Dear Participant,

At the 16-17 November 1987 meeting of the Negotiating Group on GATT Articles it was agreed in principle to conduct an enquiry on the use made by contracting parties of paragraph 1(b) of the Protocol of Provisional Application (MTN.GNG/NG7/5). Following consultations on the modalities of such an enquiry, it is my intention to write to all contracting parties in the near future asking them to provide the Group with this information.

You may wish to see, before the letter is finalized, the terms in which this request would be conveyed, and I therefore attach a copy. It aims at obtaining factual information on legislation maintained by contracting parties, and measures taken under it, for which justification is claimed under the PPA or under Accession Protocols.

Thank you for your attention in this matter.

Yours sincerely,

J. Weekes,
Chairman,
Negotiating Group on GATT Articles

Participants,
Negotiating Group on GATT Articles.
The Negotiating Group on GATT Articles, of which I am Chairman, has agreed to undertake an enquiry among contracting parties in order to obtain up-to-date information on legislation contrary to Part II of GATT maintained by contracting parties for which GATT cover is claimed under the Protocol of Provisional Application or under accession protocols. I have been asked to request all contracting parties to provide such information.

You will be aware that the General Agreement itself has never formally entered into force. The provisions of the General Agreement are applied by the original contracting parties on the basis of the Protocol of Provisional Application, which was signed on 30 October 1947. Countries which have acceded since 1948 under Article XXXIII apply the agreement on the basis of their protocols of accession. In the case of countries succeeding under Article XXVI:5(c) the protocol accepted by the former metropolitan territory (in practice the Protocol of Provisional Application) is the legal basis.

The Protocol of Provisional Application and the protocols of accession confer the right to apply Part II of the General Agreement only "to the fullest extent not inconsistent with existing legislation" (paragraph 1(b) of the PPA). This means that legislation inconsistent with the General Agreement, if it existed on 30 October 1947 or before the date of the Accession Protocol to the GATT may be maintained.
In order to qualify for cover under the PPA the legislation in question must be mandatory: the CONTRACTING PARTIES have agreed that the existing legislation clause is only "applicable to legislation which is, by its terms or express intent, of a mandatory character, i.e. it imposes on the executive authority requirements which cannot be modified by executive action". The same criterion applies to "existing legislation" maintained by other contracting parties under accession protocols. Further decisions by the CONTRACTING PARTIES have established that legislation may be modified without losing its status of "existing legislation" provided the degree of inconsistency with the General Agreement is not increased. However, any partial steps towards GATT conformity may not be reversed; further changes in the legislation having the effect of making it less consistent with GATT would deprive it of the status of "existing legislation". A fuller description of the purpose of the PPA, and of the decisions regarding it which have been taken by the CONTRACTING PARTIES, is given in a note by the secretariat dated 4 September 1987 (MTN.GNG/NC7/W/17) a copy of which I enclose.

The purpose of the enquiry undertaken by the Negotiating Group is to ascertain what legislation inconsistent with GATT is currently maintained by contracting parties under the PPA or under the accession protocols. There is no obligation to notify such legislation, or measures taken under it, and this has given rise to uncertainty as to the rights and obligations of contracting parties. In 1955 a request was made to contracting parties for information on their existing mandatory legislation which was not in conformity with Part II of the GATT. Thirteen contracting parties
responded, of which six indicated that they had no such legislation. In connection with an examination of residual import restrictions in 1962, two further contracting parties supplied information relevant in this context. It is therefore only partially known to what extent the PPA serves as a legal justification for measures inconsistent with the General Agreement. As legislation has been amended or abandoned over the years the practical effect of these provisions has certainly diminished. However, it is still important to know to what extent the PPA serves as a legal justification for measures inconsistent with the General Agreement.

I should therefore be extremely grateful if your authorities would provide an indication of any mandatory legislation, inconsistent with Part II of the GATT, which in their view is covered by the Protocol of Provisional Application or by your country's Accession Protocol. It would also be greatly appreciated if an indication could be given of all significant measures taken under this legislation. I should emphasise that this enquiry is entirely without prejudice to the continued justification of the legislation and measures notified. Nor should it be taken to imply that the Negotiating Group will necessarily seek to amend the status of "existing legislation" under GATT law. The sole purpose of the enquiry is to compile an up-to-date and comprehensive list of the legislation for which this justification is claimed.
The information to be provided should be sent to me through the GATT secretariat (Mr. D. C. Hartridge). It would be much appreciated if it could reach me by 1 June 1988.

Yours sincerely,

J. Weekes

Chairman

Negotiating Group on GATT Articles