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COMMUNICATION FROM AUSTRALIA, HONG KONG, KOREA, NEW ZEALAND AND SINGAPORE

The following communication, dated 2 October 1987, has been received from the delegations of Australia, Hong Kong, Korea, New Zealand and Singapore.

GATT SECRETARIAT
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Considerations in formulating an agreement on Safeguards

This paper outlines some of the thinking behind the ideas in the working paper entitled "Elements of an Agreement on Safeguards" which was submitted by the delegations of Australia, Hong Kong, Korea, New Zealand and Singapore to the Negotiating Group on Safeguards in May 1987 and circulated as document MTN.GNG/NG9/W/4. This is therefore a companion paper to MTN.GNG/NG9/W/4 and should be read together with it.

Scope of Safeguards Negotiations

2. Terms like "safeguards", "safeguard mechanism" and "safeguard measures" are generally used to refer to the procedure or measures provided for in Article XIX whereby emergency action can be taken in given circumstances to suspend, withdraw or modify, certain GATT obligations in respect of imports of particular products, in order to provide a breathing space for domestic producers seriously injured or threatened with serious injury by increased imports. Such actions may extend for the time necessary to prevent or remedy injury.

3. There is no logical connection between Article XIX, which provides for temporary relief from the effects of normal GATT obligations, and certain other GATT rules, such as those in Article VI on anti-dumping and countervailing, which have sometimes been loosely termed as "safeguards" but which in fact provide for countermeasures against specific sources of unfair trade practice. Article XIX envisages

action against products and not against source. It is non-discriminatory in its operation and is a logical counterpart to the provisions of Article I and Article XIII.

4. It is clear that Article XIX is the context which the Ministers had in mind in framing the negotiating objective on safeguards at Punta del Este. The Ministerial Declaration lists for inclusion in a comprehensive agreement the elements derived from the previous safeguards work which was conducted over many years in GATT in specific relation to Article XIX.

Comprehensive Approach

5. A comprehensive agreement would be one which contained all the elements listed in the Ministerial Declaration. A limited or progressive approach whereby certain elements might be put in place first as "building blocks" on which others might perhaps be placed later on, is not provided for in the Ministerial Declaration. The working paper (MTN.GNG/NG9/W/4) serves to elaborate on the elements in the form of a supplement to Article XIX. This supplement seeks to clarify and reinforce the disciplines of the General Agreement in accordance with the Negotiating Objective. The paper is essentially conceptual and the ideas in most cases are indicative of the direction and are not intended to be rigid formulations.

Legal mechanism

6. While the objective is to secure a comprehensive understanding on safeguards, the precise legal mechanism to bring it into effect is not spelt out in MTN.GNG/NG9/W/4. The five delegations have not yet taken a firm view on this. However, what is important in the choice of a legal mechanism is that any agreement must be binding on all

contracting parties (which is clearly stipulated in the Ministerial Declaration) and that it should be designed to be brought into effect reasonably quickly. An understanding to be adopted by the CONTRACTING PARTIES ought to be more effective for this purpose than opening a protocol for signature. Such a protocol procedure could be time consuming and might lead to the type of situation existing, for example, in the MTN codes where only a limited number of contracting parties have signed on.

The Elements

7. The following paragraphs contain explanatory comments in respect of the elements listed in MTN.GNG/NG9/W/4.

(i) Objective Criteria

8. Paragraph 1(b) of the working paper seeks to supplement the injury criteria (i.e. serious injury or threat thereof) in paragraph 1 of Article XIX by emphasising the need to establish a direct causal link between increased imports and a decline in the condition of domestic producers in overall terms. In other words, no one factor like output or sales should be singled out as an indication of the health of the domestic producers since this could present a distorted or misleading picture. A decline in a single measure like domestic sales, for example, might be offset by improvements elsewhere such as increased exports. Therefore a whole range of factors needs to be looked at in building up a picture of the health of the domestic producers and any actual or prospective decline in this overall picture must be directly and causally attributable to an increase in imports.

