

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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RECORD OF DISCUSSIONS OF THE
MEETING OF THE AD HOC GROUP ON LEGAL AMENDMENTS
TO THE GENERAL AGREEMENT HELD 27-29 APRIL 1965

1. At the twenty-second session, the CONTRACTING PARTIES endorsed the decision of the Committee on Trade and Development to establish an Ad Hoc Group on Legal Amendments to the General Agreement with the following terms of reference:

- basing themselves on proposals submitted by contracting parties, and taking account of discussion in the Committee on the Legal and Institutional Framework of the GATT, the Council of Representatives and the CONTRACTING PARTIES, as well as the Committee on Trade and Development;
- to examine what amendments to Articles XVIII and XXIII of the General Agreement, including - in respect of the proposal for use of surcharges to meet balance-of-payments difficulties - consequential amendments in other Articles of the Agreement, are necessary, or desirable, to meet the special trade and development needs of less-developed contracting parties, taking into account the secretariat note in document COM.TD/5; and
- to report its findings, together with any recommendations for the amendment of these Articles, as appropriate, to the Committee not later than October 1965.

2. The first meeting of the Group took place on 27-29 April 1965. The Group had before it a secretariat paper, document COM.TD/F/W.1 which contained a proposal for the amendment of Article XVIII submitted originally by the Australian delegation to the Committee on Legal and Institutional Framework; a proposal which had been annexed to the report of the Committee on Legal and Institutional Framework for incorporating a provision in Article XVIII on the use of import surcharges by less-developed countries to safeguard their balance of payments; a proposal by Brazil and Uruguay for amending Article XXIII; and a summary of points raised in a secretariat note COM.TD/5 regarding compensation to less-developed countries for loss of trading opportunities resulting from the application of residual restrictions.

I. The use of surcharges to safeguard the balance of payments of less-developed countries

(a) Need for a definition and/or qualification of the term "surcharge"

3. Some members of the Group felt that it was desirable to have an agreed definition of what was meant by a surcharge. A suggestion was made that any definition should contain two characteristics. First, the surcharge should be uniformly applied over wide categories of products; secondly, the incidence of the surcharge on each category of products should be determined by the less-developed country in such a way as to give priority to essential imports. The Group could not agree on the need for a definition. It was noted that in the discussions on cases where waivers had been granted for the use of surcharges, no attempt had been made to define a surcharge. It was pointed out that in the context of waivers from the provisions of paragraph 1 of Article II in which these surcharges have in the past been dealt with by the CONTRACTING PARTIES, they would fall into the category of "all other duties or charges of any kind imposed on or in connexion with or in excess of" those authorized by Article II.

4. The Group considered whether less-developed contracting parties should be allowed to apply surcharges on specific products or whether they should be applied only on an "across-the-board" basis. It was suggested that less-developed countries should have the same degree of flexibility in the use of surcharges as they have in the use of quantitative restrictions for balance-of-payments reasons. Thus, it was suggested that while surcharges should be used as an instrument for controlling the general level of imports, it would be open to a less-developed contracting party to determine their incidence on different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development as provided by paragraph 10 of Article XVIII in the case of import restrictions. There was some discussion on whether the word "temporary" should precede the word "surcharges" in the text of a provision on the use of surcharges. Those members who were not in favour of retaining the word "temporary" felt, in particular, that as such a provision would, no doubt, be subjected to the same criteria as those required under Article XVIII for quantitative import restrictions on balance of payments, the use of the word "temporary" would be unnecessary. Moreover, the inclusion of the word "temporary" would erroneously suggest that the criteria applied were not the same in the two cases. Certain members of the Group felt that, presentationally, there was merit in retaining the word "temporary" because while it was obviously unnecessary to include the word "temporary" in relation to quantitative restrictions which are in principle forbidden by the General Agreement, it was less so in the case of surcharges.

