

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Goods (GATT)
Negotiating Group on Safeguards

NEGOTIATING GROUP ON SAFEGUARDS

Meeting of 25 and 27 May 1987

Note by the Secretariat

I. Examination of the issues in the area of safeguards

1. The Chairman invited the authors of the two written proposals in documents MTN.GNG/NG9/W/3 and MTN.GNG/NG9/W/4 to introduce their papers.

2. In introducing document MTN.GNG/NG9/W/3, the representative of Brazil referred to several basic principles of the General Agreement relevant to the negotiations on safeguards. These included the central principle of non-discrimination, the objective of trade liberalization and the obligation of contracting parties to accept external competition and to accordingly undertake domestic adjustment. He drew a distinction between adverse situations created by unfair external competition, which could be safeguarded by anti-dumping and countervailing duties, and those arising from fair competition, which could be dealt with by either Article XII or XIX of the GATT. He further drew a distinction between the application of Article XII which allowed the imposition of import restrictions to protect the economy as a whole and to restore balance-of-payment equilibrium, and the application of Article XIX which allowed emergency action to protect domestic producers of a specific product. Given the inner logic of Article XIX, safeguard action permitted under it could not be applied on a discriminatory basis, for no exporter in particular could be held responsible for the situation created. He said that under the pressure of fair competition, many industrialized countries had increasingly resorted to selective actions either by the misuse of the right to impose anti-dumping and countervailing duties or by forcing upon exporting countries "grey-area" measures such as Voluntary Export Restraints or Orderly Marketing Arrangements. He described the situation as a grave one, and said that the inclusion of a specific mandate for the negotiation on safeguards in the Uruguay Round offered another opportunity for contracting parties to come to grips with the key problems. It would be difficult to conceive of additional liberalization if the safeguards issues could not be adequately dealt with. For the developing countries to accept a greater integration in the world trading system by binding or reducing their

tariffs, it was absolutely necessary to be able to rely on a predictable framework of rules operating in a non-discriminatory manner. There would be no incentives for the developing countries to engage in this direction if their exports, once they became competitive, were to be subject to arbitrary and discriminatory actions. The solution, therefore, was in the outlawing of bilateral and selective actions, instituting precise, firm and transparent rules for Article XIX actions which would facilitate governments' efforts in resisting protectionist pressures. Starting from the notion that fair exporters should not be punished, the Brazilian proposal considered that the burden of domestic adjustment should be borne by the economy of the importing country, and governmental action to correct the negative effects of the operation of market forces should primarily consist of assistance to adjustment by domestic producers. Only in an eventual second phase should measures at the border be made possible, on the condition that there was collective determination by contracting parties of injury and of its derivative link to the rise in imports. He concluded his introductory statement by saying that the notion of special and differential treatment for developing countries should form an integral element of the new Article XIX.

3. The representative of Hong Kong circulated some figures on Article XIX actions taken between 1950 to 1985 and said that document MTN.GNG/NG9/W/4 contained an amalgam of specific suggestions by the governments of Australia, Hong Kong, Korea, New Zealand and Singapore. It was already a negotiated document, and the views therein did not represent the starting point of any one of the five delegations. The proposal offered an elaboration of Article XIX which aimed to reinforce and clarify the disciplines of the General Agreement. The question of legal mechanism was not addressed but the main idea was that the arrangement, in the form of a supplement to Article XIX, would be binding on all contracting parties. He said that the first element in the joint submission by the five governments sought to supplement the injury criteria in paragraph 1 of Article XIX. It suggested that there should be a direct link between increased import and an overall decline in the conditions of domestic producers; and in making such a determination, a whole range of factors had to be taken into consideration. He said that the second element - coverage - was the heart of the matter. There was no place for selectivity in Article XIX and there was no question of any price to be paid in exchange for the principle of unconditional m.f.n. which was the fundamental basis of safeguards. The second part of this element stated that safeguard actions should normally take the form of tariffs. Nevertheless, it was recognized that quantitative restrictions had been used in the past and would be used in future. Therefore, the paper set out certain conditions to ensure that quota levels would be established according to import levels over a representative period of time. The third element tried to establish transparency through notification, to be applied to all Article XIX actions as well as to "grey-area" measures which should either be brought into conformity with the provisions of Article XIX or be eliminated within a timeframe. The fourth element set a standard time-limit of three years for all safeguard measures, with possible extension leading to a maximum of

