

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED
MTN.GNG/NG7/11
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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 1 and 2 May 1989

1. The Negotiating Group on GATT Articles held its eleventh meeting on 1 and 2 May 1989 under the Chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2765.
2. One delegation requested confirmation that the wording of the first item of the agenda "Consideration of issues arising from the examination of Specific Articles" did not mean that the Group had already decided which Articles or issues were appropriate for negotiations. The Chairman replied that this was the formulation used in all previous meetings, and that the Group was following the directions given by Ministers in Montreal: "define the issues for negotiation with precision and clarity. Any specific proposals should be brought forward as soon as possible, and preferably not later than 31 December 1989" (MTN.TNC/11, page 15).
3. The Chairman informed the Group that documents NG7/W/41/Rev.1 and NG7/W/30/Corr.3 had appeared since the last meeting. The first contained a revised checklist of documents circulated so far, and the second an up-dated list of Contracting Parties between which Article XXXV presently operated.

Agenda item A: Consideration of issues arising from the examination of Specific Articles

Article XVII

4. The Chairman mentioned that since the Group last had a substantive discussion of Article XVII as long ago as June 1988 it was perhaps necessary to recall some of the main issues which had emerged in the discussions so far. There were four broad issues needing consideration:

(i) How far did the actual provisions of Article XVII need clarification? There seemed to be uncertainty both about what constituted a State Trading Enterprise (STE) and about the types of activity which should be notified. However, the main problem of interpretation was probably the relationship between the national treatment obligation and the activities of STEs.

(ii) Did the disciplines regarding notifications need clarification or strengthening, or was the problem here mainly a matter of inadequate surveillance and follow-up? Should there be provision for a follow-up mechanism, since it may well be that its absence explained the desultory and partial observance of the notification requirement? Or was it enough to rely on the right of contracting parties under paragraph 4 to take up matters adversely affecting their interests, and eventually to pursue them through dispute settlement?

(iii) Did anything need to be done to strengthen the framework for negotiations under paragraph 3 of the Article? The explanatory note on this paragraph indicated the nature of the negotiations which might be envisaged, and the Committee on Industrial Products had made some additional points in its report of 1971 (L/3496). Furthermore, no institutional framework was provided for negotiations under Article XVII, the presumption being that they would take place in the context of negotiations on tariffs, non-tariff barriers, etc. according to the type of concessions envisaged.

(iv) What, if any, was the possible relationship between Countertrade and Government Procurement, and Article XVII, as well as between certain activities of STEs and the provisions concerning subsidies in Article XVI.

5. The Chairman mentioned that the paper circulated by the secretariat on 21 December (NG7/W/15/Add.1) responded to requests made by delegations for further information on a number of issues concerning the drafting history of Article XVII, the relationship between Article III and STEs, and earlier work on the subject of notifications.

6. In discussion participants put forward additional comments on the following issues: the applicability of the national treatment obligation to STEs, the scope of Article XVII and the meaning of certain key concepts contained in it, the question of transparency and non-compliance with notification requirements, and the relationship between Article XVII and a number of other subjects.

7. On the question of the applicability of Article III to the enterprises falling into Article XVII one participant pointed out that the secretariat paper did not suggest that national treatment was not applicable to STEs and that it was the intention of her delegation to elaborate further on this matter. In the opinion of another participant the secretariat paper usefully recalled that, on one hand, the drafting history suggested that the notion of non-discrimination in Article XVII:1 did not include national treatment, and on the other, that a panel report had supported the argument that Article III:4 was applicable to STEs at least when the monopoly of importation and of distribution were combined. In her opinion the application of national treatment in such circumstances needed to be given serious consideration particularly through the examination of concrete cases. Review of this and other Articles should be based upon previous deliberations and the relevant drafting history. For other delegations

consideration of the drafting history of a particular provision was only the initial step; it must be complemented by other considerations such as whether the provisions were adequate in relation to present needs.

8. Referring to the scope of Article XVII, one delegation said that there was a parallelism between the strength and extent of obligations applying to private enterprises and to state-trading enterprises; the provisions in this Article should not be considered as a lex-specialis which derogated from other provisions of the General Agreement but rather as additional obligations on those countries which had STEs. Other delegations stressed that Article XVII applied to any enterprises which had received special or exclusive privileges, which should act having due regard to the other provisions of the General Agreement and make transactions on the basis of commercial considerations. It was also stated that the term commercial considerations needed clarification and that STEs should not have more obligations than private enterprises.

