

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED
MTN.SB/15
23 November 1990
Special Distribution

Surveillance Body

MEETING OF 9 NOVEMBER 1990

1. The Surveillance Body met on 9 November 1990.

Adoption of the agenda

2. The Surveillance Body adopted the agenda proposed in the convening airgram GATT/AIR/3111.

Item (A): Standstill

- (I) Examination of standstill notifications (MTN.SB/SN/- series) submitted in accordance with the agreed procedures (MTN.TNC/W/10/Rev.1)

3. The Chairman noted that the agreed procedures provided for the Surveillance Body to transmit a record of the proceedings relating to standstill notifications to the next meeting of the TNC, due to be held in December in Brussels. The record would also be transmitted to the GNG for information.

4. The record of the Body's examination of notifications on standstill, drawn up in accordance with paragraph 3 of the agreed procedures, is annexed (Annex).

- (II) Consideration of statements by participants concerning other aspects of the standstill commitment

"Early warning"

- (a) United States marketing orders

5. The representative of Chile recalled the statement which its delegation had made in this Body about a year ago concerning the dangers of certain protectionist tendencies during the Uruguay Round, contrary to the Punta del Este spirit. At that time, this concern had been directed at the "marketing orders" broadly used by the United States to regulate the quality and quantity of fruit and vegetables in order to maximise prices and reduce the uncertainties faced by local producers.

6. A month ago, in the GATT Council, Chile stressed that this situation had not changed, and urged the United States Government to oppose these protectionist tendencies within the country. However, Chile's fears became reality: an amendment had been adopted to the Agriculture Act of 1990 extending the coverage of the marketing orders to imported kiwis, cherries,

nectarines, pistachios and apples, while also establishing an additional procedural stage before the regulation was put into effect. Chile therefore hoped that the United States Government would be true to its liberal ideas and not protectionist when the time came to implement this legislation and would concur with Chile's views on the unlawfulness of such measures.

7. The marketing orders existing prior to the amendment had already cost Chile some US\$60 million (in lower sales to the United States and lower prices in third markets) over the last four years. It was further estimated that the adverse effect of these new protectionist rules on Chilean exports could amount to nearly US\$300 million annually.

8. In the view of the Government of Chile, the marketing orders were essentially protectionist and contrary to the rules of the General Agreement and the Code on Technical Barriers to Trade, and consequently violated the spirit and the letter of the standstill and rollback commitments entered into under point C of the first part of the Punta del Este Declaration. The marketing orders violated paragraph (i) of the section on standstill for the following reasons.

9. First, they were discriminatory and infringed upon the principal of national treatment in two ways. At least in the case of grapes, there was a clear discrimination in that during the period when the marketing orders were in force 100 per cent of some types of imported grapes entering the United States were subject to compulsory inspection, while only a small proportion of domestic production of the same types of grapes were subject to that obligation. Specifically, it was known that the marketing orders were applied to only 13.6 per cent of Californian production of table grapes. All imported grapes were subject to the measure. Consequently, this practice was in breach of Article III of the General Agreement in that it favoured most local grape producers against foreigners. Furthermore, the marketing orders established distinctions with regard to fruit size. However, in accordance with the above-mentioned Article III:4, there must not be discrimination among like products. No one could doubt that, large or small, apples were still apples.

10. Second, the marketing orders violated the general principle of the most-favoured nation treatment. Under special agreements with Canada and Mexico, the United States Department of Agriculture authorized the inspection of products subject to marketing orders at their origin, in other words on Canadian and Mexican territory. In the case of Chile, however, in spite of Chile's request for similar treatment, inspections continued to be made at the port of entry. In other words, Chile was discriminated against compared with the above-mentioned countries. Proof of this was the fact that efforts had been made to introduce amendments to do Chile justice in this matter and yet they had not been adopted by the United States Congress. The failure to extend this benefit to third countries which so requested was contrary to the principle which was the cornerstone of the GATT, namely the most-favoured-nation clause. Chile asked this to be redressed without further delay.

