

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG2/W/85

2 November 1990

Special Distribution

Group of Negotiations on Goods (GATT)
Negotiating Group on Non-Tariff Measures

RULES OF ORIGIN AND PRESHIPMENT INSPECTION

Draft Agreements

At the meeting of the Negotiating Group on Non-Tariff Measures which was held on 19 September 1990, the Chairman of the Negotiating Group stated his intention to forward to the Chairman of the TNC the results of the work reached by 15 October 1990 on rules of origin and preshipment inspection (MTN.GNG/NG2/21, paragraph 15).

Attached are the texts of draft agreements on rules of origin and preshipment inspection, and cover notes thereto which have been forwarded by the Chairman of the Negotiating Group to the Chairman of the TNC.

ACCORD GÉNÉRAL
SUR LES TARIFS DOUANIERS
ET LE COMMERCE



GENERAL AGREEMENT
ON TARIFFS AND TRADE

ACUERDO GENERAL SOBRE ARANCELES
ADUANEROS Y COMERCIO

TELEPHONE: (022) 739 51 11
LIGNE DIRECTE: (022) 739.....
TELEGRAMMES: GATT, GENEVE
TELEX: 412324 GATT CH
TELEFAX: (022) 731 42 06

Centre William Rappard
Rue de Lausanne 154
CH - 1211 GENÈVE 21

REFERENCE:

19 October 1990

REPORT TO THE CHAIRMAN OF THE TNC FROM THE CHAIRMAN
OF THE NEGOTIATING GROUP ON NON-TARIFF MEASURES

Rules of Origin

Dear Mr. Chairman,

In line with the directive from the heads of delegations to the TNC to produce an agreed text by 19 October 1990, I am forwarding to you the attached report of the Chairman of the Informal Drafting Group on Rules of Origin. His letter, which should be read in conjunction with the draft text of an agreement on rules of origin, outlines clearly the state of negotiations in this area. Given the situation reflected in the letter, consideration will have to be given to the best way of pursuing these negotiations.

A handwritten signature in dark ink, appearing to read "Lindsay Duthie".

Lindsay Duthie
Chairman of the Negotiating
Group on Non-Tariff Measures



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Centre William Rappard
Rue de Lausanne 154
CH-1211 GENÈVE 21

REFERENCE: 2573

19 October 1990

REPORT TO THE CHAIRMAN OF THE NEGOTIATING GROUP ON
NON-TARIFF MEASURES FROM THE CHAIRMAN OF THE INFORMAL
DRAFTING GROUP ON RULES OF ORIGIN

Dear Ambassador Duthie,

Since my last report to the Negotiating Group on Non-Tariff Measures, the Drafting Group met on the basis of the text annexed to the Chairman's report to the GNG (MTN.GNG/NG2/W/72). This text was circulated to all participants in the negotiations who were also invited to attend the meetings of the Drafting Group.

During its last meetings, the Drafting Group worked under a directive from the heads of delegations to the TNC to produce an agreed text by 19 October 1990. Intensive negotiations have therefore been conducted to this end. It is on the basis of these negotiations that the Drafting Group has asked me to forward the attached ad referendum text with the request that high level negotiations be conducted on the issues identified by square brackets.

Negotiations on rules of origin are closely related to negotiations on a number of other areas.

A handwritten signature in black ink, appearing to read "P.J. Williams". The signature is fluid and cursive, written over a white background.

P.J. Williams
Chairman
Informal Drafting Group

19.10.90

16.00

Negotiating Group on Non-Tariff Measures

Informal Drafting Group on Rules of Origin

DRAFT TEXT OF AN AGREEMENT ON RULES OF ORIGIN¹

PREAMBLE

The CONTRACTING PARTIES,

NOTING that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to bring about further liberalization and expansion of world trade, strengthen the role of the GATT and increase the responsiveness of the GATT system to the evolving international economic environment;

DESIRING to further the objectives of the GATT;

RECOGNIZING that clear and predictable rules of origin and their application facilitate the flow of international trade;

DESIRING to ensure that rules of origin themselves do not create unnecessary obstacles to trade;

DESIRING to ensure that rules of origin do not nullify or impair the rights of contracting parties under the GATT;

RECOGNIZING that it is desirable to provide transparency of laws, regulations, and practices regarding rules of origin;

¹The legal form of the agreement will be examined at a later stage.

DESIRING to ensure that rules of origin are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner;

RECOGNIZING the availability of a consultation mechanism and procedures for the speedy, effective and equitable resolution of disputes arising under this agreement;

DESIRING to harmonize and clarify rules of origin;

hereby agree as follows:

PART I

DEFINITIONS AND COVERAGE

Article 1

Rules of Origin

1. For the purposes of this agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any contracting party to determine the country¹ of origin of goods [provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of Article I:1 of the General Agreement].

