

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED
MTN.GNG/NG7/13
16 November 1989
Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 16, 17 and 18 October 1989

1. The Negotiating Group on GATT Articles held its thirteenth meeting on 16, 17 and 18 October 1989 under the Chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2848.
2. The Chairman informed the Group that two documents had been circulated by the secretariat since the last meeting: the first, NG7/W/30/Corr.5, contained an up-dated list of Contracting Parties between which Article XXXV presently applied; the second, NG7/W/54, contained a brief review of economic literature on the trade effects of Article XXIV-type regional agreements.
3. The Chairman recalled that in accordance with the decision taken at the last meeting regarding the programme of work, the Group should continue with the intensive discussions on Article II:1(b) that were initiated in July, and launch a period of intensive work on Articles XVII and XXVIII. Time would be provided during the meeting for both formal and informal discussions.

Agenda item A: Consideration of Issues arising from the Examination of Specific Articles

Article II:1(b)

4. The Chairman recalled that earlier discussions on this Article had focussed on three main issues arising from the proposal that other duties and charges, in addition to the ordinary customs duty, should henceforth be recorded in tariff schedules. These were:
 - coverage of ODCs - that is whether it was necessary and possible to define other duties and charges, given that no explicit definition appeared in Article II;
 - determination of the applicable date as of when ODCs are bound: there had been discussion at the last meeting as to whether the applicable date was that of the most recent renegotiation of the tariff item in question or that of the instrument by which the tariff concession was first incorporated into the General Agreement;

- identification of the likely effects of recording ODCs in schedules of concessions: questions arising here included the benefit to transparency and security of tariff bindings; the administrative task that would be entailed; and the legal implications of the proposal, including the possibility of challenging the consistency of recorded ODCs with previous GATT bindings and with other GATT obligations.

At the last meeting the Group had felt that additional research was needed and to this effect it had requested the secretariat to prepare an additional note shedding further light on these issues. The note had now been circulated as MTN.GNG/NG7/W/53, dated 2 October 1989. It suggested in its final paragraph the main issues which should be considered if the Group were to decide to act on New Zealand's proposal that ODCs should be recorded. New Zealand had also suggested that the value of such a change would be maximised if it were adopted early enough to be taken into account in negotiations in the Tariffs Group, and this would imply that a decision should be taken in December. In this light the Chairman invited participants to express their views not only on the questions appearing on page 9 of the note by the secretariat, but also on the additional question of timing of implementation of the proposal.

5. The greater part of the discussion of the proposal took place in informal session. In formal discussion a participant said that the secretariat note had demonstrated that there were no major problems, practical or legal, in implementing the proposal. It also made clear that legal rights and obligations would not be affected. In this respect, a useful distinction had been drawn between the level and the legal character of an ODC. It might be appropriate, as the note suggested, that the right to challenge the consistency of an ODC as recorded with the bound level should be subject to a time-limit such as three years, though it should certainly be no longer than this. The consistency of an ODC with other GATT obligations, however, should remain open to challenge indefinitely. On the question of the applicable date, his delegation was still not convinced that the date of first binding must be regarded as the applicable date, given the language of the Kennedy and Tokyo Round tariff protocols, but the mere fact that such uncertainty existed demonstrated the value of clarifying the position in this Round. Moreover, since it would clearly be difficult for many countries to establish the level of charges applying at the time of tariff bindings undertaken many years ago, there was a strong case for agreeing on a uniform and recent applicable date, such as the date of the Uruguay Round tariff protocol. His delegation would be prepared to accept that all ODCs, not merely those on tariff items subject to negotiation in the Round, should be recorded.

6. The representative of India, in a statement which has been circulated in MTN.GNG/NG7/W/56, said that the proposal to record ODCs, while it would not affect substantive legal obligations, would improve transparency and should be supported on this ground. It would be necessary to ensure that the additional administrative burden involved would be commensurate with

the practical value of the new arrangement and that the technical complexity of entries in schedules was minimised. Taking these points into consideration, India could agree that the date of the Uruguay Round protocol should be the applicable date, that all "other duties and charges" should be bound at the levels in force on that date (provided that these levels are not themselves in breach of earlier bindings) and that for a period of three years thereafter it should be possible to challenge recorded ODCs on the basis of their consistency with earlier bindings.

