

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG9/W/6

16 September 1987

Special Distribution

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

"GREY-AREA" MEASURES

Background Note by the Secretariat

Introduction

1. At its meeting held on 25 and 27 May 1987, the Negotiating Group on Safeguards agreed that the secretariat should prepare a paper based on information obtained in the course of previous informal discussions, on 'grey-area' measures, and that the draft should be checked with those delegations which participated in such discussions (MTN.GNG/NG9/2, page 9). This note has been prepared and circulated by the secretariat on its own responsibility in accordance with this request, after being checked with delegations which participated in the informal consultations referred to above.

Informal examination of "grey-area" measures

2. In 1982, following informal consultations conducted by the Chairman of the Committee on Safeguards with delegations, the secretariat had, on its own responsibility, prepared a list of measures which were taken and notified under Article XIX as well as other measures which appear to serve the same purpose (Spec(82)18 dated 26 March 1982). Annexes B and C of this document contained lists of so-called "grey-area" measures. The document has been subsequently revised three times.

3. In March 1983 consultations conducted by the Chairman of the Council led to an agreement that the list of "grey-area" measures in Spec(82)18/Rev.2 would be discussed informally and that delegations would take part on a personal basis without being bound by governmental instructions. It was also understood that these discussions could have no bearing on the legal nature of the measures nor on the rights and obligations of the participants under the GATT.

4. The list contained measures relating to trade in footwear, steel, flatware, tableware, jute products, automobiles, beef, apples, sheepmeat, motorcycles, TV receivers and woven fabrics of silk. The intention of the discussions was to provide answers to the following questions:

- (a) What is the precise nature of the measure?
- (b) What are the reasons that have led countries to take such action?

- (c) What are the reasons that parties have agreed to such a measure?
- (d) What are the reasons why Article XIX-type action has not been taken (advantages and disadvantages)?
- (e) What can be said about the effects of the measure including their effects on trade of the third countries?
- (f) What can be said about the phasing-out of the measure, including any problems that need to be dealt with and how multilateral disciplines can be established?

5. Informal case-by-case examination of specific "grey-area" measures were held from March 1983 to September 1983. The following paragraphs summarize the discussions that took place during this period. Not all questions asked were provided with answers.

Nature of "grey-area" measures

8. Concerning the nature of such measures it would appear, in general, that:

- (a) Many of the so-called "grey-area" measures are bilateral restraint arrangements of a VER or OMA type (usually in the form of quantitative restrictions, surveillance systems or price undertakings) concluded between importing and exporting countries; they may take the form of export forecasts by the exporting country.
- (b) The extent of government participation varies considerably, some of the cases being industry-to-industry arrangements where the specific rôle of government is not always clear. In one case the action taken changed from an industry-to-industry arrangement to an Article XIX action and then to a VER.
- (c) Importing countries have also taken unilateral actions affecting imports, involving tariff increases, quota restrictions or price monitoring in relation to imports from particular sources without notification or reference to GATT provisions.
- (d) The actions are usually introduced for a period ranging from one to five years. The arrangements sometimes, but not always, involved an element of degressivity providing more liberal conditions of market access.

Reasons that have led countries to take such action

9. Concerning the reasons given for the use of such actions, it would appear that:

- (a) From the point of view of importers, VERs and other similar actions represent a pragmatic response to pressure for restrictive action arising from increased imports which, if they remain unchecked, would in their view cause injury to the domestic industry. In a number of instances these actions could be used without the need to justify or to prove injury to the domestic market or the imminent threat of injury. In some cases the intention is to guarantee to domestic producers stable prices where production conditions are cyclical and to secure income by providing protection from competition of third country producers. In many cases the application of Article XIX action on a non-discriminatory basis would again, in the opinion of importing countries, restrict trade much more than arrangements of a VER or OMA-type, because the latter do not usually affect all supplying countries, because they contain an in-built element of compensation, and because they reflect bilateral negotiations with respect to trade levels, etc. Such actions have also been seen as carrying with them less risk of retaliation and as better suited to the circumstances of contracting parties that are both importers and exporters.
- (b) In some cases these actions have followed a determination of injury caused by subsidized or dumped imports. In some of the cases however, the threat of an anti-dumping or subsidy investigation has been followed by the adoption of a VER.
- (c) In some cases existing import restrictions have been replaced by VERs in order to give domestic industries a breathing space for adjustment.
- (d) In another case the introduction of a VER is linked to a concession emerging from the MTNs in the Tokyo Round.
- (e) Some countries have considered that the use of Article XIX in respect of items benefiting from their GSP schemes was not appropriate but that in such cases it would be more appropriate to negotiate a VER. The use of a "grey-area" measure has been seen as avoiding problems of free circulation when Article XIX action was taken by only one of the members of a customs union.
- (f) In one case actions were taken because national legislation was enacted providing for a limitation on the quantity that could be imported of the product in question. In another case, action was requested by a supplying country on the basis of an equity clause in an OMA with another supplying country.

