MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Group of Negotiations on Goods (GATT)

Negotiating Group on GATT Articles

NEGOTIATING GROUP ON GATT ARTICLES

Note by the Secretariat

1. The Negotiating Group on GATT Articles held its third meeting on 14 and 15 September 1987 under the Chairmanship of Ambassador John M. Weekes (Canada).

2. The representative of the United States indicated his wish to address the question of the organization of the work of the Group under Other Business, on the basis of a submission contained in MTN.GNG/NG7/W/19. The Group agreed and adopted the agenda set out in GATT/AIR/2452.

Continuation of consideration of requests by interested contracting parties for review of GATT Articles, provisions and disciplines

3. The Chairman asked whether any member of the Group wished to add to the list of Articles or provisions which had already been mentioned for review by the Group. Some delegations indicated that they may wish to refer to, or request the review of, additional Articles and provisions in due course, but there were no additions made at this stage to the existing list. As regards additional papers on Articles and provisions already identified, several delegations indicated that they had recently submitted such papers or intended to do so. These submissions are referred to below in the context of the review of specific Articles.

Review of GATT Articles and provisions

4. In regard to Article XVII, the Group had before it a submission by Chile (MTN.GNG/NG7/W/1) and a factual background note by the secretariat (MTN.GNG/NG7/W/15). Referring to his delegation's submission, the representative of Chile expressed the view that there were shortcomings in the notification arrangements under Article XVII which created a lack of transparency. Not only did some contracting parties fail to observe the notification requirements, but there were no satisfactory procedures for examining notifications. In terms of the substance of the Article, there was no agreement about whether the GATT's national treatment provisions applied, and there were also interpretative difficulties in regard to the question of non-discrimination and the definition of commercial considerations. This situation made it hard to secure further trade liberalization and it conferred a negotiating advantage on those governments

which granted monopoly buying and selling rights to particular enterprises. Finally, the representative of Chile said that his authorities considered Article X:1 and X:3, which dealt with the publication and administration of trade regulations, to be relevant to some of the difficulties associated with Article XVII. In particular, Article X provisions were relevant to the control of such practices as minimum purchase commitments.

5. A number of delegations were in agreement with Chile that Article XVII had various shortcomings. Views differed, however, as to whether problems arose only in regard to the interpretation and application of the Article, or whether the provisions themselves were also deficient. A delegation expressed the view that any review should start with the conclusion reached by the Committee on Trade in Industrial Products in 1970 and 1971 that the existing rules of Article XVII seemed reasonably adequate; the problems appeared to lie in the area of implementation. This delegation considered that national treatment provisions did not apply to state trading enterprises. The matter of government purchases, which had been raised in Chile's written submission, was covered by the Government Procurement Code. Any proposed improvements in notification provisions should take account of the need for a certain degree of commercial confidentiality and should not be too onerous for developing countries. As far as negotiations involving entities with import monopolies were concerned, there were examples of such negotiations involving minimum import commitments and similar arrangements. Lastly, the reference in the Chilean sumbission to the relation between State trading and countertrade was not relevant, since countertrade could take place in many different kinds of trading environment.

6. For its review of Article XXIV, the Group had before it submissions by New Zealand (MTN.GNG/NG7/W/3) and Japan (MTN.GNG/NG7/W/20), and a factual background note by the secretariat (MTN.GNG/NG7/W/13). In introducing the submission by his authorities, the representative of Japan expressed the view that a review of Article XXIV was justified because of an unforeseen proliferation of regional arrangements, some of which involved large trading nations, and also because of differences in the interpretation of certain provisions of the Article. It was important to ensure that regional arrangements did not undermine the MFN principle nor create barriers to the trade of third parties.

