

GENERAL AGREEMENT ON TARIFFS AND TRADE

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Working Party on Textiles and Clothing

FULL APPLICATION OF GATT PROVISIONS

Note by the Secretariat

The Working Party decided to begin the examination envisaged in its terms of reference by looking at the possibilities for bringing about the full application of GATT provisions to trade in textiles and clothing. During the discussions, suggestions were made that the secretariat should prepare a document which would describe in greater detail the relevant GATT provisions that would have to be taken into account in considering this option. This paper attempts to respond to that request. To avoid a detailed description of the provisions of the MFA in the main text, a brief summary of these provisions is annexed to this paper.

Introduction

The legal relationship between the MFA and the GATT has never been clearly defined. It will be noted that the preamble to the MFA recognizes the existence of an unsatisfactory situation in trade in textile products and calls for special measures of co-operation. It also notes the determination of the parties in agreeing to the Arrangement to have full regard to the principles and objectives of the General Agreement. Moreover, Article 1:6 states that "provisions of this Arrangement shall not affect the rights and obligations of participating countries under the GATT".

The specific provisions in Articles 3 and 4 of the MFA for the use of restrictive measures or bilateral agreements relate to the recognition under Article 1:5 that the application of safeguard measures under the Arrangement may become necessary in exceptional circumstances in the field of trade in textiles. The MFA also provides for special surveillance and dispute settlement procedures to supervise the implementation of the Arrangement. It is in regard to the right to take special emergency action in terms of Articles 3 and 4 that the MFA in practice affects certain rights and obligations under the General Agreement, notably those under Articles XI, XIII and XIX.

The management of the MFA has been entrusted to the Textiles Committee which is assisted by the TSB and which is "established within the framework of the GATT". The operation of the MFA does not affect the right to maintain restrictions justified under the General Agreement. The GATT Council and the CONTRACTING PARTIES serve as final arbiters in dispute settlement following the procedures of the General Agreement (Article 11:9 and 10).

The following paragraphs examine the principal provisions of the General Agreement that are relevant to an analysis of what might be involved in a move to full application of the General Agreement to trade in textiles and clothing.

Articles I, II and XXVIII

Article I defines the most-favoured-nation principle by which all contracting parties are bound to extend to each other any advantages which they grant to the products of any other country. This principle is applicable not only to tariffs but also to all rules and formalities connected with trade.

There are certain exceptions to this general rule, some of which are dealt with later in this note.

The MFA provides for no exception to Article I in so far as tariff treatment is concerned. It departs from the principles of equal treatment in as much as it allows quantitative restrictions to be applied to some contracting parties without their being extended to all other contracting parties. This departure concerns Articles XIII and XIX in particular.

The General Agreement recognises that tariffs often constitute serious obstacles to trade and the GATT has sponsored multilateral negotiations for substantial reductions in the general level of tariffs, on a reciprocal and mutually advantageous basis. The MFA, in its preamble, envisages progress in the reduction of tariffs to achieve "harmonious development" of trade in textiles.

Substantial reductions were made in the textiles sector during the Tokyo Round, the weighted average depth of cut being 19 per cent. The spread of tariffs on textile and clothing products in the industrialized countries, before and after the Tokyo Round, is described in detail in the GATT Study "Textiles and Clothing in the World Economy" (pages 68-69). The nominal tariff averages now range between 11.5 per cent and 21.5 per cent in the major industrialized countries.

The situation with respect to tariff bindings is as follows. In certain developed countries (Canada, the EEC, Japan and the United States) the proportion of tariffs remaining unbound after the Tokyo Round is less than 1.2 per cent. Among the remaining developed countries, it ranges from zero (Switzerland) to 90 per cent (Australia). In between are Finland (6.5 per cent), Sweden (11.2 per cent), Austria (11.3 per cent), Norway (33.8 per cent) and New Zealand (65 per cent). Compared with figures for industrial products as a whole, the percentage of bound tariffs on textiles and clothing is similar or higher in Canada, the EEC, Japan and the United States and lower in other countries. (GATT Study, pages 70-71 and 110).