(b) Simultaneous imposition of quantitative restrictions and surcharges

5. The Group noted from the records of past discussions of the Committee on Legal and Institutional Framework that the Committee had given no clear finding as to whether the use of surcharges should be authorized only as an alternative to the application of quantitative restrictions to imports, or whether there should be provision for the application of both types of measures to the same items. Some members felt that less-developed countries should be allowed to use both measures simultaneously. They pointed out that there could be situations where a country might be applying import restrictions for balance-of-payments reasons and would find it helpful to impose surcharges not only to obtain additional revenue from importers who might be taking advantage of the scarcity value of the products covered by quotas, but as a measure to assist in regulating the balance of payments over the long term. Some members further suggested that in a situation of general shortage, there could be some commodities the demand for which remained unaffected by an increase in duties. Indeed, the demand for such items and the price they can fetch on the domestic market might tend to increase with the imposition of restrictions on other products. The imposition of quantitative restrictions in addition to surcharges may be the only practical means of dealing with this situation. One member felt that in situations where import restrictions were already being applied and where there was need for increased restrictions, there might be certain essential areas where the authorities would not be able to judge the needs of the market and might more advisably apply surcharges. The use of import surcharges in addition to quantitative restrictions, in such instances, might be preferable to the further tightening up of these restrictions. Some members pointed out that the important consideration was that the effect of the measures taken to control imports should not exceed the limits prescribed in paragraph 9 of Article XVIII and the fact that the import surcharges were used singly or in addition to quantitative restrictions on the same item was of no significance.

6. Other members of the Group noted that the simultaneous application of quantitative restrictions and import surcharges to products could cause serious difficulties to traders. Some members felt that the main reason for the tendency towards the use of surcharges in recent years, was the realization that surcharges avoided the various inconveniences and shortcomings of quantitative restrictions. This advantage of surcharges over quantitative restrictions would be nullified if both measures were applied simultaneously to the same categories of imports. It was also argued that where surcharges and quantitative import restrictions were used simultaneously, there may be difficulties in assessing the total balance-of-payments effects of these measures. In the ordinary course a less-developed country would use surcharges in addition to import restrictions only because it also served a revenue purpose or operated as an anti-inflationary measure. It was not, however, clear that the Group was concerned with providing for any use of surcharges which was not directly intended to protect the level of reserves. (See Article XVIII:9.) Some members pointed out that if quantitative restrictions and surcharges were both applied to the same items for balance-of-payments reasons and it was observed that the quotas were not used fully, it followed that the surcharges were the really effective measure. There was therefore no need to apply quantitative restrictions with all their administrative disadvantages.

7. Some other members thought that the stabilizing effect of a surcharge on the economy would reflect itself in an improvement of the balance-of-payments situation. If therefore a surcharge in addition to its direct impact on imports also had this stabilizing effect, this should be considered a point in favour of its being authorized. Some members pointed out that the stabilizing effect could be achieved by other internal measures which would not be confined to imports.

(c) Imposition of surcharges on unbound items

8. Some members felt that if surcharges were authorized as an alternative to or as an addition to quantitative import restrictions for balance-of-payments reasons, the surcharges imposed on unbound items should also be submitted to the same procedure for consultation as surcharges imposed on bound items. Less-developed countries were required under Article XVIII:12 to consult on quantitative restrictions applied to unbound items; in the same way, surcharges applied by them to such items as an alternative to or in addition to quantitative restrictions should also be subject to consultations. It was pointed out that if this were not done it would be difficult to arrive at any assessment of the balance-of-payments effects of the surcharges. The situation would be particularly confusing where surcharges were used in conjunction with import restrictions. Other members pointed out that there was nothing in the General Agreement preventing any contracting party, whether a less-developed country or not, from increasing an unbound rate of duty. The obligation to consult arose only when an increase in bound rates affecting the provisions of paragraph 1 of Article II was involved, and if consultations were to be required for surcharges imposed on unbound items this would create a new obligation for less-developed countries which would not exist for developed countries. It was further suggested by these members that when surcharges were imposed for balance-of-payments reasons on both bound and unbound items, while the consultations under paragraphs 11 and 12 of Article XVIII could relate to such matters as the nature of the country's balance-of-payments difficulties, policies for restoring equilibrium, alternative corrective measures in their entirety, any specific discussion of individual surcharges and recommendations in regard to any modifications, etc., in the restrictions in terms of paragraph 12(c) of Article XVIII, could relate only to surcharges imposed in respect of bound rates. Some delegations pointed out separately, that if consultations were confined to bound items there would be an anomaly in less-developed countries who have given bindings in their tariff schedules in GATT negotiations being required to consult when they imposed surcharges on balance-of-payments grounds, whereas no such obligation arose in respect of countries which did not have bound schedules.