7. Some delegations said that the practical value of the recording of ODCs, and thus their own view of the proposal, would be directly related to the number of tariff bindings undertaken by contracting parties in the Round. In this respect the proposal was closely linked with the negotiations on tariffs and it was to be hoped that it would facilitate, not hinder, progress in these negotiations. One delegation, supporting the proposal in principle, pointed out that certain additional charges were already recorded in its schedule, and that in respect of these the same procedures would be followed in future. Another delegation suggested that it should be possible for ODCs to be recorded in annexes to schedules, as was already the case for his country.

8. Another delegation, while firmly supporting the objective of transparency, suggested that the proposal would change the effects, if not the nature, of rights and obligations. In general his country did not levy discriminatory ODCs in the industrial sector and in agriculture the great majority of ODCs in existence affected unbound items. They therefore had no defensive interest in the matter. But they feared that to notify tariffs and ODCs on the same basis would blur the distinction between them - a point also made by another delegation - and change the legal perception, if not the content, of ODCs. In his own country this might have important practical consequences since the legal basis of tariffs was quite different from that of ODCs. Any new obligation undertaken by his country must be shown to be fulfilled to the letter; it would be very difficult for the great majority of contracting parties - or at least those which had bound a large part of their tariff - to prove that current levels of ODCs were not in excess of bound levels. In order to maintain the balance of rights and obligations, therefore, it would be necessary to define very clearly the conditions on which any agreement on this subject would be based. Other participants responded that the recording of ODCs would have no effect on legal rights and obligations other than to render them transparent.

9. Some participants asked if it would be possible to decide that the applicable date of ODCs should in future be the date of the Uruguay Round protocol, for example, without changing the text of Article II:1(b), which referred to the "date of this Agreement". Would it be possible, as had been suggested, for a new understanding or agreement on this question to take the form of a decision by the CONTRACTING PARTIES? Secondly, it was asked whether the suggestion that the right to challenge the consistency of ODCs with earlier bound levels should lapse after three years would have the effect of limiting the rights of contracting parties under Articles XXII and XXIII. The secretariat was requested to provide the Group with legal advice on both questions.

10. Recalling the extensive discussions held informally on Article II:1(b), the Chairman said that the first informal session had brought to light a considerable degree of support for the objectives of the proposal, and a degree of convergence on the questions set out in the final paragraph of the secretariat note. The secretariat had accordingly been asked to prepare a first draft of a decision, which had been considered in a second informal session and had been generally regarded as a useful basis for further intensive work. The draft, dated 18 October, indicated alternative approaches on the questions of the applicable date, the ODCs to be recorded and the right to challenge their validity. The Chairman expressed the hope that the Group would be in a position to take a decision on this proposal at its December meeting.

11. The representative of the United States introduced under Article II a proposal that contracting parties should be permitted to levy a uniform import fee for trade adjustment purposes (NG7/W/57). The fee or charge, which would not exceed 0.15 percent and would be applied on all imports, would be used for the sole purpose of funding programmes which directly assisted adjustment to import competition and which were consistent with GATT principles and obligations. The trade adjustment funds would be made available to all sectors of the economy, and in the majority would be directed to workers adversely affected by increased imports - for example through worker training, job search services, and reallocation allowances. Some assistance to firms and industries might however be provided if given on a GATT consistent-basis; eligible firms and assistance programmes could be discussed in the Subsidies Group. Explaining the reasons for the proposal, it was pointed out that almost every country, developed and developing alike, had to adjust to international competition. Programmes to ease adjustment would reduce pressures for protective measures and would help create public support for GATT negotiations to liberalise trade; in its effects the proposal was thus trade liberalising. A minimal adjustment fee would allow all parties collectively to pay for the maintenance of a free trade system through short-term support for those adversely affected by trade liberalisation; those who gained from trade would pay a small fee for a portion of their benefits. Finally, beneficiaries of the programmes would not have to worry about the maintenance of assistance funds since the fee would be independent of the budgetary process.

