

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG7/W/17

4 September 1987

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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

PROTOCOL OF PROVISIONAL APPLICATION OF  
THE GENERAL AGREEMENT ON TARIFFS AND TRADE

Note by the Secretariat

As requested by the Negotiating Group on GATT Articles, the Secretariat has prepared the following background note on the Protocol of Provisional Application (PPA). The note briefly describes the purpose and historical origin of the PPA (Part I), the decisions of the CONTRACTING PARTIES relating to the PPA (Part II) and the practical consequences of the PPA (Part III). The text of the PPA is reproduced in the Annex.

I. PURPOSE AND HISTORICAL ORIGIN OF THE PROTOCOL OF PROVISIONAL APPLICATION

According to its Article XXVI:6, the General Agreement on Tariffs and Trade enters into force after governments representing a certain minimum share of world trade have accepted it. Since only two governments (Haiti and Liberia, which later withdrew) have deposited their instruments of acceptance, the General Agreement itself has not entered into force. The provisions of the General Agreement are applied by the twenty-two original contracting parties on the basis of the PPA signed in 1947. The PPA confers upon the contracting parties two rights not provided for in the General Agreement. First, the right to apply Part II of the General Agreement, that is the part dealing mainly with non-tariff measures, only "to the fullest extent not inconsistent with existing legislation" (paragraph 1(b) of the PPA). Second, the right to cease to apply the General Agreement with a sixty-day notice (paragraph 5 of the PPA), which contrasts with the six-month withdrawal notice provided for in the General Agreement (Article XXXI).

The governments that have acceded to the General Agreement after 1947 in accordance with Article XXXIII have done so on the basis of protocols with provisions substantially equivalent to those contained in the PPA (see for instance BISD 29S/3). Thirty-eight governments became contracting parties in accordance with Article XXVI:5 which declares that a territory for which a contracting party has accepted the General Agreement and which possesses or acquires full autonomy for its external commercial relations and for the other matters provided for in the General Agreement, shall be deemed to be a contracting party upon sponsorship through a declaration by

the responsible contracting party establishing the above-mentioned fact. The CONTRACTING PARTIES have decided that a government becoming a contracting party under that provision does so on the terms and conditions previously accepted by the metropolitan government of the territory in question (BISD 10S/73), including the terms and conditions in the PPA or the protocol of accession of the metropolitan government. For these reasons, not only the signatories of the PPA but also the governments that became contracting parties in accordance with the accession provisions of Article XXXIII or the succession provisions of Article XXVI:5 have the right to apply the General Agreement only to the fullest extent not inconsistent with their existing legislation and to cease to apply the General Agreement with a sixty-day notice.

The decision to apply the General Agreement on the basis of the PPA was taken for the following reasons. When the negotiations on the General Agreement and the parallel tariff negotiations neared their end in 1947, the negotiations on the Charter of the International Trade Organization (ITO) had not yet been completed. Some delegations suggested that the commercial provisions of the draft ITO Charter be included in the General Agreement as a Part II so as to ensure that the tariff concessions to be included in Part I (Articles I and II) would not be nullified or impaired through non-tariff measures. Other delegations opposed this idea. They feared that their parliaments might object to bringing parts of the Charter into force before its final adoption and that the inclusion of a part of the Charter into the General Agreement might be taken as an indication that no further negotiations on this part were necessary and that the other parts were not needed. Another concern was that the inclusion would make it necessary for some countries to change their domestic legislation and that this would delay the implementation of the tariff concessions. These delegations therefore proposed that, instead of the suggested Part II, a general commitment not to nullify or impair tariff concessions be included in the General Agreement. The application of Part II subject to the existing legislation clause was the compromise found between these opposing considerations. It eliminated the need for legislative actions that could have been regarded as prejudging the outcome of the Havana Conference and that would have been time-consuming, while at the same time ensuring that the value of tariff concessions could not be nullified or impaired by new legislation. The designation of the Protocol as "provisional" made clear that the Havana Charter, if it entered into force, would be given priority over the General Agreement. (Cf. Summary Record of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/TAC/SR/1, 2 and 6).