2. [Rules of origin referred to in paragraph 1 shall include, all rules of origin used in non-preferential commercial policy instruments, such as the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of the General Agreement; anti-dumping and countervailing duties under Article VI of the General Agreement; safeguard measures under Article XIX of the General Agreement; origin marking requirements under Article IX of the General Agreement; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for public procurement and trade statistics.²]

¹The word "country", wherever it appears in this agreement, includes the territory of each of the contracting parties. For the purposes of this agreement, the European Communities shall be considered as a contracting party.

²It is understood that this provision is without prejudice to those determinations made for purposes of defining "domestic industry" or "like products of domestic industry" or similar terms wherever they apply.

PART II

DISCIPLINES TO GOVERN THE APPLICATION OF RULES OF ORIGIN

Article 2

Disciplines during the transitional period

Until the work programme for the harmonization of rules of origin set out in Part IV below is completed, contracting parties shall ensure that:

- [(a) they apply rules of origin equally for all purposes covered by this agreement, as set out in Article 1 above;]
- [(b) under their rules of origin, the country to be determined as the origin of a particular good shall be either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;]
- (c) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:
 - in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the sub-headings or headings within the tariff nomenclature which are addressed by the rule;
 - in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin;

- in cases where the criterion of manufacturing or processing operation is prescribed, the operation which confers origin on the good concerned shall be precisely specified;

- (d) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;¹

- (e) Rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. [They shall not be adapted to specific purposes.] They shall not pose unduly strict requirements [or require the fulfilment of a certain condition not related to manufacturing or processing, such as research and development, as a prerequisite for the determination of the country of origin]. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with sub-paragraph (c) above;

- (f) the rules of origin which they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other contracting parties, irrespective of the affiliation of the manufacturers of the good concerned;^{1,2}

¹[It is understood that this provision does not apply to rules of origin used for preferential trading arrangements.]

²[With respect to rules of origin applied for the purposes of government procurement, this provision shall not create obligations additional to those already assumed by contracting parties under the GATT.]

- (g) their rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
- (h) [their rules of origin are based on a positive standard. Rules of origin which state what does not confer origin (negative standard) are permissible as part of a clarification of a positive standard [or in individual cases where a positive determination of origin is not necessary]. [However, under exceptional circumstances, contracting parties may apply negative standards to individual cases, if they provide other contracting parties an explanation of their difficulties in applying a positive standard to such individual cases]];
- (i) their laws, regulations, judicial and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of Article X:1 of the General Agreement;
- (j) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days¹ of a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point of time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid

¹In respect of requests made during the first year from entry into force of this agreement, contracting parties shall only be required to issue these assessments as soon as possible.

when a decision contrary to the assessment is made in a review as referred to in sub-paragraph (l) below. Such assessments shall be made publicly available subject to the provisions of sub-paragraph (m) below;

- (k) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (l) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
- (m) all information which is by nature confidential or which is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

Article 3

Disciplines after harmonization

After the entry into force of harmonized rules of origin in accordance with Part IV below, contracting parties shall ensure that:

- [(a) they apply harmonized rules of origin equally for all purposes covered by this agreement, as set out in Article 1 above;]

- (b) the harmonized rules of origin which they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other contracting parties, irrespective of the affiliation of the manufacturers of the good concerned;^{1,2}

- (c) the harmonized rules of origin are administered in a consistent, uniform, impartial and reasonable manner;

- (d) their laws, regulations, judicial and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of Article X:1 of the General Agreement;

- (e) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days of a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point of time. Such assessments shall remain valid for three years provided that the facts and

¹[It is understood that this provision does not apply to rules of origin used for preferential trading arrangements.]

²[With respect to rules of origin applied for the purposes of government procurement, this provision shall not create obligations additional to those already assumed by contracting parties under the GATT.]

conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in sub-paragraph (g) below. Such assessments shall be made publicly available subject to the provisions of sub-paragraph (h) below;

- (f) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (g) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
- (h) all information which is by nature confidential or which is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

[Article 4

Disciplines if harmonization work
programme is otherwise completed

If the work programme set out in Part IV below is completed otherwise than as envisaged in Article 3 above, [contracting parties shall continue to observe the provisions of Article 2 above, in particular paragraphs (a) and (b) thereof] [the CONTRACTING PARTIES shall decide whether to continue, amend or discontinue this agreement].]

