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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

# NEGOTIATING GROUP ON GATT ARTICLES

## Note on Meeting of 17-19 July 1990

1. The Negotiating Group on GATT Articles held its twentieth meeting on 17-19 July 1990 under the chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/3048 with the addition of two items: Article XXXV, and the Chairman's Report to the GNG on the Status of Work in the Negotiating Group.

2. The Chairman informed the Group that the following documents had been issued since the last meeting: (a) two communications on Article XXIV, one from the EEC concerning Article XXIV:12 and one from Poland commenting on some of the earlier proposals tabled. These communications had been circulated as informal documents on 6 July; (b) revised versions of the draft decisions on Articles XXVIII and XVII dated 10 and 11 July respectively. The latter texts had been prepared by the secretariat and were intended to facilitate final discussions on these Articles during the present meeting; (c) a draft of the Chairman's Report to the GNG on the Status of Work in the Negotiating Group which had been circulated on 16 July.

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

### Article II (Import fee)

3. The representative of the United States reiterated the points made by his delegation in previous meetings; his delegation continued to believe that the levying of a small import fee to finance trade adjustment programmes should be permitted, since it would help to build and maintain support for trade liberalisation. Each contracting party would be free to decide whether to levy such a fee which would have a minimal effect on trade.

4. Replying to the question whether there was any relationship between this proposal and the category of "non-actionable subsidies" under discussion in the Negotiating Group on Subsidies, the representative of the Unites States said that the proposal stood alone; since the proposed import fee would have the character of an allowable fee it would be consistent with GATT.

Article XVII

5. The Group discussed in informal session a revised draft decision circulated by the Chairman on 11 July. The Chairman subsequently reported to the Group that agreement had been reached in informal session on a revised draft which he submitted to the Group for its approval. One delegation indicated that it was accepting the text on an ad referendum basis. On this basis the text annexed to this note was approved. It was also included as Annex 3 in the Chairman's report to the GNG.

Article XXVIII

6. The Group discussed in informal session a draft decision circulated on his own responsibility by the Chairman on 10 July. Reporting on these discussions, the Chairman subsequently informed the Group that agreement had been reached on a revised version of this text, with the exception of its first paragraph. He therefore proposed to include in his report to the GNG a text which would include two versions of this paragraph: the compromise proposal contained in the draft he had submitted to the Group and, in square brackets, an alternative proposal which had been supported by several delegations. He would make it clear in the report that in his view the negotiating possibilities on this question had been exhausted, and that the alternative versions of the first paragraph were maintained not as a basis for further discussion but in order that participants should make the necessary choice between them at the appropriate time. He would also make clear his view that agreement was unlikely to be possible except on the basis of the unbracketed text.

Articles XII, XIV, XV and XVIII

7. Recalling that at its previous meeting the Group had discussed these provisions at considerable length, the Chairman invited participants who wished to comment further on the proposal submitted by Canada and the United States (NG7/W/72), or on any other aspect of this question, to do so. No comments were made.

Article XXIV

8. Since its previous meeting, the Group had received two communications on Article XXIV, from the EEC and from Poland, both of which had been circulated informally on 6 July. The communication from the EEC contained proposals on the interpretation of Article XXIV:12. That from Poland contained comments on proposals submitted by Japan (in NG7/W/66 and in an informal submission dated 20 June) and on the note circulated by the Chairman on 21 May in which the secretariat had presented in drafting language the proposals made by Australia, Canada and Japan.

9. The representative of Japan made a statement addressing points raised by other delegations either orally or in writing. He said first that Japan accepted that there was nothing inherently suspect about regional

arrangements, which could give rise to economic benefits. However, they could also have adverse effects on non-member contracting parties, and his delegation was seeking to balance these two tendencies. They had no intention to rewrite or substantially change Article XXIV but sought clarification of certain points which had given rise to contention in the past. Many disagreements over the interpretation of Article XXIV had been in dispute for years. Nor was it Japan's intention to restrict the freedom of countries to join or form regional arrangements; but compliance with GATT obligations should be ensured. There was no substance in the argument that because most contracting parties belong to Article XXIV agreements, the Article stood in no need of revision; contracting parties were entitled to redress of grievances even if, and perhaps especially when, they were in a minority. In the debate so far, no country had suggested that it was desirable that third countries should be adversely affected or that regional arrangements should not promote the freedom of trade. His delegation had sought to reaffirm these principles and to increase the involvement of the CONTRACTING PARTIES in the formation and enlargement of regional arrangements. It could hardly be maintained that existing mechanisms were functioning properly since virtually no arrangements had been found GATT-consistent but equally no recommendations had been made under Article XXIV:7.