7. The representative of Japan expressed the view that Article XXIV should go further than ensuring that regional arrangements did not raise barriers to the trade of third countries, and that provision should be made for improving market access for these countries. There was also a need to clarify various aspects of the rules and their application, including in relation to approval by the CONTRACTING PARTIES before a regional arrangement could be said to have entered into force, the consultation procedures for examining these arrangements, and the definition of "the general incidence of duties". Other specific issues proposed for examination by delegations included coverage of the term "duties and other restrictive regulations of commerce", the exclusion of Article XIX from those Articles listed as exemptions from the requirement that duties and other restrictive regulations of commerce be eliminated within a customs union or free trade area, the interpretation of the terms "substantially all the trade" and "substantially the same duties and other regulations of commerce", and the terms of tariff renegotiations in a customs union. It was also suggested that Article XXIV:12 raised issues which merited separate consideration.

8. Many delegations supported the view that Article XXIV was in need of review. They referred to the lack of a clear interpretation of several provisions and ambiguity about the legal status of numerous regional arrangements. One delegation considered that any review of GATT provisions regulating regional preferences should extend beyond Article XXIV, and examine arrangements which were covered by other provisions. Certain other delegations considered that it was more appropriate to limit the review to the provisions of Article XXIV. A number of delegations were of the view that while some aspects of Article XXIV could be improved, it was important to bear in mind that this Article had been valuable in promoting regional integration and expanding international trade flows. Finally, a delegation said that if any changes were made to Article XXIV, these should not be applied retroactively to existing arrangements.

9. In its consideration of Article XXV:5, the Group had before it a submission by the European Communities (MTN.GNG/NG7/W/4) and a factual background note by the secretariat (MTN.GNG/NG7/W/18). The representative of the European Communities introduced the submission made by his authorities. He stated that the GATT's waiver provisions risked distorting the equilibrium of rights and obligations among contracting parties. A particular reason for this was that no clear time constraints had been established for waivers. They should never be open-ended, as some appeared to have become. Moreover, there should be criteria established which defined the exceptional circumstances leading to the granting of waivers. He was of the view that relatively minor adjustments in procedures and approaches to Article XXV:5 would be sufficient to rectify the problem. A number of delegations agreed that this question should be examined further. It was suggested by one delegation, however, that a degree of caution was necessary, since without the flexibility offered by Article XXV:5, there was a danger that contracting parties would be unwilling to accept additional commitments within the GATT system.

10. For its review of Articles XII, XIV, XV and XVIII, the Group had before it submissions by the United States (MTN.GNG/NG7/W/7) and Canada (MTN.GNG/NG7/W/25), as well as a factual background note by the secretariat (MTN.GNG/NG7/W/14). The representative of the United States said that the idea behind the proposal to review the balance-of-payments provisions of the GATT was to develop rules in this area which were flexible and workable, and which protected the rights of contracting parties. Changes in the international monetary system made it necessary to consider the continuing relevance of provisions drafted in other circumstances. Moreover, trade restrictions did not rectify balance of payments problems. Article XII and Article XVIII needed updating and strengthening. Consultation procedures should also be improved. In addition, some attention should be focused on the infant industry provisions of Article XVIII:C, which had been widely ignored.

11. In presenting the submission of his authorities, the representative of Canada said that there was increasing recognition that trade restrictions had become part of the balance-of-payments problem, rather than the solution. Furthermore, many countries had maintained restrictions over a considerable period. Against this background, there were a number of questions to be examined, such as whether there was a valid justification

for using trade restrictions for balance-of-payments reasons, and, if so, whether they should be time specific and whether quantitative restrictions were appropriate measures. A number of related questions about procedures and surveillance arrangements were also relevant. In addition, it was necessary to examine the matter of co-operation between the GATT and international financial institutions as it related to balance-of-payments issues, but with due regard for work being undertaken in other areas of the negotiations.

12. Several delegations expressed their support for a review of the balance-of-payments provisions, and reiterated many of the points made in the written submissions. One of these delegations was of the view that the basic problem was the unclear interpretation and limited application of the provisions, rather than the provisions themselves. Another delegation identified a lack of political will to apply the rules as one problem in this area.