PART III

PROCEDURAL ARRANGEMENTS ON NOTIFICATION, REVIEW,
CONSULTATION AND DISPUTE SETTLEMENT

Article 5

Institutions

There shall be established under this agreement:

1. A Committee on Rules of Origin (hereinafter referred to as the Committee) composed of the representatives from each of the contracting parties. The Committee shall elect its own Chairman and shall meet as necessary but not less than once a year, for the purpose of affording contracting parties the opportunities to consult on matters relating to the operation of Parts I, II, III and IV of the agreement or the furtherance of its objectives and to carry out such other responsibilities assigned to it under this agreement or by the CONTRACTING PARTIES. Any contracting party may bring a matter to the Committee [for examination]. Where appropriate, the Committee shall request information and advice from the Technical Committee (referred to in paragraph 2 below) on matters related to this agreement. The Committee may also request such other work from the Technical Committee as it considers appropriate for the furtherance of the objectives of this agreement. The GATT secretariat shall act as the secretariat to the Committee.

2. A Technical Committee on Rules of Origin (hereinafter referred to as the Technical Committee) under the auspices of the Customs Co-operation Council as set out in Annex I of this agreement. The Technical Committee shall carry out the technical work called for in Part IV and prescribed in Annex I of this agreement. Where appropriate, the Technical Committee

shall request information and advice from the Committee on matters related to this agreement. The Technical Committee may also request such other work from the Committee as it considers appropriate for the furtherance of the objectives of the agreement. The CCC secretariat shall act as the secretariat to the Technical Committee.

[Article 6

Notification and procedures for modification

1. Upon entry into force of this agreement, each contracting party shall notify within 90 days to the secretariat its rules of origin, judicial decisions, and administrative rulings of general application relating to rules of origin in effect on that date. Lists of notifications shall be circulated to contracting parties through the GATT secretariat. If by inadvertence a rule of origin has not been notified, the contracting party concerned shall notify it immediately this fact becomes known.

[2. During the period referred to in Article 2 above, contracting parties introducing changes, other than de minimis changes, to their rules of origin, or introducing new rules of origin, which, for the purpose of this Article, shall include any rule of origin not notified under paragraph 1 above shall [endeavour to]:

- (a) publish a notice to that effect at an early appropriate stage, in such a manner as to enable interested parties to become acquainted with the proposal;
- (b) notify the proposal to other contracting parties, through the secretariat, at least 75 days before it is to be adopted;

- (c) include in the notification a brief description of the proposal, the goods affected and an explanation of the reasons for the proposal;
- (d) allow at least 30 days prior to the adoption of the proposal for contracting parties to hold consultations with a view to ensuring that it is as neutral as possible and in conformity with the agreed principles and procedures, as well as with GATT obligations and principles, and take any written comments and the results of consultations into account before finalizing the proposal.

3. Where exceptional circumstances arise or threaten to arise for a contracting party, that contracting party may omit such of the steps enumerated in paragraph 2 as it finds necessary, provided that it shall:

- (a) in a manner as prescribed in paragraph 2(b) above notify as soon as possible and in no case later than 10 days after adoption of the proposal, other contracting parties of the proposal and of the nature of the exceptional circumstances involved; and
- (b) consult with other contracting parties upon request, as soon as possible and in no case later than 30 days after adoption of the proposal.]]

Article 7

Review

1. The Committee shall review annually the implementation and operation of this agreement having regard to its objectives. The Committee shall annually inform the CONTRACTING PARTIES of developments during the period covered by such reviews.

2. The Committee shall review the provisions of Parts I, II and III above and propose amendments as necessary to reflect the results of the harmonization work.

3. The Committee, in cooperation with the Technical Committee, shall set up a mechanism to consider and propose amendments to the results of the harmonization work, taking into account the objectives and principles set out in Article 10. This may include instances where the rules need to be made more operational or need to be updated to take into account new production processes as affected by any technological change.

Article 8¹

Consultation

The provisions of Article XXII of the General Agreement, as improved and elaborated upon by the Negotiating Group on Dispute Settlement, are applicable to this agreement.

Article 9¹

Dispute settlement

The provisions of Article XXIII of the General Agreement, as improved and elaborated upon by the Negotiating Group on Dispute Settlement, are applicable to this agreement.

¹It is understood that the procedures on consultation and dispute settlement[, including the possible role of the Committee in this context,] will be re-examined when the legal form of the agreement is examined.