The majority of developing countries have bound only a small percentage of their tariffs on textiles and clothing. It is not possible to say, without further examination, as to whether the percentage of bindings in these industries differs from the average for all industrial tariffs.

Some of the contracting parties have linked the tariff concessions granted by them in the Tokyo Round to the continued existence of the special arrangements for textiles. In Schedule XX - Part I, the United States has stipulated the following:

"In the case of each item in this schedule which contains a concession on any cotton, wool, or man-made fibre textile product as defined in the Arrangement Regarding International Trade in Textiles, as extended on December 14, 1977 (the Arrangement), if the Arrangement, or a substitute arrangement (including quantitative restrictions or bilateral agreements) determined by the President to be suitable, should cease to be in effect with respect to the United States before the full concession rate for such item has become effective, the President shall proclaim, effective within not more than 30 days after such cessation, the rate for such item existing on January 1, 1975. If subsequently the Arrangement, or a substitute arrangement (including quantitative restrictions or bilateral agreements) determined by the President to be suitable, should enter into force with respect to the United States, the President shall so proclaim and, effective not more

than 30 days following such entry into force, the staging to the full concession rate for such item shall be resumed, but the period during which such higher rate was in effect shall be excluded as provided in general note 14 to this schedule." (Geneva (1979) Protocol, Vol. II).

Similar reservations are also found in the list of concessions of the European Community and Canada:

"The Community has taken note that the United States make the maintenance of their tariff concessions in the textile sector dependant on the continuation of satisfactory arrangements for trade in this sector. In these conditions, and taking into account the difficult situation of this sector, the Community reserves to itself the right to review in its turn its own concessions in the absence of a mutually acceptable arrangement concerning the international trade in textiles." (Geneva (1979) Protocol, Vol. IV)."

"Canada reserves the right to modify, suspend or withdraw its concessions on textiles and textile products should its trading partners modify, suspend or withdraw their concessions in this sector." (Geneva (1979) Protocol, Vol. 1).

It may be noted that the benefits accruing from the European Community's GSP in textile and clothing products are available only to such countries which have bilateral agreements with the EEC. Since there is no provision for bilateral arrangements in the General Agreement, the EEC's GSP scheme might require some modifications in the event of full application of GATT provisions.

Articles III, IV and V

Articles III, IV and V deal with national treatment, provisions related to cinematograph films and freedom of transit, and their operation is not affected by the MFA.

Articles VII, VIII, IX and X

These articles deal with customs valuation, fees and formalities, marks of origin, and publication and administration of trade regulations. The operation of these articles is not affected by the MFA.

Articles VI and XVI (Anti-dumping, Countervailing Duties and Subsidies)

Article VI affords protection to the domestic industry from material injury caused by dumped or subsidised imports, by the levy of anti-dumping or countervailing duties to the required extent. This provision is available to contracting parties, irrespective of the existence of the MFA.

From the information available in the secretariat, it appears that the following actions were taken in respect of anti-dumping and countervailing duties in the textile field since 1980.

Anti-dumping cases: Australia has initiated thirteen anti-dumping actions. Six of these resulted in the imposition of definitive duty against Israel, Korea (thrice) and Taiwan (twice). Two of these resulted in price undertakings by China and France. In one case there was a finding of no injury against the United States, in another a finding of no dumping against Italy, and three were resolved in other ways.

Canada initiated seven anti-dumping actions of which three were terminated by findings of no injury, the countries involved being France, Italy and Spain in two cases, and Japan and Korea in another. Definitive duty was imposed in two cases - against Brazil and Korea. The remaining two are outstanding, one involving Italy, Netherlands and Portugal, and the other Korea.

The EC initiated three anti-dumping actions against the United States, of which two resulted in the imposition of a definitive duty and one in a finding of no dumping.

The United States initiated five anti-dumping cases, of which four resulted in the imposition of definitive duties (final) involving China (twice), Japan and Korea, one case against another exporter is reported to be pending.

