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STATEMENT BY REPRESENTATIVE OF EUROPEAN COMMUNITIES ON 27 OCTOBER 1976

This statement has a limited objective, to offer the comments of the European Community on the proposal presented by the United States delegation in MTN/SG/W/11. We welcome this proposal which contains many interesting features, and puts forward a number of points with which we agree although we think there could be a number of practical problems which might be further discussed by the Group. There are one or two points which we do not think would contribute to any real improvement in the safeguards system.

Our comments at this stage relate to the ten main features set out in the United States proposal. We have noted the ideas for some more general obligations at the end of the proposal but since these go beyond the immediate work of this Group we do not propose to comment on them in detail at this stage.

General orientation

At the outset I should like to recall the Community view that the "raison d'être" for any attempt to improve the operation of the safeguard system can only be to promote a greater liberalization of trade. It is in this spirit that we approach the question and we think that it is very important if we are considering a new system that it should be applied on a mandatory basis if we are to have any improvement compared with the present. If we are to accept new obligations and stricter disciplines, it is essential for at least the major countries and the more advanced developing countries to adhere to the code because, if not, the whole purpose of the new system could be undermined where significant safeguard activities continue outside the new rules and procedures.

It is our understanding that the United States proposal for a new code would be applied on a mandatory basis in all cases of actions which affect countries accepting the code, i.e. where both the country taking the measure and the country or countries affected are signatories to the code, but that in other situations the existing

provisions of Article XIX would apply. We do see a number of practical difficulties in this approach. Our experience of such codes so far shows that they are of two types, either reinforcing existing obligations (e.g. the Anti-Dumping Code) or replacing existing obligations by new provisions (e.g. the Multifibre Agreement). In the former case the basic contractual situation is unchanged but in the latter case, unless all or virtually all the parties concerned are signatories, the legal aspects become of greater importance. The problem that we see in the area of safeguards is that it is not easy ab initio to identify all the parties that are likely to be involved and there is a clear risk of situations where you have actions affecting a number of countries some of whom are not signatories. We suggest that this problem of different rights and obligations could introduce legal difficulties which the Group will have to consider as we proceed.

The principle of a new system would be easier to visualize if all countries start from a broadly equal position. In this context we recognize the objective of the proposal relating to tariff binding. But the fact is that it is unlikely that all countries will start from a similar position and the disciplines of the new system will therefore be more onerous for some than for others. We have in mind that some countries have invoked Article XIX and have taken safeguard actions more than others, and we think this is a problem which could only be resolved in the context of the global benefits which we all expect to obtain in the course of the MTN.

The proposal from the United States says nothing about retroactive effects. We believe that it could create major problems if all existing measures were to be examined against the standards of a new system and we would be interested to know what the views of other members of the Group are on this point.

Coverage of the new system

The Community has no particular difficulty on this aspect of the proposal which is linked to the idea that all trade restrictive action whether under Article XIX, under other GATT articles or outside the GATT should be brought under some kind of supervision.

We note that the idea is to bring so-called "voluntary export restraints" into the new system. But it is not at all clear what this would mean in practice. Such measures involve mutual agreement between the countries concerned and thus already imply prior bilateral consultation and agreement. So retaliation or compensation is not usually at issue. Is it intended that the same conditions and criteria should be applied and, if so, through what mechanism? Would third parties have the right to raise such measures in the monitoring committee and, if so, in what circumstances, given that the Article XXII/XXIII provisions already exist? Is it intended that one or other party to such an agreement could refer

the matter to the monitoring committee? If so, the implications of this for the whole process of resolution of trade differences through bilateral means would need to be considered.

Is it intended that there should be an obligation to notify at some stage to the monitoring committee bilateral arrangements of this kind? If so, while this might be feasible in the case of governmental measures, how would it cover, for example, arrangements between industries (where these are permitted - this is not the case under EEC competition rules)?

In relation to other types of measure where Article XIX is not invoked it is our impression that these are already the subject of notification and consultation procedures. The Group would have to consider whether there would be practical problems in extending the other conditions and criteria of the new system to such measures. Would it be possible for example, to apply such rules in cases of tariff increases where the tariffs are not bound? How would action by State-trading countries fit in? Would it be possible to include measures taken under the general cover of Article XVII or Articles XX/XXI within the scope of the new system?