9. The notion of determination of injury on the basis of a list of factors is not new in the GATT. Indeed, a similar list is used in the Code on Subsidies and Countervailing Duties and the Code on Anti-Dumping. This approach is clearly distinguishable from the "market disruption" criteria of the Multifibre Arrangement which are based on a "sharp and substantial increase" in imports at a substantially lower price. In GATT, competitive pricing as a reflection of comparative advantage is not in itself objectionable unless it is unfairly derived as for example in dumping or subsidisation.

(ii) Coverage

10. The first sentence under paragraph 2(a) contains the most important premise upon which the working paper is based - unconditional most-favoured-nation treatment. This is one of the basic principles of the GATT which, as indicated in the Ministerial Declaration, should be the fundamental basis for any agreement on safeguards that may emerge from the present negotiations. Selective actions against imports from particular sources, clearly has no place in the Article XIX safeguard mechanism which envisages emergency action on products and not on individual contracting parties. That this is so is confirmed by the fact that the Multifibre Arrangement, which permits selectivity, is a formal derogation from the GATT and in particular from the non-discriminatory provisions of Article I, XIII and XIX.

11. The second sentence under paragraph 2(a) is designed to prevent circumvention of the non-discriminatory principle by over-definition of the characteristics of a product such as price, quality or other physical attributes so as to target specific sources.

12. Paragraph 2(b) sets out the principle that safeguard measures should normally take the form of tariff measures, whilst at the same time recognizing that quantitative restrictions may continue to be used for this purpose. In the latter case, and bearing in mind that the provisions of Article XIII will apply, it is important to attach a certain conditionality to ensure that the limit should not be set below a reasonable level, based on trade during a representative period. The notion of "representative period" already has an accepted interpretation in the GATT - it is normally taken to mean up to 3 years. The paper emphasises that the representative period should be as recent as possible and should not include any time during which imports were insignificant.

(iii) Transparency / Notification

13. Article XIX already provides for prior notification and the opportunity to consult. The intent of paragraph 3(a) is to elaborate on the content of the notification. It should be read in conjunction with paragraph 1(b) which sets out the injury criteria and the elements to be taken into account in the determination of injury. Paragraph 3(a) also stresses the need for the

notification, including the full supporting data, to be made in sufficient time to enable adequate consultations to take place before a measure is brought into effect. However, Article XIX does provide that in critical circumstances, actions may be taken provisionally without prior consultation. The procedures to be followed in such instances are outlined in para. 8 (b) of W/4 and discussed in paragraph 23 of this paper.

14. Paragraphs 3(b) and 3(c) deal with the related issue of the "grey-area" safeguard measures. The grey-area is a central problem of safeguards and must be addressed satisfactorily in any overall solution. The concepts in the working paper are first of all to establish transparency through notification, and then either to bring grey area measures into conformity with the provisions of Article XIX and the agreement on safeguards or to eliminate them within a time-frame, in accordance with undertakings along the lines spelt out in paragraph 3 (c).

15. There are various reasons for the existence of the grey-area, including political concessions to protectionist pressures in circumstances where no GATT justification for action existed, and the desire to avoid the need to compensate or the fear of retaliation in circumstances where GATT action might have been justifiable. The grey-area is essentially non-transparent and has a market sharing effect which undermines the basis of the open multilateral trading system. The clearest demonstration of

why the grey-area should be brought back to the GATT, rather than the GATT being realigned with the grey area, is provided by the experience of the past 25 years in textiles. What began as an attempt to bring temporary multilateral discipline to a series of grey area measures on cotton developed into a semi-permanent and progressively more restrictive market sharing regime with an ever-widening coverage not only of fibre (cotton, wool, mmf., vegetable and silk) but also of products (yarns, fabrics, garments, luggage, footwear, dolls, sails, cordage etc). The Ministers have clearly indicated the direction by stipulating that negotiations on textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines. The latter phrase refers to a comprehensive agreement on safeguards on the basis of the basic principles of the General Agreement. The Ministers have stated their determination to preserve the basic principles and to further the objectives of the GATT. Thus any approach that would lead to further derogations or to compromising the basic principles of GATT would not be consistent with the Ministerial Declaration. Hence the approach outlined in paragraphs 3(b) and 3(c) of the working paper.

