ where } Z = \text{final duty and } x = \text{initial duty.}$$

22. Many developing countries expressed a preference for the formula approach while maintaining that they themselves needed to take into account their individual development, financial and trade needs. Brazil proposed a general formula which consisted of binding at zero level by developed countries of their tariffs on all products, to be applied on a preferential basis only to the developing countries for a period of ten years. After that period, the zero rate was to be extended to all countries. Some developing countries called for the need to establish an approach for giving recognition to the liberalization measures already adopted by them.

Mid-Term Review

23. At the mid-term review meeting at Montreal, agreement was reached not on whether a formula or request-offer approach had to be adopted but on a number of key points which guided the negotiations thereafter. The Ministers agreed on the following approach, subject to the understanding that the participation of developing countries in the tariff negotiations would be in accordance with the general principle governing the negotiations as laid down in the Punta del Este Declaration:

"(a) A substantial reduction or, as appropriate, elimination of tariffs by all participants with a view to achieving lower and more uniform rates, including the reduction or elimination of high tariffs, tariff peaks, tariff escalation and low tariffs, with a target amount for overall reductions at least as ambitious as that achieved by the formula participants in the Tokyo Round.

(b) A substantial increase in the scope of bindings, including bindings at ceiling levels, so as to provide greater security and predictability in international trade.

(c) The need for an approach to be elaborated to give credit for bindings; it is also recognized that participants will receive appropriate recognition for liberalization measures adopted since 1 June 1986.

- (d) The phasing of tariff reductions over appropriate periods to be negotiated."¹⁷

Initial offers

24. Further proposals after Montreal to reach agreement on a formula approach did not succeed and in the procedures approved in January 1990 it was agreed that the participants would submit proposals for the reduction, elimination and binding of tariffs on a line-by-line basis in accordance with the agreement reached at the mid-term review. This implied that it was left to each participant to determine the manner in which it would reach the overall target of reduction, which translated into a quantitative reduction of one-third (33 1/3%). In making their offers the developed countries which had proposed a formula used either the formula proposed by themselves or those proposed by others. The EC and Finland, Sweden and Norway employed (the latter with some variations) the formula proposed by the EC, while Canada, Japan and Austria used the formula proposed by Canada, except that Austria did not subject the reduction to a maximum of 38 per cent as proposed by Canada. Australia adopted the following formula, where D = base rate and R = rate of reduction, with some exceptions:

where $D > 15\%$	$R = \frac{D-15}{D} \times 100$
where $10\% > D \leq 15$	$R = \frac{D-10}{D} \times 100$
where $D \leq 2$	R = 100% (elimination).

25. The United States stuck to its approach of following the request-offer, item-by-item technique. Its original submission on industrial tariffs was in two parts. It proposed tariff elimination in respect of a number of product groups if two conditions were met: (a) other participants provided duty-free treatment on the same products; and (b) non-tariff measures on such products, wherever relevant, were eliminated. The other part of its offer contained a list of products on which it was willing to grant concessions "only in response to requests from other participants, and in exchange for acceptable offers on both tariffs, and where relevant, non-tariff measures". In regard to its intentions for conducting market access negotiations, the United States stated that it would accept requests from its trading partners either on a "request/offer" basis or a "formula" basis. Item-by-item requests submitted by trading partners employing a "request/offer" approach were to be considered in their entirety, without regard to the requesting country's supplier status. For requests made on the basis of a "formula" approach, the United States said that it would limit its consideration to those items for which the requesting country was the principal supplier.

26. In the subsequent submission made by the United States, the proposal for tariff elimination in product groups and sectors was considerably expanded. Specific tariff offers were made on other products except those where it was indicated that the US had reserved the item. The US offer explained that such reserves arose from two situations:

- (a) where the principal supplier of the item had not requested a concession from the United States until that time; or
- (b) where countries with which the United States was not negotiating in the Uruguay Round supplied a substantial share of imports to its market.

The US submission further stated that in either situation the US was willing to consider a tariff reduction on the item if the requesting country offered reciprocity "based on the most-favoured-nation value of the

¹⁷ Uruguay Round Doc. MTN.TNC/7(MIN), p.4

trade in the tariff line". An important point made in the US submission of offers was that countries failing to participate in the Uruguay Round market access negotiations should not receive the benefits from these negotiations. In order to achieve this objective, the United States stated its intention "to refine U.S. offers sufficiently to ensure that offers responded primarily to the interests of those trading partners having submitted specific requests and having made specific offers".

Tokyo Accord and after

27. In subsequent negotiations the sectoral proposals for the elimination of tariffs ("zero for zero" as they came to be called) occupied a central place in the negotiations among developed countries. In some of these sectors there were also proposals for harmonization of tariffs whereby all participants would agree to bring down the duty rates to the same level. Such proposals were made for chemicals, textiles and clothing and non-ferrous metals. While the principal impulse for the sectoral proposals came from the United States, the EC put its weight behind reduction of tariff peaks. Disagreements among the major trading countries on these aspects were one of the reasons that delayed the conclusion of the Round. Industrial tariff negotiations resumed only after Canada, the EC, Japan and the USA (known as the QUAD) reached an agreement on these issues at Tokyo in July 1993. A communication¹⁸ from Japan dated 7 July 1993, circulated to all participants contained the following summary of the Tokyo accord:

"(a) Tariff and non-tariff measure elimination: In the context of a far-reaching and balanced market access package, we have thus far identified a common list of product sectors for complete elimination of tariff and non-tariff measures (pharmaceuticals, construction equipment, medical equipment, steel – subject to the MSA, beer, and subject to certain agreed exceptions, furniture, farm equipment and spirits). We shall seek to add to this list as many sectors as possible.

(b) Harmonization: We have identified chemical products for a harmonization of tariffs at low rates, including, in some cases, zero, and further negotiations may lead to the harmonization of tariffs in additional product areas.

(c) For tariffs of 15 per cent and above, we will negotiate the maximum achievable package of tariff reductions, recognizing the objective of reaching 50 per cent reductions, subject to agreed exceptions and to other exporting countries agreeing to provide effective market access through tariff reductions and appropriate non-tariff disciplines.

(d) Other tariff cuts: For products other than those subject to (a) and (c) above, we will negotiate tariff cuts by an average of at least one-third. We have also identified a number of sectors where tariffs could be reduced substantially beyond this level, in some cases, possibly beyond 50 per cent."

28. The remaining negotiations among the developed countries concentrated heavily on the search for sectors for tariff elimination and harmonization. While a number of developing countries were approached to join the sectoral proposals only a few agreed to participate. However, even without a majority of the developing countries, it was ensured that the sectoral agreements had a sufficiently broad-based participation, as will be seen from the following estimates of trade coverage made on the basis of 1994 data:

¹⁸ Uruguay Round Doc. MTN.TNC/W/113; MSA refers to the Multilateral Steel Agreement covering non-tariff measures also, which was sought initially by the participants in the zero-for-zero initiative on steel as a pre-condition for the elimination of tariffs. Negotiations for the MSA were not successful and the pre-condition was dropped.

Proposals for tariff elimination

<u>Product sector</u>	<u>Participants</u>	<u>1994 exports percentage of world exports</u>	<u>1994 imports percentage of world imports</u>
Agricultural equipment	Canada, EU (12), Hong Kong, Iceland, Japan, Korea, Norway, Singapore, Switzerland, USA	88.24	74.94
Beer	Australia, Canada, EU (12), Hong Kong, Japan, USA	79.76	85.97
Construction equipment	Canada, EU (12), Hong Kong, Japan, Korea, Norway, Singapore, Switzerland, USA	84.84	64.00
Distilled spirits (Brown)	Canada, EU (12), Hong Kong, Iceland, Japan, Norway, USA	86.63	78.17
Furniture	Canada, EU (12), Hong Kong, Japan, Korea, Norway, Singapore, Switzerland, USA	72.44	85.53
Medical equipment	Canada, EU (12), Hong Kong, Iceland, Japan, Norway, Singapore, Switzerland, USA	89.73	74.30
Paper	Canada, EU (12), Hong Kong, Japan, Korea, New Zealand, Singapore, USA	71.16	71.63
Pharmaceuticals	Australia, Canada, Czech Rep., EU(12). Iceland, Japan, New Zealand, Norway, Singapore, Slovak Rep., Switzerland, USA	86.83	73.50

Steel	Canada, EU (12), Hong Kong, Japan, Korea, Norway, Singapore, USA	72.54	63.77
Toys	Canada, EU (12) Finland, Japan, Korea, USA	32.84	69.73

Proposal for Harmonization

Chemicals	Canada, Czech Republic, EU (12), Japan, Korea, Norway, Singapore, Slovak Republic, Switzerland, USA	82.57	68.79
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The harmonization proposal on chemicals envisaged elimination of duty in respect of HS Heading 2901-2902 and HS Chapter 30, reduction of duty to 5.5% in respect of Chapter 28 and HS 2903-2915 and to 6.5% in respect of HS Heading 2916-2942 and HS Chapters 31-39.

Source: WTO Secretariat.

29. The negotiations on tariff peaks did result in considerable reduction but not elimination of rates above 15 per cent in the developed countries. The overall target for reduction by one-third in respect of industrial tariffs was reached by all developed countries and exceeded by some.

30. As for the developing countries, one of the main objectives of the developed countries was to secure an increase in the scope of bindings. In respect of countries with interests in exports of textile and clothing products, the major trading countries sought to secure, with mixed success, reduction and binding of tariffs in the textile and clothing sector itself. In developing countries which made ceiling bindings, the effort of developed-country participants was to get the binding level closer to the applied level. (More details of the tariff offers of developing countries are given in the section below on developing countries.)

Tariff negotiations on tropical and natural resource-based products

31. The negotiations on tariffs in respect of tropical products and natural-resource-based products proceeded on their own tracks in the separate negotiating groups established by the Trade Negotiating Committee on the basis of separate mandates in the Punta del Este Ministerial Declaration that are reproduced below:

"Tropical products

Negotiations shall aim at the fullest liberalization of trade in tropical products, including in their processed and semi-processed forms, and shall cover both tariff and all non-tariff measures affecting trade in these products.

The CONTRACTING PARTIES recognize the importance of trade in tropical products to a large number of less-developed contracting parties and agree that negotiations in this area shall receive special attention, including the timing of the negotiations and the implementation of the results..."¹⁹

"Natural resource-based products

Negotiations shall aim to achieve the fullest liberalization of trade in natural resource-based products, including in their processed and semi-processed forms. The negotiations shall aim to reduce or eliminate tariff and non-tariff measures, including tariff escalation."²⁰

In the negotiating group on tropical products, seven product groups were identified as tropical products, it being understood that the list was not exhaustive. These groups were: tropical beverages; spices, flowers and plaiting products; tobacco, rice and tropical roots; tropical fruits and nuts; natural rubber and tropical wood; jute and hard fibres. In respect of natural resource-based products, a proposal submitted by the Chairman in 1990 included fish and fish products, forestry and forestry products and non-ferrous metals and minerals in the basic definition, but there was no agreement on this list.

32. In accordance with the Punta del Este mandate, the developed countries and a few developing countries made interim contributions on tropical products at the time of the mid-term review in December 1988.²¹ Some of the contributions by the developed countries were on a preferential basis under the GSP. The following terms and conditions were attached to these contributions:

(a) Participants undertook to apply the reductions on a provisional basis, for the duration of the round. It was understood that if any participant found it necessary to withdraw any or all of its contributions, other participants could reassess their own contributions;

(b) in relation to contributions made on an MFN basis, individual participants were to consider binding concessions at the end of the Round in the light of the overall results achieved.

33. After the Montreal meeting, although work continued in the group on tropical products, the negotiations were really subsumed under the negotiations relating to tariffs on industrial products and the separate negotiations on agricultural products. In respect of natural resource-based products, the negotiations never really took off, although a great deal of technical work was done and the Chairman even made concrete proposals for the reduction of tariffs. All products regarded as natural resource-based products were dealt with in the group on tariffs.

Tariff negotiations on agriculture

34. In agriculture, tariff negotiations were carried out as a part of the overall negotiations on market access, domestic subsidies and export subsidies. The following basic rules for agriculture negotiations are formally set out in the Uruguay Round Agreement on Agriculture:

(i) The coverage is given in terms of the Chapters, Codes and Headings of the Harmonized System. These are H.S. Chapters 1 to 24 less fish and fish products, H.S. Codes 2905.43 (mannitol), H.S. Code 2905.44 (sorbitol), H.S. Heading 33.01 (essential oils), H.S. Headings 35.01 to 35.05 (albuminoidal substances, modified starches, glues), H.S. Code 3809.10 (finished agents), H.S. Code 3823.60 (sorbitol n.e.p.), H.S. Headings 41.01 to 41.03 (hides and skins), H.S. Heading

¹⁹ GATT, BISD, Thirty-third Supplement, p.23

²⁰ Ibid.

²¹ Uruguay Round Doc. MTN.GNG/17 and Add.1; some further autonomous unilateral contributions were notified by participants after the issuance of this document.

43.01 (raw furskins), H.S. Headings 50.01 to 50.03 (raw silk and silk waste), H.S. Headings 51.01 to 51.03 (wool and animal hair), H.S. Headings 52.01 to 52.03 (raw cotton, waste and cotton carded or combed), H.S. Heading 53.01 (raw flax) and H.S. Heading 53.02 (raw hemp). It is specified that the product descriptions in round brackets are not necessarily exhaustive.

(ii) All border measures other than ordinary customs duties are required to be "tariffed" or to be converted into tariff equivalents, and maintenance of, resort to, or reversion to these measures are prohibited. A footnote to Article 4 of the Agreement on Agriculture lists these measures as including quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints, and similar border measures, whether or not the measures were maintained under country-specific derogations from the provisions of GATT 1947. However, the same footnote excludes measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

(iii) In agricultural products subject to tariffication, the Agriculture Agreement allows recourse to a special safeguard provision whereby Members may impose temporarily an additional duty on a product over the level at which the tariff is bound, if:

(a) the volume of imports of that product during any year exceeds a trigger level which is related to the existing market access opportunities as set out in the Agreement; or

(b) the price at which imports of that product falls below a trigger price equal to the average 1986 to 1988 reference price.

The additional duty in the event of imports exceeding the volumetric trigger is required not to exceed one-third of the ordinary customs duty. The additional duty in the event of a fall in the import price can be imposed in accordance with a scale graduated in proportion to the extent of fall in the price as provided in the Agreement.

(iv) Section A of Annex 5 of the Agreement on Agriculture conditionally exempts from the tariffication requirement any primary agricultural product and its worked and/or prepared products if imports of such product during the base period (1986-88) are less than 3 per cent of the corresponding domestic consumption, no export subsidies have been provided and effective production-restricting measures are applied to the primary agricultural product. This exemption, which was designed to meet the concerns of Japan about rice, was not open-ended and had to be formally invoked before the Protocol embodying the results of the Uruguay Round was finalized. On the obligation side, the requirement is that the Member would have to establish minimum access opportunities amounting to 4 per cent of the base period domestic consumption for the first year of the implementation period. The quota has to be increased annually by 0.8 per cent of the domestic consumption so that, in the final year of the implementation period, it expands to 8 per cent of the domestic consumption. The Member concerned may choose not to apply the special treatment at any time during the period of implementation. As an incentive it is provided that where a Member ceases to avail itself of the special treatment it will have to increase the minimum access opportunity by only 0.4% per year (instead of 0.8%) during the remainder of the implementation period.

(v) Section B of Annex B extends the above special treatment to developing countries in respect of any primary agricultural product that is the predominant staple in the traditional diet of the developing-country Member. A developing country Member availing itself of the special treatment has also to provide minimum access opportunities amounting to 1 per cent of the base

period domestic consumption, increasing to 2 per cent in the fifth year and 4 per cent in the 10th year of the implementation period.

35. As for the extent and manner of reduction of tariffs, the Agreement on Agriculture does not say anything. However, the Dunkel text,²² which was proposed by the then Director-General and which became the basis of negotiations in this area without being formally adopted, had included an annex on modalities for market access negotiations which had the following elements:

(i) The customs duties, including those resulting from tariffication, were to be reduced on a simple average basis by 36 per cent, with a minimum rate of reduction of 15 per cent for each tariff line to be implemented in six years. The base rate was to be the bound rate and for unbound rates the duties applied on 1 September 1986. For developing countries, the rate of reduction was fixed at two-thirds of the general rate, i.e., 24 per cent, with a minimum rate of reduction of 10 per cent. The implementation period for developing countries was 10 years. The least-developed countries were exempted from reduction commitments. In the case of products subject to unbound ordinary customs duties, developing countries had the additional flexibility of being able to offer ceiling bindings.

(ii) Where there were no significant imports, minimum access opportunities had to be established. The minimum access opportunity was to be not less than 3 per cent of the domestic consumption in the base period (1986-88), increasing to 5 per cent by the end of the implementation period. Current access opportunities which, during the base period, were in excess of the minimum access requirement of 3 to 5 per cent had to be maintained and increased during the implementation period. For the purpose of minimum and current access opportunities, the participants were expected to bind an in-quota rate which had to be at a level at which trade flows could take place. This provision was made to safeguard against the possibility of the tariff levels consequent on tariffication being pitched so high as to prevent any trade from taking place.

(iii) A separate annex in the Dunkel text laid down the procedures for the calculation of the tariff equivalent of non-tariff measures. This calculation had to be done by using the actual difference between internal and external prices. The external reference prices had to be determined in general on the basis of the actual average c.i.f. unit values for the importing country. Where average c.i.f. unit values were not available or appropriate, the external price had to be either (a) appropriate average c.i.f. unit values of a nearby country or (b) estimated from average f.o.b. unit values of one or more major exporters adjusted by adding an estimate of insurance, freight and other relevant costs to the importing country. The internal prices were generally to be a representative wholesale price on the domestic market or an estimate of that price where adequate data was not available. The external and internal prices had both to be calculated on the basis of the data for the years 1986 to 1988.

36. In the implementation of these modalities, some latitude was tolerated by the Uruguay Round participants, specially in respect of tariffication and minimum access commitments. For many products in a number of countries, the tariff equivalents incorporated in the schedules were in fact much higher than the tariff equivalent during the base period calculated by some commentators. In relation to minimum access commitment, despite the MFN requirement, Members counted special arrangements as part of their minimum access commitments and allocated the minimum access to exporters having special arrangements. Thus the modalities for agriculture appear to have served only as broad guidelines and there was a considerable element of bilateral and plurilateral negotiations in the commitments that were finally accepted.

²² Uruguay Round Doc. MTN.TNC/W/FA

C. Procedural Aspects of Rounds of Negotiations

The first five rounds

1. Before Article XXVIII *bis* was introduced into GATT 1947, rounds of tariff negotiations were convened from time to time on an *ad hoc* basis. There was no requirement in GATT 1947 for the CONTRACTING PARTIES to convene conferences for such tariff-cutting exercises on a multilateral basis. The Dillon Round was the first to be convened after Article XXVIII *bis* had been introduced, enabling the CONTRACTING PARTIES to sponsor from time to time negotiations "on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports". However, in all the rounds up to the Dillon Round, since the approach adopted was that of product-by-product negotiations, the procedures followed were similar. Each round began with the adoption of a decision convening a tariff conference on a fixed future date. The decision required the contracting parties to exchange request lists and furnish the latest edition of their customs tariffs and their foreign trade statistics for a recent period well in advance of the first day of the conference and the offers had to be made on the first day. The negotiations were concluded generally over a period of six to seven months after the offers had been made. The Dillon Round was an exception and the negotiations took a year and a half to conclude. The following schedule stipulated for the Torquay negotiations was typical of early GATT rounds:

Not later than 22 November 1949	-	exchange of customs tariff, details of other import charges or taxes and of annual import statistics
Not later than 15 January 1950	-	exchange of lists of products on which concessions are intended to be requested
Not later than 15 June 1950	-	exchange of the final list of products on which tariff and other concessions are requested
Not later than 28 September 1950 (first day of meeting in Torquay)	-	exchange of concessions offered, indicating the existing and proposed rate of duty on each item

2. The rules of the Dillon Round stipulated not only the time frame of the negotiations but also the form in which the request and offer lists would be submitted. The request lists were to have information on the following:

- (i) Tariff item number
- (ii) Description of products
- (iii) Present rate of duty
- (iv) Requested rate of duty

The consolidated lists of offers were required to have information on the following:

- (i) The tariff item number
- (ii) Description of products
- (iii) Present rate of duty
- (iv) Requested rate of duty
- (v) Concession offered, and
- (vi) Countries to which the offer was made.

3. Up to the Dillon Round, negotiations began only after the offers had been exchanged. These negotiations were essentially bilateral between pairs of delegations. A report²³ on the operation of GATT 1947 published by the ICITO in June 1950 mentions that 123 pairs of countries completed negotiations at Geneva and 147 at Annecy. The expectation was that 400 negotiations would take place at Torquay.

4. The above account should not, however, give the impression that the negotiations were entirely bilateral in character. First, the request and offer lists were circulated to all participating governments. Second, these governments granted concessions not only on the basis of concessions received directly on products for which their countries were principal suppliers but they also took into account the benefits derived by them on the basis of concessions exchanged between other pairs of countries. The following description of the process in the Geneva negotiations is given in another report published by the ICITO.

"The multilateral character of the Agreement enabled the negotiators to offer more extensive concessions than they might have been prepared to grant if the concessions were to be incorporated in separate bilateral agreements. Before the Geneva negotiations, a country would have aimed at striking a balance between the concessions granted to another country and the direct concessions obtained from it without taking into account indirect benefits which might accrue from other prospective trade agreements; it might even have been unwilling to grant an important concession if it had been obliged to extend that concession to third countries without compensation.

The multilateral method of negotiation thus maximized the scope and extent of the concessions granted. As a rule, the requests for concessions covered all products of interest to the negotiating countries; but for a product of which the principal supplier was not among the participating countries, the duty was generally reserved for negotiation on another occasion with that principal supplier; some duties thus reserved at Geneva have been negotiated with acceding governments at Annecy."²⁴

5. Adoption of the principal supplier rule was necessary because of the application of the most-favoured-nation rule concurrently with the principle of reciprocity. Concessions could not be granted to a small supplier unless reciprocal concessions had been received from the larger suppliers. In the event of a tariff concession being granted to the principal supplier, it was acceptable to some extent if the smaller supplier got a free ride. Instances of free ride were reduced when the participating governments agreed to take into account the indirect benefits in making their own offers. However, a free ride for the smallest suppliers could not be avoided.

Kennedy and Tokyo Rounds

6. In the Kennedy and Tokyo Rounds, in which the linear or formula approaches were adopted in the Ministerial Decisions launching the rounds, the initial discussions related to bringing greater specificity to the approach. Once a decision had been taken (working hypotheses of 50 per cent in the Kennedy Round

and the harmonization formula $Z = \frac{AX}{A+X}$ in the Tokyo Round) the participants were expected to submit their offers on the basis of the approach adopted. The next stage was the assessment by each participating country of the offers made by its trading partners. In such assessments the exceptions and exemptions were evaluated and each participating country sought from its trading partners additional concessions to make good the shortfalls in receiving reciprocity. For this purpose, request lists of product lines in which an improvement of the offer was sought were exchanged. Some participating countries took the stand that

²³ ICITO, *Liberating World Trade: Second Report on the Operation of the General Agreement on Tariffs and Trade*, 1950.

²⁴ ICITO, *The Attack on Trade Barriers: A Progress Report on the Operation of the General Agreement on Tariffs and Trade from January 1948 to August 1949*.

to redress the shortfalls they would withdraw or modify their own offers, and lists of such products were sent to the trading partners. In fact, during the Tokyo Round, some participating countries had made their initial offer on the basis of no exceptions and, thereafter, exceptions were made on the basis of evaluation of the offers of trading partners. The negotiating position of one of them was that it did not subscribe to the notion of compensation for exceptions, thereby implying that the only response to exceptions would be downward adjustment of its offers. A series of bilateral discussions were held in order to iron out the differences and to resolve the issue whether individual offers would be adjusted upwards or downwards in order to give satisfaction to the participating countries on the question of reciprocity. Multilateral discussions were also held to evaluate the offers. In the Kennedy Round, for instance, there was to be a process of "confrontation and justification" of departures from the working hypothesis of 50 per cent which participating countries were allowed to make for reasons of overriding national interest. Participating countries gave reasons for exceptions ranging from social and political considerations (declining and depressed industries, problems of small-scale enterprises, depressed areas, adverse effects for low-income people) to statutory requirements for exclusion (existing escape-clause action) and limits to negotiating authority granted by the legislature. While "confrontation and justification" took place in multilateral discussions, these debates had little influence on the course of the negotiations. One of the participants in the Kennedy Round has given the following assessment of the process of "confrontation and justification":

"These sessions, lasting from January 19 through February 12, 1965, were an education in the detailed rationale, facts and figures, valid and spurious, for maintaining tariff protection. It was specially exhausting for those delegates with long lists to defend. But the contents of the lists did not change since they were now a subject of negotiation rather than debate".²⁵

7. The really meaningful discussions were those that took place bilaterally between the trading partners and particularly those between the major players. Thus a linear or formula approach did not obviate the need for bilateral negotiations: they only gave the participants an additional tool to employ in the bargaining process.