12. Commenting upon the proposal one delegation expressed surprise and concern at an initiative which by allowing the levying of an import fee, albeit small, would run counter to the Uruguay Round objective of trade liberalisation. Another participant, while finding the proposal imaginative and interesting, said he saw no economic justification for it, since if all contracting parties levied such a fee none would derive any net benefit. Furthermore, the adjustment needs of developing countries, and their needs for additional employment and research and development, were such as to justify a higher fee in their case; by what criteria could any generally appropriate level be determined? It was understandable that trade adjustment efforts deserved attention but it was not clear that the fee proposed constituted the best approach.

Article XVII

13. The Chairman informed the Group that two new submissions had been circulated since the last meeting: a communication from the EEC, NG7/W/52, dated 18 August 1989, and a proposal by the United States, NG7/W/55, dated 13 October 1989. In earlier discussions attention had been focussed on two categories of issues:

- In the first category, which had probably attracted the more attention, it was possible to put together two questions, one on the clarification of provisions and the other, on notifications. With regard to the provisions of Article XVII, was there agreement that they needed to be clarified and if so, in what respects? There seemed to be uncertainty about the definition of a state trading enterprise, about the meaning in this context of concepts such as non-discrimination and commercial considerations, and about the relationship between the national treatment obligation and the activities of STEs. With regard to notifications, the question arose whether the disciplines regarding notifications also needed clarification, or was the problem here mainly a matter of inadequate surveillance and follow-up? Should there be provision for a follow-up mechanism permitting examination of notifications, since only a handful of countries complied with the notification requirement, or was it enough to rely on the right of contracting parties under paragraphs 4(b) and 4(c) to take up matters adversely affecting their interests, and eventually to pursue them through dispute settlement?
- The second category of issues related to the possibility of conducting negotiations to reduce obstacles to trade generated by the operation of STEs, as envisaged in paragraph 3 of Article XVII. Were contracting parties pursuing negotiations under this Article? Was there a need to provide an institutional framework for this kind of negotiation, or should they take place in the context of negotiations on tariffs, non-tariff barriers, etc. Similarly, was there scope for examining the relationship between, on the one hand, countertrade and government procurement, and on the other, between certain activities of STEs and the provisions concerning subsidies in Article XVI.

14. Introducing the Community's proposal, the representative of the EEC explained that it did not imply a radical reform or modification of the Article but aimed at making it work more effectively and transparently for all contracting parties whatever their stage of economic development or socio-economic structure. The definition of state trading enterprises should be taken up a later stage in the light of the experience gained from the procedure of notifications and counter-notifications suggested in the proposal. Counter-notifications, which were familiar in GATT, were an important element of the proposal, and it was clear that they must be made responsibly, in respect of genuinely significant trade interests. The review or re-examination by each contracting party of its own policy towards notifications would also be an essential element of the process.

As to the questionnaire on state trading, on which considerable work had been carried out in the past, the negotiations presented an opportunity to revitalise it and to improve the quality of the information submitted. The review of notifications and counter-notifications, which was an essential component of the process, would not necessarily involve frequent meetings or the creation of permanent machinery.

15. Introducing the United States proposal the representative of the United States said that it contained two parts, the first dealing with GATT disciplines over state trading practices, and the second with improving transparency of these practices. Regarding the former, the idea was to clarify how Article XVII obligations related to other GATT disciplines. From the point of view of his delegation it was clear that the Article was not intended to create an exemption from other GATT obligations but was a complementary discipline intended to ensure that state trading enterprises complied with them. The proposal therefore suggested that the Contracting Parties explicitly agree that the following provisions applied to state trading: the national treatment obligation of Article III; Article XI's prohibition of quantitative restrictions; and the subsidy disciplines in Articles VI and XVI. The same approach should apply to all types of marketing boards. As regards problems in the area of fulfilment of the notification obligation, the proposal suggested that the Contracting Parties establish a Working Party to convene no later than 31 December 1991 and which would: develop an illustrative list of practices associated with state trading, thereby clarifying definitions; review the existing questionnaire and make the necessary revisions; and conduct periodic comprehensive reviews of notifications while providing a forum for discussion and clarification of state trading issues and problems. His delegation firmly believed that these steps would greatly enhance transparency, provide clearer guidance as to obligations, and assess the importance of state trading in the national and international fields.