five years. These figures were not accidental nor arbitrary but were based on an analysis of statistics which showed that 55 per cent of past actions lasted for three years and over 80 per cent lasted for five years. The fifth element laid down strict disciplines for the progressive liberalization of safeguard measures. It also stipulated that an appropriate programme of structural adjustment was indispensable during the period of application of the safeguard measure and was a prerequisite for any extension of a safeguard measure. This condition as well as others were to be found in the sixth element of the paper concerning extension. The seventh element gave higher preference to compensation over retaliation, but the ultimate right of affected contracting parties to take retaliatory actions was not compromised. In this context, the special need to take into consideration the interest of developing countries was emphasized. The eighth element tried to establish a procedure to limit the application of the "critical circumstances" clause in Article XIX so that when a measure was taken without prior consultation, contracting parties would have to fulfil their notification and consultation requirements within three months if an action was to remain in force. The last element in the paper proposed the establishment of a body open to all contracting parties for multilateral surveillance.

4. The representative of Korea said that the draft proposal by the five delegations represented a practical and balanced approach to the negotiations on safeguards. He stressed that safeguard actions were envisaged in situations of fair trade and that such actions should be limited to the minimum necessary to remedy domestic producers of importing countries. Negotiations on safeguards should aim to achieve a comprehensive agreement based on the basic principles of the General Agreement.

5. The representative of New Zealand said that the philosophy of the proposal by five middle-ranking trading entities in the Pacific Basin was to further define Article XIX. He believed that for all practical purposes, selectivity was a dead issue for the current round of negotiations although it might show up from time to time. He said that while the essential principles were preserved, the proposal contained certain flexibilities. There were provisions for the application of quantitative restrictions and the use of the concept of "threat of serious injury". To bring "grey-area" measures into the GATT system would be a difficult process; but if an operational system for GATT was to be achieved, there had to be a clear statement on principle.

6. The representative of Singapore said that the comprehensive agreement on safeguards must be based on the m.f.n. principle and non-discrimination which were non-negotiable. "Grey-area" measures such as VERs or OMAs which were illegal should be notified and brought into conformity with Article XIX or be eliminated according to an agreed timeframe. If these measures were legitimized through selectivity, then it would lead to a wide range of products being covered by market-sharing arrangements and would retard the export growth of developing countries in areas where they enjoyed comparative advantage.

7. The representative of Australia said that safeguards was not an issue between developed and developing countries but an issue between major and minor traders. An upsurge of "grey-area" measures from 1975 to the present had robbed Article XIX of its meaning and value. He regarded Article XIX as an effective instrument, and he was aware of the difficulties for major traders to apply the Article. The proposal by the five delegations therefore tried to offer some solutions to particular problems. He echoed the sentiment of the representative of the New Zealand on the question of selectivity and said that it should not remain the primary issue for the negotiations. The conduct of trade relations on the principle of non-discrimination might even be in the interest of the major traders. The pattern of recent bilateral disputes should lead people to reflect on this point.

8. Many delegations made comments and observations and raised some questions on some of the points in the proposals. These, together with the response by the authors, are summarized in the following paragraphs.

Transparency

9. One delegation commented that the requirements for notification as appeared in Paragraph 3(a) of MTN.GNG/NG9/W/4 were not contained in Article XIX. He asked how it was possible or practicable to present evidence of injury or threat thereof in any precise manner.

Injury or threat thereof

10. One delegation referred to Paragraph 1(b) of MTN.GNG/NG9/W/4 and said that some of the relevant factors for the determination of serious injury should be quantifiable. Another delegation said that injury had to be clearly demonstrable. One delegation commented that the factors listed had a lot in common with Annex A of the Multifibre Arrangement which had not worked well because it equated increase in imports with injury. The representative of one delegation remarked that the list of factors went beyond what was written in Article XIX. Moreover, to create a link between the cause and the measure would render the invocation of Article XIX even more difficult. He asked how could one reconcile the list of factors, some of which clearly non-operational, with a situation of emergency.

11. The representative of Hong Kong said that the list of factors in Paragraph 1(b) of MTN.GNG/NG9/W/4 derived directly from the Agreement on Implementation of Article IX rather than Annex A of the MFA which spoke of market disruption caused by increase in imports of products at certain price levels.

12. Several delegations noted the proposal in MTN.GNG/NG9/W/3 that a situation of "threat of injury" should be addressed through appropriate negotiations under Article XXVIII and agreed that the concept was not relevant in the negotiations on safeguards.

Coverage

13. Many delegations stressed that the m.f.n. principle of non-discrimination was non-negotiable and that they could not accept selectivity in any safeguards agreement. One delegation pointed out that each element in any negotiation had its price if a compromise was to be found. Furthermore, if Article XIX was read literally, it could mean that all obligations including those in Article I could be waived. One delegation noted that both written proposals dealt with particular products and not sectors of products, nor did they make any distinction between agricultural and manufactured products.