8. The bilateral negotiations were in many cases preceded by a communication by the participating countries of the results of the assessment of other offers made by them. In some cases, these communications contained detailed calculations showing how the shortfalls in reciprocity had been calculated (see the section on reciprocity below). Bilateral negotiations had to be held without the aid of a formula with those countries which had been exempted from adopting the working hypotheses (New Zealand, South Africa, Australia) and with developing countries to which the concept of non-reciprocity applied (see section on developing countries below). In the bilateral negotiations, certain sectoral issues and conditionalities attached to specific offers were also discussed. For instance, in the Kennedy Round, the major industrial countries other than the USA had made their offers on chemical products conditional on the resolution of issues relating to the American Selling Price in the USA whereby certain chemical products were subject to customs valuation on the basis of the selling price in the United States. During the Tokyo Round, one country made the concession on newspaper and periodicals conditional on continued exemption for it from the manufacturing clause of USA copyright legislation. Certain other concessions were made conditional on resolution of disputes. During the same round, the offers on textiles and steel were made by the USA subject to the achievement of sectoral objectives (continuation of MFA and VERs on steel). There was a proposal for a snap-back clause on textiles and clothing products whereby the tariffs would be restored to pre-Tokyo Round levels should the MFA be terminated. This conditionality was retained by the United States in its Schedule. Other countries retained the right to review the situation in case the conditionality was given effect by the US. In some cases, besides global reciprocity countries sought reciprocity in individual sectors (automobiles, aircraft, aluminum, chemicals).

²⁵ Ernest Preeg, *Traders and Diplomats*, pp.87-88

Bilateral negotiations also resulted in both the Kennedy and Tokyo Rounds in individual countries granting INRs on specific products to their negotiating partners in the process of balancing out for reciprocity.

9. As a result of bilateral negotiations, participating countries submitted revisions of their offers at intervals – including both improvements and withdrawals. A condition attached by many was that further adjustments were possible in the light of possible deviations from concessions presented earlier by other trading partners. The offers became final only after they were rendered in the form of schedules and attached to the Protocols at the conclusion of the negotiations. At the end of bilateral negotiations, it was customary for countries to initial agreements on the list of products or specific approaches agreed. It was with the help of such initialled documents that these countries would verify the schedules before they were attached to the Protocols.

Uruguay Round

Industrial tariffs

10. During the Uruguay Round, the initial work on tariffs on industrial products resulted in the submission of proposals for modalities. Proposals on modalities continued to be submitted after the agreement during the mid-term review for a target reduction at least as ambitious as the one achieved in the Tokyo Round (i.e. one-third average reduction). In January 1990, participants gave up attempts on a common modality and agreed that each country would submit tariff proposals for reduction, elimination and binding on a line-by-line basis in accordance with the agreement reached at the mid-term review. After the submission of offers by a large number of participants, many of them, both developing and developed, exchanged request lists for improvement of offers. In accordance with the agreed procedures, each participant's tariff proposal was examined by the group of participants which had submitted proposals in order to determine whether it complied with the mid-term review agreement. To assist these reviews, analyses were provided by the Secretariat. These multilateral reviews supplemented the bilateral and plurilateral negotiations which constituted the core of the negotiations. In their original offers, in March 1990, while other developed countries had made specific proposals in most cases following a formula approach, the US had only listed the tariff lines in respect of which it was prepared to make offers on the basis of requests, apart from proposing sectors for tariff elimination. It was only in response to requests that the US made specific offers on most of the tariff lines. After the process of bilateral, plurilateral and multilateral discussion, most participating countries made revised offers in October 1990. Following the failure of the Brussels meeting, there was a pause in the negotiations.

11. The tariff negotiations were reactivated after the submission of the Dunkel text, which contained a compromise on several outstanding areas of the negotiations. Participating countries were invited to submit their revised offers comprising both agricultural and industrial products in the form of schedules in March 1992. These schedules incorporated the results of the bilateral negotiations which had been undertaken by a number of countries centring on the proposals for the elimination and harmonization of tariffs in specific sectors. The bilateral negotiations were intensified after the accord among the QUAD countries at Tokyo in July 1993. As mentioned earlier, the main objective of the developed countries *vis-à-vis* the developing countries was to ensure that bindings covered the maximum proportion of the latter's import trade. The bilateral negotiations continued right up to the last day of substantive negotiations, namely 15 December 1993, and even beyond.

Agricultural tariffs

12. The negotiations on agricultural tariffs (along with other specific commitments in the areas of domestic support and export subsidies) followed a somewhat different course. Country lists showing the extent of protection and support in respect of agricultural products were tabled prior to the Brussels Ministerial Meeting in December 1990, on the basis of formats established in line with the framework text proposed by the Chairman of the Negotiating Group on Agriculture. Mr. Dunkel's compromise text,

submitted in December 1991, contained, *inter alia*, modalities for agricultural negotiations. Although the EC and a few others formally rejected the Dunkel text in early 1992, and the modalities proposed by him were never formally adopted, participants proceeded to table comprehensive schedules on tariffs, domestic support and export subsidies from early 1992 onwards in line with the Dunkel text. The draft schedule of the EC in respect of export subsidies had to await the accord with the USA in November 1992 (Blair House I). These schedules also had supporting tables to show the manner of calculation of the tariff equivalent of non-tariff measures (as also the Aggregate Measurement of Support for domestic support and export subsidies). Bilateral and plurilateral consultations and negotiations took place to understand better how the modalities had been observed for the calculation of tariff equivalent, minimum and current access, in-quota tariff rates, etc. and for improvement of access where possible. Since there was more than a modicum of tolerance in ensuring strict adherence to the agreed modalities, the objective of bilateral and plurilateral negotiations was also to secure a situation in which no single participant deviated more than the others. A fresh dispute between the US and the EC erupted in 1993 and the agriculture negotiations were closed only after the two major economies made another deal in November 1993 (on export subsidy).

Conclusion of tariff negotiations

13. On 15 December 1993, on the strength of the submission made by all the major trading countries that they had concluded substantive negotiations with their main trading partners, in respect of both agricultural and non-agricultural products, the Chairman of the TNC declared that the Uruguay Round negotiations had been concluded. Since some negotiations were still continuing, the Chairman stipulated that, even if the negotiations were continued, there would be no withdrawals but only additional incremental commitments. As things turned out, not only were additional commitments made in the period before the Marrakesh meeting but there were withdrawals as well. The EC notified withdrawals in respect of non-ferrous metals and trucks on the ground that the United States had also retreated from the position at which its tariff offers stood on 15 December 1993. There were other withdrawals as well when the conditions stipulated in individual schedules were not fulfilled.

Verification of tariff schedules

14. During the period from 15 February to the end of March 1994, meetings were held for verification of market access draft final schedules to enable participants to ensure that the agreed results of the market access negotiations were accurately reflected therein. The verification process held after the Uruguay Round was much more substantive and complex than the similar exercise conducted after the Tokyo Round. The following were the highlights of those meetings:

(i) To be a contracting party to GATT 1947, it was not always necessary for countries or customs territories to have a schedule of concessions. Many of them which had become contracting parties by succession under the procedures of Article XXVI:5(c) of GATT 1947 did not have a schedule at all. But, for the original membership of the WTO, it was a prerequisite for them to have a schedule of concessions and commitments annexed to GATT 1994 (besides a schedule of specific commitments annexed to GATS). Some of these contracting parties had not submitted any schedule before the substantive conclusion of the negotiations in December 1993, or had submitted it too late. While the proposed Ministerial Declaration on Measures in Favour of Least-Developed Countries gave additional time of one year from 15 April 1994 for these countries to submit schedules, there was no such dispensation for others. The period of verification allowed time for the participants that were late in submitting their draft schedules to carry out, where necessary, further negotiations with other participants and to submit the schedules for verification.

(ii) In respect of industrial products, the participants were afforded the opportunity to ensure that the concession granted by their trading partners and noted in bilateral records of understanding appeared in the final schedule.

(iii) The process also gave participants the opportunity to make final adjustments if the conditions attached by them in the conditional offer were not fulfilled or if their expectations were not otherwise fulfilled. It was in the course of the verification process that the EC announced its adjustments referred to earlier. For fear of unravelling, the EC clarified that it had sought to restrict the withdrawals to items for which the US was by far the largest supplier.

(iv) During the verification process, the conditionalities attached by participants to their draft schedules were eliminated to a large extent. If some of them survived it was because the conditionality depended on matters which went beyond tariff negotiations, e.g., where the value of tariff concessions depended upon the negotiations in the area of government procurement. There were also some instances in which conditions were retained requiring trading partners to take certain policy actions (e.g., elimination of export restrictions on certain raw materials by exporters of wooden furniture).

(v) The WTO Understanding on the Interpretation of Article II:1(b) of GATT 1994 required "other duties or charges" levied on bound tariff items to be recorded in the schedules of concessions, at the levels applying on 15 April 1994. During the verification process, participants obtained an assurance that this was the case. Where it was not, a correction was made to reflect the level actually levied on that date. Four Members, i.e. Cameroon, Côte d'Ivoire, Gabon and Senegal, were given additional time to specify their ODCs.

(vi) The verification process was helped by the submission of analyses by the Secretariat showing, *inter alia*, the coverage of the agricultural and industrial schedules of participants, in terms of tariff lines and trade flows, the extent of trade-weighted reduction commitment on industrial products and simple average reduction on agricultural products. This helped participants to draw a conclusion on whether the agricultural tariff reduction modalities were complied with and whether the trade-weighted reduction target on industrial products had been reached.

(vii) During the verification process, participants also had an opportunity to make a last appeal to individual developing countries to improve the coverage of bindings or to lower the ceiling bindings or to improve their schedules on industrial products in other ways.

(viii) In respect of agricultural products, participants used the opportunity to raise questions on adherence to the agreed modalities on such matters as the levels of in-quota tariffs and tariff quotas. The issues were resolved after further bilateral negotiations alongside the verification process.

15. After verification, the schedules were attached to the Marrakesh Protocol to GATT 1994. The verification in respect of a large majority of the least-developed countries took place after the Marrakesh meeting. Special dispensation to complete the verification process (which implied also extended bilateral negotiations) was also given to other contracting parties to GATT 1947 which had submitted their draft schedules before the entry into force of the WTO Agreement but were not able to complete the negotiations in time to annex them to the Marrakesh Protocol. It was agreed that the approval of the schedules would be deemed to be approval of the terms of accession by the Members of the WTO under Article XII, paragraph 2 of the WTO Agreement.

D. Reciprocity and its Measurement during Negotiations

1. The notion that negotiations for the substantial reduction of tariffs are to be held on a mutually-advantageous and reciprocal basis, embodied in the Havana Charter and the preamble of GATT 1947, was reiterated in the rules of each round of negotiations even before it was incorporated in the substantive provision in Article XXVIII *bis* of GATT 1947. The Ministerial Declaration that launched the Kennedy

Round mentioned the "principle of reciprocity" and the Tokyo Declaration provided that "the negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause, and consistently with the provisions of the General Agreement relating to such negotiations". The Punta del Este Declaration avoided a direct reference to reciprocity but clearly the principle was covered when it was stipulated that "(n)egotiations shall be conducted in a transparent manner, and consistent with the objectives and commitments agreed in this Declaration and with the principles of the General Agreement in order to ensure mutual advantage and increased benefit to all participants." The same declaration makes references to the launching, conduct and implementation of the results of the negotiations as a single undertaking and overall balance of the negotiations, both of the concepts being obviously connected with the notion of reciprocity on the higher plane of comprehensive negotiations.

2. As mentioned earlier, neither the provisions of GATT 1994 nor the procedures of the eight rounds of tariff negotiations indicate how reciprocity is measured or defined. At the Review Session, Brazil had proposed a formula for measurement of concessions for determining reciprocity. On this "the Working Party noted that there was nothing in the Agreement, or in the rules for tariff negotiations which has been used in the past, to prevent governments from adopting any formula they might choose, and therefore considered that there was no need for the CONTRACTING PARTIES to make any recommendation in this matter".²⁶ No further attempt has been made to give greater definition to the manner in which reciprocity is to be measured and it has been left to each country to develop its own yardsticks.

3. In the bilateral exchanges of tariff concessions during the first five rounds when negotiations were held on the basis of request-offer item-by-item technique, trade coverage and depth of tariff reduction were the two main criteria whereby reciprocal balance was established. These two criteria remained the basic consideration in measuring reciprocity during later negotiations as well. Sometimes they took the form of a single yardstick of the weighted average reduction of tariffs in bilateral trade. Things became more complicated with the adoption of a linear or formula approach and complementary techniques were used to establish reciprocity. Participating countries would compare the average reductions in the dutiable products or the trade coverage of 50 per cent reduction (in the Kennedy Round). Where the duty reduction was less than the working hypothesis of 50 the offers were converted to the equivalent of 50 per cent before comparison. Thus, if the trade in a product was \$10 million and the reduction 25 per cent, it would count as \$5 million trade coverage on the basis of the 50 per cent reduction. Countries also took into account the extent to which the exception covered products of export interest to them.

4. The following table drawn up by one of the participating governments in respect of its trade with a major trading partner during the Kennedy Round illustrates some of the parameters that were taken into consideration while measuring reciprocity:

A-B Summary of Offers (1962 in million \$)

	<u>Non-Agricultural</u>				<u>Agricultural</u>				<u>Total</u>			
	A Imports from B	B Imports from A	A Imports from B	B Imports from A	A Imports from B	B Imports from A	A Imports from B	B Imports from A	A Imports from B	B Imports from A	A Imports from B	B Imports from A
Total Imports	2,457	2,927	220	1,171	2,677	4,098						
Dutiable trade	2,167	1,976	178	355	2,365	2,331						
Dutiable offered	2,081	1,706	167	38	2,248	1,744						

²⁶ GATT, BISD, Third Supplement, p.22

Duty free trade	14	496	2	9	16	505
Binding of free offered	14	235	-	9	14	244
Greater than 50% cuts	9	2	-	-	9	2
50% cuts	1,921	1,253	167	1	2,088	1,254
Less than 50% cuts	151	451	-	37	151	488
Average percentage cut dutiable	45.6%	35.9%	46.9%	1.7%	45.7%	30.7%
Total offered: 50% equivalents (including binding of duty free treatment)	1,990	1,653	180	22	2,170	1,675

The attempt in the above summary was to show that A's offer had a positive balance in reciprocity terms as compared to B's offer on the basis of most yardsticks.

5. In the case of another set of two countries, the following figures were given to illustrate the measurement of reciprocity:

	<u>Imports of X from Y</u>	<u>Imports of Y from X</u>
	1963 trade in million \$	
Dutiable imports	1547,7	1151,3
Dutiable offered	1465,1	888,8
Percentage offered	94,7	77,7
Free available for concession (unbound)	6,7	373,1
Binding of free offered	100,0	90,0

6. Another table used was in respect of offers on dutiable trade converted to the equivalent of 50 per cent reductions:

Imports (1963) in million \$ by:	<u>X</u>	<u>Y</u>
Agricultural	19,5	184,8
Non-agricultural	1435,3	644,6
Over-all	1454,8	829,0

7. One participant suggested during the negotiations in the Kennedy Round that a strong case could be made out for calculating the industrial balance on the basis of percentage of exceptions to the application of the working hypothesis. In other words, if country X had excepted 10 per cent of its industrial imports from the linear cut, but country Y only five per cent, the latter would be entitled to withdraw tariff concessions equivalent to another five per cent of its imports. For agricultural products, it was suggested that evaluation on the basis of a comparison of positive offers would be more appropriate.

8. Although the above tables and references might suggest that statistical methods were used for measuring reciprocity, in fact the procedures adopted for internal assessment by governments of participating countries were much more complex. In determining reciprocity, participating countries took into account the existence of other factors such as quantitative restrictions which diminished the trade-

creating possibilities of tariff reduction. The following extract from the final report by the USTR on the Kennedy Round Negotiations explains the various criteria used in measuring reciprocity:

"In order to simplify the presentation, the results of U.S. participation in the Kennedy Round tariff negotiations are presented in this report solely in terms of the value of trade covered by the concessions and the depth of the tariff reductions. However, in the course of the negotiations, numerous other factors were considered in evaluating the balance of concessions – the height of duties, the characteristics of individual products, demand and supply elasticities, and the size and nature of markets, including the reduction in the disadvantage to U.S. exports achieved through reductions in the tariffs applied to the exports of the United States and other non-member countries by the European Economic Community (EEC), the European Free-trade area (EFTA) and those countries in the British Commonwealth preferential system"²⁷

9. In the Kennedy and Tokyo Rounds, it was not only global reciprocity in bilateral trade that was sought by participating countries in tariff negotiations. Sometimes there were also sectoral objectives whereby countries sought reduction or harmonization of tariffs on specific products. Some participating countries reserved the right to proportion their concessions to the reciprocity that they obtained in the same sector. In the discussions on sectors in the Kennedy Round (aluminum; chemicals; cotton textiles; iron and steel; and pulp and paper), a proposal was made that countries participating in the sector group should strive to reduce their tariffs to certain target zones which would result in a harmonization of the tariffs of those countries. Thus global reciprocity in tariffs was complemented by reciprocity on specific products. On the other hand, during the Tokyo and Uruguay Rounds reciprocity in tariff negotiations was only a part of the equation in the larger and more comprehensive negotiations on non-tariff measures and (in the Uruguay Round) areas beyond trade in goods. Quantitative techniques for the measurement of reciprocity have become less important in tariff negotiations. Sectoral negotiations for the elimination or harmonization of tariffs and negotiations for the reduction of peak tariffs by the major trading countries implied that reciprocity had greater depth. In the sectoral negotiations, one of the conditions attached by the participants was that there would be broad-based participation by other producers and exporters. The extent to which such participation was ensured can be judged from the figures of percentage of world exports accounted for by the participants as already given in an earlier section. At the same time, in its application the principle of reciprocity has become more comprehensive. In agriculture, strict adherence to the tariff cutting formula of a reduction by a simple average of 36 per cent (subject to a minimum of 15 per cent on a particular product) was a way of achieving reciprocity. But this had to be accompanied by a reduction of production subsidies not enumerated in the green category and of export subsidies. Compulsory adherence to all the non-tariff measure agreements enhanced reciprocity and made it multi-dimensional.

E. Developing Countries and the Concept of Non-Reciprocity

The first five rounds

1. The developing countries participated in the earlier rounds of tariff negotiations on the basis of a reciprocal exchange of tariff concessions. The need of developing countries for special consideration was recognized for the first time when Article XXVIII *bis* was added during the Review Session. Paragraph 3 of this Article provides for negotiations to take into account, *inter alia*, – "the needs of less-developed countries for a flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes". When in 1959 a proposal was made that the negotiating rules for the Dillon Round should contain a provision on unilateral concessions, it was pointed out "that Article XXVIII *bis* recognized the special needs of less-developed countries and confidence was

²⁷ U.S. Office of Special Representative for Trade Negotiations, Report on United States Negotiations, 1967, Vol. I, p.iii.

expressed that contracting parties would bear this in mind in the course of the forthcoming negotiations".²⁸ In March 1961, the Executive Secretary of GATT submitted an Explanatory Memorandum to Committee III stating that Article XXVIII *bis*: 3 (b) could be interpreted to mean that the developing countries would not "always be held to strict reciprocity".²⁹ During the Dillon Round, while the concept of non-reciprocity was not explicitly recognized, the European Economic Community made a statement that the "Community is not considering requesting full reciprocity from less-developed countries during the second phase of the 1960-61 Tariff Conference".³⁰ Subsequently, in the Ministerial Declaration of 30 November 1961, it was stated that, "in view of the stage of economic development of the less-developed countries, a more flexible attitude should be taken with respect to the degree of reciprocity to be expected from these countries".³¹ It was in the Ministerial Declaration launching the Kennedy Round that the concept of non-reciprocity was set forth for the first time in the rules adopted for the conduct of the negotiations. It was provided that "in the trade negotiations every effort shall be made to reduce barriers to exports of the less-developed countries, but that the developed countries cannot expect to receive reciprocity from the less-developed countries".³² Efforts to elaborate the concept further were continued during the discussions in the Committee on Legal and Institutional Framework, the recommendations of which were later incorporated in Part IV of GATT. During the discussions in the Committee, it came to be recognized that it was really a question of less than full reciprocity on the part of the developing countries rather than none at all, as some of them were seeking. This implied that the developing countries could be expected to undertake not equivalent tariff commitments but commitments commensurate with their individual levels of development. It is this idea that is reflected in Article XXXVI, paragraph 8, and the addendum thereto, which states that "the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments".

Kennedy and Tokyo Rounds

2. During the Kennedy Round, instead of reciprocal concessions the developing countries were called upon to make at their own discretion a general contribution to the overall objective of trade liberalization. The Chairman of the Sub-Committee on Participation of Less-Developed Countries in the Kennedy Round reported to the Trade and Development Committee as follows:

"Ministers agreed that reciprocity would not be expected from developing countries. This decision has since been given formal legal expression by incorporation in Part IV of the General Agreement. There will, therefore, be no balancing of concessions granted on products of interest to developing countries by developed participants on the one hand and the contribution which developing participants would make to the objective of trade liberalization on the other and which it is agreed should be considered in the light of the development, financial and trade needs of developing countries themselves. It is, therefore, recognized that the developing countries themselves must decide what contribution they can make."³³

3. During the Tokyo Round the concept of non-reciprocity received a great deal of attention in the negotiations in the Framework Group in which developing countries made proposals for concretizing the concept. In the submissions made by Brazil, it was proposed that in trade negotiations the contributions by the developing countries should be directly linked to the additionality of benefits accruing to them from the negotiations; that evaluation of a concession should not be on the basis of trade coverage but on the relative impact of such a concession on the national economy and particularly on the trade flows; that the

²⁸ GATT, BISD, Eighth Supplement, p.110

²⁹ GATT, BISD, Tenth Supplement, p.172

³⁰ GATT, BISD, Tenth Supplement, p.172

³¹ GATT, BISD, Tenth Supplement, p.26

³² GATT, BISD, Twelfth Supplement, p.48

³³ GATT Doc. COM.TD/W/37, p.3

developing countries should be allowed to negotiate plurilaterally; that there should be a provision for a developing country to grant a single concession in exchange for several different concessions, and that the implementation of concessions by the developing countries should be staged or deferred. These proposals did not, however, find a place in the text of the Enabling Clause that resulted from these negotiations. On the other hand the concept of graduated reciprocity which was already embodied in Article XXXVI:8 was elaborated further in paragraph 7 of the Enabling Clause.³⁴ This paragraph provides that the developing countries having benefited generally from the application of a lower level of GATT obligations and specifically from the concept of non-reciprocity in trade negotiations should assume more obligations and make increased contributions and concessions on an autonomous basis as their trade situations improve and their economies develop. The Punta del Este Declaration virtually reproduced the language of Part IV of GATT and the Enabling Clause on non-reciprocity.

4. How was the concept applied during the trade negotiations held after its recognition? First of all, in the Kennedy Round, the developing countries were not asked to participate in the linear reduction of industrial tariffs. The industrialized countries did not even formally submit request lists to the developing countries for negotiation of reduction of tariffs on products of interest to them. Some of them only gave the developing countries a list of suggestions for making contributions to the objective of liberalization of trade. These included not only suggestions for selective reduction of high tariffs, elimination of preferential margins and binding of a majority of tariffs at applied rates, but also action on such non-tariff measures as burdensome documentation requirements, special exchange rates, prior deposits for imports, state trading practices, consular fees, government procurement, import restrictions on capital goods, administration of import restrictions, labelling requirements, etc. It was also suggested to them that they should consider reduction of barriers to imports from other developing countries. In response, the more advanced developing countries reduced their tariffs or bound them at existing or higher levels on a selected number of items. They also claimed that action taken by them already for liberalizing quantitative import restrictions or import licensing or for elimination or reduction of import deposits or exemption from consular fees were contributions to trade liberalization. Some of them claimed that autonomous reduction of tariff rates (even though not bound) and elimination of Commonwealth tariff preferences in specific products or adoption of the Brussels Tariff Nomenclature should be counted as contributions. One contracting party stated that it had made a contribution by not having recourse to retaliation under Article XXIII of GATT even though the finding in the complaint made by it had been in its favour and the measures were continuing. Several developing countries stated that they would make contributions to trade liberalization by taking measures to enlarge trade exchanges among themselves through negotiations in which they were actively engaged. The developing countries were subjected to gentle exhortations during the Kennedy Round rather than tough negotiations.

5. During the Tokyo Round, the mood *vis-à-vis* the developing countries was more demanding. In making their initial offers some developed countries declared that, although they subscribed to the concept of non-reciprocity, they would seek appropriate contributions from the more advanced developing countries. While, for tropical products, most developed countries did not demand any reciprocity before implementing their concessions on a GSP or MFN basis in advance of the conclusion of the negotiations, the United States did obtain a modicum of reciprocity from several developing countries. Bilateral agreements were exchanged between the United States and a number of developing countries whereby the latter listed the liberalization of import licensing and other measures such as import surcharges and made a commitment (although somewhat weak) to maintain them in exchange for advance implementation of tropical product offers by the United States.