Countervailing duty: Japan initiated a case against Pakistan which was terminated on the ground of the latter having partly abolished the subsidies.

The United States undertook six actions of which two resulted in the imposition of definitive countervailing duty against Peru (twice), one in a price undertaking by Mexico, one in a finding of no subsidy by India, one against China was withdrawn and the last against Pakistan is pending.

Two additional actions by the United States have been recently initiated: one against Peru and the other for a wide range of textile and apparel products from Argentina, Colombia, Indonesia, Mexico, Malaysia, Panama, the Philippines, Peru, Portugal, Singapore, Sri Lanka, Thailand and Turkey (C/W/448/Rev.1). The complaints against Panama and Portugal were withdrawn by the petitioners; the case against Singapore was dismissed. Preliminary determinations of subsidization were made against Argentina, Colombia, Indonesia, Malaysia, Mexico, Peru, the Philippines, Sri Lanka, Thailand and Turkey. Investigations are continuing against these countries and final determinations by the United States are expected to be made in March 1985.

The recent United States' action against a group of exporting countries was the subject matter of discussion in the Textiles Committee and it was referred to the TSB for examination in the light of Article 9 of the MFA as to whether the actions constitute additional trade measures which may have the effect of nullifying the objectives of the Arrangement (COM.TEX/38, Para. 41(iii)(c)).

The GATT rules in respect of subsidies stipulate that both developing and developed contracting parties may grant production subsidies on any products, subject to the obligation to notify such subsidies and to enter into consultations with other contracting parties suffering serious prejudice as a result of the subsidization. Developed countries members of GATT may not grant export subsidies on exports of manufactured products (which includes all products covered by the MFA), while developing countries maintain freedom to grant such subsidies.

The provisions of the General Agreement on subsidies have been elaborated in the Code on Subsidies and Countervailing Duties, concluded at the end of the Multilateral Trade Negotiations in 1979. The MFA does not contain any provisions relating to subsidies, and the termination of the MFA would thus not bring about any change in the present legal situation in respect of subsidies.

It is not possible to say how far the existence of the MFA has made a difference in the number of anti-dumping or countervailing measures initiated on textiles and clothing products. Nor is it possible to say whether, in the absence of the MFA, there would have been greater or lesser resort to the use of subsidies in these industries.

Article XI (General Elimination of Quantitative Restrictions)

Article XI prohibits the use of quantitative restrictions subject to the exceptions provided for in that Article and elsewhere in the General Agreement. The MFA permits a system of quantitative restraints in the area of textiles and clothing in a manner not provided for in the General Agreement. The particular manner in which its provisions affect the operation of existing exceptions to the prohibition of the use of quantitative restrictions in the GATT is dealt with below.

Articles XII and XVIII:B (BOP Restrictions)

The restrictions applied under these provisions are not affected by the MFA and can be maintained under its Article 2. The MFA provides for annual notification of these restrictions for the information of the TSB in the context of Article 11 of the MFA. It will be noticed that non-contracting parties, on accession to the MFA, are required to undertake that they will not introduce new restrictions or intensify existing ones, "insofar as such action would, if that government had been a contracting party to the GATT, be inconsistent with its obligations thereunder". (Article 13:2). Non-contracting parties are required to notify all such restrictions for annual review by the TSB.

It is not possible to say whether the absence of a requirement to report to the TSB restrictions on textiles and clothing justified under Article XII or XVIII:B would make a difference to the examination of these restrictions in the context of BOP consultations.

Articles XIX and XIII (Safeguard Action and Non-discriminatory Administration of Quantitative Restrictions)

The most important difference between the General Agreement and the MFA is in the area of safeguard actions taken against specific products.

If its conditions are met, Article XIX permits either the withdrawal of tariff concessions or a release from other obligations laid down in the General Agreement. In practice, the actions have usually taken the form of increases in tariffs bound under Article II or the imposition of quantitative restrictions prohibited by Article XI.

