GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

Spec(88)28
27 May 1988

Working Party on the Accession of
Portugal and Spain to the European Communities

MEETING OF 20 APRIL 1988
Chairman: Ambassador F. Jaramillo (Colombia)
Note by the Secretariat

1. The Working Party held its sixth meeting on 20 April 1988. It adopted the agenda contained in GATT/AIR/2571.

A. Examination of the provisions concerning the accession of Portugal and Spain to the European Communities (L/5936 and addenda), in the light of the relevant provisions of the General Agreement

(i) Tariffs

2. The representative of Canada stated that his delegation which was still engaged in Article XXIV:6 renegotiations with the European Communities, reserved the right to make observations on tariffs at a subsequent meeting of the Working Party. The submission of the Communities' new external tariff did not mean that negotiations had been concluded and did not represent a definitive basis for review and analysis of the tariff aspects of enlargement. The schedule contained a covering note which indicated that the concessions could be modified pending the outcome of negotiations. In Chapter 3 of the new schedule of concessions there were eight tariff items, of importance to Canada, which were accompanied by footnotes stating that they were "subject to limits and conditions to be determined by the competent authorities". His delegation would require clarification on these footnotes before it could proceed to discussing the Working Party's conclusions. It would also be very difficult to try to measure the general incidence of tariff changes in Spain and Portugal.

3. The representative of the European Communities found it normal that Canada should have reservations on the Communities' new schedule of concessions, since negotiations were not completed and the Communities had reserved their right to modify it if necessary. However, he could not understand why it would be difficult to measure the overall impact of tariff changes in accordance with Article XXIV:5, because an individual negotiation was outstanding. The Communities' total imports came to 240 billion ECU in which the share of Spain and Portugal was only 17 billion ECU. Any individual Article XXIV:6 renegotiation which was still outstanding would not affect these figures significantly. In the case of Canada, the outstanding issue related to trade worth 100 million ECU and would not affect the exercise carried out by the Working Party.

4. The representative of the European Communities then introduced "the Note by the European Community on the question of tariff incidence" (see Annex) which provided a response to analyses submitted by the United States (Spec(87)2, Annex II). He drew attention to the data submitted by the European Communities to the Working Party at its meeting of 17 February 1988 (Spec(88)15, Annex), in which it had been shown that the trade of Spain and Portugal only accounted for seven per cent of the Communities' total trade, the bulk of which would not be affected by the tariff changes. Article XXIV:5 required that the whole of the Communities' trade be taken into account when measuring the incidence of these changes. Furthermore, tariff increases which resulted from unbindings or bound tariffs being raised, affected less than half per cent of the Communities' total imports. The approach adopted by the United States ignored the fact that unbound duties could be raised at any time, prior to or after accession. That had to be taken into account when assessing incidence. In their present submission, the European Communities had followed the approach favoured by the United States. However, the approach was not correct because in an Article XXIV:5 exercise one had to calculate the overall incidence of tariff changes, rather than the precise equivalents of bindings. Therefore the Communities would not accept that it figure in the Working Party's report except as the view of one or other delegation. Nevertheless, the figures still showed that the tariff incidence of accession was favourable for third countries, even more so if one took account of the Communities' point on unbound duties. In their analysis, the Communities had added figures relating to 1985 which was the third year of the reference period and had taken into account the new bindings which had resulted from Article XXIV:6 negotiations. According to their new submission, the volume of trade where tariffs had increased came to only 1.5 per cent of the total trade of the Communities. This was slightly higher than the half per cent which the Communities had originally presented on the basis of their own approach. The figure of 1.5 per cent was still very low and it would not be reasonable to argue that the overall tariff incidence of enlargement was negative especially as tariffs had been reduced for a considerable volume of trade. The Working Party was therefore in a position to reach positive conclusions on the tariff incidence of accession, even though some delegations might have reservations to make until Article XXIV:6 negotiations in which they were involved were concluded.