6. Only a few developing countries participated in the main tariff negotiations in the Tokyo Round, which ended with the signing of the Geneva Protocol on 30 June 1979. The Geneva (1979) Protocol was signed by all the developed contracting parties but by only four developing countries, namely Argentina,

³⁴ GATT, BISD, Twenty-sixth Supplement, pp.203-205

Jamaica, Romania and Yugoslavia. However, negotiations between some developed countries and the developing countries continued after the signing of the Geneva (1979) Protocol and several developing countries signed the Protocol Supplementary to the Geneva (1979) Protocol towards the end of 1979. This Protocol was signed by Brazil, Chile, Dominican Republic, Egypt, Haiti, India, Indonesia, Israel, Ivory Coast, Korea, Malaysia, Pakistan, Peru, Singapore, Uruguay and Zaire among the developing countries. The EC and Canada, which had made additional concessions during the negotiations with the developing countries, also signed the Supplementary Protocol. Though the United States did not make additional tariff concessions to the developing countries after the signing of the Geneva (1979) Protocol, it did secure tariff concessions from selected developing countries in return for the concessions already incorporated by it in its Schedule attached to the Geneva (1979) Protocol. Additionally, it secured from them commitments in respect of quantitative restrictions and licensing requirements. Of particular interest is a bilateral agreement between the United States and a developing country which listed, not only the tariff concessions by the two sides but also the non-tariff measure liberalization made by the developing country concerned. The latter reserved the right to withdraw the non-tariff measures after intervals of three years but subject to consultation with the United States. The bilateral agreement mentions that, in the event of withdrawal by the developing country of the liberalized NTMs, the United States too would have the right to withdraw equivalent concessions to restore a balance. This was an attempt to bring non-tariff measures into the equation for exchange of tariff concessions.

Uruguay Round

7. In the Uruguay Round, while the same rules on non-reciprocity were accepted in the ground rules as during the Tokyo Round, there was a sea-change in the attitude of the developing countries. Most of them had already undertaken substantial tariff liberalization in the context of wider economic reforms and decided to hasten the pace of integration into the world economy. They were, therefore, anxious to prove that they were very keen on full participation in the tariff negotiations. What made it easier for them was the fact that many of them had already lowered their tariffs by autonomous liberalization since the Tokyo Round and further after the commencement of the Uruguay Round negotiations. However, they did benefit from the application of the concept of non-reciprocity. First, in regard to industrial tariffs, it was generally not expected of them that they would reach the target amount for overall reductions "at least as ambitious as that achieved by the formula participants in the Tokyo Round". Second, in agricultural tariffs they were required to cut their tariffs only by two-thirds of the simple average reduction of 36 per cent set for others. The minimum reduction for them for any product line was set at 10 per cent as against 15 per cent for others. They were given the further benefit of implementation of reduction commitments in 10 years as against six years for others. The least-developed countries were not called upon to make any reduction in tariffs at all. In the case of products with unbound ordinary customs duties, the developing countries had the additional flexibility of offering ceiling bindings. On industrial tariffs a few of them were requested to join the sectoral zero-for-zero or harmonization initiatives, but in the end only three of them (Hong Kong, Korea and Singapore) joined these agreements. Nevertheless, the concessions made by the developing countries were quite substantial, specially when judged against the background of the commitments undertaken by them in past rounds. Given below are the calculations made in the GATT Secretariat of pre- and post-Uruguay Round trade-weighted averages of tariffs of some of the developing countries on industrial products. The pre-Uruguay duties refer to 1994 bound duties or, for unbound tariff lines, to duties applicable as of September 1986. The post-Uruguay duties refer to the concessions listed in the schedules annexed to the Uruguay Round Protocol to GATT 1994. Import statistics used are generally those of 1988. In some cases, due to the use of ceiling bindings, the post-Uruguay trade-weighted average is higher than the pre-Uruguay Round average.

Trade-weighted averages of tariffs

<u>Country</u>	<u>Pre-Uruguay</u>	<u>Post-Uruguay</u>
Argentina	38.2%	30.9%
Brazil	40.7%	27.0%
Chile	34.9%	24.9%
India	71.4%	32.4%
Indonesia	20.4%	36.9%
Korea	18.0%	8.3%
Malaysia	10.0%	9.1%
Mexico	46.1%	33.7%
Thailand	37.3%	28.0%
Turkey	25.1%	22.3%

Source: GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations, November 1994.

8. Even more impressive was the increase in bindings by the developing countries. The following table, also drawn from the same GATT publication, gives the details:

Tariff bindings on industrial and agricultural products (percentages)

	Industrial products				Agricultural products			
	Percentage of tariff lines bound		Percentage of imports under bound rates		Percentage of tariff lines bound		Percentage of imports under bound rates	
	Pre-Uruguay	Post-Uruguay	Pre-Uruguay	Post-Uruguay	Pre-Uruguay	Post-Uruguay	Pre-Uruguay	Post-Uruguay
Total	43	83	68	87	35	100	63	100
Developed countries	78	99	94	99	58	100	81	100
Developing countries	21	73	13	61	17	100	22	100

Source: GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations, November 1994.

9. The following table gives greater details of bindings in respect of industrial products for selected developing countries:

Scope of bindings in industrial products for selected developing countries

Country	Industrial Products			
	Number of lines		Percentage of imports	
	Pre-Uruguay	Post-Uruguay	Pre-Uruguay	Post-Uruguay
Argentina	5	100	21	100
Brazil	6	100	22	100
Chile	100	100	100	100
India	3	60	9	68
Indonesia	10	93	30	92
Korea	10	85	24	86
Malaysia	0	25	1	44
Mexico	100	100	100	100
Thailand	1	63	9	66
Turkey	34	37	38	39

Source: GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations, November 1994.

10. It will thus be noted that, while the rules on non-reciprocity in trade negotiations between developing and developed countries have remained the same over the past three decades (and three rounds), the participation of the developing countries and the extent of their contributions have been increasing progressively and significantly.

Tropical Products

11. Since tropical products are produced and exported by the developing countries, these products have received special attention in the negotiations among developing and developed countries in the last three rounds of negotiations. In the Kennedy Round, the offers made on tropical products were monitored separately in a Group set up for this purpose through a succession of periodic summaries brought out by the Secretariat. An indicative list of products was established by the Secretariat, but the participants treated all products on which requests had been made by the developing countries as tropical products irrespective of whether such products were included in the indicative list. A significant point in the offers made by the developed countries was that they demanded not reciprocal concessions in return but that their industrial trading partners also take similar action on such products. Some of the developed countries implemented their offers on tropical products with effect from January 1, 1967, in advance of the conclusion of the negotiations.

12. In the Tokyo Round also a separate group was established on tropical products. While various proposals were made for dealing with these products ranging from across-the-board reductions in tariffs and other forms of protection to elimination of tariff escalation based on degree of processing and negotiation of stabilization arrangements for particular tropical products, in the end a number of developed countries made offers of reduction of tariffs on a preferential (GSP) or MFN basis generally without asking for reciprocal concessions and they implemented the concessions in advance, midway through the negotiations.

13. In the Uruguay Round, too, tropical products received separate attention and interim offers for tariff reduction on a preferential or MFN basis were made by the developed countries (and indeed by some developing countries) at the time of the mid-term review, and were implemented well ahead of the conclusion of the negotiations, again without seeking reciprocal concessions from the beneficiary

countries. Thus, in each of the three last rounds of negotiations the concept of non-reciprocity was applied to tropical products.

Credit for autonomous liberalization

14. It has already been mentioned that a major aspect of developing-country participation in the Uruguay Round was that many of them had already embarked on ambitious tariff and trade reform since the end of the Tokyo Round and the process of autonomous liberalization had continued after the commencement of the Uruguay Round. An important issue arose from the demand of the developing countries for being given credit for such autonomous liberalization. A widely-shared feeling was that credit in negotiating terms could be given for autonomous measures only if the tariff reduction was bound. The decision at Montreal that the base rate for unbound tariffs would be the normally applicable rates in September 1986 provided the basis to some extent for developing countries to be given credit for tariff reductions made since the commencement of the round, provided they bound those concessions. In December 1991 the Chairman of the Market Access Group made recommendations on guidelines for giving credit for ceiling bindings. The guidelines envisaged a general formula whereby for each 10 per cent of imports bound at 40 per cent there would be one per cent credit. For every 10 per cent of imports bound at ceiling levels below 40 per cent, additional credit was to be given in the proportion of one per cent for every 10 percentage points at which duties were bound below 40 per cent. Thus if a participating government bound 80 per cent of its imports at 40 per cent it received a credit of 8 per cent and if it bound 80 per cent of its imports at 30 per cent it received a credit of 16 per cent. In other words, in respect of a country which bound its tariffs at 30 per cent on 80 per cent of its imports, it was to be considered that it had reduced its tariffs by 16 per cent. In subsequent negotiations, the guidelines did not prove to be of any practical value as no targets for industrial tariff reduction were laid down for developing countries. Later there was an informal understanding shared by many participants that developing countries offering binding of industrial tariffs at 35 per cent across-the-board would be considered as having achieved the Montreal target.

F. Base Date and Base Rate

1. Since negotiations on tariffs have generally resulted in agreement on the extent of reduction, the base rate and base date were a particularly sensitive matter in the initial rounds of negotiations under GATT 1947 when countries were starting from a position of no existing tariff commitments under GATT. The rules of procedure for the first five rounds of negotiations contained the stipulation that the participating governments refrain from increasing tariffs and other protective measures inconsistently with the principles of the Havana Charter (and later the General Agreement) and with the objective of improving their bargaining position in preparation for the negotiations. In the rules for the Geneva negotiations in 1947, it was recognized that changes in the form of tariffs, or changes in tariffs owing to the depreciation or devaluation of the currency of the country maintaining the tariffs, which did not result in an increase of the protective incidence of the tariff, would not be considered as new tariff increases. In the rules for Annecy negotiations it was provided as follows:

"In the event of a change in the form of tariff or a revision of rates of duties to take account of either a rise in prices or the devaluation of the currency of the country maintaining the tariff, the effects of such change or such revision would be a matter for consideration during the negotiations in order to determine, first, the change, if any, in the incidence of the duties of the country concerned and, secondly, whether the change is such as to afford a reasonable basis for negotiations."³⁵

2. For the Torquay negotiations, as a general rule, the basis for negotiations was to be the rates of duty in effect on November 15, 1949, but rules similar to those followed during the Annecy negotiations

³⁵ GATT Doc. GATT/CP.2/26, p.3

were also adopted for dealing with cases in which a revision of rates of duty had taken place. During the Kennedy Round the general rule was that "the duties used for reference purposes should reflect the results of the 1960/61 Tariff Conference (Dillon Round)". The base rate became an issue among the developed countries during the Tokyo Round because Australia and Japan used the GATT bound rates as the starting-point for offering reductions although the applied rates were much below these rates because of liberalization measures taken by them in recent years. No agreement could be reached on a common base date and the offers were made on the basis of base rates and dates chosen by individual participants, it being left to other participants to take the difference in base rates into account in their evaluation of offers.

3. During the Uruguay Round, the base date and rate again became an issue, not for the products for which the tariffs were already bound but for those for which tariffs were not bound. The issue was important as a large number of developing countries had undertaken autonomous liberalization measures in the period after the Tokyo Round and they were anxious to ensure that they got credit for such liberalization. The matter was settled at the Montreal meeting where it was decided that "the base rates for the negotiations will be the bound m.f.n. rates and, for unbound rates, the normally applicable rates in September 1986". Since it was in September 1986 that the Uruguay Round was launched, the foundation was laid for the Uruguay Round participants, both developing and developed, to be given credit for any reduction made in unbound duties after the commencement of the Round. For agricultural products, the data for the years 1986 to 1988 had to be used for the calculation of the tariff equivalents.

G. Staging of Tariff Reductions

1. In the earlier rounds of negotiation, the tariff concessions normally became fully applicable immediately after the entry into effect of the Protocols. However, from the 1956 Geneva Conference onwards, staging of tariff reductions became an element in tariff negotiations. In the 1956 Geneva Conference, the US concessions were staged over two to three annual instalments. In the Dillon Round, the presidential authority for the negotiations required the US to make the agreed reductions in a minimum of two and a maximum of four stages. With some countries, the US agreed to make the reductions in two stages. With a number of countries the US also agreed to put into effect the tariff concessions without awaiting the drawing-up of the protocol embodying the results of the negotiations.

2. Since the Kennedy Round, staging of tariff concessions has become the general practice. The relevant protocol has generally embodied a norm for staging, leaving individual participants to deviate from the norm. Such deviations are naturally an element in the bargaining for reciprocity that takes place before the conclusion of the negotiations. In the Kennedy Round, the norm adopted was for the reduction to be implemented in five equal annual instalments beginning on 1 January 1968. Where a participant began the reductions on 1 July 1968, or on a date between 1 January and 1 July 1968, the requirement was that it would make two-fifths of the reductions on that date and the remaining three instalments on 1 January 1970, 1971 and 1972. Participants were, of course, free to make the entire concession effective on 1 January 1968 and to otherwise deviate from the norm, as agreed with their trading partners.

3. In the Tokyo Round, a norm was similarly fixed, but this time the tariff reductions were to be implemented in eight equal annual reductions beginning on 1 January 1980 and becoming fully effective on 1 January 1987. As in the Kennedy Round, deviations were agreed for many participants, although some of them were later to announce acceleration in tariff reductions. Illustrations of some of the deviations as originally stipulated are given below:

- (a) (i) The European Community stipulated that, at the end of the initial phase of five years it would examine, having regard to the economic, social and monetary situation and the implementation by its partners of the various undertakings they had entered into, whether it was in a position to enter into the second phase of three years.

(ii) Regarding the concessions for chemical products falling within Chapters 29, 32 and 39 of the CCT, the EC stated that the implementation would take place in the following manner:

- the first reduction, of one-eighth, would take effect on the date of entry into force for the USA of the Agreement relating to the implementation of the Customs Valuation Agreement;
- the subsequent reductions would take effect in six annual stages.

(iii) The concessions for kraft paper and board were to be implemented, during the first phase, in two reductions, each of 0.5 points, on 1.1.83 and 1.1.84, and during the second phase, in two reductions, each of 0.5 points, on 1.1.86 and 1.1.87.

(b) The United States Schedule contained the following lists indicating departures from the norm:

(i) Concessions to be implemented in more than one stage but less than eight stages;

(ii) Concessions to be implemented in eight stages but the implementation did not otherwise conform to the general staging rule;

(iii) Concessions to be implemented in more than eight but not more than ten stages;

(iv) Staging for certain compound rates of duty.

(c) Japan provided, *inter alia*, that for textile and steel products the commencement of reductions would be deferred to 1 January 1982 and thereafter the full reduction would be made in six equal instalments.

4. In the Uruguay Round once again a norm of five equal annual instalments beginning on the date of entry into force of the WTO Agreement has been provided in the Marrakesh Protocol in respect of industrial products and of six equal annual instalments for developed countries and ten for developing countries in agricultural products. An important difference between the staging rules for these two sectors is that, whereas there is a possibility for deviations from the norm in respect of industrial products, there is no such possibility for agricultural products. Of course, there is no problem in accelerating the reduction. Where ceiling bindings were offered, these became applicable in general on 1 January 1995, or the date of entry into force of the WTO Agreement for the Member concerned.

5. Important departures were made by the developed countries from the five-year rule in the sectoral agreements. While in some sectors implementation was agreed over longer periods, in others it was agreed to put the full reduction into effect immediately. The concessions on textiles and clothing were staged over longer periods by many participants and some developing countries linked the tariff concessions to the integration envisaged in the Agreement on Textiles and Clothing.

6. While no deviations were possible in respect of agricultural tariffs, the EC commenced its reduction on 1 July 1996, taking advantage of the provision in the Agreement on Agriculture which defines "implementation period" as "the six-year period commencing in the year 1995" and the related provision which states that the "year" "in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member".

H. Participation in Tariff Negotiations

1. In the 1947 Geneva negotiations, 23 out of 24 members of the Preparatory Committee for the Charter for the International Trade Organization (not including the Soviet Union) accepted the invitation of the United States to negotiate concrete arrangements for the reduction of tariffs and trade barriers. In the subsequent negotiations at Annecy and Torquay, all contracting parties generally participated in the negotiations along with the governments applying for accession. There was a measure of optionality in participation for the contracting parties as participation was necessary only if they sought concessions in return and such concessions could be sought only by the principal suppliers. Even when a country participated in bilateral negotiations, in many cases where trade flows were insufficient, there was no exchange of concessions. In the 1956 Geneva negotiations, some developing countries did not participate at all, while other which participated did not make any offers. The same situation prevailed in the Dillon Round, in which only 23 out of 37 contracting parties made concessions.

2. In the Kennedy and Tokyo Rounds, in which the linear or formula approach was followed, participation was in a sense obligatory. However, the concept of non-reciprocity applied to the developing countries and many of them did not undertake any tariff commitments. As compared with 76 contracting parties to GATT in 1967 only the following 31 countries and the EEC (6) granted tariff concessions in the Kennedy Round: Argentina, Australia, Austria, Brazil, Canada, Chile, Czechoslovakia, Denmark, Dominican Republic, Finland, Iceland, India, Ireland, Israel, Jamaica, Japan, Korea, Malawi, New Zealand, Norway, Peru, Portugal, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, United Kingdom, United States and Yugoslavia.

3. In the Tokyo Round, although the number of contracting parties had risen to 85, only 36 countries and the EC (10) granted tariff concessions. The schedules of concessions of the following participants were annexed to the Geneva (1979) Protocol, signed on 30 June 1979: Argentina, Austria, Canada, Czechoslovakia, EC, Finland, Hungary, Iceland, Jamaica, Japan, New Zealand, Norway, Romania, South Africa, Spain, Sweden, Switzerland, United States and Yugoslavia. However, negotiations were continued in later months of 1979 and the Protocol Supplementary to the Geneva (1979) Protocol signed on 22 November 1979 embodied the results of the further negotiations. This Protocol included the schedules of concessions of the following participants: Australia, Brazil, Canada (additional concessions), Chile, Dominican Republic, Egypt, EC (additional concessions), Haiti, India, Indonesia, Israel, Ivory Coast, Korea, Malaysia, Pakistan, Peru, Singapore, Spain, Uruguay and Zaire.

4. In the Uruguay Round, as mentioned earlier, it became obligatory for every Member to have a schedule of concessions on trade in goods. Due to this requirement, every government had to participate in the negotiations and grant concessions. The concessions of many developing country and least developed country Members were in the form of ceiling bindings.

I. Institutional Aspects and Secretariat Support

1. In the early rounds of negotiations, the practice followed was to establish a "Tariff Negotiations Working Party" at the opening of the conference. The Working Party was responsible for ascertaining the progress of negotiations and for making recommendations on questions of procedure and other matters connected with the conduct and conclusion of the negotiations. In the 1956 Geneva Negotiations and in the Dillon Round, a Tariff Negotiations Committee was established with broader functions: to exercise its good offices to maximize progress, to review consolidated offers, to be at the disposal of participants to arrange plurilateral or multilateral discussions, to consider any problems impeding or delaying the conclusion of the conference, and to draft the instrument or instruments embodying the results of the conference.

2. During the Kennedy Round, when the Ministerial Resolution itself had decided upon a linear approach, the Trade Negotiations Committee was mandated to elaborate a trade negotiation plan with a

view to reaching an agreement on the details of the plan for tariff reduction. It was given the overall function of supervising the conduct of trade negotiations.

3. While the Trade Negotiations Committee was composed of representatives of all participating nations, the discussions on exception lists was held only among the participants which had made offers. Tariff and other market access problems in five product sectors, i.e. aluminum, iron and steel, cotton textiles, pulp and paper and chemicals were considered in smaller groups. Additional groups and sub-groups were set up in the negotiations to deal with agricultural products and non-tariff barriers (anti-dumping in particular).

4. During the Tokyo Round, a Trade Negotiations Committee was similarly established to elaborate and put into effect detailed trade negotiating plans and establish appropriate negotiating procedures, and to supervise the progress of negotiations. The Committee was not intended to be the place where substantive negotiations would take place and, for this purpose, five negotiating groups and several sub-groups were set up. The negotiating groups took up separately the negotiations on tropical products, tariffs, non-tariff measures, agriculture, sector approach and safeguards. The sub-groups were set up for non-tariff measures and agriculture.

5. In the Uruguay Round, the Ministerial Declaration itself established the Trade Negotiations Committee to carry out the negotiations, a Group of Negotiations on Goods (GNG) and a Group of Negotiations on Services (GNS). The negotiating structure set up on 28 January 1987 for negotiations in the area of trade in goods consisted of 14 negotiating groups, including groups on tariffs, non-tariff measures, natural resource-based products, textiles and clothing, agriculture and tropical products, which related to market access. Towards the end of 1990, four of these negotiating groups, i.e. tariffs, non-tariff measures, natural resource-based products and tropical products, held joint meetings and thereafter they were merged into one market access group.

6. In the initial rounds, the Secretariat's role in the conduct of negotiations was very modest, although the governments participating in negotiations looked to it for "appropriate assistance". The tariff and trade statistics as well as the request and offer lists were prepared by the participating governments themselves and the Secretariat merely helped to circulate them. As and when bilateral negotiations were concluded between pairs of participants, the jointly-agreed lists of concessions were transmitted to the Secretariat for record. At the conclusion of the negotiations, each participating government prepared for distribution through the Secretariat a consolidated list of concessions it had granted and a supplementary list showing the country or countries with which each concession was initially negotiated.

7. However, by the time of the Tokyo Round, the Secretariat was providing considerable support for the tariff negotiations by preparing comprehensive, detailed and usable basic material on tariffs. The basic material on tariffs consisted of a tariff study giving the full facts on the tariff structure of each of the major trading countries together with trade statistics. For the EC and 10 developed countries, the GATT Secretariat established a basic file containing detailed information on duty rates, tariff bindings and the corresponding imports in recent years under each tariff line.

8. The Secretariat support for tariff negotiations was broadened further in the Uruguay Round. Besides providing the basic statistical material on tariff rates and trade flows, the Secretariat was called upon to undertake evaluations of tariff offers. In 1990, the reviews of offers made by the participants to determine whether the Montreal targets had been achieved were held on the basis of analyses prepared by the Secretariat. Analytical work was also done by the Secretariat on each of the schedules before these were approved in the verification process. These analyses included calculation of trade-weighted average reduction in the case of industrial products and of simple average reduction in the case of agricultural products, checking whether all agricultural products were bound and whether the minimum cut in the case of agricultural products complied with the requirements of the agreed modalities. During the verification process, the Secretariat's role was further enhanced by requiring it to report on whether the ceiling bindings

infringed existing bindings, the nature and application of other duties and charges and the completeness of agricultural supporting data.

J. Results of Tariff Negotiations

1. Only the overall results of tariff reduction and binding are considered here, as a more disaggregated analysis is outside the scope of this study.

2. No reliable evaluation of the tariff reductions and other commitments made during the first five rounds of negotiations in GATT 1947 is available. However, studies were conducted in the Secretariat on the results of the negotiations during the Kennedy, Tokyo and Uruguay Rounds and the findings are summarized below.

3. During the Kennedy Round, the principal industrialized countries made tariff reductions on 70 per cent of their dutiable imports, excluding cereals, meat and dairy products. Although the working hypothesis adopted for industrial products was for a linear cut of 50 per cent, because of numerous exceptions, an effective reduction of 35 per cent was obtained in industrialized countries for these products. The tariff reductions made by the developing countries were highly selective and would not have made a significant impact on their trade-weighted average tariff.

4. During the Tokyo Round, the level of all industrial duties in industrialized countries (EC, USA, Canada, Japan, Austria, Finland, Norway, Sweden and Switzerland) was reduced by one-third if measured on the basis of customs collection and by about 39 per cent if based on simple average rates. In these countries, the simple average declined from 10.4 to 6.4 per cent and the weighted average was reduced from 7.0 to 4.7 per cent (using import data from m.f.n. origin in 1977, except that 1976 was used in the case of Austria, Canada and Norway). No comparable estimates are available for developing countries, again because of the selective nature of their bindings and reductions, but a GATT Secretariat study mentions that the coverage of their tariff reductions was \$3.9 billion of their imports in 1976 and 1977. As for tariffs facing imports of developing countries, the average m.f.n. reduction on industrial products was shallower than the overall cut, about one-quarter compared with one-third. This reflected the fact that important product groups in the exports of developing countries such as textiles, clothing, footwear and travel goods were subjected to lower than formula reduction.

5. The main findings in the GATT Secretariat study of the results of the Uruguay Round in tariffs are given below:

(a) Developed countries agreed to reduce their tariffs on industrial goods from an average of 6.3 to 3.8 per cent, a reduction of 40 per cent;

(b) The proportion of industrial products which would enter duty-free in the developed country markets would increase from 20 to 44 per cent;

(c) The proportion of industrial products which would encounter tariffs above 15 per cent would decline from 7 to 5 per cent;

(d) In the case of industrial products, the percentage of bound tariff lines rose from 78 to 99 per cent for developed countries, from 21 to 73 per cent for developing economies, and from 73 to 98 per cent for transition economies;

(e) In agricultural products, all countries bound all their tariff lines, after – wherever applicable – converting their non-tariff measures into tariff equivalents. In a large number of cases, these were expressed in terms of specific duties with very high ad valorem equivalents. For unbound tariffs many developing countries offered ceiling bindings much above the current rates.

