APPLICATION OF ARTICLE XXVIII:5 TO NEW PRODUCTS
IN THE HIGH TECHNOLOGY AREA SUCH AS DIGITAL AUDIO DISCS (DADs)

Working Paper submitted by the Delegation of Japan

1. Basic Issue

(1) Generally speaking, high technology products including DADs are expected to bring new practical benefits to our livelihood, and play an important role in revitalizing the world economy in the ways outlined below:

(a) The R & D and commercialization of a high technology product set in motion a ripple effect by creating new effective demand and employment opportunities, eventually leading to the revitalization of the national economy of each country.

(b) With the diffusion of a high technology product, a new industry is formed. This facilitates the structural adjustment of the national economy and ultimately furthers the smooth working of the international division of labour and the free and expanding flow of trade.

(c) A high technology product advances the overall level of technology by inducing the development of other new high technologies and new products.

(2) New high technology products such as DADs have by their nature the potential to create big demand which is unforeseeable at first.

(3) Accordingly, there would arise serious impediments to the development of the tremendous and far-
reaching potential of a new high technology product if a pre-emptive raising of tariff were to be effected at a point which has not entered the production and trade stage of the product or is still far from full-scale commercial production and trade.

If the tariff raise on DADs were to serve as a precedent for the legitimate application of Article XXVIII-5 on new high technology products and such pre-emptive tariff raise were to be resorted to by the contracting parties to the GATT, new impediments in the form of higher protective tariff rates would jeopardize the sound expansive of production and trade in new high technology products.

Hence, the invocation of Article XXVIII-5 to a new high technology product at a point which is still far from full-scale commercial production and trade is not appropriate in the light of the basic objective of the GATT, i.e., the growth of the world economy through expansion of trade.

2. Problems related to the interpretation of Article XXVIII-5 of the GATT

In invoking Article XXVIII-5 the prior consultations and negotiations in accordance with the procedures provided for in the Article are prerequisites to the actual raising of tariffs, in order to ensure the stability of concessions.

Through these consultations and negotiations, the parties concerned should endeavour to maintain "the
general level of concessions" provided in the GATT. In the event agreement is not reached between the parties concerned, the party invoking Article XXVIII-5 can raise the tariff while any party having an I, P or S status can withdraw "substantially equivalent concessions". A prerequisite inherent in this process is that there should be a substantial degree of measurability with respect to the product in question which would enable the calculation of "substantially equivalent concessions". (See Annex I)

(3) Given the fact that a new high technology product has by its nature the potential to trigger unforeseeable demand at home and/or abroad, the measurability with respect to the product and the related concessions varies from nil to some recognizable degree as the activity on the product moves from the conception/R&D end to the full-scale commercial production/trade end of the spectrum. Thus, to the extent that such measurability is a prerequisite to invoking Article XXVIII-5 and constitutes a common ground for consultations and negotiations, the earlier in the spectrum, the more difficult would it be to invoke Article XXVIII-5 due to the diminishing of measurability.

Such tariff raise without a substantial degree of measurability would not only jeopardize the development of production and trade of such products but also undermine the stability of concessions under Article XXVIII.

It should be recalled from past examples that Article XXVIII-5 seems to have been invoked only
in cases with substantial measurability, evidenced in particular by 3 years of actual trade.

3. Conclusion

(1) The pre-emptive invocation of Article XXVIII-5 with regard to new high technology products such as DADs is not appropriate in the light of the basic objective of the GATT.

(2) In terms of the interpretation of GATT Article XXVIII-5, the earlier in the spectrum before full-scale commercial production and trade, the less measurability there is with respect to high technology products such as DADs, and, as a result, the more difficult it is to invoke GATT Article XXVIII-5 to raise tariffs pre-emptively.

