

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)

Negotiating Group on Non-Tariff Measures

FEES, DUES AND OTHER IMPORT CHARGES

Background Note by the Secretariat

Introduction

1. At its meeting of 21 October 1988, the Negotiating Group requested the secretariat to prepare a background note on fees, dues and other import charges, similar to the ones it had prepared on preshipment inspection and rules of origin (MTN.GNG/NG2/9, paragraph 11).
2. This note provides some background information on these charges, relevant provisions of the General Agreement, and past discussion in the GATT on the subject. Full details of charges in force are not presently available in the GATT. Some national customs tariffs contain information on charges levied on imports in addition to customs duties. Some information on measures maintained by a number of countries is contained in the Inventory of Non-Tariff Measures (Industrial Products) and the proposals made by a number of participants in the Negotiating Group, which have been sorted by the secretariat using the classification of the Inventory (MTN.GNG/NG2/W/19/Rev.1). UNCTAD has published a "Handbook of trade control measures of developing countries, 1987" which includes information on additional fiscal charges, service charges and internal taxes. It also maintains a Data Base.
3. The present paper is organized under three broad headings:
 - (a) Duties or charges (other than charges for services rendered) which are levied on imports but not on domestic products: Whatever the name by which they are known, these taxes or charges are equivalent to customs duties, and are treated together with customs duties in the General Agreement. Problems may arise when the rate at which such taxes are levied exceeds that of bound duties;
 - (b) Charges for services rendered imposed in connection with imports: Examples of such charges are port taxes, port improvement taxes, warehousing taxes, sanitary and

phytosanitary taxes, customs user fees, statistical taxes, etc. Problems may arise if these charges exceed the approximate cost of services rendered or if they are levied in a discriminatory manner;

- (c) Internal taxes as they relate to imported products: At importation, products are often subject to charges equivalent to internal taxes already levied on like domestic products. Such charges, and rebates of indirect taxes made on the export side, are referred to as border tax adjustments. Discussions in the past have centred on whether or not tax adjustments are trade-neutral and on whether or not domestic taxes afford protection to domestic production or reduce consumption of particular products.

4. This note does not deal with ordinary customs duties, variable levies, anti-dumping or countervailing duties.

Relevant provisions of the General Agreement

- (a) Duties or charges (other than charges for services rendered) levied on imports but not on domestic products

5. The basic GATT principles which relate to such duties or charges are that they should be levied in a non-discriminatory manner and that they should not exceed bound duties. These principles are contained in Articles I and II. Article I lays down the most-favoured-nation clause, namely that "with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation ... and with respect to the method of levying such duties or charges, ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". Article II contains the principle that duties bound in contracting parties' Schedules of concessions shall not be exceeded, except if required by mandatory legislation in effect when the country in question acceded to the GATT or in very clearly determined circumstances. In particular, paragraph 1(b) states that "the products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date".

(b) Charges for services rendered

6. The basic principles relating to charges for services rendered, are that they should not exceed the approximate cost of services rendered and that they should be levied in a non-discriminatory way. The first of these principles is contained in Article VIII. Paragraph 1(a) requires that "all fees and charges ... imposed by contracting parties on or in connection with importation ... shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports ...". In sub-paragraph 1(b), the CONTRACTING PARTIES recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a). Paragraph 2 requires contracting parties to review, upon request, the operation of their laws and regulations in the light of the Article. The principle contained in Article VIII:1(a) is also reflected in Article II:2(c) which enables contracting parties to impose at importation "fees or other charges commensurate with the cost of services rendered". Article I:1 requires that such taxes or charges be levied without discrimination between contracting parties.

