

20 January 1971

JAMAICA - MARGINS OF PREFERENCE

*Report of the Panel adopted on 2 February 1971
(L/3485 - 18S/183)*

1. The Panel was established by the Council in connection with a request made by the Government of the United States that the CONTRACTING PARTIES consider the question of an increase in certain margins of preference by Jamaica. The terms of reference of the Panel were: "To investigate, in accordance with the provisions of paragraph 2 of Article XXIII, the matter referred to the CONTRACTING PARTIES by the Government of the United States concerning the margins of preference maintained by Jamaica and to report thereon to the Council.". The composition of the Panel was as follows:

Chairman: Mr. S. R. Pasin (Turkey)

Members: Mr. M. H. E. Moerel (Netherlands)
Mr. J. R. Samaranayake (Ceylon)
Mr. A. Schnebli (Switzerland)

The Panel met on 26 October and on 12 November 1970.

2. The Panel heard statements by the representative of the United States and by the representative of Jamaica and obtained additional information from them to clarify certain points. The Government of Jamaica submitted an extract from the Jamaican Customs Tariff of Import Duties listing the import duties at present applicable on goods on which the margin of preference has been increased since 10 April 1947, supplemented by tables showing the margins of preferences as of 6 August 1962 and 10 April 1947. The tables are annexed to this report. The Panel furthermore examined copies of documents and correspondence relevant to the matter.

3. The Panel noted that in accordance with paragraph 2 of the Protocol of Provisional Application, the Government of the United Kingdom, by letter dated 28 June 1948, gave notice to the Secretary-General of the United Nations of its intention to apply the General Agreement provisionally to the territories for the international relations of which it was responsible. Jamaica, however, was explicitly excluded at that time. Only in 1962, the United Kingdom, in a communication received on 2 July, notified the Secretary-General of the United Nations and the Director-General of GATT that the General Agreement was to be applied provisionally also in respect of Jamaica. In accordance with paragraph 2 of the Protocol of Provisional Application and paragraph 5(b) of Article XXVI this notification was effective as from 1 August 1962 (L/1809).

4. The Panel noted that on 6 August 1962, Jamaica achieved independence. On the sponsorship of the United Kingdom the Recommendation providing for the de facto application of the General Agreement in relations with newly-independent States became applicable to Jamaica (L/1823). At the same time, the Director-General entered into consultation with the Government of Jamaica informing it inter alia of the options open to it. Jamaica could either become a contracting party under Article XXVI:5(c), in which case Jamaica would assume the obligations involved in the application to it of the General Agreement by the United Kingdom before Jamaica became independent, or accede to the General Agreement under Article XXXIII. In reply, the Jamaican Government expressed its intention to apply the General Agreement on a reciprocal de facto basis pending a final decision on its membership in GATT.

5. The Panel noted that in 1963, the Government of Jamaica advised that it wished to become a full contracting party to the GATT under Article XXVI:5(c). In his letter of acknowledgement the Director-General stated that in accepting the status of contracting party to the GATT, the Government of Jamaica had acquired the rights and obligations which had previously been accepted by the United Kingdom in respect of the territory of Jamaica. Subsequently, on 31 December 1963, a certification was issued (L/2111) declaring that the conditions required by Article XXVI:5(c) were met, and Jamaica had become a contracting party; its rights and obligations dated from 6 August 1962.

6. The Panel noted, from the table annexed to this report, that in the period before August 1962, when the General Agreement was not applicable to Jamaica, certain modifications had been made in the Jamaican tariff, as a result of which some preferential margins were reduced while some were increased, the majority of preferential margins, however, remaining unchanged. In June 1967, further modifications in the Jamaican Customs Tariff resulted in increased margins of preference on a much larger number of items. The Panel, therefore, was confronted with the task of expressing an opinion as to the consistency of these increases in margins of preference with the obligations of Jamaica under the General Agreement and, in particular, as to whether the base date of 10 April 1947, provided in paragraph 4 of Article I, was legally applicable to Jamaica.

7. The Panel heard a statement by the representative of the United States noting that the issue rested on differing interpretations of the obligations assumed by Jamaica with respect to the base date applicable to Jamaica under the provisions of paragraph 4 of Article I. In the view of the United States delegation Jamaica had been given an option with regard to the procedure of accession to the General Agreement; Jamaica had exercised that option and had acceded to the General Agreement under Article XXVI:5(c). This had the consequence that Jamaica had to accept the General Agreement as it stood when the United Kingdom applied the General Agreement to the territory of Jamaica. Paragraph 4 of Article I establishing the date of 10 April 1947 as base date was quite clear and unambiguous in its language. To decide otherwise and thus permit the ex post facto choosing of a different base date could create a precedent that would endanger the practice of not permitting increases in preferences. Furthermore, the matter was not only of legal interest to the United States. There were approximately eighty-eight items at stake, twenty-eight of which were of considerable trade interest to the United States. He agreed, however, that only a small number of items were cases where the margin had been increased between 1947 and 1962.