PART IV

HARMONIZATION OF RULES OF ORIGIN

Article 10

1. Objectives and principles

With the objectives of harmonizing rules of origin and inter alia providing more certainty in the conduct of world trade, the CONTRACTING PARTIES shall undertake the work programme set out below in conjunction with the Customs Cooperation Council, on the basis of the following principles:

- [(a) Rules of origin should be applied equally for all purposes covered by this agreement, as set out in Article 1 above;]
- (b) Rules of origin should provide for the country to be determined as the origin of a particular good to be either the country where the good has been wholly obtained, or where more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;
- (c) Rules of origin should be objective, understandable and predictable;
- (d) Notwithstanding the measure or instrument to which they may be linked, rules of origin should not be used as instruments to pursue trade objectives directly or indirectly. They should not themselves create restrictive, distorting or disruptive effects on international trade. They should not pose unduly strict requirements or require the fulfilment of a certain condition not relating to

manufacturing or processing as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for purposes of the application of an ad valorem percentage criterion;

- (e) Rules of origin should be administrable in a consistent, uniform, impartial and reasonable manner;
- (f) Rules of origin should be coherent;
- (g) Rules of origin should be based on a positive standard. Negative standards may be used to clarify a positive standard.

2. Work programme

- (a) The work programme shall be initiated as soon after the Uruguay Round as possible and will be completed within three years of initiation.
- (b) The Committee and the Technical Committee provided for in Article 5 of this agreement shall be the appropriate bodies to conduct this work.
- (c) To provide for detailed input by the CCC, the Committee shall request the Technical Committee to provide its interpretations and opinions resulting from the work described below on the basis of the principles listed in paragraph 1 of this Article. To ensure timely completion of the work programme for harmonization, such work shall be conducted on a product sector basis, as represented by various chapters or sections of the Harmonized System Tariff Nomenclature.

(i) Wholly obtained and minimal operations or processes

The Technical Committee shall develop harmonized definitions of:

- the goods which are to be considered as being wholly obtained in one country. This work shall be as detailed as possible;
- minimal operations or processes which do not by themselves confer origin to a good.

The results of this work shall be submitted to the Committee within three months of receipt of the request from the Committee.

(ii) Substantial transformation - Change in tariff classification

- The Technical Committee shall consider and elaborate upon, on the basis of the criterion of substantial transformation, the use of change in tariff subheading or heading when developing rules of origin for particular products or a product sector and, if appropriate, the minimum change within the nomenclature which meets this criterion.
- The Technical Committee shall divide the above work on a product basis taking into account the chapters or sections of the Harmonized System, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within one year and three months from receipt of the request of the Committee.

(iii) Substantial Transformation - Supplementary Criteria

- Upon completion of the work under (ii) for each product sector or individual product category where the exclusive use of the HS nomenclature does not allow for the expression of substantial transformation, the Technical Committee:
 - shall consider and elaborate upon, on the basis of the criterion of substantial transformation, the use, in a supplementary or exclusive manner, of other requirements, including ad valorem percentages¹ and/or manufacturing or processing operations² when developing rules of origin for particular products or a product sector;
 - may provide explanations for its proposals;
 - shall divide the above work on a product basis taking into account the chapters or sections of the Harmonized System, so as to submit results of its work to the Committee at least on a quarterly basis. The Technical Committee shall complete the above work within two years and three months of receipt of the request from the Committee.

¹Where the ad valorem criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin.

²Where the criterion of manufacturing or processing operation is prescribed, the operation which confers origin on the product concerned shall be precisely specified.

3. Role of the GATT

On the basis of the principles listed in paragraph 1 of this Article:

- the Committee shall consider the interpretations and opinions of the Technical Committee periodically in accordance with the time-frames provided in (i), (ii) and (iii) above with a view to endorsing such interpretations and opinions. The Committee may request the Technical Committee to refine or elaborate its work and/or develop new approaches. To assist the Technical Committee, the Committee should provide its reasons for requests for additional work and, as appropriate, suggest alternative approaches;
- upon completion of all the work identified in (i), (ii) and (iii) above, the Committee shall consider the results in terms of their overall coherence.

4. Results of the harmonization work programme and subsequent work

(a) The CONTRACTING PARTIES shall establish the results of the harmonization work in an annex as an integral part of this agreement. The CONTRACTING PARTIES shall establish a time-frame for the entry into force of this annex.

(b) [The contracting parties shall apply the principles laid down in Article 3 in a uniform manner wherever rules of origin are invoked for all purposes referred to in Article 1 as from the entry into force of the harmonized rules of origin.]

N.B. The issue of rules of origin for preferential purposes has not been resolved.

PART V

FINAL PROVISIONS

Article 11

National legislation

Each contracting party accepting or acceding to this agreement shall ensure, not later than the date of entry into force of this agreement for it, the conformity with the provisions of this agreement, of its laws, regulations and administrative practices to determine the country of origin of goods.

Etc.

ANNEX I

Technical Committee on Rules of Origin

1. The on-going responsibilities of the Technical Committee shall include the following:

- (a) at the request of any member of the Technical Committee, to examine specific technical problems arising in the day-to-day administration of the rules of origin of contracting parties and to give advisory opinions on appropriate solutions based upon the facts presented;
- (b) to furnish information and advice on any matters concerning the origin determination of goods as may be requested by any contracting party or the Committee;
- (c) to prepare and circulate periodic reports on the technical aspects of the operation and status of this agreement; and
- (d) to review annually the technical aspects of the implementation and operation of this agreement.