16. All grey-area measures, i.e. all measures entered into directly or industry-to-industry arrangements condoned by governments, which are not based on the GATT and which have a safeguard effect (i.e. taken in lieu of Article XIX action) should be covered by the provisions of paragraph 3. Grey area measures taken in lieu of other GATT provisions such as Article VI (anti-dumping and countervailing) are not relevant in this context and would be for consideration in

other negotiating groups. The paper also recognises that measures covered by conditional exemptions (such as waivers) would not be subject to this provision. Of course, the provision would be applicable if such exemptions were to be withdrawn. The Multifibre Arrangement, as a formal derogation from the General Agreement, is also outside the purview of this provision, but, as already indicated above there is a separate negotiating process mandated by the Ministers to bring the textiles sector back into the GATT under strengthened rules and disciplines. An agreement on safeguards should, therefore, in principle apply eventually to all products including textiles.

(iv) Temporary Nature

17. Safeguard actions are essentially emergency actions and should not be prolonged indefinitely. A standard period of three years is proposed in paragraph 4 but this is related to the period indicated under paragraph 6(c) for possible extension up to a maximum period of five years. The key point is that there should be an outer limit. These figures are not accidental. They are based on the analysis of past Article XIX invocations which was circulated at the NG meeting on 25 May (a copy is attached to this paper for easy reference). By taking five years as the outer limit, more than 80% of the previous invocations would be covered. This should be a reasonable timeframe for future safeguard actions.

(v) Degressivity and Structural Adjustment

18. Paragraph 5(a) prescribes strict discipline on degressivity which is obviously related to the notions of limited duration and progressive return to a normal situation. It is easier to express for tariff than it is for quantitative restrictions and for that reason the formulation at the end of paragraph 5(a) is put in square brackets. The idea is that the quota should be progressively increased, but there are various ways to achieve this objective. The formulation in square brackets suggests one possible means by having a fixed percentage per annum which could be any figure - say four, six, eight or ten per cent. Clearly such an approach would be arbitrary and this is not the only approach to deriving a figure for growth. Another possibility might be to relate to a growth rate which equates with what was the normal expectation prior to the emergency.

19. Structural adjustment is an essential element. It is fundamental to the concept of emergency suspension of GATT obligations as the whole purpose of taking such limited protective action is to provide an opportunity to adjust. The working paper is not too specific as to what is intended by structural adjustment because there are a variety of different approaches to this, ranging from non-interference in the autonomous structural adjustment process on the one hand, to fullscale industry assistance programmes on the other hand. Furthermore, what precisely would be appropriate in any given set of circumstances is difficult to envisage in a set of rules for objective application. It

should be expected though that any adjustment measures should be consistent with GATT obligations (on e.g. subsidisation). Moreover, it is envisaged that introducing structural adjustment measures should be a condition of any extension of emergency measures, so that, as indicated in paragraph 6(b), it would be a pre-requisite of considering an extension that structural adjustment measures should have been introduced during the initial period of the operation of a safeguard measure.

(vi) Extension

20. The basic concepts here are that extensions should be exceptional, conditional and limited. They should be conditional on a review of the original determination of serious injury, prior notification and consultation. Therefore, the provisions set out earlier in paragraphs 1(b) and 3(a) of the working paper are again relevant. It will be noted that reference is made to the concept of threat of serious injury in para. 6(a). This is because in considering an extension, there should obviously be no existence of serious injury at the time that the extension is proposed as the safeguard measure would still be in effect. The question to be considered is what would happen if there was no extension, i.e. whether the original situation leading to the action would recur? Any extension should be made in the context of a limited overall period since the safeguard measure is essentially temporary and must come to an end. At the same time, it is recognised that it might not be practicable to expect immediate

adjustment. Some time would have to be allowed for any intended effects of any structural adjustment programmes or measures to work their way through. Maxima of three to five years should be sufficient for this purpose.

