

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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ARTICLE II:1(b) OF THE GENERAL AGREEMENT

Additional Note by the Secretariat

Introduction

1. The Secretariat has been requested to provide a background note, additional to that contained in in NG7/W/12/Rev.1, on the legal and technical implications of the proposal by New Zealand that "other duties and charges" (ODCs) bound under Article II:1(b) should be recorded in tariff schedules, alongside ordinary customs duties. The note which follows considers the following issues:

- (i) Coverage of ODCs for purposes of Article II:1(b)
- (ii) Applicable date
- (iii) Legal implications of inscription of ODCs in tariff schedules
- (iv) Administrative implications

(i) Coverage of ODCs for purposes of Article II:1(b)

2. The secretariat has been asked if it can provide guidance as to which charges fall within the purview of Article II:1(b) as opposed to other provisions of the General Agreement. The relevant provision says that:

"Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation..."

It has been established in the Council decision on the Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions that "such duties or charges are in principle only those that discriminate against imports" (BISD 27S, p.22) - i.e., they do not include charges applied to imports and domestic goods alike.

3. Paragraph 2 of Article II goes on to say that nothing in the Article prevents a contracting party from imposing at any time:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III...
- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;
- (c) fees or other charges commensurate with the cost of services rendered.

This means that all other charges, of whatever kind, other than those falling into the three categories above, which are levied solely on imports or discriminate against them and were in force on the applicable date, are bound at the level then obtaining and should, according to New Zealand's proposal, be inscribed in tariff schedules at that level.

4. The definition of ODCs falling under the purview of Article II:1(b) can only be done by exclusion - i.e. by reference to those categories of ODC not covered by it. It would be impossible, and logically fallacious, to draw up an exhaustive list of ODCs which do fall under the purview of Article II:1(b), since it is always possible for governments to invent new charges. Indeed, an attempt to provide an exhaustive list would create the false impression that charges omitted from it, or newly invented, were exempt from the II:1(b) obligation.

5. The secretariat has no comprehensive source of information on the great variety of charges in existence; however, Part V:B of the Inventory of non-tariff measures contains fifty-nine notifications by contracting parties of non-tariff charges maintained by other countries, and is useful for illustrative purposes. A sample of measures taken from the Inventory is contained in Annex B of New Zealand's submission of 21 June 1989 (NG7/W/47/Add.2). It is not implied that all of these concern ODCs bound under Article II:1(b); many of them are levied on unbound items and some are covered by the exceptions in Article II:2.

(ii) Applicable Date

6. The applicable date is the date as of which Other Duties and Charges are bound. This is currently accepted as being the date of the instrument by which the tariff concession on the item in question was first incorporated into the General Agreement, i.e. the date of the first binding of the item. New Zealand has proposed however that the applicable date should in future be agreed to be the date of the most recent renegotiation of the binding in question. The following paragraphs look at some of the implications of such a change.

7. The text of Article II:1(b) relevant for the purpose of determining the applicable date for bindings of ODCs reads as follows:

"... 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."

8. For those bindings undertaken at the time of the institution of GATT, contracting parties are obliged not to raise the level of applicable ODCs beyond that prevailing at that date. For countries which acceded to the GATT subsequently the applicable date for bindings undertaken at the time of accession is usually specified as the date of accession itself. When new concessions are added or old ones renegotiated under rounds of tariff negotiations the protocols have specified the applicable date for bindings. The Protocol Embodying the Results of the 1960-61 Tariff Conference ("The Dillon Round") specified that the applicable date in respect of each product which was the subject of a concession in that Round would be the date of the protocol, provided the product in question was not already subject to a binding provided for in the same part or section of a schedule to the General Agreement. In other words the date of the Dillon Round Protocol was only the applicable date for concessions negotiated for the first time in that Round: for earlier concessions renegotiated in the Dillon Round the applicable date remained that of their first incorporation into the General Agreement.

9. The Protocols adopted at the end of the Kennedy and Tokyo Rounds provide that:

"In each case in which paragraph 1(b) and (c) of Article II of the General Agreement refers to the date of that Agreement, the applicable date in respect of each product which is the subject of a concession provided for in a schedule of tariff concessions annexed to this Protocol shall be the date of this Protocol, but without prejudice to any obligations in effect on that date."

