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STATEMENT BY REPRESENTATIVE OF CANADA ON 28 JUNE 1977

Notification, Consultation, Surveillance and Dispute Settlement

Introduction

To a considerable extent Article XIX already provides for a system of surveillance and dispute settlement. There is provision for notification and consultation. There is provision for the CONTRACTING PARTIES to become involved in this process. The purpose of the consultation is clearly to reach "agreement" (not, in the context, a completely unambiguous word) but if this is not possible the Article authorizes "the affected contracting parties" "to suspend ... the application to the trade of the contracting party taking such action ... of substantially equivalent concessions or other obligations under this Agreement, the suspension of which the CONTRACTING PARTIES do not disapprove".

Clearly the drafters of the Article have designed many of the provisions with a view to ensuring that disputes would be resolved. In our work, however, there may be some opportunity to build upon the existing provisions to improve the functioning of the system. I would like to look in turn at the issues of notification, consultation, surveillance and dispute settlement to see if some improvement might be reasonably considered.

Notification

Article XIX now reads: "Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable". This provision is quite clear. Perhaps some procedures could be elaborated in an interpretative note. For instance, consideration could be given to specifying that notification be made at least a certain number of days prior to the action being taken. In such a case, however, consideration would have to be given to ensuring that no commercial undertaking was able to take commercial advantage as a result of the notification.

Consultation

Article XIX now reads: "Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it ... shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action". "In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action."

These provisions are clear and reasonable and in our view should be retained. But perhaps a few questions and comments would be in order.

It would be useful to know whether there have been cases of consultation with "the CONTRACTING PARTIES" prior to or immediately after an Article XIX action.

Perhaps some further precision could be given to the word "immediately" although its intent seems clear enough.

In situations in which prior consultation has not been possible, have contracting parties only "provisionally" taken action, as required by paragraph 2, before consulting?

Regarding the definition of "critical circumstances in which delay would cause damage which it would be difficult to repair", it is obvious that the decision as to whether such an emergency situation exists lies initially within the competence of the contracting party taking the action. But there could be provision for some form of international review as to whether provisional action prior to consultation was in fact justified.

The suggestion of the United States Delegation that "governments taking safeguard measures would be required to consult with countries having a trade interest affected by the measure, including countries potentially affected by trade diversion, resulting from the imposition of such measures", is important and might well be considered further, although it is not entirely clear as to what the United States Delegation envisages would be added to the present text. Presumably under the provision of Article XIX such contracting parties could raise such problems during consultation between the contracting party taking the action and the CONTRACTING PARTIES, although it might well be preferable to provide for bilateral consultation in such situations under Article XIX; of course, any contracting party now could raise such a problem under Article XXII.

Surveillance

My delegation is of the view that the safeguard system would be improved, and perhaps made more equitable as between countries of different size, if a fairly regular and more effective procedure of surveillance were established. A special committee of the CONTRACTING PARTIES might be assigned this function. Membership on such a committee should be open to any contracting party. It could assume the important functions now given to the CONTRACTING PARTIES in paragraphs 2 and 3 of Article XIX.

This "Safeguards Committee" could therefore:

- (1) receive the written notice required "before any contracting party shall take action";
- (2) avail itself of the "opportunity" to be afforded to the CONTRACTING PARTIES by the contracting party taking the action "to consult with it in respect of the proposed action";
- (3) meet upon receipt of the "written notice" that an "affected" contracting party intends "to suspend ... the application to the trade of the contracting party taking such action ... of such substantially equivalent concessions or other obligations" to consider whether or not the CONTRACTING PARTIES should "disapprove" of the suspension.

Simply assuming these functions, now assigned the CONTRACTING PARTIES in Article XIX, could give the Committee a significant rôle.

It could also be for consideration whether it might be desirable for the Committee to review on a regular basis, say once a year, all Article XIX actions which are in effect. Such a review could take place on the basis of reports from the contracting parties maintaining safeguard action explaining why the action was still required and how it was discharging the various conditions to be fulfilled by any contracting party maintaining such action. In the course of its review the Committee would examine whether each safeguard action was still justifiable, and whether each contracting party maintaining it was doing so in conformity with the provisions of the Agreement.

Dispute settlement

The Canadian delegation considers that the safeguard system would be improved by setting out a series of procedures to be followed for resolving disputes and by prescribing in specific terms the rights and obligations of contracting parties in regard to these procedures.

The Article XIX system now obliges the contracting party taking action under the Article to "afford those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action". This requirement for bilateral consultation provides an initial opportunity for disagreements between contracting parties to be resolved. It should also be recalled that under Article XIX the CONTRACTING PARTIES also have a right to be consulted at this stage by the contracting party proposing action. It is for consideration whether some procedures should be developed, around the present Article XIX provision, for determining under what conditions the CONTRACTING PARTIES might avail themselves of this right, perhaps, as suggested above, through a safeguards Committee. It could be agreed, for instance that this Committee would consult with the contracting party proposing action in the event that such consultation was requested by say at least five contracting parties. This procedure would give some assurance to smaller contracting parties, who might not have a "substantial interest", but for the trade of which a particular safeguard action might have serious consequences. In the event that the matter did not go before the CONTRACTING PARTIES, or the Safeguards Committee, at this stage, it should be possible for any contracting party involved in the bilateral consultation process to request, in the event no agreement can be reached, that the matter be referred to the Safeguards Committee with a view to trying to resolve the disagreement. Specific time limits might also be built into such procedures.

Finally if agreement were not reached within, say, sixty days of the time the matter was referred to the Committee, then consideration could be given to referring the matter to a Panel of independent individuals who were experienced in the trade policy field. Consideration could also be given to describing the Panel's functions.

It could also be for consideration whether any contracting party might be able to refer a disagreement arising during any annual review of a safeguard action to the Panel to seek its consideration and appropriate recommendations.

Further, it might be appropriate to refer to the Panel any disputes arising concerning the suspension of substantially equivalent concessions or other obligations under Article XIX:3:a.