The CONTRACTING PARTIES considered on several occasions the question of whether the PPA should be replaced by an acceptance of the General Agreement itself, for instance during the review session in 1955 (BISD 3S/48, 247 ff), during the twenty-second session in 1965 (see the Secretariat Note in L/2375) and again in 1977 (BISD 24S/61 ff) when the EEC submitted a memorandum proposing the definitive application of the General Agreement under Article XXVI (CG.18/W/20). In no case did the considerations lead to concrete actions.

II. DECISIONS OF THE CONTRACTING PARTIES RELATING TO THE PROTOCOL OF  
PROVISIONAL APPLICATION

The CONTRACTING PARTIES have answered the following questions relating to the interpretation of the existing legislation clause in the PPA:

- (1) At what date must the legislation have been in force in order to qualify as existing legislation?

In 1948 the Chairman of the CONTRACTING PARTIES ruled that the relevant date was 30 October 1947, the date of the Protocol (and not the date of signature by individual governments as some contracting parties had suggested) (BISD Vol. II/35).

- (2) Is there an obligation to notify measures which are permitted under the existing legislation clause but which could, in the absence of the Protocol, only be justified under a provision of the General Agreement requiring notification, such as Article XVIII?

The CONTRACTING PARTIES approved in August 1949 a report which states that "there is no obligation on the part of a contracting party to notify a measure permitted by sub-paragraph 1(b) of the Protocol of Provisional Application" (BISD Vol. II/62).

- (3) Does the PPA cover all legislation or only mandatory legislation?

The CONTRACTING PARTIES have adopted various reports which state that the existing legislation clause is only "applicable to legislation which is, by its terms or express intent, of a mandatory character, i.e. it imposes on the executive authority requirements which cannot be modified by executive action". (These reports are listed in BISD 7S/105).

- (4) Does the PPA only apply to obligations under the original General Agreement or also to the amendments adopted after the Agreement's entry into force?

When Part II of the General Agreement was amended in 1957, some contracting parties made their acceptance subject to the reservation that the amendment "... will not be applied except to the fullest extent not inconsistent with legislation which existed on 30 October 1947" (GATT, Status of Legal Instruments, pp. 2-8.3). The CONTRACTING PARTIES declared on 15 November 1957 that they accepted these reservations on the understanding that they confirmed the legal situation existing under the PPA and the protocols of accession. As a consequence Part II not only of the original but also of the revised General Agreement applies to the fullest extent not inconsistent with the legislation that existed on 30 October 1947 or on the date mentioned in the protocol of accession (BISD 6S/13). This does not apply to the provisions of Article XVI:4 on export subsidies for manufactured goods which entered into force in 1960 as a result of a declaration that contains no reservation as to existing legislation. Article XVI:4 therefore also applies to legislation which predates the PPA (BISD 23S/126).

- (5) Does an amendment of legislation which does not increase or which reduces the inconsistency of that legislation with the General Agreement deprive it of the status of "existing legislation"?

In 1948 the CONTRACTING PARTIES adopted the report of a working party which had examined the following case: When Brazil acceded to the General Agreement it had certain internal taxes on imported products that were twice as high as the taxes on domestic products (on liquor, for instance, the rates were Cr\$3 and Cr\$6 respectively). This was contrary to the national treatment principle of Article III and Brazil invoked the PPA as a justification. Brazil subsequently introduced legislation which increased the taxes on domestic products and raised the taxes on imported products proportionately (in the case of liquor the increases were from Cr\$3 and Cr\$6 to Cr\$18 and Cr\$36 respectively). All members of the Working Party accepted that the PPA did not prevent Brazil from adjusting the taxes on imported products to take into account the changes in the rates applied to domestic products provided the degree of inconsistency with Article III was thereby not increased. The prevailing view was "that the Protocol of Provisional Application limited the operation of Article III only in the sense that it permitted the retention of an absolute difference in the level of taxes applied to domestic and imported products, required by existing legislation, and that no subsequent change in legislation should have the effect of increasing the absolute margin of difference". Brazil could thus increase the taxes on domestic and imported liquor only from Cr\$3 and Cr\$6 to Cr\$18 and Cr\$21 respectively (BISD Vol. II/183).

