

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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SAFEGUARDS

Report by the Chairman of the Council to the Fortieth Session of the CONTRACTING PARTIES

1. The Ministerial Decision of 1982 called for a comprehensive understanding on safeguards to be presented to the CONTRACTING PARTIES at their session last year (L/5424, page 5). As we all know, despite the great efforts made by all concerned, this did not prove possible and you, Mr. Chairman, as Chairman of the Council in your report to that Session (W.39/4) stated that more time would be needed to achieve this goal. The CONTRACTING PARTIES in 1983 then decided to give us the mandate "to conclude the work of drawing up a comprehensive understanding on safeguards as called for by Ministers within such a time frame that it would be placed for adoption by the CONTRACTING PARTIES at their 1984 Session" (SR.39/1).
2. I have therefore been conducting informal consultations over the last year to explore how progress could be made on this matter. I have reported on these consultations to the Council in February, July and November this year (C/M/174, 180, 182).
3. In reporting on this matter to the CONTRACTING PARTIES I would first of all like to note that, while agreement has not yet been reached on a comprehensive understanding, all delegations remain convinced of the need for reaching such an understanding. Delegations are also convinced that a satisfactory understanding on safeguards is an element of central importance for the effective functioning of the multilateral trading system. I would also wish to report that though there is no agreement on a comprehensive understanding, intensive work on each of its various elements is going on. A note put forward by the Director-General is serving as an informal reference paper in these consultations by way of focussing and stimulating discussion on each of the elements that must be addressed in a comprehensive understanding. The paper is attached to this report. Delegations are, of course, not committed to this informal reference paper, and many have their own views on particular elements in it.
4. The discussions show that views converge on many but not on all points. This convergence of views on certain points is progress and the situation today is, I believe, more hopeful than it was a year ago.
5. In the discussions, all participants have reiterated their commitment to the principles of the General Agreement, to the disciplines and to the undertakings in the Ministerial Declaration, including those in paragraph 7(i).

6. There is a general recognition that safeguard actions should only be taken if the criteria laid down in Article XIX, in particular the criterion relating to serious injury or threat thereof, are met.

7. There is a convergence of views that safeguard actions are not intended to protect domestic producers for an unlimited period of time. Safeguard actions are emergency measures which should therefore be temporary by definition and progressively liberalized during the period of their application, unless they are maintained for such a short time as to make this impractical.

8. There is a convergence of views that contracting parties should retain the right given to them in the General Agreement to re-establish the balance of rights and obligations under the Agreement if this is significantly modified. At the same time, it is recognized that the right to retaliate can, in practice, be used more effectively by some contracting parties than others. There is furthermore a convergence of views that the threat of retaliation could have a deterrent effect against the application of safeguard actions; the possibility of retaliation could also promote agreement on compensation. There is, at the same time, a recognition that retaliatory action has trade disruptive effects. The conclusion that many participants draw is that, wherever possible, constructive settlements should be reached involving compensation rather than the retaliatory withdrawal of benefits. In the view of participants from developing countries their special situation should be taken into account, in particular as concerns retaliation and compensation.

9. There is still a lack of convergence of views on the basic question of geographic coverage.

10. There is a general recognition that resort to "grey" area measures and their cumulative effect pose a serious threat to the multilateral trading system. Most participants fully support the phasing-out and prohibition of such actions. Not all participants, however, share this view.

11. There is a convergence of opinion that in this context questions relating to industry-to-industry agreements need to be further discussed.

12. There is a convergence of opinion on the desirability of adequate transparency and surveillance in respect of all safeguard actions. In the light of the positions taken on geographical coverage and so-called "grey" area measures there are, however, differing concerns on the purposes to which such transparency and surveillance may be directed and the rôle they could serve.