(c) Internal taxes as they relate to imports

7. In Article III, paragraph 1, "the CONTRACTING PARTIES recognize that internal taxes and other internal charges ... should not be applied to imported or domestic products so as to afford protection to domestic production". Paragraph 2 of the Article goes on to give effect to this recognition by requiring that "the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products". Article II:2(a) authorizes contracting parties to levy on imports "a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part". It may also be noted that the note ad Article XVI contains the corollary to this principle in that it lays down that the exemption of exports from duties or taxes borne by the like product when destined for domestic production, or the remission of such duties, shall not be considered as an export subsidy. The General Agreement therefore permits border tax adjustments both on the importing and the exporting side. The most-favoured-nation rule contained in Article I:1 also relates to all matters covered by paragraph 2 of Article III. In paragraph 1(c) of Article XXXVII, contained in Part IV of the General Agreement, developed contracting parties commit themselves to the fullest extent possible, to refrain from imposing new fiscal measures which would hamper significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

They also commit themselves in similar terms to accord high priority to the reduction or elimination of fiscal measures affecting such products.

(d) Provisions of general application to fees and charges on imports

8. In addition to the above-mentioned provisions—which apply to each of the three types of taxes or other charges on imports referred to above, one may cite Article X:1 which requires that "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... rates of duty, taxes or other charges, ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Paragraph 2 states that "no measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports ... shall be enforced before such measure has been officially published". Paragraph 3 goes on to require the establishment of independent review procedures for administrative action relating to customs matters.

Past discussion in the GATT

(a) Duties or charges (other than charges for services rendered) levied on imports but not on domestic products

9. As indicated above, Articles I and II require that such duties or charges be levied in a non-discriminatory way and that they should not be levied in excess of bound duties. The discussion which has been conducted in the GATT on this subject has therefore generally aimed at determining whether particular taxes or charges were consistent with the above requirements.

10. Most recently, the question of duties and charges levied in excess of bound duties has come up in the Uruguay Round Negotiating Group on GATT Articles, where a proposal has been made with the intention of giving transparency to "other duties or charges" mentioned in Article II:1(b). In particular, this proposal envisages that commitments undertaken in tariff negotiations would relate to a single concession rate, and would combine ordinary customs duties and "other duties and charges" (MTN.GNG/NG7/W/47 and Add.1). A background paper by the secretariat on Article II:1(b) can be found in MTN.GNG/NG7/W/12/Rev.1.

11. In several decisions taken in the early years of the GATT, the CONTRACTING PARTIES have ruled that contracting parties were not entitled under the General Agreement to levy import charges in excess of bound rates even "as a temporary and transitional device designed to facilitate

the removal of quantitative restrictions on imports". But waivers were sometimes granted to cover the levying of such surcharges as an emergency measure designed to overcome a threat to monetary reserves (BISD, 3S/27, 7S/37, 11S/58, etc.). Later, such surcharges were referred to the Balance-of-Payments Committee. The formalities of a waiver were dispensed with but the surcharges became subject to consultation (L/4200).

12. During one such consultation, it became clear that surcharges imposed for balance-of-payments reasons should be administered in a non-discriminatory way. The Committee on Balance-of-Payments Restrictions took note that the treatment of imports depended on whether or not they were carried in vessels flying the flag of the country imposing the surcharge. Many contracting parties found it unjustified and economically unsound to draw a distinction between ships of national and foreign registration for purposes of applying this measure. The country imposing the surcharge later assured the Committee that no discrimination existed any longer in the administration of the surcharge between goods carried in vessels flying a foreign flag and those flying its own flag (BISD, 19S/130).

13. Another country maintaining an import surcharge for balance-of-payments reasons, exempted goods imported from members of the Group of 77, as of the date when its GSP scheme was introduced. Several contracting parties welcomed this decision, but others expressed concern that the exemption did not extend to all developing countries and still others said that the discrimination created by these exemptions gave their delegations cause for concern (BISD, 19S/120).

14. The Declaration on Trade Measures taken for Balance-of-Payments Purposes which was adopted at the end of the Tokyo Round clarified the procedures applicable to surcharges while not explicitly mentioning them. It states that "in applying restrictive import measures, contracting parties ... shall give preference to the measure which has the least disruptive effect on trade". The Declaration provides that contracting parties shall abide by the disciplines provided for in the GATT but also recognizes that "developed contracting parties should avoid the imposition of restrictive trade measures for balance-of-payments purposes to the maximum extent possible". The Declaration also calls on developed contracting parties which are compelled to apply restrictive import measures for balance-of-payments purposes to "take into account the export interests of the less-developed contracting parties" and states that "they may exempt from [these] measures products of export interest to those contracting parties". The Declaration provides that all restrictive import measures taken for balance-of-payments purposes shall be subject to notification and consultation in the Balance-of-Payments Committee. The procedural arrangements set out in the Declaration are taken without prejudice to the provisions of the General Agreement (BISD, 26S/205).

