

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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

ARTICLE XXIV OF THE GENERAL AGREEMENT

Note by the Secretariat

Addendum

As requested by the Negotiating Group on GATT Articles at its meeting of 25-27 May 1988, the secretariat has updated its previous note on Article XXIV in relation to a number of specific points that were raised at that meeting.

1. Practice of countries unilaterally withdrawing an entire tariff schedule upon the formation of a customs union and subsequently renegotiating it (MTN.GNG/NG7/7, paragraph 18): Article XXIV:6 of the GATT provides that in cases where, in the context of the formation of a customs union, a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. Article XXVIII in its paragraph 1 in turn stipulates that a contracting party may, by negotiation and agreement with the "contracting parties primarily concerned" (i.e. countries having an initial negotiating right or a principal supplying interest) and subject to consultation with substantial suppliers, modify or withdraw a concession. According to paragraph 3 of the same Article, the contracting party proposing to modify or withdraw the concession shall be free to do so even if agreement in the negotiations with the contracting parties primarily concerned cannot be reached. It is thus clear from these provisions that a modification or withdrawal of a tariff concession by a contracting party is only possible after negotiations or consultations as outlined above have been conducted. In other words, the contracting party in question is in the first instance required to seek agreement, essentially on compensatory adjustments with respect to other products, before it may proceed to modify or withdraw the concession. As Article XXIV:6 makes a direct reference to the procedures of Article XXVIII, it would therefore appear that a unilateral modification or withdrawal by a contracting party of a tariff concession (or its entire GATT tariff schedule), without having carried out the necessary negotiations or consultations and in the absence of a waiver to suspend the application of Article II, is not in conformity with the GATT.

2. Notion of "reverse compensation" in case of a reduced tariff incidence after the formation of a customs union (NG7/7, paragraph 18): the question is whether a customs union has a right to obtain compensation from other contracting parties where such contracting parties benefit from import liberalization measures taken by members of the customs union upon its formation. Article XXIV:6 in its second sentence addresses only the opposite situation in which the customs union has to provide compensation (in the sense of Article XXVIII:2) for the increase in bound tariffs by one or several of its members upon the formation of the customs union. In this case, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the customs union. The situation where the general incidence of the duties (and other regulations of commerce) in the newly-formed customs union has decreased and the latter claims a "credit" in terms of the general incidence, is nowhere addressed in the General Agreement. While the customs union has the right to ask other contracting parties which have benefited from the decrease in the duties of the customs union for individual products to grant "reverse compensation", there is no indication in the GATT or the decisions of the CONTRACTING PARTIES that an obligation exists for other contracting parties to grant such compensation.

3. Exclusion of Article XIX from the exceptions granted in Article XXIV:8 (NG7/7, paragraph 19): the original text containing a definition of a customs union, which corresponds to the present Article XXIV:8 can be found in Article 33 of the United States Draft Charter (1946), which reads: "... a union of customs territories for customs purposes shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce as between the territories of members of the union are substantially eliminated and the same tariffs and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union." During the first session of the Preparatory Committee in London (October-November 1946), only a minor amendment was made by adding the word "substantially" before the words "the same tariffs". Another minor change was introduced at the drafting session held at Lake Success, New York (January-February 1947). The relevant part of the so-called "Geneva Draft", i.e. Article 42:4 therefore reads: "...a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that all tariffs and other restrictive regulations of commerce are substantially eliminated and substantially the same tariffs and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union."

It is only in Article 44:4 of the Havana Charter (April 1948) that the exceptions which constituent territories can maintain in relation to duties and other restrictive regulations of commerce are mentioned for the first time, as follows: "... a customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of

commerce (except, where necessary, those permitted under Section B of Chapter IV and under Article 45) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories ...". Section B of Chapter IV of the Charter contains provisions relating to quantitative restrictions and related exchange matters, which corresponds to the present GATT Articles XI, XII, XIII, XIV and XV; Article 45 of the Charter corresponds to the present Article XX. There is no indication in the drafting history or the records of the secretariat why a provision corresponding to the present Article XIX was not included in the list of exceptions in Article 44:4 of the Final Act, or indeed in the present Article XXIV:8.

