

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG7/W/24
15 September 1987

Special Distribution

Group of Negotiations on Goods (GATT)

Original: English

Negotiating Group on GATT Articles

COMMUNICATION FROM CANADA

The following communication, dated 15 September 1987, has been received from the delegation of Canada with the request that it be circulated to members of the Group.

STATEMENT BY CANADA ON
ARTICLE XXVIII ISSUES

There are a number of issues or problems which have come to light during negotiations under Article XXVIII which appear to deserve discussion in the MTN context. In general, a balance is desirable between the need for stable and predictable tariff schedules, on the one hand, and on the other, the right which sovereign states will no doubt wish to retain to make adjustments from time to time in their customs tariffs as part of commercial and/or industrial policy. Among the issues which appear to require review are:

- suppliers' rights;
- tariff rate quotas;
- compensation in the absence of past trade flows;
- withdrawal of MFN concessions;
- Article XXVIII:5 (notification of intentions)

1. Suppliers' Rights:

It has become increasingly clear in recent years that a lack of consensus in the definition of what properly constitutes suppliers' rights is creating problems. One major objective of the rules on suppliers' rights is, and should remain, that of ensuring that only a reasonable number of countries hold negotiating rights on any one item which is under negotiation. Otherwise Article XXVIII negotiations would become too unwieldy, especially where a large number of tariff items were involved (the harmonized system negotiations being perhaps the most extreme example of such a scenario).

There is the question as to whether or not contracting parties other than INR holders or principal and substantial suppliers (generally accepted to be those GATT members supplying ten percent or more of a country's imports on a tariff line basis) should be accorded negotiating rights in defined circumstances. Certain smaller trading nations have pointed out that they are sometimes absent from negotiations on products where they reap a substantial proportion of their export revenue because they do not qualify as a substantial supplier. Canada has occasionally run into this same difficulty. We have lost negotiating rights on a number of items because our exports, while significant, are overshadowed by those of larger suppliers.

Paragraph five of AD Article XXVIII was intended to be used to handle this problem, but there are some limitations in its usefulness. It contains the criterion that "the concession in question affects trade which constitutes a major part of the total exports of such contracting party". In the case of industrialized countries, this condition would almost never arise, given the huge number of individual products being

exported. Even in the case of LDCs, to the extent that their exports become more diversified, the criterion becomes more and more difficult to satisfy.

Various proposals have been made to grant additional supplier status in an Article XXVIII negotiation to a country on the basis of the importance of the export to that country. Different criteria have been suggested. In the paper sponsored by several countries, including Canada, the Secretariat has been invited to "illustrate" these proposals against recent Article XXVIII negotiations in order to allow further examination of their appropriateness. Canada would certainly support this analysis being carried out by the Secretariat. We would also request that this analysis include the identification by any CPS which would have had rights under Article XXVIII had the definition of a substantial supplier been set at five percent of imports on a tariff line basis. We would not, however, preclude the possibility that additional or different criteria might also be examined, along with those already proposed. In addition, the exercise of any new negotiating rights might need to be related to the proportion of a contracting party's tariff which is, or will be, bound in the GATT.

Another suppliers' rights issue concerns the status of contractual preferential suppliers in the determination of the list of principal and substantial suppliers. We will need to consider, therefore, whether the trade of contractual preferential suppliers should be included in the determination of principal and substantial suppliers.

2. Tariff Rate Quotas:

A second problem area in the context of Article XXVIII relates to the adequacy of the Article in relation to Tariff Rate Quotas (TRQS). TRQS should be a mechanism for furthering trade liberalization. It should be used to allow a country to move as a transitional measure from the use of QRS in the direction of the more transparent and secure binding of the tariff. Some CPS have, however, used the TRQ as a trade restrictive device. For example, certain CPS have attempted to transform existing unlimited bound tariff concessions into bound tariff rate quotas covering only "traditional" trade at the previous bound rate. Exports at greater than historical levels would face unbound or higher ex quota tariff rates. Such use of TRQS is obviously designed to cut off trade rather than liberalize it, and it will be important to develop new disciplines to close this loophole. One option might be to require compensation for the entire existing level of trade under the item. This formulation might appear too extreme in terms of compensation, but would seem justifiable relative to the qualitative (and potentially quantitative) damage inherent in the capping of a previously

unlimited bound concession. The option also seems well justified on the basis that calculating future growth potential would be at least equally contentious.

