

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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THE RELATIONSHIP OF ARTICLE XXIII TO DRAFT ARTICLE XVIII, SECTION C

Statement by the United States Delegation

Section C of draft Article XVIII (W.9/17) provides that an under-developed country proposing a restrictive measure of the type contemplated in Section C shall notify the Organization of the proposed measure. The Section provides that the measure may be imposed if the Organization gives its tacit or explicit consent within a specified period. The Section provides, nevertheless, that the measure may be imposed even if such consent is not given, but it provides in that case that compensatory action may be taken against the country imposing the measure.

In discussing these provisions in Sub-Group I-A, the opinion was expressed that even where the Organization had concurred in a measure an affected contracting party could have recourse to Article XXIII in order to take appropriate action to restore the balance of the Agreement. In support of this position, it was argued that Article XXIII provides for a restoration of balance in the Agreement which has been upset by any action, whether or not in violation of the Agreement, and that therefore, an adjustment could be made under Article XXIII, paragraph 2, following the imposition of a measure in which the Organization had concurred in accordance with a provision of the Agreement.

The issue presented has two facets: one of substance or policy and one of legality.

With regard to the substantive or policy aspect of the issue, the United States delegation believes that concurrence by the Organization should free a country imposing a measure under Section C from any retaliation directed at the normal effects of such measures. The United States delegation also believes that this assurance can generally be given under the terms of draft Article XVIII and that in such event Article XXIII could not be used to deprive a contracting party obtaining concurrence of the general assurance against retaliation.

Article XXIII provides for adjustments in a number of circumstances.¹ With respect to the legal aspect of the question presented by draft Article XVIII, Section C, only one situation covered by Article XXIII is pertinent to the discussion, namely, the nullification or impairment of a benefit accruing to a contracting party by any measure, whether or not it conflicts with the provisions of the Agreement. Accordingly, the discussion of the legal aspect will relate only to a situation of this character.

Where some measure has been imposed by one contracting party, such as might occur under Article XVIII-C, paragraph 2 of Article XXIII cannot be resorted to by another contracting party solely on grounds that the balance of the Agreement has been disturbed by some action which may or may not involve a violation of the Agreement. The prerequisite for recourse to the Article XXIII, paragraph 2, in such a case is something else; it is the failure of a contracting party to derive some benefit which it could reasonably have expected to accrue to it under the Agreement. The formal records of the CONTRACTING PARTIES support this interpretation.

This interpretation was agreed to by the CONTRACTING PARTIES in connection with their consideration of a complaint brought by Chile against Australia. Chile alleged that it was unjustifiably deprived of certain benefits when Australia withdrew a subsidy benefiting Chilean fertilizer, on which Australia had granted a tariff concession, but continued to apply the subsidy with respect to a competing fertilizer. The CONTRACTING PARTIES first agreed that the action taken by Australia did not violate the Agreement. They then considered the issue of nullification and impairment. As stated in the report of the Working Party which examined the case, "It was agreed that such impairment of a benefit accruing to Chile directly or indirectly under the General Agreement would exist if the action of the Australian Government which resulted in upsetting the competitive relationship between sodium nitrate and ammonium sulphate could not reasonably have been anticipated by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding of sodium nitrate."² (Emphasis supplied)

¹ The circumstances are set out in paragraph 1 of the Article in the following manner: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation ..."

² Basic Instruments and Selected Documents, Volume II, p. 193.

The key to the interpretation of Article XXIII as it may apply to adjustments by one contracting party following measures imposed by another contracting party lies in the question of whether a benefit which a contracting party could reasonably expect to accrue to it has not in fact accrued to it. In considering what might be reasonably expected, consideration must be given to all relevant circumstances and the provisions of the Agreement. With regard to measures imposed under Section C of draft Article XVIII, the procedures specifically provided in the Article for the imposition of restrictive measures under certain conditions would have to be taken into account in considering what Agreement benefits might reasonably have been expected.

This interpretation of Article XXIII does not preclude all possibility of adjustments under paragraph 2 of the Article in connection with measures imposed under Section C of Article XVIII upon the concurrence provided in that Section. Adjustments could still be authorized under Article XXIII, paragraph 2, but only if action taken under Section C could not reasonably have been expected when concurrence was given, taking into consideration all pertinent circumstances and the terms of the concurrence.

In summary, the delegation of the United States believes as follows. First, Article XVIII, Section C, should permit an under-developed country, once it gets the explicit or tacit consent of the Organization, to impose a measure of the type contemplated in Section C without fear of retaliation for any effects which might reasonably be expected to ensue. Second, a contracting party adversely affected by an action taken under Section C upon the explicit or tacit consent of the Organization should be permitted to make such an adjustment under Article XXIII, paragraph 2, only if, in the light of the procedures stipulated in Section C and of other relevant circumstances, some benefit which could reasonably have been expected to accrue to it did not accrue. Third, the Article as presently drafted (W.9/17) could properly be applied only in conformity with the above two points. Fourth, in order to remove any doubt, this issue should be discussed in the Working Party Report, or some other device, such as interpretative note, should be used to ensure that a contracting party having recourse to Article XVIII, Section C, as it appears in the secretariat draft, gets the general assurance herein recommended.