

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG7/21

25 September 1990

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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note on Meeting of 3-5 September 1990

1. The Negotiating Group on GATT Articles held its twenty-first meeting on 3-5 September 1990 under the chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/3064.
2. The Chairman informed the Group that the following documents had been issued since the last meeting:
 - NG7/W/74 dated 31 August which contained a Communication by the United States on Article XXXV;
 - NG7/W/30/Corr.6 dated 31 August which contained an updated list of contracting parties between which Article XXXV currently operated;
 - NG7/19/Corr.1 dated 25 July which contained a small modification to the note of the penultimate meeting of the Group;
 - NG7/W/73/Rev.1 dated 7 August which constituted a revision of the Spanish version of the Chairman's Report to the GNG.

Agenda Item A: Consideration of issues arising from the examination of specific articles.

Article XXXV

3. Introducing the proposal in NG7/W/74, the representative of the United States recalled the interest that his delegation had shown in this matter in previous meetings. His authorities believed that the 1949 ruling by the Chairman of the CONTRACTING PARTIES according to which delegations should be deemed to have entered into tariff negotiations when "they had held a first meeting scheduled by the Tariff Negotiations Working Party at which they had exchanged lists of offers" was not relevant to the way accession negotiations were currently conducted; nowadays the establishment of the applicant's GATT schedule was not the result of reciprocal tariff concessions exchanged during a multilateral round of negotiations. Rather than an amendment of Article XXXV, his delegation was proposing a practical understanding that would clarify the meaning of "tariff negotiations" in

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UR-90-0549

terms of the current accession process. As a practical matter, the discussions between a contracting party and an acceding country to establish its GATT schedule should not be considered to be "tariff negotiations" in the sense of Article XXXV.

4. All contracting parties stood to benefit from such a practical understanding. Otherwise, if a contracting party had entered into discussions with an applicant country concerning the establishment of a GATT schedule of concessions, the contracting party would be prevented from invoking Article XXXV if the outcome of the discussions was unsatisfactory. If such a situation occurred, the only recourse open to the contracting party would be to attempt to block Working Party approval of the accession request, which would be unfortunate. Extensive consideration had been given to how this understanding would be implemented. A contracting party's invocation of Article XXXV at the conclusion of an accession negotiation would probably result in the withdrawal of the bilaterally-agreed concessions from the tariff package. Under certain circumstances, it might necessitate a negotiated adjustment in the concessions made by the acceding country relative to other contracting parties. However, a contracting party which could not agree to accord full GATT rights to an acceding country, for economic or other reasons, should not be expected to do so merely to avoid such an adjustment by the acceding country.

5. As to the question whether the understanding would apply to accessions currently under way, his delegations' view was that if the proposal were accepted as part of the Uruguay Round package, then it would apply to countries now in the process of accession, unless these accession negotiations were concluded and approved before the package of agreements was implemented. It should be made clear that the proposal would not impose additional obligations on the contracting parties. Article XXXV had been adopted in 1948 to ensure that a contracting party would not be required to accord GATT rights to acceding countries without its consent. The proposal offered an interpretation of the Article that would fit current accession procedures and reconfirm the rights of contracting parties.

6. A number of delegations supported the proposal, which they considered a helpful clarification of matters pertaining to the accession process. The point was made that no contracting party could be obliged to take on obligations in respect of an acceding contracting party to which it did not consent. It was suggested that the phrase "discussions entered into" in the last paragraph of the proposal might need clarification. One participant expressed concern that the proposal was not conducive to an open and non-discriminatory trading system, and would result in an enlargement of the bargaining power of certain contracting parties together with an increased burden for the applicant country. It had to be recalled that a number of developing countries were not yet GATT members. Invocation of Article XXXV should be minimised and its current interpretation maintained.

7. Responding to these remarks the representative of the United States indicated that the proposal would facilitate the accession process rather than becoming an additional burden. He indicated that in the context of a current accession negotiation, because of present thinking on Article XXXV, his delegation had been unable to begin bilateral tariff negotiations; they would first negotiate the Accession Protocol and only then begin to talk on tariffs. If the proposal were accepted his delegation would be able now to discuss both tariffs and the Accession Protocol. As to the meaning of "discussions entered into", he suggested that the dividing line would be when delegations began talking about specific products. In reply to the question of whether the proposal covered services, his understanding was that tariff negotiations only covered goods.

Article XXVI:5

8. One participant recalled that there were a number of issues of concern with respect to Article XXVI:5. While recognising the little time remaining his delegation was still considering some options in this area.

Article XXVIII

9. The Chairman recalled that at the last meeting it had been agreed that the Group would revert to this subject during the present week. It was clear that the intention was not to re-open substantive discussion of the draft decision contained in his report on the progress of the Group's work to the GNG, since there was agreement that the negotiating possibilities had been exhausted, but to see whether the Group was yet in a position to make a firm choice between the two alternative versions of paragraph 1.