(d) Application of Articles XIII and XIV

9. The Group also discussed how the question of consistency with the provisions of Article XIII (subject to the provisions of Article XIV), referred to in paragraph 12(c) of Article XVIII could be dealt with in any provision on the use of surcharges for balance-of-payments purposes. Some members felt that it would be efficient to provide that the application of import surcharges should be

subject to the conditions and procedures provided in the General Agreement in respect of import restrictions, and that any resulting anomalies could be dealt with on an ad hoc basis. Others considered that the conditions and procedures applicable to import restrictions were not well suited to govern the application of surcharges. They suggested that the difficulty could be avoided by a decision to authorize non-discriminatory surcharges only (leaving less-developed countries free to discriminate, where discrimination would be justified, by quantitative restrictions consistent with present provisions of the General Agreement).

10. The Group concluded that the discussions had brought out certain points which had not been apparent earlier. Some members suggested that it might become apparent that it might be preferable to deal with the problem involved on an ad hoc basis in individual cases rather than by means of a legal amendment; but that in the meantime a further exchange of views was necessary. On the assumption that the General Agreement should be amended to enable less-developed countries to impose surcharges for balance-of-payments reasons, the Group felt that further thought should be given in particular to the following points:

- (i) whether import surcharges should be permitted only as an alternative to quantitative import restrictions, or whether both types of measures could be applied to the same items at the same time;
- (ii) whether the consultations provided for in paragraph 12 of Article XVIII as applied to the use of surcharges, should be related to the totality of measures taken by the country concerned to improve its balance-of-payments, without distinction between surcharges on bound and on unbound items;
- (iii) whether the recommendations referred to in paragraph 12(c)(ii) of Article XVIII would be limited as far as import surcharges were concerned, to those relating to bound items;
- (iv) whether and, if so, how far the provisions of Articles XIII and XIV of the GATT could and should be applied to surcharges imposed by less-developed countries under Article XVIII.

II. Amendment of Article XXIII

11. The representative of Brazil in opening the discussion said that the Brazilian/Uruguayan proposal (COM.TD/F/W.1, pages 14-19) was not intended to tamper with the GATT tradition of solving differences by conciliation. The intention behind the proposal was merely to streamline the procedures provided for in the Article. This would enable action under the Article to proceed with greater speed than at present, and countries would always be clear as to where things stood at any stage in the proceedings. Provision was also made for recognizing the unequal bargaining position of less-developed countries vis-à-vis developed countries in consultations under Article XXIII. The consultations

provided for under Article XXXVII of the new Part IV were not a substitute for consultations under Article XXIII; the latter were individual consultations dealing with cases of nullification and impairment, while the former were collective consultations regarding the implementation of new commitments. While it was noted that the present exercise was limited only to those aspects of the question which related to the trade of less-developed countries, the Brazilian delegation felt that the amendments proposed were also applicable to action among developed countries, and considered that the latter would also find the improvement useful.