13. A number of delegations expressed reservations or opposition to the suggestion that these Articles, particularly Article XVII, should be subject to negotiation. It was noted that the changes which had been referred to by the United States and others in the international monetary system, including the introduction of flexible exchange rates, had taken place in the early 1970s. If these changes rendered import restrictions ineffectual in addressing balance of payments problems, then an important question was why this had not been reflected more fully in the 1979 Declaration. It was suggested that far from rendering trade restrictions redundant, exchange rate flexibility had made them more necessary than before. It was also suggested that the proposals for reform of the balance-of-payments provisions were based on a misunderstanding of the function of trade restrictions. They were not imposed as a remedy for foreign exchange shortages, but as a necessary reaction. Certain delegations stressed the view that the balance-of-payments provisions were an essential element of special and differential treatment and that developing countries could not be expected to forego their rights in this area, particularly in view of the precarious economic situation in which many of these countries found themselves - which might be significantly ameliorated if developed countries were to refrain from taking protectionist trade measures and open their markets to developing country exports.

14. The Group's discussion of Article XXVIII took place against the background of written submissions by New Zealand (MTN.GNG/NG7/W/3), Korea (MTN.GNG/NG7/W/6), Switzerland (MTN.GNG/NG7/W/11), Japan (MTN.GNG/NG7/W/20), fifteen countries (MTN.GNG/NG7/W/21), Argentina (MTN.GNG/NG7/W/22), Peru (MTN.GNG/NG7/W/23), Canada (MTN.GNG/NG7/W/24) and Australia (MTN.GNG/NG7/W/26). The Group also had before it two factual background notes by the secretariat (MTN.GNG/NG7/W/9 and MTN.GNG/NG7/W/10). Delegations introduced their written submissions.

15. Many of the submissions contained proposals on the redefinition of negotiating rights under Article XXVIII. These proposals were predicated on the argument that the present distribution of negotiating rights unduly favoured large suppliers and this created an impediment for small countries wishing to enter into tariff negotiations. Most of the proposals envisaged representing the value of exports of the product to the destination in question as a ratio of some other variable, thereby establishing a new criterion for a negotiating right. For New Zealand, the proposed variable was gross national product, for Korea it was total exports, for Switzerland it was per head of population, for Argentina it was exports of the same product to all other destinations, and for Peru it was total exports of the sector, but only for developing countries. In the submission by Argentina it was also proposed that a substantial supplier interest be accorded to all contracting parties with a ratio of over 10 per cent on the basis of the criterion indicated. Several delegations referred to paragraph 5 of the interpretative note to Article XXVIII:1, which states that "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". It was suggested in the submission by Peru that this definition of a principal supplying interest be given the same status as that contained in Article XXVIII:1.

16. Whilst supporting a review of the question raised by these submissions, a number of delegations cautioned against developing new definitions of negotiating rights which were complex and might lead to disputes. The procedures for renegotiating tariffs should also be kept simple. Certain delegations referred to differences among contracting parties in the extent to which they had bound their tariff schedules. It was suggested that in the absence of a greater balance of bindings it would be difficult to contemplate new ways of defining suppliers' rights. A delegation also expressed the view that the kinds of proposals that had been put forward were a negation of commercial realities and would introduce distortions into the system. With regard to the proposal of a criterion which would only apply to developing countries, a delegation stated the view that this was not an appropriate context in which to contemplate special and differential treatment for developing countries.

17. The document MTN.GNG/NG7/W/21 was put forward by the delegations of Argentina, Austria, Canada, Chile, Colombia, Czechoslovakia, Hong Kong, Hungary, Korea, Mexico, New Zealand, Pakistan, Singapore, Switzerland and Thailand. It proposed that the secretariat calculate, on the basis of a recent representative sample of Article XXVIII negotiations, the implications for the distribution of negotiating rights of each of the proposals put forward on this subject. It was agreed that the secretariat would consult with interested delegations on the feasibility of such an exercise and report back at the Group's next meeting.

