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TRADE FACILITATION: ARTICLE X OF GATT ON THE PUBLICATION AND ADMINISTRATION OF TRADE REGULATIONS

Communication from Canada

The following communication, dated 24 May 2002, has been received from the Permanent Mission of Canada.

Introduction

In the period leading up to the Fifth Ministerial Conference, the Doha Ministerial Declaration directs the Council for Trade in Goods to “review and, as appropriate, clarify and improve relevant aspects of GATT Articles V, VIII and X and identify the trade facilitation needs of Members, in particular of developing and least-developed countries”. Members also undertook a commitment in the Ministerial Declaration to “ensuring adequate technical assistance and support to build capacity” in the area of trade facilitation.

This paper provides a number of Canadian ideas on how GATT Article X on Publication and Administration of Trade Regulations could be clarified and improved. Our paper also flags some possible areas for technical assistance in support of our proposals. Canada continues to support fully the integrated approach of developing WTO commitments and ensuring technical assistance and capacity building where required to assist in implementing such commitments.

Considerations

The importance of transparency, predictability and consistency in the application of trade regulations and procedures for international trade is why GATT Article X was one of the original GATT provisions. The original drafters of the GATT recognized that traders and investors are affected directly by border procedures as these can have a significant impact on their costs and timing, and ultimately as to whether they choose to enter individual markets. With the expansion and diversification of trade over the last fifty-five years, there are significant potential benefits from further enhancing transparency of border rules and procedures, promoting more advance notice of and opportunities to comment on proposed trade rules, ensuring right of appeal against administrative decisions and providing advance rulings. These potential benefits of increased trade, investment, economic growth and development are even greater if such improvements and clarifications are based on multilateral commitments applied by all trading partners, based on the principles already encompassed by GATT Article X.

Aside from the needs of larger traders, complete, simple and readily accessible information is also crucial for smaller countries and small and medium-sized enterprises (SMEs) to enable them to trade efficiently. Publishing laws and regulations, seeking public comments, ensuring due process and so forth can also benefit governments by allowing them to implement their policies more

effectively and efficiently and in ways that encourage a more positive and cooperative relationship between government and the private sector.

Possibilities for Clarifying and Improving GATT Article X

Canada would suggest the following improvements and clarifications to GATT Article X. These suggestions, which reflect the trade facilitation principles of transparency, due process, integrity, efficiency and simplification, and consultation, fall under the following four categories: publication and administration of requirements; consultative/feedback mechanisms; right of review and appeal; and advance rulings. In many cases, these ideas draw from a number of existing WTO Agreements, such as the Agreement on Rules of Origin and the Agreement on Implementation of Article VII of the GATT. Our ideas also draw upon the National Experience papers on trade facilitation submitted to the Council for Trade in Goods by various Members.

A. Publication and Administration of Requirements

1. To promote transparency and due process, relevant information regarding border rules and procedures should be made available to all interested parties on a non-discriminatory basis through an officially designated, readily accessible medium, e.g., through centralized inquiry points, publications and, where possible and feasible, through display on-line (e.g., via electronic homepages).

For the explicit purpose of informing the public and enabling traders to be fully acquainted with necessary information, improvements should include publishing or making publicly available as widely and promptly as possible:

- all laws, regulations, judicial decisions, administrative guidelines and administrative rulings affecting imports and exports;
- all multilateral, regional and bilateral agreements affecting international trade policy;
- information on customs and other border-related agency processes;
- conditions and qualifications for different forms of customs treatment;
- any amendments to the foregoing; and
- where (e.g., offices, websites) the above information can be obtained.

Many governments have turned to technology in an effort to disseminate such information ore quickly to their clients' attention. However, while use of technology is helpful in cases where the capacity exists to do so, or where the technology can be implemented in the short term, it is not a "have-to-have"/mandatory process. The information can also be made readily available in publications such as the Customs tariff, official gazettes, bulletins and public notices. These can be located at appropriate Customs offices or at other strategic locations where such information is likely to be needed, e.g., at embassies and trade missions abroad or by display in public offices such as major post offices. Special enquiry offices or desks can provide a valuable information service.

Although Canadian government departments, including customs and trade, use internet-based web sites extensively to communicate such information to interested parties and to receive feedback, they also make use of all the other information sources noted above for such purposes. We are open to discussing with WTO Members where technical assistance might be provided in developing either or both non-electronic and electronic similar, relevant processes.

B. Consultative/Feedback Mechanisms

2. In order to increase transparency and predictability, enhance government-private sector cooperation and heighten the likelihood of compliance, provide early opportunities for stakeholders to comment on prospective rules and procedures (i.e., before the rules and procedures are implemented), including:
 - early notice of a proposed regulation, e.g., in an annual regulatory plan;
 - a requirement that a public consultation process be launched to give interested persons an opportunity to make their views known within a specified time period, e.g., within 60 days;
 - analysis to explain what the regulatory proposal is meant to achieve, what alternatives have been considered, what consultations have been carried out, what the reply of the department or agency is to the concerns voiced and, what mechanisms are built in to ensure compliance with the regulations; and
 - prepublication of the draft regulations in the official gazette before they can be put in place to give those who are interested in a regulatory proposal the opportunity to determine the extent to which the proposal is in keeping with previous consultations.

