MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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ARTICLE II:1(b): LEGAL QUESTIONS

Note by the Secretariat

1. During the discussion of Article II:1(b) at the thirteenth meeting of the Negotiating Group the secretariat was asked to provide advice on two issues of a legal nature arising from the proposal that "other duties and charges" (ODCs) should henceforth be recorded in tariff schedules. This note is provided in response to these requests.

Legal procedures for changing the applicable date

2. The first request concerned the "applicable date" as of which ODCs are bound. It had been suggested that the Group might agree on a uniform applicable date, so that all ODCs would be bound at the rate prevailing on that date (with the proviso that such rates could not be in excess of previously bound rates). For example, it might be agreed that the applicable date should be the date of the Uruguay Round tariff protocol or the Punta del Este Declaration. Noting these suggestions, some delegations pointed out that a new definition of the applicable date could be seen as an amendment of Article II:1(b), which speaks of "other duties or charges imposed on ..... the date of this Agreement". They asked if an agreement on Article II:1(b), incorporating a new definition of the applicable date, could take the form of a decision by the CONTRACTING PARTIES or if it would be necessary to amend the text of the Article through formal amendment procedures.

3. It is clear that if the Group were to recommend, and the CONTRACTING PARTIES to decide, that the applicable date for ODCs should henceforth be that of the Uruguay Round protocol or some other recent date, the rule set forth in Article II:1(b) would cease to apply: the present understanding that the applicable date is that of the first incorporation into the GATT of the tariff binding in question would be superseded and the phrase "the date of this Agreement" in Article II:1(b) would be inoperative.

4. An agreement to make such a change could take several different forms. If it were decided to amend the text of Article II it would be necessary to follow the formal amendment procedures set out in Article XXX. Since Article II is in Part I of the General Agreement this means that an amendment protocol would have to be formally accepted by each individual contracting party in order for the change to come into force. However it

would be possible to introduce and implement a new definition of the applicable date without formally amending the Article. Such an agreement could take the form of a decision by the CONTRACTING PARTIES, or by the Council acting on their behalf, under Article XXV. Legal changes have been introduced in this way on several occasions. For example, the introduction of the "Enabling Clause" (the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries) authorised the grant of new preferences expressly forbidden by Article I:1. Nevertheless the Enabling Clause was adopted by a consensus decision of the CONTRACTING PARTIES, and the text of Article I has not been amended.

5. Other decisions by the CONTRACTING PARTIES which have changed legal obligations set out in GATT provisions include the Declaration on Trade Measures Taken for Balance-of-Payments Purposes (L/4904), which extended the scope of consultations in the Balance-of-Payments Committee to cover "all restrictive import measures taken for balance-of-payments purposes". Many decisions regarding the definition of the applicable date itself have also been taken by the CONTRACTING PARTIES - for example, in the Kennedy and Tokyo Round tariff protocols, which explicitly interpret Article II:1(b) and (c) (NG7/W/53 para 9) and in all accession protocols. It should be noted that all of these decisions were adopted by consensus.

6. A new definition of the applicable date could thus be introduced by a consensus decision of the CONTRACTING PARTIES. It would have the same legal effect as an amendment of Article II:1(b) and its status would be precisely the same if the decision were taken by the Council on behalf of the CONTRACTING PARTIES. There would be considerable advantage in proceeding by means of a decision, since securing the agreement of all contracting parties to an amendment protocol would be an extremely lengthy process.

Certification Period for Recorded ODCs

7. The second request for secretariat advice concerned the right to challenge the legal validity of other duties and charges as recorded in tariff schedules. The point had been made that the inscription of ODCs in schedules would not establish their legality in terms of consistency with other GATT obligations, and that it should always remain possible for third countries to challenge the legal character of any particular charge. (See NG7/W/53 para 20). However it had also been suggested that the consistency of a recorded charge with the obligation under Article II:1(b) - that is to say whether the level recorded is not higher than the originally bound level, or indeed whether such a charge existed at the time of the original binding - might be regarded as being established if it were not challenged within an agreed period, such as three years from the date of inscription. This would mean that after this period the ODCs recorded in schedules would become definitive in the same way that customs duties themselves become definitive if not challenged within three months of the circulation of the relevant documentation by the secretariat.

8. The question put to the secretariat was whether a limitation in time of the right to challenge the level of an ODC, to three years or some other agreed period, would amount to a curtailment of the right of contracting parties to invoke Articles XXII and XXIII.

9. An agreement that the right to challenge the level of an ODC should lapse after three years would not formally curtail the right to invoke Articles XXII and XXIII. The right to seek consultations or the creation of a panel would in theory still exist. But it seems clear that it could not be invoked effectively: a panel would presumably find that an ODC, having been recorded in the schedule for more than three years, could no longer be challenged. However, this would not be a new departure or the creation of a precedent. As noted above, changes in tariff rates cease to be open to challenge 90 days after the circulation of the relevant documentation to all contracting parties - and it should be noted that the 90-day certification period applies not merely in the case of tariff concessions bilaterally negotiated but also to unilateral modifications and rectifications of schedules. The reason for which the CONTRACTING PARTIES have found it desirable to accept this limitation is presumably that the advantage of certitude in tariff schedules is thought to outweigh the surrender of an unlimited right to challenge them.

10. The argument might also be formulated in terms of the substantive rights of the notifying country rather than in terms of the procedural rights of third countries. It could be argued that a contracting party, having recorded its ODCs, should have the right to have them accepted as definitive unless evidence to the contrary is brought forward within a reasonable period; otherwise their legal status would remain permanently unsettled and the obligation to provide evidence of their consistency with formerly bound levels would persist indefinitely.