10. Although the language is somewhat different from that of the Dillon protocol, and the reason for this change is not clear from the negotiating history, the secretariat's understanding is that the substantive obligation with respect to the applicable date remained the same. More specifically, the phrase "but without prejudice to any obligations in effect on that date" can be read as a reaffirmation of the obligation not to exceed previously existing bindings. However, the position is made clear by the decision taken by the GATT Council in 1980 (BISD-27S/24), soon after the conclusion of the Tokyo Round negotiations, on the basis of a proposal by the Director-General, which states that, "It has been agreed that the date as of which ODCs on importation are bound, applicable to any concession in a consolidated schedule should be, for the purposes of Article II, the date of the instrument by which the concession on any particular item was first incorporated into the General Agreement." (Emphasis added)

11. As for those bindings, existing and new, negotiated under Article XXVIII procedures, the same principles apply; the applicable date is the date of the first incorporation into a tariff schedule of a concession on the item in question.

12. The implication of this legal situation for the implementation of New Zealand's proposal is that countries would have to specify for all bound tariff lines the nature and level of any ODCs maintained at the time they were first bound. In the case of items bound for the first time in the Uruguay Round the nature and level of ODCs to be inscribed in schedules would be those in force at the date of the Uruguay Round tariff protocol.

13. It could be said that this would create a considerable disparity in the practical value of the information recorded about ODCs. For new bindings the ODCs inscribed in schedules, and their levels, would be those currently in force, and would therefore provide useful guidance for negotiators and traders. For old bindings, on the other hand, the ODCs in force at the time of the original binding, which would sometimes date back to 1948, might well have been abolished or reduced in the meantime, so that the inscriptions in the schedules, while correctly recording legal obligations, might be very different from the charges currently levied.

14. While the Group would no doubt agree that it would still be desirable that legal obligations should be fully recorded, it may feel that it would be valuable to take the further step of recommending a change in the current understanding as to the applicable date. During the Group's discussions, New Zealand has suggested that for all ODCs the applicable date should be the date of the most recent renegotiation of the binding. This would have the advantage of reducing disparities between currently applied levels of ODCs and the bound levels. It would also be a step in the direction of trade liberalisation, since ODCs, if they had changed at all since the date of the original binding, could only have moved downwards and would therefore become bound at a lower level.

15. If it were felt desirable to achieve the fullest possible transparency and to minimise the technical complexity of the entries to be made in the schedules, the Group might consider that for all bound items, whatever the date of their first incorporation into GATT schedules, the applicable date should become the same. If it were decided that for example the date of the Uruguay Round Protocol should be the applicable date, all ODCs would be bound at the levels in force at the date of the Uruguay Round tariff protocol, provided that these levels were not in themselves illegal - i.e., in breach of an earlier binding. The practical difference between this and New Zealand's proposal is that it would cover all bindings, whether renegotiated in the Round or not, whereas under New Zealand's proposal the applicable date for bindings not affected by the Round would be the date of their last renegotiation.

16. In either form such a change would bring about a great improvement in the transparency and comparability of charges and legal obligations. The improvement would be greater if a uniform date were adopted. However, it should be borne in mind that even ODCs currently in force will be reduced over time, and the Group may think it logical that at each subsequent tariff negotiation the applicable date should be revised, to become that of the latest tariff protocol. Of course, tariff negotiations take place between "rounds", under Article XXVIII and in accession negotiations. It would seem reasonable that, pending the next tariff protocol, for countries acceding to GATT the applicable date should continue to be the date of accession and that for bindings renegotiated under Article XXVIII it should be the date of the new binding.

17. A change in the applicable date would have certain legal and administrative implications, and these are considered below.

(iii) Legal implications of inscription of ODCs in tariff schedules

18. In itself the inscription of ODCs in schedules would have no legal effect. The binding commitment under Article II:1(b) already exists; the inscription of bound levels would simply make existing obligations transparent.

19. Questions have been raised in the Group concerning other legal implications of New Zealand's proposal, both for obligations under Article II and for those relating to other GATT Articles.

