MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG7/W/47
28 June 1988
Special Distribution

Group of Negotiations on Goods (GATT)

Original: English

Negotiating Group on GATT Articles

COMMUNICATION FROM NEW ZEALAND ON ARTICLE II.1(B)

The following communication, dated 27 June 1988, has been received from the delegation of New Zealand with the request that it be circulated to members of the Group.

GATT SECRETARIAT
UR-88-0298

NEW ZEALAND SUBMISSION ON ARTICLE II.1(b)

27 JUNE 1988

Introduction

In MTN GNG/NG7/W/3 the delegation of New Zealand drew attention to some implications of the current operation of Article II.1(b). We had initially suggested that the problems which related to lack of transparency and consequent scope for lack of security to concessions could be addressed by redefining the phrase "ordinary customs duties".

We outline below, for consideration by the negotiating group, a possible approach to the issues concerned, but which could resolve any problems by means of a practical understanding rather than a potentially complex definitional approach. We would also draw attention of delegations to the very helpful background document supplied by the Secretariat (MTN.GNG/NG7/W/12/Rev.1).

Background

When a binding is first taken on either as part of an accession negotiation or for the first time in a GATT negotiation (most notably in a multilateral trade negotiating round), the rate of "ordinary customs duty" bound in a contracting party's Schedule is not an absolute ceiling for all duties and charges that discriminate against imports.

As Article II.1(b) is presently drafted, any other duty or charge on imports (apart from those specifically exempted in Article II.2) may be maintained, even if this means the totality of charges and duties on imports is higher than the bound level (provided that the level of those other duties or charges is not higher than that prevailing on the date of the concession).

In practical terms this means that the rate appearing in a schedule is not necessarily a reliable guide to the limitation in the GATT on the totality of duties and other charges that may be levied on imports in the case of a concession. The level of "other duties and charges" that is permissible is that which prevailed on the effective date of the concession. Column 6 in looseleaf schedules gives a guide to that date. But what that actual figure of level might be in any given case can only be determined by further, often complex, research. This situation in respect of these "other duties and charges" contrasts sharply with the transparency and certainty of the commitment in relation to ordinary customs duties. Given

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the importance of certainty of GATT commitments, this state of affairs seems, at the very least, to be anomalous. It could also be considered that it leaves open scope for uncertainty (particularly over time) as to whether past commitments are being maintained. It could also leave the way open for potential incentive to fragmentation of instruments for levying charges on imports, in as much as a normal duty rate mechanism is strictly controlled in GATT schedules, but the GATT monitoring of other duties and charges is far less effective.

But does this significant different of treatment of categories of import duties and charges that are the subject of concessions amount to much?

At the time of the drafting of the General Agreement, it was probably not envisaged that such an allowance would amount to anything significant. Perhaps that perception reflected the fact that the measures that were then potentially relevant to this provision were relatively minor in nature, eg primage duty, shipping duty, etc. But, since that time, there has been a proliferation of "other duties and charges" which constitute very significant levels of charges on imports. (One need only refer to the analytical index to obtain an indication of this). Indeed, in some cases, they are at levels as high, or higher than "ordinary customs duties". For instance, many contracting parties have had, and do have, recourse to such classes of measures as "import surcharges", "revenue duties", "special import taxes", "economic development taxes", and import/security deposits to name just a few.

This in itself suggests a need to rationalise procedures for handling this situation. Such a need has become evident in light of the fact that there have been variable practices in how to handle the situation. In one case of a renegotiation of a schedule, the contracting party concerned has specifically listed in its schedule the classes of other duties and charges applying to imports. In one case of accession, the Working Party on accession passed a judgement on the status of the duties and charges in question. In another case of accession, the acceding contracting party made a specific reservation in respect of certain "other duties and charges" on bound items. In yet another case of accession, a very precise undertaking has been made in the schedule concerned in respect of "other duties and charges". By contrast, in many other cases no reference whatsoever has been made to these measures, yet they have undoubtedly existed. Moreover, in this Round, there is a prospect that more bindings will be undertaken, but they will be undertaken in an environment where

significant "other duties and charges" exist. This will mean, inevitably, that the managerial problem of dealing with them in relation to undertakings on bindings will become important. There is every reason to expect that in a comprehensive multilateral negotiation this situation would become much more complex if it were not addressed directly.