The above process would allow for a more open, informed and cooperative relationship between government and the private sector and would help the public be better informed as to the government's objectives and goals. Direct public and private sector feedback to regulators means they would be better informed and thus better prepared to draft appropriate, workable laws/regulations and avoid later problems. Prepublication of the laws and regulations allows a final opportunity for public comment before the laws/regulations are put into effect. In this regard, Canada also supports and encourages public participation and consultation with stakeholders through means such as consultative bodies involving customs administrations and industry groups or sector associations. This allows for early dialogue between interested parties, governments and the private sector, on proposed new legislation, regulations and other procedures affecting import and export administration and border-related procedures, before their formal adoption or entry into force.

Canada is open to discussing and sharing its experience on consultations and feedback in order to explore the possibility for developing specific technical assistance and training in this area.

C. Right of Review and Appeal

3. To enhance the existing provisions under GATT Article X on review and appeal by improving accessibility to independent judicial, arbitral or administrative tribunals and making more readily available procedures to review and correct administrative actions related to customs matters. This could include provisions to ensure that trade is not unduly affected pending the outcome of appeal procedures and could include the following:
 - ensuring that stakeholders seeking redress with respect to decisions resulting from the interpretation of rules and procedures have access to appropriate appeal mechanisms;
 - providing right of review and appeal for tariff classification and other customs rulings; and
 - providing a mechanism to allow goods to be released and the possibility, in certain situations, for payment of duties and taxes to be left in abeyance, subject to the requirements of national legislation, to the payment of a surety, guarantee or other form of bond pending the outcome of the appeal.

Canada believes that there should be a non-discriminatory, legal right of appeal against customs and other agency rulings and decisions, initially to a higher authority within the same agency or another body, and subsequently to a separate judicial or administrative body. Appeal procedures

should be clearly outlined in legislation, and the legal requirements and procedures for filing an appeal should be made readily accessible to the trade community and the general public. The availability of a transparent, open, accessible and effective review and appeal system would instil confidence by the public and the trading community in the government institutions, and would further the effectiveness and efficiency of government measures.

In this regard, consideration could also be given to developing and extending a provision similar to that of Article 13 of the Customs Valuation Agreement which requires all WTO Members to make provision for goods' release in the event of delays in the determination of customs value. In certain circumstances, pending the outcome of an appeal, goods could be released on the basis of the provision of collateral or some form of monetary security to ensure that obligations of importers, exporters, warehouse operators or international transporters of goods would be met. Care needs to be taken to ensure that the enforcement activity of customs or other agencies is not reduced or unduly impeded by an unfettered right of release of goods.

Over the years, the Canadian legal system has evolved in the provision of avenues of judicial and administrative appeals. Canada is ready to discuss with WTO Members the possibility for developing specific technical assistance/training in the matter of appeals systems.

D. Advance Rulings

4. Provision of binding rulings on tariff classification, possibly also on eligibility for treatment under specific customs procedures such as those offering relief from duties and taxes, including:

- rulings in advance of importation (in response to a written request by an importer, exporter or their representative), which are binding on the importing authorities, provided that the goods and the circumstances at importation are identical to those presented in the ruling request.
- rulings could cover the main elements of import requirements, e.g., tariff classification and applicable duties, taxes and import licensing requirements, and could be modified or revoked, after notification, without retroactive application.
- in circumstances where inaccurate or false information was provided, such rulings could be modified or revoked without notification and with retroactive application.

Both traders and government administrations can benefit from binding advance rulings. Not only do such rulings offer the traders greater certainty and predictability in terms of the treatment of their goods at the time of importation, advance rulings also encourage the traders to comply with customs and border-related requirements. The provision of binding rulings in advance of the importation of goods benefits the customs administration that provided the rulings, in that the traders are informed of the appropriate import requirements and delays, complaints and subsequent appeals are minimized.

The WTO Agreement on Rules of Origin, Part 11, Article 3 (f), provides for origin rulings to be issued to an importer or exporter as soon as possible, but not later than within 150 days of the request, assuming that all information is available. In consideration of any future WTO commitments that may be made in respect of advance rulings in other areas, we would suggest that the texts be closely aligned on existing provisions such as those in the Agreement on Rules of Origin.

Technical Assistance

Technical assistance can assist developing countries, particularly the least developed countries, who face resource and capacity constraints in implementing improvements and clarifications of GATT Articles V, VIII and X. Developing countries may also need time to implement new commitments.

Canada has flagged above some potential areas where technical assistance in the areas covered by its proposals on GATT Article X might be considered a priority. But more broadly, Members will need to discuss in greater detail how best to identify, coordinate and deliver technical assistance where and when it is needed to implement future commitments on trade facilitation. Canada looks forward to engaging actively and fully with other Members on this, taking into account the interrelationship of technical assistance to future WTO commitments in the area of trade facilitation.
