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MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Negotiating Group on GATT Articles

COMMUNICATION FROM AUSTRALIA

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

GATT SECRETARIAT
UR-87-0248

ARTICLE XXVIII : PROPOSAL BY AUSTRALIA

Introduction

1. The Government of Australia supports the view of a significant number of participants in the negotiating group that there is a need to review the provisions of Article XXVIII. In particular, Australia sees scope to make the rights and obligations established in the Article clearer and more enforceable.

2. For example, Australia considers the current distinction between principal and substantial supplier rights is largely artificial. Also the lack of clarity in the Articles provisions gives rise to a number of inequitable situations.

3. Australia also considers that it is possible to amend the provisions of Article XXVIII so as to provide a strong impetus to the expansion of tariff bindings and the reduction of tariffs.

4. It is with these considerations in mind that Australia submits the following proposal. However, we would note that the proposal is without prejudice to Australia's final attitude to the review of GATT Articles or to its right to submit additional material.

Proposal

5. At a date to be decided by the Trade Negotiations Committee, all current principal supplier, substantial supplier and initial negotiation rights determined in accordance with the current rules would be inscribed in Schedules of Concessions simply as negotiating rights.

6. Any contracting party not having rights under current rules which would be inscribed according to the provisions of paragraph 1 above would be free to negotiate rights on the basis of a reciprocal exchange of concessions. These rights would also be inscribed in Schedules. The basis of negotiation of these rights would be existing or anticipated value of trade but obviously at a value less than that of a principal or substantial supplier as currently defined otherwise the right would be conferred automatically under the provisions or paragraph 1 above.

7. Subsequently, negotiating rights would be acquired only on the basis of negotiation and not on the basis of changing patterns of trade and market shares.

8. This proposal could be supplemented by a provision whereby it would not be necessary to negotiate compensation in cases where imports of a product were less than a nominated value, say, US$100,000. This would simplify Article XXVIII procedures where changes to a concession have a minimal trade impact.

Comments

1. Under this proposal, there would be no loss of current rights as all current rights would be automatically inscribed in Schedules of Concessions. The proposal would also effectively eliminate the concept of principal and substantial supplier and hence the need to define a supplier right. It would also avoid the largely artificial distinction between the right of a principal supplier to negotiate under Article XXVIII and that of a substantial supplier merely to consult. In this regard, it is noted that Article XXVIII currently enables a substantial supplier to withdraw concessions, if it is not satisfied with the compensation offered to principal suppliers and countries holding INR's.

2. The proposal represents an extension of current rights in that the negotiating right acquired by a reciprocal exchange of concessions would allow suppliers having less than 10 percent of a market to protect their trading position. It would also ensure that current major suppliers could retain their negotiating rights even though their dominant (principal) trading position subsequently declined. It would also permit countries to protect an anticipated improvement in their positiion in a market which would provide some form of back-up guarantee to new investment in the development of new products.

3. A balance will be maintained in the exchange of concessions as new rights would be acquired after the date of entry into force of this new arrangement only by negotiation and not on the basis of increased trade.

4. It would also dispose of the problem of a proliferation of principal supplier and substantial supplier rights arising through trade shares in compensatory concessions. Under current rules, the subsequent modification or withdrawal of a concession offered previously in compensation for earlier Article XXVIII action must be accompanied by an offer of compensation to the principal supplier in the compensatory concession although this particular CP may have had little or no trade interest in the original concession which was modified or withdrawn. Conversely, this will encourage a wider participation in the process of exchanging concessions among all contracting parties.

5. In the event that a concession had to be modified or withdrawn, negotiations for compensation would proceed on the basis of the value of trade supplied by countries holding negotiating rights and not trade shares. Such an approach would dispense with the need to define the basis of trade shares (e.g. MFN trade; trade with all contracting parties; including or excluding contractual or non-contractual preferences; 10% rules; major part of total exports; etc.).

6. These new provisions on Article XXVIII rights would have direct effects on rights under Article II. Since all future rights will have been negotiated, each contracting party will always know precisely to which other contracting parties it is obligated. Consequently, it would be a much simpler matter, than at present, to review and renegotiate periodically its Schedule of Concessions on the basis of a balance of benefits. For example, if Country A had granted a negotiating right to country B and Country B's trade in that item had substantially declined, Country A might be disposed to grant negotiating rights to Country C (who might now be the significant supplier) in exchange for reciprocal concessions from Country C. These negotiations would be conducted under the provisions of Article XXVIII bis which can be invoked at any time suitable to interested parties without the need for formal multilateral negotiations.

