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 on Meeting of 29-30 March 1990

1. The Negotiating Group on GATT Articles held its sixteenth meeting on 29-30 March 1990 under the Chairmanship of Mr. John M. Weekes (Canada). The Group adopted the agenda contained in GATT/AIR/2952.

2. The Chairman informed the Group that since the last meeting a paper entitled "Negotiating Group on GATT Articles - Note by the Chairman" dated 19 March had been circulated by the secretariat. It contained draft texts on Articles XVII and XXVIII on which he had held informal consultations on 28 March, and to which the Group shall return during the course of the meeting.

Agenda Item A: Consideration of issues arising from the examination of specific Articles

Article II

3. The Chairman recalled that there were two issues to be considered under this Article, the first being the draft decision on Article II:1(b) on the recording of other duties or charges in schedules of concessions, and the second the proposal by the United States on the possibility of levying a uniform import fee for trade adjustment purposes.

4. On the first point he said that Brazil had not yet lifted its reservation but that he was hopeful this could be done before the next meeting; he would then be in a position to transmit the decision to the GNG.

5. Referring to the second point, the representative of the United States reiterated that the purpose of the proposal was to make it easier for firms and workers to adjust to new conditions of competition and to ensure, as suggested in the GATT preamble, that expanded trade would contribute to increases in standards of living and full employment. Contracting parties would benefit from the imposition of a small uniform import fee to fund GATT-consistent adjustment programmes, in that the existence of these programmes would facilitate the process of obtaining public support for the results of trade-liberalising agreements in the Uruguay Round; the proposal was thus designed to expand trade.

Articles XII, XIV, XV, XVIII

6. The Chairman recalled that at the last meeting the Group had had a first discussion of the submission by the EEC regarding the balance-of-payments provisions (NG7/W/68) on which a number of delegations said they would wish to comment further, after having studied it more carefully. The Group also had before it the submissions by Canada and the United States in NG7/W/58, by Peru in NG7/W/62 and by Bangladesh in NG7/W/60. The discussion last time, like previous discussions of these Articles, had made it clear that this was an important and sensitive issue for many delegations, probably the most difficult one this Group had to face. The differences of perception between those delegations who saw a need for reform in this area and those who were not persuaded of this need were still apparently very wide. However, it was the Chairman's belief that there were larger areas of common ground than sometimes appeared to be the case, and that a more fruitful dialogue might start from recognition of certain shared assumptions.

- First, he believed nobody questioned that some developing countries had serious long-term BOP problems which needed to be addressed at the national level by a combination of domestic economic measures, exchange rate measures and temporary trade-related measures, and at the international level by removal of barriers to trade and adequate provisions regarding debt problems and financial flows;

- Second, everybody recognised that trade restrictions, while they might be inescapable in some circumstances, were an unsatisfactory and in general inefficient way of solving BOP problems; they were painful for the country applying them and in the long term, they might produce economic distortions or problems of dependence on top of the original BOP problems. It was also recognised that in practice, the level of restrictions maintained might vary over time, being reduced as the BOP situation improved and vice versa;

- Third, nobody suggested that Article XVIII:B should be renegotiated or that recourse to it should be denied. It could be invoked when necessary and if it was disinvoked, there was nothing to prevent the country concerned from invoking it again, if balance-of-payments problems occurred;

- The Balance-of-Payments Committee was one of the more important standing bodies of the GATT. It had an important function in ensuring that trade measures taken for balance-of-payments reasons did not have unnecessarily adverse consequences for international trade and that trade restrictions were liberalised when improvements in the BOP situation made this possible. Opinions varied as to how well it had performed this function over the years, but as to the importance of the function there was no disagreement;

- He had not been able to detect much common ground as to the effectiveness with which the 1979 Declaration on trade measures taken for balance-of-payments purposes had operated. It had been said that paragraph 12 of the Declaration, which concerned the external environment facing the consulting country, had not been particularly effective. And on the other hand, he had noticed that some of the proposals made by the Community, for example, in effect reaffirmed principles contained in the 1979 Declaration, which suggested that the principles were regarded as still valid, at least by the Community, but that their application had been less than satisfactory.

7. He wondered whether the best way to try to reach agreement on whether or not anything needed to be done would be to examine recent experience, seeking to establish whether the present disciplines and procedures were working satisfactorily and if not, why not.

