

COMMUNICATION FROM CUBA

The following communication, dated 16 September 2005, from the Delegation of Cuba, is being circulated in advance of the Negotiating Group meeting of 19-20 September 2005.

**IMPROVEMENT AND CLARIFICATION OF ARTICLE V OF THE GATT:
STRENGTHENING OF THE PRINCIPLES OF NON-DISCRIMINATION AND
MOST FAVOURED NATION TREATMENT**

I. INTRODUCTION

1. With a view to achieve wide, balanced and useful results of these negotiations on trade facilitation, we consider it appropriate to focus our efforts in the clarification and improvement of provisions of Article V and the principles of non-discrimination and most-favoured-nation treatment, which stand as fundamental pillars to maintaining the confidence in the Multilateral Trading System.

2. Article V is a basic rule for the normal functioning of international trade and the success of the Trade Facilitation negotiations if the target is to ensure the expeditious movement of goods and means of transport, including in-transit traffic.

3. As indicated in document TN/TF/W/35 on Freedom of Transit, "**despite existing GATT rules aimed at ensuring the smooth and non-discriminatory flow of trade across borders for transit, freedom of transit is often absent or compromised in practice**".

4. Our proposal is aimed at eliminating unnecessary barriers to freedom of transit, which is incompatible with the existing rules of the Multilateral Trading System by strengthening the principles of non-discrimination and most-favoured-nation treatment in the application of Article V. This proposal is not comprehensive and Cuba reserves the right to make new contributions on this issue in the future.

II. MAIN OBLIGATIONS

5. The right interpretation of Article V should be enough that no Member can prevent goods and means of transport of any origin from passing through its territory, in the exercise of the right to free transit. However, in practice there are measures adopted that annul this right to which all WTO Members are entitled.

6. Article V defines that in-transit traffic is the **"transit across the territory of a contracting party, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes"**. Only goods (including baggage), and also vessels and other means of transport constitute traffic in the sense of Article V.

7. The main objective of Article V is allowing the freedom of transit through the territory of each Member for in-transit traffic with a destination in the territory of other Members or coming from them, that uses the **"routes most convenient for international transit"**. To achieve this free movement of in-transit traffic, Article V establishes two main obligations:

- No obstacles to in-transit traffic by imposing delays or unnecessary restrictions or imposing charges that are not reasonable; and
- Granting the most-favoured-nation treatment (MFN) to the goods in transit of all Members, in relation with all cargoes, regulations and formalities concerning transit.

III. NEED TO REINFORCE THE PRINCIPLES OF NON-DISCRIMINATION AND MFN TREATMENT

8. Since the work on Trade Facilitation began in the Council for Trade in Goods, Members have shown interest in strengthening the principle of non-discrimination, (a) in relation to the different modalities of transport regarding transit procedures, (b) among individual carriers in relation to transit procedures, and (c) among types of goods being transported. Likewise, proposals have been submitted to strengthen the principle of non-discrimination between origin and destination of in-transit goods, routes used and among goods themselves.

9. While the spirit and the letter of Article V are very clear in the sense of abiding by the obligation of observing the principles of non-discrimination and MFN treatment, the commercial practice also show the need to strengthen the disciplines of paragraph V.2 in order to avoid the discretionary compliance and the abuse of recurring to exceptions foreseen in GATT 1994.

10. Article V obliges all parties to grant freedom of transit, as it expressly establishes in paragraph 2 that **"no distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or other means of transport"**.

11. However, this obligation of non-discrimination is systematically breached by some WTO Members who apply, unilaterally and for non-commercial reasons, laws and measures of extraterritorial scope that ignore the legitimate interest of other Members' right to free transit and to carry out normal trade practices in the enjoyment of their rights as full Members of this Organization, as well as the commercial interests of third parties affected.

IV. PROPOSAL

12. The objective of the proposal is to strengthen the principle of non-discrimination stated in Article V, in order to prevent the application of trade laws that limit the free transit of goods and means of transport among Members due to non-commercial reasons. Nowadays, this sensibly affects the trade of many WTO Members.

13. We agree with some Members when they state that presenting proposals in the Negotiating Group does not involve in any sense the commitment of legitimate objectives of public order; therefore Members must preserve their right to implement appropriately and justifiably the exceptions included in Articles XX and XXI of the GATT, but they cannot appeal to them without justified reason.

14. In light of the above, Cuba considers that, even when paragraph 2 of Article V of the GATT is clear regarding the obligation of non-discrimination in the freedom of transit, this provision should be strengthened by adding a new paragraph with the following text:

"The Contracting Parties shall not apply discriminatory measures to goods in transit, as well as vessels or other means of transport of other contracting parties for non-commercial reasons. This does not exclude the right to recourse to the exceptions already established in WTO agreements".

V. COSTS, SPECIAL AND DIFFERENTIAL TREATMENT, TECHNICAL ASSISTANCE

15. This proposal does not have an impact on the costs; therefore, in its application there is no need for any measures of Special and Differential Treatment or Technical Assistance.