2. The Technical Committee shall exercise such other responsibilities as the Committee may request of it.

3. The Technical Committee shall attempt to conclude its work on specific matters, especially those referred to it by contracting parties or the Committee, in a reasonably short period of time, [particularly in respect of any work related to Article 5].

Representation

4. Each contracting party shall have the right to be represented on the Technical Committee. Each contracting party may nominate one delegate and one or more alternates to be its representatives on the Technical Committee. Such a contracting party so represented on the Technical Committee is herein referred to as a member of the Technical Committee. Representatives of members of the Technical Committee may be assisted by advisers at meetings of the Technical Committee. The GATT secretariat may also attend such meetings with observer status.

5. Members of the Customs Co-operation Council who are not contracting parties may be represented at meetings of the Technical Committee by one delegate and one or more alternates. Such representatives shall attend meetings of the Technical Committee as observers.

6. Subject to the approval of the Chairman of the Technical Committee, the Secretary-General of the Customs Co-operation Council (hereinafter referred to as the Secretary-General) may invite representatives of governments which are neither contracting parties nor members of the Customs Co-operation Council and representatives of international governmental and trade organizations to attend meetings of the Technical Committee as observers.

7. Nominations of delegates, alternates and advisers to meetings of the Technical Committee shall be made to the Secretary-General.

Meetings

8. The Technical Committee shall meet as necessary, but not less than once a year.

Procedures

9. The Technical Committee shall elect its own chairman and shall establish its own procedures.

**ACCORD GÉNÉRAL
SUR LES TARIFS DOUANIERS
ET LE COMMERCE**



**GENERAL AGREEMENT
ON TARIFFS AND TRADE**

**ACUERDO GENERAL SOBRE ARANCELES
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TELEPHONE: (022) 39 51 11
LIGNE DIRECTE.....
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TELEX: 28 787 GATT CH
TELECOPIE: (022) 31 42 06

Centre William Rappard
Rue de Lausanne 154
CH-1211 GENÈVE 21

18 October 1990

REFERENCE:

REPORT TO THE CHAIRMAN OF THE TNC FROM THE CHAIRMAN
OF THE NEGOTIATING GROUP ON NON-TARIFF MEASURES

Preshipment Inspection

Dear Mr. Chairman,

In line with the directive from the heads of delegations to the TNC to produce an agreed text by 19 October 1990, I am forwarding to you the attached report of the Chairman of the Informal Drafting Group on Preshipment Inspection. His letter, which should be read in conjunction with the draft text of an agreement on preshipment inspection, outlines clearly the state of negotiations in this area. Given the situation reflected in the letter, consideration will have to be given to the best way of pursuing these negotiations.

A handwritten signature in cursive script, appearing to read 'Lindsay Duthie'.

Lindsay Duthie
Chairman of the Negotiating
Group on Non-Tariff Measures

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GENERAL AGREEMENT
ON TARIFFS AND TRADE

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TÉLÉCOPIE: (022) 31 42 06

Centre William Rappard
Rue de Lausanne 154
CH - 1211 GENÈVE 21

REFERENCE: 2489

18 October 1990

REPORT TO THE CHAIRMAN OF THE NEGOTIATING GROUP
ON NON-TARIFF MEASURES FROM THE CHAIRMAN OF THE INFORMAL
DRAFTING GROUP ON PRESHIPMENT INSPECTION

Dear Ambassador Duthie,

Since my last report to the Negotiating Group on Non-Tariff Measures, the Drafting Group met on the basis of the text annexed to the Chairman's report to the GNG (MTN.GNG/NG2/W/72). This text was circulated to all participants in the negotiations who were also invited to attend the meetings of the Drafting Group. This text contained many points of divergence.

During its last meetings the Drafting Group worked under a directive from the heads of delegations to the TNC to produce an agreed text by 19 October 1990. The Drafting Group has therefore conducted intensive negotiations to this end. A large number of proposals and suggestions have been made. All of these have been thoroughly discussed.

..... It is on the basis of these negotiations that I forward the attached text. It is drawn up on my own responsibility.

Main issues

Some participants have problems with different paragraphs in the text but the Drafting Group identified the following three issues as of particular difficulty and the main differences of position on these are indicated in square brackets in the text:

- (a) action to be taken on the report of the independent review panel (Article 5:1(h));
- (b) relationship between the provisions of the agreement and national laws and regulations (Articles 4:1 and 10:2);
- (c) price verification (Article 2:20);

Other points

The International Chamber of Commerce and the International Federation of Inspection Agencies have expressed their willingness in principle to administer the Independent Review Entity referred to in Article 5:1 and consultations have been initiated on the arrangements that would be made to this end.

