

# GENERAL AGREEMENT ON TARIFFS AND TRADE

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Committee on Trade and Development

COMPENSATION TO LESS-DEVELOPED CONTRACTING PARTIES FOR  
LOSS OF TRADING OPPORTUNITIES RESULTING FROM THE  
APPLICATION OF RESIDUAL RESTRICTIONS

Note by the Secretariat

1. At the Second Special Session it was agreed that the secretariat should carry out a study of the proposals made in the report of the Chairman of the Action Committee for effective implementation of the obligations in the General Agreement relating to the use of quota restrictions, in particular, through the granting of compensation to less-developed contracting parties for loss of trading opportunities resulting from the application of quota restrictions inconsistently with the GATT.
2. It may be noted that since 1963 there have been two possibilities open to less-developed countries for securing action in respect of residual restrictions. Firstly, the Action Committee had carried out a periodical review of restrictions affecting items covered by the Action Programme and conducted a series of consultations with countries maintaining these restrictions. These consultations have taken place in the context of proposals formulated, in connexion with the Action Programme for removal, within a period of two years, of quota restrictions maintained inconsistently with the GATT. Secondly, it has been open to contracting parties to deal with these restrictions through the procedures of Articles XXII and XXIII. In accordance with a Decision of the CONTRACTING PARTIES at their seventeenth session, these procedures may be applied to allow a contracting party affected by residual restrictions, to seek bilateral consultations. If these bilateral consultations do not produce satisfactory results, any of the parties concerned could seek consultations by the CONTRACTING PARTIES pursuant to paragraph 2 of Article XXII or alternatively resort to paragraph 2 of Article XXIII.
3. The new Part IV provides for consultations in any instance where a failure to give priority to the removal of barriers to the exports of less-developed countries is reported to the CONTRACTING PARTIES. Under its terms of reference, the Committee on Trade and Development is required to arrange for any consultations which may be necessary in this connexion. It would follow that the new Committee would also review residual restrictions applied to exports of less-developed countries. The consultations relating to such matters, could

cover any product of particular export interest to less-developed countries and would aim at solutions which permit both individual and joint action by contracting parties.

4. Prima facie it would appear that, where these consultations indicate that it is not possible for compelling reasons for a contracting party to abolish a quota restriction on a particular product, a solution which might give satisfaction to all concerned contracting parties, could be the accelerated reduction of tariffs or other charges on other items of interest to less-developed countries which offer larger scope for this type of action to the contracting party maintaining the restrictions. It could be agreed that adjustments of this character would be particularly appropriate where restrictions maintained inconsistently with the GATT are involved.

5. However, the obligations in respect of quota restrictions maintained inconsistently with the GATT exist independently of any provision in the new Part IV. The exceptions on the grounds of compelling reasons do not apply to these restrictions in the way in which they apply to instances of failure to provide priority to the removal of trade barriers to exports of less-developed countries in terms of the new Part IV. It is thus not relevant for the establishment of a case of nullification of benefits that the restrictions are maintained for what are considered compelling reasons.

6. The new Part IV recognizes that the procedures for consultations would not affect the existing rights and obligations of contracting parties under the General Agreement. It would, therefore, be open to a less-developed contracting party initially, or after consultation in the Committee on Trade and Development, to invoke the procedures of Articles XXII and XXIII in respect of residual restrictions affecting its exports. Where recourse is had to the machinery of Article XXIII, following some consultations under the new Part IV, it would appear unreasonable to make recourse to paragraph 2 of Article XXIII condition upon prior consultations under Article XXII or paragraph 1 of Article XXIII. In other words, there would be good grounds for considering the requirement of prior consultation before the invocation of paragraph 2 of Article XXIII as having been satisfied when a less-developed country has, in the first instance, raised the matter for consultation in the Committee on Trade and Development.

7. The question arises whether it would be feasible for a panel or other appropriate body to make a recommendation to the contracting party responsible for the nullification of benefits to provide equivalent benefits through other concessions. It may be noted in this connexion that paragraph 1 of Article XXIII allows a contracting party whose benefits under the Agreement are being nullified or impaired, to make representations or proposals to the other contracting party concerned with a view to the satisfactory adjustment of the matter. There seems to be nothing to preclude a contracting party from proposing the adoption of compensatory measures by the other contracting party

concerned which would help offset the loss of trading opportunities in respect of items on which quota restrictions are being maintained inconsistently with the GATT.

8. In the normal course, action by a panel or other body set up by the CONTRACTING PARTIES to examine complaints under paragraph 2 of Article XXIII has consisted in a finding of nullification of benefits whether through non-compliance with the provisions of the Agreement or otherwise. This has been followed by a recommendation to the contracting parties concerned for termination of the measure responsible for this situation. In the final stage, the CONTRACTING PARTIES have authorized the contracting party whose benefits under the Agreement are being impaired to withdraw equivalent concessions.