8. The Panel also heard a statement by the representative of Jamaica, who pointed out that in 1948 his authorities had specifically requested the United Kingdom to exclude Jamaica from the provisional application of the General Agreement. A process of industrialization and trade diversification had just been started at that time, which could have been endangered by participation in the General Agreement. Furthermore, Jamaica had not been prepared to relinquish its right to increase margins of preference. Therefore, not until 1962 had Jamaica requested the United Kingdom to inform the GATT that the General Agreement should be applied to Jamaica as from 1 August 1962. Jamaica had never contemplated becoming party to any agreement in a manner that would impinge on its rights and obligations before independence.

9. Paragraph 4 of Article I was in the view of the Jamaican representative a standstill agreement freezing the margins of preference for the signatories and did not apply to countries which were not contracting parties. On the other hand, the wording of Article XXVI:5 was largely procedural and made it evident that the GATT, including Article I, paragraph 4, was not intended to be applied retroactively. One had to differentiate between those non-metropolitan territories to which the General Agreement was applied in accordance with Article XXVI:5(a) and those to which it was applied under Article XXVI:5(b).

10. Furthermore, Jamaica had never been aware that accession under Article XXVI:5(c) would entail any element of retroactivity and thus nullify the decision taken by Jamaica in 1948. In his view, no specific reference had been made as to the content of the rights and obligations which had previously been accepted by the United Kingdom in respect of Jamaica.

11. The representative of Jamaica further stated that, due to the fact of the non-application of the General Agreement for fourteen years and its short application from 1 August to 5 August 1962 by the metropolitan country on behalf of the territory of Jamaica, the case at hand was unique and without precedent in the GATT.

12. With regard to the economic aspects the Jamaican representative stated that it was important to realize that it was economically unrealistic to return to the margins of preference as they stood on 10 April 1947. Any move to restore margins of preference which existed twenty-three years ago would produce considerable changes in Jamaica's established pattern of trade which, in turn, would have far-reaching implications inter alia for her industries, her balance of payments, and the financing of development programmes. During informal consultations with the United States delegation the Jamaican delegation had offered to restore the margins of preference to the 1962 level in respect of twenty-eight items which were of particular interest to the United States. Though no final decision had yet been made, it was likely that Jamaica would achieve this restoration by reducing the general rates and not by raising the preferential rates. The estimated revenue loss if margins were restored on these twenty-eight items to the levels existing on 1 August 1962 would be £J250,000.

13. The Panel held that since Jamaica had acceded to the General Agreement on Tariffs and Trade under the provisions of Article XXVI:5(c) it had acquired the rights and obligations which had previously been accepted by the United Kingdom in respect of the territory of Jamaica. This meant that Jamaica assumed the rights and obligations involved in the application to it of the General Agreement by the United Kingdom before Jamaica became independent. On 6 August 1962, the day Jamaica became independent, Article I:4 formed part of the General Agreement as it had been applied by the United Kingdom on behalf of the territory of Jamaica. The provision of Article I:4 establishing 10 April 1947 as the base date for permissible margins of preference was therefore applicable to Jamaica.

14. The Panel agreed, however, that it was important to find a solution which, on the one hand, would not require a strained interpretation of the General Agreement and which would leave the General Agreement intact, but which, on the other hand, would take into account the uniqueness of the Jamaican case and would therefore permit Jamaica to apply in a legally correct manner margins of preference as they were in effect on 1 August 1962, the date the General Agreement was first applied to the territory of Jamaica.

15. The Panel therefore suggests that in the light of the exceptional circumstances the CONTRACTING PARTIES consider taking a decision in accordance with the provisions of paragraph 5 of Article XXV to change with respect to Jamaica the base date referred to in paragraph 4 of Article I from 10 April 1947, to 1 August 1962.

16. The Jamaican representative indicated that this solution would be acceptable to his Government. If the CONTRACTING PARTIES would agree to the suggested change in base date, his Government would take immediate steps to restore the margins of preference to the 1962 level in respect of all items for which the present margin of preference exceeded the 1962 margin. The Jamaican Government hoped that in this way the matter would be settled to the satisfaction of all parties.

17. The American representative noted that the proposed solution, while meeting a large part of his Government's request, would have the effect of legalizing an increase in the margin of preference for some items of particular trade interest to the United States. He was nevertheless prepared to recommend the Panel's suggestion to his authorities on the understanding that the waiver would not be interpreted as authorizing the Government of Jamaica to increase margins of preference in respect of those items where the current margins were lower than was the case on 1 August 1962.

18. In order to facilitate consideration of this matter, the Panel prepared a draft decision which is annexed to this report¹.

¹For the decision, see page 33.