10. A number of participants supported these points. One suggested that the Group should clarify the relationship between Articles XXIV and XXVIII and in particular the basis for compensatory adjustment. The monitoring of commitments after the implementation of a customs union was also a matter which merited consideration, as was the need to improve the decision making mechanism under paragraph 7(b) of Article XXIV so that in future examinations the question of the GATT conformity of regional arrangements would be settled. Referring to Article XXIV:8 the point was made that the Group should examine in the autumn the coverage of the terms "duties and other restrictive regulations of commerce" and "substantially the same duties"; from the point of view of one delegation the former included revenue duties and the latter implied that common quotas were necessary.

11. The representative of the EEC welcomed the recognition that there was nothing inherently wrong with regional arrangements. The need for balance to which some participants had referred was reflected in several parts of Article XXIV itself: in paragraph 4 it was recognised that the purpose of these arrangements was "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories", and in paragraph 5 it was accepted that "the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of interim agreement necessary for the formation of a customs union or of a free-trade area". On the relationship between Articles XXIV and XXVIII it should be borne in mind that in negotiations leading to the expansion of a customs union "the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations".

It was clear that the proposals which had been tabled would in fact entail substantial redrafting of the Article; a case in point was the language proposed in respect of Article XXIV:5(a). Nevertheless, though his delegation had found premature the preparation of draft texts, they were not refusing to negotiate on Article XXIV.

12. The representative of the EEC then introduced his delegation's informal communication on paragraph 12 of Article XXIV. He explained that the purpose of this proposal was to ensure that Article XXIV:12 should not operate as an escape clause exempting some contracting parties from certain of their GATT obligations; it should be made clear that contracting parties with a federal structure of government have the same obligations as those with a unitary structure. The first of the six points proposed by the Community affirmed the full responsibility of contracting parties for measures taken by regional or local governments or authorities within their territories and would extend, inter alia, to action in the Supreme Court to secure observance of GATT obligations. Paragraph 2 reflected ideas in two relevant panel reports which had found that each contracting party must be the judge of what "reasonable measures" were available to it, but that the CONTRACTING PARTIES should decide whether the obligations of Article XXIV:12 had been met. This paragraph would provide the possibility for an affected contracting party to obtain information on the measures taken to secure compliance. The fifth paragraph reaffirmed the right to compensation in cases where all reasonable measures had been taken but compliance with GATT obligations had not been secured.

13. Many participants expressed interest in further exploring the ideas put forward by the Community, agreeing that it was very desirable to clarify this area and to establish a proper balance of obligations among contracting parties. One participant found it remarkable that there should be any need to reaffirm the responsibility of contracting parties for actions taken at lower levels of government. The point was made that the notion of the "full responsibility" of contracting parties was not new; it was for example established in footnote 22 to Article 7 of the Subsidies Code. It was suggested that a requirement to "ensure observance", as in Article XXIV:12 itself, was preferable to "seek observance" as proposed by the Community.

14. One participant requested clarification of the first of the Community's six points and suggested that the remainder of the proposal added little or nothing to the existing provision. The notifications called for in the sixth paragraph could be secured in the context of the TPRM, so that the need for a new obligation to notify seemed doubtful.

15. Another participant, while recognising the importance of the issues raised and expressing readiness to explore Article XXIV:12 in the context of a substantive outcome to the Round, said that there should be no question of creating extra obligations on federal states as compared to unitary states. For example, there should be no requirement to notify measures taken by regional governments that would not be notifiable if

taken by the federal government. It should also be remembered that Article XXIV:12 did not apply only to federal states; measures taken at all levels of government, for example by city authorities, would also be covered by it.

16. The question was raised whether, in the light of existing notification obligations, it would be necessary to create the new obligation proposed by the Community; in more general terms, it was not clear why any special obligations were necessary in the case of contracting parties without a unitary structure. Another participant suggested in response that in the case of federal states there was a special need for clarity as to the location within the government structure of responsibility to secure the observance of GATT obligations, in order to ensure against any imbalance between contracting parties. It was also necessary to make clear that the obligation to ensure observance was a primary obligation rather than something to be achieved through dispute settlement.