10. Having ascertained that positions on this subject remained unaltered the Chairman invited the Group to revert to this item at the next meeting.

Articles XII, XIV, XV, and XVIII

11. Introducing this item the Chairman recalled that in his summing up at the end of the July TNC meeting, the Chairman of the TNC had said that participants should decide without delay whether or not they were going to engage in negotiations on the use of measures taken for balance-of-payments purposes. This echoed his own view, as expressed in the profile of the Group's work which he had submitted to the GNG. He stated that during this meeting he intended to consult a number of delegations, probably on an individual basis, on this question. He stressed that he was available to discuss the matter with any delegation which so wished, and urged delegations to consult among themselves as to possible solutions.

12. The representative of the United States, referring to the US proposal, said that his delegation did not seek, overtly or covertly, to abolish, or otherwise change, Article XVIII:B. It was accepted that countries with serious balance of payments problems might need to impose temporary trade restrictions, including quantitative restrictions, and that developing countries had a right to adjust to their balance of payments difficulties

in a manner which addressed their development needs. These rights were not in dispute and there was no intention to put them on the negotiating table. The intention was to seek refinements of existing rules which would discourage their abuses, i.e. use of this exemption to address purposes other than balance of payments adjustment. These refinements would promote reliance on the least disruptive measures available. His delegation conceded the point made by a number of countries in the discussions on this issue: that flexibility must be preserved in cases where countries had few options, both in terms of the types of measures which could be applied and their duration. The United States was prepared to negotiate reasonably and to entertain proposals made by developing countries to ensure that this flexibility would be maintained.

13. It was necessary to stress that in the United States view, it was more important than ever to address the balance of payments disciplines in the context of the efforts, throughout the Round, to limit derogations from GATT discipline. It was very clear to business people in his country that balance of payments disciplines were linked to nearly every other discipline in the GATT, including the new ones being negotiated. While the effort in some areas of the Round was to make radical reforms or to negotiate totally new rules, the effort in other areas was to make incremental or evolutionary changes. For example, in another group, participants were discussing the Codes negotiated in the Tokyo Round. This involved examining how they had worked over the last 10 years. The same process was applicable to the balance of payments disciplines. The idea was to follow with the 1979 Declaration what was being done to the Codes: to see what improvements could be made in the light of experience over the last 10 years. The fact that the improvements contemplated were incremental did not diminish their importance. A viable trading system must have meaningful controls against potential or actual abuses of the system - abuses for balance of payments reasons were no exception. Refusal to negotiate could only damage the ultimate outcome of the negotiations and would be a counterproductive strategy for developing countries. Developing countries with balance of payments problems were already making major strides in opening their economies: GATT rules which encourage this process were no threat. He strongly urged that participants begin immediately to engage constructively in practical, substantive negotiations on this issue.

14. The representative of the European Communities said that his delegation had made a proposal at the beginning of the year which was still on the table. Like the United States - and this point had been made clear on a number of occasions - his authorities were not seeking to change the spirit or the letter of Article XVIII(b) nor the right of developing countries to invoke such provisions. His delegation was basing its approach on the 1979 Declaration; it should not be terminated but areas capable of improvement and extension should be adjusted. He saw considerable importance in the improvement of the procedures in the Balance-of-Payments Committee. The language used by the Chairman of the Group in his report to the TNC offered a helpful way out of the situation - to engage in a process designed to avoid disagreement over or

misinterpretation of existing provisions and to improve the functioning of the BOP Committee. His delegation welcomed and accepted the invitation of the Chairman to engage in further discussions on a workmanlike basis.

15. The representative of Canada emphasised that his delegation's intention was not to change the nature of Article XVIII nor the right to use it in legitimate circumstances; what was necessary was an updating of the 1979 Declaration. Experience accumulated over the past ten years had shown that there were ample grounds for improvement, and his delegation was prepared to be flexible in approaching these matters.

Article XXIV

16. The Chairman invited the Secretariat to report on the informal discussions held on this Article during the week. It was explained that the informal discussions on Article XXIV on 3 and 4 September had been long, detailed and useful. They were focused on the communications which had been made in the past on paragraphs 5, 6, 7, and 8 of Article XXIV, on the idea of a general review of regional arrangements, on the question of serious adverse effects on third countries and on the responsibilities of contracting parties under Article XXIV:12. It could not be said that these discussions had resolved the long standing disagreements over the interpretation of some of these provisions, but they certainly gave no reason to despair about the possibility of reaching a useful, even if modest, agreement which might help to reduce future disputes about the interpretation of these provisions.

