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CROSBIE PRESENTS DETAILED PROPOSAL FOR STRENGTHENING THE GATT SYSTEM

International Trade Minister John C. Crosbie today presented to his counterparts at an Informal Trade Ministers meeting in Puerto Vallarta, Mexico, Canada's proposal to strengthen the global trading system, through the establishment of a world trade organization.

"We must achieve a strong and effective institutional framework to govern world trade upon successful completion of the current Round of GATT trade negotiations," Mr. Crosbie said.

Mr. Crosbie launched discussions on Canada's initiative last week in Geneva in meetings with the GATT Director General Arthur Dunkel and several Ambassadors. Attached is a copy of the proposal, Strengthening the Open Multilateral Trading System, released today.

"I stressed both in Geneva and in Puerto Vallarta that Canada regards this initiative solely in the context of a large and substantive outcome of the negotiations," the Minister said.

A centrepiece of Canada's strategy is reform of the GATT dispute settlement system. The Canadian discussion paper includes procedures regarding adoption and implementation of GATT panel findings and establishing an appeal process. This proposed system would aim at reducing the threat of unilateral action.

A copy of the dispute settlement paper is also attached.

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Canada

CANADA

April 19, 1990

MTN: STRENGTHENING THE OPEN MULTILATERAL TRADING SYSTEM

THE GLOBAL TRADING ENVIRONMENT

When the Uruguay Round was launched in 1986, Ministers embarked upon the most ambitious, complex and comprehensive multilateral trade negotiations yet undertaken. They agreed to seek to liberalize agricultural trade and bring it under the GATT; to substantially reduce tariffs and non-tariff barriers to trade; to review and strengthen the effectiveness and fairness of the major trade rules; and to extend the benefits and disciplines of the multilateral trading system to the new areas of trade in services, trade-related intellectual property and trade-related investment. Achieving a large substantive outcome of the MTN in these areas by the Brussels Ministerial meeting next December is a fundamental challenge for the success of this Round.

When Ministers agreed to the Punta del Este Declaration, they also recognized the importance of using the Uruguay Round to strengthen the institutional framework of the multilateral trading system. The following objectives were included in the Declaration:

* to strengthen the role of the GATT to improve the multilateral trading system;

* to increase the responsiveness of the GATT system to the evolving international economic environment;

* to strengthen the inter-relationship between trade policies and other economic policies affecting growth and development;

* to enhance the surveillance in the GATT to enable regular monitoring of trade policies and practices of Contracting Parties and their impact on the functioning of the multilateral trading system;

* to improve the overall effectiveness and decision-making of the GATT as an institution;

* to increase the contribution of the GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organizations responsible for monetary and financial matters.

Since 1986, rapid and dynamic changes have taken place in the world political and economic environment. As the shape of the Uruguay Round results becomes more clear, the need for a concerted effort to build upon the progress made at the Montreal Mid-Term Review to strengthen the institutional framework for a new, substantially more open multilateral trading system has become apparent.

These changes include:

a) Membership

The GATT is evolving from a relatively small club of major traders to a universal body. Since the end of the Tokyo Round in 1979, 14 countries have joined the GATT which now has 97 members. Other major countries have either expressed an interest in or are actively seeking GATT membership. While these developments are clearly showing the importance of fully sharing in the benefits of the open and vibrant international market, they also put additional stresses on the effective operation of the trading system itself.

The enormous political changes sweeping the centrally-planned economies of eastern Europe are resulting in rapid adjustment to their economic and trade policies. In certain cases, these countries joined the GATT under special protocols of accession which now have become less relevant. It will be important that the changes to these economies contribute to a further strengthening and effectiveness of the GATT system.

Virtually all major developing countries are now in the GATT. Developing countries are playing an active role in the Uruguay Round and expect the evolution of the multilateral trading system to include changes responding to their particular priorities. They wish to obtain the full benefits of a strong, open and non-discriminatory trading system in order to pursue export-oriented development policies. They also want to strengthen the capacity of the multilateral system to protect their terms of access to major markets against the threat of unilateral retaliatory measures.

b) Protectionism and Unilateralism

The pressures for protectionist solutions to market access problems are increasing because of the need to respond to powerful economic, technological and industrial forces at play in international markets. These developments could lead to powerful, conflicting, regional trading blocks. This trend could be accentuated by the emergence of large and dynamic economic growth poles in different parts of the world.