15. In a report on the work of the Committee on Balance-of-Payments Restrictions transmitted to the Council on 18 July 1975, it is stated that "the CONTRACTING PARTIES have not decided whether an import deposit scheme in respect of bound items is a "charge ... imposed on or in connection with importation, or more generally, a treatment ... less favourable than that provided for in the appropriate schedules", and therefore contrary to Article II" (L/4200, page 13). Since the submission of this Report, the CONTRACTING PARTIES have adopted a Panel report in which they accepted the argument that "the interest charges and costs in connection with the lodging of the additional security ... were inconsistent with obligations ... under Article II:1(b)" (BISD, 25S/103).

16. The CONTRACTING PARTIES have ruled on a number of occasions that measures of a financial character which impair the value of tariff concessions were contrary to Article II. The first such decision was taken in 1952 in connection with the increase which a contracting party had decided in the currency conversion coefficient which it had bound in its schedule of concessions (BISD, 1S/23). In another decision at their review session of 1955, the CONTRACTING PARTIES adopted the report of the Review Working Party which stated that "the value of tariff concessions would be impaired if contracting parties were free to introduce additional levies on imports in the form of transfer charges" (BISD, 3S/209). However, they did not take up the Working Party's recommendation that the words "charges imposed on the international transfer of payment for imports" be added to Article II:1(b) and (c) so as to remove any possibility of misunderstanding. Apparently, some contracting parties felt that this amendment might have caused confusion in that it might have suggested that the CONTRACTING PARTIES could limit the rights of a contracting party to employ exchange measures consistently with the Articles of Agreement of the International Monetary Fund. The Working Party also expressed its understanding that the expression "charges of any kind" contained in Article II does not include ordinary commercial charges for effecting the international transfer of payments for imports (BISD, 3S/209).

17. The CONTRACTING PARTIES have never taken a decision on how to distinguish between trade controls, which would be covered by GATT obligations and exchange controls which would be covered by IMF rules. The Working Party which examined the relations between the CONTRACTING PARTIES and the IMF prior to the 1955 Review session noted that "in many instances it is difficult or impossible to define clearly whether a government measure is financial or trade in character and frequently it is both" (BISD, 3S/196).

(b) Charges for services rendered

18. Past discussion in the GATT related to charges for services rendered has concentrated on how they should be assessed and what action could be taken to reduce their number and minimize any trade restrictive effect that they might have.

19. At the review session of 1955, the text of Article VIII was modified to make it clear that the expression "fees and charges" does not pertain to import and export duties or to taxes which fall within the purview of Article III. Later, Working Group 5 of the Committee on Trade in Industrial Products, which was created by the CONTRACTING PARTIES in 1967 to explore the opportunities for making progress towards further liberalization of trade, conducted an exploratory examination on, inter alia, administrative and statistical duties. During this examination, concern was expressed with the multiplicity of taxes of various kinds which were applied to imports by many countries. They were considered as an unnecessary hindrance to trade, all the more burdensome because of their complexity. It was agreed that a solution lay in strict application of Articles II and VIII, but a difficulty arose in trying to assess the cost of services rendered. It was therefore suggested, that as a first step, procedures be adopted whereby countries applying such fees would be requested to supply details of revenues from fees of this kind and of expenditure on services rendered each year. Some delegations expressed doubt as to the necessity of such an exercise in view of the fact that, in their opinion, the measures in question did not constitute a major hindrance to world trade. In its report, the Committee recommended that a very few topics be selected for further work directed towards the development of concrete action, and charges on imports were not included among them (L/3496).

20. In their examination of several complaints relating to the proceeds of certain charges levied for services rendered being allocated to other uses, the CONTRACTING PARTIES have ruled that such action constituted a violation of Article VIII:1 (L/238, L/410, L/579, L/720, L/1912, BISD, 18S/89).