5. The representative of the United States stated that under Article XXIV:5 the effects of the changes in duties and other regulations of commerce resulting from enlargement had to be measured. The trade coverage method used by the Communities was only one element of the measurement because it did not provide an indication of the magnitude of the individual changes in the categories subject to tariff decreases or increases. The only way the incidence could be measured was to look at the duties collected, using the figures mentioned by the Communities, but taking the analysis a step further. The duties collected approach was the standard method for measuring tariff incidence in GATT. It therefore had a place in the Working Party's deliberations and in its report. Unbound

positions were also relevant since they were changed to the disadvantage of third parties, as a result of the Treaty of Accession. Article XXIV:6 contained provisions relating to bound tariffs, but Article XXIV:5 dealt with more general considerations. The United States had not used 1985 figures in their own analysis because they had not been available but they would be willing to use them now. It was not accurate to say that the United States approach did not take into account the trade of the EC/10, because their revised submission (Spec(88)18 Annex) did take it into consideration.

6. The representative of the European Communities replied that there were different approaches to the question of the requirements of Article XXIV:5 and that these approaches should be put on the record. He considered that the duties collected method was not traditionally used or discussed in the GATT for the purposes of Article XXIV:5. Similar exercises had been carried out in the past with the use of the trade coverage method. It was not clear that incidence could be measured by looking at the effects of changes in tariffs, but if this was the case, the Communities were willing to produce figures showing how imports into Spain had increased during the previous 2.5 years. In the light of such evidence, other delegations would probably not insist on carrying out an assessment of incidence on the basis of the effects of changes in tariffs. The Communities also took note of the view that changes in unbound duties constituted a disadvantage for third parties, and would bear it in mind when future free trade areas were examined in the GATT since it might mean that the parties to such agreements would commit themselves not to change any unbound duties. The Communities themselves believed that they were entitled to change unbound duties as a result of enlargement in order to meet the requirements of Article XXIV:8. It was not possible to argue that this was contrary to Article XXIV:5. He saw no evidence in the United States submission that the trade of the Communities as a whole had been taken into consideration. The tariff of the EC/10 had not changed, though it might have changed if a trade weighted average tariff had been adopted or if the EC/10 tariff had been aligned with those of Spain and Portugal. Though such approaches would have created other negotiating problems, the Communities were entitled to credit for the fact that they had not been adopted.

(ii) Other regulations of commerce

7. The representative of Canada was concerned at the impact of the extension to Spain and Portugal of the Communities' regulations of commerce, because the introduction of such measures as the Common Agricultural Policy had trade restrictive effects in the markets of the new member states. The representatives of Poland and Romania stated that as a result of accession to the Communities, Spain had introduced in the field of quantitative restrictions a discriminatory régime vis-à-vis contracting parties. Prior to its accession to the Communities, Spain had notified the GATT that it applied no discriminatory quantitative restrictions on imports from their countries. After accession, a number of quantitative restrictions were introduced by Spain on imports from Poland and Romania in

contravention of Articles XI and XIII of the GATT and of the Protocols of Accession of Poland and Romania. Article XXIV did not waive any contracting party from its obligations under other provisions of the General Agreement or GATT instruments. Therefore Spain should eliminate without delay all discriminatory quantitative restrictions. Under Article XXIV:7 recommendations to that effect should be made to the Communities because this was a matter of concern to all contracting parties as it affected the principle of non-discrimination which was one of the cornerstones of the GATT. The representative of Japan recalled that at the previous meeting of the Working Party he had put a number of questions to the European Communities which dealt with the introduction by Spain of new discriminatory quantitative restrictions on imports from Japan of 7 items. Furthermore, Paragraph III of the Japanese submission to the Working Party (Spec(87)31, Annex) also mentioned a number of problems relating to quantitative restrictions maintained by Spain. Japan wanted to be informed about the date envisaged for the elimination of restrictions maintained in Spain and Portugal for an undetermined period and the reasons for the discriminatory treatment given to Japan with respect to the date for the elimination of quantitative restrictions listed in L/5936/Add.5. Unless the European Communities provided answers to these questions, Japan could not agree to the Working Party drafting its report. The representative of the United States stated that they had had contacts with the Community and Spanish authorities on some of the restrictive elements of the new Spanish import régime, but had made no progress in these discussions. They found the new import régime to be vastly more restrictive than the pre-accession one because US exports were now facing restrictions which had not previously existed. They had also expressed concerns relating to the Portuguese import régime for oilseeds, which was restrictive as was confirmed by Portuguese importers who had complained that they were no longer in a position to import from the United States the quantities that they required.