3. Compensation in the Absence of Past Trade Flows:

Calculations of appropriate compensation (or withdrawal of concessions) under Article XXVIII have been based on past trade flows, usually the most recent representative three-year period. Cases have arisen, however, in which trade flows have not yet taken place; in these cases the calculation of compensation is problematic, since Article XXVIII currently provides no methodology or guidance.

One aspect of this issue concerns the importance of protecting bound tariff concessions in areas of rapid technological development; one CP may act effectively to prevent another from capitalizing on its emerging comparative advantage, as embodied in the development of a new product.

This type of problem is not, however, limited to new products. Canada has been affected, for example, in at least one case where a CP created a break-out from a bound item and raised the rate for the new sub-item where Canada had had no previous trade. We did, however, have a potential trade interest.

Some method must be found to protect the interests of the exporting country in such cases. One possibility would be to ensure that CPS increasing tariff rates in such cases are required to provide compensation (or face retaliation). Where trade flows do not exist, but where the product is not new, some estimation of future damages might be calculated on the basis of: total market size and growth; price trends of domestic and imported goods from other sources; and estimated potential market share. Such calculations would admittedly be contentious; and yet, a pre-emptive tariff rate increase is serious, in that it impairs a bound concession.

4. Withdrawal of MFN Concessions:

In the case of retaliation under Article XXVIII, substantially equivalent concessions are withdrawn on an MFN basis. In practice, it is difficult to choose items which do not "sideswipe" other substantial suppliers, or even INR holders. It may be worth exploring the idea of allowing the withdrawal of concessions along the line of Article XIX.3(A) on a bilateral basis. The major potential disadvantage is that such actions could, especially over time, dilute the MFN principle. However, as there are expected to be only a small number of such cases any significant dilution of the MFN principle in the tariff area will be unlikely. We would also note that the use of Article XXVIII is frequently related to objectives which could be characterized

broadly as "protection". This would seem to be evident from the Secretariat's paper entitled "Use of Article XXVIII of the GATT". (Document MTN.GNG/NG7/W/10 of 02 July). In this context, the use of Article XXVIII could be considered to be somewhat parallel to that of Article XIX, which certainly allows for bilateral retaliation where agreement on compensation cannot be reached. On balance, Canada would favour further examination of the question of providing for the withdrawal of concessions under Article XXVIII on a non-MFN Basis.

5. Use of Article XXVIII:5:

Under Article XXVIII:5, CPS may "reserve the right" for "the duration" of the upcoming three-year period, to make tariff rate adjustments under Article XXVIII (subject to the usual requirements). This contrasts with Article XXVIII:1, which provides authority to make tariff adjustments ("modify or withdraw a concession") only on the first day of each three-year period; and with Article XXVIII:4, under the CPS must "authorize" negotiations. The restrictive nature of paragraphs 1 and 4 has led an increasing number of CPS to invoke paragraph five. In the 1958-60 period only four CPS invoked paragraph five; by 1973-75, twelve CPS took this step; and by 1982-84, nineteen CPS used paragraph five. This situation has both positive and negative elements in it. On the positive side, governments wishing to take tariff measures for commercial or industrial policy reasons can arrange to be "covered" on a continuous basis, and do not have to seek special permission under Article XXVIII:4. On the negative side, continuous legal cover for the use of Article XXVIII detracts from the objective of maintaining predictable and stable schedules of tariff concessions.

Given the CPS have become accustomed to being able to use Article XXVIII on a continuous basis using regular invocation of paragraph five, it is likely unrealistic to propose that governments give up this flexibility. Political realities seem to dictate that some adjustments in bound tariff rates are necessary from time to time; and many CPS will no doubt argue that, on the condition that they are willing to provide adequate compensation under the terms of Article XXVIII, they should have a mechanism available. In addition, if further constraints were to be introduced into the availability of Article XXVIII procedures, this could interfere significantly with the objective of obtaining a higher proportion of bindings in the tariff schedules of many CPS during the MTN. It would seem that what is required is a thorough airing of the question as to the degree of ease or difficulty with which a CP should be able to invoke Article XXVIII procedures.