Proposal

Against this background, we consider that the present situation is both anomalous and in need of procedural rationalisation. Accordingly, we would suggest an essentially administrative change to the way in which GATT tariff concessions are negotiated and expressed. To put it briefly, we think we should ensure that, for all future bindings, there is a single harmonised concession rate figure that is applicable in what presently appears in the looseleaf schedules as the column 3 commitment.

This would be a comprehensive concession commitment, and it would relate to what are described as "ordinary customs duties" as well as what are referred to as "all duties or charges of any kind imposed on or in connection with importation" (other than those excepted in Article II.2). This would ensure that there was a single visible reference point for all concessions rather than the present situation where one aspect of a commitment is visible but the other is not. For purposes of clarity we provide in the annex a draft which expresses the essential point. It is intended to illustrate the approach and is not meant to be a precise proposed legal text.

Implications

What would this mean in legal and practical terms?

There would be no changes to the existing rights of contracting parties. A contracting party would retain the right to conduct whatever structure of charges on imports, domestically, that it deems appropriate within the terms of the other relevant provisions of the General Agreement. But in terms of expressing the GATT commitment on the concession, there would be a single record of that undertaking. This means that there would be simply an alteration to the manner in which those rights would be exercised.

Thus any contracting party or acceding country would, in expressing the binding commitment it was prepared to undertake, ensure that that commitment was at a level sufficient to cover the sum of its ordinary customs duty applicable as well as whatever other duties and charges are applicable. In this way, any contracting party which

applied, domestically, eg a special import tax and a normal tariff rate would remain as free to do so as before. In the case of a binding in the GATT it would simply have to ensure that the bound rate it had agreed upon and had recorded in its schedule would provide enough leeway for it to levy the sum of the charges involved in the S.I.T. and the normal tariff rate.

We consider that this would mean enhanced transparency and security for both the actual conduct of negotiations on bindings and the subsequent monitoring of adherence to them.

As to the former, there would be what is, in our view, a desirable reversal of onus of responsibility. Under current practice, it tends to become the task of the contracting parties, other than that which is taking on, or otherwise committed itself to a binding, to discover what the relevant "other duties and charges" are in relation to that binding. By contrast, the approach suggested above would mean that any contracting party contemplating assumption of a binding would, in the conduct of negotiations, bring explicitly before other contracting parties concerned, all relevant import duties and charges for that item. Furthermore, in practical terms, it may in fact encourage, although it would not oblige, contracting parties to unify, domestically, all duties and other charges on imports into a single rate. Of course, as indicated above, contracting parties would retain the right to maintain them as distinct entities, but we suspect that by making the operation more transparent, the logic of having a single import duty rate would become more compelling. Be that as it may, this approach would, in the conduct of multilateral negotiations, also offer the advantage of making assessment on incidence of application of proposed bindings more precise and transparent.

As to the latter point, it would mean that schedules become a much more effective means of monitoring adherence to past commitments. As indicated above, all that schedules currently indicate (in column 6) is the date on which a particular binding was undertaken. In order to assess whether the obligation in respect of "other charges" as of the binding date has been respected, it is necessary to undertake further (often extremely complicated) research to determine what those charges actually were. If the new approach suggested was adopted this would become unnecessary for new bindings. The schedule would simply record the single relevant rate. At any particular point in time the sume of all applicable duties and charges could never exceed that rate specified in the schedule: in terms of monitoring and managing GATT commitments, we consider that this more transparent method of working is desirable.

/Annex

ANNEX

"Illustrative" Text of "Understanding"

In order to ensure greater simplicity to, and transparency of, the conduct and outcome of tariff negotiations, it would be understood that GATT commitments within the terms of Article II.1(b) would be expressed in the schedules of concessions of contracting parties in a single rate to be called, for working purposes, the "true concession rate". This rate would comprehend all ordinary customs duties, and all other duties or charges of any kind imposed on or in connection with importation within the terms of Article II.1(b) and would constitute, accordingly, the reference figure by means of which GATT concessions undertaken are expressed and monitored.