I

Legal Framework for Tariff Negotiations and Renegotiations under GATT 1994[1]

Several articles of the General Agreement on Tariffs and Trade (GATT) have a bearing on the process of tariff negotiations and renegotiations. An analysis of all these articles and the ways in which the provisions impinge on the commitments made during tariff negotiations and renegotiations is outside the scope of this work. We take up only those articles which have a direct bearing on the subject of our study.

A. Provisions Relating to Tariff Negotiations

While GATT 1947 (like GATT 1994) prohibited quantitative restrictions as a general rule, it allowed the use of 'duties, taxes or other charges' for the regulation of trade. Furthermore, the national treatment provision which required that, once goods had been imported, they should be treated on equal terms with domestically produced goods, served to ensure that all discriminatory taxes (i.e. tariffs) aimed at protection were applied in a transparent manner only at the border. The plan

[1] The General Agreement on Tariffs and Trade (GATT) 1994 provides that 'the references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member".' As for the term 'CONTRACTING PARTIES', which refers to contracting parties acting jointly, it provides that, in the case of certain provisions (which are not of relevance in this study), the reference shall be deemed to be a reference to the WTO while, in the case of other provisions (which are of relevance in this study), the functions of the CONTRACTING PARTIES shall be allocated by the Ministerial Conference. No such allocation has, however, been decided upon so far.

In describing the provisions of GATT 1994, therefore, we have substituted the term 'contracting party' with 'Member' and the term 'CONTRACTING PARTIES' with 'Ministerial Conference'. Since the functions of the Ministerial Conference are carried out by the General Council in the intervals between meetings of the Ministerial Conference, for all practical purposes references to the Ministerial Conference should be deemed to be references to the General Council.

In this publication, the term 'CONTRACTING PARTIES' is expressed as Contracting Parties, and the term 'Member' as 'member'. References to Contracting Parties occur only when an account is being given of what happened during the operation of GATT 1947.

envisaged in 1947 for the liberalization of world trade was to prohibit the application of quantitative restrictions, to allow regulation of import (and export) through transparently administered non-discriminatory tariffs applied at the border, and then to work for the progressive reduction of these tariffs through successive rounds of negotiations.

Periodic tariff negotiations

Article 17 of the Havana Charter provided, *inter alia*, as follows:

> 'Each Member shall, upon the request of any other Member, or Members, and subject to procedural arrangements established by the Organization, enter into and carry out with such other Member or Members, negotiations directed to the substantial reduction of the general levels of tariffs and other charges on imports and exports, and to the elimination of the preferences referred to in paragraph 2 of Article 16, on a reciprocal and mutually advantageous basis.'

The *desiderata* contained in this provision provided the basis for the initial rounds of tariff negotiations held under GATT 1947. It was not until the review session of 1954–55 that the present Article XXVIII *bis* was introduced, entering into force on 7 October 1957. This article envisages that, from time to time, the Ministerial Conference may sponsor negotiations directed to the substantial reduction of the general level of tariffs and other charges on imports and exports, and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities.

The report of the working party, on the recommendation of which this article was added to GATT 1947, noted that 'The article would impose no new obligations on contracting parties. Each contracting party would retain the right to decide whether or not to engage in negotiations or participate in a tariff conference.' Thus, under GATT 1947, participation in tariff negotiations was optional. The position remains unchanged in the WTO Agreement, even though the requirement for original membership of the WTO, that contracting parties to GATT 1947 should have schedules of concessions and commitments annexed to GATT 1994, as well as schedules of specific commitments annexed to the General Agreement on Trade in Services (GATS), made participation in the tariff negotiations (as well as the negotiations for specific commitments in GATS) obligatory during the Uruguay Round (1986–1994).

Principle of reciprocity

A central requirement of Article 17 of the Havana Charter and Article XXVIII *bis* of the GATT is that the negotiations be held on a reciprocal and mutually advantageous basis. There is no provision on the manner in which reciprocity is to be measured, and even the rules of various rounds of negotiations did not spell out any guidelines on the issue. The understanding has always been that governments participating in negotiations should retain complete freedom to adopt any method for evaluating the concessions.