21. A recent examination by a Panel of a complaint relating to service charges has led it to conduct an extensive discussion of the provisions contained in Articles II and VIII (L/6264). This Panel, whose report has been adopted by the CONTRACTING PARTIES, found that, given the central importance assigned by the General Agreement to protecting the commercial value of tariff bindings, the exceptions contained in Article II:2(c), required strict interpretation because they could disadvantage imports vis-à-vis domestic products.

22. The same Panel interpreted Article VIII:1(a) as permitting the levying of charges at the border, other than tariffs and charges which serve to equalize internal taxes, if they satisfy the following three criteria:

- (a) the charge must be "limited in amount to the approximate cost of services rendered";
- (b) it must not "represent an indirect protection to domestic products;
- (c) it must not "represent ... a taxation of imports ... for fiscal purposes".

23. The Panel also considered that Articles II and VIII clearly do not employ the term "services" in the economic sense, because most of the activities performed by governments in connection with the importation process are not desired by the importers who are subject to them and do not add value to the imported goods. The Panel therefore considered that such activities are simply taxes on imports and that the drafters of the General Agreement must have meant the term "services" to include government activities closely enough connected to the process of customs entry as to be called a "service" to the importer in question.

24. On the question of the "costs of services" and whether under Articles II:2(c) and VIII:1(a), service fees charged on individual shipments could exceed the approximate cost of the government activities performed in relation to it, the Panel came to the conclusion that the term "costs of services" in Articles II:2(c) and VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question, and accordingly that, to the extent that it caused fees to be levied in excess of such costs, the ad valorem fee under examination was inconsistent with these provisions. The Panel also noted that a substantial number of the services fees reported in GATT documents appeared to have had excessively high rates, but that for the most part, they had not been challenged either because Article II:1(b) does not prevent governments from continuing to impose charges imposed on the date of the General Agreement or directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date, or because Article VIII is subject to the reservation for existing mandatory legislation in the Protocol of Provisional Application.

25. On the question of whether exemptions from service fees granted to imports from certain countries is inconsistent with the m.f.n. obligation of Article I:1, the Panel was not aware that any answer could be given to the legal claim that preferential exemptions for specific developing countries constituted a breach of Article I:1 and that they were not authorized by the Enabling Clause. However, it did not think it appropriate to make a formal finding on this issue which had not been included in the complaint which it was examining.

(c) Internal taxes as they relate to imports

(i) Border tax adjustments

26. Border tax adjustments are measures which "enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products". A Working Party was established in 1968 to examine the provisions of the General Agreement relevant to border tax adjustments, the practice of contracting parties in relation to such adjustments and the possible effects of these adjustments on international trade (BISD, 18S/97).

27. Some members of the Working Party considered that the present GATT rules, namely those contained in Articles II and III on the import side and Article XVI on the export side, favour countries which rely heavily on indirect taxes and discriminate against countries which rely predominantly on direct taxes. They considered also that the present rules were ambiguous and led to differing tax adjustment practices for similar types of taxes. They further considered that the current GATT provisions and tax practices were not trade neutral. They argued that the present rules, under which indirect taxes are collected in the country of destination and direct taxes in the country of origin, distorted patterns of international trade because the assumptions underlying these rules, that indirect taxes were fully passed on to the consumer and that direct taxes were fully absorbed by the producer, did not correspond to the real situation. Most members of the Working Party noted that the rules of the GATT had been accepted by those countries predominantly relying on direct taxes. They were of the opinion that the present rules were, by and large, trade neutral and represented, in any event, the best approach to the problem. A number of studies were quoted to support each side of this argument. The Working Party recognized that there were serious difficulties in quantifying the possible effects of tax adjustments on international trade, it being difficult to determine what trade figures would have been if tax adjustments had not been made. Beyond this, no firm conclusions were reached on this issue. The Working Party also conducted a discussion on the question of the eligibility of taxes for adjustment under the present rules and concluded that taxes directly levied on products were eligible for tax adjustment. Examples of such taxes included specific excise duties, sales taxes, cascade taxes and the tax on value-added. There was also a convergence of views to the effect that certain taxes that were not directly levied on products were not eligible for tax adjustment. Examples of such taxes included social security taxes and payroll taxes.