It is understood that, for the purposes of this agreement, force majeure in Article 2:15 shall mean "irresistible compulsion or coercion, unforeseeable course of events excusing from fulfilment of contract".

The legal form of this agreement remains to be examined. The wording of the attached text may need to be adapted in the light of the decision taken on this subject.



P.J. Williams
Chairman
Informal Drafting Group

18 October 1990

Negotiating Group on Non-Tariff Measures

Informal Drafting Group on Preshipment Inspection

DRAFT TEXT OF AN AGREEMENT ON PRESHIPMENT INSPECTION

PREAMBLE

NOTING that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to bring about further liberalization and expansion of world trade, strengthen the role of GATT and increase the responsiveness of the GATT system to the evolving international economic environment;

NOTING that a number of developing contracting parties have recourse to preshipment inspection;

RECOGNIZING the need of developing countries to do so for as long and insofar as it is necessary to verify the quality, quantity or price of imported goods;

MINDFUL that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment;

NOTING that this inspection is by definition carried out on the territory of exporter contracting parties;

RECOGNIZING the need to establish an agreed international framework of rights and obligations of both user contracting parties and exporter contracting parties;

RECOGNIZING that the principles and obligations of the General Agreement apply to those activities of preshipment inspection entities that are mandated by governments that are Parties to the General Agreement;

RECOGNIZING that it is desirable to provide transparency of the operation of preshipment inspection entities and of laws and regulations relating to preshipment inspection;

DESIRING to provide for the speedy, effective and equitable resolution of disputes between exporters and preshipment inspection entities arising under this agreement;

The contracting parties hereby agree as follows:

ARTICLE 1

Coverage. Definitions

1.1. This agreement shall apply to all preshipment inspection activities carried out on the territory of contracting parties, whether such activities are contracted or mandated by the government, or any government body, of a contracting party (hereinafter referred to as user contracting party).

1.2. Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user contracting party.

1.3. The term "preshipment inspection entity" is any entity contracted or mandated by¹ a contracting party to carry out preshipment inspection activities.

ARTICLE 2

Obligations of user contracting parties

Non-discrimination

2.1. User contracting parties shall ensure that preshipment inspection activities are carried out in a non-discriminatory manner, that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities. They shall ensure uniform performance of inspection by all the inspectors of the preshipment inspection entities contracted or mandated by them.

Governmental requirements

2.2. User contracting parties shall ensure that in the course of preshipment activities relating to their laws, regulations and requirements, the provisions of Article III:4 of the General Agreement are respected to the extent that these are relevant.

Site of inspection

2.3. User contracting parties shall ensure that all preshipment inspection activities, including the issuance of a Clean Report of Findings or a note of non-issuance, are performed in the customs territory from which the goods are exported or, if the inspection cannot be carried out in that customs territory given the complex nature of the products involved, or if both parties agree, in the customs territory in which the goods are manufactured.

¹It is understood that this provision does not obligate contracting parties to allow government entities of other contracting parties to conduct preshipment inspection activities on their territory.

Standards

2.4. User contracting parties shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards, relevant international standards¹ apply.

Transparency

2.5. User contracting parties shall ensure that preshipment inspection activities are conducted in a transparent manner.

2.6. User contracting parties shall ensure that, when initially contacted by exporters, preshipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The preshipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of the user contracting parties relating to preshipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under Article 2:21. Additional procedural requirements or changes in existing procedures shall not be applied to a shipment unless the exporter concerned is informed of these changes at the time the inspection date is arranged. However, in an emergency situation, such additional requirements or changes may be applied to a shipment before the exporter has been informed, provided that this does not affect contracts already entered into. This assistance shall not, however, relieve exporters from their obligations in respect of compliance with the import regulations of the user contracting parties.

2.7. User contracting parties shall ensure that the information referred to in Article 2:6 is made available to exporters in a convenient manner, and that the preshipment inspection offices maintained by preshipment inspection entities serve as information points where this information is available.

2.8. User contracting parties shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

¹An international standard is a standard adopted by a governmental or non-governmental body whose membership is open to all contracting parties, one of whose recognized activities is in the field of standardization.

Protection of confidential business information

2.9. User contracting parties shall ensure that preshipment inspection entities treat all information received in the course of the preshipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User contracting parties shall ensure that preshipment inspection entities maintain procedures to this end.

2.10. User contracting parties shall provide information to contracting parties on request on the measures they are taking to give effect to Article 2:9. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would jeopardize the effectiveness of the preshipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.