Modalities of tariff negotiations

On the modalities of tariff negotiations, Article XXVIII *bis* leaves it to participants to decide whether the negotiations should be carried out on a selective product-by-product basis or by the application 'of such multilateral procedures as may be accepted by the contracting parties concerned'. It envisages that the negotiations could result in the reduction of duties, the binding of duties at existing levels or commitments not to raise duties on particular products beyond specified levels. It stipulates further that 'The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.'

Article XXVIII *bis* also provides for the negotiations to take into account the diversity of situations of individual participating countries 'including the fiscal, developmental, strategic and other needs' and the needs of developing countries for tariff protection to assist their economic development and to maintain tariffs for revenue purposes.

Concept of non-reciprocity

In the 1960s and 1970s, the concept of non-reciprocity was developed for trade negotiations between developed and developing countries and was embodied in paragraph 8 of Article XXXVI, which was introduced in Part IV of the GATT and became effective on 27 June 1966. This paragraph states that 'The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.' An interpretative note adds that the developing countries 'should not be expected, in the course of trade negotiations, to make contributions which

are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments'. The interpretative note also extends the applicability of the concept of non-reciprocity to renegotiations under Article XVIII or XXVIII.

The concept was further elaborated in the Tokyo Round Decision on 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', also known as the 'Enabling Clause', which was adopted on 28 November 1979. This clause provided, *inter alia*, as follows:

> 'The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries i.e. the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs . . . Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.'[2]

Supplementary negotiations

In the years before Article XXVIII *bis* was introduced into GATT 1947, the practice had been established for negotiations to take place for tariff concessions even outside of general tariff conferences or rounds of negotiations. In fact, while adopting the procedures for the Torquay Tariff Conference (1950), the Contracting Parties had also established procedures[3] for negotiations between two or more contracting parties at times other than during general tariff conferences. These procedures require notification to other contracting parties about the date and place of negotiation, as well as circulation of the request lists exchanged between contracting parties proposing negotiations. Other contracting parties are given the right to join in these negotiations. The procedures

[2] GATT (2003), Twenty-sixth Supplement, p. 204. [3] GATT (2003), Vol. I, p. 116.

provide for a selective, product-by-product basis for the negotiations. These bilateral and plurilateral negotiations are known as supplementary negotiations, and their results as supplementary concessions.

Tariff negotiations during accession

Although tariff negotiations are a substantial component of the process of accession of governments, neither Article XXXIII of GATT 1947 (which is now no longer relevant as it has ceased to be in force) nor Article XII of the WTO Agreement gives any guidelines on how such negotiations are to be conducted. The latter article provides simply, as the former had done, for the accession to take place on 'terms to be agreed' between the applicant government and the full membership. One of the terms in every case has been for the acceding member to undertake market access commitments, including reduction and binding of tariffs. The negotiations for securing tariff commitments are made on a bilateral basis between the applicant government and its main trading partners.

Tariff commitments on behalf of dependent territories

The Protocol of Provisional Application of GATT 1947 provided for the acceptance of the protocol by the contracting parties in respect of their metropolitan territories as well as on behalf of their dependent territories. Article XXVI 5(c) of GATT 1947 provided that, when these dependent territories acquired full autonomy in the conduct of their external commercial relations, they would become contracting parties when the responsible contracting parties certified that such autonomy had been acquired. The states which became contracting parties through the succession route of Article XXVI 5(c) were bound by the tariff commitments made earlier on their behalf. Upon their becoming new contracting parties, a new schedule was established for them on the basis of the corresponding entries in the schedules of the contracting parties which had made the commitments on their behalf. The provision has not been carried forward into the WTO Agreement.

Non-application

Article XXXV of GATT 1947 provided for non-application of either the full Agreement or of Article II of the Agreement between two contracting parties if:

(a) the two contracting parties had not entered into tariff negotiations with each other, and
(b) either of the contracting parties, at the time either became a contracting party, did not consent to such application.

The prerequisites for non-application of GATT 1947 were so formulated as to provide for such non-application only at the outset (in January 1948) or at the time of accession of a new contracting party. The contracting party invoking the article had the option of providing for the non-application of the entire agreement or only of tariff concessions.