In 1984 the CONTRACTING PARTIES took a further decision on the interpretation of the PPA by adopting the report of a Panel established at the request of the European Communities to examine the Manufacturing Clause in the U.S. copyright legislation (BISD 31S/74). The Manufacturing Clause (Section 601 of Title 17 of the U.S. Code, as extended by Public Law 97-215 of 13 July 1982) prohibited, with certain exceptions, the importation into or public distribution in the United States of a copyrighted work consisting preponderantly of non-dramatic literary material in the English language if the author is a U.S. domiciliary, unless the portions consisting of such material had been manufactured in the United States or Canada. The original Manufacturing Clause went back to 1891. As a result of amendments in 1949, 1952 and 1976, the coverage of the Manufacturing Clause was progressively reduced. According to the 1976 amendment, the Manufacturing Clause was to be applied only "prior to 1 July 1982". But when this date approached Congress passed a bill changing the date prior to which the Manufacturing Clause was to be applied to 1 July 1986. The bill became law on 13 July 1982.

Both parties to the dispute agreed that the Manufacturing Clause was contrary to Article XI of the General Agreement. They disagreed however on the question of whether the Clause was covered by the PPA despite the various amendments to that Clause after 1947 (BISD 31S/77). The first question before the Panel therefore was whether the amendments after 1947 that had reduced the coverage of the Manufacturing Clause and provided for its expiry in 1982 had deprived it of the status of existing legislation under the PPA. According to a literal interpretation of the PPA, any change in legislation creates new legislation that has to be in conformity

with the General Agreement. If this interpretation were accepted, the contracting parties would have only the choice between either maintaining the legislation or bringing it completely into conformity with the General Agreement. No adjustments to new circumstances and no intermediate steps towards greater consistency with the General Agreement would be allowed. One of the basic purposes of the PPA was to permit the entry into force of the Part II provisions without legislative changes. It could therefore be argued that, whenever a government amends legislation at a later date, it should bring it fully into conformity with Part II.

This interpretation had been rejected by the CONTRACTING PARTIES in the case of the Brazilian internal taxes discussed above. In that case they accepted that legislation could be modified without losing its status of "existing legislation" provided the degree of inconsistency with the General Agreement was not increased. If it is possible to introduce changes provided these do not increase the degree of inconsistency, legislative movements that reduce the degree of inconsistency should a fortiori be permitted. The Brazilian internal taxes case can therefore also be taken as a basis for concluding that legislation which leads to a greater degree of conformity with the General Agreement is not new legislation within the meaning of the PPA. One of the basic purposes of the provisional application of Part II was to protect the value of tariff concessions against new protective legislation. To regard as new legislation only changes that increase the degree of inconsistency would be in accordance with this purpose of the PPA. On the basis of these considerations the Panel concluded that those changes in the Manufacturing Clause which did not alter the degree of inconsistency with the General Agreement or which constituted a greater degree of consistency did not cause it to cease to qualify as existing legislation (BISD 31S/89).

The next question before the Panel was whether the postponement of the expiry date from 1982 to 1986 was a movement away from consistency with the General Agreement that might not be covered by this interpretation of the PPA. The Panel considered that the answer to this question depended on whether the introduction of an expiry date in 1976 had constituted a move towards conformity with the General Agreement or whether the 1976 amendment had represented only an announcement of the possibility of a future move towards consistency with the General Agreement. In the view of the Panel the response to this question depended in turn on whether the insertion of the expiry date could justifiably have been considered by the United States' trading partners as a change in U.S. policy (with delayed implementation) or merely as an announcement of the possibility of a future change in policy. The Panel found on the basis of the evidence before it that the European Communities had been justified in reaching the conclusion that the expiry date inserted in 1976 had constituted a policy change and hence a move towards greater conformity with the General Agreement. Consequently, the Panel concluded that the 1982 legislation postponing the expiry date to 1986 constituted a reversal of this move and, therefore, increased the degree of inconsistency of the Manufacturing Clause with the General Agreement (BISD 31S/89).

