Background

1. It was agreed at the first meeting of the Negotiating Group on GATT Articles, held on 3 March 1987, that the secretariat would prepare a factual background note on the problems which had been identified in relation to those Articles which had been suggested for review. It was understood that this paper would refer to the discussions in the first meeting of the Group and would also indicate any additional points that had been made previously in the Senior Officials' Group and the Preparatory Committee. The paper would also provide background information on the basis of material available in the Analytical Index.

2. The paper which follows therefore provides, on each of the Articles proposed for review, a description of the problems identified by delegations. In cases where Articles have been proposed for review but the problems arising have not yet been identified, the paper simply notes the fact. Finally, reference is made to the Analytical Index in cases where the Index provides any indication of the negotiating history of provisions referred to by delegations or an indication of any earlier consideration of the issues in question. The paper does not seek to summarise the discussions which have taken place: in many cases questions have been raised as to the importance or substance of the problems identified, and these are recorded in the notes of the relevant meetings, but they are not repeated here.

3. Article XXVIII

(a) Criteria for determination of suppliers' rights

Many delegations have expressed the view that the existing provisions for determining which contracting parties have a "principal supplying interest" or a "substantial interest" in the context of tariff negotiations...
are unsatisfactory. The point has been made that for historical reasons negotiating rights tended to be concentrated on a restricted number of countries and that a growing number of suppliers had no negotiating rights. It has also been suggested that the criteria for the definition of principal and substantial suppliers should reflect the relative importance of the trade in question to different suppliers, not simply the absolute share of imports in the market of the importing country. These delegations have proposed various approaches which might be considered in order to take account of the interests of smaller countries for which the product subject to tariff renegotiation represents a significant source of income or export earnings. In this connection, mention has been made by some delegations of paragraph 5 of the interpretative note to Article XXVIII:1, which foresees the possibility of determining exceptionally that a contracting party has a principal supplying interest where the concession in question affects trade which constitutes a major part of the total exports of such a contracting party. Certain delegations have also referred to the possibility of defining suppliers' rights so as to take account of the potential future trade of new entrants in the market in question.

References in the Analytical Index

On pages 8 and 9 reference is made to guidelines adopted on 10 November 1980 on "Procedures for Negotiations under Article XXVIII" (BISD 27S/26). In paragraph 4 of the guidelines certain procedures are set out in relation to the identification of contracting parties having a principal or substantial supplying interest.

On page 9 the Index also refers to a statement made in July 1985 in the Committee on Tariff Concessions to the effect that the "10 per cent share" rule had been generally applied for the definition of substantial supplier (TAR/M/16).

(b) Calculation of the amount of compensation

Several delegations have referred to what they consider as inadequacies in the methods used to calculate the amount of compensation due in the event of the renegotiation of a tariff concession. Among the specific issues raised in this connection is the question of compensation for potential trade, particularly where a tariff increase is applied to a new product before any substantial trade has been built up. One delegation has also pointed to the problem arising, when an unlimited tariff binding is replaced by a tariff quota, as to whether the quota level established takes adequate account of potential trade growth. Another matter raised in relation to the estimation of compensation due concerns the question whether suppliers' rights should be calculated so as to exclude trade under contractual preferential arrangements.
References in the Analytical Index

On pages 6 and 7 references are given to discussions which have taken place in the Council and the Committee on Tariff Concessions on the application of Article XXVIII to new products. There is also a reference on page 19 to a working paper submitted by Japan to the Committee on Tariff Concessions in April 1984 (TAR/W/45), dealing with the case of a pre-emptive tariff increase against a new high technology product prior to its full-scale commercial production.

(c) Recourse to Article XXVIII:5

Article XXVIII:5 provides the possibility of tariff renegotiations on the whole or part of a tariff schedule in successive three year periods without further authorisation. Several delegations have argued that a tendency towards more frequent invocation of the right to renegotiate tariff concessions under Article XXVIII:5 - even if the number of actual renegotiations is substantially smaller than that of invocations of the right to renegotiate - has undermined the security and value of tariff bindings, if countries having invoked this provision may at any time during a three year period modify or withdraw existing concessions. It has also been suggested that this provision tends to be invoked in a routine manner as a safeguard, when there is no special reason to foresee a need to renegotiate the concessions in question.

References in the Analytical Index

On pages 18 and 19 there are references to certain matters raised in relation to the use of Article XXVIII:5 provisions. These include observations made in the Committee on Tariff Concessions to the effect that in certain cases the excessive prolongation of tariff renegotiations had led to or might lead to the introduction of proposed tariff changes before the completion of negotiations (TAR/M/6 and TAR/M/9).

On pages 19 and 20 reference is made to a secretariat note dated 8 November 1983 on the "Use of Article XXVIII of the GATT" (TAR/W/42). The note includes information on the frequency with which contracting parties have availed themselves of the provisions of Article XXVIII:5 and identifies "a clearly rising trend over the years".