7. As at present, it would also be permitted for different parties to accord negotiating rights at different tariff rates, although all contracting parties would receive MFN treatment at the operative tariff rates which would reflect the lowest negotiated rate. There would be similarities between what is now proposed and the present system in respect of compensation and retaliation for holders of historical and current INR's. In the event of modification or withdrawal of a concession under the present proposal, compensation would be payable to, or retaliation able to be taken by, only the party to whom a negotiation right has been granted at a rate below the new rate. No negotiations for compensation or rights to retaliation would be available to parties with negotiating rights at rates above the new bound rate.

8. This graduated scale of negotiating rights would encourage risk-taking in according new concessions as it would enable the donor country, at the time of entering into a

commitment, to assess with considerably increased predictability the future cost of renegotiating a concession should that become necessary.

9. As there is an inter-relationship between Article XXVIII and XIX, consideration should be given to whether the principles of this proposal might be applicable to the improvement of the provisions of Article XIX.

10. For instance, it might be advantageous to extend the principle of a negotiating right to Article XIX and amend its retaliatory provisions in order to reduce to a minimum occasions where retaliation would be considered unavoidable. For this to be achieved, it would be necessary, as a precondition, for a party with a negotiating right in a product subject to an Article XIX measure to accept the application of the measure for a pre-determined limited period. If the Article XIX measure were not removed by the expiry of the pre-determined period, the adversely affected party would then receive, by way of compensation, a concession with a negotiating right, without reciprocity, equivalent to that breached by the Article XIX measure. To ensure the most effective operation of this agreement, the compensatory concession would be agreed in advance of the Article XIX measure coming into effect.

11. An example might be where Country A applies an Article XIX action by raising the bound rate from 10 percent to 20 percent for an agreed period of say three years. In exchange, Country A would then agree with the country having a negotiating right on this item that it would reduce the rate on another item and bind it, subject to the new provisions of Article XXVIII. If agreement on a compensatory package is not reached, the adversely affected party could have recourse to the present retaliatory provisions in Article XIX:3(a).

12. In the past, the threat of early retaliation has been a significant factor in the drift towards avoiding the obligations of Article XIX. The proposed modifications to that Article outlined above could contribute to a progressive return to the use of tariffs as the predominant protective measure in the GATT and to the application of the m.f.n. principle in Article XIX actions with an associated downturn in the use of selective, non-tariff measures.

13. Another potential advantage of this proposal is that it could contribute to improved negotiations under Article XXIV associated with the expansion of customs unions. One of the difficulties which has protracted negotiations under Article XXIV has been the failure to define, to the satisfaction of all parties, the rights to compensation resulting from changed concessions.

14. The concept of "inherent credit" has been introduced into Article XXIV negotiations. The purpose of this concept is to justify the failure to negotiate new specific compensatory concessions with all parties adversely affected by the enlargement of a customs union and who have contractual rights under current rules. The practice has been to present as compensation a large number of items whose individual trade value is insufficient to confer new contractual rights under current rules. Under the proposed system, rights could be inscribed and therefore guaranteed regardless of trade levels, thereby looking after the party who complained at the potential loss of rights. The advantage for the customs union is that no compensation above the level of inherent credit need be payable and the resolution of negotiations would be expedited.

15. A further advantage of the new proposal in respect of customs unions is that it will eliminate the practice of claiming negotiation rights for new members of a customs union simply on the grounds of their new association with

members who previously negotiated these rights. In addition, it would bring equity between contracting parties in those cases where there is the potential, under present practice, for a customs union to acquire principal supplier status by the aggregation of the trade shares of its individual contracting party members and, consequently, deny that status to another contracting party not a member of the customs union whose trade might be significantly greater than that of any individual member of the customs union. Under the new system, all negotiating rights would have to be negotiated and no rights under Article XXVIII or Article XXIV could be claimed simply on the grounds of inheriting the rights from other members of the customs union.