8. The representative of the European Communities agreed that Article XXIV did not provide a waiver from obligations arising out of other provisions of the General Agreement. The views of participants which considered that measures maintained in Spain and Portugal were not consistent with the GATT could be recorded in the report of the Working Party. There were differences of view about the Portuguese import régime for oilseeds which was under review. If there was a genuine need for additional imports, this could be accommodated. However, the work of the Working Party could not be predicated on the particular system for one product in one of the new member states. The Working Party was looking at the general incidence of all regulations of commerce and all duties. It was being argued that new restrictions had been introduced in Spain because that country had previously notified the GATT that it maintained no discriminatory quantitative restrictions. However, these notifications had not been totally correct. Moreover, in their submission to the Working Party (L/5936/Add.5), the Communities had indicated that of the 238 quantitative restrictions which Spain had maintained before accession against imports from state-trading countries, 200 would be liberalized at

accession or during the transitional period. In the light of this information, it could not be argued that the general incidence of accession had been restrictive for quantitative restrictions. Spanish imports from East European countries as a whole had risen five-fold in 1987 which was also an indication of improved access and liberalization. The East European countries had acceded to the GATT with special Protocols because their economic structures were different. The Communities maintained some restrictions because of these Protocols but compared to the pre-accession situation, real progress had been made in Spain.

9. With respect to the questions put by the delegation of Japan, the representative of the European Communities recalled that in their submission to the Working Party (L/5936/Add.5), they had shown that of the 333 positions under restriction in Spain against Japan, over 200 had been liberalized in full or in part after accession and a further 85 were to be liberalized at the end of 1989 or of 1991. Even if there were some questions which needed to be clarified about 25 positions, the general result was one of liberalization. It had been suggested by Japan that new restrictions had been introduced on 7 items, contrary to Article XXIV:4. The Communities considered, as had been stated in the past, that Article XXIV:4 contained an objective rather than an obligation. The restrictions in question were covered by past bilateral arrangements concluded between Spain and Japan. Some of these restrictions had been liberalized de facto on an autonomous basis, but they remained legally in force. They were now being applied during the transitional period and would be eliminated at the end of it. Consequently, since these restrictions had not constituted a problem for Japan before accession, they should not constitute one now. No date had been set in the Treaty of Accession for the elimination of the other restrictions mentioned by Japan. The position remained under review but the items in question were also covered by previous bilateral agreements concluded by Japan with Spain and Portugal. As to the question of dates for liberalization, in some cases no differential treatment was involved, in others the difference was in Japan's favour and in still others the difference would disappear at the end of the transitional period, i.e. 1991. In a very few cases, which could only be identified at the NIMEXE level and which like the others were covered by previous agreements with Japan, differences would remain. However, such questions of detail had to be set against the important movement which was occurring in the direction of liberalization . The balance sheet of enlargement was therefore positive and the incidence of restrictions applicable to Japan in Spain was lower than before accession and would be still lower at the end of the transitional period.