11. Third, the application of marketing orders to imported fruit was contrary to the Agreement on Technical Barriers to Trade. Domestic production was inspected at the point of packing, where it was required to satisfy "point of shipment" standards, after which it was refrigerated and transported to various parts of the United States. Imported fruit, on the other hand, was inspected on arrival at United States ports under the same "point of shipment" standards, when the product might have undergone some natural deterioration due to land and/or sea transport. In other words, damage from refrigeration and/or transport was taken into account only for imported fruit. Domestic fruit, although it underwent the same deterioration, was not affected by these standards. These double standards were an obstacle to international trade and hence a violation of Article 5 (5.1.1 and 5.1.2) of the Agreement on Technical Barriers to Trade.

12. Even assuming purely academically that the marketing orders were not contrary to paragraph (i) of the section on standstill in the Punta del Este Declaration, the United States would also be in breach of paragraph (ii) of the section, since these internal standards went beyond what was "necessary to remedy specific situations". Their aim was to protect local production; they were the corollary of what had taken place in the 1920s and 1930s to combat low prices and chaotic conditions on the market by means of quantity and quality control programmes for agricultural products. The objective was to manage prices so as to protect United States producers, and to ensure more stable incomes for them. This was made clear by the dominant rôle played by producers in the process that gave rise to the marketing orders. It was precisely the producers who promoted the establishment of such measures; it was producers who, by referendum, decided if it were necessary to maintain existing marketing orders; it was they who decided whether or not to extend their application to other products; and it was also producers who agreed on their elimination when they were no longer required. The administration merely sanctioned and applied the decision of the producers and intermediaries. What was most serious was that the issue was not about legitimate sanitary or public health regulations, but rather about standards simply concerning quality, in other words the issue was about big or small grapes, attractive kiwis and less attractive ones, more or less sweet apples, and so forth.

13. In paragraph (iii) of the section on standstill in the the Punta del Este Declaration, each participant undertook "not to take any trade measures in such a manner as to improve its negotiating positions". As the United States was the main market for Chile's fruit and vegetables, the United States substantially improved its negotiating position as a consequence of the above-mentioned situation.

14. Finally, the United States not only failed to respect the standstill commitment, but also made the rollback undertaking just a paper commitment because of the amendments to its agricultural legislation. The representative of Chile concluded by requesting the Surveillance Body to urge the United States to take appropriate steps to fulfil the Uruguay Round obligations. At the same time, Chile hoped that the relevant authorities of the United States Government would recognize that the new marketing orders were contrary to GATT rules.

15. The representative of the United States, in reply, said that parts of the 1990 Farm Bill addressing marketing orders would act to extend the provisions of Section 8e of the Agricultural Marketing Agreements Act to commodities not currently covered by that provision. Section 8e provided that standards of quality, ripeness, or maturation imposed on domestic products under marketing orders should also be extended to imports of those products. The marketing orders covered by the Bill (kiwis, nectarines and plums) were not new. They had been in existence for many years. The only new issue was whether imports of these commodities should be required to meet the same quality standards as the commodities grown in the United States. Currently, imports of kiwis, nectarines and plums were allowed into the United States regardless of their quality. At the same time, American growers and packers of these commodities must contend with stringent quality guidelines that sometimes had prevented them from marketing some of their produce due to cosmetic damage. Section 8e of the Agricultural Marketing Agreement Act provided that imports of a given commodity may be held to the same standards as were established for the comparable domestic commodity under a marketing order. There was not and had never been a marketing order for apples. Furthermore, there was no current discussion of the creation of a marketing order for apples in the future. Without marketing order standards on the domestic product there were no way to invoke Section 8e standards on imports. Thus imports of apples would not be affected under this provision. Pistachios did not yet have a marketing order either.

16. The representative of New Zealand said that his delegation fully shared the concern expressed by Chile.

(b) United States ban on imports of tuna

17. The representative of Mexico, referring to Mexico's statement under the agenda item "Other Business" at the Council meeting of 7 November 1990, said that Mexico had informed the Council of its request for consultations to the Government of the United States on the ban on imports of tuna which had entered into effect on 10 October 1990. The United States measure was directed against Mexican products. Mexico hoped that satisfactory outcome would be produced through the consultations with the United States, but, at the same time, Mexico was aware that other contracting parties were considering to take the similar type of measures. Therefore, Mexico raised the issue at this meeting to express its concern over such measures.