(3) Consequently, the delegation of Japan proposes the following:

(a) That it be established in the Committee on Tariff Concessions that the contracting parties should not invoke, or should at least refrain from invoking, Article XXVIII-5 with regard to a new high technology product such as the DAD prior to its full-scale commercial production and trade on the presumption that a substantial degree of measurability is not ensured, pending agreement mentioned in (b) below;

(b) That the Committee on Tariff Concessions should examine the conditions, such as the degree of
measurability required and the method of calculating the compensation, which would need to be fulfilled if Article XXVIII-5 were to be applied to new high technology products prior to their full-scale commercial production and trade, with a view to reaching an agreement as soon as possible. (See Annex II)
ANNEX I

On Article XXVIII-5 (an interpretative note)

1. Through the consultations and negotiations provided for in Article XXVIII-5, the parties concerned should endeavour to maintain the general level of concessions provided in the GATT. In the event agreement is not reached between the parties concerned, the party invoking Article XXVIII-5 can raise the tariff and any party having an I, P or S status can withdraw substantially equivalent concessions.

In other words, the criterion guiding the consultations and negotiations is that of maintaining the "general level of concessions". Should there be disagreement as a result of the consultations and negotiations, the criterion which sets the limits within which any contracting party having an I, P or S status can withdraw concessions is "substantially equivalent concessions".

2. Although both the "general level of concessions" and "substantially equivalent concessions" may have some qualitative implications, the overriding consideration behind these is quantitative and presupposes measurability. It is on this basis that tariff raises on specific items under Article XXVIII-5 are to be treated. Namely, there are certain limits on the contracting parties in quantitative terms as they invoke Article XXVIII-5.
3. As stated above, it is on the basis of the quantitative concept that the negotiations and consultations should be conducted under Article XXVIII-5 for which a substantial level of measurability is required regarding the item involved.

4. If approval were given to the invocation of GATT Article XXVIII-5 in relation to products which are not considered to have a substantial degree of measurability:

   (1) Even with respect to a product such as the fast breeder reactor for which commercialization is not expected for another ten to twenty years, it would become difficult to rule out pre-emptive tariff raises under Article XXVIII-5.

   (2) There could be a profusion of Article XXVIII-5 negotiations or consultations which lack rational basis, thus increasing the likelihood of disputes.

5. Past examples naturally show that, with the sole exception of DADs, Article XXVIII-5 seems to have been invoked only in cases of substantial measurability, evidenced in particular by three years of actual trade.
### ANNEX II

**Regarding the Invoking of GATT Article XXVIII-5 in Relation to New High-Tech Products such as DADs**

(Prepared as a discussion paper for an informal meeting, not as the official view of the Japanese Government)

<table>
<thead>
<tr>
<th>Further tightening of conventional GATT practices for the purpose of trade expansion, taking into consideration the vital role new high-tech products such as DADs would play.</th>
<th>Specific examples of criteria</th>
<th>Calculating method of compensation</th>
<th>I.P.S. Authorization</th>
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<tbody>
<tr>
<td>Production and trade are or are becoming full-scale, and there is a trade record for three years or more.</td>
<td>Possible to calculate according to the conventional approach.</td>
<td>(1) If the &quot;I&quot; status exists in the concession concerned, the &quot;I&quot; status shall be granted.</td>
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<td>The conventional approach to calculation can be adopted as is.</td>
<td>(2) There is to be no distinction between &quot;P&quot; and &quot;S&quot; (all P).</td>
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<td>(3) If a contracting party insists on the &quot;P&quot; status, it will make notification to the contracting party which is to invoke Article XXVIII-5, along with evidence such as records of trade or the amount of investment in production facilities related to the said products.</td>
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<th>Compliance with conventional GATT practices.</th>
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<th>Calculating method of compensation</th>
<th>I.P.S. Authorization</th>
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<td>Production and trade have been going on for a proper period of time, but for less than three years, and there is a substantial record of trade.</td>
<td>Possible to calculate according to the conventional approach.</td>
<td>In addition to the factors mentioned in the above column, it is also necessary to study the applicability of the following rules:</td>
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<td>There has been a certain level of recorded trade in terms of value and period of trade since the beginning of production and trade.</td>
<td>Possible to calculate according to the conventional approach.</td>
<td>(i) Where appropriate, calculation of compensation is to be withheld for as long as three years;</td>
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<td>(ii) If a contracting party is to invoke Article XXVIII-5 in raising a tariff, a reasonable amount of compensation is to be calculated on a provisional basis for the time being, until a clear, three-year record of trade becomes available, making it possible to recalculate compensation.</td>
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