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GENERAL AGREEMENT ON TARIFFS AND TRADE

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UNITED STATES - IMPOSITION OF COUNTERVAILING DUTY WITHOUT INJURY CRITERION/INDUSTRIAL FASTENERS IMPORTED FROM INDIA

Recourse to Article XXIII:2 by India

The Director-General has received the following communication, dated 29 October 1980, from the Permanent Mission of India with the request that it be circulated to the contracting parties.

You would recall that in the Meeting of the GATT Council of Representatives on 9 October 1980 my delegation had outlined some of Government of India's concerns on the subject of denial to India by the U.S. authorities of the injury criterion in respect of dutiable products while they have chosen to extend this benefit to some other contracting parties of the GATT. On that occasion, we had also referred to the text of our communication to the Delegation of the United States requesting consultation under Article XXIII:1 of the General Agreement wherein we had stated Government of India's position that this U.S. action constituted a contravention of the obligation of the United States under Article I of the General Agreement, and further that by this action the benefit accruing to India under Articles I and VI of the General Agreement was being impaired.

2. I would now like to inform you that India has held Article XXIII:1 consultations with USA on October 21 1980 and that as in the case of previous bilateral consultations on these matters and related aspects, the above-mentioned Article XXIII:1 consultations did not result in a satisfactory adjustment between the two parties.

3. In the discussions and consultations which have so far been held, the Indian authorities have endeavoured to clarify the problem with United States' representatives, underlining in particular some of our major concerns which I would attempt to summarise below.

(a) India and the USA became signatories to to the Agreement on interpretation and application of Articles VI, XVI and XXIII of the GATT. This Agreement came into force for USA on January 1, 1980. India accepted the Agreement on 11 July 1980, and in accordance with the provisions thereof, became a Party to the Agreement on 10 August 1980. We refer, in this connection, to the action taken by the U.S. authorities in invoking Article 19.9 of the Agreement against India through the U.S. communication made to this effect to you and circulated by you to the contracting parties on 27 August 1980.

It remains our position that this action seeks to erode the nature of even the most modest special and differential treatment accorded to developing countries in the crucial area of subsidies and detracts from the credibility of the agreements entered into causing a major set back to the goal of maximum participation, particularly that of the developing countries.

(b) Apart from this aspect of the U.S. action, we also consider that the invocation of Article 19.9 of the Agreement by USA constitutes, on several grounds, a contravention of U.S. obligations as a signatory to the Agreement. The Agreement bans the use of export subsidy on manufactures and minerals by countries other than developing countries. It goes further in the case of the latter by explicitly recognising the right of developing countries to subsidise exports of manufactured goods and paragraph 5 of Article 14 of the Agreement stipulates that these countries should endeavour to enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidy is inconsistent with their competitive and development needs. It is, therefore, more than manifest that the decision for undertaking such commitments will be autonomous, voluntary and purely as a result of sovereign decisions to be taken by individual developing countries themselves. This provision is, therefore, persuasive and promotional and not mandatory or obligatory. Even the U.S. authorities do not contest the right of any developing country to accede to the Agreement without making such commitments if they so decide. Although the formal U.S. communication, which I have referred to earlier, does not contain a reason for invoking Article 19.9, the U.S. position of linking this action with commitments envisaged under paragraph 5 of Article 14, has already been clearly established in the General Policy Statement made by the U.S. Delegation in the meeting of the Committee of Signatories of this Agreement held on 8 May 1980 to the effect that they can extend the benefits of injury test accruing from their new countervailing duty law only to those developing countries that have undertaken commitment with regard to their export subsidy practices. It remains our contention that, in this context, the U.S. action contravenes

the Agreement and, in fact, may be construed to be a conditional acceptance of or a reservation to the Agreement itself unilaterally made by the U.S. authorities even after their obligations in terms of the Agreement have formally entered into force.

(c) It is also questionable whether Article 19.9 of the Agreement can be validly invoked by any Party with the objective of obtaining concessions from another Party to the Agreement which are not envisaged in the provisions and go beyond the balance of rights and obligations contained in the Agreement. We may recall here the report of the Working Party on the review of the operation of Article XXXV of the General Agreement with respect to Japan which was adopted by the CONTRACTING PARTIES on 7 December 1961 and is contained in document L/1545. The Working Party's conclusions that the invocation of Article XXXV should not be a normal practice of accession, or that its invocation could not legitimately be used as a bargaining lever for gaining privileges and advantages over and above those provided for in the General Agreement, was endorsed by the then U.S. representative in unequivocal terms.