2.11. User contracting parties shall ensure that preshipment inspection entities do not divulge confidential business information to any third party, except that preshipment inspection entities may share this information with the government entities that have contracted or mandated them. User contracting parties shall ensure that confidential business information which they receive from preshipment inspection entities contracted or mandated by them is adequately safeguarded. Preshipment inspection entities shall share confidential business information with the governments contracting or mandating them only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

2.12. User contracting parties shall ensure that preshipment inspection entities do not request exporters to provide information regarding:

- (a) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;
- (b) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
- (c) internal pricing, including manufacturing costs;
- (d) profit levels;
- (e) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. In such cases, the entity shall only request the information necessary for this purpose.

2.13. The information referred to in Article 2:12, which preshipment inspection entities shall not otherwise request, may be released voluntarily by the exporter to illustrate a specific case.

Conflicts of interest

2.14. User contracting parties shall ensure that preshipment inspection entities, bearing in mind also the provisions on protection of confidential business information in Article 2:9-13, maintain procedures to avoid conflicts of interest:

- (a) between preshipment inspection entities and any related entities of the preshipment inspection entities in question, including any entities in which the latter have a financial or commercial interest or any entities which have a financial interest in the preshipment inspection entities in question, and whose shipments the preshipment inspection entities are to inspect;
- (b) between preshipment inspection entities and any other entities, including other entities subject to preshipment inspection, with the exception of the government entities contracting or mandating the inspections;
- (c) with divisions of preshipment inspection entities engaged in activities other than those required to carry out the inspection process.

Delays

2.15. User contracting parties shall ensure that preshipment inspection entities avoid unreasonable delays in inspection of shipments. User contracting parties shall ensure that, once a preshipment inspection entity and an exporter agree on an inspection date, the preshipment inspection entity conducts the inspection on that date unless it is rescheduled on a mutually-agreed basis between the exporter and the preshipment inspection entity, or the preshipment inspection entity is prevented from doing so by the exporter or by force majeure.

2.16. User contracting parties shall ensure that, following receipt of the final documents and completion of the inspection, preshipment inspection entities, within five working days, either issue a Clean Report of Findings or provide a detailed written explanation specifying the reasons for non-issuance. User contracting parties shall ensure that, in the latter case, preshipment inspection entities give exporters the opportunity to present their views in writing and, if exporters so request, arrange for reinspection at the earliest mutually convenient date.

2.17. User contracting parties shall ensure that, whenever so requested by the exporters, preshipment inspection entities undertake, prior to the date of physical inspection, a preliminary verification of price and, where applicable, of currency exchange rate, on the basis of the contract between exporter and importer, the pro forma invoice and, where applicable, the application for import authorization. User contracting parties shall ensure that a price or currency exchange rate that has been accepted by a preshipment inspection entity on the basis of such preliminary verification is not withdrawn, providing the goods conform to the import documentation and/or import licence. They shall ensure that, after a preliminary verification has taken place, preshipment inspection entities immediately inform exporters in writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate.

2.18. User contracting parties shall ensure that, in order to avoid delays in payment, preshipment inspection entities send to exporters or to designated representatives of the exporters a Clean Report of Findings as expeditiously as possible.

2.19. User contracting parties shall ensure that, in the event of a clerical error in the Clean Report of Findings, preshipment inspection entities correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

Price verification

2.20. User contracting parties shall ensure that, in order to prevent over- and under-invoicing, preshipment inspection entities conduct price verification, other than for purposes of customs valuation, according to the following guidelines:

- (a) preshipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in Article 2:20(b)-(e) below [and indicate a breach of the laws and regulations of the user contracting party];
- (b) price verification shall be based upon the prevailing export price, which is the price at which identical or similar goods are offered for export from the same country of exportation [to the same country of importation], at or about the same time under competitive conditions and comparable terms and conditions of sale, in conformity with customary commercial practice, and net of any applicable standard discounts. Appropriate adjustments shall be made for minor differences in the goods being compared, the time of exportation and/or the conditions of delivery;

- (c) when conducting price verification, preshipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price, such as the contractual relationship between the exporter and importer;
- (d) the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;
- (e) the following shall not be used for price verification purposes:
 - (i) the selling price in the country of importation of goods produced in such country;
 - (ii) the price of goods for export from a country other than the country of exportation;
 - (iii) the cost of production;
 - (iv) arbitrary or fictitious prices or values.