18. In reply, the representative of the United States said that his delegation took note of the statement of the representative of Mexico and would transmit it to its authorities.

19. The representative of the European Communities said that the Community was particularly concerned about the possible impact on third countries of the United States ban.

(c) European Communities future automobile import régime

20. The representative of the United States noted that, according to press reports, negotiations between the EC and Japan on automobile imports into the EC had reached a tentative conclusion. His delegation had already brought up the issue in a previous meeting of this Body, but wished to note that the United States continued to have concerns in this matter. He asked the delegation of the EC to provide information on the agreement, especially whether the production of automobiles by Japanese companies outside of Japan might be covered by the agreement.

21. The representative of the European Communities took note of the concern expressed by the United States and undertook to convey it to his authorities.

Item (B): Rollback

(I) Consideration of statements concerning the rollback commitment in the light of the agreed procedures (MTN.TNC/W/10/Rev.1)

22. The Chairman recalled the agreement at the July meeting of the Surveillance Body that participants should submit, by mid-October, full reports on rollback consultations, and notifications on other autonomous rollback measures already taken, as well as any other envisaged rollback measures. The reports and notifications were expected to help the Surveillance Body in providing the TNC with the fullest possible information on the actions taken in compliance with the rollback commitment. The Surveillance Body had received notifications from Argentina (MTN.SB/RBN/3/Rev.1), Colombia (MTN.SB/RBN/4), the Republic of Korea (MTN.SB/RBN/5), Finland (MTN.SB/RBN/6), Indonesia (MTN.SB/RBN/7), Hong Kong (RBC/8/Add.6), and the United States (MTN.SB/RBN/8). The notification from the United States contained information on the status of rollback consultations with a number of participants. Hong Kong's notification was related to its rollback consultation with Japan. The other notifications were all related to autonomous trade liberalization actions concerning measures which had not been the subject of rollback consultations. The Chairman inquired whether any delegations had supplementary information with respect to rollback consultations or any other rollback actions.

23. The representative of the United States said that the notification by his authorities included not only information on the status of rollback consultations, but also the United States' rollback action concerning the customs user fee.

24. The Chairman recalled that, at the last meeting, the Secretariat was asked to make a list of measures which had been found by the CONTRACTING PARTIES, following Panel findings, to be inconsistent with the General Agreement, and any information on actions taken in response to such findings. Such a list had been prepared by the Secretariat in consultation with participants concerned, and it had been circulated as MTN.SB/W/11.

Item C: Other business, including review of the situation in the context of the meeting of the TNC in December and consideration of the Chairman's report to the TNC

25. The Chairman referred to a draft Report of the Chairman to the TNC meeting at Ministerial level in Brussels which had been presented to participants for discussion at this meeting. The Report consisted of a brief factual summary of the implementation of the standstill and rollback commitments, and a more detailed account of the implementation of the commitments in its ANNEX. He said that his intention was to up-date and, as necessary, amend the draft in the light of the discussions at this meeting. The revised report would be submitted to the TNC meeting in December. He stressed that the report was meant to be purely factual in order to assist the TNC in its task of carrying out an evaluation of the implementation of the standstill and rollback commitments. The Chairman also drew attention to paragraph 16 on page 4 of the draft report. Informal consultations had been held before this meeting with a view to exploring whether there was sufficient common ground among participants to put forward specific recommendations to Ministers as to how the full implementation of the rollback commitment might be facilitated. However, many participants had indicated that, at this stage, it would be difficult to agree on any such recommendations.

26. The representatives of the United States, New Zealand, Mexico, Chile, Yugoslavia, Uruguay, the European Communities, Canada, Australia, Japan, and Hong Kong commented on the draft. The Chairman suggested that, while comments relating to factual parts of the draft would be reflected in a revised final Report, other statements would be recorded in the minutes of this meeting.

27. The representative of the United States requested that paragraphs relating to its rollback notification and its action regarding Section 337 legislation should be revised so as to reflect the notification more accurately.