Differing views have been expressed by contracting parties on whether the fact that Article XIX is not mentioned among the exceptions in Article XXIV:8 should be interpreted to mean that a member of a customs union or free-trade area is entitled to exempt from the application of safeguard measures under Article XIX imports from other members of the customs union or free-trade area. This question came up in the working parties examining the agreements between the European Communities, on the one hand, and Austria, Iceland, Portugal, Sweden and Switzerland, on the other (BISD 20S/ pages 156, 169, 181, 194, 207, respectively). The EC called attention to the omission of Article XIX from those provisions mentioned in Article XXIV:8 and held the view that they were free to exempt members of a free-trade area from possible restrictions imposed under Article XIX. Other members of the working parties could not accept this explanation and maintained that the invocation of Article XXIV did not mean that other provisions of the General Agreement should cease to apply; they could not agree that the invocation of Article XXIV permitted the discriminatory application of Article XIX. A particular case involving the issue arose in 1973 when the Council discussed the action by the European Communities under Article XIX on magnetophones. On that occasion, one contracting party noted that the measures did not apply to the associated countries and the other members of the Community, while Article XIX required global application. The EC replied that this was in accordance with Article XXIV (C/M/86). The matter was subsequently discussed in the 29th Session of the CONTRACTING PARTIES, where the representative of the EC stated that while Article XIX measures should apply erga omnes, they need not apply to countries which had an agreement with the Community in accordance with Article XXIV (SR 29/1). There have been other cases of Article XIX invocations in which the application of the measures were limited to third countries (see, e.g., the cases listed under item numbers 15 and 79 in Annex III of MTN.GNG/NG9/W/7). The matter has never been resolved by the CONTRACTING PARTIES. It cannot be assumed that the failure to include Article XIX in the list of exceptions contained in Article XXIV:8 was an oversight on the part of the drafters of the General Agreement, but rather that this was a deliberate omission.

4. Previous interpretations of the term "general incidence of the duties and other regulations of commerce" in Article XXIV:5(a) (NG7/7, paragraph 20): the question of "general incidence" was discussed in detail

in the Committee (Sub-Group A) which examined the provisions of the Rome Treaty relating to the establishment of a common tariff and the elimination of import and export duties among the members of the EEC (of Six). In its report, adopted on 29 November 1957 (BISD 6S/70), it is stated that in considering the basis on which a judgement could best be made with regard to the common tariff in the light of the provisions of Article XXIV:5(a), most members of the Sub-Group felt that an automatic application of a formula could not be accepted and agreed that the matter should be approached by examining individual commodities on a country-by-country basis. These members drew attention to the drafting history of the provision in question, according to which the term "general incidence of duties" was used with the intention "that this phrase should not require a mathematical average of customs duties but should permit greater flexibility so that the volume of trade may be taken into account". The member States of the EEC, on the other hand, held the view that the common tariff had to be judged in its entirety. They saw therefore no advantage in a product-by-product study which could only lead to a confirmation that the duties of the external tariff were on the whole of a general incidence not higher than the incidence of the rates which they had replaced. The EEC member States could also not accept a country-by-country study. No agreement on these issues could be reached in the Committee.

The Working Party on Accessions to the European Communities (accession of Denmark, Ireland and the United Kingdom) had long and detailed discussions on the methodology of assessing the general incidence. In this context, the EC reiterated its view that the examination under Article XXIV:5(a) was a global exercise and that it was neither a question of examining the effects of the enlargement in individual sectors nor of looking at it on a country-by-country basis. This position was taken in response to the views held by other delegations that it would be justified to take into account in the examination of the Accession Treaty the effects of the enlargement on particular products and countries. The EC instead submitted a formal methodology proposal according to which growth rates of imports of agricultural products (where the main problems had appeared) into the EC of Six and the three acceding countries over a past representative period would be compared; on the basis of this comparison it would be possible to make a real appraisal of the effect on import trends of the agricultural policies followed by the EC of Six and the acceding countries and to arrive at some valid conclusions. For other products, the EC proposed the calculation of the average tariff rates in the EC of Six and the acceding countries before and after enlargement, for which a number of different methods could be used. Other members of the Working Party did not accept the EC proposal relating to agricultural products (analysis of development of trade) and pointed out that trade was affected by many factors other than the incidence of duties and other regulations of commerce applied at the border. Some of these supported a proposal under which a calculation of the overall change in the weight of tariffs and variable levies was needed; protection should be specified in terms of ad valorem equivalents of tariffs and all other regulations of