(f) The developed countries reduced their tariffs on twelve groups of agricultural products by an overall simple average amount of 37 per cent, ranging from 26 per cent for dairy products to 48 per cent for cut flowers. The reduction on dutiable tropical products as a whole was 43 per cent, ranging from 37 per cent for "tropical nuts and fruits" to 52 per cent for "spices, flowers and plants";

(g) The tariff cuts in the developed countries on industrial products, except petroleum, imported from the developing and least-developed countries were again lower as compared to the cut on imports from all sources, as shown in the following table:

Imports from	<u>Trade-weighted tariff average</u>		<u>Percentage reduction</u>
	Pre-Uruguay	Post-Uruguay	
All sources	6.3	3.8	40
Developing countries other than the least-developed	6.8	4.3	37
Least-developed countries	6.8	5.1	25

Source: GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations, November 1994.

The main factor responsible for the lower average reduction for imports from the developing countries was the lower reduction for textile and clothing as well as for fish and fish products.

(h) The study measured changes in tariff escalation by the change in the absolute difference between the tariffs at the higher and the lower stages of processing and came to two conclusions. First, the developed country tariffs, averaged over all industrial products, were subject to escalation before the Uruguay Round cuts, and in most (but not all) instances would remain so after the cuts. Second, there had been greater absolute reductions in average tariffs at more advanced stages of production than at earlier stages of production.

6. Studies done in the WTO, UNCTAD³⁶ and the OECD³⁷ show that, while the achievement during the last 50 years or so in industrial tariff reduction has been impressive, there is still considerable work to be done in future tariff negotiations. Among the aspects that might need attention in such negotiations, the following have been mentioned in particular:

In the developed countries:

(a) The tariffication of non-tariff measures for agricultural products resulted in the introduction of very high outside-of-quota tariff rates, and in many instances of high inside-of-quota tariff rates;

(b) In some countries, in the agricultural sector (and in some non-agricultural products) specific or mixed duties are used, leading to lack of transparency in the *ad valorem* incidence of tariffs;

(c) In the industrial area, tariff peaks, defined as those above 15 per cent, continue to affect such sectors as textiles, clothing, footwear and motor vehicles.

³⁶ UNCTAD, The Post-Uruguay Round Tariff Environment for Developing Country Exports, UNCTAD/WTO Joint Study, 1997

³⁷ OECD, Review of Tariffs Synthesis Report, 1999

In the developing countries:

- (a) High tariffs are prevalent in both agricultural and industrial sectors in a large number of countries. Some developing countries maintain much higher tariffs across-the-board than others at the same level of development. A similar divergence is noticeable in the level of bindings in industrial products;
- (b) In most developing countries, there is a large gap between the applied and bound rates. Since WTO Members have the freedom to raise duties to bound levels, the gap between the bound ceiling levels and the applied levels in both agricultural and industrial products is a source of uncertainty in international trade.

In both developing and developed countries:

Tariff escalation, although somewhat reduced in the past negotiations, continues to give additional protection to domestic producers.

K. Tariff Negotiations for Accession

1. In the course of every tariff conference or round of multilateral trade negotiations, except the Geneva Tariff Conference of 1956, the negotiations encompassed accession negotiations with a number of countries. In fact, the Ancey Tariff Conference was convened only in connexion with accession negotiations and in the Torquay Tariff Conference accession negotiations were a substantial component. The CONTRACTING PARTIES had also established as early as in 1949 "Procedures Governing Negotiations for Accession" outside of tariff conferences. In these procedures, and in practice, during the first five tariff conferences tariff negotiations were the principal – if not the sole – component of accession negotiations. The practice of establishing working parties to make an in-depth examination of the trade policies of the applicant countries developed much later, sometime in the mid-sixties. If working parties were established earlier in individual cases it was for a specific purpose such as examining the modalities of provisional accession.

2. Not all countries in the process of accession which have participated in multilateral trade negotiations have concluded their tariff negotiations successfully during the rounds. Others which have had a negotiated schedule at the end of a round have not been able to accede until much later, sometimes after fresh tariff negotiations. A unique case was that of Bulgaria's participation in the Tokyo Round. While not successful in concluding its tariff negotiations pursuant to its request for accession, Bulgaria offered to give the benefit of the tariff concessions enumerated in the schedule tabled by it to all contracting parties to the GATT in accordance with the principles of Articles II, XIX, XXIV, XXVII, XXVIII and other relevant provisions of the General Agreement, provided, on their part, the contracting parties extended to Bulgaria reciprocal benefits in respect of tariff concessions enumerated in their Schedules.

Accession under GATT 1947

A review of the accession negotiations under GATT 1947 brings out the following features of the practice of contracting parties:

- (i) In the early days of GATT 1947, accession negotiations entailed an exchange of concessions and both the contracting parties and the applicant countries made concessions. Of course, the existing contracting parties' lists of new concessions were shorter as the applicant countries got the benefit of the concessions made earlier by the former. Since the Tokyo Round generally the practice has been that only the applicant country makes concessions. Even earlier some applicant countries did not request from contracting parties anything more than the benefit of existing concessions. This practice could be the consequence of the fact that, by the end of the Tokyo Round, the tariff concessions made by contracting parties had already become very

comprehensive and the prevailing sentiment was to obtain concessions from acceding countries in return for concessions already made by the contracting parties in the past.

The outcome of tariff negotiations during accessions was initially in the form of bilateral lists of concessions. The concessions made by the acceding States were then embodied in the schedules which were annexed to the Protocol of Accession. As for the concessions made by the contracting parties, when accession negotiations were concluded in the context of multilateral trade negotiations, generally the practice was for the concessions to be reflected in the Protocols embodying the results of the multilateral trade negotiations and not in separate schedules annexed to the Protocol of Accession. In the Uruguay Round, some acceding states negotiated concessions which were directly incorporated in the schedules of the contracting parties annexed to the Marrakesh Protocol.

(ii) The industrialized contracting parties have been the principal players in the accession negotiations of developing countries. Except in the first few years of the operation of GATT 1947, developing country contracting parties have seldom sought concessions from acceding developing countries.

(iii) The tariff negotiations from the beginning up to the time when GATT 1947 was terminated remained bilateralized. The applicant country concluded bilateral tariff agreements with all or almost all the contracting parties with which it entered into negotiations.

(iv) Since, in every case, there was a bilateral list of concessions, there was a record of the contracting parties with which the concessions were initially negotiated. However, a practice developed in the later phase of the operation of GATT 1947 for the acceding countries to specifically grant INRs on the tariff lines on the bilateral lists. In some cases INRs were specifically excluded in respect of a number of concessions on the lists.

(v) The accession negotiations usually resulted in bilateral lists which were selective, comprising tariff lines in which the contracting party concerned was the principal supplier or had an interest as a substantial supplier or otherwise. The practice in the later phase of the operation of GATT 1947 was for the contracting parties also to secure a ceiling binding for all or nearly all industrial products and in some cases for agricultural products as well.

(vi) In the early phase of GATT 1947, the acceding country and the contracting party negotiating with the acceding country sent two notifications to the Secretariat, first that they had entered into negotiations with an exchange of offers, and second, that they had concluded the negotiations. Sometimes the Secretariat was also informed of the exchange of request lists. Later on, the practice was only to notify the Secretariat of the conclusion of negotiations, not their commencement.

(vii) In some cases, while negotiations were entered into they concluded on the note that the level of then existing trade was not such as to warrant an exchange of concessions.

(viii) Non-tariff measures figured increasingly in the bilateral negotiations in the accessions from the mid-80s onwards, and commitments were made by the acceding countries to become signatories to the Tokyo Round agreements on these measures. In some cases, specific commitments were made on the elimination of licensing in respect of tariff lines on which tariff concessions had been made. While the acceding country concerned retained the right to have recourse to existing GATT 1947 provisions (to impose quantitative restrictions), it also agreed that, if the use of such rights proved necessary, it would enter into negotiations to give compensation to contracting parties which would be affected.

(ix) In the case of some accessions, contracting parties invoked the non-application clause (Article XXXV) and did not consent to the application of GATT 1947 between themselves and the

newly-acceding countries. As a prerequisite of non-application is that negotiations should not have been entered into between the two contracting parties, those invoking the non-application clause had not entered into negotiations with the acceding country concerned. In one case, however, one contracting party, Brazil, notified that, not having completed its negotiations with Japan, it wished to invoke the provisions of Article XXXV of GATT. The notification went on to say that "(t)he Brazilian Government hopes that it will be able to suspend the application of the said Article as soon as negotiations with Japan have resulted in a mutually-advantageous agreement."³⁸

The largest number of invocations of Article XXXV were against Japan at the time of its accession in 1955 when 14 contracting parties, including several important trading nations, i.e. France and the UK, resorted to the provision. The invocation was made on behalf – not only of their own but also – of their dependent territories. Four more invocations of Article XXXV were made against Japan subsequently at the time of accession of other contracting parties. When these invocations were later withdrawn, it was without entering into tariff negotiations. Upon withdrawal, however, these contracting parties got the opportunity to exchange concessions with Japan in subsequent multilateral trade negotiations such as the Kennedy Round and the Tokyo Round. New Zealand entered into bilateral tariff negotiations with Japan shortly after withdrawal of its invocation of Article XXXV in March 1963. There was no case of non-application involving only Article II of GATT 1947 as permitted under Article XXXV.

(x) In their accession negotiations, Romania and Poland did not make any tariff concessions. The Working Party on the accession of Poland had reported, *inter alia*, as follows:

"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 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 for its accession to the General Agreement would be commitments relating to an annual increase in the value of its imports from contracting parties."³⁹

Consequently, Poland's schedule annexed to the Protocol for the Accession of Poland which entered into force on 18 October 1967 provided as follows:

"Schedule LXV – Poland

1. 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.
2. On 1 January 1971 and thereafter on the date specified in paragraph 1 of Article XXVIII of the General Agreement, Poland may, by negotiation and agreement with the CONTRACTING PARTIES, modify its commitments under paragraph 1 above. Should this negotiation not lead to agreement between

³⁸ GATT Doc. L/405, p.3

³⁹ GATT, BISD, Fifteenth Supplement, p.110

Poland and the CONTRACTING PARTIES, Poland shall, nevertheless, be free to modify this commitment. Contracting Parties shall then be free to modify equivalent commitments."⁴⁰

In the case of Romania, the same arguments applied and in the Working Party 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 of increasing imports from contracting parties at a rate not smaller than the growth of total Romanian imports provided for in its Five-Year Plans."⁴¹

In the Tokyo Round, which was held after the accession of Poland and Romania, both contracting parties participated and made tariff offers. However, only the tariff concessions made by Romania were attached to the Geneva (1979) Protocol as Poland withdrew its offers, citing lack of interest by other contracting parties. By the time the Uruguay Round took place the economic systems of these two countries had changed and both of them had tariff schedules of the usual type attached to the Marrakesh Protocol.

(xi) When Bangladesh became independent it requested accession on the basis of the existing terms and conditions which applied to its territory including the schedules of tariff concessions. There were, therefore, no tariff negotiations and the schedule attached to the Protocol of its accession was based on the existing schedule of Pakistan.⁴² A similar procedure was followed when the Czech and Slovak Federal Republic, formerly known as Czechoslovakia, announced that it would cease to exist on 31 December 1992 and that it would be replaced by two successor States, the Czech Republic and the Slovak Republic. There were no tariff negotiations and the tariff schedules encompassing the concessions in the schedule of Czechoslovakia were annexed to each Protocol of Accession. In the case of Slovenia, however, the request for accession without negotiations was not accepted and negotiations were held to establish a new schedule.

(xii) In a number of cases provisional accession was granted to governments pending the completion of procedures for definitive accession. In only one case, that of Switzerland, was provisional accession preceded by tariff negotiation and Switzerland was temporarily granted GATT rights by the signatories to the Declaration on the Provisional Accession of the Swiss Confederation dated 22 November 1958. This Declaration provided, *inter alia*, that commercial relations between the participating contracting parties and the Swiss Confederation shall, subject to certain conditions, "be based upon the General Agreement as if the Swiss Confederation had acceded to the General Agreement in accordance with the relevant procedures and as if the schedules annexed to this Declaration were schedules annexed to the General Agreement..."⁴³

2. The above description of the features of the practice of contracting parties applies to negotiations for accession under Article XXXIII of GATT 1947. As for accessions under paragraph 5 (c) of Article XXVI, no tariff negotiations were provided for and the government concerned became a contracting party on the basis of a declaration by the "responsible contracting party" that the customs territory possessed or had acquired "full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement", as provided in the Article.

Accessions under the WTO

3. The following are the features of the accessions to the WTO in respect of tariff commitments made by the acceding countries:

⁴⁰ GATT, BISD, Fifteenth Supplement, p.52.

⁴¹ GATT, BISD, Eighteenth Supplement, p.95

⁴² GATT, BISD, Nineteenth Supplement, pp.6-7

⁴³ GATT, BISD, Seventh Supplement, p.19

(i) The trend in the last phase of the operation of GATT 1947 for the acceding countries to bind the tariffs on all or nearly all industrial products (besides agricultural products as required by the WTO Agreement on Agriculture) as well as granting concessions on a specific list of products has continued. While high tariffs have been accepted for agricultural products, the trend has been for the acceding developing countries to bind their industrial tariffs at much lower levels than was the case under GATT 1947. In some cases they have made commitments partially or substantially accepting the Uruguay Round sectoral agreements aiming at harmonization or elimination of tariffs.

(ii) The practice of specifically granting initial negotiating rights even though such rights are inherent in bilaterally-agreed lists has continued. To guard against the practice of INRs being granted at different levels to different Members in respect of the same product, some Members have secured commitments that the level of tariff for each INR will not be higher than the rate at which it is extended to other Members.

(iii) Commitments have been obtained envisaging that the bound rate on specific products will not be higher than the bound rate on competing products (e.g., rapeseed/colza/canola products *vis-à-vis* comparable soya products).

(iv) In the bilateral agreements commitments have been made in respect of regional arrangements of which the acceding Member is a participant. In one case the commitment is to make serious attempts to obtain agreement from the partners in the regional arrangement to lower the existing common external tariff for specific products. In another case the commitment is to endeavour to limit to a minimum the effects of the negotiations in the regional arrangement on the tariff rates applied by the acceding Member at the time of accession. In one case the acceding Member declared its intentions (on a non-legally binding basis) to maintain its existing applied rates notwithstanding the ceiling bindings.

CHAPTER III

BILATERAL AND PLURILATERAL NEGOTIATIONS

A. Bilateral and Plurilateral Tariff Negotiations under GATT 1947

1. Reference has already been made in Chapter I to the procedures established by the CONTRACTING PARTIES for two or more contracting parties to hold tariff negotiations at times other than general tariff conferences. Ten negotiations were held under these procedures, nine of which were bilateral. One of them, held in 1956, was joined in by a large majority of the contracting parties and is, therefore, counted as one of the rounds of multilateral trade negotiations and has already been dealt with in the previous Chapter. Of the remaining nine, seven bilateral negotiations involved Germany and other contracting parties (South Africa, Austria (twice), Denmark, Norway, Sweden and Finland). Cuba and the USA had bilateral negotiations under these procedures in 1957 and Japan and New Zealand in 1963. The bilateral negotiations between Japan and New Zealand were held shortly after the withdrawal by New Zealand of the invocation of Article XXXV against Japan in March 1962.

2. Plurilateral tariff negotiations were also held in the context of the Tokyo Round. The Agreement on Trade in Civil Aircraft, negotiated during the Round among a group of mainly industrialized countries, involved tariff concessions and customs duties and other charges were eliminated from all civil aircraft, civil aircraft engines, other parts, components and sub-assemblies, as well as from all ground flight simulators and their parts and components. The signatories to the Agreement agreed in March 1984 to an expansion of the products covered by the Agreement.

B. Bilateral and Plurilateral Negotiations under the WTO

2. Since the entry into force of the WTO Agreement, there have been instances of concessions flowing from bilateral and plurilateral negotiations being bound by incorporation in the schedules of the participating countries concerned.

Information Technology Agreement

3. The most far-reaching negotiations were those on information technology products. On 13 December 1996, during the course of the Singapore Ministerial Meeting, 28 Members of the WTO and States or separate customs territories in the process of acceding to the WTO adopted a Declaration⁴⁴ signifying their intention to eliminate the customs duties and other duties and charges on six categories of information technology products. These categories were computers, telecommunication products, semi-conductors, semi-conductor manufacturing equipment, software and scientific instruments. The modalities for reaching a final agreement by 1 April 1997 were spelt out in the Ministerial Declaration. A unique feature of these modalities was that the agreement was to become effective and the participants were to implement the decision to eliminate tariffs if "participants representing approximately 90 per cent of world trade in information technology products have by then notified their acceptance". When the matter was reviewed by the participants on 26 March 1997, the acceptances had risen to 39 participants accounting for 92.5 per cent of trade in these products. The Agreement therefore entered into effect on 1 April 1997. A number of other participants have joined the Agreement since then.

4. Another unique feature of the Information Technology Agreement was that the starting-point for negotiations was not always tariff lines but a list of ITA products. The Ministerial Declaration contained an attachment A with a list of HS headings, but it also contained an attachment B giving a list of products.

⁴⁴ WTO Doc. WT/MIN(96)16

The modalities required the participants to implement the binding and elimination of duties by the following procedures:

- (i) In the case of the HS headings listed in Attachment A, by creating, where appropriate, subdivisions in its Schedule at the national tariff line level; and
- (ii) in the case of the products in Attachment B, by attaching an Annex to its Schedule including all products in Attachment B, which is to specify the detailed HS headings for those products at either the national tariff line level or the HS 6-digit level.

5. The ITA envisaged that customs duties would be eliminated in four stages starting on 1 July 1997 and ending on 1 January 2000. There was provision for extending the staging of reductions in limited circumstances. A few participants, including Costa Rica, Korea, Chinese Taipei, Thailand, Malaysia, Indonesia and India were given the benefit of extended staging for a limited number of products. In some cases, staging was permitted up to the year 2005. The Agreement also envisaged that, in future, the participants would review and enlarge the product coverage. Such a review was taken up in 1998, but disagreements over exclusion of certain consumer electronic items and over the proposed inclusion of certain items having a bearing on external and internal security have stymied the negotiations.

6. Although the initiative for the Agreement came from the QUAD members, the momentum of other governments wanting to join it was considerable, even though it was always clear that the concessions would be applied by the participants on an m.f.n. basis. While some participants had low levels of existing tariffs on IT products, there were others which were maintaining moderately high levels of tariffs and in some areas very high levels of tariffs on these products. Since all tariffs were agreed to be reduced to zero, there would be a significant increase in market access worldwide for these products once the agreed elimination was implemented.

7. The success of the sectoral approach in the case of the Information Technology Agreement raises some questions of policy regarding future negotiations. Generally speaking, it is widely acknowledged that only global tariff negotiations can yield far-reaching and substantial results in securing a reduction or elimination of tariffs, as in only such negotiations is there a possibility of sectoral trade-offs which are an essential ingredient for success. But individual sectors may have some unique features which may make it feasible for agreement to be reached on a stand-alone basis for some sectors. The information technology industry is a highly globalized one and there is keen competition to attract foreign direct investment in the industry. Duty-free treatment of inputs is one of the factors which make host countries attractive for foreign investors. In the circumstances, most governments were attracted to a worldwide agreement for the elimination of tariffs on information technology products, even outside the framework of global negotiations on tariffs.

8. Another aspect of the Agreement which might call for comment is the provision whereby the Agreement became effective upon participants with a trade share of 90 per cent signifying their acceptance. At the time of the discussions at Singapore, the parallel was given of paragraph 6 of Article XXVI of GATT 1947, which stipulated that the GATT would enter into force definitively only after acceptance by contracting parties accounting for 85 per cent of the trade of all contracting parties. However, it can also be argued that the modality was not far different from the one adopted for sectoral negotiations for tariff harmonization and elimination during the Uruguay Round. In fact, as the figures given in an earlier section would show, in the sectoral agreements during the Uruguay Round, the participants were satisfied generally by the adherence of WTO Members with a share of exports which was in all cases less than the figure of 90 per cent stipulated in the Information Technology Agreement.

Pharmaceuticals

9. It has been mentioned earlier that one of the areas in which the zero-for-zero initiative was successful in the Uruguay Round was pharmaceuticals. Duty elimination in this product group involved

the items classified or classifiable in Harmonized System (HS) Chapter 30 and in H.S. Headings 2936, 2937, 2939 and 2941 (except for certain listed items) and four groups of pharmaceutical products and intermediate chemicals listed in the annexes to the record of discussions⁴⁵ among representatives of the governments participating in the agreement for tariff elimination on pharmaceuticals. Over 6000 products were covered. The record of discussions also mentioned that the WTO Members concerned would meet once every three years to review the product coverage with a view to including, by consensus, additional pharmaceutical products for tariff elimination. The first such review took place over the period 30 November 1995-11 July 1996 and resulted in 465 additional products being added to the list eligible for duty-free treatment. The second series of meetings took place during the period April 1998 to October 1998 and a further 639 products were added to the list.

Other liberalization commitments

10. The United States and the EEC have notified their decision to reduce duties on white spirits, one which (presumably) flowed from bilateral negotiations. There have also been notifications of unilateral decisions on tariff commitments. For instance, Hong Kong (China) took a decision to bind many of its tariffs at the applied level of zero duty. Pursuant to the provisions of Annex 5 to the Agreement on Agriculture, at the end of 1998 Japan tariffed the one product, i.e. rice, in which it had received special treatment and had maintained quantitative restrictions as a departure from the general obligation contained in paragraph 2 of Article 4 of the Agreement on Agriculture.

⁴⁵ GATT Doc. L/7430

CHAPTER IV

PRACTICE AND PROCEDURES IN RENEGOTIATIONS

A. Renegotiations during the period 1948-1957

Duration of schedules

1. As Article XXVIII was substantially revised during the Review Session and the revised version came into effect in October 1957 we shall first consider the practice and procedures in renegotiations up to 1957.

2. Article XXVIII as originally incorporated in GATT 1947 is reproduced below:

"1. On or after January 1, 1951, any contracting party may, by negotiation and agreement with any other contracting party with which such treatment was initially negotiated, and subject to consultation with such other contracting parties as the CONTRACTING PARTIES determine to have a substantial interest in such treatment, modify, or cease to apply, the treatment which it has agreed to accord under Article II to any product described in the appropriate Schedule annexed to this Agreement. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually-advantageous concessions not less favourable to trade than that provided for in the present Agreement.

2 (a) If agreement between the contracting parties primarily concerned cannot be reached, the contracting party which proposes to modify or cease to apply such treatment shall, nevertheless, be free to do so, and if such action is taken the contracting party with which such treatment was initially negotiated, and the other contracting parties determined under paragraph 1 of this Article to have a substantial interest, shall then be free, not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the contracting party taking such action.

(b) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with a contracting party taking action under such Agreement."

2. The tariff commitments made in the 1947 Geneva negotiations had an initial validity of three years and in Article XXVIII as originally incorporated in GATT 1947 there was no provision for renegotiations for modification or withdrawal of these commitments before 1 January 1951. At Torquay it was decided⁴⁶ to extend the assured validity of the tariff commitments up to 1 January 1954 by an amendment of the text of paragraph 1 of Article XXVIII. Even before this amendment of Article XXVIII became effective in accordance with the requirement of Article XXX (by the acceptance of two-thirds of the governments

⁴⁶ GATT, The Torquay Protocol and the Torquay Schedule of Concessions, p.5

which were at that time contracting parties), the Torquay Protocol provided for the extension of the commitment on the assured validity of the concessions by the contracting parties which signed either the Protocol or a Declaration which was separately adopted on "The Continued Application of the Schedules to the General Agreement on Tariffs and Trade".⁴⁷

3. On 24 October 1953, the CONTRACTING PARTIES adopted another Declaration⁴⁸ to provide that they would not invoke prior to 1 July 1955 the provisions of paragraph 1 of Article XXVIII. The adoption of a declaration without any accompanying amendment of the text of paragraph 1 of Article XXVIII was considered to be "the best means of giving effect to the desire of the majority of the contracting parties to prolong the assured life of their schedules beyond 31 December 1953."⁴⁹

4. By early 1955, the Review Session had already finalized its recommendations for amendment of a number of articles, including the amendment of Article XXVIII to its present form, which, *inter alia*, dispenses with the need to take a decision on the extension of validity of the schedules from time to time and instead provides for the possibility of renegotiations at three-year intervals beginning on 1 January 1958. On 10 March 1955, the CONTRACTING PARTIES adopted another Declaration⁵⁰ extending the assured validity of the schedules for a further period of two years and six months (up to 1 January 1958).

Renegotiations under paragraph 1 of Article XXVIII

5. The first set of renegotiations already authorized under paragraph 1 of Article XXVIII of the original GATT 1947 were held during the Torquay Tariff Conference before the contracting parties agreed to prolong the life of the tariff commitments. These renegotiations were held in parallel with negotiations for new concessions among the contracting parties. The available records of the Torquay renegotiations show that renegotiations were held among 13 contracting parties, Australia, Brazil, Benelux (Metropolitan Territories, Belgian Congo and Ruanda-Urundi and Surinam), Chile, Cuba, Denmark, France, Haiti, Italy, New Zealand, South Africa, United Kingdom and Uruguay. The United States, while making a statement that it did not wish to invoke Article XXVIII during the Torquay negotiations, nevertheless carried out discussions for "certain adjustments" in respect of three products. Other details of the renegotiations are not available, but the results of these renegotiations were incorporated in the Torquay Protocol.