28. The representative of Mexico, noting that the Chairman would submit the report to the TNC on his own responsibility, wished to raise two points to be reflected in the report. The first point concerned paragraph 13 relating to autonomous trade liberalization. His delegation was of the view that autonomous liberalization was, by definition, not inconsistent with the GATT. For example, Mexico had bound tariffs at 50 per cent but the maximum applied tariffs were 20 per cent. This was an autonomous liberalization action and Mexico considered that such actions should be given credit and recognition in multilateral trade negotiations.

29. The second point concerned rollback. Mexico considered that there were two types of cases for rollback. One related to measures that were subject to Panel proceedings. In this case, Mexico could conceive two ways of following through on the rollback commitment. One was a political commitment to implement recommendations of the Panel as rapidly as possible within a fixed time limit. The other was a political commitment to apply the outcome of negotiations on dispute settlement procedures to outstanding

cases. The second alternative did not mean a retroactive application of improved dispute settlement procedures, but rather a political commitment to accept such improved procedures. The second type of cases related to measures addressed in rollback requests, which had not been subject to Panel proceedings. In such instances, the burden of proof concerning their GATT-consistency should be shifted from the participant complaining about them to the participant applying such measures. If it was not possible to justify the measures, the participant complained against should withdraw them, or apply other measures such as those under safeguard provisions.

30. Referring to paragraph 36 of the draft, the representative of Chile said that, while the Punta del Este Declaration might lead to different interpretations, its language as to the date by which all rollback measures should be implemented was quite clear. According to the Declaration, the implementation must be made by the date of the formal completion of the Uruguay Round, and his delegation could not understand how one could interpret it in such a way that it was not necessary to do so before the end of the Round.

31. The representative of Yugoslavia said that, in the view of her delegation, the language relating to the rollback commitment in the Punta del Este Declaration left room for different interpretations. On the one hand, it could be read that all GATT-inconsistent measures should be removed or brought into conformity by the end of the Uruguay Round. On the other hand, the implementation of the commitment was linked with the results of the Round which could be known only at the end of the negotiations, and therefore the GATT-inconsistent measures could be removed or brought into conformity only after the completion of the Round. In any case, the measures which were found to be inconsistent with the GATT by the CONTRACTING PARTIES, following Panel reports, should be removed or modified immediately or by the end of the Uruguay Round if the political commitment on rollback was to be respected. The implementation in respect to such measures could not be conditional upon the results of the negotiations of the Round.

32. The representative of Uruguay said that the statement by Chile had raised a point of importance, and asked the comment of the Chairman on the matter.

33. The Chairman noted that paragraph 36 reflected the points of view which had been put forward by participants at meetings of the Surveillance Body. As indicated by the representative of Yugoslavia, the problem was related to difficulties in determining whether certain measures were consistent or not with the provisions of the General Agreement or Instruments negotiated within the framework of GATT or under its auspices when the final picture of multilateral agreements, undertakings and understandings with respect to these provisions was not yet clear. The view referred to in the paragraph was related to this particular problem. This problem was also mentioned in paragraphs 15 and 16.

34. The representative of the European Communities said that his delegation supported the view referred to in paragraph 36. The paragraph

had been carefully drafted to indicate that there was a feedback between the time-frame for rollback undertakings and political decisions out of negotiations. One had to take into consideration that decisions made at the end of the Uruguay Round influenced how the rollback commitment should be put into force. His delegation considered it a logical way of understanding the commitment.

35. The representative of Chile said that the Punta del Este Declaration could not be altered and therefore the paragraph should reproduce the full language of the relevant part of the Declaration. It should also make it clearer that the view referred to in the paragraph was advanced by some participants, but not shared by other participants.

36. The representative of Canada said that his delegation had no difficulty with paragraph 36 as originally drafted, but he suggested that, if there was a reference to the Punta del Este Declaration with respect to the agreed time-frame, the full language concerned in the Declaration should be reproduced.

37. The Chairman suggested that paragraph 36 would be revised so as to reflect the comments made.

38. Referring to paragraph 26, the representative of New Zealand suggested that the following be added as the third sentence: "They drew attention in this regard to MTN.SB/W/11, dated 26 October 1990, which contained a note by the Secretariat on actions taken regarding measures which were found by the CONTRACTING PARTIES to be inconsistent with the GATT."