10. The representative of Poland could not agree with the representative of the European Communities that Protocols of Accession to the GATT could be regarded as justification for the maintenance of discriminatory quantitative restrictions. On the contrary, the Protocol of Accession of Poland provided for the progressive elimination of all quantitative restrictions which contracting parties had applied in a manner inconsistent with Article XIII and required that the discriminatory element was not

increased. He repeated that prior to its accession to the Communities Spain had notified the GATT that it did not apply discriminatory quantitative restrictions vis-à-vis Poland. The representative of Japan repeated that Article XXIV:5(a) could not be interpreted as authorizing the maintenance of discriminatory quantitative restrictions merely because their number had been reduced. Restrictions which were not consistent with the General Agreement could not be included in an assessment of the incidence of "other regulations of commerce". The most-favoured nation principle was one of the most important pillars of the GATT. The Japanese position was that the past bilateral agreement with Spain was no longer valid. Japan reiterated that discriminatory restrictions should be eliminated immediately. If these restrictions were not eliminated, Japan would have to conclude that the enlargement of the Communities was achieved to the detriment of other contracting parties in a manner inconsistent with Article XXIV. Responding to the European Communities the representative of Hungary repeated that Articles 177:3 and 177:5 of the Treaty of Accession, its Annexes and EC Regulations 7334(85) and 175(86) allowed or required the introduction of discriminatory quantitative restrictions against products of Hungarian origin. Furthermore, contrary to what was argued by the Communities, differences in economic structure had nothing to do with the GATT. The Hungarian Protocol of Accession clearly stipulated the rights and obligations of Hungary and of the other contracting parties. In this respect, it called for the elimination of discriminatory quantitative restrictions inconsistent with Article XIII which had existed at the time of Hungary's accession to the GATT, contrary to what had been done in Spain. He emphasized that Hungary had no reason to question the correctness of the notification made previously on the subject by Spain. He agreed with the representative of Japan that newly established GATT-inconsistent barriers could not be traded-off against the alleged reduction or removal of other barriers. Discriminatory restrictions which were inconsistent with Articles XI and XIII should be eliminated without delay because, like the European Communities, Hungary considered that Article XXIV did not waive contracting parties from obligations contained in other GATT provisions. The representative of Romania stated that paragraph 3 of Romania's Protocol of Accession to the GATT required that quantitative restrictions inconsistent with Article XIII be eliminated and that the discriminatory element of these restrictions not be increased. Therefore, the CONTRACTING PARTIES had to make appropriate recommendations for the removal of GATT-inconsistent restrictions and the prevention of the intensification of their discriminatory element. The representative of Czechoslovakia stated that the accession of Spain and Portugal had resulted in the introduction in these countries of quantitative restrictions which were contrary to Article XXIV. In the case of Czechoslovakia, these restrictions could not be justified under a Protocol of Accession, because his country was a founding member of the GATT.

(iii) Final statements, suggestions for conclusions and recommendations

11. The representative of Australia stated that the accession of Spain and Portugal to the European Communities was important not just because of the Communities' influence in world trade but also because it was yet another departure from the most-favoured nation principle. Article XXIV provided for such departures for customs unions and free trade areas but it also set the conditions governing their formation. It laid down very clearly that "... the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories". The text was so clear that one could not ascribe to it any special subtleties or reservations. As a smaller trading nation, Australia's interests were protected through the preservation and implementation of GATT rules. Its participation in the Working Party had been directed towards that end. While each new agreement had to be examined on its own merits, past experience was relevant when the agreement provided for the simple extension of existing policies to other contracting parties. Spain and Portugal would adopt the Communities' Common Agricultural Policy which had had a major negative impact on Australia's export opportunities to the markets of member states of the Community and to third country markets. Australia had made clear its view that the extension of the CAP to Spain and Portugal would result in increased barriers to trade with these countries. Australia had stated in the Working Party that no matter how managed and opaque the pre-accession import arrangements of Spain and Portugal for agricultural products, it would not be tenable to argue that adoption of the import levy system was a trade liberalizing move. Australia had repeatedly sought to have the Working Party address the impact of other measures, such as domestic subsidies, but the Communities had rejected these suggestions as not being relevant. At the same time, the Communities sought to have the Working Party take into account other internal measures such as the introduction of VAT in Spain and Spanish fiscal liberalization. In Australia's view the Communities' position was not balanced and prevented a comprehensive assessment by the Working Party.