18. The written submissions of Korea, Japan and Canada referred to situations in which current trade flows did not accurately reflect the interests of contracting parties. In this view, compensation should be possible where a tariff increase caused loss of potential trade. This problem could relate to new products in a market or to new suppliers. In the case of new products, the situation was potentially more serious because of the possibility of imposing pre-emptive tariffs. In the submission by Japan it was also suggested that consideration be given to the question whether contracting parties should be permitted automatically to invoke Article XXVIII in cases where little or no trade was taking place. Several delegations expressed doubts about the practicality of seeking to estimate the degree to which potential suppliers of a product should be compensated. There was also a question about the justification of such an approach to tariff renegotiations.

19. In addition to the definition of suppliers' rights, the submission by Canada dealt with certain other aspects of Article XXVIII. These included the suggestion that the proposed secretariat study referred to above should examine the implications, for the definition of substantial suppliers, of setting the threshold at 5 per cent instead of 10 per cent of total imports. Reference was also made to the method of calculating compensation when unlimited bound tariff concessions were replaced by tariff rate quotas. Another matter was whether consideration should be given to the possibility of withdrawing substantially equivalent concessions, in the context of retaliation, on a non-MFN basis. Finally, it was suggested that there should be an examination of the procedures for negotiations under Article XXVIII. In particular, it was for consideration whether resort to the three-year negotiating period under Article XXVIII:5 had been excessive in recent years. The views of delegations varied on this matter, with some claiming that this flexibility was necessary and others that it introduced instability and uncertainty into the system.

20. The submission by Australia proposed that at a date to be agreed, all existing rights of initial negotiators, principal suppliers and substantial suppliers be inscribed in schedules of concessions as negotiating rights. Any contracting party not having rights so inscribed would then be free to negotiate rights on the basis of a reciprocal exchange of concessions. This would be the only manner in which negotiating rights could be acquired. An additional proposal was that it would be unnecessary to negotiate compensation if the trade involved was less than a certain value, such as US$100,000. The representative of Australia indicated that the proposed approach to Article XXVIII negotiations may have implications also for Article XIX and Article XXIV, where negotiating rights, as envisaged in the proposal, could be introduced.

21. The Group agreed to postpone its reviews of Article II:1(b), Article XXI and the Protocol of Provisional Application until its next meeting.

Other business

22. The United States introduced a proposal on the organisation of work in the Group (MTN.GNG/NG7/W/19). A part of the proposal was that at the last meeting in 1987, the secretariat would list all the Articles and provisions which had been discussed during the year, and this would constitute the subject matter of the negotiations. It was further suggested that participants would be able to add to this list during the subsequent negotiating process. While some delegations supported this proposal and the flexibility it implied, others were opposed to it, suggesting that it would have the effect of extending or reinterpreting the Initial Phase of the Negotiating Plan.

23. Certain delegations referred to an earlier Australian submission (MTN.GNG/NG7/W/5), which proposed that the possibility be left open in the subsequent phases of the negotiations to take up Articles which were being considered in the first instance in other Negotiating Groups. These delegations indicated that they could support this proposal. The Group agreed to continue the discussion of this issue informally following the adjournment of the meeting.

24. The Chairman recalled that at its meeting in June the GNG had decided to ask the Negotiating Groups to evaluate the number of days, both formal and informal, needed to carry out the Initial Phase, and also to indicate their wishes in terms of the timing of meetings. He said that in his view the Group would probably require four or five meeting days before the end of the year. On this basis, meetings might be envisaged on 22 and 23 October and on 16 and 17 November. A representative said that he understood the estimated meeting time required would cover both formal and informal meetings, and that in his view the proposed November dates were still hypothetical at this stage.