39. Referring to paragraph 16, the representative of the European Communities said that the paragraph carried the essential message of the report. Although it was reasonable to pass the task of considering what further action was needed to Ministers at the TNC, the question was how to express it in the report. In order to give Ministers the complete freedom, it might be better to phrase that "Ministers may wish to consider whether further action is needed", instead of "Ministers may wish to consider what further action is needed".

40. The representatives of New Zealand, Chile, Australia and Hong Kong objected the revision proposed by the representative of the European Communities, saying that the original draft conveyed adequately the meaning which the Community intended to include.

41. The representative of Japan said her delegation could accept both alternatives. In this connection, she noted that according to the understanding of her delegation, the basic objective of the standstill and rollback commitments was to ensure a good negotiating environment for the Uruguay Round negotiations. The Punta del Este Declaration stipulated that the commitments of standstill and rollback would continue "until the formal completion of the negotiations". Her delegation believed that this mechanism of standstill and rollback had duly played its rôle and would end to play the rôle on the day of the formal completion of the Uruguay Round.

As far as Japan was concerned, it had been the first country to have implemented an autonomous rollback action, and it had participated in various rollback consultations in a positive manner.

42. Japan was not convinced why this mechanism of political commitments needed to continue to exist after the completion of the Uruguay Round. It might lead to a complication of the dispute settlement mechanism. The question of GATT-consistency of certain trade measures should be primarily dealt with in the improved and strengthened dispute settlement mechanism, and the follow-up of those measures which were found GATT-inconsistent by Panels should basically fall within the scope of the dispute settlement scheme. Furthermore, in many of the Negotiating Groups, including those on safeguards, and textiles and clothing, negotiations were under way to establish appropriate mechanisms to conduct surveillance which would ensure and implement the agreed results of the negotiations. These individual surveillance mechanisms in different negotiating areas should be sufficient, and duplication of such mechanisms should be avoided so as not to create any confusion in the future.

43. The Chairman enquired whether participants were agreeable that on the basis of discussions at this meeting, the Chairman's report should be forwarded to the TNC meeting at Ministerial level in Brussels. The Surveillance Body so agreed (the revised Chairman's report to be submitted to the TNC is contained in MTN.SB/14).

44. The representatives of New Zealand said that when introducing its proposals (MTN.SB/W/8) some time ago, he had said that the issue would have to be looked at at the end of the Uruguay Round. Originally, New Zealand had hoped that the Round would be in a much tidier shape than was currently the case, and the Surveillance Body could have completed its task. However, that was not possible and the task would continue until the formal end of the Round. Further action which Ministers might wish to consider could mean either nothing, a little action, or a great deal of action, depending on success in various negotiating areas.

45. If there was success in the negotiations at some point, there would be every reason to believe that one could return to the issue of the implementation of existing Panel recommendations. The question was whether the Panel recommendations on measures found to be inconsistent with the GATT, adopted by the CONTRACTING PARTIES, had or had not been implemented. If they had not been implemented, then by definition they remained inconsistent with the GATT. He asked what Ministers meant by the Punta del Este Declaration calling for the implementation of the rollback "within an agreed time-frame not later than by the date of the formal completion of the negotiations, taking into account of multilateral agreements, undertakings and understandings, ..., reached in pursuance of the Objectives of the Negotiations." One might return to the question but, politically, timing was not ripe because of the second phrase in the sentence. There were three possibilities of interpretation of the sentence in the Declaration. One was that all measures which had been found to be GATT-inconsistent by Panel reports, adopted by the CONTRACTING PARTIES, would have to be phased out or brought into conformity by the end of the

Uruguay Round. Another possibility of interpretation was that by the end of the negotiations, participants would have to have a time-frame for phasing out GATT-inconsistent measures in place, which might go beyond the final day of negotiations. In this respect, Japan might have a cause to reconsider its views on this issue in connection with one Panel report. The other interpretation was that the sentence had not meant anything at all.

