

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED
MTN.GNG/NG7/9
28 October 1988
Special Distribution

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

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 20 and 23 September 1988

1. The Negotiating Group on GATT Articles held its ninth meeting on 20 and 23 September 1988 under the Chairmanship of Mr. John M. Weekes (Canada). The Chairman referred to his letter of 2 September sent to all participants, which indicated the manner in which he proposed to organise the business of the meeting. The Group adopted the agenda set out in GATT/AIR/2648.
2. The Chairman informed the Group that five new documents had appeared since the last meeting. The first, NG7/W/40/Rev.1, added Hong Kong and Tanzania to the list of contracting parties which had acceded to GATT under Article XXVI:5(c). The second, NG7/W/49, contained the statement made by the EEC at the last meeting of the Group on the Balance-of-Payments Articles. The third, NG7/W/13/Add.1, was an addendum to the earlier secretariat note on Article XXIV. The fourth, NG7/W/45/Add.1, showed the countries holding Initial Negotiating Rights for the products which were the subject of the negotiations under Article XXVIII dealt with in the original secretariat note. The fifth, NG7/W/50, was a communication from Chile dealing with several of the Articles that had been discussed in the Group.

Agenda Item A: Consideration of issues arising from the examination of specific Articles

Article XXVIII

3. In introducing this Article for discussion, the Chairman drew attention to his informal note dated 30 June 1988 setting out the issues raised in relation to Article XXVIII.
4. The representative of Australia presented a statement to the Group which explained the case for changing the basis of allocation of suppliers' rights under Article XXVIII in the manner proposed by his delegation. The objective of amending Article XXVIII would be to secure existing rights in tariff concessions and relative permanency in newly negotiated concessions, and to maintain a better balance in the general level of reciprocal concessions. The rights of countries trading on an MFN basis, whether as principal suppliers or substantial suppliers, had been eroded by the proliferation of preferential agreements under Article XXIV and the practice of including preferential trade when calculating trade shares for

the purpose of identifying principal and substantial suppliers. Similarly, the right of substantial suppliers to retaliate, by withdrawing substantially equivalent concessions initially negotiated with the applicant country, had been eroded by the practice of formula-based tariff negotiations, in which it is not possible to identify initial negotiators. The Australian proposal to base negotiating rights on a direct exchange of concessions would make them less dependent on fluctuations in trade shares. It would thus make it unnecessary to confront the issue whether trade shares should be calculated on the basis of MFN trade alone or of total trade (including preferential trade). It would also create greater transparency and a more stable balance of concessions.

5. The view was expressed that the current distribution of negotiating rights reflected not only relative trade shares but also the imbalance in the distribution of tariff reductions and bindings undertaken by countries. The redistribution of negotiating rights in favour of smaller suppliers, as proposed by a number of participants, would aggravate this imbalance if no account were to be taken of relative levels of tariffs bindings. Several participants said that the proposals could make the Article more cumbersome to use and suggested that the secretariat study in NG7/W/45 showed that no significant change in the distribution of negotiating rights would occur as a result of implementing some of the suggested proposals for change. Given the practical difficulties of implementing some of the proposals, including the unavailability of data and the difficulty of establishing a concordance between import and export data, consideration must be given to their potential effects on the efficient operation of Article XXVIII.

6. One participant observed that the lack of balance in the distribution of bindings largely resulted from factors which restricted the trade of developing countries. These included the MFA and the lack of appropriate levels of bindings in their export markets in respect of trade in primary products. His delegation's proposal calling for a general recognition of the exceptional circumstances contained in the interpretative note to paragraph 1 of Article XXVIII was subject to certain technical difficulties, but these could be resolved in the future with the help of the Integrated Data Base and he therefore urged continuing analysis of the proposal. Another participant suggested that the erosion of suppliers' rights could be addressed by excluding preferential trade, but not trade under GSP schemes, from the calculation of trade shares.

7. Another participant argued that the main issue was the question how the rights implied in tariff bindings could be enforced by small and medium suppliers in the face of the erosion of their compensatory and retaliatory powers. An example of this erosion was that negotiating rights were often held by preferential suppliers, such as fellow members of a customs union, and were therefore not exercised, with the result that no negotiations took place and MFN suppliers were denied the opportunity to participate. There was increasing resort to the practice of tariff rate capping, whereby an existing binding was limited to a certain quantum of trade and the compensatory liability was subject to a corresponding limitation. It was ironic that whereas Article XI guaranteed a measure of security of future access because of the right to a proportionality between imports and

domestic production, Article XXVIII did not because the compensatory liability was determined on the basis of past trade. The proposals covered in the secretariat's paper could remedy the inability of smaller suppliers to acquire negotiating rights in negotiations based on import shares and at the same time offer incentives for countries with low levels of bindings to offer concessions. The study did not bear out the contention that the changes proposed would necessarily work to the disfavour of countries with a high level of bindings.