Rights to retaliation/compensation, criteria for taking safeguard action

We note that the proposal is that when safeguard actions are taken in conformity with the criteria and conditions proposed, there would no longer be a liability to retaliatory measures nor an obligation to compensate. In this context we feel we should introduce a reminder that, although we talk commonly of retaliation/compensation, the provisions of Article XIX in fact contain no obligation to give compensation. The only basis for compensation action is that it may permit the parties to reach mutual agreement that the provisions of Article XIX have been adequately observed. Since the United States proposal would introduce supplementary conditions and procedures in addition to those at present in Article XIX including a great degree of international surveillance and a stricter procedure for justification of action taken, it is clear that the idea of paying compensation would make no sense and accordingly the United States proposal that countries be relieved explicitly from such an "obligation" is unnecessary.

The Community has in previous meetings lent support to the general idea expressed in point 2 of the proposal. In certain conditions the retaliation concept in Article XIX may have had the effect of restraining safeguard action and it is certainly an argument that can be used to resist domestic pressure for protection against imports. But, where action has become essential we believe it has more frequently led to measures outside the Article, such as voluntary restraints, orderly marketing arrangements, etc. In addition it has become

increasingly clear that for the majority of countries - even for the most powerful - retaliatory action is very often a possibility which is more theoretical than actual given the practical problems of finding measures that are appropriate.

Furthermore the logic of the retaliation/compensation provisions (which may have its origin in the desire to keep a balance between a country's basic right to take action in the light of national factors and the right of third countries to preserve concessions for which they have paid in trade negotiations) is in our view in need of some reappraisal. For example, some countries are much freer than others to take safeguard actions, e.g. those with relatively few tariff bindings, or developing countries in order to safeguard the development; and this being so, it is not clear that the rigid check represented by these provisions on countries which do not have these possibilities is still fully justified. Even so, the moment the right to act for national reasons is closely circumscribed by defined criteria and conditions and by international surveillance, it is reasonable to expect also some equivalent relaxation of the rights accorded to third parties. In particular safeguard action which is based upon the application of well-defined criteria, of temporary duration and clearly designed to ease the process of adjustment should not we believe lead to retaliation or to demands for compensation.

As regards the criteria justifying safeguard action we have noted of course that the United States proposal follows closely the language of Article XIX. We welcome this as an indication that the United States are ready to revert to agreed international criteria, especially in the light of the fact that the 1974 Trade Act had already unilaterally modified the yardstick for escape clause action, the object being "to relax the criteria for determining injury".¹ Inter alia, the concept of increasing imports being a substantial cause of serious injury was introduced in S.201 of the Act. This criterion of "substantial cause" replaced the previous concept of increased imports being "the major factor" in causing serious injury and it is clear that this was intended to be a weakening of the test applied. Substantial cause is defined in the Trade Act as a cause which is important and not less than any other cause: and this is a less onerous test than the one which the EEC for example has suggested - a cause which is more important than all other factors taken together. Furthermore the reference to the "conditions" under which imports are effected - generally interpreted to refer to price - has been omitted from S.201.

Apart from the fact that this is inconsistent with Article XIX, we believe it is most undesirable for national legislation to interpret key issues of this kind. If interpretation is required it should be based on internationally agreed criteria.

¹Senate Finance Committee Report, page 120.

We also welcome the indication in the United States statement that the United States is prepared to see "a restructuring and elaboration of the Article XIX system to provide more assurance of stability".¹ But we find it curious, in this context, that they do not propose to go beyond the present Article XIX language which is in contrast to the desire to create a new set of rules and conditions for safeguard actions. We believe that, in situations of this type, where a country's obligations under the GATT prove too onerous in relation to its domestic industrial circumstances by reason of injurious import competition, the trend is clearly towards the establishment of more clearly enunciated criteria, the most notable example being clearly in the textiles field. This trend is at least partly the result of the inadequate language in Article XIX.

In the light of these considerations we think it is necessary to pose a specific question: it would be our understanding that, in the context of a new code, accepted by the Congress, Section 201 of the Trade Act would be repealed. It is only on this basis that it would be possible for other signatories to the code to ensure that their partners are observing the same standards of judgement in determining the need for safeguard action. There is a need in general for wider observance of the same standards in relation to testing for serious injury: procedures on the lines we have proposed in the context of countervailing duties, where an objective, factual stage designed to establish levels of import penetration would be followed by a subjective second stage evaluating injury, would help to avoid some of the more bizarre decisions that occur at present. We submit that without better defined criteria, the proposed monitoring committee would be inundated with complaints about non-conformity of actions with the new agreement.