6. The next series of renegotiations under paragraph 1 of Article XXVIII took place at the beginning of 1955, when further prolongation beyond 1 July 1955 of the assured life of the schedules became due for consideration. As many as 21 contracting parties notified their intention to invoke paragraph 1 of Article XXVIII before giving their support to the continuation of the assured life of the schedules. After 1955, the next renegotiations under this provision were in 1957, before the next period of validity of the schedules was to begin on 1 January 1958. Nine contracting parties took advantage of these negotiations.

7. In the context of the renegotiations in 1957, the Secretariat made recommendations⁵¹ for arrangements and procedures for the conduct of renegotiations. The procedures recommended by the Secretariat contained many of the elements which were included eventually in the procedures for renegotiations under Article XXVIII approved by the CONTRACTING PARTIES in 1980. It should also be recalled that Article XXVIII at that time envisaged negotiations and consultations only with contracting parties with which the concession was initially negotiated and with those having a substantial interest. The rights of contracting parties with a principal supplying interest were not separately recognized.

⁴⁷ GATT, BISD, Vol. II, p.31

⁴⁸ GATT, BISD, Second Supplement, pp.22-23

⁴⁹ GATT, BISD, Second Supplement, p.61

⁵⁰ GATT, BISD, Third Supplement, pp.30-32

⁵¹ GATT Doc. L/635

Authorization of requests for renegotiation on "sympathetic consideration"

8. While renegotiations on a general basis took place before the extension of the assured validity of the schedules from time to time, a practice also developed for the CONTRACTING PARTIES to grant authorization on "sympathetic consideration" of requests to modify or withdraw tariff concessions. Even before the Torquay negotiations, four contracting parties, Brazil, Cuba, Pakistan and Ceylon (Sri Lanka), were granted such authorization. The Working Party on the "Continued Application of Schedules Annexed to the Agreement" on the basis of whose recommendation the Declaration of 24 October 1953 was adopted had cited earlier instances of such authorization and concluded that "(t)here was no reason to believe that contracting parties will be less ready in the future than they have been in the past to consider requests of this kind and to join in granting authority for the necessary negotiations, and the approval of this report would in itself be confirmation that the CONTRACTING PARTIES would give sympathetic consideration to such requests."⁵²

9. One of the additions to Article XXVIII emerging from the Review Session was the provision for special circumstance renegotiations which could be authorized by the CONTRACTING PARTIES under paragraph 4 of the revised Article. While the contracting parties were awaiting the entry into force of the Protocol amending various provisions of the General Agreement, including Article XXVIII, there was a desire to put paragraph 4 of the revised Article into effect immediately. Consequently, the Declaration⁵³ of 10 March 1955 whereby the CONTRACTING PARTIES extended the assured validity of the schedules for a further period of two years and six months also provided that, during that period or until the above-mentioned protocol entered into effect, whichever was earlier, contracting parties might enter into renegotiations under conditions and in accordance with procedures which were the same as those contained in paragraph 4 of the revised Article XXVIII.

10. During the period 1948-57, before Article XXVIII in its current form entered into effect, there was recourse on 20 occasions to renegotiations under the customary practice of the CONTRACTING PARTIES showing "sympathetic consideration" for granting special authorization for renegotiations to contracting parties or under paragraph 4 of Article XXVIII, which it was agreed to put into effect through the Declaration dated 10 March 1955 even before it had entered into force legally. These requests were made mostly on account of the urgent need for additional protection of specific industries or in a few cases on the ground of changes in classification of products.

11. During the period before 1957, the renegotiations under paragraph 1 of Article XXVIII, those held pursuant to special authorization on "sympathetic consideration" as well as those under paragraph 4 of the Article were held quite smoothly. In general, the claims of "substantial interest" were recognized and the contracting parties with such interest were satisfied with the results of renegotiations. There were only a few cases in which claims of substantial interest were not recognized. There were no instances of retaliatory withdrawals. The renegotiations under paragraph 1 of Article XXVIII were generally completed over a short period and only in a few cases was an extension of time needed. After paragraph 4 of the Article was made operational through the Declaration, additional time was given to contracting parties under this provision to complete renegotiations which had been commenced earlier. Thus, a number of renegotiations which had begun under paragraph 1 of Article XXVIII were allowed to be continued under paragraph 4 of that Article.

⁵² GATT, BISD, Second Supplement, p.63

⁵³ GATT, BISD, Third Supplement, pp.30-32

Sui generis renegotiations by Brazil

12. There was one *sui generis* case in which Brazil was granted a waiver from the obligations of Article II by a decision of the CONTRACTING PARTIES on 16 November 1956, to enable it to put into force its new customs tariff immediately as its programme for the reform of its final structure had resulted in a comprehensive tariff revision. Brazil was required to undertake negotiations in order to establish a new schedule within a year of the tariff revision. Pending the entry into force of the results of the negotiations, other contracting parties were allowed to suspend concessions initially negotiated with Brazil on the basis of "procedures analogous to those provided in Article XXVIII". Paragraphs 3 and 4 of the Decision are reproduced below *in extenso*:

"3. As soon as the negotiations referred to in paragraph 1 above have come to an end the Brazilian Government and other negotiating contracting parties shall submit to the CONTRACTING PARTIES a report on the results of the negotiations and on other action taken in pursuance of this Decision. The CONTRACTING PARTIES may make such recommendations to Brazil and to other contracting parties as they may deem appropriate. In particular, if any negotiating contracting party considers that the situation resulting from the negotiations and other action pursuant to this Decision does not constitute a mutually satisfactory adjustment, the CONTRACTING PARTIES shall authorize the suspension of the mutual obligations of that contracting party and of Brazil under the General Agreement.

4. Together with the report referred to in paragraph 3 above, the Brazilian Government and other negotiating contracting parties will submit to the CONTRACTING PARTIES the new Schedule III, and modifications in the schedules of other negotiating contracting parties resulting from such negotiations, provided that any contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest or a substantial interest in any concession which would be modified or withdrawn as a result of such negotiations will be entitled to withdraw substantially equivalent concessions initially negotiated with the contracting party having modified or withdrawn such a concession. Such action will have to be taken not later than six months after such concession has been modified or withdrawn and after the CONTRACTING PARTIES having been duly notified."⁵⁴

13. The result of this authorization was full-fledged negotiations between Brazil on the one hand and 17 other contracting parties on the other, lasting about two years. A Tariff Negotiations Committee was established to conduct the negotiations and Brazil's trading partners reviewed past concessions made by them to Brazil. Request lists were exchanged by both sides and new sets of concessions agreed both by Brazil and by its trading partners.

14. During the period 1948-57, apart from recourse to Article XXVIII for modification and withdrawal of concessions, there were also instances of recourse to Article XVIII:7 for renegotiation of bound concessions. Sri Lanka (then Ceylon) invoked the provision on four occasions, twice in 1955 and once each in 1956 and 1957, and Greece once in 1956.

B. Renegotiations during the period 1958-1994 under Article XXVIII: 1, 4 and 5

1. During this period, under GATT 1947, Article XXVIII in its present form was available to the contracting parties which had accepted the Protocol on the Review Session amendments after its entry into effect in October 1957 upon acceptance by two-thirds of the contracting parties. For other contracting parties which had not been able to complete the domestic legal formalities to accept those amendments, the revised Article XXVIII was made applicable by the adoption of a declaration on 30 November 1957 and again on 19 November 1960 on the continued application of schedules for three-year periods.

⁵⁴ GATT, BISD, Fifth Supplement, p.38

Main trends of renegotiations (1958-1994)

2. During the period 1958 to 1994, the relative flexibility in the use of Article XXVIII:5 as compared to Article XXVIII:1 (where renegotiations could be done only in a slot of about six months before the commencement of successive three-year periods) and Article XXVIII:4 (where authorization had to be obtained and renegotiation had to be completed within defined time limits) induced a gradual shift to Article XXVIII:5. This is evident from the table given below:

<u>Time period</u>	<u>Para. 1</u>	<u>Invocation of Para. 4</u>	<u>Para. 5</u>
1958-59	0	11	1
1960-69	27	21	11
1970-79	9	5	43
1980-89	2	2	54
1990-94	3	1	8

3. The slide into desuetude of Article XXVIII:4 took place notwithstanding the fact that the authorization of renegotiations under this provision became progressively easier. In the early 1950s, when special authorization had to be given, the discussions among contracting parties were spread over two or three days. Even as early as in 1958, however, approval of requests for authorization under Article XXVIII:4 had become a routine matter and there was no detailed examination of "special circumstance" in the Intersessional Committee. Requests were granted even when the documents had not been circulated in advance in accordance with the rules of procedure. Again, the limitation of time in respect of Article XXVIII:1 renegotiations was not a big impediment and extension of time was easily given. But the relative freedom of Article XXVIII:5, under which negotiations could begin at any time and could be carried on over any period, made this paragraph very attractive to contracting parties. All that they had to do in order to be able to invoke Article XXVIII:5 at any time during a three-year period was to make a reservation to this effect at the beginning. Such a reservation was made by an increasing number of contracting parties during the period 1958-94, as will be seen from the following table:

	<u>Year</u>												
	1958-60	1961-63	1964-66	1967-69	1970-72	1973-75	1976-78	1979-81	1982-84	1985-87	1988-90	1991-93	1994-96
No. of contracting parties	4	9	2	6	9	12	11	18	19	23	28	35	37

These reservations were made even if there was no intention at the time of the reservation to hold such negotiations, with a view to retaining the flexibility to invoke Article XXVIII:5 if the need arose to renegotiate a tariff concession.

Rules and procedures for renegotiations

4. One development during the period was the adoption of rules and procedures for negotiations under Article XXVIII. In 1957, the CONTRACTING PARTIES had approved the rules and procedures for the renegotiations under Article XXVIII:1 planned before 1 January 1958. Suggestions for changes in these procedures were made by the Secretariat in the light of experience and new procedures⁵⁵ were approved by the Council in November 1980. An important point to be noted about these procedures is that

⁵⁵ GATT, BISD, Twenty-seventh Supplement, pp.26-28

they are in the nature of guidelines. The relevant parts of the minutes of the meeting of the Committee on Tariff Concessions are set out below:

"The Chairman took up the question of the character of the document and recalled the comments made by the representative of Finland that the terms used in the text and particularly the word 'should' meant that the document should be interpreted as guidelines and that contracting parties entering into Article XXVIII negotiations were invited to follow those guidelines but should not consider them as binding obligations".⁵⁶

5. The main elements of the guidelines are described below:

What has to be done by the Member when initiating action to modify or withdraw a concession

6. The Member invoking Article XXVIII:1 or 5 or seeking authority under Article XXVIII:4 must send a notification to the Secretariat indicating its intention and giving the following information:

- (i) List of items, with corresponding tariff line numbers, which are affected;
- (ii) Whether it is intended to modify or withdraw the concession;
- (iii) The Member, if any, with which the item was initially negotiated;
- (iv) The statistics of imports of the products involved, by country of origin, for the last three years for which statistics are available;
- (v) In the case of specific or mixed duties, both values and quantities have to be indicated.

7. If the intention is to modify the concession, the Member concerned has been given the option to indicate the proposed modification in the first notification or to circulate it as soon as possible thereafter to the Members with INRs or with a principal or substantial supplying interest. At the same time as the first notification, in the case of renegotiations under Article XXVIII:4 when the authorization has been granted, the Member seeking modification or withdrawal of a concession should communicate to other concerned Members the compensatory adjustments which it is prepared to offer.

What has to be done by Members claiming a principal or substantial supplying interest

8. Within 90 days of the initial notification, other Members have to communicate in writing their claims of interest as a principal or substantial supplying Member and at the same time send a copy to the Secretariat. If the claims of interest are recognized by the Member seeking modification or withdrawal of a concession, such recognition constitutes a determination by the Ministerial Conference of interest as required in Article XXVIII:1. If a claim of interest is not recognized, the Member making the claim may refer the matter to the Ministerial Conference. It should be noted that the Member with INRs is not required to make a claim of interest.

What has to be done by the Member seeking to modify or withdraw a concession on completion of renegotiations

⁵⁶ GATT, Doc. TAR/M/3, p.9

9. Upon completion of each bilateral negotiation the Member seeking to modify or withdraw a concession is required to send to the Secretariat a joint letter attaching a report indicating (a) concessions to be withdrawn; (b) bound rates to be increased; (c) reduction of rates bound in the existing schedules and (d) new concessions not in existing schedules. On completion of all its negotiations, the Member concerned has to send a final report indicating the Members with which agreement has been reached and those with which agreement has not been reached and the names of Members with a substantial interest with which consultations have been held. Members are free to give effect to the proposed changes after the conclusion of the negotiations have been notified. Another notification has to be submitted to the Secretariat of the date on which the changes will come into effect.

Duties of the Secretariat

10. The Secretariat is required to circulate as secret documents all notifications for initiating renegotiations, with the accompanying information as well as the reports on completion of bilateral negotiations and the final report on the conclusion of all negotiations/consultations. The report on the date on which the changes will come into force is also to be circulated, but not as a secret document. The notifications to the Secretariat of claims of interest are only for the record.

Main features of renegotiations (1958-1994)

11. The main features of the practice of contracting parties in the renegotiations under paragraphs 1, 4 and 5 of Article XXVIII are described below:

(i) Tariff concessions were modified or withdrawn under Article XXVIII generally to afford additional protection to industry or agriculture. Other common reasons were rationalization or simplification of tariffs, introduction of new tariff nomenclature and conversion from specific to *ad valorem* tariffs;

(ii) Extension of time to complete negotiations held under Article XXVIII:1 was granted as a routine matter if renegotiations could not be completed before 1 January. However, the practice developed later of dispensing with extensions and the contracting party concerned announcing that it would continue the renegotiations under Article XXVIII:5;

(iii) The renegotiations under Article XXVIII:4 were generally the most expeditious, although in some cases the process overlapped with a new cycle for renegotiations under Article XXVIII:1. In some cases, even when the renegotiations under Article XXVIII:1 were already in sight, special circumstance was claimed in response to domestic pressures and authorization obtained under Article XXVIII:4. The following extract from the summary record of the meeting of the Intersessional Committee held at the Palais des Nations on 20 April 1960, illustrates the above point:

"The representative of Australia pointed out that if the situation had permitted his Government to wait for a few months until the end of the present period of firm validity of concessions, it would have been able to renegotiate the concessions concerned in the normal way without the need for any special authority. However, there were urgent internal reasons which precluded delay. Perhaps the most important of these arose from the action taken by his Government in February 1960, as a result of which some 90 per cent of Australia's total imports were now exempt from import licensing. In some quarters in Australia there had been considerable criticism of this action. The Government wished to maintain the removal of controls while being able to afford a reasonable level of protection to domestic industry and it felt it important that it should be able to demonstrate to interested circles in Australia that the facilities

provided in the GATT were meaningful and that countries could have recourse to Article XXVIII when circumstances justified it.⁵⁷

In this instance the renegotiations were finally concluded only in July 1961. As regards Article XXVIII:5 renegotiations, in some cases the process was concluded within a few months while in others it took up to six years or more. Sometimes delays occurred due to inaction on the part of the trading partners of the contracting party modifying or withdrawing a concession.

(iv) Three contracting parties, Australia, New Zealand and South Africa, were the most frequent users, followed by Canada.

(v) The tariff rates resulting from Article XXVIII invocations were implemented generally after concluding the renegotiations with contracting parties with which the concession was initially negotiated or those with a principal supplying interest and consultations with those with a substantial interest. However, there were also a limited number of cases in which the new tariff rates were implemented after the renegotiations had been concluded with most but not all contracting parties concerned, or in which renegotiations had been in progress but no agreement had been reached or where the contracting party seeking to modify or withdraw the concession had reached the conclusion that no agreement was possible. In a few cases, the concession was suspended and the tariff raised or a tariff quota imposed even before the process of renegotiation had commenced. Some of these cases caused friction in trade relations and even led to retaliation or threatened retaliation. There has been less concern in cases in which the compensatory concessions offered have been simultaneously implemented and/or the renegotiations have been continued (and agreements reached at a later stage).

(vi) Agreements have been reached generally on the basis of compensatory concessions granted by the contracting party modifying or withdrawing a concession, but in some cases the package has also envisaged the withdrawal of concessions by the contracting party affected. In one case, it was recognized that the trade coverage of the compensatory offer exceeded the trade coverage of the concessions withdrawn. It was, therefore, agreed that the credit for the balance of the trade coverage would be retained by the contracting party concerned to be drawn down in the event of future withdrawals of tariff bindings.

(vii) In some cases of renegotiations commenced at the time of the conclusion of rounds of multilateral tariff negotiations, agreements were reached in the context of the tariff concessions exchanged during the rounds. Reference has already been made to the renegotiations under Article XXVIII during the Torquay Tariff Conference. The Final Act of the Torquay Conference mentions that the negotiations encompassed "(n)egotiations between governments with a view to making adjustments in their concessions negotiated at Geneva or Annecy" besides negotiations for accession and negotiations for new or additional reciprocal tariff concessions. The Final Act also certifies that, in each case where a schedule of an existing contracting party annexed to the Torquay Protocol "provides treatment for any product less favourable than is provided for the same product in the existing schedule to the General Agreement, appropriate action has been taken to enable effect to be given to such a change".⁵⁸ While not as extensively as during the Torquay Conference, some renegotiations were also absorbed into subsequent tariff negotiations. The Final Act of the 1960-61 Tariff Conference (Dillon Round) mentions that the negotiations at that conference included renegotiations by contracting parties of existing concessions pursuant to Article XXVIII besides the renegotiations under Article XXIV:6 resulting from the establishment of the EEC.

⁵⁷ GATT Doc. IC.SR.47, 29 April 1960

⁵⁸ GATT, The Torquay Protocol and the Torquay Schedules of Concessions, p.5

On a limited basis some renegotiations were also concluded during the tariff negotiations in the Uruguay Round. Paragraph 7 of the Marrakesh Protocol is quoted below:

"In each case in which a schedule annexed to this Protocol results for any product in treatment less favourable than was provided for such product in the Schedules of GATT 1947 prior to the entry into force of the WTO Agreement, the Member to whom the Schedule relates shall be deemed to have taken appropriate action as would have been otherwise necessary under the relevant provisions of Article XXVIII of GATT 1947 or 1994. The provisions of the paragraph apply only to Egypt, Peru, South Africa and Uruguay."

In some cases of renegotiations involving agricultural products where renegotiations were blocked due to differences, agreement was reached in the context of the Uruguay Round Agreement on Agriculture.

(viii) The practice in the 1960s and the 1970s was for the contracting party seeking to modify or withdraw a concession under Article XXVIII to identify the contracting parties with which the concession was negotiated or those with a principal supplying interest and to seek negotiations with them. In recent years, the practice seems to have developed for reliance to be placed entirely on the expression of interest in negotiations by other contracting parties.

(ix) Renegotiations were held and agreement reached with contracting parties with which the concession was negotiated even if that contracting party had ceased to be a significant supplier of the concerned product. As for contracting parties with a substantial interest, in some cases compensatory concessions have been granted while in others consultations have been held and the contracting party concerned has been satisfied with the compensatory concessions granted to the contracting parties with which the concession was initially negotiated or those with a principal supplying interest.

(x) The contracting parties seeking to modify or withdraw a concession under Article XXVIII have invariably furnished the statistics in order to enable determination of the supplier status of other contracting parties. In most cases three years' data were given and the average for three years was used to determine supplier status.

(xi) In one or two cases Article XXVIII renegotiations have been concluded on the basis of informal contacts with countries affected and without any formal agreement.

(xii) In most cases Article XXVIII renegotiations have resulted in permanent changes in the tariff schedules. However, there have also been cases in which renegotiations have led to temporary increases in tariffs above the bound level or temporary suspensions of concessions accompanied by the imposition of limitations such as tariff quotas.

(xiii) In the 1950s and the 1960s, in several cases renegotiations under Article XXVIII followed safeguard action under Article XIX. This practice has ceased in recent years because the availability of Article XXVIII:5 for renegotiations at any time has proved to be a substitute for Article XIX action, particularly in the light of the practice of making temporary tariff increases under Article XXVIII.

(xiv) In a few cases, recourse to Article XXVIII has been the consequence of panel reports submitted in disputes under Article XXIII:2.

(xv) During the Uruguay Round four contracting parties referred to in paragraph 7 of the Marrakesh Protocol (Egypt, South Africa, Peru and Uruguay) held renegotiations under Article XXVIII resulting in the establishment of full new schedules and the deletion of old schedules.

(xvi) In specific cases there were unresolved differences of view on whether in determining the status of supplying contracting parties only the MFN trade or preferential trade should be taken into account and on how the supplier status should be determined in the case of a new product where three years' trade statistics were not available. These differences were settled in paragraphs 3 and 4 of the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994.

(xvii) Although in a number of cases contracting parties have reserved their rights when other contracting parties have gone ahead with modification or withdrawal even before the renegotiations were complete, or where renegotiations were concluded without agreement with the principal supplier or without the substantial supplier being satisfied, and in other cases there have been threats of retaliation before the renegotiations were satisfactorily completed, there were only three cases of retaliatory withdrawal of concession in renegotiations under Article XXVIII:1, 4 and 5 during the period 1958 to 1994. The rare use of the provision for retaliation in Article XXVIII:3 can be ascribed to the fact that renegotiations under the Article were generally successful. Other reasons have been the general desire to avoid a chain of retaliatory withdrawals by other trading partners affected by the initial withdrawal. Since, under Article XXVIII:3 a concession must be withdrawn on an MFN basis (as compared to discriminatory retaliation under Article XXIII:2), there is an inherent difficulty in invoking the provision for retaliatory withdrawal. The details of the three cases are given below:

(a) On 1 July 1965 the EEC notified its intention to modify the tariff concessions in respect of various types of cheese, including cheddar cheese. After agreement with one of the contracting parties on 29 June 1967, the EEC proceeded to effect the modification in the tariff rate on 1 August 1967 and renegotiations were continued with other contracting parties concerned. While agreements were eventually reached with Austria (28 March 1968), Finland (31 May 1968) and New Zealand (15 June 1970), no agreement could be reached with Australia and Canada. Canada did not retaliate, but Australia, which had a substantial supplier interest in respect of cheddar cheese, withdrew tariff concessions initially negotiated with the EEC on transistors and certain apparel items. This withdrawal took effect 30 days after the Australian notification dated 5 February 1968. As against the average imports from Australia into the EEC of cheddar cheese in 1963-65 of US\$1,140,000, the trade coverage of withdrawn concessions was US\$1,035,000 (average imports from the EEC into Australia).

(b) In December 1974, the EEC notified its intention to modify concessions on unwrought lead and zinc by changing existing specific duties into *ad valorem* rates. In December 1975, it submitted its final report on the renegotiations indicating that, while agreement was reached with Australia, no agreement had been possible with Canada. The new rates of duty were made effective on 1 January 1976. On 4 June 1976, Canada notified its intention to invoke Article XXVIII:3 to withdraw bindings in the Canadian schedule on certain items which were initially negotiated with the EEC (canned meats, liqueurs, vermouths, aperitifs and cordial wines and wire of iron and steel). It claimed that the new rate of 3.5 per cent on unwrought zinc represented a substantial increase over the *ad valorem* equivalent of the old specific rate. The trade coverage (average imports of unwrought zinc into the EEC during the period 1973-75) was Can\$35,332,000 against which the trade coverage of the concessions withdrawn by Canada was Can\$30,216,000. The EEC had recourse to Article XXIII:2 on the Canadian action and the following conclusion was reached by the panel:

"The Panel...was of the view that the withdrawal of concessions should have been less than the equivalent of the total export volume of zinc to the Community as account should have been taken of the rebinding of the Community duty. Also, the right of retaliation should be related to the actual damage suffered by Canada and consequently the withdrawals should have been based on the difference between the *ad valorem* equivalent of the specific rate calculated on imports from Canada only and the new *ad valorem* rate. Finally, account should have been taken of the fact that the *ad valorem* duty on lead had been fixed at a level lower than the incidence in respect of Community imports from Canada.... In the interest of maintaining the highest possible general level of concessions, the Panel finds that the Canadian retaliatory action should be withdrawn, i.e. the previous Canadian tariff bindings should be re-established as soon as the Community proceeds either to decrease their tariff on zinc or to make tariff concessions on other products of export interest to Canada of an equivalent value."⁵⁹

(c) On 11 June 1985, the United States notified that it had modified the concession on orange juice and indicated its willingness to enter into renegotiations under Article XXVIII. The duty on reconstituted orange juice was raised from 20 to 35 cents per US gallon. Despite mutually-agreed extension of the six-month time-period envisaged in Article XXVIII:3 for retaliatory withdrawal, no agreement could be reached. On 12 March 1986, Canada notified its decision to modify the concession on fresh vegetables, in respect of which the USA had an initial negotiating right. The trade coverage of the item on which the concession was withdrawn was based on the three-year average as Can\$4.5 million against a decline of trade by US\$4.8 million during the period January-October 1985 as compared to the previous year after the duty had been raised.

(xviii) Since their adoption in 1980, the guidelines have been followed by the contracting parties to GATT 1947 and the Members of the WTO less than fully. Generally speaking, the contracting parties to GATT 1947 and WTO Members have given the particulars as required in the guidelines while initiating the renegotiations. Claims of interest have mostly been made within the ninety-day period, but where delays have taken place, contracting parties have not disregarded the claim. An important shortcoming has been that in many cases reports on the conclusion of bilateral negotiations as well as final reports have not been submitted. In the absence of such reports it is not possible to say whether the proposals for modification or withdrawal of concessions were given up or concluded successfully or absorbed in the framework of the rounds of multilateral trade negotiations. The Geneva (1967) Protocol concluding the Kennedy Round and the Geneva (1979) Protocol concluding the Tokyo Round do not mention Article XXVIII renegotiations at all, while the Marrakesh Protocol which concluded the Uruguay Round mentions the conclusion of renegotiations of only four Members.