17. In responding to these interventions the representative of the EEC reiterated that Article XXIV:12 added no new obligation to those contained elsewhere in the GATT: its function was to address problems which might arise in ensuring internal respect of GATT obligations. He commented that for problems to arise at the level of city governments would be very unusual, but that strong regional or state governments would be a different matter. It was clear that a contracting party could not be required to act outside its constitutional powers; this was why his delegation had referred to measures which could be enforced under the constitution, and had suggested that remedies in the form of compensation or retaliation should be provided where the powers available to the central government were not sufficient to secure compliance. He indicated the Community's desire that the points they had put forward should be incorporated in any future draft of a decision on Article XXIV; in the same way, other delegations had suggested the inclusion of points to which they attached importance without tabling a formal proposal.

18. One participant invited the delegation of the EEC and the Group to consider the following additional questions: (a) would the proposal apply only to federal systems or to other systems including unitary and supranational forms of government? (b) would the terms "full responsibility" and "full extent" embrace implementation/enforcement and/or compensation/retaliation? (c) what would be the appropriate body for adjudicating on what would be permitted under a constitution, and what would be intended by the latter term? (d) what would be the meaning of "trade interest" in paragraph 2, and was it intended that a contracting party would make a unilateral determination that its trade interests were affected by a measure - and that the onus of proof would be on the other party to rebut that presumption? (e) given the wide scope of Articles XXII and XXIII and panel precedents what was the intention of including paragraphs 3, 4, and 5? what was the relation between paragraph 4 and Article XXII:1? what was the rationale for including regional governments in paragraph 3, but not in paragraph 4? was paragraph 5

intended to clarify "reasonable measures"? (f) in respect of paragraph 6, what interpretation was envisaged for administrative or legal judgements or rulings which "significantly affect the relationship between national and local governments"? why were local but not regional governments included? what was the definition attached to "national", as compared to "contracting party", or to the term used in other paragraphs? what would be the relationship between notifications under Article XXIV:12 and notifications under other Articles? (g) was it intended that the proposal should be implemented by means of an interpretative note, by an addition to the existing Article or by some other form of decision?

19. The Chairman closing the debate on this Agenda item said that he was encouraged by the interest shown by many delegations in negotiating on Article XXIV. He pointed out however that time was now running very short and that a major effort would be needed to reach agreement on this complicated issue within the time remaining.

Article XXXV

20. The representative of the United States reminded the Group that his delegation had at an earlier stage expressed interest in negotiating on Article XXXV, some ideas having been put forward in NG7/W/35. They had since raised some of the pertinent points in the GATT Council. He wished now to inform the Group that a short and simple proposal would shortly be tabled with a view to correcting the current interpretation of Article XXXV according to which it was not possible to invoke the provision after having opened tariff negotiations with an acceding country. Other participants expressed interest in addressing this issue at the Group's next meeting. One participant however wondered whether there would be a proliferation of invocations of Article XXXV if the US proposal was accepted. It was also important to reflect on the possible implications for other contracting parties, which would have expected to benefit from the multilateralisation of tariff concessions negotiated with an acceding country by a major contracting party, if the latter were to invoke Article XXXV at the end of the negotiations leading to withdrawal of the tariff concessions negotiated.

Chairman's Report to the GNG on the Status of Work in the Negotiating Group

21. Introducing the discussion on the draft of the Chairman's Report on the Status of Work in the Group dated 16 July, the Chairman recalled that it was based on his analysis of work in the Group and would be submitted to the GNG and TNC on his responsibility. Participants were welcome to express their comments on the draft, but it was ultimately his decision to decide on the final version which would be circulated as document NG7/W/73; of course, participants could raise any matters in the GNG and TNC if they so wished.

Balance-of-Payments Provisions.

22. The representatives of the European Communities and the United States said that the Chairman's summary of the proposals tabled, contained in Annex 2 to his report, did not fully reflect their proposals and suggested

some drafting changes in paragraphs 2, 3 and 5 of the Annex. Some other participants said that while the Annex reflected adequately the different national positions on the Balance-of-Payments Provisions, they had certain reservations on paragraphs 8-11, where the Chairman had sought to identify areas of convergence in the Group; some of the language in these paragraphs should reflect more precisely the texts of Article XVIII:B and the 1979 Declaration; only these texts could be deemed to be areas of common understanding on trade measures taken for balance-of-payments purposes. Paragraph 11 might also be misleading in that it appeared to suggest that there was a shared perception in the Group on the need to address the two issues identified in this paragraph. It was suggested that either paragraphs 9-11 be deleted altogether or that the changes proposed by participants be incorporated in the draft. A participant proposed that the annex containing the description of the status of work be deleted and the Chairman's report be confined to paragraph 4 of the covering note with the addition of a reference to all the relevant working documents and notes of meetings. A participant requested that the draft should reflect the position of some countries which had said that in the light of the comprehensive economic reform that they had embarked upon, it would be difficult for them at this stage to commit themselves to avoid recourse to Article XII.

