Working Party on Article XXXV Review

DRAFT REPORT OF THE WORKING PARTY ON ARTICLE XXXV REVIEW

1. The Working Party was appointed by the CONTRACTING PARTIES at their eighteenth session and was instructed to conduct a review, under paragraph 2 of Article XXXV, of the operation of that Article with respect to Japan. The composition of the Working Party and its terms of reference are as set out in document L/1482.

2. The Working Party met from 28 August to 1 September 1961. In the absence of its Chairman the meetings were presided over by Mr. Wyndham White, the Executive Secretary. Corresponding to the terms of reference of the Working Party the present report sets out (i) the findings of the Working Party in the course of the factual review, and (ii) certain general considerations which might be taken into account by the CONTRACTING PARTIES in formulating recommendations pursuant to paragraph 2 of Article XXXV.

I. Review of the Facts

3. As requested by the CONTRACTING PARTIES, the Executive Secretary had prepared a note on the origin of Article XXXV and its application in the case of Japan (L/1482) as well as a paper on the trade relationships between Japan and contracting parties invoking Article XXXV against it (L/1531). The last mentioned secretariat paper sets out the import treatment granted to Japanese products by the contracting parties concerned, and the facts stated therein formed the basis of discussion at the Working Party.

4. The Party noted that at present there were fourteen contracting parties invoking the Article in question against Japan (in addition, Cambodia and Tunisia have indicated that they may want to invoke Article XXXV against Japan when they accede to the General Agreement). It was noted that among the fourteen contracting parties only two, namely Haiti and South Africa, withhold most-favoured-nation customs tariff treatment to imports from Japan. All the other contracting parties in question granted imports from Japan, either unilaterally on a de facto basis or pursuant to bilateral agreements, the same customs treatment as on imports from other contracting parties. Furthermore, in the case of South Africa, maximum duty rates...
higher than most-favoured-nation rates existed only in regard to about one-fourth of the customs tariff items; in other words, for the major part of its imports from Japan, most-favoured-nation rates were also applicable.

5. As regards import restrictions and controls, special measures applying to imports from Japan were maintained by five of these contracting parties (Austria, France, Ghana, Rhodesia and Nyasaland, and the United Kingdom). In most of these countries, however, a varying range of products had been liberalized for Japan and the special controls affected only a part of their imports from that country. Apart from these countries, the Benelux countries maintained licensing control on some twenty-eight items of imports from Japan; with the exception of these few items all imports from Japan were free from restriction.

6. It should be noted, however, in some of the cases where no import restrictions were maintained against Japanese products, their trade relations with Japan were the subject of bilateral arrangements which provided for certain safeguards against serious injury which might arise from this trade. For example, the trade agreements entered into by Australia and New Zealand with Japan were based on the concept of an exchange of GATT treatment between the partner countries as far as practicable subject to the provision that if serious injury to a domestic industry were caused or threatened in either country by imports of a particular product from the other, the importing country would be entitled to suspend its obligations under its agreement in respect of that particular product. The agreements also made provisions for consultation between the partner governments with the objective of avoiding the need for any such discriminatory action. It is understood that trade relations between some of the contracting parties invoking Article XXXV and Japan also involved certain undertakings on the part of Japan.

7. The Working Party was also instructed to examine the effects of the invocation of Article XXXV against Japan on the trade of Japan as well as on other contracting parties. From the statements supplied by the countries invoking Article XXXV, the Working Party gained the impression that in most cases trade between those countries and Japan had developed in an encouraging manner in recent years: there had been a considerable increase in their imports from Japan in absolute terms and, in some cases, their imports from Japan as a proportion of their total imports had also shown a significant
increase. It was noted by some members of the Working Party that the invocation of Article XXV constituted no inhibition to the expansion of trade between the countries concerned; more relevant to a consideration of trade possibilities would seem to be the existence or absence of import restrictions, particularly those of a discriminatory nature. The Working Party noted that the statistical and other factual information available to it did not conclusively demonstrate that any close correlation between the development of trade and the invocation or non-invocation of Article XXV; rather it would appear that in countries where Japan's exports were faced with special restrictions which were not generally applicable to other countries, imports from Japan would tend to stay at a relatively lower level or to increase at a lower rate than imports from other sources.

II. General conclusions

8. In the light of the factual review the Working Party puts forward the following considerations which the CONTRACTING PARTIES might wish to take into account in formulating their recommendations pursuant to paragraph 2 of Article XXV.