12. The representative of Australia also stated that their concerns had been reinforced by the quantitative analysis conducted by the United States (Spec(87)2, Annex II). The Communities had argued that the effects of arrangements in one sector could be outweighed by the overall impact of regulations of commerce. Australia could not agree that the agricultural sector could be subjected to special treatment and excluded from trade liberalization initiatives. Australia's concerns in agriculture had been paralleled by concerns raised by other members of the Working Party with respect to other sectors. Both Japan and Hungary, which was supported by other Eastern European countries, had put forward strong evidence that the accession of Spain and Portugal to the Communities had led those countries to adopt a number of discriminatory import restrictions. In this regard Australia noted that the United States had produced studies that showed a significant increase in post-enlargement quantitative restrictions affecting US trade with Spain.

13. Australia could not accept the Communities' contention that the extension of the tariff of the EC/10 to the EC/12 was compatible with their obligations under Article XXIV:5(a) regardless of the effect that this may have on the tariffs of Spain and Portugal. This argument ignored the fact that Article XXIV:5(a) required a comparison with the pre-accession tariffs of the constituent territories. It would also make the article meaningless when a large country formed a customs union with a much smaller one, or in the case of future enlargements of the European Communities. The relative size of the parties to the customs union or free-trade area was not a subject addressed by Article XXIV.

14. Australia could not subscribe either to the Communities' claim that a deterioration in access for a major trade item could be adequately compensated by improvements in access on a large number of items of minor trade interests. Like Canada, Australia could not accept the contention that credit was owed to the Communities because of their own decision to proceed with the enlargement. His delegation had been concerned by the failure of the Communities to provide information which separately identified trade taking place under preferential conditions rather than on the basis of global trade patterns. It was necessary to exclude preferential trade from statistics when making an assessment of the impact of the new arrangements under Article XXIV:5(a) as well as for the purpose of determining supplier rights in the negotiations conducted under Article XXIV:6.

15. The representative of Australia said that the Communities had consistently argued that from an early stage certain issues raised by other participants were beyond resolution and that the Working Party only need write a report reflecting all the views, instead of attempting to reach definitive conclusions. There had been no real attempt to address the issues raised in a meaningful way, which only worked to the benefit of the parties to the agreement. Under Article XXIV:7(a), the burden of proof about the compatibility of an agreement with the GATT rested with the parties to such an agreement. Therefore, it was not possible to reach at the present stage the conclusion that the enlargement conformed with the obligations of the Communities, Spain and Portugal under Article XXIV. The only tentative conclusion that could be drawn was that the new customs union did not meet the test of Article XXIV:5(a). However, the Communities had on a number of occasions asked the Working Party to avoid too static an analysis. Australia was prepared to take this request into account when drafting the report of the Working Party. It therefore proposed that the Communities prepare annual or biennial reports on the implementation of the Treaty of Accession as was customary for free trade arrangements and had been done with respect to the implementation of the Treaty of Rome.

B. and C. <u>Preparation of the Working Party's report to the Council, with the help of a factual summary of the discussion to date which the secretariat has been asked to prepare at the previous meeting of the Working Party. Any other relevant points, including the timetable for the completion of the Working Party's work and the date of its next meeting</u>

16. The Chairman suggested that the Working Party should aim to produce, before the summer break, a report which summarized the discussion, recorded points of agreement and disagreement and set out conclusions and recommendations. He proposed that at the next meeting of the Working Party, there should be a discussion on conclusions and recommendations. He invited those delegations which were in a position to do so to submit to the secretariat beforehand any suggestions which they might have.

17. After some discussion on the way in which the work should be organized and the tasks to be done by the secretariat, the Chairman suggested that at the next meeting of the Working Party, to be held on 23 June 1988, the Working Party start discussing its report on the basis of a draft by the secretariat, which would in turn be based on the "factual summary of the discussion to date", the secretariat's note on the present meeting, and suggestions for conclusions and recommendations received from delegations. It was so agreed.

