

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG7/W/12

10 August 1987

Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on GATT Articles

ARTICLE II:1(b) OF THE GENERAL AGREEMENT

Note by the Secretariat

As requested by the Negotiating Group on GATT Articles, the secretariat has prepared the following background note on Article II:1(b) of the General Agreement, as it relates to the problem raised in paragraph A of the Communication by New Zealand, contained in document MTN.GNG/NG/7/W/3 (lack of a definition of the phrase "ordinary customs duties").

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1. The present text of Article II:1(b) provides as follows:

"The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

2. The drafting history of this provision reveals that in the New York draft of January 1947, it was envisaged that the preface of each individual schedule of concession would include the following note:

"The products of the territories of the contracting parties, enumerated and described in Part I of this Schedule, shall, on their importation into, be exempt from ordinary customs duties in excess of those set forth and provided for in Part I of this Schedule, subject to the conditions therein set out. Such products shall also be exempt from any other duties or charges imposed on or in connection with importation in excess of those imposed on the day of the signature of this Agreement or required to be imposed thereafter under laws of in force on that day."

3. However, in its report to the Second Session of the Preparatory Committee of the UN Conference on Trade and Employment in September 1947, contained in document EPCT/201 of 17 September 1947, the Sub-Committee on Schedules of the Tariff Agreement Committee recommended that the preface to the individual schedules be deleted and replaced by the following first paragraph of Article II:

"Except as provided in paragraph 2 of this Article, the products enumerated and described in the Schedule relating to any contracting party, which are the products of the other contracting parties, shall, on their importation into the customs territory to which the Schedule relates, be exempt from ordinary customs duties in excess of those set forth and provided for in such Schedule, subject to the terms, conditions or qualifications set forth therein. Such products shall also be exempt from all other duties and charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

In the discussion related to the drafting of this paragraph, a delegate had suggested the deletion of the word "ordinary" before "customs duties", but another delegate opposed this deletion and explained that there were two types of charges dealt with in the schedules: the rates of regular tariffs shown in the schedules and the various supplementary duties and charges which countries impose on importations, and that it was necessary to make a distinction between these two types of charges. In his view, if the word "ordinary" were deleted, the products would then be exempt from all customs duties other than those shown in the schedules. In addition, he explained that there were charges on importations which were clearly customs duties and which did not form part of the regular tariff (i.e. *primage* duty). Another delegate pointed out that his delegation did not like the words "ordinary customs duties" which appeared in the New York draft, but realized that these words had some value, because they establish a distinction between ordinary customs duties and taxes such as *primage* duty. Although no consensus could be reached, the words "ordinary customs duties" were retained and it was specifically requested that these words be translated into French by "*droits de douane proprement dits*".

4. The present wording of Article II:1(b) has not been changed since the entry into force of the General Agreement. In its decision of March 1980 (BISD 27S/22) on the introduction of the loose-leaf system for the schedules of tariff concessions, the GATT Council stated that the term "other duties or charges" comprised in principle only those that discriminate against imports; Article II:2 made it clear that they concern neither charges equivalent to internal taxes, nor anti-dumping or countervailing duties, nor fees or other charges commensurate with the cost of services rendered.

5. The basic objective of the provisions of Article II:1(b) and 1(c) is that contracting parties should be able to maintain charges on imports which they levy, in addition to the ordinary customs duties, at the time a concession is granted on a particular product, without having to indicate them in their respective schedules of concessions. However, the imposition of new charges on imports, or the increase to a higher level of existing charges, is not permitted, as it would diminish the value of the concession.

6. Although paragraphs 1(b) and 1(c) were included in the body of Article II to obviate the need for individual notes in each schedule, some countries have nevertheless chosen to list in their GATT schedules the various charges in existence at the time of their accession to the GATT. This is the case, for instance, of Peru when it renegotiated its whole schedule in 1966/67 (SECRET/171). The following was added to the General Notes:

"The products included in this Schedule XXXV - Peru shall be subject, besides of duties hereon specified, to the following taxes not considered as import duties:

- (a) 4 per cent on the value of the maritime freight (Laws No. 11537 and 13836).
- (b) Soles 2.00 by metric ton (Law No. 10811).
- (c) Consular certification of bills of landing and consular and commercial invoices.
- (d) Port service charges corresponding to the sort of service and to the category of goods."

7. The various tariff protocols to the General Agreement provide that:

"In each case in which paragraph 1(b) and (c) of Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of each product which is the subject of a concession provided for in a schedule of tariff concessions annexed to this Protocol shall be the date of this Protocol, but without prejudice to any obligations in effect on that date."

This clause appears in each tariff protocol established either following tariff concessions deriving from multilateral trade negotiations or made on the occasion of the accession of a country to the GATT. The clause always makes reference to the fact that a concession (principally in the form of a reduction of duty rate) offered in the context of multilateral trade negotiations is without prejudice to any existing obligations, a formulation which makes it clear that the relevant date for establishing whether additional charges are permitted is the date when the concession was first granted on a particular product. It is for this reason that the

loose-leaf schedules contain a column indicating when a concession on a particular product was first granted in order to make it easier to establish the relevant date for the maintenance of additional charges.

8. In order to clarify further the intent of Article II:1(b), reference is made to the explanation given by Professor John H. Jackson in his book entitled "World Trade and the Law of GATT" (on page 210), which reads as follows:

"This last commitment can be analyzed in two parts: (1) 'other duties or charges of any kind'; and (2) the historical measure of allowable charges. The first part is similar to the language of Article I setting out the MFN obligation. 'Charges of any kind' is meant to be all-inclusive. A proposed 1955 amendment would have clarified the phrase by adding explicit reference to charges on international transfer of payments, although the committee report on this amendment notes the understanding that 'charges of any kind' are not meant to include 'ordinary commercial charges for effecting the international transfer of payments.'

"The second part of the last sentence of Article II, paragraph 1(b), and the identical language in Article II, paragraph 1(c) allows charges in excess of those actually or potentially in effect on 'the date of this Agreement.' For the original GATT parties, this date is October 30, 1947. For countries subsequently acceding, however, 'this date' is specified in the particular agreements of accession. Furthermore, when later protocols add concessions to the Schedules, those protocols usually specify that the applicable date in respect of each product which is the subject of a concession provided for in the Schedule annexed to this Protocol... if such product was not the subject of a concession provided for in the same part or section, of a Schedule to the General Agreement... shall be the date of this Protocol.

"Thus, in a particular contracting party's Schedule in GATT, different products may have different dates by which one measures the permissible 'other charges'. In order to ascertain the permissible 'other charges' that a country may levy on a particular product in its Schedule, one must go back to each of the protocols that affect the commitment on that product to determine the reference date and then one must find out what charges existed as of that date.

"Not only charges 'imposed' but charges 'directly and mandatorily' required by legislation in force on the reference date are permissible. This language raises questions similar to those raised in connection with the 'existing legislation' clause of the Protocol of Provisional Application The word 'directly' was apparently included to emphasize that the charge be required by legislation and not just administrative regulation pursuant to legislative authorization."