In this rapidly changing trading environment, there are strong pressures to use unilateral trade actions to respond to perceived

unfair or unreasonable trade practices. One reason for the increase in the threats of unilateral action is the perceived inability of the GATT, as it is now constituted, to deal with fundamental changes in trade. It is, therefore, important that the international trading system have an institutional framework which will provide countries with a credible, multilateral alternative to unilateral action.

c) Dispute Settlement

There has been a continuing significant increase in recourse to GATT dispute settlement procedures since the beginning of the Uruguay Round. The evolution of these procedures in the GATT, as well as the improvements agreed to at the Montreal Ministerial meeting, have made the system more effective. Major outstanding problems remain, however, with adoption and implementation of panel findings. The new trading system must provide a credible, integrated mechanism for the resolution of trade disputes.

d) Fragmentation of the Trading System

There are at present a very large number of bilateral, plurilateral (e.g. Codes) and multilateral trade agreements. Significant new agreements are under negotiation in the MTN, including in areas not previously covered by the GATT. The new trading system emerging from this Round must provide a global, flexible and realistic framework for ensuring that the central principles of non-discrimination, open and secure market access, transparency and effective dispute settlement will be strengthened and not weakened.

OPPORTUNITY

These changes in the international trading environment make even more significant the importance of achieving major, substantive results in the Uruguay Round. Without such results, there would be little point in significant institutional reform. A major result in all areas, on the other hand, will make it necessary to adopt measures that will facilitate the integration, overall management and stability of the multilateral trading system. This would include the establishment of an umbrella World Trade Organization (WTO).

Specific elements of a comprehensive institutional framework should include:

1. Transparency/Surveillance

To ensure greater domestic transparency in government decision-making and lay the necessary basis for facilitating the effective enforcement of trade agreements, governments should agree:

a) to increase transparency of decision-making on trade policies, legislation, regulations and practices;

b) to confirm the establishment of the Trade Policy Review Mechanism, and improve it.

2. Dispute Settlement

Effective dispute settlement is a central pillar of a well-functioning and credible multilateral trading system. Substantial results in the rule-making areas in the Uruguay Round combined with improvements to the dispute settlement system will strengthen the credibility of the GATT as the forum for the resolution of trade disputes and eliminate the need for any country to act unilaterally, outside the trading rules, to resolve trade disputes.

There is a need to ensure increased coherence and consolidation of dispute settlement procedures. The existing fragmentation of the GATT dispute settlement system due to the existence of a number of agreements, each with its own dispute settlement mechanism, has at times resulted in not all aspects of a complaint being addressed or in "forum shopping".

A key element relates to restructuring adoption procedures. Under existing procedures, panel reports are adopted by consensus, which can have the effect of allowing parties to the dispute to block adoption.

To deal with this problem the following approach could be considered. Countries could agree to provide for a review stage within the existing panel process (and within the existing time-limits for the panel process). This would ensure that a panel was fully informed of all relevant issues and concerns. The report would then be circulated to the contracting parties and forwarded to the Council (or other appropriate body) for consideration. The addition of the review stage, coupled with the improvements agreed at the Montreal Mid-term Review, should ensure that parties to the dispute will be in a position to accept the panel's findings at the first Council meeting at which the report is presented. In rare cases, where a party to the dispute considers (despite the review by the panel and consideration by the Council) that a report is fundamentally flawed, that party could refer the report to an appellate body. A decision of the appellate body would be final.

Another key element of this approach relates to the implementation of panel reports. The objective of the GATT dispute settlement system has consistently been to secure the removal of measures which are impairing benefits through a breach of the rules or otherwise. The existing procedures regarding implementation and the actions that may be taken in the absence of implementation, however, are vague. It is proposed that

procedures be put in place to restore the balance of benefits in cases of failure to implement panel reports.

The issues related to adoption and implementation of panel findings are the subject of a separate Canadian paper.