8. Referring to the importance of recent technical innovation in creating new products, a participant said that it was necessary to deal with problems created by the pre-emptive raising of tariffs on such products, since this had not been foreseen in the General Agreement. However, with regard to the determination of rights to compensation in such cases, another speaker suggested that some of the criteria which had been proposed, such as investment levels and estimates of future production, were highly subjective and would be difficult to apply. It would also be difficult to implement the proposal that negotiations on compensation should take place three years after the invocation of Article XXVIII. Some other delegations questioned these arguments.

9. A participant asked the secretariat to clarify the following questions relating to its paper illustrating the effects of some of the criteria which had been suggested for the attribution of negotiating rights: on what basis was the choice of product lines made? why were products for which small countries had principal or substantial supplying interest not chosen? was contractual preferential trade included in the determination of trade share? were there any difficulties in preparing the paper apart from those noted in document W/32?

10. With regard to the inclusion of preferential trade in the trade share calculations, a member of the secretariat said that this issue had appeared before the Working Parties on the enlargement of the European Community and in various Article XXVIII negotiations but had never been brought to a dispute settlement panel. In the paper, contractual preferential trade had been included in the trade share calculations, in keeping with existing practice. In regard to the selection of cases analysed, the secretariat had been asked to consider the most recent instances of Article XXVIII negotiations, and all recent cases involved major trading nations. If required, the secretariat could have analysed cases in which smaller trading nations were involved but these would have dated back to the 1950s or 1960s.

11. With regard to the progress of work on this Article a delegation proposed that the Group should agree that the issues listed in the Chairman's informal paper were the appropriate ones for negotiation. Some others suggested that further consideration would be necessary, especially in the light of the information provided by the secretariat, before it could be decided that this was a complete list of issues for negotiation.

Article II:1(b)

12. The representative of New Zealand made a statement on this subject, indicating that it was intended to provide further information in response to the questions posed by participants at the previous meeting regarding the proposal made by New Zealand. The original proposal dealt mainly with new bindings but it could also be applied to existing bindings. With respect to new bindings, the proposed commitment to combine all duties and charges in a single rate would change neither the legality of "other duties and charges" permitted under this Article nor the right to challenge their legality. In practical terms there would be an improvement as the obligation to record them in schedules would make it easier to establish whether a GATT-inconsistent charge existed. It would also make clear the total charges on imports and the obligations of contracting parties, thus increasing transparency, since there was at present no obligation to notify the magnitude of "other duties and charges". Possible technical difficulties in expressing the sum of all other duties and charges as one figure would, however, need to be examined.

13. With regard to negotiations on existing bindings, the base rates for such negotiations would remain the normal duty rate as in the past. A country which used "other duties and charges" would be able to record these separately in the schedules with a reference to the relevant date, instead of unifying them in a single rate. In addition to knowing whether or not a claimed rate of "other duties and charges" was in excess of that which existed at the date of the binding, contracting parties would also be able to check and challenge the legality of "other duties and charges".

14. A preliminary examination had indicated that "other duties and charges" had been used by twelve contracting parties since the Tokyo Round, and in at least four instances specific arrangements had to be made to deal with them. This rather extensive use of such charges suggested that it would be necessary to consider them in the negotiation of any new bindings. The representative of New Zealand undertook to consider circulating his statement as a document.

15. Several participants welcomed the proposal as contributing to greater transparency and clarity. However, the question was raised whether it would be appropriate to unify customs duties and "other duties and charges" since the legal obligations of contracting parties with respect to each were different. There might also be a risk that failure to specify particular charges would effectively exempt them from the disciplines agreed upon. It was also suggested that if the objective was to reduce or eliminate the "other duties and charges", it might be preferable to seek an agreement to reduce and bind these charges separately instead of unifying them with the normal duty for the purpose of bindings. The question was raised whether variable levies fell under the category of ordinary customs duties or "other duties and charges". Doubts were expressed on the appropriateness of applying the proposal to new bindings alone; further clarification was sought on the effects of the proposal on new as opposed to existing bindings. It was also asked if the proposed unification had any implications for compensation obligations in the event that concessions

were withdrawn or unbound. Some participants wondered if the background information collected by New Zealand in identifying "other duties and charges" could be made available to the Group. The suggestion was made that the secretariat provide a list of such "other duties and charges". In reply the Chairman observed that so few instances of such charges had been notified that it was unclear whether such a list would serve a useful purpose.