13. Some delegations could see themselves in a position to agree to certain elements even if there was not agreement on all the elements of a comprehensive understanding, certain delegations adding that they could consider implementing these elements autonomously pending agreement on a comprehensive understanding. It was, at the same time, stressed that agreement on certain elements should not be viewed as an interim or partial solution which could take the place of a comprehensive understanding, but

only as a step towards such an understanding. It has, however, been made clear by some other delegations that they could not commit themselves on any of these elements until agreement on a comprehensive understanding is reached since the various elements of a comprehensive understanding were interrelated.

14. In the light of the situation that I have outlined, I would recommend that the work directed towards a comprehensive understanding be continued, taking into account the present report, and brought to a completion as rapidly as possible.

ANNEX

Safeguards

1. Progress on the safeguards issue is necessary. The deadline set by Ministers has already been extended once. In the meantime the internationally agreed rules are disregarded and so-called "grey area actions" continue to proliferate.

2. The same fundamental difference of opinion which existed among contracting parties at the end of the MTN has so far also prevented agreement on a Comprehensive Understanding although considerable efforts have been made by contracting parties to pave the way for such an Understanding.

3. In attempting to move the work forward, more than one approach is possible. Recently, efforts have been directed towards agreement on certain of the elements in the Ministerial Decision in the expectation that this would act as a confidence building measure by demonstrating a will to make progress in this area. While there is no agreement, there is a measure of support for the propositions that all Article XIX measures or so called "grey" area actions:

- should be reported and/or notified to the GATT;
- should, wherever possible, take the form of tariffs rather than quantitative restrictions;
- should be temporary and that the period for which any safeguard action is expected to be in effect should be specified when the measure is announced;
- should (unless taken to deal with short-term problems e.g. problems created by seasonal factors) be progressively liberalized during the period of their application; and
- should be the subject of consultation and multilateral surveillance in the GATT.

4. It is, of course, accepted that such propositions would only be a part of a comprehensive understanding. An alternative approach, which is the subject matter of the rest of this paper, is to tackle the problem in its entirety, taking into account, so far as possible, the propositions put forward in the "building blocks" approach.¹

5. The central problem is the continuing erosion of the GATT rules and principles through the use of unilateral or bilateral measures of protection that are selective or discriminatory in character. This erosion of the principle of non-discrimination undermines the multilateral trading

¹See paragraph 13.

system of which the General Agreement is the legal foundation. The principle of non-discrimination ensures that each contracting party satisfies its import needs from the most efficient sources of supply, at the same time ensuring that a given level of protection to special interest groups is achieved at the minimum cost for both the other inhabitants in the protecting country and the rest of the world. The possibility of taking discriminatory action also leads to a higher overall level of protection because such actions are seen to be engaging the interests of individual countries, whereas governments taking non-discriminatory action come under pressure from all countries affected to remove the action. Non-discrimination in commercial policies, plus convertibility of currencies, are the essential components of the multilateral trading system.

6. A number of GATT provisions permit the imposition of trade measures which would otherwise be prohibited under the rules. These provisions, however, provide for selective action limited to imports from particular sources only in some clearly defined situations. These include those described in Article VI¹, which permits selective action against injurious subsidized or dumped imports from particular sources (often referred to as "unfair" trade practices), which would otherwise be contrary to the most-favoured-nation provisions of Article I and, when the existing duties are bound, to Article II as well.

7. Article XIX permits governments to grant temporary protection where the producers in question are seriously injured (or threatened with serious injury) as a result of differences in competitiveness, and has generally been interpreted as requiring such measures of protection to be applied on a non-discriminatory basis.

8. The use of selective measures to deal with difficulties arising from differences in competitiveness not related to an unfair or trade distorting practice as defined in the relevant GATT provisions mentioned above would appear to be contrary to the basic concept in Article XIX and to the fundamental character of the multilateral trading system.

9. It is not possible to argue both that the multilateral trading system should be preserved and that Article XIX should be applied on a selective basis. A decision has to be made. An alternative to the multilateral trading system can be conceived - it would take the form of a series of market sharing agreements - but this alternative was not the intention of the Ministerial Declaration.