Furthermore, it is difficult when assessing injury, to abstract entirely from the question of the source of imports. In a few situations imports may increase collectively and create a cumulative pressure on the domestic industry. But in the majority of cases the dynamic growth of imports from a few sources causes difficulty while the development of trade from other countries evolves normally. This phenomenon was recognized, in another context, in the Senate Finance Committee² report on the Trade Act when it urged the right of Congress to overrule Presidential actions "to act against innocent countries" and to require action "only against the offending country or countries".

¹United States statement, 19 July, page 7.

²Report, page 31, in relation to unfair trade practices.

This is an aspect of the safeguard system to which the Community is still giving a good deal of thought. But we think it is a matter which could usefully be discussed further in this Group. What does the Group think, for example, of the idea of limiting safeguard actions to the minimum necessary to remedy the injury caused? While the EEC, and no doubt all other participants, strongly adhere to the MFN principle, is it or is it not paradoxical to require that safeguard measures must be applied to all sources, including small exporters? This is not the case in other areas of defensive action against injurious imports.

We wonder whether the notion that action can be taken limited to the imports causing or threatening the serious injury is a radical departure from present practice? It is a fact that countries have in a number of ways already taken safeguard action on a selective basis, and it is apparently not a new idea to the United States delegation since the Trade Act also envisages action on such a basis. Providing that the notification/consultation procedures are observed and that adequate criteria for action are set out, it might well be thought that such a change would not prejudice in any real way the rights of exporting countries, indeed in some respects they would have an additional degree of international supervision.

Public investigations

It is well-known that our existing procedures do not incorporate requirements for public investigation and equally that we are not convinced that such procedures necessarily lead to more defensible decisions. Indeed the existence of a public forum can sometimes contribute in itself to an increase in political pressures on a government making it more rather than less difficult to avoid taking some action. We consider that it is much more important to have a clearer basis for action in terms of better defined criteria than to enforce any particular procedures for decision making.

If one of the objects of this proposal is that the fact of an investigation into safeguard action is publicly known, we consider that this is largely the case in practice already. Industries seeking safeguard action rarely have an interest in avoiding publicity. If however, there are difficulties in this area, procedures for giving public notice of an investigation on the lines already in force for anti-dumping cases could perhaps be considered. It might be argued that a public procedure would have advantage of permitting third parties to present their views but again it is our feeling that this is already substantially the case in terms of the Community's procedures and that a requirement for public investigation would not substantially alter matters.

In any event the proposed monitoring committee which would facilitate consultations and as necessary look into the facts would provide the same sort of supervision ex post. It is unrealistic to think that the mere fact of a public procedure before decisions are taken would make any substantial difference compared with the situation at present and indeed where such public procedures exist our experience is that they do not necessarily lead to a stricter observation of internationally agreed rules.

Conditions to be applied to safeguard measures taken, e.g. time-limits, phasing out, quota increases, etc.

The various specific conditions set out in the United States proposal would be a matter for eventual negotiation but do not in our view pose insuperable problems. Their practical implications would however clearly have to be elaborated in greater detail before they could be adopted. One of the issues which would have to be faced is that the period necessary for adjustment may well differ considerably from industry to industry and also in relation to general economic circumstances. In consequence, it may be difficult at the outset to determine precisely what the maximum period should be. A provision for multilateral review in cases of continuing measures beyond a certain length of time may offer a possible alternative.

The relationship between safeguard action and the internal adjustment process is a particularly delicate issue. We have noted on this point that the proposal does not intend that measures to facilitate such adjustments should be a prerequisite for action. With this we strongly agree.

We have however doubts about the suggestion in the United States proposal that such adjustment measures as exist, whether private or governmental, might be communicated (to whom? - to the monitoring committee perhaps). Although this does not appear to be an onerous requirement, we can see a number of practical difficulties. For example, there are relatively few cases where adjustment assistance is specific to an industry. It is more usual for general measures which offer help for re-equipment, re-location, or for re-training of labour to be applied in cases of difficulty. There are also problems of definition - would a re-arrangement of the capital structure of a firm be considered a form of adjustment assistance?