8. Outlining the factors that made reform of the balance-of-payments provisions essential, the representative of the European Communities said that trade restrictions for balance-of-payments purposes, and the procedures surrounding them, had not worked well and were in need of greater attention and discipline. Such disciplines should include greater reliance on price based measures, without ruling out entirely the use of quantitative restrictions in particularly critical situations, the temporary use of trade restrictions and their degressivity over time. Improvements were required in the workings of the Balance-of-Payments Committee so that it could acquire greater authority in terms of its recommendations for action; these improvements related to notification of information by invoking countries and to the periodicity of review under simplified and full procedures. He pointed out that the EEC's proposal was closely related to the concern for the balance of rights and obligations within GATT which had also motivated their proposals on Article XXV:5 and the PPA. The same concern for balance was manifested within the proposal itself, which sought greater commitments from countries at higher levels of development in respect of the use of trade measures for balance-of-payments reasons and which sought to address a particular concern of developing countries by giving more operational meaning to paragraph 12 of the 1979 Declaration.

9. Responding to questions raised at the previous meeting, the representative of the Communities said that his delegation would be prepared to take account of concerns raised in connection with the perceived inadequacies of uniform price-based measures where income distributions in society were skewed and where scarce foreign exchange had to be allocated amongst competing uses. As for the announcement in advance of a time schedule for liberalisation, he said that the Community could understand the difficulties that might arise in some cases, but equally contracting parties whose trade might be damaged should be given some degree of certainty and commitment in the form of a time schedule for liberalisation.

10. Providing further explanations on the joint US/Canada submission (NG7/W/64), the representative of the United States said that it would change the status quo in four ways. First, there would be more full consultations than had been the case in the past. Secondly, there would be less disagreement over the criteria to be used for assessing the justification of trade measures. In his view, experience of past consultations had shown that there was no coherent synthesis of all the criteria which Committee members must incorporate in their assessment of trade restrictions. Thirdly, conclusions to Balance-of-Payments Committee reports would be clearer as to when a decision was called for, and recommendations more frequent. By providing options for acceptance or conditional approval, enforcement of Committee recommendations, which were currently often ignored, would be facilitated. Fourthly, lack of consensus in the Balance-of-Payments Committee would not create a presumption of GATT-consistency of the trade measures as was currently the case. He emphasised, however, that there would not be a presumption that lack of consensus meant that the measures were GATT-inconsistent, and that countries would not have the option of taking counter-measures without a decision by the CONTRACTING PARTIES. In conclusion he said that overall balance in the results of the Uruguay Round negotiations would require a reasonable package of reforms on the balance-of-payments provisions; if that were not achieved the multilateral trading system would witness greater tension in the future. Some participants reiterated the views expressed in paragraph 36 of NG7/15 on the need for and the nature of reforms of the balance-of-payments provisions.

11. Responding to comments, some participants reiterated the view that there was no need to consider changes in the rules or procedures related to the balance-of-payments provisions. Not only had the situation deteriorated for developing countries since 1979 but the record showed that in the past they had liberalised their trade restrictions as their balance-of-payments situation had improved and had not made unreasonable use of these provisions. Resort to price based measures was not a realistic alternative because of their inflationary effects and their ineffectiveness in the presence of market imperfections and price inelasticities. It was difficult to announce a plan for the relaxation of trade restrictions in view of the fact that the economies of the consulting countries were severely affected by exogenous factors; in fact, the notion of relaxation of restrictions was qualified in paragraph 11 of Article XVIII. The Balance-of-Payments Committee had worked well taking account of the findings of the IMF and of comments made by members which were based on detailed documentation provided not only on the macroeconomic situation but also on the alternative measures being taken by the consulting country to deal with its balance-of-payments problem. References to the prolonged use of balance-of-payments restrictions by developing countries had to be seen in the context of the use of equivalent measures by others for over 40 years. A participant said that the task before the Group was not that of determining how countries could better address balance-of-payments problems but of ensuring that trade measures invoked for balance-of-payments purposes did not create adverse effects for the trade

of other contracting parties. The balance-of-payments provisions already embodied a balance between the rights of invoking countries and those of their trading partners which was reflected inter alia in the stipulation on non-discrimination and in other provisions designed to prevent abuse by invoking countries. The effect of trade restrictions on other parties was minimal but, if countries felt that their GATT benefits were being nullified or impaired they could take recourse to the dispute settlement provisions of the General Agreement. The notion of balance had to be viewed in this light rather than seen as one of treating waivers on the same footing as the balance-of-payments provisions, which were of an entirely different nature.