Articles XII, XIV, XV, and XVIII

16. Introducing a statement on the Balance-of-Payments Provisions, the representative of the United States indicated that it was not his country's intention to seek the elimination of access to reasonable policy tools for responding to a balance-of-payments crisis. Recognising that the BOP provisions should serve only as a limited departure from some GATT principles, the authors of Articles XII and XVIII and the 1979 Declaration had provided that restrictions should be temporary until alternative corrective measures could take effect, should not protect industries from foreign competition and should preferably take the form of tariff measures. But the application of the balance-of-payments provisions had not, in practice, been consistent with these principles and they had been used as an open-ended trade restricting device. The effect was to weaken the process of trade liberalisation through multilateral negotiations and impair confidence in the world trading system. In the last twenty-three years, only four out of nineteen countries invoking Article XVIII:B had eliminated BOP restrictions, with one country later reimposing them. This suggested that long term use was the rule rather than the exception; eighty-five per cent of the quantitative restrictions notified to GATT were maintained under Article XVIII:B and on average, two-thirds of the BOP restrictions restricted trade in items of export interest to developing countries. Other restrictions were imposed for BOP reasons but not notified to the GATT. He recognised that quantitative restrictions arose in many other areas such as safeguards, waivers and grey area measures and his country was participating actively in negotiations addressing the problems in those areas.

17. Continuing, the participant observed that lax disciplines in the BOP area created problems not only for the trading system but also for the countries invoking these provisions. Development experience had shown that countries using such restrictions grew slower, adjusted slower to BOP problems and had less equitable income distributions than outward-oriented economies. Protection resulted in uncompetitive import-competing sectors and reduced resource flows to export sectors. The current GATT system did not provide the means to assist in the dismantling of import restrictions. In the light of these circumstances, more effective GATT disciplines should be devised to encourage effective adjustment to BOP problems and to remove quantitative restrictions while at the same time preserving a country's right to use trade restrictions as a last resort.

18. Some participants welcomed the statement which in their view provided useful information and demonstrated the damage to the international trading system resulting from BOP restrictions. A participant said that in addressing the BOP Articles it must be recognised that the ability of countries to use effectively exchange rate and other internal measures varied according to their level of development and integration into the world trading system. However, it should also be recognised that provisions existed elsewhere in GATT for the protection of domestic industry or for safeguard purposes. The view was put forward that the statement did not address the concerns raised by some delegations in earlier discussions and failed to reflect the substantive differences between Articles XII and XVIII. Further, while the BOP provisions were a derogation from Article XI they did not allow departures from the GATT principles of non-discrimination, transparency and predictability. There were strict procedures to notify, consult and comply with the basic GATT rules which did not exist for other measures. It had not been demonstrated that the trade regimes of the countries invoking the BOP provisions had violated any of these principles. The point was also made that because BOP problems did not originate in the trade area, solutions to them could not be found within GATT.

19. One participant pointed out that there existed a number of derogations and departures from GATT obligations such as the US agriculture waiver, the reservation of sectors in protocols of accession, the MFA and grey area measures. These created disadvantages for developing countries which would be exacerbated, particularly for those with heavy debt burdens, in the absence of Article XVIII. However, some participants argued that the existence of these exemptions, which were being addressed elsewhere in the negotiations, could not be advanced as a reason for not addressing the BOP Articles. It was hoped that there would be specific analysis of the experience of the use of the BOP provisions in the light of the information provided by the secretariat, which in some instances might not be complete.

Communication from Chile

20. Introducing a communication (MTN.GNG/NG7/W/50), the representative of Chile said that in its concentration on specific Articles the Group had tended to ignore the globality of the General Agreement. Most of the Articles discussed had concerned exceptions from basic GATT principles. These exceptions had however tended to become the rule and had undermined the multilateral trading system. The use of particular exceptions by contracting parties varied depending on the rights and obligations associated with each as well as the set of "alternatives" open when deciding to apply exceptional measures. For these reasons a comprehensive approach, viewing many of these exceptions simultaneously, was required. For example focusing on Article XVIII alone would create an imbalance because given free trade, including the removal of restrictions like those under the MFA, developing countries could increase their exports and improve their BOP situation. Several GATT Articles were critically in need of re-examination. For example, Article XXIV required an examination which would include the clarification of certain terms such as "duties and other regulations of commerce" and "substantially all the trade" in paragraph 8, "a plan and schedule" and "within a reasonable length of time" in

paragraph 5(c), and of exceptions not explicitly referred to in paragraph 8. The Protocol of Provisional Application needed to be reviewed so that all legislation inconsistent with the General Agreement could be eliminated. Article XXV:5 required amendment in order to establish time-periods and review mechanisms to end existing waivers as well as to define what constituted the exceptional circumstances which could justify the granting of a waiver. With respect to Article XXXV, the proposal seeking to broaden the right of non-application of the General Agreement contained in the Article would allow countries with greater bargaining power to discriminate against and bring pressure to bear on others and would not contribute to a non-discriminatory multilateral trading system.