Reasons that parties have agreed to such measures

10. Concerning the reasons that have led exporting countries to accept such measures, it would appear that:

- (a) In many cases these actions have been accepted primarily because of the threat that the alternatives would be unilateral action which (even if in conformity with the General Agreement) could involve considerably more severe cutbacks in the trade of the exporting country. In particular developing countries considered in many cases that they had no choice but to accept a VER. One important factor appears to be the assessment that actions applied unilaterally by the importing country would tend to be more permanent and less transparent than actions the administration of which is left to the exporting country. Some advantages were also seen for the exporting countries in the administration and monitoring of restraints being implemented at the exporting end.
- (b) The exporters also appear to have considered that the VER arrangements provide greater security and stability with respect to trade actions than an Article XIX type action, and that the acceptance of VERs or price disciplines as an alternative to the opening of anti-dumping investigations or the enforcement of basic price mechanisms involves less disruption of trade in those cases where an exporting country is confronted with having to choose between one or the other of these actions being applied to its trade.
- (c) It was also suggested that the acceptance of VERs or other bilateral restraints allows solutions to be worked out which correspond to the particular nature of the problem in each case. In some cases, exporting countries appear to have accepted the argument that time was necessary to allow positive structural adjustment in the importing country.
- (d) It appears, however, quite clearly that not all exporting countries accept these reasons and some have consistently refused to enter into such arrangements and have insisted on the provisions of the GATT and on their GATT rights.

Effects of the measures

11. The following points also emerged in the course of the discussions with respect to the reasons behind and the effects of such actions:

- (a) In some instances, a VER negotiated with one exporting country has been followed by VERs with other exporting countries in order to avoid increased supplies from these exporting countries. Where a VER has been negotiated by one importing country, other importing countries have sought similar arrangements in order to avoid diversion of trade. When one importing country has negotiated such an action, political pressures have been created for other importing countries to do the same.

- (b) The fact that one country managed to negotiate a VER type arrangement did not, however, necessarily permit another country which considered itself to be in a similar situation to do so. Much depended on the bargaining relationship between different countries.
- (c) The negotiation of a VER on a basic product, by raising costs, created pressures for the establishment of a similar arrangement for goods processed or fabricated from that product. Thus VERs tended to proliferate not only from country to country, but also from one sector to another.
- (d) While third countries have been concerned, whether as importers or exporters, by diversion of trade that could be caused by VERs, the evidence needed to establish a case of impairment of benefits under the GATT has not always been available.
- (e) There was more risk of proliferation with respect to VERs than if all actions were taken under Article XIX. With respect to VERs, the criteria of injury to the domestic industry caused or threatened by increased imports was not necessarily met, nor was the temporary nature of the action a necessary element. The fact that an importing country could avoid the risk of retaliation was also relevant in this connection.

Phasing-out of "grey-area" measures

12. On the question of the phasing-out of "grey-area" measures, the following points were made:

- (a) It was generally recognized that a considerable lack of information and transparency existed with regard to such measures especially the industry-to-industry arrangements. In addition, it was not at all clear how the phasing-out of such arrangements could be enforced since it was argued that they did not fall under any GATT provisions. It was said that under most national competition laws such arrangements were probably illegal since they distorted the normal competition situation of the market, but often for political or other reasons no action was taken against them.
- (b) Participants from some exporting countries asserted that they were prepared to phase out all VERs, including industry-to-industry arrangements. Such action depended, in their view, entirely on the importing countries since it was in the first place the pressure exerted by them which led to the conclusion of such arrangements. This was not accepted by participants from some importing countries which stated that it was not at all certain that governments in importing countries would take unilateral action against imports of products where

the extension of an industry-to-industry arrangement was refused by the industry in the exporting country.

- (c) Some cases were clearly presented as hard core cases where phasing-out would be very difficult for political, socio-economic or other reasons, particularly in the absence of an overall solution to some sectors.
- (d) Often the existence and acceptance of bilateral arrangements between other contracting parties were cited as reasons that such arrangements proliferated further since it was difficult for governments to refuse their industry advantages which had been given to industries in other countries. The ability of governments to resist such pressures, and the possibility of phasing-out existing measures, depended therefore largely on the behaviour of other countries and on other alternatives.
- (e) The view was expressed that VERs could be brought before the GATT by affected contracting parties in the context of Article XXIII because of nullification and impairment of GATT rights. In this connection, the important rôle played by the time element in the conclusion of VERs was raised. Industries in exporting countries were often afraid that they might suffer great damage if they resorted to the legal GATT way of finding remedy against restrictive actions, because of the cumbersome and time-consuming procedures involved. It would be important to make the dispute settlement procedures work quicker and more efficiently. Exporting countries could accept a commitment to resort to the GATT in cases of restrictive actions against them, if importing countries on their side would also accept to observe GATT disciplines more strictly.
- (f) In one case it was stated that positive features, like increased access and phasing-out, were included in the arrangement. In some cases, the exporting country had no information on the exact background and modality of the measures applied against its exports. It was therefore difficult to judge the possibilities for phasing-out.

General points

13. The following general points emerged from the informal discussions:

- (a) VERs and other similar actions of a safeguard nature clearly offer considerable practical conveniences for the importing countries in dealing with the pressures on their domestic markets. In certain circumstances they are also seen by exporting countries as offering some advantages over the pre-existing situation or an Article XIX action.

- (b) In many instances these actions are used where it would not be possible for the importing country to justify an Article XIX action.
- (c) Even when exporting countries have agreed to such actions, they have done so on the basis that they are both temporary and exceptional and remain outside the General Agreement.
- (d) Apart from the effects of restricting trade and of affecting the pace of adjustment, there may be a need to consider the effect of these actions in terms of lack of transparency, the danger of proliferation, setting aside of criteria relating to injury, and weakening of disciplines for safeguard action as well as the lack of equity that could be created between contracting parties.