10. At the present time, governments applying selective or discriminatory measures are increasingly doing so through the negotiation of so-called "voluntary" export restraints and orderly marketing arrangements. Last year's exercise on so-called "grey" area actions demonstrated that in many cases these actions respect neither the principle of non-discrimination in Article XIX nor the requirements relating to injury contained in that Article. Furthermore, these actions are not taken in conformity with Article VI and the Subsidies Code.

¹ Additional provisions are contained in the Anti-Dumping and Subsidies Codes.

11. Export restrictions are generally prohibited under Article XI unless covered by an exception. Measures limiting exports to certain contracting parties only are, in any case, contrary to the provisions of Article XIII¹ which provides for the non-discriminatory application of such restrictions. It may be argued that this is a very legalistic way of looking at the matter and that "voluntary export restraints" are not, in fact, export restrictions but import restrictions which are administered by the exporting country. They would, once again, only be in conformity with the General Agreement if they were justified under a particular exception to Article XI and administered in accordance with the provisions relating to the non-discriminatory administration of quantitative restrictions contained in Article XIII. In fact "voluntary" export restraints are clearly contrary to the present rules of the General Agreement and are only "outside the General Agreement" in the sense that governments have not brought them formally to the GATT for examination.

12. It has to be recognized that many voluntary export restrictions and orderly marketing arrangements are intended to be responses not only to problems related to differences in competitiveness but also to what are perceived to be situations of subsidy or dumping. In either case, however, they evade the requirements of GATT provisions. Article VI, for example, as noted above, permits selective action against subsidized or dumped exports but does so only in accordance with certain prescribed modalities and criteria; if these provisions are found not to be working satisfactorily, the solution must be found in relation to this Article.

Comprehensive Understanding on Safeguards

13. It is suggested that the Comprehensive Understanding should contain the following elements:

General

Reconfirmation of the commitment of the CONTRACTING PARTIES to the principles of the General Agreement and the disciplines which it embodies with a view to avoiding the circumvention of GATT provisions.

Nothing in the Understanding would affect rights and obligations under the GATT.

The Understanding relates to Article XIX and to all so-called "grey" area actions.

Transparency

All existing and future Article XIX actions would be notified to the CONTRACTING PARTIES. All existing so-called "grey" area actions would also be reported.

¹ Except in the exceptional situations laid down in Article XIV.

Coverage

Actions taken under Article XIX would, wherever possible, take the form of tariffs rather than quantitative restrictions.

All Article XIX actions would be applied erga omnes without discrimination among contracting parties.

Objective criteria

Article XIX actions would only be taken if the criteria laid down in the Article, in particular the criterion relating to serious injury or threat thereof, are met.

Temporary nature, degressivity and structural adjustment

Recognition that Article XIX is designed to give the protected domestic producers a limited period of time for adjustment.

Article XIX actions would therefore be temporary. The period for which any safeguard action is expected to be in effect would be specified when the measure is announced.

Actions taken under Article XIX would (unless the problem is short term in nature, e.g. related to seasonal factors) be progressively liberalized during the period of their application.

Compensation and retaliation

Compensation would be preferred to retaliation.

Contracting parties would exercise restraint when considering whether to suspend concessions or other obligations under Article XIX:3, in particular when the safeguard actions in question are temporary, degressive and accompanied by an appropriate programme of structural adjustment.

So-called "grey" area actions

All so called "grey" area actions would be progressively phased out over a number of years in accordance with an agreed time-table¹. No new so called "grey" area actions would be taken.

Industry to industry agreements

Contracting parties would use all reasonable means within their power to ensure that this Understanding is not circumvented e.g. by industry to industry agreements.

¹For example, this time-table might provide that each "voluntary" export restraint be expressed as a quota amount which would be increased by a certain percentage each year and eliminated by a specified date. Other formulae are possible.

Notification, consultation, multilateral surveillance and dispute settlement

The notification and consultation provisions of Article XIX would be observed.

A body would be established to consult on safeguard actions taken, to monitor the implementation of this Understanding and to make any appropriate recommendations.