

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG7/5
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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note by the Secretariat

1. The Negotiating Group on GATT Articles held its fifth meeting on 16 and 17 November 1987 under the Chairmanship of Ambassador John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2507.

Requests by interested contracting parties for review of GATT Articles, provisions and disciplines

2. No delegation proposed any additional GATT Articles, provisions or disciplines for review by the Group. A delegation indicated, however, that his authorities were currently examining a number of issues, relating both to new Articles and to Articles already raised for review, and would make proposals on these matters in due course. Before doing so, however, his delegation intended to consult with other delegations and the secretariat. A number of other delegations indicated either that they intended to submit new proposals for review or that they were considering the possibility.

Review of GATT Articles, provisions and disciplines

3. The Group began by reviewing Article XXI on the basis of a submission by Nicaragua (MTN.GNG/NG7/W/34) and a secretariat background note (MTN.GNG/NG7/W/16). The representative of Nicaragua noted that there were few precedents on which to base a review of Article XXI. Nevertheless, the case presented by Nicaragua to the CONTRACTING PARTIES regarding the trade embargo imposed by the United States demonstrated the need to examine the provisions and application of the Article. Apart from certain inconsistencies in the pronouncements of the United States in relation to whether or not the GATT was the competent forum in this matter, the fact that there had been no satisfactory solution to the problem indicated either that Article XXI was deficient because it permitted the infringement of international law, or that its provisions were not being properly interpreted.

4. Discussions of the complaint brought by Nicaragua had raised three fundamental issues regarding Article XXI which required attention. The first concerned the competence of GATT in matters of national security and the relation between the GATT and the United Nations in this connection. The drafting history of Article XXI suggested that actions taken under it could only be applied in conformity with other international obligations, such as Security Council Resolutions. In other words, issues of an

essentially political character were the responsibility of the United Nations, while the application of the relevant measures fell within the ambit of GATT. The second issue related to the degree of discretion afforded to contracting parties under Article XXI:(b)(iii). In the view of Nicaragua, this provision had been misused; there should only be recourse to it in conformity with international law and following negotiations or an examination of the matter by the United Nations or other relevant intergovernmental organizations. Finally, it had been recognised at the outset, and reaffirmed in a Decision by the CONTRACTING PARTIES at their Thirty-Eighth Session, that contracting parties subjected to an Article XXI action retained their rights under Article XXIII:2. Nicaragua's experience was that these rights had been denied.

5. A delegation expressed the view that Article XXI had worked well to keep outside GATT questions which could not be productively discussed or resolved within the institution. The Article had not been used extensively and was not in need of improvement. However, this delegation said that any specific proposals on the matter would be given due consideration. Another delegation noted the interest of his authorities in a review of Article XXI and their intention to make a proposal on the matter shortly.

6. The discussion on Article XXVI:5(c) took place on the basis of a proposal by the United States (MTN.GNG/NG7/W/36) and a background note by the secretariat (MTN.GNG/NG7/W/31). The representative of the United States expressed concern at the differences between accession to the GATT and succession under Article XXVI:5(c) in relation to transparency and accountability. Succeeding countries were not required to identify the terms of their succession. Moreover, less than half of the contracting parties which had succeeded to GATT under Article XXVI had established schedules of concessions under Article II. The United States considered that ways should be found of injecting greater discipline in these areas. Another delegation supported these views and also expressed concern that while de facto countries had no rights and obligations under the GATT in a strict legal sense, upon their succession contracting party status became retroactive to the date of the assumption of de facto status. Particularly where a country maintained its de facto status for a long period of time, this created a problem of legal inconsistency and uncertainty. It was suggested that such time lags before succession took place had not been foreseen and that there should be an examination of this matter. The secretariat was also requested to provide any available information on the question.

7. For its discussion of Article XXXV, the Group had before it a proposal by the United States (MTN.GNG/NG7/W/35) and a background paper by the secretariat (MTN.GNG/NG7/W/30). The representative of the United States expressed the view that the provisions of Article XXXV were too narrow in that they only permitted the invocation of its non-application provisions in cases where tariff negotiations had not been entered into. It was suggested that this restriction be removed so that any decision regarding non-application could be taken in the light of the results of tariff

negotiations. The representative of the United States also requested the secretariat to provide any information available in addition to that contained in its background note on the drafting history and interpretation of the word "and" linking paragraphs 1(a) and 1(b) of Article XXXV.