3. World Trade Organization (WTO)

Developments in the substantive negotiations are now demonstrating that the Uruguay Round results cannot be effectively housed in a provisional shelter. It is also becoming clear that the post-Uruguay Round trade policy agenda will be complex and may not be adequately managed within the confines of the GATT system as it now exists.

Canada would propose to come forward with a draft of an umbrella framework around the time of the July TNC when the profile of the overall, substantive MTN package should have emerged from the detailed negotiations in the various negotiating groups.

The draft could provide a basis for examination through the fall of how the results of the Round could be incorporated into a new institutional structure. As part of a major and substantive result in the Uruguay Round, Ministers would decide in Brussels to create a World Trade Organization. Detailed administrative arrangements could be worked out in early 1991.

The substantive obligations of the GATT, other existing agreements and the Uruguay Round agreements would not be changed. The WTO would provide an institutional framework and formal legal status for the overall, multilateral trading system. It should be approved by the national legislative authorities as part of the approvals necessary to implement the overall, MTN trade agreements.

4. Strengthened Trade/Finance Linkages

A major contribution of a new WTO would be to provide the institutional capacity and credibility for the new GATT trading system to engage in more sustained and effective cooperation with the IMF and the IBRD. Indeed, the key to increased economic policy coherence lies in a successful MTN which would result in improved and expanded trade rules, an effective dispute settlement system and increased transparency in the development of national trade policies and practices.

In recognition of the need for increased coherence between monetary, trade and financial policies, governments should also agree on a number of concrete initiatives to be taken to enhance cooperation with the IMF and the IBRD.

Canada
April 10, 1990

DISCUSSION PAPER

MTN:DISPUTE SETTLEMENT

Dispute settlement is an integral part of a well functioning and credible multilateral trading system, underpinning the rights established by the multilateral trade agreements. A fundamental objective of the Uruguay Round is to make the dispute settlement system more effective, timely and predictable. While improvements have been steadily made to the system over the years and new procedures regarding establishment and operation of panels have been implemented on an interim basis as a result of the Mid-Term Review, further improvements are needed on adoption and implementation of panel reports.

An improved GATT dispute settlement system will fulfill the Punta del Este mandate of ensuring prompt and effective dispute settlement for the benefit of all contracting parties. It will strengthen the credibility of the GATT as the forum for the resolution of trade disputes and obviate the need for any contracting party to act unilaterally, outside the trading rules, to resolve trade disputes arising under trade agreements.

In order to be effective and credible, the multilateral dispute settlement system must be accepted by all contracting parties. Criticisms condoning recourse to unilateralism purport that the existing GATT rules are inadequate, the GATT system is slow and its results can be ignored, either through blocking adoption or delaying implementation. Substantial improvements in the rule making areas in the Uruguay Round combined with improvements to the timing of the dispute settlement process, and the strengthening of the procedures for implementation and the restoration of the balance of benefits would respond to these criticisms. The value of stronger rules will be diminished if contracting parties choose to ignore the system.

A) Consistent Framework

Currently, the procedures for dealing with disputes differ among complaints brought under the General Agreement and those brought under other GATT codes and agreements. Each of the Tokyo Round codes has a separate structure for settling disputes and the improvements to the system to date have applied only to Article XXIII complaints. The lack of consistency in procedures has created trade frictions, as, for example, with respect to the right to have a panel established. Similarly, problems yet unaddressed with respect to Article XXIII panels, such as the adoption and implementation of panel reports, also persist with the codes. In addition, the code signatories have undertaken obligations which exceed those in the General Agreement. This has fragmented the dispute settlement process both in cases where one of the parties to a dispute is not a signatory to the codes and even in cases where both are signatories. This fragmentation at times has led to "forum shopping", for such reasons as to have all aspects of the complaint addressed or to invoke an appropriate defence of a measure.

The Uruguay Round provides an opportunity to introduce new disciplines in areas such as agriculture, intellectual property and services. Along with these disciplines, mechanisms for resolving disputes will need to be established. There is no inherent reason why these mechanisms could not be largely standardized and made consistent with existing procedures for the main GATT dispute settlement system itself.

