

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG7/W/42

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COMMUNICATION FROM AUSTRALIA

The attached communication, dated 1 February 1988, has been received from the delegation of Australia with the request that it be circulated to members of the Group.

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SUPPLIER RIGHTS - ARTICLE XXVIII

This is an explanatory note to the proposal by Australia on a review of Article XXVIII set out in MTN.GNG/NG7/W/26.

The essence of the proposal is to insert into the text of Article XXVIII the concepts which are in common use and to make some improvements to the Article. The objectives of the proposal are:

- (i) to preserve existing rights by initially inscribing them into Schedules of Concessions;
- (ii) to introduce greater clarity and predictability into the rights of substantial suppliers under Article XXVIII;
- (iii) to provide an impetus to the expansion of bindings;
- (iv) to simplify the operation of the Article by removing the need for negotiations in de minimis situations.

SUBSTANTIAL SUPPLIERS

A literal reading of Article XXVIII would suggest that, while there is no obligation to negotiate with the substantial supplier, substantial suppliers are entitled to be consulted regarding concessions which are being withdrawn or modified. However, substantial suppliers have the right to withdraw substantially equivalent concessions if they are not satisfied with the outcome of the negotiations with the principal supplier and the country with the initial negotiator right (if different).

The contention that it is not necessary to negotiate with substantial suppliers is a dubious one in practice. It has certainly been the Australian practice in formulating offers of compensation to be made to principal suppliers and initial negotiators to attempt to address the trade interest of substantial suppliers with the objective of satisfying the substantial supplier and limiting the prospect of retaliatory withdrawals. We believe that other contracting parties have also followed this course.

The criticism that the granting of a new negotiating right to substantial suppliers would unduly complicate the Article XXVIII process appears to be unjustified. In this respect, the Australian proposal would simply give recognition to current practice in which the consultation is, in effect, a negotiation. The obverse of the Australian proposal would be to modify Article XXVIII to remove retaliatory rights from substantial suppliers.

Even if the contrary view were accepted, it might be observed that there are on the table a number of other proposals to amend Article XXVIII to accord a new negotiating right on the basis of comparison of trade with factors such as GNP, population, total exports, expected trade, etc. The Australian proposal would be no more onerous than these other proposals and would offer advantages, particularly of precision and predictability, not available under these alternatives. For instance, in most cases arising under these alternative proposals, the country proposing a modification or withdrawal of a concession would not be in a position to make a prior judgement about which countries should be involved as it would not have the data on GNP, importance to trade, population etc. necessary to make that judgement.

Historically, there has been an erosion of the rights of substantial suppliers under Article XXVIII:3 due to the progressive reduction of tariffs through formulae, as well as through the tendency for growth in trade to concentrate trade shares in the hands of fewer and fewer suppliers.

Contracting Parties will be aware that under Article XXVIII:3, a substantial supplier can retaliate only by withdrawing substantially equivalent concessions initially negotiated with the party which is modifying or withdrawing a concession.<sup>1</sup>

According to decisions by the CONTRACTING PARTIES following the adoption of formula approaches to tariff negotiations since the Kennedy Round, rights under Article XXVIII are acquired on the basis of trade shares at the time of the renegotiation of bindings subject to formula reductions. (cf. 15S/67 and 26S/202). In other words, initial negotiator rights have not been accorded automatically, if at all. This has resulted in the benefits of initial negotiator rights (INRs) under the provisions of Articles II and XXVIII being significantly reduced in practice. Fewer and fewer INRs have been exchanged since the use of formula tariff reductions. Moreover, previous or historical INRs have usually been negotiated at significantly higher tariff rates than the rate currently bound. Therefore, the legal basis on which a substantial supplier could exercise its rights under Article XXVIII:3 has been subtly but significantly eroded. The Australian proposal would correct this situation as explained below.

#### BILATERAL NEGOTIATION

Australia is confident that the proposal would be effective in encouraging an increase in the exchange of concessions. It might be noted that the GATT does not only encourage the use of the tariff as the sole means of protection but it does this through an exchange of concessions. The Australian proposal would, to a significant extent, involve a return to the original concept of Articles II and XXVIII whereby a rebalancing of concessions would take place periodically.