Appeals procedures

2.21. User contracting parties shall ensure that preshipment inspection entities establish procedures to receive, consider and render decisions concerning grievances raised by exporters, and that information concerning such procedures is made available to exporters in accordance with the provisions of Article 2:6-7. User contracting parties shall ensure that the procedures are developed and maintained in accordance with the following guidelines:

- (a) preshipment inspection entities shall designate one or more officials who shall be available during normal business hours in each city or port in which they maintain a preshipment inspection administrative office to receive, consider and render decisions on exporters' appeals or grievances;
- (b) exporters shall provide in writing to the designated official(s) the facts concerning the specific transaction in question, the nature of the grievance and a suggested solution;

- (c) the designated official(s) shall afford sympathetic consideration to exporters' grievances and shall render a decision as soon as possible after receipt of the documentation referred to in (b) above.

Derogation

2.22. By derogation to the provisions of Article 2, user contracting parties shall provide that, with the exception of part shipments, shipments whose value is less than a minimum value applicable to such shipments as defined by the user contracting party shall not be inspected, except in exceptional circumstances. This minimum value shall form part of the information furnished to exporters under the provisions of Article 2:6 above.

ARTICLE 3

Obligations of exporter contracting parties

Non-discrimination

3.1. Exporter contracting parties shall ensure that their laws and regulations relating to preshipment inspection activities are applied in a non-discriminatory manner.

Transparency

3.2. Exporter contracting parties shall publish promptly all applicable laws and regulations relating to preshipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

Technical assistance

3.3. Exporter contracting parties shall offer to provide to user contracting parties, if requested, technical assistance directed towards the achievement of the objectives of this agreement on mutually agreed terms.

[ARTICLE 4

National laws and regulations

4.1. All contracting parties shall ensure that any relevant domestic laws and regulations relating to preshipment inspection activities shall not in any way change, limit or inhibit the operation of the preshipment inspection programmes as adopted by the user contracting parties.]

ARTICLE 5

Independent review procedures

5.1. Contracting parties shall encourage preshipment inspection entities and exporters mutually to resolve their disputes. However, two working days after submission of the grievance in accordance with the provisions of Article 2:21, either party may refer the dispute to independent review. Contracting parties shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

- (a) These procedures shall be administered by an independent entity constituted jointly by an organization representing preshipment inspection entities and an organization representing exporters for the purposes of this agreement;
- (b) the independent entity referred to in Article 5:1(a) above shall establish a list of experts as follows:
 - (i) a section of members nominated by an organization representing preshipment inspection entities;
 - (ii) a section of members nominated by an organization representing exporters;
 - (iii) a section of independent trade experts, nominated by the independent entity referred to in Article 5:1(a) above.

The geographical distribution of the experts on this list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of this agreement and shall be updated annually. The list shall be publicly available. It shall be notified to the GATT secretariat and circulated to all contracting parties;

- (c) an exporter or preshipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in Article 5:1(a) above and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the above list by the preshipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this

member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in Article 5:1(a) above. No objections shall be made to any independent trade expert drawn from section (iii) of the above list;

- (d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. He shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;
- (e) if the parties to the dispute so agree, one independent trade expert could be selected from section (iii) of the above list by the independent entity referred to in Article 5:1(a) above to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;
- (f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;
- (g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;
- (h) the decision of the panel shall be binding upon the parties to the dispute. [Exporter contracting parties shall reserve their rights to ensure compliance with the decision.] [The pre-shipment inspection entity may refer the dispute to the user contracting party which will decide whether the decision of the panel shall be given effect, and inform the independent entity accordingly.]

ARTICLE 6

Notification

6.1. Contracting parties shall submit to the GATT secretariat copies of their laws and regulations by which they put this agreement into force, as well as copies of any other laws and regulations relating to preshipment inspection when the agreement comes into force for the contracting party concerned. No changes in the laws and regulations relating to preshipment inspection shall be enforced before such changes have been officially published. They shall be notified to the GATT secretariat immediately after their publication. The GATT secretariat shall inform the contracting parties of the availability of this information.

ARTICLE 7

Review

7.1. Not later than the end of the second year from the entry into force of this agreement and every three years thereafter, the CONTRACTING PARTIES shall review its provisions, implementation and operation, taking into account the objectives thereof and experience gained in its operation. As a result of such review, the CONTRACTING PARTIES may amend the provisions of the agreement.

ARTICLE 8

Consultation

8.1. Contracting parties shall consult with other contracting parties upon request with respect to any matter affecting the operation of this agreement. In such cases, the provisions of Article XXII of the General Agreement, as amended by the Uruguay Round, shall apply.

ARTICLE 9

Dispute settlement

9.1. Any disputes among contracting parties regarding the operation of this agreement shall be subject to the provisions of Article XXIII of the General Agreement, as amended by the Uruguay Round.

ARTICLE 10

Final provisions

10.1. Contracting parties shall take the necessary measures for the implementation of the present agreement.

10.2. Contracting parties shall ensure that their laws and regulations shall not be contrary to the provisions of this agreement.