(vii) Compensation and retaliation

21. The language in paragraph 7(a) puts a much higher preference on compensation than on retaliation, but the ultimate right to retaliate is not prejudiced. It should be noted that proposals being put forward in other Negotiating Groups, such as the Group on GATT Articles, may have implications in this respect.

22. Paragraph 7(b) recognizes the need for some special consideration for the developing countries, which, in this context, are usually at a disadvantage.

(viii) Consultation

23. The consultation procedures are set out in paragraph 1 of Article XIX, but there is a provision under paragraph 2 of Article XIX (and a tendency in practice) for safeguard measures to be taken immediately without prior notification or prior consultation by invoking critical circumstances. Paragraph 8(b) of the working paper is an attempt to circumscribe the application of the "critical circumstances" clause, so that the user of that clause who has not undertaken the notification and consultation before taking the safeguard measure is given three months to do so, if the measure is to remain in force in accordance with Article XIX and the terms of the proposed agreement on safeguards. This period of three months should be an adequate timeframe and also ties in with the same duration given under paragraph 6(a).

(ix) Multilateral surveillance

24. The aim is to reinforce the disciplines by providing for scrutiny of actions, oversight of procedures, leverage on compliance, but without prejudice to access to the normal GATT dispute settlement procedures. What is suggested is the establishment of a body that would be open to all contracting parties. This would avoid the difficulty of trying to agree on a more limited membership perhaps on a constituency basis that many might not regard as equitable, reasonable and representative of all interests. Under an open membership system, the more active participants would be self-selecting. The body should be free to decide its own working procedures and its effectiveness would depend, to a large extent, on these.

Conclusion

25. Problems relating to safeguards have been under discussion in GATT for very many years. Whether they are likely to come any closer to resolution in the Uruguay Round than on any previous occasion remains to be seen. The proposals in MTN.GNG/NG9/W/4 are designed to give effect to the clear intention of Ministers that the basic principles of GATT and the procedures of Article XIX should be preserved and strengthened. It is important to bear in mind

that the fact that GATT principles are often honoured in the breach as much as in the observance does not detract either from their validity or from their value as beacons, guides and ideals for behaviour, as well as levers against excessive or prolonged departures. Moreover, they are absolutes - any dilution and they no longer exist. If they can be moved once then they can be moved again and again. The lesson of textiles should not be forgotten. Thus there is no room for compromise with those who would urge that the GATT be realigned to conform with the reality and practice of the "grey-area". For as long as such views continue to be pressed in the Round, the issues will remain unresolved. The prolongation of the deadlock can only be detrimental to the development of a more open, viable and durable multilateral trading system.

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Table 1 : Average Duration of Article XIX Actions.

Covering period	No. of Art. XIX Actions	Total No. of years	Average duration (in years)
	(A)	(B)	(C)=(B) : (A)
50 - 59	18	90.96	5.05
60 - 69	30	107.57	3.59
70 - 79	42	112.86	2.69
80 - 85 (MARCH)	16	34.14	2.13
50 - 85 (MARCH)	106	345.53	3.26

Note : The Analytical Index lists a total of 123 invocations of Article XIX during the period 1950 - March 1985, of which 106 "completed" cases are chosen for the calculation of their average duration.

