Committee on the Legal and Institutional Framework of the GATT in Relation to Less-Developed Countries

LEGAL DRAFTING GROUP

Draft Report

1. The Legal Drafting Group was set up by the Council at its meeting on 28-30 October 1964 with the following terms of reference:

   (i) to remove any legal drafting imperfections in the new Chapter;
   (ii) to ensure conformity between the texts in the two official languages;
   (iii) to make a recommendation on the most appropriate means for incorporating the Chapter in the General Agreement;
   (iv) to draw up the protocol of amendment.

The members of the Committee on the Legal and Institutional Framework were invited to nominate experts to serve on this Group. Experts were nominated by the EEC and by the Governments of Brazil, India, Japan, Nigeria, United Kingdom, and United States.

2. The Group examined the text of the draft Chapter on Trade and Development contained in Annex I of document L/2281, and made the changes necessary to improve the legal drafting and to ensure conformity between the French and English texts. The Group also considered the most appropriate means for incorporating the new provisions in the General Agreement and decided to recommend that Part II of the GATT should be divided into three chapters, the first chapter, comprising Articles IV(revised) to XVII, to be entitled "General Trade Provisions"; the second chapter, comprising the new provisions as Article XVIII:I and the existing Article XVIII as Article XVIII:II, to be entitled "Trade and Development"; the third chapter, comprising Articles XIX to XXIII, to be entitled "Exceptions, Consultations and Complaints". The Group
considered that this method of incorporating the new provisions in the GATT has the great advantage of requiring a minimal number of consequential amendments throughout the General Agreement and avoids the necessity of renumbering existing Articles. A draft Protocol to give effect to these amendments is attached in Annex A to this report; it has been modelled on the amendment protocols which were drawn up by the CONTRACTING PARTIES at the Review Session in 1955.

3. A member of the Group felt that because of the difference in legal value between the preambular and the operative part of an international treaty the language of paragraph 1 of Article XVIII:I properly belonged in the preamble (Article I revised) of the General Agreement. He felt that the presentation recommended by the Group would leave some doubt as to whether the language of paragraph 1 was a preamble in the strictly formal sense, although it was obviously preambular in substance. The Group was aware of these considerations, but noted that many provisions of the Agreement were already preceded by such preambular language. The Group, bearing in mind the practical difficulties which would arise if an attempt were made to amend Part I of the Agreement, decided to recommend the presentation in the draft Protocol.

4. Certain members of the Group expressed regret that time did not permit consideration of any consequential drafting changes which may be desirable in the existing Article XVIII which it is proposed shall form part of the new Chapter. As a result the text of the Chapter as a whole may not be fully satisfactory from a legal drafting point of view. However, it was noted that the Council has recommended a review of the existing Article XVIII in the near future and the Group considers that the consideration referred to above renders that review all the more urgent.

5. The words inserted by the Legal Drafting Group in Article XVIII:I, as set out in Annex A, have been underlined in order to facilitate comparison with the previous text.
6. The Group draws attention to sub-paragraph 13(b)(i) of the draft Article XVIII:I. It was the view of the Group that there was some ambiguity in the phrasing of the first four lines of this sub-paragraph (and especially the use of the words "without prejudice to any bilateral consultations which may be undertaken"), which could lead to differences in interpretation in the substance contained in that paragraph. The Group therefore suggests that an amendment of this sub-paragraph in a way which would fully reflect its intention should be considered.

7. The Group considered the request by the Council that it should look into the legal advisability of including in the chapter an appropriate reference to the machinery required for pursuing the work of the CONTRACTING PARTIES as provided in the chapter. The Group noted that there was no precedent in the General Agreement for such a provision, and that such a reference might present legal difficulties both for the CONTRACTING PARTIES and for individual contracting parties. The Group therefore concluded, with one member reserving his position, that it would not be desirable to introduce a reference to the machinery to be established.

8. The Group considered that representatives of the contracting parties attending the Special Session would wish, when they have approved the Protocol of Amendment, to sign some document authenticating the text. For this purpose a draft Final Act has been prepared and is attached hereto in Annex B.

9. The Group also considered the request by the Legal Committee and by the Council that it should explore the possibility of the new provisions being applied on a de facto basis pending their formal entry into force when the Protocol has been accepted by two-thirds of the contracting parties. It is the view of the Group that the only way this can be done is by the contracting parties, either collectively or individually, adopting a Declaration in which they would announce their intention to implement the amendments on a de facto basis for a certain period. A draft of such a declaration is attached in Annex C for consideration by the CONTRACTING PARTIES at the special session. It is suggested in this draft that the de facto application should begin on 1 January 1965 and should be co-terminous with the closing date for acceptance of the Protocol or until the amendments enter into effect if that should be at an earlier date. Thus, if the amendments had not entered into effect by the end of 1965 the CONTRACTING PARTIES, when considering whether to extend the closing date for acceptance of the Protocol, could review the arrangement for de facto implementation.
10. The experts from the European Economic Community reserved their right to propose an amendment to the expression "governments" in the Protocol and the Final Act.

11. The Group draws attention to the fact that, since it is only the contracting parties which can amend the General Agreement, the Protocol will not be open for acceptance by governments which have acceded provisionally. The Group therefore suggests that, at an appropriate time, the CONTRACTING PARTIES consider how governments which have acceded provisionally and which wish to observe the new provisions might be accommodated. Governments which have acceded provisionally and which are represented at the special session will, on the other hand, be able to participate in the adoption of the declaration on de facto implementation.