Article XIII of the WTO Agreement has a corresponding provision on non-application. However, it can be invoked between original members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of GATT 1947 had been invoked earlier and was effective as between those contracting parties at the time of entry into force of the WTO Agreement.

B. Provisions Relating to Tariff Renegotiations

Article XXVIII is the principal provision of GATT 1994 on renegotiations of tariff concessions. It provides for the possibility of modification or withdrawal of tariff concessions after negotiation (renegotiation) with:

(i) Members with which the concession was initially negotiated; and
(ii) Members which have a principal supplying interest. In addition, consultations have to be held with members which have a substantial interest in such concessions.

Such modification or withdrawal can be done:

(i) on the first day of each three-year period, the first of which began on 1 January 1958;
(ii) at any time in special circumstances on authorization; or
(iii) during the three-year period referred to above, if the member concerned has, before the beginning of the period, elected to reserve the right to renegotiate.

In the negotiations, the member seeking modification or withdrawal is expected to give compensatory concession on other products. If agreement is not reached, the affected members get the right to withdraw substantially equivalent concessions initially negotiated with the member making the changes.

Initial negotiating rights (INRs)

In the early days of GATT 1947, for every individual concession there were one or more contracting parties with INRs. When, at a subsequent negotiation, a concession was negotiated at a lower level of tariff on the same product, the contracting party or parties acquiring INRs could be the same or different depending on whether there had been changes in the market shares of the product in the meantime. Thus, for each tariff line figuring in successive rounds of negotiations, there could be several layers of INRs held by the same or different contracting parties. INRs other than those resulting from the latest negotiations are referred to as historical INRs.

In the first five rounds of tariff negotiations, the technique used was that of item-by-item negotiations on a bilateral request–offer basis. In these negotiations, before the tariff concessions were consolidated in a schedule, there used to be bilaterally agreed lists of concessions exchanged by participants. In these negotiations, therefore, it was easy to identify the contracting party which had INRs. However, there was no such clarity when, in the Kennedy Round (1964–67), important trading nations decided to adopt a linear reduction approach. The Contracting Parties, therefore, adopted a decision on 16 November 1967 which provided as follows:

> 'In respect of the concessions specified in the Schedules annexed to the Geneva (1967) Protocol, a contracting party shall, when the question arises, be deemed for the purposes of the General Agreement to be the contracting party with which a concession was initially negotiated if it had, during a representative period prior to that time, a principal supplying interest in the product concerned.'[4]

During the discussions of this decision in the Trade Negotiating Committee it was emphasized that the words 'that time' referred to 'when the question arises'. Following the Tokyo Round (1973–79), in which a formula approach was also followed, a similar decision[5] was adopted on 28 November 1979 in respect of INRs. While another similar decision[6] was taken in 1988 in connection with the introduction of the Harmonized System (HS), no such decision was adopted for the concessions agreed in the Uruguay Round.

[4] GATT (2003), Fifteenth Supplement, p. 67.
[5] GATT (2003), Twenty-sixth Supplement, p. 202.
[6] GATT (2003), Thirty-fifth Supplement, p. 336.

As we shall see in the account in Chapter II of the practices and procedures adopted during the tariff negotiations, INRs have also become a bargaining chip and sometimes they are granted in bilateral negotiations as a reward for important reciprocal concessions or used as an element for topping-up in the exercise for bilateral balancing of reciprocal concessions. There have been other instances during accession negotiations in which INRs were specifically excluded in respect of items figuring in bilaterally agreed lists of concessions. INRs are presumed to exist if any concession is mentioned in a bilateral list drawn up in rounds of negotiations, bilateral or plurilateral negotiations, accession negotiations or renegotiations unless indicated otherwise. Where there are no bilateral lists, INRs are presumed not to exist unless specifically indicated in the schedule.

The Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994 made an addition to the concept of INRs. It is provided that, when a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' statistics are not available), a member having initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The Uruguay Round Understanding also adds the requirement that any member having a principal supplying interest in a concession which is modified or withdrawn shall be accorded an initial negotiating right in the compensatory concessions, unless another form of concession is agreed by the member concerned.