Article XVII.

23. The Chairman informed the Group that the draft decision on which agreement had been reached during this meeting would now be incorporated as Annex 3 in his report to the GNG. He would indicate that consensus had been reached on this text but that one delegation had indicated that it was accepting the text ad referendum.

Article XXIV.

24. It was suggested that paragraph 6 of the Chairman's report should reflect what appeared to be widespread support for engaging in substantive negotiations on Article XXIV in the autumn. Some participants suggested changes to Annex 4 containing the description of the status of work so as to reflect more adequately their positions on this Article. It was requested that the discussion that had taken place during the present meeting on Article XXIV:12 should also be reflected.

Article XXVIII.

25. The Chairman recalled that the Group had come very close to reaching consensus on a decision on Article XXVIII on the basis of a text dated 19 July and revised subsequently to reflect some commonly agreed changes to paragraph 6. There was agreement on this revised text with the exception of paragraph 1. It was his intention to include in the draft both the compromise proposal which he had put forward and in addition, within square brackets, the alternative proposal supported by some delegations on this paragraph (see Annex 6 to the Chairman's Report). He would indicate that

in his view the Group had exhausted the negotiating possibilities on this paragraph. He was maintaining the two alternatives not because it was his intention to reopen the discussion, but rather to allow participants to make the choice between them at the appropriate time. However, he would make clear his view that agreement would be unlikely except on the basis of the compromise solution put forward by the Chairman and presented in the unbracketed text.

26. The representative of Korea, speaking for the record, said that his delegation had joined the consensus on the decision on Article XVII in a spirit of compromise, despite concerns stemming from the working definition contained in its first paragraph. It was regrettable that the Group had not been able to reach agreement on Article XXVIII because certain delegations had not accepted the Chairman's compromise solution on the matter of the criterion for the attribution of the additional principal supplying interest. This threatened to undo the considerable progress made by the Group on Article XXVIII. He appealed to the delegations in question to accept the Chairman's proposal, which accommodated the interests of the great majority of participants.

Article XXXV.

27. A participant requested that his delegation's remarks on Article XXXV presented earlier in the meeting should be reflected in the Chairman's covering note. He indicated his delegation's intention to submit a formal proposal at the Group's meeting in September.

Date of the next meeting

28. The Group agreed that the next meeting would be held on 3-5 September.

## State-Trading Enterprises

### Decision

Noting that Article XVII provides for obligations on contracting parties in respect of the activities of the state trading enterprises referred to in Article XVII:1, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in the General Agreement for governmental measures affecting imports or exports by private traders;

Noting further that contracting parties are subject to their GATT obligations in respect of those governmental measures affecting state trading enterprises;

Recognising that this decision is without prejudice to the substantive disciplines prescribed in Article XVII;

1. It is agreed that in order to ensure the transparency of the activities of state trading enterprises, such enterprises shall be notified to the CONTRACTING PARTIES, for review by the working party to be set up under paragraph 5 below, in accordance with the following working definition:

> "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.

2. It is agreed that each contracting party shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the CONTRACTING PARTIES, taking account of the provisions of this decision. In carrying out such a review, each contracting party should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.

3. Notifications shall be made in accordance with the 1960 questionnaire on state trading (BISD, 9S/184), it being understood that contracting parties shall notify the enterprises referred to in paragraph 1 above whether or not imports or exports have in fact taken place.

4. Any contracting party which has reason to believe that another contracting party has not adequately met its notification obligation may raise the matter with the contracting party concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the CONTRACTING PARTIES, for consideration by the working party set up under paragraph 5 below, simultaneously informing the contracting party concerned.

5. A working party shall be set up, on behalf of the CONTRACTING PARTIES, to review notifications and counter-notifications. In the light of this review and without prejudice to Article XVII:4(c), the CONTRACTING PARTIES may make recommendations with regard to the adequacy of notifications and the need for further information. The working party shall also review, in the light of the notifications received, the adequacy of the 1960 questionnaire on state trading and the coverage of state trading enterprises notified under paragraph 1 above. It shall also develop an illustrative list showing the kinds of relationships between governments and enterprises, and the kinds of activities, engaged in by these enterprises, which may be relevant for the purposes of Article XVII. It is understood that the GATT secretariat will provide a general background paper for the working party on the operations of state trading enterprises as they relate to international trade. Membership of the working party shall be open to all contracting parties indicating their wish to serve on it. It shall meet before the end of 1991 and thereafter at least once a year. It shall report annually to the CONTRACTING PARTIES.