8. Referring to his government's proposal on Article XXVIII (MTN.GNG/NG7/W/26), which had previously been discussed by the Group, the representative of Australia indicated that he would address a number of points made by delegations. He noted that while there was no obligation to negotiate with substantial suppliers under Article XXVIII, they had the right to withdraw substantially equivalent concessions if they were dissatisfied with the outcome of the negotiations in which they had an interest. This fact tended to produce a situation in practice where substantial suppliers were part of Article XXVIII negotiations, and it therefore followed that the proposal to grant this category of suppliers a new negotiating right would not impose an additional burden. Another point was that substantial suppliers could only retaliate by withdrawing concessions on which they had initial negotiating rights, and these rights had been eroded over time. The erosion had occurred mainly through the progressive reduction of tariffs through formula cuts and the tendency for trade shares to become concentrated in fewer and fewer hands. This situation would be corrected in the Australian proposal. It was suggested that the proposal would contribute to a return to the original concept of Articles II and XXVIII, and would give contracting parties an additional incentive to negotiate, in order to protect newly-established trade through a negotiating right. It would also encourage more countries to offer tariff concessions. Under a formula tariff cutting approach, negotiating rights would only be acquired by subsequent negotiations. The absence of a willingness to enter into such negotiations would imply that a particular tariff reduction was of no value. Moreover, there would not be any reason to expect an unwieldy proliferation of negotiating rights, as these would be acquired only on the basis of mutually advantageous exchanges between interested parties. The suggestion of a de minimis provision was not central to the proposal, but could facilitate Article XXVIII negotiations in some instances. Finally, the representative of Australia noted some of the potentially beneficial aspects of the proposals with respect to Article XIX and XXIV, which had been referred to in document MTN.GNG/NG7/W/26. The Chairman suggested that the statement made by the representative of Australia be circulated to the Group, since it contained useful explanations of aspects of the proposal.

9. Several delegations raised questions about the Australian proposal. There was some concern that the proposal would not provide any additional incentive to consolidate tariffs and may even create a disincentive to take on new bindings. It was also suggested that the proposal was disadvantageous to contracting parties with a high level of bindings, but the Australian representative noted that negotiations would be held on the basis of existing schedules and that negotiating rights on existing bindings could be exchanged for rights on new bindings. Some delegations considered that procedures would become cumbersome, in part because an additional layer

of negotiations would be introduced. Another question was how in practical terms negotiating rights would be given a legal status. It was suggested that the question of negotiating rights under Article XXVIII could not be considered separately from the work going on in the Negotiating Group on Tariffs. In response to the question whether the proposal took account of special and differential treatment for developing countries, the Australian representative noted that the ten per cent rule would no longer inhibit small traders from acquiring negotiating rights, although these would be acquired on a reciprocal basis. Finally, a delegation expressed the view that it was somewhat arbitrary merely to consolidate existing negotiating rights as a basis on which future rights would be acquired.

10. The Chairman drew the attention of members of the Group to document MTN.GNG/NG7/W/32, which contained information supplied by the secretariat on data sources used for the calculations in document MTN.GNG/NG7/W/28 of the effects of proposals by certain delegations for the redefinition of suppliers' rights. The note also explained some of the difficulties encountered in trying to make such calculations based on historical data in respect of the proposals by Argentina and Peru.

11. Referring to the submission by Canada on Article XXVIII (MTN.GNG/NG7/W/24), a representative expressed concern that the suggestion of making the ten per cent criterion a five per cent criterion would lead to an undesirable proliferation of negotiating rights. This representative also sought clarification from Canada on the question of the treatment of contractual preferential suppliers in the calculation of suppliers' rights. In his view, there was no established rule in GATT on this question, but the exclusion of the trade of these suppliers seemed to be the practice and should be maintained as such. The representative of Canada said the suggestion for a redefinition of the criterion for establishing substantial supplier status had been made in the context of the statistical exercise that the secretariat had been requested to undertake. While such a change might be a problem in the sense suggested, it could also provide an incentive for additional bindings on the part of small suppliers. As to the treatment of contractual suppliers, this matter would be the subject of proposals in due course.

12. The representative of Japan said that he wished to add an additional consideration to those already outlined in the submission made by his authorities on Article XXIV (MTN.GNG/NG7/W/20). It was that the practice of unilaterally withdrawing an entire tariff schedule upon the formation of a customs union and then renegotiating it created instability and gave an unfair advantage to the contracting party concerned. A tariff schedule should only be withdrawn after the completion of negotiations on a new schedule and following the necessary approval by the CONTRACTING PARTIES. A contracting party expressed the view that the right conferred by Article XXIV to form a customs union carried with it the right to withdraw an existing schedule at the time the customs union was formed. It was suggested that in practice an existing schedule remained in force while Article XXVIII negotiations proceeded following the formation of a customs union. The representative of India suggested that the following issues

should be examined: the problem of differing interpretations of the conformity with Article XXIV of notified agreements; the interpretation of the term "duties and other restricted regulations of commerce", in particular whether it should be held to cover revenue duties; the exclusion of Article XIX from those Articles listed as exemptions from the requirement that duties and other restrictive regulations of commerce be eliminated within a customs union or free trade area; the interpretation of the term "substantially all the trade"; the interpretation of the term "substantially the same duties and other regulations of commerce" - should this be held to require common quotas; the interpretation of the term "general incidence of duties"; the question whether Article XXIV:12 limited the applicability of other provisions of GATT or merely limited the obligation of federal states to secure the implementation of these provisions; the question how far, in renegotiations following the infringement of tariff commitments in a customs union, account should be taken of tariff reductions by members of the customs union on other items. A document submitted by the representative of India on Article XXIV has since been circulated to the Group as MTN.GNG(NG7/W/38).