9. In the same vein, the question was raised as to the nature of the obligations of countries maintaining a complete or substantially complete monopoly of trade; the secretariat's paper contained examples of contracting parties falling into this category which had chosen to notify, and of others which had chosen not to do so. The first requirement was therefore to reach an understanding of which enterprises fell under Article XVII, as well as of the obligations applying to them. In the opinion of another delegation the references in the secretariat paper to the provisions in the draft Charter dealing with countries maintaining a substantially complete or complete monopoly of trade showed that doubts existed in 1947 as to their practicability, and also showed why they had been considered redundant. Furthermore, more than forty years had passed, and in light of the developments which had occurred in that time it was extremely difficult to give precise meaning to the phrase "substantially complete or complete monopoly of trade", which were largely artificial notions; there was no need for the Group to concentrate on a country-wide approach but it should rather focus on specific deficiencies such as those in the area of transparency. Another participant stated that the state monopoly of foreign trade had ceased to exist in his country and that all enterprises now had the statutory right to engage in foreign trade. Regarding the reference in the secretariat's paper to Marketing Boards one participant pointed out that it was significant that the distinction between different kinds of boards had withstood the passage of time, and that this was something to remember in the course of the negotiations.

10. The aspect of non-compliance with the notification requirement was raised by many participants and linked to the lack of clarity in the rules; improving transparency and compliance were impossible without clarity as to the scope of the provisions. The questionnaire currently used as a basis for notifications had been designed in 1957 and needed revision. For some delegations it was clear that the Group should pay special attention to provisions dealing with notifications and transparency, and should provide

a greater role for surveillance. For other delegations it was instructive that the Panel on Notifications of State-Trading Enterprises, when discussing which enterprises were covered by Article XVII, had thought that there was sufficient guidance in the Article itself and in the interpretative notes, and that not only STEs but any enterprises which enjoyed exclusive or special privileges were covered in the notification requirement. Similarly, it had to be borne in mind that the Committee on Trade in Industrial Products had noted that existing rules were adequate and that the problem lay more in the area of implementation. The point was also made that consideration should be given to questions of confidentiality and the administrative burden involved in complying with the notification requirement.

11. As to the relationship between Article XVII and other subjects one participant reiterated that the appropriate forum to discuss Government Procurement was the Negotiating Group on MTN Arrangements and Agreements; similarly, issues related to subsidy matters should be dealt with in the Negotiating Group on Subsidies. Countertrade was not the monopoly of STEs since many private enterprises extensively relied on it to conduct business. There must be general agreement in the Group before this matter could be taken up for review.

Article XXV:5

12. Introducing the discussion, the Chairman said that four main issues had arisen in the course of the Group's consideration of this Article: the establishment of precise criteria defining the "exceptional circumstances" justifying the granting of a waiver; the fixing of time limits for future waivers; the termination of existing open-ended waivers; and the lack of clarity as to the precise status of some existing waivers. For the Group's review of the Article, and especially to provide greater clarity on the status of existing waivers, the secretariat had prepared a document (MTN.GNG/NG7/W/18/Add.1), at the request of the Group, indicating which of the waivers granted since the inception of GATT, identified in an earlier document (MTN.GNG/NG7/W/18), were still effectively in force. The Chairman indicated that a further addendum to the document would be issued to take account of the new waivers granted since 1 July 1988.

13. A number of delegations emphasised the importance attached to improving disciplines relating to this Article. The attempt in the Group should not be to do away with the flexibility provided to the CONTRACTING PARTIES for the granting of waivers but to provide clearer guidelines and mechanisms to effectively prevent the indefinite perpetuation of waivers.

14. A number of delegations identified as the two key issues the establishment of criteria defining the "exceptional circumstances" which would justify the granting of waivers, and the time limits imposed on existing and future waivers. On the first issue it was maintained that since "exceptional circumstances" were by definition unusual and unpredictable, it would be difficult to define criteria for their identification. The CONTRACTING PARTIES would have to determine these on a

case-by-case basis. However, some delegations expressed willingness to consider proposals that were put forward in this regard. A participant said that Article XXV:5 contained only a procedural condition for the granting of waivers and proposed the addition of a substantive condition, for example, the establishment of "necessity", before waivers could be granted; in his view, this would bring greater discipline in the granting of waivers.

15. Several delegations supported the idea of placing strict time limits on future waivers to prevent their undue perpetuation; this would be consistent with the treatment in the Uruguay Round of other derogations of GATT obligations. These limits need not be absolute and could provide for the possibility of extensions; however the imposition of reporting requirements and the institution of review mechanisms would be necessary to ensure that their indefinite perpetuation was prevented. In the view of another delegation the secretariat's document showed that the establishment of time limits was not necessary because individual waivers incorporated, at the time of their granting, provisions for periodic review by the CONTRACTING PARTIES. Another delegation said that the secretariat document highlighted the diverse nature of the waivers granted in GATT and the different circumstances relating to them, and cautioned against standardising conditions relating to the granting of, and time limits imposed on, future waivers. Some participants linked the two issues identified by proposing that the time limit for waivers be related to the end of the "exceptional circumstances" invoked in granting the waiver in the first place. It was suggested that perhaps a special GATT Council could make the determination of the expiry of "exceptional circumstances"; it was also proposed that such a determination aimed at terminating waivers be made on the basis of a voting procedure with a two-thirds majority requirement.