20. Taking up the second category of questions, it has been asked in the Group whether the inscription of ODCs in the schedules as called for by the proposal would imply recognition of their legality; or, in other words, would not the possibility of legalising GATT illegal charges be created. A recent panel - US - Restrictions on Imports of Sugar (L/6514) ruling is relevant to this question. The panel concluded "that the restrictions on the importation of certain sugars maintained by the United States under the authority of the Headnote in the Tariff Schedule of the United States are inconsistent with Article XI:1 and cannot be justified under the provisions of Article II:1(b)." The panel argued that the wording of the Article suggests that contracting parties cannot incorporate provisions in their schedules to qualify their obligations under other Articles of the General Agreement. This would indicate that the mere inscription of ODCs in the schedules (even if they are certified) cannot place them beyond legal challenge on grounds of inconsistency with obligations under other Articles of the General Agreement. If a panel were to find a particular charge illegal it could recommend the elimination of the charge and its removal from the schedule. As a further safeguard, New Zealand's latest proposal suggests that any duty or charge claimed would be recorded without prejudice to its legal status.

21. But questions relating to legal status also arise in connection with obligations under Article II itself. It is possible that ODCs might be inscribed in schedules which were not in force at the time of the original binding, or might be recorded at levels higher than the bound level. It would therefore be necessary to provide for the possibility of challenging ODCs which were thought by trading partners to be in breach of the binding,

and for any necessary amendment of the schedule, for example by restoring the correct level of the charge in question. This would be achieved by New Zealand's proposal to leave open the legal status of ODCs recorded in schedules. This would have the result that the legal status of entries in schedules relating to ODCs would be different from that of tariff entries. (At present, when a schedule is certified the information it contains on tariff bindings becomes definitive, impervious to change by the notifying country or to challenge by its trading partners.) The secretariat sees no legal implications, for the status of tariff bindings, in a decision that the status of ODCs should be left open. However, the Group might think it undesirable that the legal status of ODCs should be kept open indefinitely; it might wish to recommend that the right to challenge their consistency with earlier bindings, after their inscription in the schedules, should be limited to three years or some other agreed period. After this period, their consistency with earlier bindings would be regarded as established, though it would still be possible to challenge their consistency with obligations under other GATT provisions.

22. While it is clearly necessary to provide for the possibility of amending schedules where illegal ODCs had been recorded, the Negotiating Group may consider that it would not be desirable for a contracting party which had failed to include a particular ODC in its schedule to have the right at a later stage to restore it. The existence of such a right would considerably diminish the benefits of the proposal in terms of stability and transparency and might also upset the balance of rights and obligations, if exchanges of concessions had taken place on the basis of information later said to be defective. The implication of this line of argument is that it would not be possible to add to schedules ODCs which had not been recorded by the due date. The same principle would apply if a charge had been recorded at a level lower than the bound rate; it would not be possible subsequently to revert to the higher rate.

23. The question has been asked what would be the implications of having some but not all ODCs accorded legal status in the tariff schedules. The distinction between ODCs on bound items and those affecting unbound items would not be changed; only ODCs bound under II:1(b) have any legal status. If some bound ODCs were recorded in schedules and others not - for example because of a decision that items not negotiated in the Uruguay Round would not be subject to the obligation to record ODCs - there would still be no difference in their legal status; all ODCs, whether recorded or not, would still be bound at the levels obtaining on the relevant applicable date.

24. The agreement of a new understanding on the applicable date for the binding of ODCs would have certain legal implications, and this would be so whether the new date were to be that of the most recent renegotiation or that of the Uruguay Round. At present it may be argued that countries which have reduced the level of ODCs from the bound rate, or have eliminated them, retain the right to revert to the bound levels, in the same way that the applied level of a tariff may be restored to the bound level. According to this argumentation, such countries, by agreeing to change the applicable date for ODCs, would be making a concession in foregoing the right to revert to the originally bound levels.

25. It is not clear, however, whether a "right" to revert to the levels of ODCs applying at the time of the original binding, which in many cases would date back as far as 1948, could really be sustained. To construct a hypothetical case, a country which had negotiated a tariff reduction in the Tokyo Round might well claim nullification and impairment of benefits if its negotiating partner subsequently reintroduced a 20% "primage charge" which had been allowed to lapse in 1952. And it is conceivable that a panel might uphold such a claim, if it felt that the "one way street" principle which applies to GATT-inconsistent legislation maintained under the Protocol of Provisional Application could also apply, by extension, to ODCs, in the sense that any progress towards their liberalisation should be irreversible. (It should be emphasised, however, that the legal status of inconsistent legislation maintained under the PPA and ODCs maintained under II:1(b) is quite different; there is no suggestion that ODCs are inconsistent with GATT obligations.)

