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THE URUGUAY ROUND**

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Negotiating Group on Safeguards

US THOUGHTS ON SAFEGUARDS

Communication from the United States

The attached working paper is being circulated at the request of the Office of the United States Trade Representative.

The Uruguay Round Negotiating Group on Safeguards is faced with two fundamental, somewhat contradictory challenges: 1) to provide clearly-elaborated rules and disciplines governing safeguards measures, while 2) making the GATT safeguard provision sufficiently dynamic and credible so that nations will act under it, rather than outside of it. Participants must carefully weigh these factors when developing a comprehensive safeguards agreement.

The U.S. supports clarifying and expanding the rules and disciplines which should govern safeguard actions. It is critical that clear and enforceable rules be provided to govern safeguard actions if the GATT is to remain a relevant and dynamic institution and an open and liberal international trading system is to be maintained.

As stipulated in the Punta del Este Ministerial Declaration, elements to accomplish this purpose include, inter alia, transparency, coverage, objective criteria for action including the concept of serious injury or threat thereof, temporary nature, degressivity and structural adjustment, compensation and retaliation, notification, consultation, multilateral surveillance and dispute settlement. The United States fully endorses the need for incorporating these disciplines into a safeguards agreement. In our view, the crucial issue is how to deal with grey area measures.

The Secretariat has produced a fine report entitled "Inventory of Article XIX actions, and other measures which appear to serve the same purpose". The report indicates that there are currently more "grey area" measures in force than legitimate Article XIX measures. We must continue to examine why this is happening, consider how best to reverse the process, ask ourselves whether the multilateral trading system is better served by bringing these measures under GATT rules and, if so, consider how and under what conditions.

As the Secretariat's paper on grey area measures notes, countries have taken such actions (which are very often in the form of voluntary or involuntary bilateral restraint agreements) for a variety of reasons, including inter alia the desire to limit the extent of the protection to as few countries as possible, to address unfair trade problems, to avoid making an injury determination, and/or to avoid paying compensation or facing retaliation.

Countries also utilize other GATT articles, often under the balance of payments and unfair trade provisions, for essentially safeguard purposes. Efforts must be made in other GATT fora to address this concern and to ensure that all safeguard actions are taken under an appropriate safeguards mechanism.

Options

The safeguards issue has been, of course, discussed many times in the past. Nevertheless, the U.S. delegation believes that it would be useful to lay out in this "thoughts" paper a number of possible approaches for achieving our objective. We also emphasize, however, that this paper does not prejudge the position of the United States in the work of this Group.

1. All Safeguard Measures should be taken on an MFN basis

A safeguards agreement with a strict MFN requirement could be developed which sets out improved, explicit disciplines over the use of safeguard measures, including the elements cited above (injury, transparency, temporary, degressive, etc.) plus a clear requirement that safeguard measures be taken on an MFN basis. This option would prohibit the use of selective measures, require the immediate phaseout of such existing measures and subject those who continue to use them to counter measures. This Group has already before it for its consideration specific proposals to achieve this.

There is much to be said for this notion, as the spread of selective measures is arguably undermining the liberal trading system. Indeed, the MFN principle is a cornerstone of the GATT; the preamble of the Agreement calls for the elimination of discriminatory trade practices as a prerequisite for economic growth. Adherence to the MFN principle ensures that the CPs selling a good are the most competitive producers--not just the most adept or powerful negotiators. Conversely, selectivity moves trade away from the principles of the marketplace and into the political arena.

On the other hand, maintenance of a strict MFN principle may, in the final analysis, increase the tendency of countries to take what are essentially safeguard measures under other GATT provisions, such as the balance of payments and unfair trade provisions or outside GATT disciplines altogether. An improved GATT dispute settlement process should, therefore, accompany this strict safeguard discipline in order to discourage CPs from circumventing their MFN obligations.

2. Prohibit Selective Measures, but if taken, establish disciplines, including a means for phasing them out

The MFN principle would remain the only permissible basis for taking a safeguard action, as in option 1. Non-MFN measures would be prohibited. Option 2, however, would recognize that countries may nevertheless take grey area measures and establish procedures for addressing them. Such procedures would establish a mechanism for notifying selective measures to a safeguards committee and for phasing them out over an accelerated period of time and according to an agreed-upon timetable. Failure to do so would lead to countermeasures.