C. Other Renegotiations during the period 1958-1994

Specially-authorized renegotiations

1. During the period 1958-1994, a practice emerged among contracting parties to seek from CONTRACTING PARTIES (acting under Article XXV:5) special authorization for renegotiations outside the framework provided for in paragraphs 1, 4 and 5 of Article XXVIII. There were more than 20 instances of such renegotiations being sought during the period for diverse reasons. Tariff reform, tariff rationalization or the establishment of new customs tariffs were the main reasons, but other reasons were also given, i.e. adoption of new tariff nomenclature, BTN, CCCN, or TSUS, structural adjustment programmes flowing from undertakings given to the IMF and the World Bank and transition from a

⁵⁹ GATT, BISD, Twenty-fifth Supplement, pp.48-49

centrally-planned to a market economy. A feature of these authorizations was that in each case a waiver was also given under Article XXV:5 of the General Agreement as the contracting parties concerned wanted to implement the new customs tariff involving a breach of existing tariff bindings even before conducting the renegotiations. Authorization for such renegotiations was usually given under the following terms and conditions:

(a) Negotiations or consultations with interested contracting parties had to be entered into within six months of the modification and completed within a year or sometimes even earlier or before the next session of the CONTRACTING PARTIES;

(b) While, on the one hand the application of the provision of Article II of the General Agreement was suspended "to the extent necessary to enable the Government of ... to apply the rates of duty resulting from the rationalization of its Tariff which may exceed those bound in Schedule...., pending completion of negotiations for the modification or withdrawal of concessions", on the other, freedom was given to other contracting parties "to suspend concessions initially negotiated with.... to the extent that they consider that adequate compensation.... is not offered within a reasonable time".

(c) After the amendment of the General Agreement following the addition of Part IV, a paragraph was added decisions on waivers and special authorization for renegotiations making the concept of non-reciprocity enunciated in Article XXXVI:8 applicable to the renegotiations. However, in the waivers and special authorization granted in the late 1980s and early 1990s there was no reference to Article XXXVI:8.

2. Most of the decisions on special authorization needed one or several extensions (in one case nine times) before the renegotiations could be completed. In one instance, the renegotiations were completed after 17 years of the modification of the schedule and in another case renegotiations have been going on for more than 20 years without being completed. A few contracting parties had recourse to waiver and special authorization more than once.

3. The special authorization for renegotiations involving a waiver from the obligations of Article II granted during the 1960s, 1970s and early 1980s presaged similar decisions taken in the context of the implementation of the Harmonized Commodity Description and Coding System (Harmonized System) in the late 1980s and early 1990s. We shall deal with all aspects of the Harmonized System in the next chapter.

Renegotiations under Article XVIII:7 during 1958-94

4. Article XVIII:7 was never very popular among the contracting parties to GATT 1947 as they preferred renegotiations by authorization on the basis of "a sympathetic consideration" of requests or under Article XXVIII:4 before Article XXVIII:5 made the whole process easier by permitting contracting parties to take up renegotiations at any time provided they had made a reservation at the commencement of each three-year period. The Analytical Index lists four invocations of this provision during the period 1958-94, but all records are not available in the Secretariat. A typical case was the invocation by Greece in 1965. It was linked to the establishment of steel works at Salonika and the new customs duty was to be made effective by a royal decree three months before the factory started production. Greece argued that the new industry would provide stimulus for secondary industries, absorb part of the unemployed labour potential, yield savings in foreign exchange and, in general, contribute to raising national income. The plan was that the new duties would be reduced by 20 per cent every two years until they reached the level of 10 per cent.

Renegotiations under Article II: 5

5. There was one instance in 1965 of renegotiations concluded under Article II:5. The case involved Canada and the European Communities and concerned compensatory adjustment in connection with the

impairment of concessions on flash guns in the Canadian Schedule resulting from the decision of the Canadian Tariff Board of 17 May 1965 on the classification of electronic flash apparatus.

Withdrawal of tariff concessions under Article XXVII

6. In the early period of the operation of GATT 1947, there were several instances in which a government having participated in the negotiations did not become a contracting party (e.g., Syria/Lebanon, Liberia, Philippines, Korea and Colombia) or having become a contracting party withdrew from the GATT (China). In the case of Palestine, the United Kingdom negotiated on behalf of the territory as it had the League of Nations mandate for the territory. The concessions negotiated on behalf of Palestine were contained in a separate section of the schedule of the UK. After the UK ceased to be responsible for the mandated territory of Palestine on 15 May 1948, the UK schedule of concessions was rectified by eliminating the concessions made on behalf of Palestine. This also led to action under Article XXVII.

7. Fifteen contracting parties to GATT 1947 had had recourse to Article XXVII, some of them in several cases. Twelve withdrew concessions when China ceased to be a contracting party and one when the concessions made on behalf of Palestine were eliminated from the Schedule of the UK. Three contracting parties made withdrawals under Article XXVII when Syria/Lebanon did not become contracting parties and similar action was taken by seven in the case of the Philippines, two in the case of Liberia, four in the case of Colombia and one in the case of Korea. It should be pointed out that Colombia, Korea and the Philippines acceded to GATT in subsequent years after holding negotiations afresh.

Article XXIV:6 Renegotiations

Establishment of the European Economic Community

8. The first invocation of Article XXIV:6 was made in the context of the formation of the European Economic Community, with the initial six members, established by the Treaty of Rome signed in March 1957. As already mentioned, the renegotiations under Article XXIV:6 were held during the Dillon Round. The Tariff Conference which had been convened on 1 September 1960 was mandated to devote the first part of the conference to carrying out renegotiations under Article XXIV:6 with the European Economic Community with a view to concluding such negotiations by Christmas 1960. The rules and procedures for the renegotiations as approved by the CONTRACTING PARTIES are reproduced below *in extenso*, so as to give the full picture:

"1. The Commission of the EEC agreed to submit towards the end of 1959 its common tariff, including rates for the large part if not all of the products contained in list G annexed to the Rome Treaty.

2. The Community will submit by 1 May 1960 a list of the items bound by the Six under the GATT indicating opposite each item: the contracting party with which each item was initially negotiated; and (a) whether it considers the 'internal compensation', if any, to be inadequate; or (c) whether it considers the 'internal compensation' to exceed the compensation actually required.

3. At the same time as the list of bound items, the Community will furnish statistical information on imports into the territories of the Six as a whole for 1958; statistical information relating to 1959 might have to be sent at a later date. The Community would, of course, supply supplementary data on request in the course of the negotiations.

4. Contracting parties which so wish may submit to the Community as soon as possible after receipt of the May 1960 list, a notification of the items of which they are the initial negotiators or in which they consider themselves to have a principal supplying or substantial interest. At the same time, contracting

parties may submit to the Community for its guidance lists of items on which they would wish to request compensation.

5. At the opening of the Conference on 1 September 1960 the Community will make offers of compensation for all those modifications for which compensation was promised under 2(b) above in the list submitted on 1 May."⁶⁰

9. The Tariff Negotiations Committee established to oversee the entire negotiations adopted further "practical procedures" for Article XXIV:6 renegotiations and on 2 September 1960 the EEC submitted its list of offers. Documentation was also submitted setting out the Community's views on the adequacy, inadequacy or excess of internal compensation with respect to items bound under the GATT by the member States of the EEC, providing statistical data and indicating the principal supplier to the Community of each item in the common external tariff. Other contracting parties furnished generally the following lists in preparation for the renegotiations or consultations under the procedures of renegotiations:

- (i) list of items on which the contracting party was prepared to accept the offer made by the EEC as the internal compensation was adequate;
- (ii) list of items on which it wished to negotiate because it was the contracting party with which the concession was initially negotiated or which had a principal supplying interest;
- (iii) list of items in which it had a substantial interest and wished to be consulted.

10. After the renegotiations or consultations that followed, the EEC concluded bilateral agreements with Australia, Austria, Canada, Ceylon (Sri Lanka), Chile, Czechoslovakia, Denmark, Finland, India, Indonesia, Japan, Norway, Pakistan, Peru, Rhodesia and Nyasaland, South Africa, Sweden, Switzerland, United Kingdom, United States and Uruguay. The agreement with the United States said that the agreement in the renegotiations excluded: (a) the tariff items relating to manufactured tobacco and certain petroleum products, and (b) the products falling within the purview of the European Coal and Steel Community. The products listed under (a) were to be the subject of further renegotiations under Article XXVIII and those falling under (b) were subsequently renegotiated under Article XXIV:6 during the Kennedy Round and were incorporated in the separate schedule of the European Coal and Steel Community. Agreement could not be reached with Brazil and Nigeria. Austria, Czechoslovakia, Sweden and Switzerland did not regard the compensation received by them as entirely satisfactory and consequently reserved their rights to invoke Article XXVIII:3 to make retaliatory withdrawals. On their part, the EEC and the member States affirmed their assessment that they had fully compensated the contracting party concerned and in the event of any withdrawal by the latter they too reserved the right to withdraw concessions to achieve reciprocal balance. In the case of Uruguay, which reserved the right to withdraw substantially equivalent concessions initially negotiated with the EEC on account of inadequacy of compensation in respect of fresh and frozen bovine meat, the EEC accepted the right of Uruguay to make such withdrawals.

11. Important side-agreements signed between the EEC and the USA related to quality wheat, corn, sorghum, ordinary wheat, rice and poultry. In these agreements the EEC agreed not to increase tariffs on quality wheat or make more restrictive the national import system on other products until the EEC Council of Ministers had decided to introduce the common agricultural policy. Upon the introduction of the common agricultural policy, the EEC undertook to hold renegotiations under Article XXVIII in respect of quality wheat and negotiations on the situation of exports of other products by the United States. Similar agreements were signed with Canada on quality and ordinary wheat and another agreement signed with Australia recognized its substantial interest in wheat and contained a commitment by the EEC to enter into consultations with Australia in the renegotiations under Article XXVIII:1 at a future date.

⁶⁰ GATT, BISD, Eighth Supplement, p.119

12. The interpretation of negotiating rights under the above-mentioned bilateral agreements between Canada and the EEC in respect of quality wheat and ordinary wheat became the subject-matter of a dispute between the two contracting parties and was referred to an arbitrator in 1990 under the interim dispute settlement procedures agreed on at the time of the Mid-Term Review of the Uruguay Round. The arbitrator's findings throw valuable light on negotiating rights and are therefore dealt with here briefly. The following questions were raised in the dispute:

- (i) Whether Canada could bring a claim based on a bilateral agreement under the multilateral procedures of the GATT;
- (ii) What Article XXVIII rights did the agreements confer upon Canada; and
- (iii) Whether by formally acknowledging the conclusion in 1962 of the Article XXIV:6 negotiations, Canada had lost her right to invoke the provisions of Article XXVIII:3 including the right to withdraw equivalent concessions.

13. In respect of quality wheat the arbitrator gave the following award:

- (i) Since the bilateral agreement was attached to the formal letter attesting the conclusion of Article XXIV:6 negotiations and the EEC itself had in subsequent communications recognized the linkage of the agreement with Article XXIV:6 negotiations, the matter could be brought under the multilateral dispute settlement of the GATT;
- (ii) Given the fact that the bilateral agreement referred specifically to Article XXVIII, and the EEC in 1983 and 1984 agreed to extend the negotiating rights of Canada, the latter retained the equivalent of all of its contractual GATT rights held as of 1 September 1960, as an INR holder and a principal supplier, including the right to withdraw concessions;
- (iii) Since in 1962 it was not known what the import restrictions on wheat would be under the Common Agricultural Policy, and the parties were under considerable pressure to conclude the Article XXIV:6 negotiations, the very purpose of the bilateral agreement was to put Canada into a legal position equivalent to the one it would have been in if the time limits of Article XXVIII did not apply. It followed, therefore, that Canada maintained the right to withdraw equivalent concessions if the negotiations under the bilateral agreement were not successfully concluded.

14. In respect of ordinary wheat, the arbitrator came to a different conclusion. The agreement itself was less precise and comprehensive. Besides, Canada had not followed up on the agreement as it had done in respect of quality wheat. The arbitrator concluded that "by silence for so long on the Agreement on Ordinary Wheat Canada has relinquished any rights under the General Agreement she might have possessed under it in 1962."

15. A point should be made about the timing of the renegotiations under Article XXIV:6. The Sub-Group which was set up to examine the provisions of the Rome Treaty had recognized that "the negotiations required under paragraph 6 should be completed before the Members of the Community took the first step towards achieving a common tariff" at the beginning of 1962, although the representative of the Six made a reservation that they were "not in a position to commit the institutions of the Community".⁶¹ The renegotiations under Article XXIV:6 began on 1 September 1960 and were concluded with many trading partners by the middle of 1961. The member States notified the withdrawal of the earlier schedules on 17 August 1961 "as a consequence of the termination on 29 May 1961 of the negotiations under Article XXIV:6" with the exception of the concessions concerning items falling within the scope of the European Coal and Steel Community which were listed in a separate communication. The agreement with the USA was reached later, along with the agreements on new concessions under Article XXVIII *bis* during the Dillon Round on 7 March 1962 and with Canada on 29 March 1962. Negotiations with Australia were

⁶¹ GATT, BISD, Sixth Supplement, p.74

concluded in June 1962 and with Norway in November 1962. The Protocol Embodying the Results of the 1960-61 Tariff Conference was signed on 16 July 1962. It will be seen that the renegotiations under Article XXIV:6 were commenced and fully engaged well before the formation of the EEC and they were substantially complete around the time the first alignment towards the Common External Tariff (CET) commenced at the beginning of 1962.

Enlargement of the EEC to Nine Members

16. The next major renegotiations under Article XXIV:6 took place at the time of the expansion of the EEC from six to nine member States. The Treaty establishing the Communities of Nine (Denmark, Ireland and UK in addition to the original six members) was ratified during the course of 1972 and on 11 January 1973 the EEC sent in a communication indicating its willingness to enter into Article XXIV:6 renegotiations. The relevant part of the communication is quoted below:

"The ratification procedures have now been accomplished, and in accordance with that undertaking the European Communities propose that the contracting parties wishing to enter into tariff renegotiations in connection with the withdrawal of the schedules of concessions of the constituent territories of the enlarged customs union should consider for this purpose that the concessions at present bound in Schedules XL and XL *bis*, of the European Economic Community and of the European Coal and Steel Community respectively, are the concessions offered for application to the customs territory of the enlarged Community, subject to appropriate adjustments in the amounts of the tariff quotas indicated in those schedules of concessions. These adjustments are those required because of the accession of new member States which were formerly beneficiaries of the tariff quotas in question."⁶²

17. The EEC having opened the process of renegotiations with this offer, there were some suggestions to the European Communities in the Working Party on Accessions that the procedure for renegotiations under Article XXIV:6 adopted in the Dillon Round should be followed specially in regard to "internal compensation", and further, that a special Trade Negotiations Committee should be entrusted with the task of coordinating the negotiations. However, the conduct of the renegotiations was finally left entirely to the bilateral process. In addition to the voluminous documentation submitted to enable examination of the customs union under Article XXIV:5(a) of the General Agreement, the contracting parties were further aided in the process of the renegotiations by the Communities' submission of customs and statistical cards for individual tariff items. The customs cards contained tariff information for the item concerned as well as information on non-tariff barriers. The statistical cards covered information of the type supplied for the Dillon Round renegotiations.

18. During the bilateral process that ensued, the EEC concluded agreements with Argentina (31 July 1974), Australia (19 July 1974), Brazil (18 July 1974), Canada (28 February 1975 – with the exception of cereals), India (31 January 1975), Poland (17 July 1974), Romania (31 July 1974), South Africa (12 July 1974), Sri Lanka (12 June 1974), United States (19 July 1974), Uruguay (31 July 1974) and Yugoslavia (29 July 1974), appended to each of which was a list of products on which the EEC granted concessions to the contracting party concerned. Some of the significant aspects of these bilateral agreements are noted below:

(i) In the case of Canada, the agreement mentioned that the two sides had been unable to reach an agreement on cereals but that they had agreed to continue discussions with a view to finding through international negotiations agreed solutions to the problems of international trade in cereals.

⁶² GATT Doc. L/3807

(ii) In view of the absence of a complete agreement in all their Article XXIV:6 negotiations, the EEC inserted in its schedule a general note reserving its "right of modifying the schedule of concessions to restore the balance of concessions if a contracting party, invoking the provisions of Article XXVIII:3, were to withdraw concessions following the Article XXVIII:6 renegotiations in connection with the enlargement of the Communities".

(iii) Australia and the United States recorded their dissatisfaction with the compensation in respect of certain cereals and reserved their rights to resume the negotiations. They also reserved their rights under Article XXVIII to withdraw substantially equivalent concessions with respect to cereals or with respect to any future modification by the EEC to the draft schedule.

(iv) The United States, the EEC and Australia proposed to the GATT Council that the time laid down in Article XXVIII:3 should not apply to these reservations. The Council agreed that "the six-month period referred to in Article XXVIII:3 would not apply to actions pursuant to these reservations and that such actions could be taken at any time upon expiration of 30 days from the day that written notice is given to the CONTRACTING PARTIES".⁶³

(v) The agreements with the USA and Canada specifically mentioned that the initial negotiating rights in the schedules of the EEC 6 would be carried forward into the new schedules. It should be mentioned that these INRs were in addition to the INRs that the USA and Canada inherently had with respect to products figuring in the lists appended to the bilateral agreements.

19. The schedules of the EEC 6, Denmark, Ireland and the UK were withdrawn on 1 August 1974 and the results of the renegotiations were contained in a draft new EEC schedule circulated on 6 August 1974. The first alignment in agriculture had taken place at the beginning of 1973 and in industrial tariffs on 1 April 1974. Thus, in the case of industrial tariffs, renegotiations began a year before the establishment of the CET, but they could be concluded only a few months after its establishment. In the case of agricultural tariffs, the negotiations began only after the establishment of the CET.

Enlargement of the EEC to 10 and then 12 Members

20. Two other renegotiations under Article XXIV:6 took place before the establishment of the WTO: those relating to the accession of Greece in 1981 and of Spain and Portugal in 1986. In neither instance could the Article XXIV:6 renegotiations be concluded with all contracting parties concerned and, consequently, the results were not circulated. Some important aspects of Article XXIV:6 renegotiations in these two cases are outlined below:

(i) Greece became a member of the European Economic Community on 1 January 1981. On 8 May 1981, the EEC sent a communication stating its intention to replace Schedule XXV of Greece and Schedule LXXII and LXXII *bis* of the European Communities of Nine by a new schedule of concessions valid for the Communities of Ten. It proposed that contracting parties wishing to enter into tariff renegotiations "consider for this purpose that the concessions bound in Schedule LXXII and LXXII *bis* are essentially those to be offered as applicable in the customs territory of the enlarged Community".⁶⁴ Due to the inconclusive nature of the Article XXIV:6 renegotiations that followed, the replacement did not take place.

(ii) Portugal and Spain became members of the European Economic Community on 1 January 1986. On 4 February 1986 the EEC sent a communication⁶⁵ withdrawing Schedule XLV of Spain,

⁶³ GATT Doc. C/M/99

⁶⁴ GATT Doc. TAR/16

⁶⁵ GATT Doc. L/5936/Add.2

Schedule XLIV of Portugal and Schedule LXXII and LXXII *bis* of the European Community of 10. It also submitted the new Common Customs Tariff established by it as its offer under Article XXIV:6. The communication mentioned that, pending completion of the Article XXIV procedures and the creation of a new schedule for the Community of the 12, the new rates would be suspended and the duties laid down in the EC schedules would continue to apply to the Community of 10 while Spain and Portugal aligned their duties with the Common Customs Tariff.

(iii) The United States sent a communication on 20 May 1986 notifying the suspension of certain concessions under Article XXVIII:3, and stating that the action was being taken as a variable levy had been applied since 1 March 1986 on certain agricultural products "notwithstanding the existence of any Spanish or Portuguese concessions and without prior examination of these actions in GATT or prior negotiation of compensation".⁶⁶ The communication mentioned that the action had immediate damaging effect in particular on the trade in two concessions made by Spain to the United States in previous negotiations, on corn and sorghum. The EEC contested the right of the United States to invoke Article XXVIII:3 at that stage as the renegotiations had not been concluded. It stated in a communication that its notifications regarding the accession of Portugal and Spain and for initiating negotiations under Article XXIV:6 "do not constitute a declaration of finalization of negotiations and that consequently, in its view, the six-month period provided for in paragraph 3 of Article XXVIII has not started."⁶⁷ Subsequently, a bilateral agreement was reached on 30 January 1987 concluding the negotiations under Article XXIV:6 and the United States restored the suspended concessions.⁶⁸

(iv) The bilateral agreement between the USA and the EEC provided for the reduction of certain duty rates and the establishment of minimum access levels for corn and sorghum by the EEC on an autonomous basis until 31 December 1990. According to a communication⁶⁹ sent by the USA, the agreement specified that both parties would initiate in July 1990 a "major review of the situation... with the objective of determining at that time what new action, if any, might be appropriate". Since the EEC did not agree to extend the compensation beyond 31 December 1990, the USA again notified suspension of certain concessions with effect from midnight of 31 December 1990, arguing that "the time-limited Article XXVIII right could be construed, in this case, to expire on December 31, 1990, unless exercised". The EEC took the view that the bilateral agreement of January 1987 between the EEC and the USA had concluded the negotiations under Article XXIV:6 and the compensation was part of a final settlement.⁷⁰ However, the two sides later agreed to extend the duty reductions and minimum access granted in the 1987 bilateral agreement first to 31 December 1991 and then again to 31 December 1992 and finally to 31 December 1993, when it was absorbed in the Uruguay Round package.

D. Renegotiations under the WTO Agreement (1995-1999)

Main features of renegotiations, except those under Article XXIV:6

1. During this period, there have been so far a number of instances of renegotiations under the provisions of paragraphs 1 and 5 of Article XXVIII and none under paragraph 4 of Article XXVIII or paragraph 7 of Article XVIII. The main features of the practices of WTO Members in these negotiations are given below:

⁶⁶ GATT Doc. L/5997

⁶⁷ GATT Doc. L/6009

⁶⁸ GATT Doc. L/5997, Add.2

⁶⁹ GATT Doc. L/6774

⁷⁰ GATT Doc. L/6785

(i) There have been only eight cases of renegotiations under paragraphs 1 and 5 of Article XXVIII, of which five were in 1995, two in 1996 and one in 1998. The frequency of recourse to Article XXVIII to modify or withdraw tariff concessions for protective purposes has considerably decreased as compared to the period under GATT 1947.

(ii) In most cases, the renegotiations relate to concessions on specific agricultural products. In one case the implementation of a new Customs Tariff on 1 January 1998 was the reason for seeking modification or withdrawal of concessions under Article XXVIII.

(iii) In seven of the eight cases WTO Members have had recourse to paragraph 5 of Article XXVIII, thus continuing the pattern established during the previous two decades under GATT 1947. In the only case under paragraph 1, although the invocation was in September 1996, presumably with the intention of changes coming into effect on 1.1.97, the negotiations have continued and until the date of writing (1.10.99) no agreement has been notified.

(iv) In one case the Article XXVIII:5 renegotiation begun under GATT 1947 has been renotified and the conclusions reached have taken into account the results of negotiations and consultations held earlier under GATT 1947. In other cases Members have only notified the agreement reached in renegotiations that had been commenced under GATT 1947. In one case, in January 1995, the notification was made under both GATT 1947 and GATT 1994.

(v) The notifications on the intentions to modify or withdraw concessions have contained information on INRs as well as import data and have indicated the willingness of the notifying Member to enter into negotiations/consultations with interested Members. In one case the Member has fixed a date (later extended) by which it would accept claims of interest. Other Members have registered their claims of interest within a short period.

(vi) While, in one case, the renegotiations commenced in 1995 were concluded quickly, and in another the agreement reached with the INR holder and principal supplier has been notified, no progress was notified in any of the other cases till the time of writing (1.10.99).

Article XXIV:6 Renegotiations under the WTO

2. On 15 December 1994 the EEC had circulated for the information of the contracting parties to GATT 1947 the "Treaty concerning the accession of Austria, Finland, Sweden and Norway to the European Union", indicating that some further adjustment of the instruments concerning the accession of new Member States would be required to reflect Norway's decision not to accede and that the treaty would enter into force on 1 January 1995. It was also indicated that the EEC intended to withdraw the tariff schedules of Austria, Finland, Sweden and the EEC 12 and would be ready (from 1 January 1995) to enter into tariff negotiations provided for in Article XXIV:6. Pending completion of the Article XXIV procedures and the creation of a new schedule for the EEC 15, the communication stated that the tariff commitments of the EEC 12 would be fully respected. The acceding countries were, however, to align their duties with the Common Customs Tariff on 1 January 1995 except where a separate time-table was laid down in the Act of Accession.