21. Several participants welcomed the stress laid in the submission on the need for a global approach to the examination of the GATT Articles. Piecemeal reform could reduce the General Agreement to a system of loopholes. One participant stated that the framework of globality would have to include the special treatment of developing countries. The view was also put forward that the problem was not that the GATT had atrophied or become out of date but that the commitment to abide by its rules and disciplines had weakened. The task before the Group was to clarify matters of interpretation and appropriate application with a view to strengthening the commitment to GATT rather than to modify it to suit the tastes of different contracting parties. Some participants, while sympathising with the thrust of the Chilean proposal, pointed out that in practice it was not possible to discuss all Articles simultaneously and that questions of overall balance could also be addressed at the end of the negotiations.

Article XXIV

22. Discussion on this Article was based on the secretariat's note (MTN.GNG/NG7/W/13/Add.1) concerning a number of specific points raised at an earlier meeting. One participant argued that since the formation of a customs union was a unilateral act taken without prior consent it was unreasonable that the rights of third parties in relation to tariff bindings be adversely affected. He therefore argued that the practice of countries unilaterally withdrawing an entire tariff schedule upon the formation of a customs union and subsequently renegotiating it was not in conformity with the GATT. This needed to be explicitly stated, for example, in the interpretative note Ad. Article XXIV. This issue was also relevant to current discussions in the Committee on Tariff Concessions as well as to consideration of the proposal made by New Zealand on Article II.1(b). Another participant put forward the view that when a customs union was being enlarged whole tariff schedules had to be modified as a matter of necessity. How to do this in a manner consistent with Article XXVIII was a complicated question requiring very careful consideration.

23. Divergent views were expressed on the issue of "reverse compensation" referred to in paragraph 2 of the secretariat's document. The point was made that Article XXVIII negotiations aimed at a balance which would be disturbed without reverse compensation. However, it was also argued that paragraph 5 of Article XXIV imposed only the obligation that third parties should not be worse off after the formation of a customs union: any benefits accruing to them as an incidental effect of the unilateral decision to set up a customs union could not therefore be used to establish an obligation on their part to provide reverse compensation.

24. As regards the exclusion of Article XIX from the exceptions granted in Article XXIV:8 a member argued that the starting point had to be Article XIX, which provided for emergency actions in cases of sharp increases in imports without specifying the provenance of such imports. The view that the exclusion must reflect the deliberate intent of the drafters of the General Agreement was unacceptable as it would imply that one member of a customs union could take an Article XIX action against non-members even in cases where the sharp increase in imports was caused by other members of the customs union. However, another participant said that Article XIX was complicated and in the context of a customs union a safeguard action could not be applied internally in the same manner as externally.

25. One participant questioned the usefulness of modifying Article XXIV given that so many such agreements had already been concluded. He suggested that the Group should consider the relevance of Article XXIV:7(c) to important prospective changes in customs unions and free trade areas.

26. It was suggested by a participant that the secretariat's note went unusually far in the direction of passing judgement on sensitive issues which were subject to negotiation; in such cases care should be taken not to influence the negotiating process. Others considered that the document had been useful in throwing light on important issues. A member of the secretariat said that the document had been intended to clarify a number of difficult questions but did not purport to establish legal interpretations - and indeed was by definition incapable of doing so.

Agenda Item B: Other Business

27. The Chairman recalled the request made by the Group to all contracting parties to identify any legislation and measures maintained by them under the Protocol of Provisional Application or under accession protocols. He proposed that the Group should agree to extend the date for the provision of such information from 1 October to 1 March in order to allow sufficient time for contracting parties to undertake the necessary research. It was so agreed.

28. The Chairman recalled the request made to the secretariat at an earlier meeting, to prepare a study of the trade creation and trade diversion effects of regional agreements under Article XXIV. The secretariat had found that the technical complexity of this question and the quality of the information available made it impossible to produce an adequate study. It was agreed to request the secretariat to produce a brief review of the existing literature on this subject. The question of possible statistical analysis would be discussed further.

Date of the Next Meeting

29. The Chairman confirmed the dates of 31 October and 1 November for the next meeting of the Group.