46. New Zealand had a strong intention of returning to the issue, but only at a point where a prospect of successful negotiations in underlying areas that lay behind some of those extremely important Panel decisions was discerned. Negotiations of dispute settlement procedures would not cover existing Panel reports. Therefore, what would happen to those Panel reports was a major political question. If there was success in the Uruguay Round negotiations, something would have to be done about them. They could not be left unsettled permanently, leaving room for a whole series of trade policy arguments between major countries.

47. The representative of Australia said that his delegation shared some of the views put forward by New Zealand. On previous occasions, Australia had pointed to practical difficulties involved in determining GATT-consistency or -inconsistency of any measures in the absence of Panel reports adopted by the CONTRACTING PARTIES. His delegation could appreciate the frustration of some participants that their objectives in the Punta del Este Declaration with regard to rollback undertakings had not been met. Nevertheless, there was a need for a pragmatic approach at this stage of negotiations, which would allow Ministers in Brussels to see how the rollback undertakings might be operationalized. Australia continued to see substantial value in, and strongly supported, a decision arising from the TNC meeting that would result in the full implementation of all Panel recommendations which had been adopted by the CONTRACTING PARTIES. In order to make any such decision meaningful, it would have to be placed within a framework of binding time constraints for the implementation of programmes. His delegation also saw some benefits, although less significant, in a review of measures against new or amended rules adopted as part of the Uruguay Round. This was a pragmatic approach to the question of implementing the rollback commitment.

48. Australia considered that the time might not be ripe to reach an agreement on this and some participants might need more time to reflect on the issue. At the TNC meeting in Brussels, an environment might be created to allow such a decision to emerge. However, Australia would be disturbed if there was a perception within this Body that the Chairman's report, particularly paragraphs 15 and 16, foreclosed the possibility of further development of decisions along the lines being discussed in this Body. Australia would actively participate in any process between now and the TNC meeting in Brussels, and wished that the result of any such work during the period be made available to Ministers in Brussels.

49. The representative of the United States noted, that with respect to the time-frames, there were some important time-frame-related negotiations under way in a variety of Negotiating Groups. They would have very strong

relationships with the commitment of undertakings at Punta del Este. She also cautioned that participants should not try to redefine the language which had been carefully negotiated in 1986. The United States was particularly attached to the references to rollback in the Punta del Este Declaration in their entirety. Any further discussion between now and the conclusion of the negotiations should reflect this point.

50. The representative of Chile said that, compared with other participants, his country's vision might be less pragmatic and generous, and more reproachful towards those participants which had not lived up to their commitment in the Punta del Este Declaration and were trying to find some excuses for the inaction. The TNC meeting in Brussels would be an opportunity to continue to discuss the issue, and those participants would have to acknowledge, in one way or another, the fact that they had not lived up to their obligations.

51. The representative of the European Communities said that his delegation associated itself with the comments made by the United States. His delegation was concerned that, at the end of the negotiations participants could be faced with a task of acting twice under the same programme, in the light of the results of negotiations on time-frames in other Negotiating Groups.

52. The representative of Canada said that his delegation would also associate itself with the comments made by the United States.

53. In conclusion, the Chairman said that the points made by a number of participants would be duly reflected in the minutes of this meeting. It was clear that for some participants there were issues relating to the implementation of the rollback commitment and the implementation of Panel recommendations which needed to be pursued in the light of developments that might take place between now and the time of the TNC meeting in Brussels. Some other participants had pointed to other considerations which they believed were relevant to the discussion of further procedures. The Chairman encouraged participants to continue to consult among themselves so that there would be clearer views before the TNC meeting as to what action, if any, Ministers might be asked to consider in Brussels.

ANNEX

Examination of standstill notifications (MTN.SB/SN/- series) submitted
in accordance with the agreed procedures (MTN.TNC/W/10/Rev.1)

New notifications on standstill

1. The Chairman drew attention to the latest list of notifications on standstill (MTN.SB/W/3/Rev.9), noting that there was no new notification to be examined at the meeting.

Previous notifications on standstill

2. The Chairman drew attention to the notification from the United States (MTN.SB/SN/21) which contained information on the status of some standstill notifications addressed to the United States.