The main condition laid down in Article XIX for taking a safeguard action is the existence of serious injury to domestic producers, either caused or threatened by imports. The concept of "serious injury" has not been defined. In the absence of a precise definition, the determination of a situation of "serious injury" would depend in the first instance on the judgement of the importing contracting party. The first Article XIX action (the so-called Hatters' Fur case in 1951 between the United States and Czechoslovakia) set a precedent which would indicate that the country taking action under the Article XIX should be given the benefit of any doubt as to the existence of serious injury.

It has been generally understood that actions under Article XIX must be applied on a non-discriminatory basis. It has been argued, however, that in some cases Article XIX actions are in practice discriminatory because the product affected is very narrowly defined and/or because the action utilizes price brackets. Such practices would be contrary to Article I of the General Agreement if "like products" were not treated equally. The expression "like products" has, however, never been defined and problems in this area have been dealt with on a case-by-case basis.

Article XIX:2 prescribes the procedures for taking safeguard actions. It requires advance notice to be given to the GATT and an opportunity for consultations. However, the Article also provides that the importing country can take action in critical circumstances without going through prior consultations and this course has frequently been followed.

There is no specific time period mentioned in Article XIX, which permits the measure to be maintained "for such time as may be necessary to prevent or remedy such injury", nor does Article XIX require an annual report on the progress made in the elimination of such measures.

Article XIX gives the affected country a right to retaliate if consultation has not led to a satisfactory solution which could include the granting of compensatory concessions for the period during which safeguard action would remain in force.

Safeguard actions under the MFA (Articles 3 and 4) are based on the concept of "market disruption" (a concept which does not appear anywhere in the General Agreement). Such safeguard actions differ in three fundamental

ways from safeguard actions taken under Article XIX. First, it is not necessary for the injurious increase in imports to have already occurred - an increase that is imminent and measurable could justify additional restrictions. Second, imports of the product from particular sources can be singled out as the source of the problem, rather than imports of the product in general; as a result, the additional restrictions can be applied on a country-specific (that is, discriminatory) rather than MFN basis. Third, the existence and size of a price differential between particular imports and goods of comparable quality sold on the domestic market can be used in determining the need for additional restrictions.

These three fundamental differences are reflected in Article 3 and Annex A of the MFA.

Safeguard actions taken under Article 4 of the MFA are based not on market disruption, but on "real risks of market disruption". This term - that is, the "real risks" - is not defined in the MFA. A majority of the current MFA restrictions have been applied under Article 4.

In addition to the three fundamental changes introduced by the concept of market disruption, a number of concepts, whether provided for in the MFA or not, have been brought up in safeguard actions taken under the MFA. These include basket exit, minimum viable production, anti-surge, and cumulative disruption. As with the concept of market disruption, these various concepts do not appear in the General Agreement.

Another important difference between the provisions under Article XIX and that of the MFA is that the MFA does not give the affected exporting countries the right to retaliate if consultation has not led to a satisfactory solution.

Finally there are certain differences in procedures between the MFA and Article XIX. First, the provisions of the MFA regarding notification and consultation are more explicit. A request for consultations accompanied by full details has to be made by the importing party to the exporting party concerned, and at the same time the Chairman of the TSB has to be informed. Should a bilateral agreement result from the consultations, it has to be communicated to the TSB which has to determine its conformity with the MFA. If the consultations fail to reach an agreement, the importing country can fix a quota and report it to the TSB, which is required to conduct a prompt examination and make recommendations to the parties concerned. Second, in contrast to the absence of a time limit in Article XIX, MFA restrictions can be taken for an initial period of one year and renewed subject to agreement. These measures are reviewed annually by the TSB.

Article XIII prescribes procedures for the non-discriminatory application of any quantitative restrictions, including those that might be introduced under Article XIX.

Article XIII lays down that quantitative restrictions shall, wherever practicable, take the form of global quotas or quotas allocated among supplying countries. It permits the use of import licensing without quotas where such quotas are not practicable.

The Article provides that the aim shall be a distribution of trade approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of quantitative restrictions.