17. The representative of the European Communities, referring to the questions which one participant had raised at the last meeting, stated the following (questions in NG7/20 para. 18 have been reproduced underlined):

(a) Would the proposal apply only to federal systems or to other systems including unitary and supranational forms of government? The decision clearly would not be limited to countries with a federal system of Government but would apply in all instances where the observance of GATT provisions was the direct responsibility of regional and local governments or any authority other than the central government itself.

(b) Would the terms "full responsibility" and "full extent" embrace implementation/enforcement and/or compensation/retaliation? The first term was intended to reflect the principle confirmed by GATT Panel findings that GATT obligations were equally applicable to all contracting parties. Article XXIV:12 did not constitute an exception to that principle but merely limited the obligations of states to secure their implementation. That, in his view, was entirely consistent with the panel findings. The term "to the full extent permitted by their constitution" could include, for example, legislative action requiring that a regional or local government or authority respect a GATT obligation. If there were doubt whether such action was permitted under any particular constitution, the words would require a contracting party to seek that clarification about its own constitution through the juridical system, including, if necessary,

proceedings in the Supreme Court or Tribunal of the contracting party in question. In a situation where despite the actions taken to ensure enforcement it was not possible for a GATT obligation to be met, then the question of compensation or retaliation would be relevant.

(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? Regarding the first point, the previous answer already shed light on this question. As to the second, the term "constitution" was a matter for the individual contracting party to interpret and define.

(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? The purpose of point 2 in the Communication was to improve the transparency in the operation of the General Agreement by providing for an exchange of information on the extent to which a contracting party considered it had met its obligations under Article XXIV:12. It was intended to provide the basis for an exchange of factual information and not to be confrontational. The term "trade interests", might need further precision; it was meant to cover only those matters for which the General Agreement, established rights and obligations.

(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"? The intention of points 3, 4 and 5 in the Communication was to put beyond all doubt that Article XXIV:12 did not constitute any kind of exception or lower level of obligation and that the dispute settlement procedures applied in full, including questions of compensation and retaliation. Article XXII itself clearly would remain unchanged. The purpose of point 4 was the avoidance of doubt. The term "regional government" should also have been included in point 4. In answer to the question on reasonable measures he said that what his delegation understood by reasonable measures, was more directly addressed in points 1 and 2 of the Communication.

(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? With regard to point 6 in the Communication, only those changes in the relationship between the different levels of government which had implications for the operation of the General Agreement were intended to be subject to the notification obligation, so that internal changes which had no bearing on GATT rights and obligations would not fall within the purview

of this language. The term "regional government" should also be included in point 6. The term "national" was intended to convey nothing more than central government, in other words, the central government which was also the contracting party to the General Agreement. The notification requirement under this point did not relate to specific trade measures per se but only to changes in the structure of government which had implications for a contracting party's obligations under the General Agreement; the question about the relationship between notifications under XXIV:12 and those made under other GATT Articles did not arise since the latter related to trade measures.

(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? His delegation would like an interpretative note to Article XXIV:12 which could be in the form of a decision of the CONTRACTING PARTIES, in a similar way to the decisions already proposed on other GATT Articles or already drafted, in some cases, in the Group. In response to whether a formal negotiating communication on XXIV:12 would be tabled, he reiterated that his delegation considered the communication of 4 July which was circulated on 6 July to be a sufficient basis for further negotiation.

18. Referring to the notion of "adverse effects" one participant said that there was no legal basis for recognition that avoidance of such effects should be an objective of customs unions; the only requirement was not to raise barriers to the trade of other contracting parties with the member territories. Another participant recalled that "serious" adverse effects was the concept which merited consideration.

19. A participant indicated that the proposal on Article XXIV:12 seemed to imply an increase in GATT obligations for certain contracting parties. In response, the point was made that the proposal was intended to clarify the existing obligations of contracting parties, and not to increase them.

20. A number of participants expressed interest in pursuing negotiations on Article XXIV, which constituted a very topical and important subject in the GATT, and proposed the preparation of a draft decision. Other delegations suggested that in the short time available it was difficult to expect something more than modest. Given the sensitivity of the subject it was not easy to envisage a decision which diverged markedly from interpretations maintained in the past. In reply, the point was made that if the same logic were applied to the proposals on Article XXIV:12 the Group would not go very far in its negotiations. On these provisions as well as on others it was necessary to reach a positive result.

21. Closing the discussion the Chairman said that it seemed clear that there was still willingness and a desire to proceed with Article XXIV. In the light of the discussion that had taken place both formally and informally, it was his intention to discuss with the secretariat the preparation of a draft decision, with a view to its circulation to the

Group in advance of its next meeting. Any further views that participants might express over the coming days on the matters under discussion would be welcomed.

Date of next meeting

22. The Group agreed that the next meeting would be held on 1-3 October.