12. Some participants said that the substantive nature of the proposals on the table was not in line with the objectives that they purported to address; their effect would be to limit the ability of developing countries to use trade restrictions for persistent and structural balance-of-payments problems, to which they could not agree. A participant said that the need for trade restrictions for balance-of-payments purposes had to be seen in the light of proposals for reform in the Negotiating Group on agriculture which would worsen the balance-of-payments position of net food importers. A participant said that some comments made before the Group appeared to present the proposals as less far-reaching than they actually were; in substance they would alter the nature and content of recourse to balance-of-payments provisions and the nature and functions of the Balance-of-Payments Committee. The proposals would also result in high social costs, and could have a negative effect on the preservation of democratic values. It had to be asked whether such changes would lead to an improvement of the fundamental balance-of-payments problems of countries recognised by the balance-of-payments provisions of the General Agreement.

13. A participant said that dialogue on Article XVIII:B required improved market access for the products of interest to developing countries, a better negotiating climate, recognition of the debt problem, respect for Part IV of the GATT, and termination of certain waivers and legislation not in conformity with the GATT. Some participants commenting on the suggestion of other delegations that the secretariat should undertake a study of how some of the proposals altered the existing rights and obligations under Article XVIII and the 1979 Declaration, indicated that the matter deserved reflection and that there were a number of unanswered questions on the table which merited attention.

14. Closing the debate the Chairman said it would be very helpful if in the May meetings the Group could reach some kind of conclusion on the best possible way to address the balance-of-payments question; it was obvious that for meeting of the TNC in July the Group would need to have a good idea of its contribution to the overall package.

Article XXV:5

15. The Chairman recalled that at the last meeting the Group had had a first discussion of the proposal by the European Communities (NG7/W/69) in which a number of principles were suggested as the basis for a decision on the grant of future waivers. It was also suggested that existing waivers should be terminated or replaced by GATT-consistent measures within an agreed period and that all waivers should be subject to annual review in order to determine whether the conditions on which they were granted continued to obtain.

16. A number of delegations voiced general support for the proposal while raising questions about the practicability of some of the principles suggested. One participant said that the application of effective disciplines to long standing waivers would be one of a number of conditions that would need to be met before negotiations could be undertaken on the balance-of-payments provisions. Another participant said that it was appropriate that this discussion should follow that on the balance-of-payments provisions, since all derogations from basic GATT obligations should be subject to greater disciplines. In this context the EEC proposal was an interesting one - though it might give rise to concern in the case of the waiver covering the Caribbean Basin Initiative. The US agricultural waiver was on the table in NG5, and would cease to be necessary if negotiations in that Group succeeded. But participants should also be concerned about other measures of protection introduced without benefit of a waiver and said to be sui generis, or "outside GATT".

17. Other participants said that measures maintained under waivers could not properly be compared with trade measures taken for balance-of-payments reasons, whose legal status was entirely different.

18. The representative of the EEC welcomed the generally favourable reaction to his proposal. In answer to questions he explained that it was not intended that a single set of economic criteria should be applied in all cases, but rather that the conditions justifying the grant of each individual waiver should be specified. It would be for the requesting country to state the reasons why its objectives could not be attained by the use of measures consistent with GATT. A determination by the Council as to whether the criteria justifying the waiver continued to be met would not be very different from the Council's existing power either to recommend adoption or extension of a waiver or to refer the matter to the next Session of the CONTRACTING PARTIES. Finally, he emphasised that there was no intention to question in any way the policy objectives pursued under a waiver, such as the Caribbean Basin Initiative.

19. In conclusion, the Group agreed that the secretariat should be requested to prepare a draft decision on the basis of the EEC proposals, for circulation as an informal paper.

Protocol of Provisional Application (PPA)

20. The Chairman said that at the last meeting the Group had also had a first discussion of the EEC proposal on the Protocol of Provisional Application (NG7/W/70) in which it was proposed that GATT-inconsistent legislation maintained on the basis of paragraph 1(b) of the PPA or on the basis of equivalent provisions in accession protocols should be phased out over a short transitional period. If any such legislation could not be eliminated within the agreed period a request should be made for a waiver.