9. Under paragraph 2 of Article XXIII "the CONTRACTING PARTIES shall promptly investigate any matter referred to them and make appropriate recommendations to the contracting parties which they consider to be concerned or give a ruling on the matter as may be appropriate". Where a proposal for compensation has been made, it would appear that it is open to the CONTRACTING PARTIES to make an assessment of the loss sustained by a less-developed country from the application of residual restrictions to its trade and to make a recommendation that pending elimination of these restrictions the country applying such restrictions should consider the establishment of other appropriate concessions which would serve to compensate this loss.

10. There are, however, two points which need to be noted in this connexion. Firstly, any such recommendation under the provisions of the present Article XXIII can be implemented only to the extent that it proves acceptable to the contracting party to whom it is addressed. If such contracting party is not in a position to accept the recommendation, the final sanction must remain the authority for withdrawing equivalent obligations as provided in paragraph 2 of Article XXIII. Secondly, the nature of the compensatory concessions and the items on which these are offered would have to be determined by the contracting party to whom the recommendation is directed and would have to be a matter of agreement between the parties concerned. It would not be possible for a panel or other body set up by the CONTRACTING PARTIES to adjudicate on the specific compensations that should be offered. It may be recalled that under the new Part IV, it is for each country to determine finally what concessions it can or cannot offer. Under Article XIX of the GATT, if any obligations concerning bindings on tariff items are affected by emergency action, consultations may take place for securing agreement on alternative concessions. Similarly, modifications of schedules under Article XXVIII may be carried out through negotiated agreements on alternative concessions. In some countries national legislation requires that new concessions may be offered only after fresh negotiations, including negotiations under Article XXVIII. In the circumstances, all that a panel or the CONTRACTING PARTIES could do under paragraph 2 of Article XXIII would be to recommend that an endeavour be made through negotiations to compensate the loss which a contracting party is suffering

from the application of residual restrictions to its exports by compensatory concessions on other products which may be established in negotiation between such party and the contracting party applying the restrictions.

11. The Indian delegation has raised the question of compensation, primarily in relation to residual restrictions affecting bound items. While there may be a more precise basis for a finding of compensation where restrictions affect the value of existing bindings, the General Agreement does not make any distinction between quota restrictions affecting tariff bindings and those applying to other items. If consultations and recommendations on the establishment of compensatory concessions are considered appropriate in respect of restrictions on bound items, there appears to be no compelling reasons why these possibilities should not be available where restrictions are maintained on non-bound items.

12. If the analysis made in earlier paragraphs for the provisions of Article XXIII is correct, it may follow that the procedure for compensation in respect of residual restrictions should be available to all contracting parties and not only to less-developed contracting parties. At the same time, it must be recognized that less-developed countries have been conscious of certain special problems in benefiting from the existing procedures of Article XXIII. These problems relate largely to what has been described in various submissions to contracting parties, as the inequality of bargaining position between less-developed and developed countries and the consequent difficulty in making effective use of the authority for retaliatory action contained in paragraph 2 of Article XXIII. This situation would appear to justify placing greater emphasis on compensation in proceedings under Article XXIII which affect the export trade of the less-developed countries.

13. Contracting parties might wish to take note of two considerations relating to the scope for adjustments of the trading difficulties of less-developed countries through exploration of the possibilities of compensation. The first of these is that, if through the present trade negotiations or otherwise, effective action is taken to reduce tariff or non-tariff barriers to the exports of less-developed countries in terms of the commitments expressed in the new Article XXXVII, the possibilities of affording compensatory concessions would be increasingly limited since such tariff or non-tariff barriers as can be reduced or eliminated without creating major problems would have already been subjected to appropriate action. This, however, may be more a problem for the future than for the present. Secondly, while the adjustment of problems relating to residual restrictions through this type of action may, over the short term, be to the advantage of both the country applying these restrictions and the country affected by them, the CONTRACTING PARTIES might wish to see that this does not lead to the indefinite maintenance of existing restrictions. Even if the idea of compensatory adjustments is acceptable, the Committee on Trade and Development may therefore need to keep existing residual restrictions under review so that the breach of the GATT obligations can be terminated as soon as effective action can be taken to eliminate the cause for the maintenance of the restrictions.

14. In preparing this note the secretariat has endeavoured to examine how the existing provisions of the General Agreement, including the new Part IV, can be operated to help minimize loss of trading opportunities to less-developed countries from the application of residual restrictions. The note does not deal directly with proposals for the amendment of Article XXIII which have been submitted by some less-developed contracting parties.