In order to increase the credibility and effectiveness of the international trading system, the same broad set of dispute settlement procedures should apply to all obligations assumed under the trading system, whether under the General Agreement, the Codes or any new agreements. This would provide for common procedures in such areas as consultations, establishment of panels, their terms of reference and composition, adoption of panel reports, etc.

The framework would have to allow for supplements to the system which would take account of unique provisions applicable to a specific agreement. For example, the Technical Barriers Code provides for experts to study an issue. The system would also have to allow for taking into account the special technical aspects of new disciplines being considered in areas such as subsidies, safeguards, agriculture phytosanitary standards, intellectual property and, possibly, services sectoral agreements.

It is proposed that the GATT Secretariat be given the task of preparing a consolidated text of dispute settlement procedures, taking account as necessary of unique provisions applicable to an existing specific agreement or any special technical aspects of new disciplines that may result from the Uruguay Round negotiations.

It is for consideration whether differences in dispute settlement could be consolidated under the authority of one body, such as the Council or other appropriate body. There would be a number of questions to be considered, both procedural and substantive. These considerations would be affected by the scope of the negotiations, particularly in the new areas, and should allow for the individual dispute settlement process to work fully before consideration of cross retaliation would arise.

B) Review of Panel Reports

Current practice has revealed a number of difficulties with respect to decisions reached by panels. At times these concerns have related as much to political considerations as to substance. Parties to a dispute are provided an opportunity to review the factual part of the panel's report prior to its circulation but not its conclusions. This has resulted in a number of instances where a panel's decisions have been questioned by one or other party to the dispute and requests have been made for a further opportunity to meet with the panel to comment on the decision. In most cases, panels have declined these requests and the party to the dispute has been left to make its case before the Council. The denial of an opportunity to have a proper airing of a concern could make it more difficult to take the necessary domestic decision allowing adoption of a panel report.

In order to ensure that a panel is fully aware of all concerns, it is proposed to add a review stage to the current process. This would allow panels to provide clarification and possibly reverse errors or avoid decisions on matters not essential to the case at hand.

The present practice whereby the panel provides the parties with the factual part of its report for comment would continue. The panel would subsequently present an initial or interim report, comprising both the factual part and its findings and conclusions, in confidence to the parties to the dispute. Either party to the dispute could then request the panel to review precise aspects of the findings and conclusions of the report before its circulation to contracting parties. The parties would provide the panel with written arguments regarding their precise concerns with specific aspects of the report. At the

request of either party the panel would hold another meeting with the parties. This review stage would take place quickly and be completed within a very short time from the presentation of the initial report.

As a result of the review the panel might modify all or part of its initial or interim report or it might decide to reject the additional arguments and maintain its initial report. If the panel were to modify its report to take account of a party's concerns, that modified report would be the one circulated to contracting parties (i.e. not the interim or initial report). If, however, the panel were to reject the arguments, then the initial or interim report would stand. In this latter case, in order to ensure that all contracting parties are fully aware of the reasoning that has led the panel to its conclusions, the final panel report that would be circulated to contracting parties would contain the arguments made by the parties in the review stage and the panel's response to those arguments.

The addition of a review stage to the current panel procedures would improve the quality of panel reports since it would ensure that all relevant arguments have been taken into account. It should help to dispel the qualms of those who fear "bad" or erroneous panel reports.

The Mid-Term Review improvements call for the period from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties not to exceed six months, as a general rule (three months in cases of urgency, including those involving perishable products). The experience of recent panels has been that the period between the setting up of the panel and the circulation of the final report to the parties has taken only four to five months. It could well be possible to add the review stage without lengthening the time required for the panel process.

C) Adoption

Currently, Governments may block adoption of a report which found against them, and then avoid the question of implementation by arguing the unadopted report is not an official GATT decision. It is in the interest of an effective system that a Panel report be responded to quickly. At the same time there are legitimate concerns of domestic constituents, and governments, regarding changes to measures as a result of a GATT ruling. Any Panel decision must be a reasonable interpretation of the rules. It is important, therefore, to ensure that a system exists which can safeguard against flawed Panel reports, while providing assurances that the disruption of benefits can be removed.