We see no reason why, if all the other conditions and procedures are properly satisfied, any country should even be obliged to report on the measures they are taking. In general we would prefer these questions to be left to the discretion of the party taking safeguard action in the sense that if its action is challenged as inconsistent with the requirements of the code, the party would be free to justify its need to act and to show that such an action is genuinely designed to

ease the process of adjustment by presenting whatever arguments it considers appropriate. Among these would normally be some reference to the adjustment measures in force. But any obligatory requirement in this area would seem to us to go too far in the direction of forcing particular measures of an internal economic character which might not be appropriate to the broader economic requirements.

Notification and consultation procedures

We welcome the general thrust of the United States proposal in the area of notification and consultation procedures. In relation to the need to give prior notification, we agree that this should be feasible and that on this point governments should make greater efforts than they have done in the past where the "critical circumstances" exception has been too often invoked without strict justification. The idea of notification being made a minimum number of days prior to adoption of any measure is one we are ready to examine. Indeed we would suggest that it should be more frequently possible to engage in consultations prior to adoption of any measure. In our view it may be equally important to have the possibility to consult before domestic procedures are initiated, procedures which often have a great effect on trade as the decisions which result at the end of the process. There would still need to be a provision for exceptions but the aim would be that prior consultation would become the general rule. We think that governments should find it possible to consult and explain the need for safeguard action before definitive measures are adopted.

We realize that if it is to be realistic to engage in prior consultation in this way there will need to be a procedure for exchange of views between the parties at short notice. We have in mind within a maximum period of two weeks after the initial notification. Without being more precise at this stage we think that it may turn out to be more convenient for these initial consultations to be bilateral in capitals, given the time element, rather than under multilateral consultations in Geneva.

It will clearly be necessary to provide for the case where consultations do not result in agreement and where further delay in taking action would lead to a serious deterioration of the situation. In such cases, and after the initial consultations, we envisage that some form of provisional holding action might be required. Further consultations and perhaps reference of the matter to the monitoring committee could then follow.

We note that the United States proposal covers consultation with countries "potentially" affected by trade diversion. We think that this concept would have to be somewhat clearer before one could judge all its implications. For example, it would not be helpful for the consultation procedure to be extended too widely since this would simply make it too cumbersome. There would need at least to be

some measure of the likelihood that other importing countries would be affected by trade diversion - and not only affected but seriously affected in the sense of disruption of their market or injury to their producers. By their nature these judgements are not easy to make, and certainly not before the effects of a safeguard measure in terms of trade diversion can be seen. While therefore, countries in this category have a legitimate interest in the matter we are not sure whether a specific obligation to consult them would be right. Their interest might be covered by the operation of the proposed monitoring committee.

Functions of monitoring committee and resolution of differences of view

We are not yet ready to take a definite stand on this aspect of the proposals although it is clear that there would need to be some procedure for resolving differences of view. The important point it seems to us is that the prime object of a monitoring committee should be to provide the means for conciliation between the parties.

We think it is necessary to distinguish between straightforward fact-finding functions and the rôle of giving advice or making recommendations. A body which was able to investigate the facts in cases of dispute, on the lines of the TSB functions in the area of fact finding, might well be useful. Such a body specifically charged with supervising safeguard measures might also mean that there would be more direct and effective control on observance of procedures than if this function was left to the ordinary GATT machinery. On the other hand the settlement of disputes, after the fact-finding stage, might quite satisfactorily be handled by reference to the GATT Council and Article XXII/XXIII procedures as at present.

Developing countries

We fully agree that the principal advantage to be gained by developing countries in the area of safeguard actions is in the establishment of a new system which would introduce new obligations and significant improvements in procedure. Developing country interests here coincide with those of all MTN participants and we agree with the United States view that a new system designed to keep safeguard action to the necessary minimum will in itself offer developing countries significant benefits. Furthermore the procedures to be observed and the functions of the monitoring committee would offer them additional possibilities to have their point of view taken into account. As in the case of the application of countervailing duties, we are ready to examine the possibility of differential treatment in relation to the procedures to be followed, especially in determining what action is appropriate in case of serious injury resulting from developing country exports.