General comments

12. Some members expressed their support for the Brazilian/Uruguayan proposals. Certain members said that their governments were unable to accept the proposals. Others, while sympathizing with the general intention behind the proposals, did not feel that some of the ideas were practicable. One of the general arguments against the proposals was that the consultation procedures provided for in Article XXXVII of the new Part IV, would enable the CONTRACTING PARTIES to grapple with many problems before the economic development of less-developed countries was harmed. It was felt further, that this element had not been present when Brazil and Uruguay had first tabled their proposals. In addition, the new Part IV was intended to redress any imbalance between less-developed and developed countries. It was also felt that the provisions of Article XXIII were sufficiently effective to maintain balance and equity in the GATT between the rights and obligations of all contracting parties. Against this view, it was argued that Part IV had been drawn up in recognition of the inequality of less-developed countries vis-à-vis developed countries, and it followed therefore that the extent to which Article XXIII was not suited to less-developed countries the Article should be examined with a view to its improvement. A member of the Group pointed out that at least part of the Brazilian/Uruguayan proposal could be implemented without Article XXIII having to be amended. Consideration could, therefore, be given to the establishment of a time-limit for the CONTRACTING PARTIES to make recommendations or give a ruling under Article XXIII:2. Further, the CONTRACTING PARTIES could establish a roster of arbitrators from which panels of arbitration could be established whenever the case arose. The Director-General could be instructed to make the necessary arrangements whenever a case had been referred to the CONTRACTING PARTIES and, in his opinion, required investigation by a panel. Any decision by the CONTRACTING PARTIES to institute such automatic procedures could also include the question of the adoption of compensatory measures and the assessment of loss, which were referred to by the secretariat in document COM.TD/5.

13. Comments were made on specific points of the Brazilian/Uruguayan proposal (COM.TD/F/W.1):

(a) Paragraph 1

One member enquired whether the sponsors of the proposal had worked out some criteria which could be used to recognize whether a country was less-developed or had considered which body would make the determination. The Brazilian representative replied that the proposal had been put forward before Part IV was drafted. He assumed that the same criteria and the same body which would determine a less-developed country for the purpose of Part IV would also apply in the case of Article XXIII.

One member of the Group felt that the definition of a less-developed country was an important requirement for taking action under Article XXIII and many other Articles of the GATT. He suggested that the Group might wish to recommend that the Committee on Trade and Development discuss this matter. Specifically, the Committee might find it useful in defining a less-developed country for the purpose of implementing Article XVIII and other provisions of the General Agreement, to take into consideration any definition or classification worked out formally or informally by other international fora. Some members were not convinced that it was necessary to have any fresh definition of a less-developed country to administer the GATT.

Attention was drawn to the fact that although the terms of reference of the Group were such that discussion of this matter was not ruled out, if it had been the intention of the Committee that the Group should take up such a matter, the Committee no doubt would have made a specific mention of this problem in the terms of reference to the Group. The Committee on Trade and Development would therefore be the proper place to initiate discussions on this question.

- (b) Some members of the Group who were against the proposal for the setting up of a permanent organ of arbitration were of the view that since the composition of such a body must in each instance be appropriate to the interests of the parties concerned, a standing panel would be extremely difficult to establish. Hitherto, the CONTRACTING PARTIES had had no difficulty in establishing an appropriate body on an ad hoc basis. Another view was that if a body were established with authority to take decisions which were normally the function of the CONTRACTING PARTIES, such an innovation would be a very fundamental change in the GATT. Some members could not agree that this change would be desirable.

14. Paragraph 2(a)

One representative commented that while a purely statistical assessment of the value of affected trade might be inadequate to show the degree of damage suffered by a developing country, there was no reason for supposing that a panel set up in the normal way would not take account of other relevant considerations. If, however, less-developed countries were strongly in favour of a provision to ensure that all relevant considerations were examined, an interpretative note to Article XXIII could satisfy this desire.

15. Paragraph 2(c)

One representative felt that the idea involved in this sub-paragraph was not a normal GATT concept and required further clarification.

16. Paragraph 3

Some representatives were not clear how the organ of arbitration could work out a suitable financial compensation. It was pointed out by one member of the Group that if it were intended that countries should make an actual cash settlement for loss of trading opportunities, it should be borne in mind that it would be impossible to evaluate the loss objectively in cash terms and that although a country's capacity to make cash settlement might be large, any requirement on it to make such compensation had implications which went beyond the fact that an impartial body had made a finding. Another member pointed out that even if some way were found of working out suitable financial compensation there would be the problem of enforcement.

17. Paragraphs 4 and 5

Some members of the Group who were opposed to the automatic retaliatory action provided for in these paragraphs, felt that such a procedure would not work to the best interests of the GATT as a whole and could lead to a chaotic situation. In the view of some representatives the use made of Article XXXV had shown what could happen if there were an easy way by which countries could be released from their GATT obligations. To make resort to retaliation, automatic in the case of less-developed countries would also be against the best interests of these countries because this could provide a convenient release to developed countries from their commitments.