26. Looked at from another point of view, an agreement that it should not be possible to restore ODCs to former bound levels, where these were higher than currently applied rates, would be beneficial in that it would introduce greater stability of charges and would further the objective of trade liberalisation; it would also create uniformity between obligations on new and existing bindings because the applicable date for both would be the same.

(iv) Administrative Implications

27. The major administrative burden involved in recording bound levels of ODCs would be the research that would be needed, in the case of previously existing bindings, to ascertain what ODCs were in effect, and at what levels, on the applicable date. If it is decided that the applicable date must continue to be that of the first concession this research is unavoidable. It would also be necessary, following the introduction of the Harmonised System of tariff nomenclature, to establish a concordance with the earlier nomenclature (to ensure that ODCs applied to "old" tariff headings are correctly attributed under the new system).

28. In the Group's discussions it has been suggested that in order to minimise the administrative burden the obligation to record ODCs might be limited, in the first instance, to bindings negotiated for the first time, or renegotiated, in the Uruguay Round. Other participants felt that all bindings should be covered, not merely those affected by the Uruguay Round, to ensure full transparency and parity of obligations. It would be for the Group to decide whether these advantages would justify the extra effort involved in covering all bindings.

29. From the point of view of administration there would be advantages in adopting New Zealand's proposal regarding the applicable date, and these would be greater if a uniform date were agreed for all bindings, as discussed in paragraph 15 above. The most important of these advantages would be as follows:

(i) Because the applicable date for all bindings would be that of the most recent negotiation, (or of the Uruguay Round Protocol, if the more comprehensive approach were chosen) it might be possible to avoid a good deal of the historical research which would be required if ODCs were to be entered at their originally bound levels. This would presumably be welcome, since the difficulty which contracting parties appear to have experienced in fulfilling the agreement to indicate the date of first concessions in column 6 of the loose-leaf schedules suggests that to provide information about ODCs in existence on that date might be a difficult task. However, this change in itself would not wholly obviate the need to undertake research into the past because it would be necessary to ensure that ODCs as recorded in schedules were not in excess of the originally bound rate. The Negotiating Group would need to consider whether it would be possible to proceed on the assumption that ODCs were correctly entered, but reserving the right to challenge them in case of doubt, as suggested in paragraph 20 above.

(ii) Because of the changeover to the Harmonised System, as pointed out above, it would be necessary to establish a tariff concordance if the date of original binding continued to be the applicable date. In view of the many different systems of tariff nomenclature which have been used since the inception of GATT, this could be a very complex matter. This problem would be less severe if the date of the most recent renegotiation were taken as the applicable date, but some concordance would still be needed because there would be cases where the most recent renegotiation predated the Harmonised System. If the applicable date for all bindings were agreed to be that of the Uruguay Round protocol, or some other date after the introduction of the Harmonised System, the problem of tariff concordance would not arise.

(iii) As suggested in paragraph 13, the change proposed would increase the value of the information provided about ODCs. If it were decided to change the applicable date and update the information at each subsequent renegotiation, the bound charges would normally correspond closely to those actually in force. This would be of assistance both in negotiations on tariffs and in monitoring commitments. The bound levels would be those actually applied at the time of the most recent negotiations.

Summary

30. The following are the main questions needing consideration by the Negotiating Group:-

- (a) Does it agree that ODCs should be recorded in tariff schedules?
- (b) If so, should the obligation to record them extend, as New Zealand has proposed, only to tariff items subject to negotiation in the Uruguay Round?
- (c) Should the applicable date continue to be that of the original binding, or alternatively:-
 - the date of its most recent renegotiation;
 - or a uniform date to be agreed, such as that of the Uruguay Round protocol, which would apply to all bindings, whether affected by the Uruguay Round or not?
- (d) If ODCs are to be recorded in schedules, should their consistency with previous bindings be open to challenge:-
 - indefinitely;
 - or for an agreed period such as three years after which consistency with previous bindings would be established?