Table 2 : Breakdown of Article XIX Actions by year of Introduction

YEAR	ITEM NO. IN ANALYTICAL INDEX	NO. OF CASES	CONTRACTING PARTIES TAKING ARTICLE XIX ACTIONS
50	1	1	US
51	-	-	-
52	2 - 3	2	US(2)
53	-	-	-
54	4	1	US
55	5 - 6	2	US, Greece
56	7 - 8	2	US, Greece
57	9 - 11	3	US(2) , Canada
58	12 - 16	5	US(2), Canada, Germany, Australia
59	17 - 19	3	US, Austria, Australia
60	20 - 21	2	US, Australia
61	22 - 23	2	Australia, Nigeria
62	24 - 30	7	US(2), Australia(4), Rhodesia Nyasaland
63	31 - 32	2	Australia, Peru
64	33 - 37	5	Australia, Austria, France, Italy, Germany
65	38 - 39	2	Australia, Greece
66	40 - 42	3	Australia(2), Spain
67	43 - 47	5	Australia(2), Austria, Canada, Spain
68	48 - 52	5	Australia, Austria, France, Canada(2)
69	53 - 54	2	Australia, Italy
70	55 - 57	3	US, Canada(2)
71	58 - 60	3	Israel, Canada(2)
72	61	1	US
73	62 - 63	2	EEC(Italy), Canada
74	64 - 66	3	US, Canada, Australia
75	67 - 71	5	Australia(4), New Zealand
76	72 - 83	12	US, Canada(6), Australia(4), Finland
77	84 - 90	7	US, Canada, Australia(4), EEC(UK)
78	91 - 97	7	US(2), Australia(4), EEC
79	98 - 101	4	US(2), Norway, Iceland
80	102 - 108	7	US(2), EEC(2), EEC(UK), Australia, Spain
81	109 - 110	2	Canada, EEC(UK, Ireland)
82	111 - 115	5	Canada(2), Australia, EEC, Switzerland
83	116 - 120	5	US(2), Australia(2), EEC(France, UK)
84	121 - 122	2	EEC(France), Chile
85(March)	123	1	Canada

Table 3 : Summary of Article XIX Actions taken by Contracting Parties

Country	50 - 59	60 - 69	70 - 79	80 - 85(March)	Total
	(year of introduction)				
Australia	2	15	17	4	38
US	11	3	9	4	27
Canada	2	3	13	4	22
EEC	-	-	3	7	10
Austria	1	3	-	-	4
Greece	2	1	-	-	3
Spain	-	2	-	1	3
Germany	1	1	-	-	2
France	-	2	-	-	2
Italy	-	2	-	-	2
Nigeria	-	1	-	-	1
Rhodesia Nyasaland	-	1	-	-	1
Peru	-	1	-	-	1
Israel	-	-	1	-	1
New Zealand	-	-	1	-	1
Finland	-	-	1	-	1
Norway	-	-	1	-	1
Iceland	-	-	1	-	1
Switzerland	-	-	-	1	1
Chile	-	-	-	1	1
TOTAL	19	35	47	22	123

Table 4 : Composition of Article XIX Actions

Duration	No. of Invocations	Percentage of Total Invocations	Relevant Item No. in the Analytical Index
≤1 yr	26	24.53	5, 9, 13, 28, 33, 38, 45, 48, 50, 51, 52, 58, 59, 62, 63, 71 78, 81, 92, 103, 105, 106, 110 113, 114, 116
1yr - 2yr	19	17.92	12, 17, 18, 20, 26, 30, 46, 57 65, 67, 68, 70, 86, 88, 95, 96 100, 107, 112
2yr - 3yr	13	12.26	31, 40, 72, 74, 77, 79, 80, 82, 83, 87, 93, 99, 121
3yr - 4yr	18	16.98	10, 22, 36, 42, 49, 54, 55, 56 64, 75, 84, 90, 94, 97, 102, 109, 111, 118
4yr - 5yr	9	8.49	4, 8, 27, 29, 47, 89, 101, 104, 117
5yr - 6yr	4	3.77	1, 6, 73, 98
6yr - 7yr	5	4.72	2, 34, 35, 39, 41
7yr - 8yr	7	6.60	14, 16, 19, 21, 37, 60, 66
8yr - 9yr	1	0.94	11
9yr - 10yr	1	0.94	7
10yr - 11yr	1	0.94	25
11yr - 12yr	1	0.94	24
12yr - 13yr	-	-	-
13yr - 14yr	1	0.94	3

Note : This table covers only the 106 "completed" Article XIX actions