21. One participant, welcoming the general thrust of the proposal, referred to the suggestion that inconsistent legislation still in force after the generally agreed termination date might be the subject of a request for a waiver, and asked if such a waiver would be granted on the basis of the current rules of Article XXV:5 or whether the new rule proposed by the EEC would apply. The representative of the EEC replied that if his delegation's proposal were accepted the new rule would presumably be used. Another participant made the point that if an application for a waiver in these circumstances could be made at the end of the transition period, the basic objective of the proposal would be undermined. He questioned whether it would be legally possible to seek waiver cover for measures already covered by an accession protocol. He also suggested that the termination date for inconsistent legislation maintained under the PPA should be the same as that for existing waivers. Another participant suggested that it would be preferable not to provide for the possibility of maintaining inconsistent legislation under a waiver; the agreed termination date should be final.

22. The Chairman commented that since the right to request a waiver would be maintained in any circumstances there was perhaps no need to make reference to it in this context. The representative of the EEC agreed that the reference to the possibility of a waiver merely recognised the existing position and that it need not be reflected in a decision. In answer to a question the representative of the EEC confirmed that specific commitments which might be undertaken in other Negotiating Groups on the termination of grandfathered legislation would override a general commitment undertaken in this Group, but said it was his delegation's expectation that phase-out periods negotiated elsewhere would be shorter than that to be agreed for grandfathered legislation in general.

23. Another participant asked whether it would not be more consistent with the objective of bringing all derogations to an end that accession protocols per se should be phased out, and not merely those provisions in them which were equivalent to paragraph 1(b) of the PPA. Another participant, while expressing interest in the EEC proposal, said that before acting upon it it would be necessary to know the coverage intended - for example whether sectoral exemptions in accession protocols would be phased out. The representative of the EEC replied that the proposal was intended merely to cover legislation maintained under provisions equivalent to paragraph 1(b) of the PPA: it would seem much more difficult to apply

it to other derogations in accession protocols, though the Community would be ready to discuss this possibility. One merit of the essentially simple proposal by the Community was that it would render unnecessary the identification of "grandfathered" legislation, which many governments clearly found difficult. Its effect would simply be that at the end of the transition period it would no longer be possible to claim PPA cover for inconsistent legislation.

24. It was agreed that the secretariat should provide a draft decision giving effect to the EEC proposal and should in addition provide advice to the Group on the legal distinction between any specific derogations contained in accession protocols and legislation covered by a general grandfather clause.

Article XXIV

25. The Chairman introducing this subject recalled that at the last meeting the Group had discussed Article XXIV against the background of a Japanese submission (NG7/W/66). In it Japan had proposed four main points for consideration by the Group: (i) ways of minimising possible adverse effects of regional arrangements on third countries and of trying to ensure that they contributed to the liberalisation of trade; (ii) increased involvement of GATT in the formation and subsequent surveillance of regional arrangements; (iii) clarification of certain points in Article XXIV:6 and XXIV:5(a); and (iv) although this was not presented as being necessarily a matter for this Group - possible problems in the areas of non-tariff measures and the new subjects under negotiation in the Round.

26. The representative of Japan addressing the first point above made the following comments: First, it was essential for contracting parties to reconfirm the principle that the formation or enlargement of regional arrangements should not result in serious damage or adverse effects to non-member countries. Second, there should be a requirement for consultation between member and non-member countries if a non-member country had a claim that serious damage was caused to it as a result of the formation or enlargement of a regional arrangement. Third, there should be agreement that a working party be set up on behalf of the CONTRACTING PARTIES to examine such a claim, and that it might make recommendations to the member countries so as to redress damage caused to the non-member country. Such recommendations might inter alia include provision to decrease the degree of discriminatory treatment by reducing the difference in tariff treatment between member and non-member countries for the product concerned or for other products; the latter could be seen as "compensatory adjustment". This would be in line with the intent of the GATT, particularly with Article XXIV:4. One participant recalled that at the last meeting his delegation had welcomed the proposal but said that it was still unclear why Articles XXII and XXIII were inadequate to address any adverse effects of regional agreements.

27. The representative of Japan said that it was not clear that the existing dispute settlement mechanisms could provide any compensation to a country which lost its share in an import market as a result of an integration agreement between the importing country and a third country. He was supported by another participant who argued that established trade carried on under a bound duty could be eliminated if the importing country were to join a regional agreement with an unbound and flexible duty designed to exclude imports. Article XXIV appeared not to provide for compensation in such cases. Another participant argued that in many cases countries joining regional arrangements moved to lower rates of duties and to generally more liberal trading regimes, but agreed that the proposals made by Japan merited further study; it would be helpful if they could be given further precision.