18. Certain representatives doubted the extent to which the proposals for speeding up action under Article XXIII had added anything new to the existing provisions. Past experience had shown that there had been no delay by the CONTRACTING PARTIES in setting up machinery to deal with requests submitted to them. Any further speeding up might not be possible since some time was required for preparing documentation, for the contracting party concerned to review the measures complained of and reconsider the policies involved, and for the CONTRACTING PARTIES to take stock of the situation and come to a decision. They felt that if a reasonable time were not allowed for the CONTRACTING PARTIES to reflect on a situation, the GATT could quickly fall into disrepute as an organization which was unable to settle differences between its members. One representative felt that the secretariat proposal in document COM.TD/5 could be fitted into the context of the proposals for speeding up action under Article XXIII. Another representative, while noting that Article XXIII already provided for prompt action, felt that the establishment of a time-limit provided for in paragraph 4 was not unreasonable. Replying to a statement that the Uruguayan recourse to Article XXIII had shown how slowly the procedures of that Article worked, one representative pointed out that the Uruguayan recourse had been protracted only because the recourse had involved many countries.

19. Paragraph 6

Those members who were opposed to the Brazilian/Uruguayan proposal, felt that a provision for collective action would undermine the existing climate in GATT, in which problems have generally been resolved on a conciliatory basis through resort to procedures for bilateral and multilateral consultations. They felt that such a proposal went far beyond the intentions and philosophy of Article XXIII. One member enquired whether a boycott was envisaged; he doubted whether the concept of collective action could be implemented.

Comments by the representatives of Brazil and Uruguay on the remarks made

20. Referring to the statement that the consultations provided for in Article XXXVII were sufficient to protect the interests of less-developed countries, the representative of Brazil recalled that in his opening statements he had stressed that the collective consultations under that Article related to the new commitments incorporated in Part IV. Article XXIII on the other hand was concerned with all cases of nullification or impairment of benefits under the General Agreement. The consultations under Article XXIII were individual and had a wider and more serious orientation. These two types of consultations were neither mutually exclusive nor were they alternatives to each other. While Article XXXVII might in many cases enable a contracting party to avoid recourse to Article XXIII, there might be situations where recourse was unavoidable. Some representatives had stated that the Brazilian proposals would harm the climate existing in the GATT. He wondered whether nullification of benefits and non-compliance with the recommendations of the CONTRACTING PARTIES were not also harmful to the GATT climate.

21. Some members had stated that action involving recourse to Article XXIII had always been prompt; he was, however, not convinced that this had been the case with the Uruguayan recourse. In any case, it would be useful for less-developed countries to be assured that action initiated by them under Article XXIII would not be delayed in the future. Article XXIII as it was now drafted gave no legal assurance to a country as to how its case would be handled. He suspected that this had been the reason why the Article had been little used by less-developed countries.

22. With regard to the comments made regarding a permanent organ of arbitration, he was unable to see the difficulties encountered by those members who were opposed to it. The traditional panel would merely be called a permanent organ of arbitration in order to stress the importance of its findings and suggestions. The actual recommendations which might be drawn up after the organ of arbitration had completed its work would be made by the CONTRACTING PARTIES. It had been argued that panels set up by the CONTRACTING PARTIES had always taken into account all the relevant facts, but it should be borne in mind that panels may or may not take account of all the relevant facts. It was therefore necessary to ensure that this was done. On the question of the assessment of damage and compensation, it was pertinent to note that if a less-developed country were authorized to reduce a percentage of its imports from a developed country which was established as causing damage to its economy, this would not compensate for the damage actually suffered. Article XXIII as it was now drafted, was based nevertheless on the assumption that damage caused and the defensive measures that could be taken were comparable.

23. He noted that some members had opposed the idea of financial compensation but had given no clear reasons why this concept was not acceptable. Article XXIII as it now stood had not ruled out financial compensation. In this connexion the points raised in the secretariat paper COM.TD/5 should be given careful consideration.