The allocation of country shares may be done by agreement with supplying countries having a substantial interest or, where this is not practicable, by the importing country on the basis of shares in a previous representative period. In addition to the problem of agreeing on the "previous representative period", this procedure may have the effect of "freezing" the historical shares and may not reflect changes in competitiveness and may thus hinder the emergence of new entrants.

There are also certain requirements in Article XIII in regard to the transparency of the procedures. It has been noticed that not all the countries have scrupulously adhered to these requirements in the past.

A return to the GATT should eliminate the possibility of taking safeguard measures on a selective basis and at the same time staying within the rules. Where the safeguard actions take the form of quantitative restrictions these should be administered in accordance with the provisions of Article XIII.

It must also be stated that Article XIX and related "grey" area actions have been under discussion since the Tokyo Round and efforts are continuing to find the comprehensive understanding called for at the 1982 Ministerial meeting. It is difficult to envisage at this stage the results of these discussions. Among the important issues under discussion are geographical coverage and phasing out and prohibition of grey area measures.

Articles XX and XXI (General Exceptions)

The general exceptions under Articles XX and XXI are available irrespective of whether the MFA is in existence or not.

Articles XXII and XXIII (Consultation, Dispute Settlement and Surveillance)

Both the procedures for dispute settlement under the MFA and the General Agreement contain a system of notification of actions taken. Both provide as a first step for, and require, bilateral consultations between the parties whose trade interests are affected. Both emphasize the need for conciliation in the proceedings. There are two main differences between these procedures.

The first is that under the MFA, the examination and resolution of the disputes is initially undertaken by the TSB within 30 days of its receipt of the notification. The MFA provides in Article 11 that where problems remain unresolved, they could be taken up in the Textiles Committee or in the GATT Council. Usually the disputes have been resolved at the level of the TSB. Under the General Agreement, if bilateral consultations have not led to agreement and Article XXIII:2 is invoked, the initial examination takes place in the GATT Council. Further consideration is usually carried out by a panel with a view to arriving at findings and recommendations which are submitted to the GATT Council for appropriate action.

The second main difference is that under the provisions of Article XXIII:2, in the absence of mutual agreement, where the circumstances are serious enough, the CONTRACTING PARTIES may authorize the withdrawal of concessions or suspension of obligations by the aggrieved party. There is no corresponding provision in the MFA.

Article XXIV (Customs Union and Free-Trade Areas)

The MFA has normally not been used to regulate trade among parties to arrangements presented to the GATT under Article XXIV, although this has been done in one case.

There is no agreement among contracting parties as to whether it is possible for a contracting party to exclude other members of a customs union or a free-trade area from safeguard actions under Article XIX. This however tends to be the general practice.

Part IV (Trade and Development)

The application of the provisions of the General Agreement to trade in textiles and clothing would also involve Part IV of the GATT and its principles and objectives along with the commitments, notably:

- (i) that the developed contracting parties do not expect reciprocity (as described in the explanatory note to paragraph 8 of Article XXXVI) for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties;
- (ii) the commitment to give high priority to the reduction and elimination of barriers to trade of export interest to developing countries and the commitment on standstill;
- (iii) that active consideration should be given to the adoption of measures designed to provide greater scope for the development of imports from developing countries.

There is a corresponding provision in the MFA in Article 6 which requires a more favourable treatment to be accorded to the developing countries. In practice, however, the restrictions have been largely applied on imports from the developing countries.

State-Trading Countries

The relations of three State-Trading countries, which are members of the GATT, with the other contracting parties are mainly governed by their Protocols of Accession to the General Agreement. While these Protocols contain a provision requiring the contracting parties to gradually abolish prohibitions or quantitative restrictions not consistent with Article XIII, a number of such restrictions continue to apply. After the MFA came into existence, many participants continued to regulate the textile trade with the state trading members of the GATT under the Protocols of Accession. The European Community started using the MFA provisions from the second phase. The United States has been regulating such trade under the MFA from the very beginning. In case of a return to the General Agreement, the safeguard provisions in the Protocols of Accession would still be available.