Nature of the measure

14. Many delegations agreed with the proposal in MTN.GNG/NG9/W/3 that safeguard actions should only take the form of tariff increases, although some believed that measures other than tariff increases such as quantitative restrictions should be permitted. One delegation pointed out that Article XIX spoke of suspension of obligations and withdrawal of concessions which encompassed more than just tariff measures. Since the levels of tariff bindings of contracting parties were not perfectly balanced and in view of the monetary fluctuations in the field of exchange rates, the proposal to allow safeguard actions in the form of tariff measures only would create a serious disequilibrium. One delegation remarked that Paragraph 2(b) in MTN.GNG/NG9/W/4 dealing with quantitative restrictions should include all the elements in Articles XI and XIII of the General Agreement. Many delegations pointed out that the manner under which country quotas were to be distributed should ensure that the market was not closed to potential and small suppliers.

15. The representative of Brazil said that Article XIX was put in place exactly to deal with the problem of tariff bindings. Contracting parties felt more relaxed in binding their tariffs because they had the possibility to withdraw their bindings under certain circumstances as described by Article XIX. To introduce non-tariff measures would be departing completely from the purposes of Article XIX.

16. Several delegations expressed concern at the proposal in MTN.GNG/NG9/W/3 that individual contracting parties members of a customs union would not be entitled to resort to import relief measures under the new Article XIX. One delegation questioned the central logic of the proposal. Another delegation, member of a customs union, commented that no customs union nowadays was a single market, and said that such a proposal required further reflection.

17. One delegation remarked that both proposals had omitted to address Paragraph 1(b) of Article XIX dealing with products which were the subject of a concession with respect to a preference. He said that there should be different procedures for safeguard actions involving such products.

Temporary nature of safeguard actions

18. One delegation pointed out that to fix a period for the duration of safeguard measures without any modulation was inappropriate. A duration of three years for safeguard measures for some agricultural products would be too long while the same period for steel or some high technology goods might not be long enough.

Degressivity and structural adjustment

19. One delegation emphasized that structural adjustment was the only remedy to industries suffering from injury and said that neither tariffs nor quantitative restrictions would solve the problem. Several delegations wondered if the domestic adjustment assistance measures as described in MTN.GNG/NG9/W/3 would not give some contracting parties carte blanche to subsidize their industries in the form of financial support and tax incentives. They also cautioned that certain contracting parties had great capacity to subsidize certain sectors of their industries and that if they were permitted to do so freely, it might create a very unbalanced situation and would distort competition. One delegation pointed out that while the General Agreement did not outlaw subsidies, its Article XVI and the Arrangement derived from that Article did recognize that contracting parties subsidizing their industries had certain obligations and that other contracting parties had certain rights. Besides, any tariff concession could be nullified by subsidies which could have the same effect as measures taken at the border. He expressed concern at this proposal of adopting subsidy as safeguard action especially as Paragraph 9 of the paper MTN/GNG/NG9/W/3 envisaged no redress under Articles XVI or XXIII for those contracting parties affected by such subsidies. One delegation asked if it was logical to subsidize an industry in order to strengthen or facilitate adjustment when it was generally believed that subsidy hindered adjustment. He further asked if to promote government assistance to industry would not go against the current trend of de-regulation or intervention by governments.

20. The representative of Brazil said that his proposal named domestic adjustment measures as the first measure to be considered when an industry was faced with a situation when a safeguard action had to be taken. This was in conformity with the philosophy of GATT as all contracting parties should be prepared to accept competition and to adjust accordingly. The normal circumstances under which adjustment should take place was through market forces. But if a contracting party could not solve this, then it should adopt domestic adjustment assistance measures rather than measures at the border. The rationale for this was that the burden of adjustment should be put on the shoulders of governments taking the measures, and not to shift the burden to other parties. Assistance to industry could take many forms, some were more direct than the others. Subsidies were tolerated in the GATT. At the same time, if a government wanted to intervene by assisting firms, it could only do it under the scrutiny and control of a surveillance body. The application of assistance measures had to be the result of collective surveillance.

Compensation and retaliation

21. One delegation commented that Paragraph 7(b) of document MTN.GNG/NG9/W/4 which proposed that special consideration be given to less developed contracting parties in cases of compensation and retaliation appeared to ignore the fact that there was little room for these parties to seek compensation or retaliation. One delegation remarked that the notion of compensation did not exist in Article XIX but compensation had been offered in the past and was still in practice. The Article also did not speak of retaliation but of suspension of equivalent concessions made.