Establishment of a process for increasing transparency and phasing out existing and future selective measures would help users bring their actions into conformity with an MFN-based safeguards agreement in an orderly manner, while recognizing domestic adjustment needs and problems confronting importing countries. CPs would benefit from increased transparency and the imposition of rules to prompt elimination of these measures. Furthermore, subjecting such measures to countermeasures would deter their use.

This option, however, would signal a shift, albeit limited, from a strict MFN requirement. As in option 1, it may increase the tendency of countries to take safeguard measures under other GATT provisions or outside of GATT disciplines entirely.

3. Make MFN the norm, but permit consensual selective actions under certain criteria

Under this option, the MFN principle would be retained as a norm, but countries would be permitted to take selective safeguard actions within a strict set of disciplines. The rules would be designed in such a way to give countries an incentive to act on the basis of the MFN principle. The agreement would set out general disciplines that would apply to

all safeguard actions. Such disciplines would include, among other things, a requirement for a finding of serious injury as well as a limited duration on the safeguard measure. Moreover, selective safeguard actions taken on a consensual basis would be subjected to additional disciplines. For example, there could be a limit on the number of countries with whom selective actions could be taken, and a more rapid phaseout than for MFN measures. Affected third countries would have the right to review such measures with respect to the possible diversion of trade.

All safeguard actions, both MFN and selective, might be reviewed by the safeguards committee for their consistency with the rules and their impact on member countries. There would be a possibility for the safeguards committee to relieve a country taking an MFN measure of compensation or retaliation, provided the measure was found to be consistent with the rules.

This option would provide importing countries with flexibility in order to craft an effective safeguard process for an affected industry, while establishing more discipline than currently exists on selective safeguard measures. In this environment, importing countries would be less inclined to take safeguard measures outside of a GATT safeguard discipline.

Conversely, permitting selective measures only under limited circumstances may not provide enough incentive for countries to act under a GATT safeguard discipline.

4. Legitimize Consensual Selective Measures

Under this option, MFN measures and selective measures taken on a consensual basis would receive equal treatment. Countries would be free to choose between MFN safeguard measures and selective safeguard measures taken on a consensual basis. All such measures would be subject to the same set of disciplines, with no distinction. All selective measures would, of course, require the approval of the exporting countries involved, and affected third countries would have the right to review such measures with respect to the possibility of trade diversion. All safeguard measures could be subject to review by the safeguards committee.

A safeguards agreement based on this option would bring under the safeguards committee's review a broad range of safeguard measures and provide transparency and discipline over their use. Countries would no longer feel as compelled to take safeguard actions under other GATT articles or to go outside the GATT process altogether.

On the other hand, this option would signal a shift away from the MFN principle as the cornerstone of Article XIX, and would thus remove an important constraint to CPs considering such actions.

5. Legitimize unilateral selective safeguard measures

Under this option, a country taking a safeguard measure would be permitted to impose selective measures, without obtaining the consent of the affected exporting country or countries, subject to the overall disciplines of the agreement. As the most permissive option, such an approach would maximize the flexibility of countries to take selective actions under a safeguards agreement, albeit with its strengthened disciplines.

All too often one learns of safeguard measures being taken with little or no notification or opportunity to consult, an indefinite duration and no degressivity, or without any demonstration of injury. Even this least ambitious option might, then, if incorporated into a safeguards agreement, bring greater discipline over today's undisciplined reality.

This option would have severe negative implications for the MFN principle. Allowing unilateral selectivity would: 1) increase protectionism, since selective trade restrictions are easier to implement than MFN measures; and 2) encourage a myriad of separate trade agreements among countries. World trade would likely decrease and would be based increasingly on what a CP was able to negotiate with its trade partners rather than what it was able to produce most efficiently.

Concluding Thoughts

Accepting options 4 or 5 would call into question certain principles upon which the General Agreement was built and which continue to have validity today. Is it worthwhile, or necessary, to abandon the MFN principle in order to achieve other important disciplines on safeguard measures? Is it certain that loosening the ties to MFN would provide sufficient incentive for countries to take safeguard measures consistently and in a disciplined fashion under Article XIX?

This paper presents questions and options which we believe must be confronted directly. The options presented here--and there may be others--need to be examined in terms of their advantages and disadvantages, and their costs and benefits, as we proceed with the task of seeking a workable and comprehensive safeguards agreement.