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NEGOTIATIONS
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NEGOTIATING RIGHTS UNDER ARTICLE XXVIII OF THE GATT

Note by the Secretariat

Article XXVIII of the GATT dealing with the procedures relating to the modification or withdrawal of tariff concessions grants negotiating rights to

- any contracting party with which such concessions were initially negotiated (the so-called INR country), and
- any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest (the so-called principal supplier).

Interpretative Note Ad Article XXVIII paragraph 1.4 stipulates for principal suppliers:

> "The object of providing for the participation in the negotiations of any contracting party with a principal supplying interest, in addition to any contracting party with which the concession was initially negotiated, is to ensure that a contracting party with a larger share in the trade affected by the concession than a contracting party with which the concession was initially negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party 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, in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest."

However, Interpretative Note Ad Article XXVIII, paragraph 1.5 also provides:

> "Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party."

In spite of the existence of this provision and the possibility of a contracting party invoking Article XXVIII to recognize an additional supplying country as a principal supplier, this provision has never been invoked before the CONTRACTING PARTIES, but may have been utilized in bilateral negotiations between contracting parties.

In the discussions held in the Committee on Tariff Concessions relating to the application of Article XXVIII, the delegation of Switzerland in December 1985 submitted a proposal, the text of which is contained in the annex. It will be noted that the criterion mentioned in this proposal for granting an additional principal supplying right is "the importance of exports of the product concerned to the market in question per head of population of the exporting country". Switzerland has now submitted a similar proposal to the Negotiating Group in document MTN.GNG/NG7/W/11. In its submission contained in MTN.GNG/NG7/W/3, New Zealand has suggested in this respect that one method to be considered is "to relate the value of exports to the GNP of the exporting contracting party". Finally, the communication from Korea (MTN.GNG/NG7/W/6) proposes that "the ratio of export value of the item concerned to the country in question to its total export value of all products" be taken into consideration.

The above-mentioned proposal made by Switzerland found the support of some delegations in the discussions of the Committee on Tariff Concessions, while other delegations expressed reservations. Some of the latter delegations pointed out that possible improvements of Article XXVIII should be taken up in the new Round.

In addition to INR countries and principal suppliers which under Article XXVIII have negotiating rights, a third category of countries, i.e. those having a substantial interest in the concession to be modified or withdrawn, are entitled to consultations. On the question of what constitutes a "substantial interest" in a tariff concession, the Interpretative Note Ad Article XXVIII, paragraph 1.7 provides that this expression "is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably expect to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession". In actual practice, contracting parties which have invoked Article XXVIII, have in their bilateral negotiations interpreted

the term "significant share in the market" to be at least 10 per cent, although nothing would prevent a country from recognizing substantial interest for a lower percentage.

Under the Procedures for Negotiations under Article XXVIII (BISD 27S/26), negotiating rights for principal suppliers and consultation rights for countries with a substantial supplying interest are established on the basis of import statistics of the products in question, by country of origin, for the last three years for which statistics are available (see paragraph 2 of the Procedures). In the years 1983-1984, a discussion developed in the Committee on Tariff Concessions and in the GATT Council relating to the invocation of Article XXVIII in respect of new (high technology) products which had not yet been, or had just started to be, traded internationally and for which consequently no, or only very small, trade figures were available. Some delegations expressed concern about the withdrawal of tariff bindings for such products which, while not yet traded, had prospects of significant future trade. These delegations were of the view that Article XXVIII should not be applied to these products so as to provide a relatively easy way to protect domestic producers from import competition, without in addition having to provide for compensatory adjustment with respect to other products (Article XXVIII.2). Other delegations stressed that the invocation of Article XXVIII in respect of new products could not be questioned and that at any rate the problems to be considered were not limited to new products but related to all products for which there were difficulties with statistical data (e.g. separate statistics did not exist for a particular item); the absence of such data had never meant that Article XXVIII was not applicable to the products in question.

A proposal submitted to the Committee on Tariff Concessions by one delegation in April 1984 (TAR/W/45) stipulated that contracting parties should refrain from invoking Article XXVIII.5 with respect to new high-technology products prior to their full-scale commercial production and trade on the presumption that a substantial degree of measurability is not ensured, and further, that the Committee examine the conditions, such as the degree of measurability required and the method of calculating the compensation, which would need to be fulfilled if Article XXVIII.5 were to be applied to the above-noted products prior to their full-scale commercial production and trade. Although this proposal was considered by the Committee on Tariff Concessions and in informal consultations convened by the Committee's chairman, no agreement could be reached.