From the outset of the Uruguay Round the issue of the adoption of panel reports has been at the center of the call to improve the existing dispute settlement system. Many contracting parties consider that the present system of adoption of panel reports by consensus weakens the dispute settlement system since a "losing" contracting party can block adoption. At the same time, however, they recognize the political importance of adoption and the perceived need for all contracting parties, including the "losing" party, to be associated with adoption.

Those contracting parties that support the need for panel reports to be adopted continue to believe that a contracting party to the dispute should have the opportunity to participate fully in the consideration of the report by the contracting parties. At the same time, however, contracting parties recognize that if a "losing" party blocks the adoption of a panel report, it runs the risk that some contracting parties will turn to unilateral action. In order to contain the threat of unilateral action, while at the same time providing for the situation of seriously flawed panel reports, it has been suggested that changes to the present system of adoption are required.

The Mid-Term Review improvements provide that parties to a dispute have the right to participate fully in the consideration of panel reports by Council. To this end, contracting parties having objections to panel reports must give written reasons to explain their objections at least 10 days prior to the Council meeting at which the panel report will be considered. In addition, in order to provide sufficient time for the members of the Council to consider panel reports, panel reports cannot appear on the agenda of Council for adoption until at least thirty days after their circulation to contracting parties. These procedural improvements, coupled with the additional panel review stage proposed above, should ensure that contracting parties are in a position to give full and careful consideration to panel reports the first time they appear before the Council for adoption.

At that Council meeting consideration of the panel report would take place. This would lead either to adoption of the panel report or, if a party to the dispute considered that the report merited further consideration and objected to adoption at that meeting, the report would be referred for Appellate review.*

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*Under this approach contracting parties not parties to the dispute, including those that have made third party submissions, could neither block adoption nor send the report to Appellate review.

In the case where a report has been adopted the parties to the dispute could have joined in the adoption, abstained from the decision to adopt or not blocked the adoption. This approach could enable the government which has to implement the changes to be associated with the adoption process. By participating in the decision, the government may have a clearer basis on which to implement the Panel's recommendations.

D) Appellate Mechanism

In rare cases where a party to a dispute considered, despite the review by the panel and consideration by the Council, that a report was so fundamentally flawed that it should not be adopted, that party could refer the report to an appellate body. The intent would not be to have appellate review become a quasi-automatic step in the dispute settlement process. Rather in those cases where a party to a dispute considered that the panel had made a grave error in interpretation of rights and obligations, that party could ask for appellate review. Decisions of the Appellate Body would be final.

There are a range of practical questions to answer to the satisfaction of all contracting parties before a decision can be taken to institute an appellate mechanism, including: 1) what exactly would be the grounds for appellate review; 2) who would constitute the members of the appellate mechanism; 3) who would service the appellate mechanism; 4) would third parties be able to participate in the appellate process; and 5) how long would the appellate process take? The following could serve as a basis for discussion.

-Either party to the dispute could bring precise issues arising from specific aspects of the panel report before the appellate mechanism. The Appellate Body would examine the interpretation of the rights and obligations in the report arising from the precise concerns brought to its attention.

-The Appellate Body would be a permanent standing body made up of a limited number of eminent GATT experts appointed by the contracting parties for a specific period of time.

-The Appellate Body would need a small secretariat of its own, since the same members of the GATT secretariat who have provided advice to the initial panel would not be well placed to carry out that same function for an appellate mechanism.

-The Appellate Body could be free to consider arguments from any party to the agreements involved.

-The Appellate Body would do its work in a short period. The Mid-Term Review improvements now provide that, unless agreed by the parties to a dispute, the period from the initiation of the GATT dispute settlement procedures (the request for consultations under Article XXII:1 or Article XXIII:1) until the Council takes a decision on the panel report shall not exceed fifteen months. We believe that the addition of an appellate mechanism should not prolong the period unduly. We therefore propose that in those cases in which appellate review is undertaken the period for final resolution shall not exceed eighteen months.