28. The Council adopted a recommendation of the Working Party that a notification and consultation procedure for changes in tax adjustment practices be established (BISD 18S/97). Few notifications have been received in response to this recommendation (L/3518 and addenda).

29. The question of fiscal adjustments, at the border or otherwise, was also examined by Working Group 5 of the Committee on Trade in Industrial Products, which took note of the procedure adopted by the Council. The Working Group considered that this went some way in the direction of finding a solution to problems connected with tax adjustments (L/3496).

30. Later, four panels were established to examine complaints relating to the exemption from income tax of profits arising out of transactions abroad. The reports of these panels (BISD 23S/98, 114, 127, 137) were adopted by the Council subject to the understanding reproduced in BISD 28S/114. The main conclusion reached was that the deferral of corporate income tax on profits from export transactions, without attracting the interest for the period involved normally charged in the case of late payment of the tax, was to be considered an export subsidy for the purposes of Article XVI. The CONTRACTING PARTIES also noted that this article did not prohibit the adoption of measures to avoid double taxation of foreign source income (BISD, 28S/114).

(ii) Domestic Taxation which affords protection to domestic production

31. There have been a number of complaints about domestic taxation of large cars, which had discriminatory effects because the taxable product was defined in such a way as to impose on such cars a higher tax burden than on domestically-produced vehicles and other imported vehicles of comparable value. This discrimination has sometimes been justified by the ability-to-pay principle or for some other fiscal or practical reason. Similar complaints have also been made with respect to differences in rates of taxation between various alcoholic beverages which afforded protection to domestic products. In the discussion which was held on this subject in Working Group 5 of the Committee on Trade in Industrial Products, a number of delegations considered that the best solution lay in the maintaining countries unilaterally altering their taxation systems to eliminate their discriminatory aspects. Some of these delegations also suggested that an attempt be made to define the term "like domestic product" by way of an interpretative note to Article III, as had already been envisaged in the Working Party on Border Tax Adjustments. However, other delegations expressed the view that little was to be gained from having a code or interpretative note since the problem did not appear to be a general one (L/3496).

32. In a number of complaints examined under the General Agreement, the CONTRACTING PARTIES have ruled that internal taxes on imports applied in excess of those applicable to like domestic products are contrary to Article III (L/6175, L/6216). The CONTRACTING PARTIES have not attempted to develop a definition of the term "like product" and decisions have been made on a case-by-case basis taking into account relevant factors such as end-use, properties, etc. Article III:2 has been interpreted as protecting the competitive relationship between imports and domestic production and therefore as requiring a broad rather than a narrow definition of the term "like product". The requirements of Article III have been considered to apply irrespective of whether tariff commitments have been undertaken in relation to the products concerned (BISD II/182). A number of contracting parties had to undertake in their negotiations for accession to the General Agreement, to eliminate the discriminatory element contained in their domestic taxation (BISD 26S/193, 29S/4, 33S/87).

(iii) Domestic taxation on particular products

33. It has from time to time been argued that high taxes which are levied on certain products which are imported but not produced domestically, reduce consumption of these products and, even if applied in conformity with the provisions of the General Agreement, in particular Article III, restrict imports. Some of the products affected, such as tea and coffee, are important as a source of foreign exchange for developing countries and this resulted in the problem being examined in the GATT. The Panel of Experts which had been requested by the CONTRACTING PARTIES in 1957 to examine trends in international trade and submit suggestions for examination, carried out a study of the question. It noted that under the existing rules internal taxes had not been negotiable in the same way as ordinary customs duties, though tariff negotiations on the customs duties applicable to those products might be devoid of significance if the entire area of "internal" taxes could be legally removed from the bargaining process. (Trends in International Trade. Report by a Panel of Experts, 1958). Soon after the submission of this report the CONTRACTING PARTIES adopted Part IV of the General Agreement and the provisions of Article XXXVII:1(c). In the course of the Tokyo Round, and later, some participants have either eliminated or undertaken not to increase internal taxes applying to some tropical beverages. (MTN.GNG/NG6/W/2/Rev.1).