ANNEX

ARTICLE XXIV : 5

NOTE BY THE EUROPEAN COMMUNITY ON THE QUESTION OF TARIFF INCIDENCE

1. As the Community has pointed out in the fifth meeting of the Working Party on 17 February 1988, negotiations under Article XXIV:6 have for the most part been completed with most of the Community's trading partners. The new schedule of concessions of the enlarged Community has been submitted to the GATT in December 1987. The concessions are substantially identical to the schedule of concessions of the Community of 10.

   Based on the data circulated with regard to the question of tariff incidence, it is clear that imports into Spain and Portugal only represent 7% of total imports of the enlarged Community and accordingly that 93% of imports are not affected by any tariff changes. Increases in duties will affect less than 1/2 per cent of total Community imports. As a consequence the incidence of duties remains unchanged, or is reduced, for an extremely large proportion of the trade of the enlarged Community and accordingly the conditions of Article XXIV:5 with regard to tariff incidence have been comprehensively fulfilled.

2. The Community cannot accept that the arguments put forward by the US delegation on this question are valid, nor is the data totally accurate. In particular, the figures used to support the US arguments are incorrect in that they only cover 2 of the 3 years which are the basis for the negotiations and also take no account of the fact that the blanks in the original tariff proposed by the Community have been subsequently replaced by new bound duties. Furthermore the US presentation is flawed because it does not take account of the trade of the Community of 10 where tariff incidence has not been modified. In addition the Community does not accept the method used for measuring the incidence of a movement from a bound tariff to a variable levy or that duty collections are a necessarily valid method of measuring tariff incidence in the context of Article XXIV:5.

   More particularly the US presentation shows substantial trade volumes in item 2 - where tariffs increase - arising in cases where Spanish and Portuguese unbound duties were bound after accession, or where they were not bound and remain not bound. This argument does not seem to recognise the requirement, under Art. XXIV.8, that the duties of the enlarged Community of 12 be substantially the same : that is, that Spanish and Portuguese duties have to be aligned on those of the EEC/10, or vice versa, or on some average duty rate. The solution chosen minimises the increase in duties while offering substantial advantages to third countries in the form of new bindings. It is also questionable how far the notion of tariff incidence can be applied, without some qualification in the case of duties of this kind. It is obvious that unbound duties could have been raised at any time before the formation of the Customs Union in order to enable the parties to claim, at a later date, that the tariff incidence had been reduced on enlargement : such a practice would however make no economic sense, and it would be ridiculous if the Contracting Parties were to encourage manoeuvres of this kind when reaching conclusions as regards conformity with Article XXIV.5

3. Nevertheless, even if we follow the style of the US presentation, adjusted to take account of the points raised in paragraph 2, it is possible to see (Annex) that the volume of trade subject to duty increases in Spain or Portugal is very small in relation to overall Community trade. Using the US methodology such trade amounts to less than 1.5% of EC-12 imports. The remaining trade either experiences no change in incidence or else enjoys positive tariff incidence resulting from lower duties in the new Member States. This proves conclusively that the conditions of Article XXIV:5 regarding tariff incidence have been met in relation to the new schedule of duties of the enlarged Community.

IMPORTS OF SPAIN AND PORTUGAL (1983-85) : MILLION ECU

	IMPORTS FROM GATT COUNTRIES	
1) TARIFFS DECREASING		
a) Bound	4,895	
b) New bindings	3,839	
c) Unbindings	5	
d) Remaining unbound	5	
	8,744	
2) TARIFFS INCREASING		
a) Bound	197	
b) New bindings	2,136	(1)
c) Unbindings (higher	-	
(variable levies	696	
d) Remaining unbound (higher	22	
(variable levies	631	(1)
	3,682	(= 1.5 % of total EC-12 imports)
3) TARIFFS REMAINING AT SAME LEVEL		
a) Bound	348	
b) New bindings	4,318	
c) Unbindings	-	
d) Remaining unbound	1	
	4,667	
Total imports of Spain and Portugal	17,094	
EC 10 Imports	239,831	
(no change in tariff incidence)		

(1) Note :The significance of these duty increases in assessing the overall level of tariff incidence is examined in the Community's note commentary on the US note of 4.12.86