3. On 19 January 1995, the EEC informed the General Council that the ratification procedures for the accession of Austria, Finland and Sweden to the European Union had been completed and the Accession Treaty had entered into force on 1 January 1995. On 27 January 1995, the EEC furnished the basic data for discussion under Article XXIV:5 and negotiations under Article XXIV:6. They consisted of concordance tables of tariff concessions made by the newly-acceding Members along with that of the EEC 12 and trade data showing the value and quantity of total trade for three years with other GATT contracting parties for each tariff line together with a breakdown by country of origin.

4. Following the commencement of the process under Article XXIV:6, 15 WTO Members expressed an interest in joining the negotiations, but the process followed thereafter was entirely bilateral. An important point was raised even before 1 January 1995 that the renegotiations under Article XXIV:6 should have been commenced and concluded before the establishment of the Common External Tariff. Following an agreement with the USA, the EEC adopted a decision on 29 December 1994, opening tariff quotas in the newly-accessing member States during the period 1 January to 30 June 1995, "to provide temporary relief to its trading partners for the most serious cases in which there is an increase in import duties".⁷¹ Not satisfied with this action, Canada invoked Article XXVIII:3 and on 1 March 1995 gave a 30-day notice for the withdrawal of certain concessions initially negotiated with the EEC. Canada requested the EEC to provide interim compensation by reinstating the 1995 tariff rate that would have been in effect in Austria, Finland and Sweden had they not joined the EEC during the period 1 April to 1 July 1995, in respect of certain products of interest to it. The EEC stated in response that it had acted in the same manner on that occasion as in the case of earlier expansions of the Community and contested that Canada was in a situation which justified the exercise of rights under Article XXVIII:3. However, an agreement was reached and the EEC provided interim compensation to Canada by accelerating the tariff reduction on newsprint already committed in the Uruguay Round. The above agreements with the USA and Canada on interim compensation on account of the establishment of the Common Customs Tariff even before the commencement and conclusion of Article XXIV:6 renegotiations were not notified to the WTO Members.

5. While the renegotiations under Article XXIV:6 were being held, the EEC notified its agreement to the prolongation of all rights under Article XXVIII:3 of GATT 1994 beyond 30 June 1995 first until 31 December 1995 and then until 31 January 1996.

6. On 28 February 1996, the EEC notified its new Schedule CXL, containing the tariff and other commitments "in the light of the Article XXIV:6 negotiations which have now been concluded with most of the EC partners."⁷² The notification mentioned that, as all current negotiations under Article XXIV:6 had not been completed till then, the EEC reserved the right to modify the concessions. The US and Canada objected to this notification on the ground that the bilateral agreements with the EEC, although initialled, had not been formally signed. A number of agricultural exporting countries made the point that, even if agreement had been reached on the netting out of export commitments and aggregation of domestic subsidy commitments, Article XXIV:6 procedures could not be applied with respect to the commitments on domestic support and export subsidy commitments for the modification of which appropriate legal modalities of implementation had to be discussed and agreed. Argentina made the point that the notification was not in order when the negotiations and consultations under Article XXVIII had not been concluded.

7. The bilateral agreements with the USA and Canada were notified to the Secretariat by the end of July 1996, but other agreements were not notified. The EEC has continued to notify amendments in the schedule originally notified on 28 February 1996 in the light of further agreements and comments. At the date of writing (1.10.99) objections remained outstanding on the schedule of the EEC 15.

⁷¹ Official Journal of the European Communities, No. L356/5, Council Regulation (EC) No. 3361/94 of 29 December 1994.

⁷² WTO Doc. G/L/65/Rev.1.

8. In the other customs union agreements notified after the entry into force of the WTO Agreement, namely the Mercosur and the EEC-Turkey customs union agreements, the commencement of renegotiations under Article XXIV:6 had not been notified at the date of writing (1.10.99).

CHAPTER V

SCHEDULES OF TARIFF CONCESSIONS: RECTIFICATION, MODIFICATION, AND CONSOLIDATION

A. Establishment of Schedules, their Rectification and Modification

Protocols of tariff concessions

1. The results of tariff negotiations at Geneva in 1947 were incorporated in the schedules of concessions of each contracting party and were annexed to GATT 1947. Article II.7 of GATT 1947 provided that the schedules were an integral part of Part I of the Agreement, comprising Articles I and II. Since Article XXX of GATT 1947 specified that amendments to the provisions of Part I could become effective only upon acceptance by all the contracting parties, the implication of Article II.7 was that any change in the schedules of concessions needed acceptance by all the contracting parties. The position has not changed in GATT 1994 and the WTO Agreement.

2. The schedules containing the concessions agreed during subsequent tariff conferences and rounds of negotiations were annexed to the protocols embodying the results of these conferences/rounds, namely the Annecy Protocol (1949), the Torquay Protocol (1951), the Sixth Protocol of Supplementary Concessions (1956), the Protocol Embodying Results of the Tariff Conference 1960-61, the Geneva (1967) Protocol, the Geneva (1979) Protocol and the Marrakesh Protocol to GATT 1994. In the case of the 1960-61 Tariff Conference and the Tokyo Round, there were supplementary protocols as well. The legal instrument of a protocol has also been used to formalize the results of the following categories of negotiations for new concessions:

- (i) Negotiations between two or more contracting parties outside of tariff conferences (the protocols being known as protocols of supplementary concessions);
- (ii) Accession negotiations; and
- (iii) *Sui generis* negotiations held by Brazil under a waiver for establishing a new schedule of concessions following tariff reform.

In the negotiations referred to in (ii) and (iii) above, not only the schedule of concessions made by the acceding government of Brazil but also the schedules of concessions made by other contracting parties were annexed to the protocols. As mentioned in Chapter II, the practice in accession negotiations before the Tokyo Round was for the existing contracting parties also to make concessions in the context of accession negotiations. During the early days of GATT all contracting parties signed the protocols embodying the results of the negotiations in tariff conferences, accessions or bilateral exchanges outside of tariff conferences. After 1959, however, they were signed only by those contracting parties whose schedules were annexed to the protocols. The schedules attached to the protocols were, consequently, binding only upon those contracting parties which had signed the protocols and had schedules annexed to them. They did not bind other contracting parties, which could have recourse to the provision in Article XXVIII:3(a) if previous concessions in which they had rights were nullified or impaired. As regards contracting parties which signed the protocols, the practice existed in GATT of affording other contracting parties the opportunity to verify whether the results of the negotiations had been correctly incorporated in the schedules that were to be annexed to the protocols. This was done by circulating draft schedules to other contracting parties for their verification before they were attached to schedules. The protocols were generally kept open for acceptance by signature or by depositing an instrument of acceptance for some time after they had been opened for signature. They entered into effect on a certain date in the future, thus

giving time to those accepting the Protocols to carry out the necessary domestic procedures required for such acceptance.

Rectification and modification of schedules: Practice in the early years of GATT 1947

3. How were other changes resulting from formal rectifications and from modifications consequent upon withdrawal under Article XXVII or renegotiations under Article XXVIII brought about in GATT schedules? The customary practice that developed in the early days of GATT 1947 included the following elements:

- (i) The proposals were circulated to the contracting parties for objections, if any, within a specified period;
- (ii) They were then examined by a working party;
- (iii) If no objections were received and if the working party found the request in order, the proposals were attached to a protocol.

4. In the beginning the proposals for rectification were considered separately from those on modification, but later they were taken up together. There were in all five protocols of rectification, one protocol of modification and nine protocols of rectification and modification. The working parties played a decisive rôle in determining whether a proposal for rectification was appropriate or a proposal for modification was mature for inclusion in the next protocol. Thus the report of a Working Party adopted on 24 October 1953 contained the following recommendation:

"The Working Party also concerned itself with the proposal of the Greek Government to introduce a minimum *ad valorem* rate for 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."⁷³

5. Another report of the Working Party which prepared the draft Fourth Protocol of Rectifications and Modifications stated as follows:

"One question could not be solved by the interested parties and was referred to the Working Party. 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. The Austrian delegation, therefore, did not further insist on the insertion in the Fourth Protocol of Rectifications and Modifications of the specific minimum rates in Items 140 to 144."⁷⁴

⁷³ GATT, BISD, Second Supplement, p.66

⁷⁴ GATT, BISD, Third Supplement, p.130

6. The practice in respect of these protocols was to require the signature of all the contracting parties and there were long delays before they could enter into effect. The working party which drew up the Fourth Protocol of Rectifications observed as follows:

"The Working Party considered that the continuance of the present state of affairs, where rectification or modification protocols of this nature do not enter into force except after extended delays, was a serious impediment to the effective operation of the General Agreement. It felt, therefore, that it was necessary for the orderly functioning of the General Agreement that individual contracting parties should take action promptly on such protocols; it did not feel that compliance with this necessity should prove unduly onerous in that the procedure for securing agreement on rectifications and modifications gave an opportunity to all interested contracting parties to express their views before the rectifications and modifications were agreed upon and included in a protocol. The action thereafter required from contracting parties was accordingly of only a formal nature and for which no extended period of delay should be necessary."⁷⁵

Introduction of the system of certification

7. The situation did not improve despite the above observations and the last five protocols of rectification and modification entered into force ten years or more after they had been opened for signature. To overcome this problem, a proposal was made at the Review Session in 1955 to amend Article XXX by adding a paragraph which would have provided as follows:

"3. Any amendment to the schedules annexed to this Agreement, which records rectifications of a purely formal character or modifications resulting from action taken under paragraph 6 of Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII, shall become effective on the thirtieth day following certification to this effect by the CONTRACTING PARTIES; provided that prior to such certification, all contracting parties have been notified of the proposed amendment and no objection has been raised, within thirty days of such notification by a contracting party, on the ground that the proposed amendments are not within the terms of this paragraph."⁷⁶

8. Pending acceptance by the contracting parties of the above amendment of Article XXX, the CONTRACTING PARTIES adopted the procedure of certification and discontinued the practice of preparing protocols of rectifications and modifications, as noted below:

"The CONTRACTING PARTIES agreed on 17 November 1959 that, as the Protocol Amending Part I and Articles XXIX and XXX of the General Agreement, which introduces in Article XXX a procedure for the certification of rectifications and modifications to the Schedules to the General Agreement, had not yet entered into force, the procedure of certification should nevertheless be adopted and the practice of preparing protocols of rectifications and modifications discontinued. The rectifications and modifications will be incorporated in certificates, as provided for in the revised text of Article XXX, but the certificates will enter into force only when the revised text of Article XXX has been accepted by all contracting parties."⁷⁷

9. Pursuant to the above decision, the CONTRACTING PARTIES adopted three certifications which were to become effective on the date of entry into force of the amendment to Article XXX. When the Protocol Amending Part I, and Articles XXIX and XXX did not enter into force by 31 December 1967, a

⁷⁵ GATT, BISD, Vol. II, p.142

⁷⁶ GATT, Final Act adopted at the Ninth Session

⁷⁷ GATT, BISD, Eighth Supplement, p.25

decision was taken to abandon the Protocol. However, the CONTRACTING PARTIES decided to establish the certification procedures for modification and rectification through a decision⁷⁸ on 19 November 1968. The first certification⁷⁹ under the 1968 decision reconfirmed the three certifications adopted conditionally under the 1959 decision, apart from incorporating new proposals for rectification and modification. In all, four collective certifications were adopted under the 1968 decision before a decision⁸⁰ was taken in 1980 to revise the procedures for rectification and modification. This decision, which is still in force, is analysed below.

10. The 1980 decision (like the 1968 one) covers changes in the authentic texts of the schedules of two types:

(i) Modifications resulting from actions/negotiations under Articles II, XVIII, XXIV, XXVII or XXVIII. It is clear that action under Article II refers to both paragraphs 5 and 6 of that article and under Article XVIII they refer to paragraph 7 of that article.

(ii) Rectifications involving amendments or rearrangements introduced in the national customs tariffs in respect of bound items or other rectifications of a purely formal character which do not alter the scope of the concessions.

11. The procedure prescribed is that the Member concerned has to communicate to the Director-General a draft of changes within three months of completing the action for modification referred to in (i) above and in the case of rectification, where possible within three months but not later than six months after the amendments or rearrangements have been introduced in the national customs tariff, and for other rectifications "as soon as circumstances permit".

12. The Director-General proceeds to notify the proposed changes to all Members and the draft becomes a certification if no objection is raised by a Member within three months. The grounds on which objections can be made are the following:

(i) In the case of modifications, the draft does not reflect the modifications resulting from actions under the relevant articles; and

(ii) In the case of proposed rectifications, the claim that they do not alter the scope of concessions is disputed.

13. The 1980 decision also provided for the use of these procedures for the establishment of consolidated schedules (with which we deal in the next section). It also provided for these procedures to apply for the establishment of new schedules under paragraph 5(c) of Article XXVI of GATT 1947 (which is now no longer in force). An important aspect of the decision on the procedures for certification has to be highlighted here. As in the case of protocols to which the list of modifications and rectifications were attached, the certifications do not have any effect on the entry into force of the proposed modification or rectification. The idea is to formally incorporate in the schedules of Members modifications and rectifications which, in most cases, have already entered into force. The 1980 procedures stipulate that "(w)henever practicable Certifications shall record the date of entry into force of each modification and the effective date of each rectification." In the case of modifications, the procedures to bring about changes in the legal obligations of the Members have already to be followed as a prerequisite for action to bring about changes in the authentic text. Thus, in the case of renegotiations under Article XXVIII, for instance, the

⁷⁸ GATT, BISD, Sixteenth Supplement, pp.16-17

⁷⁹ GATT, BISD, Seventeenth Supplement, pp.12-13

⁸⁰ GATT, BISD, Twenty-seventh Supplement, pp.25-26

procedures for these renegotiations should have already been complied with, before a request for modification of the schedule is made.

Introduction of individual certification

14. The practice when the procedure for modification and rectification involved the adoption of protocols was, generally, for a number of modifications and rectifications to be attached to each protocol. This practice continued when the procedure of certification was adopted in 1968. The procedure followed was that the notifications received from individual contracting parties for modification or rectification were circulated to all contracting parties, indicating that if no objection was notified to the Secretariat within three months, the change in the tariff schedule would be deemed to be approved and would be included in the next certification of changes to schedules. When a sufficient number of notifications had been approved, a collective draft certification was prepared and circulated by the Secretariat to all contracting parties. This draft collective certification entered into force if, during a further three months after circulation, no objections were received. At the same time as the CONTRACTING PARTIES adopted the 1980 decision on procedures for modification and rectification, they also adopted a decision for the introduction of a loose-leaf system for the schedules of tariff concessions. We shall deal with this decision in detail in the next section. However, for the purposes of this section, it is necessary to note that the idea was that the schedules of tariff concessions would be published in the form of a loose-leaf system which could be continuously kept up to date when rectifications, modifications, withdrawals and new concessions were made. The system of collective certification was, therefore, to be given up and every schedule, as well as any subsequent change, was to be certified individually. The new procedure was quicker as it involved circulation of notifications for objections only once and not twice for three months each, as was done earlier. When delays occurred in the full operationalization of the decision on the introduction of the loose-leaf system, two more collective certifications were published in 1981 and 1987 respectively. After the Sixth Certification of Changes to Schedules to the General Agreement on Tariffs and Trade was published on 28 November 1987, the practice of collective certifications was abandoned.

15. Since schedules of concessions are integral parts of the General Agreement, changes in them result in changes in the treaty obligations of Members. Because of this it is specified in all protocols and certifications that they will be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

16. Two aspects of the practice in GATT 1947/WTO in regard to modification and rectification procedures must be mentioned here. First, although the 1980 decision mentions modifications resulting from actions only under Articles II, XVIII, XXIV, XXVII and XXVIII, in practice contracting parties/Members have also resorted to these procedures to incorporate the results of new commitments made unilaterally or entered into in the course of bilateral or plurilateral negotiations. Thus, these procedures were used in respect of the 1984 decision of the signatories to the Agreement on Civil Aircraft for expanding the products covered by the Agreement, and after the entry into force of the WTO Agreement for incorporating in the schedules unilateral commitments and the commitments made pursuant to the Information Technology Agreement, as well as the plurilateral agreement on pharmaceuticals and the bilateral agreement on white spirits. Second, contracting parties to GATT 1947 did not always follow up completion of renegotiations under Article XXVIII by making a request for consequential modification of schedules under these procedures.

B. Consolidation of Schedules

Practice in the early years of GATT 1947

1. Although every Member has one schedule of concessions, from the description of the process of establishment, modification and rectification of schedules given in section A above, it will be apparent that

the tariff commitments of a contracting party to GATT 1947 were contained in several legal instruments. For a better grasp of the situation, it is necessary to look at the note entitled "Situation of Schedules"⁸¹ prepared by the Secretariat. In this note, a list was given of all instruments constituting the schedule of each contracting party at the end of the Tokyo Round. By way of illustration, the list of instruments constituting Schedule V of Canada at that time is reproduced below:

"Canada Schedule V

Part I – MFN

- Geneva 1947
amended in PR1/48, PR3/49, PR4/50, PR5/55, PRM6/57, PRM7/57, Brazilian Protocol 1958
- Annecy 1949
amended in PR4/50, PR5/55, PRM6/57, PRM7/57
- Torquay 1951
amended in PRM/5, PRM6/57, PRM7/57
- Japanese Protocol 1955
- Geneva 1956
amended in Third Certification of Rectifications and Modalities 1967
- Geneva 1962
- Israeli Protocol 1962
- Portuguese Protocol 1962
- Spanish Protocol 1963
- Kennedy Round 1964-67
amended in First Certification of Changes 1969
- Geneva (1979) Protocol
- Protocol Supplementary to Geneva (1979) Protocol

Part II – Preferential

- Geneva 1947
amended in PRM5/55, PRM6/57, PRM7/57
- Annecy 1949
amended in PR4/50, PRM5/55, PRM6/57
- Torquay 1951
amended in PRM5/55, PRM6/57, PRM7/57

⁸¹ GATT Doc. TAR/W/7 dated 18 June 1980

- Geneva 1956
- Kennedy Round 1964-67

See also document SECRET/180 + Add 1, SECRET/244 + Add 1-4 (XXVIII:5), SECRET/183 + Add.1 (XXVIII:4), SECRET/193 (II:5) and SECRET/244/Add.4 (XXVIII:3) containing information on bilateral negotiations, the results of which have not yet been incorporated in an official schedule."⁸²

2. Since the very early days of the operation of GATT 1947, the contracting parties have been worried about the lack of transparency resulting from the fact that the schedules of concessions are scattered over several legal instruments. As early as 15 December 1950, on the basis of the report of a Working Party, the CONTRACTING PARTIES decided on the preparation of the "consolidated text of the Geneva, Annecy and Torquay schedules". It was agreed that the consolidated lists should include an indication of the country or countries with which each concession was initially negotiated and of the document in which the concession appeared. Immediately after the conclusion of the Torquay Conference the consolidated schedules were prepared and distributed to the contracting parties for their comments. After they had been finalized, doubts arose about the question of giving them legal status. The Working Party which considered this question foresaw practical difficulties as "to authenticate the Consolidated Schedules would involve very extensive rechecking by governments of their own and others' Schedules and thus much time, work and expense".⁸³ The same Working Party also saw objections from the legal point of view inasmuch as some contracting parties would have constitutional difficulties in resubmitting the results of the negotiations to their legislatures in a different form. If the earlier protocols were withdrawn, difficulty was envisaged in ascertaining the exact scope of the original concession in the event of disputes. The Working Party concluded as follows:

"... it would be preferable to retain the Consolidated Schedules in their form as a working document. In cases of disputes, or when the precise extent and wording of a concession was in question, reference would be made to the authentic texts. For normal working purposes, however, the consolidated texts would be used. In order that they might retain their value, the secretariat should be instructed to issue new complete pages to take account of any changes to the Schedules resulting from Protocols of rectifications, modifications, new concessions or any withdrawals or other alterations notified by contracting parties to the secretariat. Delegations should, therefore, be requested to accompany such notifications with details of the corresponding changes required to the Consolidated Schedules."⁸⁴

3. In 1955 there was a fresh move to draw up consolidated schedules to cover all changes up to the end of 1956 tariff negotiations. Contracting parties were asked to submit their new consolidated schedule by 1 July 1956 or at the latest by 1 January 1957. The time limit was later extended to 31 December 1957. By the end of 1957 as many as 17 contracting parties had submitted their draft consolidated schedules. The procedure prescribed for approval was that, if no comments were received within 90 days, the draft consolidated schedule was to be considered as approved. If objections were received, the contracting party concerned had to consult and settle all the points raised and submit to the Secretariat a list of changes which were to be made in the original draft. The Secretariat had to distribute the list of changes to the contracting parties and, if no objections were received within 30 days, the consolidated schedule was to be deemed to have been approved.

⁸² GATT Doc. TAR/W/7 dated 18 June 1980, pp.4-5

⁸³ GATT, BISD, First Supplement, p.66

⁸⁴ GATT, BISD, First Supplement, p.66

4. The question of giving legal status to consolidated schedules was again raised in 1957. In 1958 the CONTRACTING PARTIES approved the recommendation of the Working Party on Schedules to give legal status to the consolidated schedules subject to the following conditions and procedures:

"(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 draft 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 of interpreting concessions contained in legal consolidated schedules."⁸⁵

5. The Working Party dealt with the problem regarding the date applicable to each concession for the purposes of Article II:1(b) of the Agreement, the aim of which was to establish the date as of which "other duties and charges" were bound. The CONTRACTING PARTIES agreed to the recommendation of the Working Party "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".⁸⁶

6. Following the above decision consolidated schedules of a number of contracting parties were established in the certifications dated 15 January 1963, 29 April 1964 and 5 May 1967, which were adopted pending acceptance of the protocol for the amendment of Article XXX. While the possibility was created in the decision of the CONTRACTING PARTIES for the consolidated schedules of individual contracting parties to be given legal status, the option was retained also for other contracting parties to have unofficial consolidated schedules.

7. In 1968, when the CONTRACTING PARTIES adopted a decision to follow the certification procedure for modification and rectification to schedules, paragraph 5 of the decision also provided for these procedures to be followed for the establishment of consolidated schedules. Pursuant to this paragraph, consolidated schedules were established in respect of Turkey (First Certification dated 12 July 1969), South Africa, Israel and Malawi (Second Certification dated 9 January 1974), New Zealand, Finland and Sweden (Third Certification dated 23 October 1974) and Cuba (Part I only), Japan and Portugal (Fourth Certification dated 20 April 1979). In some cases these consolidated schedules were updated versions of the schedules approved during the period 1963-67. These consolidated schedules were listed against these contracting parties in the note by the Secretariat dated 18 June 1980 describing the "Situation of Schedules".⁸⁷ The note also mentioned that the unofficial consolidated schedules of a number of other contracting parties were available in the Secretariat.

⁸⁵ GATT, BISD, Seventh Supplement, pp.115-116

⁸⁶ GATT, BISD, Seventh Supplement, p.116

⁸⁷ GATT Doc. TAR/W/7

1980 Decision on the introduction of a loose-leaf system

8. After the Tokyo Round, the CONTRACTING PARTIES approved a new proposal by the Director-General on the introduction of a loose-leaf system for the schedules of tariff concessions. The proposal⁸⁸, which was adopted on 26 March 1980, had the following elements:

(a) Henceforth, the schedules of tariff concessions were to be published in the form of a loose-leaf system which could continuously be kept up to date when rectifications, modifications, withdrawals and new concessions were made. In order to establish the loose-leaf system, contracting parties submit consolidated schedules of tariff concessions as soon as possible and not later than 30 September 1980.

(b) The schedules have the following information:

1. Tariff item number
2. Description of product
3. Rate of duty
4. Present concession established in
5. Initial negotiating rights on the concession
6. Concession first incorporated in a GATT schedule
7. INRs on earlier occasions
8. Annotations.

(c) The existing understanding concerning consolidated schedules that earlier schedules and negotiating records should be considered as proper sources in interpreting concessions in consolidated schedules applied, *inter alia*, to INRs regarding earlier bindings. Once the previous INRs had been indicated as required in column 7 above, and the loose-leaf schedules had been established, that understanding would cease to be valid in respect of this element.

(d) In view of the fact that the incorporation of previous INRs into the schedules would necessitate time-consuming research in old negotiating records, a further period of one year up to 30 September 1981 was allowed for indicating this information in the loose-leaf schedules. It was also proposed that earlier schedules and negotiating records would remain proper sources for interpreting concessions until 1 January 1987.

(e) In column 6, the instrument by which the concession was first incorporated into a GATT schedule was to be indicated to enable a determination of the date as of which "other duties and charges" on importation are bound.

9. The task of drawing up consolidated loose-leaf schedules of tariff concessions was taken up in earnest in 1980 and 1981. In subsequent years, however, the exercise was overtaken by the more ambitious endeavour of drawing up the consolidated schedules in the nomenclature of the Harmonized System, which we shall deal with in the next section. Efforts continued, however, in the Committee on Tariff Concessions up to 1990 to obtain and approve consolidated pre-Harmonized System schedules. In the report⁸⁹ of the Committee presented to the Council on 7 November 1990, it was mentioned that out of 65 contracting parties having a GATT schedule (EEC schedule = 12 member States), 45 schedules had been circulated in accordance with the requirements of the loose-leaf system, and 21 of them had already been approved.

⁸⁸ GATT, BISD, Twenty-seventh Supplement, pp.22-24

⁸⁹ GATT, BISD, Thirty-seventh Supplement, p.75

1996 Decision on consolidated loose-leaf schedules

10. After the entry into force of the WTO Agreement, a new initiative was taken to establish consolidated loose-leaf schedules on goods and the General Council adopted a decision⁹⁰ on 29 November 1996. The following are the significant elements of this decision:

(i) The consolidated loose-leaf schedules are to be binding instruments replacing all previous schedules for all purposes except with respect to historical INRs.