"Grey-area" measures

22. Several delegations said that "grey-area" measures were inconsistent with the General Agreement and that they should be subject to the examination within the context of the standstill and rollback commitments. One delegation commented that neither MTN.GNG/NG9/W/3 nor MTN.GNG/NG9/W/4 had adequately addressed the question of "grey-area" measures because the solution to the problem was not simply to outlaw such measures which were taken for a variety of reasons. Their origin could derive from an Article XIX situation or an Article VI situation. Their existence represented facts of life and not all of them should be condemned.

23. The representative of Brazil said that "grey-area" measures in certain cases represented the misuse of Article VI. They were selective in nature, based on no criteria for action, tended to be permanent and non-transparent. There was no provision for structural adjustment, compensation or retaliation. They were concluded purely on the strength of importing countries vis-à-vis exporting countries. Legalizing the "grey-area" measures would not reinforce the trading system. Governments should be given firm rules and good instruments to resist the pressure from protectionism. To extend the "grey-area" measures as the rule of law for the future was simply unacceptable.

Multilateral Surveillance

24. One delegation expressed doubts over the proposal to set up a Surveillance Body on Safeguards because there were already too many surveillance mechanisms in GATT working unsatisfactorily. Another delegation said that there was no need for a surveillance body. It would also be a tactical error to ask for one as it might be misinterpreted as an encouragement to take safeguard actions or serve as a signal to the outside world that an escalation of such measures was anticipated.

Special and differential treatment for developing countries

25. Several delegations commented that the special consideration to the exports of developing countries in the proposals especially in MTN.GNG/NG9/W/4 was not strong enough. One delegation said that both

papers had ignored the fact that small and innocent suppliers could not be the cause of injury or threat of injury and proposed that safeguard actions should be applied to all sources of supply. This was too rigid an approach. When faced with increased tariffs or quota restrictions, small suppliers and new entrants would be squeezed out of the market. Many delegations mentioned that special consideration should be given to small and potential suppliers in quota allocations. One delegation asked if it was not contradictory to have non-discriminatory m.f.n. and special and differential treatment for developing countries at the same time.

26. The representative of Brazil said that he did not see any contradiction in asking for special and differential treatment for developing countries. He said that he was not proposing that developing countries should be exempted from safeguard actions. What he proposed was that, given the different stages of development, developing countries, when applying safeguard actions, should enjoy a special consideration because their economies were not as strong as the developed countries and they might not have the same capability of absorbing adjustment.

27. The representative of Hong Kong said that the allocation of country quotas under Article XIX had naturally to take into account the provisions of Article XIII. He wondered how the interests of small and potential suppliers could be better served under an alternative system which was the "grey-area" measures. There was absolutely no transparency under such a system and the small and potential suppliers could not enter the market at all.

Legal framework

28. Many delegations stated that the comprehensive agreement to be negotiated should apply to all contracting parties. Most of them expressed no strong preference for the agreement to take the form of an amendment to, or an elaboration of, Article XIX. One delegation commented that the proposal in MTN.GNG/NG9/W/3 to amend Article XIX was too ambitious because that would require approval by consensus. Some delegations believed that the question of legal framework should not be addressed until there was agreement on substance. One delegation maintained that domestic legislation should be aligned with any agreement on safeguards that might emerge.

II Future work

29. The Chairman said that it was his intention at the next meeting to continue the discussion of written proposals received and to identify the issues that had emerged in the discussion with which the Group would have to deal. He recalled the Group's Negotiating Plan which read "Proposals by participants would be examined with a view to drawing up a draft text of a comprehensive agreement as a basis for negotiation" (MTN.GNG/5, page 13) and said that the Group would have to consider this process during its next meeting. A few delegations said that apart from the written submissions, proposals and comments made orally should also be taken into account when a draft text was to be drawn up.

III. Papers to be prepared by the secretariat

30. It was agreed that the secretariat should:

- (a) revise the working document MTN.GNG/NG9/W/2 in the light of comments from delegations;
- (b) prepare a paper on the drafting history of Article XIX and its place in GATT;
- (c) based on information available from previous informal discussions, prepare a draft on "grey-area" measures; such a draft should be checked with those delegations which participated in such discussions.

IV. Observer organizations

31. It was noted that there was no agreement at this stage as to which organizations should be accepted as observers and the group agreed to revert to the matter in the light of further progress in its work.

V. Date of the next meeting

32. The Chairman said that the general calendar pattern indicated that the next meeting of the Group would be held in the week commencing 21 September 1987. Since there would be a problem of clash with other meetings, he suggested that consultations on the meeting date be held before the next meeting of the GNG and said that the Group should meet again on 21, 22 and 25 September. Members of the Group would be advised of the outcome of the consultations and be informed of the dates by the secretariat.