

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG7/W/30
6 November 1987

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

ARTICLE XXXV

Note by the Secretariat

1. As requested by the Negotiating Group on GATT Articles, the secretariat has prepared this factual background note on Article XXXV (Non-application of the Agreement Between Particular Contracting Parties) of the General Agreement. The note briefly describes the origins of Article XXXV (Part I), past discussions on the interpretation of the Article (Part II), and cases of invocation (Part III).

1. The origins of Article XXXV

2. The text of Article XXXV reads:

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

(a) the two contracting parties have not entered into tariff negotiations with each other, and

(b) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

3. There are no interpretative notes to Article XXXV.

4. Under the original text of the General Agreement, non-contracting parties could accede to the General Agreement only with the consent of all contracting parties. Since each contracting party could therefore veto the accession of any non-contracting party, a clause permitting the non-application of the General Agreement between an existing and a new contracting party was not included in the original text.

5. In 1948 it was proposed to change the unanimity rule for accessions to a two-thirds majority requirement. This proposal gave rise to objections. It was pointed out that the proposed change would permit two-thirds of the contracting parties to oblige a contracting party to enter into a trade agreement without its consent and that it would give rise to problems of relations between the new contracting party and those other contracting parties with which no tariff negotiations had taken place (GATT/1/SR.6, page 2 and GATT/1/SR.7, page 5). To meet these objections a protocol was drafted which introduced the two-thirds majority requirement in Article XXXIII and at the same time added Article XXXV to the General Agreement. This Protocol entered into force on 24 March 1948.

II. Past discussions on the interpretation of Article XXXV

6. At the Second Session of the CONTRACTING PARTIES in 1948 a delegate asked whether the two conditions, in (a) and (b) of paragraph 1 of Article XXXV, were meant to be mutually exclusive or interdependent. The Chairman replied that "according to the paragraph, if two countries, one of which was a contracting party and the other of which was acceding to the General Agreement, had not entered into negotiations, either of them, the contracting party or the acceding party, could decide that the Agreement or Article II should not apply between them when the second party become a contracting party" (GATT/CP.2/SR.18, p.4).

7. The Chairman of the CONTRACTING PARTIES ruled in 1949 that "delegations should be deemed to have entered into negotiations when they had held a first meeting scheduled by the Tariff Negotiations Working Party at which they had exchanged lists of offers" (BISD Vol.II/35). A 1964 "Note by the Director-General" refers to the above-mentioned "Chairman ruling" and states, *inter alia*: "The ruling and the procedure described in the preceding two paragraphs are based on the earlier technique of tariff negotiation under which offers are made by each participant to other individual participants" (TN.64/60).

8. The Working Party on Article XXXV Application to Japan discussed in 1961 the question of the invocation of Article XXXV by governments of territories to which the General Agreement had been applied and which had assumed the status of a contracting party pursuant to Article XXVI:5(c). The Working Party stated: "... if Article XXXV had been invoked in respect of that territory (or if that territory had not been specifically excluded from such an invocation), it would continue to be valid unless expressly disinvoked by the succeeding government" (BISD 10/73).

9. The Working Party, in concluding its examination of the application of Article XXXV to Japan, stated: "As regards countries acceding to the General Agreement under Article XXXIII, the Working Party felt that there could be no question of depriving them of the legal right of making use of Article XXXV. The CONTRACTING PARTIES might, however, wish to take steps to dispel the idea that the invocation of Article XXXV was a part of the normal

practice of accession or that the invocation of Article XXXV could legitimately be used as a bargaining lever for gaining privileges or advantages over and above those provided for in the General Agreement. The CONTRACTING PARTIES might wish to consider recommending to acceding countries that they afford the government against which Article XXXV might be invoked an opportunity for an exchange of views." (BISD 10/73, 74). This report was adopted by the CONTRACTING PARTIES on 7 December 1961. Before its adoption the representative of Australia had sought and obtained a confirmation that the CONTRACTING PARTIES were not asked to set up further procedural machinery which involved some kind of obligation (SR.19/10, page 162).

10. In 1971, during the Council discussion of Romania's application for accession to GATT, the Chairman confirmed that there was nothing in the rules of the GATT which would prevent a contracting party from voting in favour of a decision pursuant to Article XXXIII, even if it did not consent to apply the General Agreement to the newly acceding country in accordance with Article XXXV (C/M/73, page 2).

III. Use of Article XXXV

11. Although Article XXXV permits the non-application either of the General Agreement as a whole or only of its Article II, which incorporates the contracting parties' schedules of concessions into the General Agreement, all past invocations of Article XXXV have in fact related to the General Agreement as a whole. The invocations took the form of a communication to the Director-General of the GATT in which in most cases no reasons for the invocation were indicated. However, in the case of the numerous invocations made against Japan upon its accession in 1955, some of the contracting parties concerned issued public statements explaining their action, and some others furnished explanations subsequently when the question of application of Article XXXV to Japan was discussed from time to time by the CONTRACTING PARTIES (see L/1545).

12. Since its introduction into the General Agreement in March 1948, the following 51 contracting parties have invoked Article XXXV:

Australia, Austria, Barbados, Belgium, Benin, Brazil, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Cuba, Cyprus, Czechoslovakia, Egypt, France, Gabon, Gambia, Ghana, Guyana, Haiti, India, Ireland, Jamaica, Kenya, Korea, Kuwait, Luxembourg, Madagascar, Malaysia, Malta, Mauritania, Netherlands, New Zealand, Niger, Nigeria, Pakistan, Portugal, Romania, Rwanda, Senegal, Sierra Leone, South Africa, Spain, Tanzania, Togo, Trinidad and Tobago, Uganda, United Kingdom and United States.

13. Article XXXV presently operates between the following contracting parties:

<u>Invocation by</u>	<u>in respect of</u>	<u>Reference</u>	<u>Date</u>
Cuba	Dominican Republic	GATT/TN.1/33	August 1949
	Italy	GATT/TN.1/33	August 1949
	Germany (Fed.Rep. of)	GATT/CP/111	April 1951
Cyprus	Japan	Succession	July 1963
Czechoslovakia	Korea (Rep. of)	L/2783	April 1967
Egypt	Zimbabwe	L/3386	May 1970
	South Africa	L/3386	May 1970
Ghana	Portugal	L/1764	May 1962
Haiti	Japan	L/405	August 1955
India	South Africa	GATT/CP.2/4	January 1948
Nigeria	Portugal	L/1764	May 1962
Portugal	Ghana	L/1764	May 1962
	Nigeria	L/1764	May 1962
Romania	Korea (Rep. of)	L/3626	November 1971
United States	Hungary	L/3911	September 1973
	Romania	L/3619	November 1971