(ii) All the information contained in previous consolidated loose-leaf schedules is to be indicated with the addition of information on staging and on "other duties and charges" (ODCs). Thus the new consolidated schedules have to contain information in the following columns:

- (a) Tariff item number
- (b) Description of product
- (c) Rate of duty (base and bound rates)
- (d) Present concession established
- (e) Initial negotiating rights on the concession
- (f) Concession first incorporated in a GATT schedule
- (g) INRs on earlier occasions
- (h) Other duties and charges.

(iii) In respect of INRs, the decision states as follows:

"Each Member shall include in its schedule all INRs at the current bound rate. Other Members may request the inclusion of any INR that had been granted to them. Historical INRs different from the current bound rate not specifically identified shall remain valid where a Member modifies its concession at a rate different from the rate at which the INR was granted."

This statement, together with the stipulation that the consolidated schedule will replace all previous schedules for all purposes except with respect to historical INRs, seems to give to Members an option not to fill in historical INRs at all.

(iv) The decision mentions that the 1980 "Procedures for Modification and Rectification of Schedules of Tariff Concessions" will apply with respect to modification and rectification of loose-leaf schedules. It does not mention whether the same procedures will be applied for the establishment of these schedules as foreseen in paragraph 5 of the 1980 Procedures. Presumably that is the intention.

(v) Members have been discussing the possibility of establishing a new procedure for verification of schedules whereby Members would be assisted in the task by the Secretariat undertaking electronic verification. It is not clear from the record of discussions whether the idea is to first establish the consolidated schedules and then use the electronic version to verify future changes in the schedules or to introduce electronic verification for the establishment of the new consolidated loose-leaf schedules themselves. The decision states that until a methodology for verification is agreed upon existing procedures (presumably the 1980 Procedures) will continue to apply.

(vi) No date has been set for the submission of new consolidated loose-leaf schedules.

⁹⁰ WTO Doc. G/L/138

11. Implementation of the 29 November 1996 decision has not yet taken off. As we shall see in the next section, Members are submitting consolidated loose-leaf schedules in the context of the 1996 revision of the Harmonized System in accordance with the 1991 Decision on "Procedures to Implement Changes in the Harmonized System" and the 1980 Decision on "Introduction of a loose-leaf system for the schedules of tariff concessions". In the practice established in the 1980s, these consolidated schedules generally do not contain information on INRs (current and historical) and on the date of first incorporation of a concession in a GATT schedule. These consolidated schedules do not, therefore, fulfil the requirement of the 29 November 1996 Decision.

C. Harmonized Commodity Description and Coding System

Introduction

1. Contracting parties to GATT 1947 had used different nomenclatures in their customs tariffs before adopting the Convention on the Harmonized Commodity Description and Coding System (hereinafter referred to as the Harmonized System) drawn up by the Customs Cooperation Council in Brussels. While some convergence took place with the adoption by a number of them of the Brussels Tariff Nomenclature (BTN) and later Customs Cooperation Council Nomenclature (CCCN), there remained wide divergences in the nomenclatures used by the contracting parties in their customs tariffs and GATT schedules. The difficulty of contracting parties participating in tariff negotiations and renegotiations was compounded by the fact that most of them maintained data on imports and exports in the Standard International Trade Classification (SITC) developed in the United Nations, which was different from the nomenclatures used for customs tariff purposes. A unique feature of the Harmonized System was that it was to be used as the basis for customs tariff as well as international trade statistics nomenclatures. It was widely recognized that, in addition to the benefits for trade facilitation and analysis of trade statistics, adoption of the Harmonized System would help ensure greater uniformity among countries in customs classification and enhance their ability to monitor and protect the value of tariff concessions in GATT.

1983 Decision on GATT concessions under the Harmonized System

2. Contracting parties to GATT also recognized that the introduction of the Harmonized System would imply considerable changes in the GATT schedules of tariff concessions. By their decision⁹¹ dated 12 July 1983, the CONTRACTING PARTIES laid down detailed procedures for the transposition of GATT schedules to the Harmonized System nomenclature. The important elements of this decision are described below:

(i) The main principle to be observed was that the existing GATT bindings should be maintained unchanged. The decision stipulated that "(t)he 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 of customs duties collected on a particular product."

(ii) It was recognized that in some cases where the introduction of the Harmonized System resulted in tariff lines with different bound rates being combined or bound rates being combined with unbound rates, renegotiations under Article XXVIII would be necessary. To the extent that the value of existing concessions was not impaired, the conversion of existing nomenclatures to the Harmonized System could be done through the rectification procedures.

⁹¹ GATT, BISD, Thirtieth Supplement, pp.17-21

(iii) Special procedures were prescribed for undertaking the exercise for rectification and renegotiations under Article XXVIII. Each contracting party adopting the Harmonized System was to supply the following information to the Secretariat for circulation:

- (a) An up-to-date consolidated schedule of concessions in the existing nomenclature in loose-leaf form;
- (b) A proposed consolidated schedule of concessions in the nomenclature of the Harmonized System containing information on the new tariff schedule number, a complete product description, the proposed rate of duty for the item and the proposed INR(s) for the item. If practicable, this document had also to contain information on historical INRs and other information required for loose-leaf schedules. In other words, information had to be provided in all the columns as specified in the March 1980 decision on the introduction of the consolidated loose-leaf schedules;
- (c) A concordance table from the existing to the proposed consolidated schedules of concessions. For each item in the existing schedule, this document was required to indicate (1) the item number and an abbreviated product description; (2) the corresponding item(s) in the concordance table from the proposed to the existing consolidated schedules; (3) the existing and proposed rates of duty; (4) the initial negotiating right status for the existing item; (5) the percentage of total imports in the existing item which had been allocated to each of the proposed items; and (6) the value of trade allocated to each of the proposed new items for the most recent three years for which import statistics were available. Information on items (5) and (6) was not required to be supplied if there was no change in either the proposed rate of duty or the initial negotiating right status from the existing tariff line;
- (d) A concordance table from the proposed to the existing consolidated schedules of concessions giving broadly the same information as required for the concordance table from the existing to the proposed consolidated schedules of concessions;
- (e) A list of items proposed for certification;
- (f) A list of items proposed for renegotiations.

The decision recommended that, where it became unavoidable to combine headings or part of headings in implementing the Harmonized System, contracting parties could consider the following alternatives:

- (a) Applying the lowest rate of any previous heading to the whole of the new heading;
- (b) Applying the rate previously applied to the heading or headings with the majority of trade;
- (c) Applying the trade-weighted average rate of duty for the new heading;
- (d) Applying the arithmetic average of the previous rates of duty, where no basis existed for establishing reasonably accurate trade allocations.

3. An account is given below of the main features of the process of implementation of the decision to transpose GATT schedules to the Harmonized System nomenclature:

- (i) There were a number of departures from the guidelines for renegotiations under Article XXVIII. For instance, some contracting parties, instead of submitting claims of interest within 90 days, made blanket reservations and then followed up with individual requests. The results of

bilateral negotiations, although provided to the Secretariat, were not circulated to other contracting parties. Certain new practices were also introduced to facilitate the process of renegotiations. Some contracting parties exchanged information on "bilateral balances" showing the trade coverage of items in bilateral trade in which the bound duties were increased or decreased.

(ii) Difficulties arose in practice in filling up the information in columns 6 and 7, concerning the first incorporation of the concession in the schedule and previous INRs respectively. Even before the commencement of the process for transposition of GATT schedules to the Harmonized System nomenclature, in connection with the introduction of the loose-leaf system, a Secretariat note⁹² circulated in June 1982 had acknowledged that the 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 cover several pages in respect of one tariff line. It therefore proposed that INRs could be condensed into one INR at a mutually-agreed level through bilateral negotiations. However, if the INR holder so requested, the country submitting the schedule would have to fill column 7 in full detail. While the suggestion seemed to have been accepted in principle, the consolidated schedules that were submitted both with pre-Harmonized System and Harmonized System nomenclatures continued to suffer from lack of information on previous INRs. Regarding the date of first incorporation of the concession to be furnished in column 6, some delegations suggested in the Committee on Tariff Concessions that the date to be indicated should be the date at which a concession or a part of a concession (earliest constituent component) was granted. However, other delegations requested more time to reflect on the proposal as the matter had come up for negotiations in the GATT Articles Group of the Uruguay Round and consequently no agreement could be reached on the content of column 6. The schedules in most cases did not have information on column 6 either. Again, the final schedules attached to various protocols did not have entries in column 5 on current INRs in most cases.

(iii) The contracting parties accepted the following observations made by the Secretariat in a note dated 14 January 1987:

"It is recognized that participants will find it difficult within the time-frame envisaged for the implementation of the Harmonized System to include in their consolidated draft schedules which are to be annexed to the Harmonized System Protocol, information under column 6 (concession first incorporated in a GATT schedule) and column 7 (INRs on earlier concessions), of the loose-leaf model....Since the inclusion of this information is mandatory under the Decision of the GATT Council of 26 March 1980 (BISD 27S/22) on the introduction of the loose-leaf system, a schedule which is annexed to the Harmonized System Protocol and which contains information relating only to columns 1-5 would be considered a legally valid consolidated – but incomplete – schedule of concessions. In order to comply with the requirements of the above-mentioned decision, the missing information (relating to columns 6 and 7) would have to be submitted at a later stage. At that time, it will be necessary to certify the completed consolidated schedule...."⁹³

(iv) In the March 1980 decision on the introduction of the consolidated loose-leaf schedules, it had been provided that earlier schedules and negotiating records would remain proper sources for interpreting tariff concessions until 1 January 1987. In view of the delays in the submission of the consolidated schedules pursuant to the 1980 decision and further complications relating to Article XXVIII negotiations in connection with the introduction of the Harmonized System, the GATT

⁹² GATT Doc. TAR/W/30

⁹³ GATT Doc. TAR/W/65

Council reviewed the March 1980 decision in this respect. It was decided⁹⁴ to replace the words "until 1 January 1987" by the words "until a date to be established by the Council".

(v) While it was agreed in the 1983 decision that alteration of existing bindings would be envisaged only if their maintenance would result in undue complexity in the national tariffs and that such alteration should not involve a significant or arbitrary increase of customs duties collected on a particular product, in actual practice many contracting parties, developed and developing, did raise their bound duties, in some cases significantly, in the process of the transposition of the GATT schedules to the Harmonized System nomenclature. In some cases these resulted in loud complaints⁹⁵ in the Committee on Tariff Concessions.

(vi) In the Committee on Tariff Concessions, it was debated whether the protocol or certification approach would be the best means to incorporate in the GATT schedules changes resulting from the transposition of concessions to the Harmonized System nomenclature. The protocol approach was preferred in view of the greater flexibility it afforded. Three protocols were opened for acceptance in 1987 and one each in 1988, 1989, 1992, 1993 and 1994, in order to enable the contracting parties to annex their schedules to the protocols as and when they were ready.

(vii) A large majority of GATT contracting parties decided to apply the Harmonized System in their customs tariff. While some followed the prescribed procedures ending with the annexing of their consolidated schedules in the Harmonized System to the Protocols before implementation, and others obtained waivers to enable them to implement the System before completing the GATT procedures (including renegotiations), some others implemented it without having followed those procedures. As of 14 October 1994, 28 contracting parties and the European Communities had their Harmonized System schedules attached to various protocols.

(viii) In view of the fact that the transposition to the Harmonized System nomenclature resulted in the tariff schedules of a large number of contracting parties being put on a completely new basis, it was considered necessary to adopt a fresh decision⁹⁶ on the question of floating INRs on the lines of the ones taken by the CONTRACTING PARTIES at the end of the Kennedy and Tokyo Rounds.

1991 Revision of the Harmonized System

4. In July 1989 the Customs Cooperation Council adopted a Recommendation concerning the Amendment of the Harmonized Commodity Description and Coding System which was to come into effect on 1 January 1992. Most of the changes were of a technical or editorial nature, but in about a dozen cases the amendments involved substantive changes resulting from the transfer of a product from one 6-digit heading to another. For the implementation of the revision of the Harmonized System the CONTRACTING PARTIES adopted a decision⁹⁷ on 8 October 1991 simplifying the earlier procedures. This decision required contracting parties to submit a notification which included the pages of their loose-leaf schedules containing the proposed changes. These pages had to show clearly those items in which, in the view of the contracting party in question, the proposed changes did not alter the scope of the concession and those in which they did. For the items in which the proposed changes altered the scope of the concession, the following information had to be furnished:

⁹⁴ GATT, BISD, Thirty-third Supplement, pp.135-136

⁹⁵ GATT Doc. TAR/M/24

⁹⁶ GATT, BISD, Thirty-fifth Supplement, p.336

⁹⁷ GATT, BISD, Thirty-ninth Supplement, pp.300-301

- (i) A concordance table between the existing and the proposed schedule;
- (ii) A concordance table between the proposed and the existing schedule;
- (iii) An indication of the contracting party or parties with which the existing concession was initially negotiated;
- (iv) Import statistics by country of origin, for the most recent three-year period for which statistics were available.

5. The procedures for modification and rectification had to be followed and the changes in the GATT schedules certified if no objection was raised within 90 days in respect of changes which did not alter the scope of the concession and if no consultation or negotiation was requested within the same period in respect of changes which altered the scope of concessions. If an objection was raised or a request for negotiation or consultation was made, the procedures for negotiations under Article XXVIII had to be followed. In the case of changes claimed as not altering the scope of a concession, if an objection was raised the contracting party concerned had to submit the full documentation, as required for changes in which the scope of a concession was altered.

6. The implementation of the 1991 decision in respect of the 1992 revision of the Harmonized System was quite smooth. Eleven contracting parties notified changes in their schedules relating to the 1992 revision and ten of the notifications were certified.

1996 Revision of the Harmonized System

7. The next revision of the Harmonized System approved by the Customs Cooperation Council at Brussels for implementation with effect from 1 January 1996 was more extensive than the 1992 revision. Since the 1991 decision on the procedures for incorporating in GATT schedules the 1992 changes in the Harmonized System was meant for "any changes which may be introduced in the future", these procedures were applied for the 1996 revision also. The process for introducing into the Schedule of Goods the changes in the 1996 revision of the Harmonized System began in 1995, after the entry into force of the WTO Agreement.

8. Although the 1991 decision requires contracting parties (Members) to submit a notification which includes only the pages of their loose-leaf schedules containing proposed changes, the practice has varied among Members in respect of changes resulting from the 1996 revision of the Harmonized System. A number of Members have submitted the full consolidated loose-leaf schedules, including the items where there have been changes following the 1996 revision of the Harmonized System. Others have submitted only the list of items affected by the 1996 revision.

9. A Secretariat note⁹⁸ dated 13 October 1994 stated that the final objective was that "delegations prepare a consolidated schedule in loose-leaf format" as agreed in the 1980 decision on the introduction of a loose-leaf system for the schedules of tariff concessions. Detailed guidelines were given in the note for the preparation of a new schedule in loose-leaf format while incorporating the changes in the 1996 revision of the Harmonized System. The format suggested was that of the 1980 decision regarding the introduction of the loose-leaf system with the addition of a new column on ODCs. The Members which have submitted consolidated loose-leaf schedules in accordance with these guidelines have in most cases not filled in columns 5 (current INRs), 6 (date of first incorporation) and 7 (INRs on earlier concessions) and the pattern set in the original transposition to the Harmonized System has been maintained.

10. Long delays have taken place in completing the procedures for changes in schedules stemming from the 1996 revision of the Harmonized System. In the beginning the process was blocked in a large number of cases because of general reservations made by some Members. These Members took the

⁹⁸ GATT Doc. TAR/W/93

position that the 1991 procedures were not adequate for the implementation of the 1996 revision and it was necessary for the Members to furnish the fuller documentation as required in the 1983 decision. Other Members asserted that the 1991 decision needed to be followed for the 1996 revision and amendment of the currently applicable procedures could be considered only for future changes in the Harmonized System. There could not be an agreement in this regard, but the Members which had made general reservations proceeded later to specify their reservations and the process was unblocked after the Council for Trade in Goods took a decision which provided that, if the objections on the documentation already submitted were not specified by a certain date, they would be deemed to have lapsed.

11. As in the past, Members which could not complete the required procedures before the date of implementation of the 1996 revision of the Harmonized System needed a waiver under paragraph 3 of Article IX of the WTO Agreement and a waiver⁹⁹ was granted to them initially up to 30 June 1996 and they were required to complete the negotiations and consultations by that date. The time limit has had to be extended a number of times and on 1.10.99 it was being proposed that the time limit be extended to 30 April 2000. A requirement in these decisions has been that Members should have submitted the documentation or, if special circumstances applied, should have requested technical assistance from the Secretariat for the completion of such documentation. As in the past, the waiver decisions authorize other Members to suspend concessions initially negotiated with the Members concerned to the extent that they consider that adequate compensation is not offered by the Member concerned.

12. By 1 October 1999, 41 Members (counting the EEC as one) had submitted the documentation relating to the 1996 revision of the Harmonized System and out of these 10 had been certified and in seven the document was being prepared for certification. In respect of the remaining 24, the process has remained blocked, in some cases by more than two years, because of objections.

13. Not all Members which have submitted the documentation but which have not completed the procedures have been seeking waivers or continuation of earlier waivers. Some Members which are covered by waivers have not submitted the documentation. A very large number of Members have neither submitted the documentation nor applied for waivers. It must be pointed out here that some of these Members, particularly those which have made ceiling bindings, may not need waivers and there might not even be a requirement for them to transpose their concessions on goods to the 1996 version of the Harmonized System.

D. Integrated Data Base

1. A data base on tariffs and trade has existed in the Secretariat since the early 1970s. The first data base, known as the GATT Tariff Study, containing information on customs tariff and imports in respect of 10 industrialized countries and the European Communities, was developed after the Kennedy Round to allow for an analysis of the tariff situation in those markets. During the Tokyo Round, the data base was used by the eleven GATT contracting parties participating in the exercise to facilitate the negotiations. The participants authorized the Secretariat to provide developing countries with summary information derived from the data base concerning products of export interest to them.

2. In 1987, the exercise was widened to cover all contracting parties when the CONTRACTING PARTIES adopted a decision¹⁰⁰ on 10 November 1987 requiring the Secretariat to begin work on setting up an integrated data base (IDB) consisting initially of information at the tariff line level on three elements, namely imports, tariffs and quantitative restrictions. It was agreed that, for the purposes of the integrated data base, contracting parties would submit annually to the Secretariat tariff data for unbound items and import data for all bound and unbound items, in addition to the existing notification requirements on

⁹⁹ WTO Doc. G/MA/W/4/Rev.1

¹⁰⁰ GATT, BISD, Thirty-fourth Supplement, pp. 66-67

quantitative restrictions and bound tariffs. The data base thus set up was of great use during the Uruguay Round, in which it enabled the Secretariat to provide the analyses on the basis of which the participants evaluated the results of the Round in the area of tariffs on both agricultural and industrial products. The IDB also helped the Secretariat to provide analytical inputs into the exercise for verification of the tariff schedules of the participants so as to enable them to determine whether the Montreal target for reduction of industrial tariffs by one-third and the Agriculture Agreement requirement of reduction by a simple average of 35 per cent (24 per cent for developing countries) had been met.

3. After the entry into force of the WTO Agreement, the operation of the IDB was reviewed. It was decided to downsize the IDB and make it operational with basic information on tariffs and imports before broadening its scope by including non-tariff measures. By a decision¹⁰¹ dated 16 July 1997 the General Council required Members to supply to the Secretariat, on an annual basis, the information for the IDB. MFN tariffs, both current bound duties and applied duties, have to be furnished on an obligatory basis and preferential tariffs on an optional basis. Information on imports has to be furnished origin-wise, without indicating if the imports were admitted on a preferential or MFN basis.

4. As regards dissemination of information contained in the IDB, in June 1997 the Committee on Market Access adopted a document which provided as follows:

"The IDB contains information already in the public domain – customs tariffs published in the national tariff schedules, concessions available in the WTO list of concessions and import statistics available from national statistical authorities. This IDB information has been available to all WTO Members and to international organizations for their internal use. This is the present policy followed by the Secretariat in the dissemination of the IDB on the CD-ROM, but it may need to be reviewed."¹⁰²

5. Some Members have been concerned about the level of compliance by Members in the IDB notification requirement and suggested partial restriction of access to non-complying Members. However, in June 1999 it was agreed as follows:

"In light of the need to assure the broadest possible participation of Members in the IDB and full compliance with the 16 July 1997 Decision of the General Council (WT/L/225) concerning supply of information to the IDB, Members agreed that the Market Access Committee would undertake prior to 1 June 2000 a review of the operation of the IDB and of IDB-related technical assistance activities. If, at the time of the review, participation of Members in the IDB falls substantially below the current level of participation, access to the IDB data will be temporarily suspended until adequate participation is secured again, unless other steps considered appropriate by Members are agreed."¹⁰³

6. IDB information is distributed not only through the IDB CD-ROM but also on-line. While the IDB CD-ROM permits the viewing and printing of tariff-line and summary data, on-line tariff level data can be further analysed using PC desktop software. This facility can be of great use during tariff negotiations and renegotiations.

¹⁰¹ WTO Doc. WT/L/225

¹⁰² WTO Doc. G/MA/IDB/1/Rev.1

¹⁰³ WTO Doc. G/MA/IDB/3

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Plurilateral Negotiations on Sectors: An Additional Tool for Liberalization

1. While global comprehensive rounds of trade negotiations are the best means of obtaining ambitious results in tariff liberalization, sectoral liberalization on a plurilateral basis is an additional tool which can be employed during the rounds as well as in the interval between rounds. Sectoral liberalization, whether during or between rounds, can be undertaken plurilaterally by Members having the predominant share of world exports (say 80 per cent), as was done in the Uruguay Round and in the Information Technology Agreement. There is precedent and there are rules governing plurilateral negotiations between rounds. Such negotiations can help to maintain the momentum for liberalization of world trade when more comprehensive negotiations are not taking place. Needless to say, the results should be applied on an MFN basis and all Members wishing to participate in the negotiations should be allowed to do so.

Surveillance of Future Renegotiations

2. In order to help in expediting renegotiations and to ensure that the results of such negotiations are reported and incorporated in the schedules, it is necessary for Members to maintain surveillance of all future renegotiations under the various articles of GATT 1994. For this purpose, periodic information should be furnished to the Committee on Market Access on the stage reached in each of the negotiations. The Secretariat can compile such information on the basis of data available to it.

Standing Body for Modification and Rectification

3. At present, requests for rectification can be blocked by objections received from any Member on a proposal made by another Member they may remain so for years. Consideration should be given to establishing a standing body of Members that may, where an objection has been raised, review all proposals for rectification with a view to devising appropriate solutions.

Preparation of Updated Note on Situation of Schedules

4. In order to facilitate the task of preparation of the consolidated loose-leaf schedules, to replace all previous schedules as decided by the General Council on 29 November 1996, the Secretariat should be requested to prepare an update of the note in document TAR/W/7 dated 18 June 1980 on "Situation of Schedules" and to list all the instruments constituting the schedules on goods of Members. In the past, efforts to prepare consolidated loose-leaf schedules have succeeded only partially as information has been missing in several columns. Even the 29 November 1996 decision states that the new consolidated loose-leaf schedule will replace all previous schedules for all purposes except historical INRs. Thus, the past instruments will remain valid as a source of information for historical INRs even if Members are successful in filling in all the columns of the new consolidated loose-leaf schedules. The task of preparing the list of all past instruments constituting the schedule on goods deserves, therefore, to be given top priority.

Completion of Transposition to the Harmonized System

5. Priority should also be given to the transposition of pre- and post-Uruguay Round schedules to the nomenclature of the Harmonized System as revised up to 1996. This should be substantially accomplished before a date is set for the submission of new consolidated loose-leaf schedules in accordance with the decision of 29 November 1996.

Tracking Information on Past Renegotiations

6. The Secretariat should also be authorized to track down information on all renegotiations taken up under Article XXVIII where final reports have not been furnished in order to see whether the renegotiations were abandoned or concluded with withdrawals or modifications which were absorbed in the results of negotiations in the rounds. The task should be limited to the incomplete renegotiations mentioned in the Secretariat note dated 18 June 1980 on "Situation of Schedules" referred to in paragraph 4 above and the renegotiations undertaken thereafter.

Review of Need to Provide for Floating INRs in Respect of Uruguay Round Concessions

7. Unlike in the Kennedy Round and the Tokyo Round, no decision was adopted in the Uruguay Round on floating INRs. In the absence of records of bilateral negotiations and on account of the fact that INRs were generally not granted specifically in the context of these negotiations, INRs are virtually non-existent in respect of the concessions agreed during the Uruguay Round. In view of the implications of this for the operation of Article XXVIII:3 of GATT 1994, consideration should be given to the adoption of a decision on floating INRs, in respect of the schedules attached to the Marrakesh Protocol. It might be even better to envisage a decision on floating INRs applying, not only to the schedules attached to the Marrakesh Protocol, but also to all future tariff concessions.

Update of 1980 Procedures for Modification and Rectification

8. The 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions should be updated and the practice of applying these procedures to modifications resulting from unilateral decisions and bilateral and plurilateral negotiations should be codified.