13. The representative of the European Communities introduced a paper on Articles XII, XIV, XV and XVIII, which was subsequently circulated to the Group (MTN.GNG/NG7/W/37). The paper was divided into four parts. The first part dealt with the relationship between GATT and the international monetary system. It was suggested that while changes in the latter called into question the relevance of Article XII, the case for Article XVIII:B was not in doubt. The implementation and operation of the provisions of Article XVIII:B did, however, require examination, since certain problems of interpretation had arisen. Another matter for consideration was why there were no provisions in the Articles of the Agreement of the International Monetary Fund relating to GATT comparable to those found in the General Agreement relating to the IMF. The second part of the submission dealt with consultations in the Balance-of-Payments Committee, including in relation to the degree of transparency and follow-up in the surveillance mechanism, guidance in the formulation and implementation of conclusions, and cooperation among contracting parties in the consultation process. The third part of the paper identified issues for negotiation. These included further commitments in regard to recourse to Article XII, revised procedures for consultations, an examination of certain existing principles of multilateral surveillance, improved symmetry in consultations in the Balance-of-Payments Committee and within the GATT system, and improved cooperation between the GATT, the IMF and the World Bank.

14. Several delegations reacted to the statement by the EEC representative and the written submission which became available subsequently. A number of these delegations expressed their support for some of the ideas put forward by the EEC. Other delegations had reservations or expressed disagreement on several points. Several of these delegations emphasized that there was no justification for modifying existing balance-of-payments provisions, and noted that this did not appear to be envisaged in the EEC's proposal. On the question whether there should be institutional symmetry between the GATT and the IMF, it was suggested that such symmetry would be inappropriate in

view of the fundamentally different functions of the two institutions in regard to balance-of-payments problems. Another view expressed was that insufficient consideration was given to an examination of how the policies of other countries could assist a contracting party obliged by circumstance to invoke the balance-of-payments provisions. Several delegations were of the view that references by the EEC to a possible rôle for the World Bank were inappropriate, since no rôle was envisaged in existing procedures and practices relating to the balance-of-payments. Moreover, the question of institutional linkages would be more suitably taken up in the Negotiating Group on the Functioning of the GATT System. A number of delegations indicated their intention to revert to some of these issues after examining the EEC submission in more detail.

15. The Group discussed the European Communities' proposal for an enquiry on the use made by contracting parties of paragraph 1(b) of the Protocol of Provisional Application (MTN.GNG/NG7/W/27) on the basis of a secretariat note on the matter (MTN.GNG/NG7/W/33). During this discussion, certain delegations suggested that the question of the provisional application of the GATT should also be addressed. Concern was expressed in regard to the difficulty that might be encountered in any effort to identify particular measures taken under legislation justified under paragraph 1(b) of the Protocol, as opposed to the legislation itself. It was suggested that there should be an indication in the information to be provided of what Article under Part II of the General Agreement was relevant in connection with justifications under paragraph 1(b). The Group agreed in principle to an enquiry along the lines proposed by the EEC, but further consultations would be held to decide upon the modalities of such an enquiry.

16. The Group also agreed in principle that the secretariat would calculate, in accordance with a request by several delegations (MTN.GNG/NG7/W/21), and on the basis of a sample of recent Article XXVIII negotiations, the implications for the acquisition of negotiating rights of the proposals made by participants in regard to the redefinition of these rights. This work would not be undertaken until further informal consultations had taken place. Certain delegations also requested a study by the secretariat, along the lines of an earlier study (L/4200), of the operation of the Committee on Balance-of-Payments restrictions since 1975. Other delegations reserved their positions and it was agreed that no decision could be taken at this stage.

17. In concluding the discussion, the Chairman made the following statement in regard to the work of the Group:

"In the Initial Phase the Group has been reviewing Articles II:1(b), XII, XIV, XV, XVIII, XVII, XXI, XXIV, XXV:5, XXVI:5(c), XXVIII, XXXV and the Protocol of Provisional Application, with a view to determining issues on which negotiations are appropriate. In view of the large number of issues proposed by participants for review, the considerable number of papers submitted during the course of the Group's work to date, and the differing views expressed, the Group recognises the need for further review of these matters as the negotiating process evolves.

The Group agrees that contracting parties have the right to request the review by the Group in the subsequent negotiating process of GATT Articles, provisions and disciplines which have in the first instance been taken up for consideration by other Negotiating Groups.

Furthermore, it is recognised that contracting parties may request the Group to review additional GATT Articles, provisions and disciplines, although it would be expected that clear reasons would be outlined to the Group indicating why they consider that these should be the subject of negotiations."

Other business

18. The Chairman suggested that the Group hold its next meeting in the week beginning 8 February 1988, subject to confirmation by the GNG at its meeting of 16 December. A participant expressed the view that this matter would have to be taken up in a wider context, bearing in mind the pattern of work for 1988. He also expressed the hope that meeting times set in 1988 would cover both formal and informal meetings.