Principal supplying interest and substantial interest

Article XXVIII provides for the Ministerial Conference (Contracting Parties) to determine which members have a principal supplying interest or substantial interest. However, the procedures adopted for renegotiations, with which we shall deal in detail in Chapter IV, provide that if a member makes a claim of principal supplying interest or substantial interest, and the member invoking Article XXVIII recognizes the claim, 'the recognition will constitute a determination by the "Contracting Parties" of the interest in the sense of Article XXVIII:1'.[7]

[7] GATT (2003), Twenty-seventh Supplement, pp. 26–28.

An interpretative note to paragraph 1 of Article XXVIII provides that a member should be determined to have a principal supplying interest if it:

> 'has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated, or would ... have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party'.

The interpretative note envisages that generally there would not be more than one or, in those exceptional cases where there is near equality in supplying status, two contracting parties with a principal supplying interest.

Another interpretative note mentions one other category of member with a principal supplying interest: where the concession to be modified affects a major part of the total exports of a member. One more category of economies with a principal supplying interest was created (and the possibility of consideration being given to yet another category on a future date was envisaged) in the Uruguay Round Understanding on the Interpretation of Article XXVIII of GATT 1994, paragraph 1 of which provides as follows:

> 'For the purposes of modification or withdrawal of a concession, the Member which has the highest ratio of exports affected by the concession (i.e. exports of the product to the market of the Member modifying or withdrawing the concession) to its total exports shall be deemed to have a principal supplying interest if it does not already have an initial negotiating right or a principal supplying interest as provided for in paragraph 1 of Article XXVIII. It is, however, agreed that this paragraph will be reviewed by the Council for Trade in Goods five years from the date of entry into force of the WTO Agreement with a view to deciding whether this criterion has worked satisfactorily in securing a redistribution of negotiating rights in favour of small and medium-sized exporting Members. If this is not the case, consideration will be given to possible improvements, including, in the light of the availability of adequate data, the adoption of a criterion based on the ratio of exports affected by the concession to exports to all markets of the product in question.'

The Uruguay Round Understanding clarifies two aspects relevant for the determination of principal supplying interest or substantial interest.

First, in the determination of principal supplying interest or substantial interest, only trade which has taken place on a most-favoured-nation (MFN) basis is required to be taken into consideration. However, trade

which has taken place under non-contractual preferences (such as the Generalized System of Preferences) will also be taken into account if the preferential treatment has been withdrawn at the time of the renegotiations or will be withdrawn before the conclusion of the renegotiations.

Second, if a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) for the determination of principal supplying and substantial interests and the calculation of compensation, production capacity and investment in the affected product in the exporting member and estimates of export growth, as well as forecasts of demand in the importing member, have to be taken into account.

There is no criterion laid down for determining substantial interest. The interpretative notes in Annex I to GATT 1947 acknowledge that the concept cannot be precisely defined, but suggest that those members could be construed as having a substantial interest when they have a significant share in the market. In practice, contracting parties (members) having 10 per cent or more of the trade share have been recognized as having a substantial interest. Article XXVIII requires members to negotiate modification or withdrawal with members having initial negotiating rights or a principal supplying interest and to reach an agreement with them, and the members with a substantial interest have only the right to consultation. But if there is no agreement with members with INRs or a principal supplying interest, or if the member with a substantial interest is not satisfied with the agreement reached, all have an equal right to withdraw substantially equivalent concessions initially negotiated with the applicant member.

Types of renegotiations: open season, special circumstance and reserved renegotiations

As already mentioned, there are three types of renegotiations envisaged in Article XXVIII: three-year (open season) renegotiations, special circumstance renegotiations and reserved renegotiations. Article XXVIII:1 provides that on the first day of each three-year period (the first period having begun on 1 January 1958 and the next one beginning on 1 January 2018), any member may modify or withdraw a concession after negotiation and agreement with members having initial negotiating rights and a principal supplying interest, and consultation with those with a substantial interest. Any other period may also be specified by a decision of the Ministerial Conference. The second type of renegotiation is that authorized in special circumstances by the Ministerial