16. On the question of existing waivers a participant said that clearer indications of procedure were required for terminating existing open-ended waivers.

Other Articles

17. A participant raised the question as to the possibility of raising other GATT Articles or provisions for consideration in the Group. In reply the Chairman referred to an earlier statement made by him (MTN.GNG/NG7/5, paragraph 17) recognising that participants could do so provided clear reasons justifying their consideration were outlined.

Agenda Item B: Organisation of the Group's future work

18. Introducing this item, the Chairman drew attention to the diverse and complex nature of the subject matter of the Group's work, its interrelationships with issues in other Groups, and the limited time available for negotiations. It was therefore essential to plan the future work of the Group to avoid work being crammed into the last phase of the

Uruguay Round. On the practical matter of setting up agendas for future meetings, there were two possibilities. The first would be to divide the Articles into two groups and discuss them in a regular sequence. However, a more rational approach would be to set up agendas on the basis of delegations' intentions, indicated well in advance of meetings, to put forward specific submissions and proposals; in other words, agendas would be determined by effective demand and ripeness of subject matter. Such a procedure, by eliminating discussion of Articles for which no requests were forthcoming, would advance work in a time-effective manner and perhaps facilitate the preparation of ad referendum texts on selected Articles in advance of the final busy phase of the Round. To assist in this process he urged delegations to give an indication, to the extent possible, of the substance, timing and form of the proposals that they wished to raise in the future, and indicated his intention to consult with delegations informally with a view to finalising a notional time-frame for future work.

19. Several delegations welcomed the Chairman's proposed approach to the future work of the Group. Some delegations said that in their view the Articles considered in the Group fell into two categories: those on which there was broad agreement that negotiations were appropriate and others on which such agreement did not exist. With respect to the first category discussions on the basis of specific texts would be appropriate, whereas for the latter further discussions, comprising the clarification of objectives, identification of issues with greater precision and clarity and determination of their appropriateness for negotiation, were necessary before specific texts could be considered. In this regard participants referred to the Group's Negotiating Plan and the April TNC decisions which, in their view, called for general agreement in the Group on the appropriateness of negotiating a particular Article before actual negotiations on the basis of specific texts could be undertaken. Some delegations said that in planning future work the requirements of globality, that is, interrelationships between Articles within the Group and with issues in other Groups, had to be borne in mind.

20. Some other delegations questioned whether it was valid, possible or helpful to create these two categories on the basis of the "ripeness" of Articles for negotiation; in fact, on many Articles the objectives, issues and problems had been adequately defined, and discussions had been carried as far as was possible in general terms and it was therefore necessary, at this stage, to give precision as to the ways for resolving the problems identified. Further discussion in the Group had to be based on the tabling of specific proposals or texts which could not depend on the measure of support received for them in the Group; in any event, the submission of specific proposals was not linked to any prior judgement of whether the issues had been clearly identified or determined to be appropriate for discussion. Such an approach was consistent with the TNC Ministerial Decision which did not create a distinction between Articles on the basis of when they could be discussed; the latter was a pragmatic matter relating to the organisation of the Group's work and the Chairman's proposal to fix a notional time-frame for discussing particular Articles would effectively carry forward the work of the Group. It was suggested that the Group set a date of October of this year to complete an exhaustive

consideration of work on Articles II:1(b) and XXVIII. In reply to the Chairman's request for indications of delegations' intentions for the next meeting, a participant said that his delegation intended to make a specific proposal on Article II:1(b); another responded that his delegation would probably submit a proposal on Article XVII.

21. In conclusion the Chairman said that in his view there appeared to be support for the establishment of a time-frame for work on individual Articles; accordingly, he intended to prepare one which could be discussed in the next meeting under this agenda item. To assist in its formulation he urged delegations to contact him or the secretariat by the end of May and provide indications of their views and intentions on this matter.

Agenda Item C: Other Business

Protocol of Provisional Application

22. The Chairman recalled that last September it had been agreed to extend until 1 March 1989 the deadline for replies to the Group's enquiry on legislation and measures maintained under the PPA or under Accession Protocols. The secretariat had received replies from only 12 countries, 10 of which had notified that they had no such legislation. Though the Chair realised that this was a difficult exercise, he wanted to urge delegations to press capitals to respond as quickly as possible.

Date of The Next Meeting

23. The Group agreed to hold its next meeting on 5, 6 and 7 July 1989.