16. Commenting on the points raised in the proposals one delegation noted that the clarification of the rules deserved the full support of the Group for it was obvious that in the absence of clearer rules it would be very difficult to come to terms with problems in the area of notifications; his authorities had often been confronted with uncertainty as to what to notify, and it was necessary to have a collective understanding on these matters. His delegation was prepared to support the initiative suggesting reliance on counter-notifications and providing for review sessions where notifications could be examined. Regarding the suggestion to establish a working party by December 1991, he presumed that the clarification of provisions would be completed before that time; another delegation indicated a preference for the establishment of a Committee rather than a Working Party since the former would give a more permanent character to the exercise. In connection with the examination of notifications it was mentioned that work to be conducted under the Trade Policy Review Mechanism would offer contracting parties an additional opportunity to examine the activities of individual countries in this area.

17. Some delegations asked questions regarding the implications of the phrase "otherwise influence the level or direction of imports or exports", appearing on page 4 of the European Community's communication, since this language did not appear in Article XVII:1 and appeared to them to be excessively wide in scope. Referring to the definition of state trading enterprises in section A of this communication, one participant suggested that the term governmental bodies should be understood to cover commercial enterprises controlled by the state. Another participant cautioned the Group against the risk of proliferation of counter-notifications if they were applied as suggested in section D, i.e. in situations where a country merely had reason to believe that the operations of these enterprises would have an impact on international trade, rather than where its own interests were directly affected. Referring to question II of the questionnaire in Annex II, he indicated that there were different reasons - internal and external - for the introduction and maintenance of state trading enterprises: internal price stabilisation, for example, was in a different category from protection of domestic producers. Consequently these activities should be dealt with on a different basis. The representative of the EEC pointed out that the questions set out in the draft questionnaire annexed to their paper were simply illustrative and invited other participants to express their own views on what the contents of the questionnaire should be.

18. Commenting on the discussions held in informal session the Chairman said that there appeared to be general recognition among those who had participated in the discussions that greater transparency was needed and that consideration should be given to strengthening the notification discipline. The period of intensive work on Article XVII had now begun. Referring to a comment made on his introductory remarks, the Chairman clarified that his recalling of issues arising in previous discussions of Article XVII had focussed on the questions raised by those participants who saw a need to clarify or strengthen its provisions; it was understood that not all participants had seen a need for action in this area.

ARTICLE XXVIII

19. The Chairman said that since the Group last had a substantive discussion of this Article as long ago as October/November 1988, it might be helpful, if the Group was about to begin intensive work on the subject, to recall some of the main issues which had emerged in earlier discussion and in the numerous submissions and other documents on Article XXVIII. Some of these issues had been set out in an informal note distributed by him in June 1988. It appeared that there were five main issues before the Group.

(i) Criteria for the determination of suppliers' rights

- It had been suggested by a number of participants that the existing criteria for the attribution of rights to negotiate or to be consulted in negotiations taking place under Article XXVIII should be modified or expanded in order to give greater weight to the significance of the trade

concerned for exporting countries. It had been argued that this would bring about a wider and more equitable distribution of suppliers' rights among contracting parties. The Chairman's informal note contained a description of these proposals. The Group needed to consider if it was appropriate to change existing criteria and if so, to examine in greater detail the specific proposals before it.

- It had also been suggested that any modification or expansion should not make negotiations under this Article more unwieldy. The Group might therefore consider whether any expansion of suppliers' rights should be restricted to one or more additional contracting parties.