(d) We also, inter alia, refer to the inappropriateness of the technical procedures followed by the U.S. authorities for invoking Article 19.9 of the Agreement which, when seen strictly in terms of the provisions of the Agreement, would make the U.S. action ineffective.

(e) Even beyond these matters is the question of the obligations of the U.S. Government under the General Agreement, particularly under Article I thereof. It is our contention that as the U.S. Government has taken the obligation to apply the injury test to subsidised products imported by it, it has to apply the test unconditionally to all contracting parties of the GATT irrespective of whether the new Agreement applies between the USA and other contracting parties. We would like to recall in this connection the findings of the Director-General, GATT, in 1967 in respect of the "Agreement on Implementation of Article VI of the GATT", a finding which was

reinforced even in a subsequent re-examination of the matter, that the words of Article I cover matters dealt with in the Anti-Dumping Code, such as investigations to determine normal value or injury and the imposition of anti-dumping duties, and further that for a contracting party to apply an improved set of rules for the interpretation and application of an Article of the GATT only in its trade with contracting parties which undertake to apply the same rules, would introduce a conditional element into the most favoured nation obligations which, under Article I of the GATT, are clearly unconditional.

(f) We also consider it relevant to recall the decision of 28 November 1979 entitled "ACTION BY THE CONTRACTING PARTIES ON THE MULTILATERAL TRADE NEGOTIATIONS" in which the CONTRACTING PARTIES had noted that the existing rights and benefits under the General Agreement, including those derived from Article I, are not affected by the various agreements which have emerged as a result of the Multilateral Trade Negotiations.

(g) In view of these facts, we consider that the invocation of Article 19.9 of aforementioned Agreement by the Government of the United States does not give them the right to deny benefit of the injury criterion on MFN basis to the Government of India.

(h) It may also be pointed out that Article I of the GATT has been modified only for the purpose of giving differential and more favourable treatment to the developing countries as set out in the AGREEMENTS RELATING TO THE FRAMEWORK FOR THE CONDUCT OF INTERNATIONAL TRADE in the decision of the CONTRACTING PARTIES of 28 November 1979.

(i) In specific terms, it should be stated that on July 11, 1980, the U.S. Department of Commerce have imposed a countervailing duty of 18 per cent on certain Industrial Fasteners imported from India without a finding on the question of injury. The U.S. Department of Commerce had also initiated countervailing duty investigations on certain textile products imported from India and provisional duties ranging from 2.5% to 15% had been imposed without a preliminary finding with regard to 'injury'. Subsequently, the countervailing

duty investigations on textile products have been dropped following a finding that India was not subsidizing textile products. The uncertain trade environment created by possible imposition of countervailing duty on other products without consideration of injury has had a general adverse effect on India's exports of dutiable products to the U.S.A.

4. These and other points have been raised by the Indian authorities in their consultations with the U.S. representatives over a considerable period of time. As stated earlier, the Article XXIII consultations held between the two sides on 21 October 1980 regrettfully did not result in the achievement of any mutually acceptable solution. The Government of India considers that the U.S. action referred to earlier has resulted in prima facie nullification and impairment of benefits accruing to India under Article I of the General Agreement. It, therefore, feels compelled to invoke the procedures of Article XXIII:2 of the General Agreement and requests that a Panel be established by the CONTRACTING PARTIES to examine the matter. In pursuance of this request, we have already informed the GATT Secretariat of our wish that an item be included in the Agenda of the next meeting of the Council of Representatives to decide on the request of the Government of India for a Panel. It is our expectation that such a Panel shall be constituted at the earliest convenient date to investigate and report on our complaint with a view to making prompt recommendations to remedy the adverse situation arising from the action taken by the U.S. Government.

Yours sincerely,

29.10.1980.

(B.L. Das)

Mr. Arthur Dunkel,
Director-General,
GATT,
Centre William Rappard,
154, Rue de Lausanne,
GENEVA.