9. The Working Party noted that the invocation of Article XXV had in most cases been motivated by the fear that competition offered by Japanese products might lead to serious injuries to domestic industries. Experience had shown, however, that such fears were generally exaggerated. In many cases the problems which the invoking contracting parties had in mind would not appear in themselves to justify such a drastic measure as the total withholding of GATT relations. Although clearly these countries were legally entitled to maintain their invocation of the Article, the fact nevertheless remained that the invocation of the Article not only affected the trade between two countries directly concerned but might create problems for third countries.

10. While it was true that trade was affected by restrictions whether or not those were based on an invocation of Article XXV, the Working Party nevertheless considers that there was an important distinction between restrictions applied by countries invoking the Article and those applied by countries not invoking it; restrictions against Japanese products imposed by countries not invoking Article XXV were subject to control and remedial procedures provided for in the General Agreement and the absence of such control and procedures would seem inevitably to have some significant effects on trade.
11. The Working Party noted that trade between the countries invoking Article XXXV and Japan had in recent years developed in an encouraging manner. Nevertheless, it considers that the atmosphere of uncertainty created by the lack of contractual relations between Japan and a number of important countries must have some inhibitive effects on Japan's exports. Moreover, the widespread invocation of the Article must have created in Japan, and elsewhere, the impression of a degree of discrimination against Japanese exports far exceeding the reality. In this connexion the Working Party noted that Japan had announced its intention of proceeding in the near future with a substantial elimination of its import restrictions. It had been suggested that Japan's efforts to fulfill its obligations in this regard had been and might further be hampered by reason of the widespread invocation of Article XXXV. Although Japan would be entitled to withhold its liberalization measures from countries invoking Article XXXV, it had indicated a reluctance to embark on such a cause until all ways and means of finding a satisfactory solution had been exhausted.

12. The Working Party also examined the contention of Japan that the widespread invocation of Article XXXV had other effects detrimental to the attainment of the objectives of GATT, notably in regard to the lowering of customs tariffs. In its view, the lack of GATT relationship with a number of important trading nations had hampered and might further hamper Japan's efforts in meaningfully participating in tariff negotiations. The Working Party recognizes the validity of this contention and feels that contracting parties should give it due weight in the context of the present report, and in connexion with any future arrangements for tariff negotiations.

13. The considerations noted above have led the Working Party to believe that there would be advantage from the point of view of Japan as well as that of contracting parties generally if the possibility of disinvoking the Article were further explored. While recognizing that the solutions of problems arising in the trade between individual contracting parties and Japan might have to be found through bilateral negotiations, the Working Party considers that such bilateral negotiations would undoubtedly be facilitated and solutions consistent with the aims of the General Agreement might more easily be found if concerted action could be taken by the contracting parties concerned.
14. The Working Party was also aware that there appeared to be certain special problems arising for certain industrialized countries in their trade with Japan, problems which had been discussed by the CONTRACTING PARTIES in another context. The Working Party is of the view that if satisfactory multilateral solutions were found for such problems, this would no doubt facilitate the solution of the problem of the widespread invocation of Article XXV against Japan.

15. The Working Party also discussed the question of invocation of Article XXV by governments acceding to GATT under Articles XXIV:5(a) and XXXIII. It wishes to point out that there can be no doubt that a government acceding under Article XXIV:5(a) does so on the terms and conditions previously accepted by the metropolitan government on behalf of the territory in question. Consequently, if Article XXV had been invoked in respect of that territory (or if that territory had not been specifically excluded in an invocation), it would continue to be valid unless expressly disinvoked by the succeeding government. If this were clearly understood, it would then be unnecessary for the new government to take an immediate decision on whether the invocation should or should not be maintained. The government could be requested to give the matter the consideration due to it after its accession to the General Agreement. This question arises, however, only in cases of immediate accession by a government after acquiring full autonomy; in the case of a government making use of the Recommendation of 1 November 1957 providing for delayed sponsorship, the delay would of course provide the necessary period in which the matter could be considered. It might be recommended by the CONTRACTING PARTIES that in the course of reflection and consideration the acceding government should be ready to afford the country against which Article XXXV was invoked an opportunity for consultation.

16. As regards countries acceding to the General Agreement under Article XXXIII, the Working Party sees no justification in depriving them of the legal right of making use of Article XXXV in appropriate circumstances. The CONTRACTING PARTIES, however, might wish to take steps to dispel the idea that the invocation of Article XXXV was a part of the normal procedure of accession or that the invocation of Article XXXV could legitimately be used as a bargaining lever for gaining special privileges or advantages from another contracting party. The Working Party also suggests that the CONTRACTING PARTIES endorse the desirability of consultations in cases where there is a possibility of Article XXXV being invoked by a contracting party or an acceding government.