24. The view had been expressed that the right to take automatic retaliatory action would not be to the best interest of the GATT as a whole. It could be argued on the other hand that non-implementation of obligations was also not in the best interests of the GATT. Many countries were suffering damage from measures applied inconsistently with the General Agreement and the countries affected were obliged to honour their own obligations without any protection from this damage. Consultations on such a situation could drag on for long periods, while in the meantime, the country concerned continued to suffer damage. This was in effect a system whereby GATT obligations could be violated unilaterally because the countries affected lacked sufficient bargaining power to protect their legitimate interests. At the same time the offending parties were allowed to take part in decisions on whether the affected country should be allowed to use special measures for solving balance-of-payments difficulties caused by the very action of the former. If the proposals to redress this unequal situation were unacceptable, it would be interesting to know what less-developed countries were to do when their rights were nullified by the illegal actions of others.

25. He noted also that several members were opposed to the concept of collective action and had enquired what type of collective action was envisaged. The Brazilian delegation considered that many types of action were possible. It would be up to the CONTRACTING PARTIES to decide on what they considered appropriate in any given case. For example, the CONTRACTING PARTIES might grant a special kind of waiver to the country affected to impose appropriate general measures, at the same time excluding the countries causing damage from taking part in decisions in cases in which they were directly involved.

26. In conclusion the Brazilian delegation felt that those members who had opposed the proposals for amending Article XXIII had not suggested satisfactory alternatives. If they felt that the aims of the proposed amendments to Article XXIII could be attained without amending the General Agreement, then it was up to them to put forward alternative suggestions. Part IV could not deal with the problems faced by less-developed countries in the context of Article XXIII, because the provisions of that Part were even weaker than the provisions of Article XXIII. The Brazilian delegation supported the secretariat proposal that the consultations under Article XXXVII could be regarded as a substitute for those provided for in paragraph 1 of Article XXIII. The suggestion that an interpretative note might be drafted to cover the suggestion in paragraph 2(a) of the Brazilian/Uruguayan proposal was also interesting.

27. Supporting the remarks made by the Brazilian representative, the representative of Uruguay emphasized that the only justification for a legal rule lay in the possibility of applying it in practice. Now, the less-developed countries could not in practice apply Article XXIII because it would be absurd for a less-developed country to resort to retaliation against a country on which it depended for the capital goods needed for its own economic development.

III. General amendments to Article XVIII

28. The Group noted that the proposal by the Australian delegation in document COM.TD/F/W.1 for streamlining and simplifying the text of Article XVIII had been introduced when it appeared that other amendments might be made to Article XVIII. Subsequently, many of the ideas then under consideration had been incorporated in Part IV of the General Agreement. Some members felt that such a streamlining might be useful and indicated that they would wish to discuss certain aspects of the proposal at a later meeting. This was agreed.

IV. Compensation to less-developed contracting parties for loss of trading opportunities resulting from the application of residual restrictions

29. The general view of the Group was that the points raised in the secretariat paper COM.TD/5 were worthy of further consideration.

30. One member of the Group suggested that thought be given to the problem of how loss of trading opportunities by less-developed countries arising from the maintenance of residual restrictions by developed countries could be assessed, and the type of compensation which might be offered. He suggested that the Group examine not only residual restrictions, but all other restrictions affecting the trading opportunities of less-developed countries. He felt that if an independent body were established to suggest different ways and means for dealing with this question, progress would be expedited. He also suggested that in considering how loss and compensation should be assessed, the Group might consider whether there were pragmatic criteria which might supplement any statistical criteria that might be arrived at. Another member said that he had no objection to the multilateral consultations provided for in Article XXXVII being regarded as a substitute for consultations under Article XXIII:1. He would not, however, wish that this substitution be automatically applied, since there were cases where the subject matter of the consultations would make it more proper for the consultations to be limited, at least at one stage, to those contracting parties which had a major interest in the trade involved. The same representative also noted that the secretariat paper referred only to the possibility of compensatory concessions in the field of trade to offset loss of trading opportunities caused by the maintenance of residual restrictions.