ANNEX

A brief description of the provisions of the MFA including its preamble is given below:

The Preamble recognizes the importance of production and trade in textiles; notes the unsatisfactory situation related to trade in textiles and the need for co-operation and constructive action within a multilateral framework, taking into account economic and social problems in this field in both importing and exporting countries; recognizes that the harmonious development of trade in textiles have full regard to the needs of developing countries. In carrying out these aims full regard should be given to the principles and objectives of the General Agreement.

Article 1 spells out the objectives of the MFA to be the expansion of trade, reduction of barriers and progressive liberalization of trade in textiles, while ensuring orderly and equitable development of such trade, and the avoidance of disruptive effects in both importing and exporting countries. Account should be taken of the minimum viable production in countries having small markets and exceptionally high level of imports. Actions taken in accordance with the provisions of the MFA shall not discourage automatic industrial adjustment processes, and should be accompanied by appropriate policies to encourage adjustment arising from changing patterns in trade and comparative advantage.

The provisions of the MFA shall not affect the contracting parties rights and obligations under the GATT. In this connection, it may be noted that in the 1977 and 1981 Protocols extending the MFA, (paragraphs 9 and 23 respectively), the parties agreed that "in order to ensure the proper functioning of the MFA, all participants would refrain from taking measures on textiles covered by the MFA outside the provisions therein before exhausting all the relief measures provided in the MFA".

Article 2 requires the parties to eliminate all restrictions in force, within a specified time limit, or to bring them into conformity with the provisions of the MFA, unless the restrictions are justified under GATT (including its Annexes and Protocols). After the expiry of this time-limit, only restrictions in conformity with the provisions of the MFA are authorized.

Article 3 prohibits the introduction of new restrictions on textile imports, except in conformity with the provisions stipulated. It authorizes new restrictions from particular sources only if imports are disrupting the market of the importing country. These restrictions can take the form of either bilateral agreements or unilateral actions. The determination of a situation of "market disruption" is defined in Annex A. The Article stipulates the consultation period between the parties concerned and reporting requirements to the Textiles Surveillance Body. If action is taken under this article the level of restriction is stipulated in Annex B.

Annex B also provides for annual growth if the restraint is extended beyond one year, as well as certain flexibilities related to the utilization of quotas in the form of swing, carryover and carry forward. Such actions are subject to review by the Textiles Surveillance Body.

Article 4 permits, within the multilateral framework, the conclusion of bilateral agreements on mutually acceptable terms in order to eliminate real risk of market disruption and to ensure the expansion and orderly development of trade in textiles. Bilateral agreements under this Article shall, on overall terms including growth and flexibility, be more liberal than measures provided for under Article 3.

Article 5 specifies that restrictions under Articles 3 and 4 shall be administered in a flexible and equitable manner, and over-categorization shall be avoided. The restrictions shall be set in quantitative units.

Article 6 provides for more favourable treatment of exporters which are developing countries, particularly if they are new entrants, small suppliers, or producers of cotton textiles. The article also refers to the special and differential treatment for products to be processed and subsequently re-imported.

Article 7 requires the exchange of information to ensure the effective operation of the MFA.

Article 8 is concerned with the avoidance of circumvention of the Arrangement by trans-shipment, re-routing, etc. It also states that non-participants shall not receive more favourable treatment than participants.

Article 9 requires parties to refrain from taking additional trade measures, which would nullify the objectives of the MFA.

Articles 10 and 11 lay down the terms of reference of the Textiles Committee, and the Textiles Surveillance Body, respectively. Article 11 also provides for the possibility of bringing certain persisting problems to the Textiles Committee, the GATT Council or the CONTRACTING PARTIES.

Article 12 defines "textiles" under the scope of the MFA.

Articles 13 to 17 are rules governing the operation of the MFA itself. They deal with acceptances, and accessions by governments which are not contracting parties to the GATT (Article 13), the entry into force of the Arrangement (Article 14), withdrawal from the Arrangement (Article 15), its duration (Article 16) and the annexes to the Arrangement (Article 17).