The postponement of the expiry date did not increase the degree of inconsistency of the United States copyright legislation to a level in excess of that which existed in 1947. Having decided that contracting parties may take partial steps towards GATT conformity, the Panel now had to decide whether they have the right to reverse such partial steps. The basic issue to be decided was, as the Panel put it, "whether the existing legislation provision of the Protocol of Provisional Application should be interpreted as opening a 'one-way street' permitting only movements from the situation on 30 October 1947 to the situation required by Part II of the GATT or a 'two-way street' permitting also movements back towards the 1947 situation" (BISD 31S/90).

The Panel decided in favour of the "one-way street" principle arguing that the PPA was designed to provide only a temporary dispensation from Part II, that the basic aim of the GATT was security and predictability in trade relations and that it would be inconsistent with this aim if contracting parties were free to reverse, at any time and at their discretion, the steps that they had taken to bring their legislation into GATT conformity (BISD 31S/90).

### III. THE PRACTICAL CONSEQUENCES OF THE PROTOCOL OF PROVISIONAL APPLICATION

As pointed out above, there is no obligation to notify measures inconsistent with the General Agreement but justified as a result of the PPA. In 1955, a request was made to contracting parties for information on their existing mandatory legislation which was not in conformity with Part II of the GATT. Of the thirteen that replied, seven countries indicated they had such legislation (see documents L/309 and Addenda, L/2375). At the time it was understood that this list was not exhaustive and that the respondents were not bound by the list. No further such requests for information were made and it is therefore not known to what extent the PPA serves as a legal justification for measures inconsistent with the General Agreement.

While the present impact of the existing legislation clause is not known, it is certain that the practical relevance of the clause has substantially declined over time. As contracting parties adapted their legislation on trade policies to new circumstances much of the legislation that existed in 1947 disappeared. The Panel report on the United States Manufacturing Clause made clear that contracting parties which have brought legislation covered by the existing legislation clause in conformity with the General Agreement or which have taken partial steps in that direction, may not reverse their moves. This "one-way-street" principle has important consequences: whenever a contracting party abandons legislation covered by the existing legislation clause or brings such legislation closer to the requirements of the General Agreement - be it autonomously, as a result of a bilateral exchange of concessions or to implement a multilateral agreement - the scope for the application of the existing legislation clause narrows. During the forty-year history of the GATT, contracting parties have introduced substantial changes in their legislation, not only as a result of negotiations in the GATT but also within the framework of free trade areas and customs unions. Over time, the difference between the trade policy obligations under the PPA and those that an acceptance of the General Agreement itself would entail has therefore greatly diminished.

ANNEXPROTOCOL OF PROVISIONAL APPLICATION  
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

1. The Governments of the Commonwealth of Australia, the Kingdom of Belgium (in respect of its metropolitan territory), Canada, the French Republic (in respect of its metropolitan territory), the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands (in respect of its metropolitan territory), the United Kingdom of Great Britain and Northern Ireland (in respect of its metropolitan territory), and the United States of America, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

- (a) Parts I and III of the General Agreement on Tariffs and Trade, and
- (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

2. The foregoing Governments shall make effective such provisional application of the General Agreement, in respect of any of their territories other than their metropolitan territories, on or after 1 January 1948, upon the expiration of thirty days from the day on which notice of such application is received by the Secretary-General of the United Nations.

3. Any other government signatory to this Protocol shall make effective such provisional application of the General Agreement, on or after 1 January 1948, upon the expiration of thirty days from the day of signature of this Protocol on behalf of such Government.

4. This Protocol shall remain open for signature at the Headquarters of the United Nations (a) until 15 November 1947, on behalf of any government named in paragraph 1 of this Protocol which has not signed it on this day, and (b) until 30 June 1948, on behalf of any other Government signatory to the Final Act adopted at the conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment which has not signed it on this day.

5. Any government applying this Protocol shall be free to withdraw such application, and such withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of such withdrawal is received by the Secretary-General of the United Nations.

6. The original of this Protocol shall be deposited with the Secretary-General of the United Nations, who will furnish certified copies thereof to all interested Governments.

In witness whereof the respective Representatives, after having communicated their full powers, found to be in good and due form, have signed the Protocol.

Done at Geneva, in a single copy, in the English and French languages, both texts authentic, this thirtieth day of October one thousand nine hundred and forty-seven.