28. The representative of India recalled his delegation's submission in NG7/W/38, which called for the clarification of a number of concepts in paragraphs 5, 6 and 8 of Article XXIV, and said that such clarification would still be valuable. Other participants indicated their agreement.

Article XVII

29. The Chairman recalled that as stated at the beginning of the meeting the secretariat had circulated on 19 March a draft decision which had been prepared on the basis of the discussion at the last meeting. It was circulated on his own responsibility and did not commit delegations. The Group had an opportunity to discuss this draft in an informal meeting on 28 March. On the basis of this discussion and of the consultations he had conducted it was now evident that some changes needed to be made to the draft decision to reflect the different points made. The secretariat would prepare a revised draft decision on Article XVII for the next meeting.

Article XXVIII

30. The Chairman drew the Group's attention to the draft decision prepared by the secretariat and circulated on 19 March 1990. This text was circulated on his own responsibility. On several of the points under discussion the Group had before it different proposals, which were basically different modalities for arriving at the same objectives. The secretariat had not sought to choose between the alternative approaches but had reflected them in the text. The purpose of the footnotes was to draw the attention of the Group to certain areas where some additional thinking was perhaps necessary.

31. In discussion of the proposal to create an additional negotiating right based upon the importance of the product in question to the trade of the exporting country, most speakers expressed preference for the formulation drawn from NG7/W/59. It was made clear that there was no question of cumulating rights - i.e. of adding a new negotiating right for

a country which already held a right in the concession in question. A suggestion that any additional rights should be confined to developing countries was questioned by a number of participants, who recognised that the proposal might well confer benefits on developing countries but did not accept that the concept of preferential treatment should be built into Article XXVIII.

32. With reference to the proposed time limit for the communication of a claim to a negotiating right, the secretariat suggested that it would be appropriate to provide for a period of 90 days, as elsewhere in Article XXVIII. A participant commented that the question should perhaps be left open, since a 90 day delay in starting a negotiation might be excessive.

33. On the question whether preferential trade should be taken into account in the calculation of negotiating rights, a number of speakers were of the view that GSP trade should be included, though one made the point that his delegation's final position would be affected by other elements of the results of the Round. Another suggested that other forms of non-contractual preferential trade should also be taken into account.

34. The representative of Japan pointed out that his delegation's proposal was not fully reflected in the relevant paragraph of the draft decision. A corrected version of the paragraph was circulated.

35. The Chairman recalled that in the Group's earlier meetings reference had been made to the uncertainties deriving from the automatic implication of the right to renegotiate tariff schedules under Article XXVIII:5 and wondered whether the Group should revisit this question, which might have relevance to the problem of preemptive tariff increases on new products. For example it might be agreed that contracting parties could still reserve the right to renegotiate every three years, but that any negotiations must begin within six months of the reservation of the right, after which negotiation might be subject to the approval of the CONTRACTING PARTIES or alternatively it might be necessary to resort to Article XIX. Some participants expressed interest in these ideas but thought that since it was hoped that the Uruguay Round would produce a large increase in tariff bindings it might not be desirable to restrict the present freedom of contracting parties to renegotiate bindings, or to encourage resort to grey area measures or the use of Article XIX.

36. Most delegations supported the general thrust of the Swiss proposal on Tariff Rate Quotas (TRQs), to the effect that compensation should exceed the value of the trade directly affected. The representative of Hungary, on behalf of the countries which had submitted the proposal in NG7/W/59, said that they could now accept the guiding principles suggested by Switzerland, but that they wished to think further about the suggestion that compensation should be increased by an amount equivalent to 50 % of the trade not affected by the tariff rate quota. In addressing the matter of compensation it might be relevant to take into consideration the view expressed by a panel that not only past trade but also other factors might have a bearing on the appropriate level of compensation.

37. With reference to the grant of an initial negotiating right on compensatory concessions it was agreed to amend the draft decision to make it clear that this would be the case unless another form of compensation was agreed by the contracting parties concerned.

38. It was agreed that a revised version of the draft decision would be circulated before the next meeting, at which the Group should aim to draw conclusions on this subject.

Dates of future meetings

39. The Group agreed that the next two meetings would be held on 3 and 4 May and 21-23 May, and reserved the dates of 19-21 June and 17-19 July for its subsequent meetings.