commerce. In his (oral) report to the Council (C/M/107, page 3), the Chairman of the Working Party stated that in view of the favourable developments with regard to the Article XXIV:6 negotiations and after consultations with delegations, he had come to the conclusion that there was no need for the Working Party to hold another meeting or formally to adopt a report. He proposed that his statement, together with the notes by the chairman on the nine meetings that had been held, be considered the final record of the activities of the Working Party. As his personal view, he expressed disappointment that the Working Party had not been able to agree on the ways and means to assess the general incidence of the duties and regulations of commerce before and after the formation of the EC of Nine. It had not been possible even to agree on the methodology for conducting such research and analysis. Such a state of affairs, if left unchecked, could reduce the effectiveness of further Article XXIV:5 examinations in the GATT. He felt that the vagueness and ambiguity of the provisions of Article XXIV were one contributory factor to this deadlock. At the appropriate time, therefore, the provisions of Article XXIV should be reviewed.

In the Working Party on Accession of Greece to the European Communities, whose report was adopted on 9 March 1983 (BISD 30S/168), the question of the general incidence of duties before and after Greece's accession was again discussed in some detail. In reply to requests made by several members of the Working Party for more detailed data and information on individual products, the EC took the position that Article XXIV:5 required only a generalized, overall judgement. This provision referred to the "general incidence", i.e. the incidence of the trade régime of the enlarged EC on all of their partners; particular implications for a contracting party with respect to individual products and countries should be taken up under Article XXIV:6. The EC also maintained that there was a high probability that when all factual data was provided, a precise evaluation of the incidence of certain of the measures other delegations had referred to, including quantitative restrictions, would prove impossible. For variable levies, the EC did not deem it appropriate to attempt to quantify them because a number of world market factors as well as internal EC prices were playing a rôle; it had been found impossible technically to make such calculations in a way which assisted a balanced analysis. Therefore, in view of the EC, any assessment of the general incidence of all the duties and other regulations of commerce in force for the purpose of describing the situation before and after the accession encountered insuperable difficulties. In the event, the Working Party could not agree on a methodology for the assessment to be made under Article XXIV:5.

Similar arguments were used in the recent Working Party on the Accession of Portugal and Spain to the European Communities, with the EC advocating a general examination of changes in the incidence by taking into consideration the total trade of the EC of Twelve, and other delegations repeating that the exercise under Article XXIV:5 could not be conducted

without looking at the specific effects of the enlargement on individual contracting parties. In this context it is interesting to note that one member of the Working Party submitted analyses according to which the global incidence of the duties of the EC of Twelve would be higher after enlargement than before, basing its calculation on what it considered the commonly used GATT approach of measuring changes in duties collected by multiplying the trade coverage for a tariff item by the change in duty for that item and assuming that the tariff rates of the EC of Ten would be extended to the EC of Twelve; for variable levies, the ad valorem equivalents at the time they had gone into effect in Portugal and Spain had been used for products subject to levies. This approach was rejected by the EC. The Working Party has not yet submitted its report to the GATT Council.

Apart from the issues mentioned in some detail in the preceding paragraphs, other problems which have arisen in the context of considering the concept of "general incidence" at various occasions include:

- whether any calculation should be based on the bound rates or whether the applicable or actually applied rates in the constituent territories should be used;
- whether the arithmetical or the trade-weighted averages of the duties of the constituent territories should form the basis for the calculation;
- whether quantitative import restrictions (imposed for reason of protection of the domestic industries or for balance-of-payments reasons) and variable levies come within the scope of the term "other regulations of commerce".

All these issues have to a large extent remained unresolved.

5. Updating of Chapter II.5 of document NG7/W/13 relating to Article XXIV:12 (NG7/7, paragraph 22): the following paragraph should be added to the text:

28. In another recent dispute settlement case, the Panel drew two conclusions: firstly, it concluded that the federal state in question would have to demonstrate to the CONTRACTING PARTIES that it had taken all reasonable measures available to it and that it would then be for the CONTRACTING PARTIES to decide whether that federal state had met its obligations under Article XXIV:12. Secondly, it concluded that the measures taken by the government of the federal state in this particular case were clearly not all the reasonable measures as might be available to it to ensure observance of the provisions of the General Agreement by the local authorities, and that therefore the government of the federal state had not yet complied with the provisions of Article XXIV:12. The Panel was of the view,

however, that in the circumstances the government of the federal state in this case should be given a reasonable period of time to take such measures to bring the practices of the local authorities into line with the relevant provisions of the General Agreement. The Panel did not elaborate on the additional questions mentioned in paragraph 27 above, including the question of compensation pending the withdrawal of the provincial trade measures.