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<sup>1</sup> Note: This right is clearly different from Article XIX where paragraph 3 allows any concessions or any other to benefit under the GATT to be withdrawn.

While at present it is possible to seek tariff negotiations at any time to have an initial negotiator right inscribed in another contracting party's Schedule, this does not generally occur in practice. Under the Australian proposal, there would be an incentive to negotiate to protect newly-established trade through a negotiating right. It would end the current practice where a negotiating right is acquired as a "windfall" simply by expanding trade performance. At present, rights to compensation often fall to countries which did not participate in the initial negotiations and exchange of concession and, for an increasing number of tariff items, these countries are becoming fewer and fewer. It would also draw a wider GATT membership into negotiations, if they want to secure negotiating rights on products of export significance. This would apply especially to small countries dependent on the export of a limited number of commodities that at present, can achieve no rights under current provisions.

In respect of access to tariff reductions from a formula approach, these would be available through the application of the MFN principle while negotiating rights would be accorded on the basis of bilateral exchanges. Consequently, this proposal would effectively restore the basis of the right to retaliatory action by substantial suppliers under Article XXVIII:3.

Australia does not see any insurmountable difficulty with the removal of the current provision which automatically accords a right to a new supplier without the need for prior negotiation. Under the Australian proposal a new supplier would need to exchange concessions in order to protect its exports. This incentive would be strong as there would be no automatic acquisition of rights as at present. In turn, the process would lead to an increase in bindings and an overall reduction of tariffs and non-tariff barriers.

Neither does Australia see as a problem that the proposal will lead to a proliferation of negotiating rights. Firstly, as it will not be mandatory to accept requests for additional rights to be inscribed, there will not be an automatic increase in the number of countries with negotiating rights. Second, rights would be negotiated on the basis of reciprocal exchanges of concessions and, consequently, the benefits of rights received would offset the potential cost of negotiating with additional participants. It would also make the sanction of withdrawal of concessions more meaningful as these would be identified by country.

#### SMALL TRADE

One element of the proposal is that the negotiating effort and the results from Article XXVIII negotiations on small trade items are disproportionate. The figure of \$100,000 is given only by way of example. The concept of limiting negotiations to cases where trade is in excess of this figure is not a key element to the proposal, but is put forward as a suggestion to assist the effective operation of the Article. The suggested cut-off point might be limited to the initial point where existing rights are inscribed in Schedules. The objective of enabling a country to negotiate a right on a product of potential trade interest is more important.

#### RELATIONSHIP TO ARTICLE XIX AND XXIV

##### (a) Article XIX

If there were a return to the original concept of a balance of rights under Article XXVIII as Australia is proposing, one could anticipate an improvement in the observance of Article XIX.

By way of background, one of the reasons for the movement away from a strict observance of Article XIX would seem to be the fear of retaliation in circumstances where the country applying the Article XIX measure has little flexibility to offer

compensatory concessions due to an already extensively bound tariff. In order to avoid the risk of retaliation, contracting parties have moved outside the provisions of Article XIX and negotiated voluntary restraint arrangements and similar non-tariff measures.

The Australian proposal, because it does not permit rights to concessions to be acquired simply through the acquisition of trade shares introduces a measure of relief by limiting the possible claimants to Article XIX rights.

It is also suggested that through the reciprocity principle in our proposal (i.e. that one acquires a right to a concession only by granting a concession) there will be a significant increase in the number of concessions. Consequently more "coin" is introduced into Article XIX actions as these concessions could be withdrawn as retaliation under Article XIX. This would remove the risk of retaliation through the withdrawal of a more radical right (e.g. MFN) which is a possibility under the present spread of concessions.

(b) Article XXIV

The rights of parties to adjustment of the balance of concessions in Article XXIV:6 negotiations would also be made clearer and more predictable. Claims that the Australian proposal would make Article XXIV negotiations more onerous can be countered by noting that present practices in Article XXIV negotiations regarding substantial supplier rights are heavily biased in favour of the parties forming the custom union or free trade area.

Conclusion

Australia would recommend careful and measured consideration of its proposal. It has elements which, if adopted, would improve the commitment to tariff-based protective measures; it would restore substantial suppliers rights under Article XXVIII and would increase the extent of concessions.