MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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ARTICLE XXVIII

Communication from the delegations of Argentina, Canada, Colombia, Czechoslovakia, Hong Kong, Hungary, Korea, Mexico, New Zealand and Singapore

A number of participants have earlier put forward proposals and/or expressed their views on how Article XXVIII could be made more operational and responsive to present needs and changes in the trading environment.

On the basis of proposals and contributions put forward to date, the aforementioned countries have conducted detailed discussions on issues related to Article XXVIII with a view to reaching a consensus on possible solutions, thereby contributing to the negotiating process in the Negotiating Group on GATT Articles.

The paper is not meant to be exhaustive. Sponsors reserve their right to come forward with additional proposals.

Criteria for Determination of Suppliers' Rights

Background

Reliance on import market shares as a basis for determining negotiating rights has resulted in an increased concentration of those rights in the hands of a limited number of larger contracting parties. While this has reflected commercial reality, it has also led to a degree of imbalance in the distribution of negotiating rights, currently based solely on INRs and principal suppliers. Interpretative Note 5 to Article XXVIII attempts - to a certain extent - to address this problem. It provides that a contracting party may be granted a principal supplying interest "if the concession in question affects trade which constitutes a major part of the total export of such contracting party". It is proposed that this concept be made more operationally effective by expanding the right to negotiations for compensation under Article XXVIII.

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Proposal

An additional principal supplier right be granted to that contracting party with the highest ratio of exports of the affected product to the market concerned to its total exports.

Further consideration should be given as to whether the trade of the affected product should be compared with total exports or with the exports of the affected product to all markets.

The merits of this proposal are:

- it is in line with Interpretative Note 5 to Article XXVIII;
- the criteria used are objective;
- it does not make Article XXVIII negotiations unduly cumbersome; and
- it recognises the importance of the export item and market to the affected country.

Preferential Trade

Background

Article XXVIII and indeed Article II deal with MFN trade. Interpretative Note 4 to Article XXVIII specifically refers to "trade affected by the concession" when dealing with the rights to compensation. Trade which is entering on a preferential basis is not "trade affected by a concession" as it is being traded under an entirely different trading arrangement.

If a preferential supplier rather than an MFN supplier is accorded a principal negotiating right, an increase in a bound MFN rate could be effected without any compensatory liability. Furthermore, by allowing preferential trade to be included in the suppliers' rights calculation, circumstances can arise where countries with preferential access to a market can, in fact, benefit from increases of MFN duties. Thus, the basic underlying principle of the preservation of MFN bindings through compensatory liability could be seriously undermined.

Proposal

It is proposed that only trade at MFN rates be used in determining suppliers' rights. However, further thought should be given as to whether GSP trade should be included, bearing in mind its special characteristics which are legally distinct from other preferential trade.

In any case, no contracting party with a supplier right could be deprived of that right for compensation under Article XXVIII in cases where preferential trade is subject to a rate above the previously bound MFN rate.

Compensation in the Absence of Adequate or any Past Trade Flows

Background

The current practice of basing compensation for changes in bound MFN tariff concessions on the most representative three years could be deficient in that it does not take into account the development of new products or instances where a contracting party has not yet exported the full potential of products provided for under a negotiated concession. In these circumstances, a three year historical average would not provide an appropriate basis for granting compensation.

Such a situation would conflict with the fundamental obligations of Articles II and XXVIII. First, the obligation in Article II:1(a) is to "accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the ... Schedule". This obligation is designed to provide security for the future and creates a presumption that the conditions governing access at the time of negotiations will be maintained. Article XXVIII provides that a contracting party seeking to modify or withdraw a concession must offer compensation that accounts fully for that, i.e., to "maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for ... prior to such negotiations."

While compensation on the basis of historical trade may, in many cases, be a reasonable basis for quantifying the compensation owed, it will, in some cases, understate the extent of the obligation incurred. There is a need, therefore, to ensure that other factors should, in such circumstances, be taken into account.

Proposal

It would remain the understanding that the calculation of compensatory liability would normally be based on trade during a previous representative period. However, in order to deal with those exceptional cases where the use of this basis would manifestly distort either the reasonable expectations created through negotiations or a demonstrable and sustainable trend in the recent trade of an exporting contracting party, additional consideration should be given to determining the appropriate levels of compensation on the basis of the following elements:

- the existence of new or additional ability to sustain exports;

- the growth rate of affected exports to the importing contracting party concerned.

The merits of this proposal are:

- it gives further support to the obligation of contracting parties to avoid upsetting the competitive relationship between imports and domestic production where these could not have been reasonably anticipated by exporting contracting parties;

- it allows for flexibility to deal with exceptional circumstances rather than rigidly applying "hard and fast rules" for compensation.

Furthermore, for concessions negotiated in the Uruguay Round, it would be understood that contracting parties will refrain from resorting to Article XXVIII action until the phased implementation of a tariff cut has been completed.

Tariff Rate Quotas

Background

Tariff rate quotas have been used to transform existing unlimited bound tariff concessions into bound tariff rate quotas covering only historical trade at a previously bound rate. For example, an item bound at 10 percent is renegotiated such that the bound 10 percent is applied to only the value of trade over the previous three year average and all additional imports attract a higher rate (which may or may not be bound). This can be viewed in terms similar to the case outlined under the section on "Compensation in the Absence of Adequate or any Past Trade Flows".

Addressing only the compensatory aspect of this situation, any such modification of an existing unlimited concession would have the effect of impairing the terms and conditions of access as initially negotiated.

In such circumstances, the use of a historical level of trade as the sole basis of determining compensatory liability would understate the extent of benefits otherwise accruing.

Proposal

It is proposed that the approach suggested in the section on "Compensation in the Absence of Adequate or any Past Trade Flows" would be applicable in this case. It would be understood that the introduction of any tariff rate quotas would be considered as an "exceptional case" in the sense of the first paragraph of the proposal part under the section on "Compensation in the Absence of Adequate or any Past Trade Flows".

Maintenance of Supplier Rights (Article XXVIII:2)

Background

On occasion, contracting parties taking Article XXVIII action have sought to compensate a principal supplier on the basis of trade coverage only but not in respect of equivalency of negotiating rights, meaning that compensation would be given on a relatively large number of items in which the affected party is not a principal or substantial supplier. This would mean that that party would have no right to negotiate if those compensatory concessions are modified or withdrawn at a later stage.

This does not accord with the provision in Article XXVIII:2 that "contracting parties should endeavour to maintain a general level of reciprocal and mutually advantageous concessions".

Proposal

In such circumstances, it is proposed that the imbalance in rights be addressed by also according negotiating rights on the replacement concessions, unless mutually agreed otherwise.