After considering arguments, which could include oral as well as written arguments, the Appellate Body could either accept the Panel's decision that a measure was inconsistent with the agreement or otherwise impairing benefits or not. In this event, the party would be found either not to be in contravention of its obligations nor otherwise impairing benefits. In either case, the decision of the Appellate Body on the dispute would be final.

The Appellate Body decision would be sent to the GATT Council or other appropriate body to be noted, but would not be adopted. Objections to the interpretation in the appeal decision could be made by third parties, but the decision, as it affects the parties to the dispute, could only be changed by Council or any other such body if it were to take such a positive decision. The focus would then be on implementation of the decision.

As the addition of an appellate mechanism to the GATT dispute settlement system represents a major change to the present system, consideration could be given to implementing the appellate mechanism on a trial basis. Contracting parties might decide to review the functionning of the appellate mechanism at the 1992 Ministerial meeting.

E) Implementation

Reasonable Period of Time

The objective of the GATT dispute settlement process has consistently been to secure the removal of measures impairing benefits through a breach of the rules or by other means (non-violation case). At present, the procedures regarding implementation of Panel reports, and actions that may be taken in the absence of implementation, are vague. Although the Mid-Term Review improvements call for the party impairing benefits to declare at the time of adoption its intention with respect to implementation, more precision as to the reasonable period of time for implementation is required in order to prevent abuse, i.e. the situation where a contracting party states that it will require what is a patently unreasonably long period of time to comply with the recommendations or rulings.

It is the contracting party that must implement the recommendations or rulings that is best placed to know how much time it requires to implement. However, the reasonable period of time must not be used as a pretext to delay implementation. It is proposed that the contracting party inform the Council of its intentions in respect of implementation and the Council then decide whether the time proposed for implementation is reasonable. In the absence of a contrary decision by the Council the time proposed by the party that must implement would be deemed to be reasonable. The contracting party proposing the period of time would have the right to participate fully in the consideration of this matter by the Council and to this end would submit written reasons in support of the proposed period of time at least 10 days prior to the Council meeting at which this matter will be considered. However, the contracting party proposing the period of time would not participate in the Council decision. In cases where the Council decides what would be a reasonable period of time it would take account, inter alia, of the stated intentions of the contracting party that must implement recommendations or rulings, including any need for legislative action, and any proposals in that respect that may be contained in a panel report.

Withdrawal of Concessions

There is a need to clarify and strengthen the procedures for requesting authority to withdraw concessions in the event the party impairing benefits does not act within the reasonable period of time. The intention would be to increase pressure on that party to remove its measure, by making it easier to withdraw concessions. The objective remains removal of the measure, not compensatory withdrawals.

Decisions regarding the appropriateness of the proposed withdrawals would be referred to binding arbitration. Withdrawal of concessions would not normally be allowed before the expiry of the "reasonable time", but the process of considering a request could begin earlier. Council or other appropriate body may decide, by consensus (without any of the parties to the dispute having a right to block), to allow the party bringing the dispute to withdraw concessions before the end of the "reasonable time" in unusual circumstances.

One possible way to structure the arbitration referred to above would be for the contracting party requesting authorization to withdraw concessions to present a specific request to the Council. The request as presented could be authorized by the Council or any contracting party, including the non-implementing party, could ask that it be referred to arbitration. The arbitration could be carried out by the panel that originally examined the dispute or some other body to determine the appropriateness of the request in the circumstances. Such a determination would not examine the products on which it was proposed to withdraw concessions. The choice of products must remain with the party seeking authorization to retaliate. Rather the determination of appropriateness would relate to the amount of trade likely to be affected by the proposed retaliation and its relation to the amount of nullification or impairment caused by the failure to implement. The parties to the dispute would be able to present to the panel or other body any material they consider relevant to such determination.

The panel would report to the Council as to what would constitute a suspension of concessions or other obligations that would be appropriate in the circumstances. The Council could then authorize the suspension of concessions or other obligations. The parties to the dispute would have the right to participate fully in the Council discussion of the matter but the non-implementing party would not be able to block the Council decision on authorization.

Retaliation, once imposed, would be temporary and would be removed when the losing party eliminates or begins to phase out the measure found to be inconsistent with the agreement or provides a solution to the nullification or impairment of benefits.