(ii) Treatment of Preferential Trade

- Another issue related to the first was how preferential trade should be treated in the determination of principal and substantial suppliers. The suggestion had been made that preferential trade should be excluded. The Group might wish to consider this suggestion as well as the related question of whether different types of preferential trade should be treated differently, e.g. should contractual preferential trade such as that covered by Article XXIV arrangements have a status different from GSP trade?

(iii) Compensation for loss of potential trade

- Several concerns had been raised in connection with this Article, which could perhaps best be understood as stemming from the backward-looking nature of compensation provided for under Article XXVIII. These problems had been identified as being likely to arise in the following situations:

- (a) pre-emptive increases in tariffs on bound items on which there had been no previous trade or on tariff lines created by a break-out from an existing bound tariff line;
- (b) pre-emptive increases in tariffs on new products;
- (c) replacement of unlimited bound concessions by tariff rate quotas.

- Despite the differences between (a), (b) and (c) in terms of their current legal status, the principle underlying the concerns raised was the same, namely that, because compensation was limited to past performance, it was relatively easy for countries to renegotiate bindings or in the case of tariff rate quotas to replace unlimited bound tariff concessions by tariff rate quotas with the quota being determined on the basis of past trade performance; in other words backward-looking compensation detracted from the effective security of bindings. The question arising was whether it would be appropriate to modify or extend existing practice with respect to compensation to take account of some measure of "future" or "potential"

trade and if so, how this should be done; and also to examine whether there would be other implications, for example, for the determination of supplier status, stemming from proposed changes to the Article. Several specific proposals had been put forward with respect to the former question which the Group might wish to consider.

(iv) Retaliation

- In the event of retaliation under Article XXVIII, should the withdrawal of "substantially equivalent concessions" be permitted on a bilateral basis? The issue was how a contracting party could invoke its rights under Article XXVIII:3 in such a way as to avoid damage to the interests of other suppliers.

(v) Stability of Tariff Schedules

- It had been suggested that there had been an increasing trend in recent years to reserve the right to renegotiate tariff schedules under Article XXVIII:5, and that the consequent possibility of more frequent modification or withdrawal of concessions created insecurity of tariff bindings.

20. One delegation indicated that a group of participants had been working intensively on the preparation of a joint submission on Article XXVIII covering points similar to those mentioned by the Chairman in his introduction of the subject. It was his expectation that this submission would be forwarded to the Group in the very near future. Another delegation indicated that it too expected to present a submission, dealing notably with the question of new products, by December.

21. The Chairman urged that new submissions should be tabled as early as possible. The Group would now initiate a period of intensive work on Article XXVIII, on the understanding that the submission expected from a group of delegations would reach the secretariat around the end of October. If it were substantially later than this, the initiation of intensive work would be postponed until the December meeting.

(B) Other Business

(i) Protocol of Provisional Application (PPA)

22. The Chairman recalled that more than a year ago 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. Delegations also remembered that both at the May and July meetings the Chairman had exhorted participants to press capitals to submit the necessary information. Replies had so far been received from only 13 countries, 11 of which had notified that they had no such legislation. Though it was evident that this was a difficult exercise, if the Group seriously intended to pursue work on these provisions the information necessary to identify the nature of the problems must be submitted.

23. One delegation agreed that a decision would have to be taken as to whether to negotiate on the PPA, and others informed the Group that they hoped to be able to submit the information requested before the December meeting. One delegation informed the Group officially that his country had no inconsistent legislation maintained under the PPA: because GATT obligations were directly applicable under his country's legal system the effort to deal with the anomaly of inconsistent measures maintained under it was a matter of serious importance for them. Another delegation recalled that the PPA was included in the programme of work of the Negotiating Group on Agriculture.

(ii) Date of next meeting

24. The Group agreed that the next meeting would be held on 6, 7, and 8 December 1989 and reserved the dates of 7, 8 and 9 February 1990 for its fifteenth meeting.