4. Article XXIV

(a) General observations

A number of delegations have expressed the view that Article XXIV provisions exempting regional preferential arrangements from the application of the m.f.n. and non-discrimination principles are in need of review. It is argued that the widespread use of Article XXIV, and frequent failure to reach consensus on whether particular arrangements are in conformity with the relevant provisions, have resulted in imbalances in rights and
obligations among contracting parties. In this connection, it has been suggested that a study should be made of the relationship between the formation or expansion of a customs union or free-trade area and the examination by the CONTRACTING PARTIES of its consistency with the provisions of Article XXIV. In addition, it has been suggested that surveillance procedures associated with Article XXIV arrangements are in need of review and improvement.

References in the Analytical Index

There are several references in the Index to earlier discussions of the above issues. In particular, on pages 5-12 discussions are recorded on the interpretation of certain concepts contained in Article XXIV:5, including the "general incidence of duties and regulations of commerce" and the methods of calculation of such incidence. In addition, on pages 26-33 reference is made to the nature of the duties and other regulations of commerce mentioned in Article XXIV:8. The notions contained in Article XXIV:5 of an "interim agreement", "plan and schedule", and a "reasonable length of time" are covered on pages 12-16. On pages 33-38 reference is made to the meaning of "substantially all the trade" (Article XXIV:8) in terms of quantitative criteria, qualitative criteria and reverse preferences. The question of the application of Article XXVIII in the event of the establishment of a customs union (Article XXIV:6) is dealt with on pages 16-18, and reference is made to the relation between Article XXIV and Articles XXII, XXIII and Part IV on pages 46-50. Finally, on pages 18-25 earlier discussions are recorded of procedures for the examination of proposed customs unions and free trade areas, as set out in Article XXIV:7. In particular, there is reference on pages 22-24 to the question whether CONTRACTING PARTIES make recommendations and the implications of not doing so. It may be noted that in only a few cases have the CONTRACTING PARTIES recognised an agreement to be in conformity with Article XXIV.

(b) Rules of origin

It was suggested by certain delegations during discussions in the Preparatory Committee that the application of rules of origin in the administration of regional arrangements had in certain cases constituted unwarranted impediments to trade.

References in the Analytical Index

On pages 6 and 7 there are references to discussions on rules of origin in the agreement between the EFTA countries and Spain (BISD 27S/127, November 1980) and the agreement between the EEC and Lebanon (BISD 25S/142, May 1978). The Index also refers to several Working Party reports where discussions have been recorded on the compatibility of rules of origin with Article XXIV:5(b).
(c) Application of the provisions of Article XXIV:12

It was suggested in the Preparatory Committee that any review of Article XXIV should include an examination of the observance of provisions governing regional arrangements by regional and local governments and authorities, such as provincial governments within federal entities, as referred to in Article XXIV:12.

References in the Analytical Index

On pages 41 to 45 there are a number of references to the purpose and scope of paragraph 12, to the interpretation of the "reasonable measures" referred to in the provision, and to the question of compensation in the case of non-observance. The greater part of the discussion on these matters has taken place in the 1985 Panel: "Canada - Measures Affecting the Sale of Gold Coins" (L/5863).

5. Article XVII

In discussions on Article XVII, which took place largely in the Senior Officials' Group and the Preparatory Committee, several delegations expressed the view that there was a need both to clarify certain Article XVII provisions and to secure a greater degree of compliance with these provisions. Reference was made to a lack of conceptual clarity with respect to the definition of state trading enterprises. Certain delegations also spoke of non-adherence to the provisions in Article XVII:1 relating to the requirement that state-trading enterprises conduct their trade on the basis of nondiscrimination and commercial considerations. Reference was also made to the possibility of improving access to markets in which state trading enterprises were operating. Finally, some delegations were of the view that arrangements for notification and surveillance under Article XVII required improvement.

References in the Analytical Index

On pages 2 to 5 there are a number of references to earlier discussions on the definition of a state trading enterprise. Some of the issues mentioned in this connection emerged in the successive drafts of what finally became Article XVII. Reference is also made to discussions which took place in 1959 and 1960 in the context of Panels on "Notifications of State Trading Enterprises", and in 1981 in a Panel on Spanish Measures Concerning Domestic Sale of Soyabean Oil (L/5161).

On pages 6 to 8 there are references to the questions of non-discriminatory treatment and commercial considerations, both in relation to the Article's drafting history and the 1983 Panel concerning Canada's administration of its Foreign Investment Review Act (BISD 30S/152).
On pages 10 and 11 an indication is given of the series of decisions taken by the CONTRACTING PARTIES in regard to notification and information requirements, culminating in the adoption in 1962 of the present arrangements (BISD 11S/58) whereby contracting parties submit full information on their state trading enterprises every third year and notify changes to the basic notification in the intervening years.

6. Other Articles

Articles XI, XIII, XII, XVIII, XV, XXI, XXV and the Protocol of Provisional Application of the General Agreement were also proposed for review during the first meeting of the Negotiating Group, but the delegations making these proposals have not yet indicated the particular issues or aspects of these provisions which they consider to be in need of review.