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

NEGOTIATING GROUP ON SAFEGUARDS
Meeting of 7 and 10 March 1988

Note by the Secretariat

I. General

1. The representative of China delivered a statement on its position on safeguards. The full text of the statement is contained in document MTN.GNG/NG9/W/14.

2. The representative of India introduced a working paper prepared by his delegation, as a contribution for furthering work in the area of safeguards. Many delegations welcomed this paper as a constructive input to the debate, but said that since they had only just heard the proposal, they would like to revert to it during the next meeting of the Group. The paper is contained in document MTN.GNG/NG9/W/15.

II. Examination of individual specific elements: "serious injury and threat thereof"

3. The Chairman recalled that the Group had, during its last meeting held in December 1987, agreed to his suggestion to begin examination of individual specific elements at the present meeting, starting with the concept of "serious injury and threat thereof", on the understanding that nothing would prevent the discussions of related issues when this element was being addressed (MTN.GNG/NG9/4, paragraph 9). He said that he did not expect the Group to be able to define serious injury or threat thereof, but it was essential for the Group to exchange ideas and try to arrive at some common understanding of the concept. His own understanding was that the discussions should not be confined only to Article XIX itself, but should address the subject of Article XIX. In other words, the Group should be discussing serious injury and threat thereof which were caused by increase in imports under fair trade conditions. Unfair trade conditions were covered by other GATT Articles or negotiations in other fora. The Group could propose changes to Article XIX or a new agreement on safeguards, provided that it was clearly understood that the subject matter concerned increased imports under fair trade conditions. It was important that all the elements mentioned by delegations as criteria for determining injury or threat of injury, such as fall in production, loss of profits and sales, unemployment etc., should be of a serious nature. It followed that one was

GATT SECRETARIAT
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not addressing the normal effects of fair trade on the domestic industry, nor the problems arising from fair competition, changes in fashion or in demand structure. One was dealing with emergency situations where sharp increases in imports were causing serious injury or threat thereof. After the subject matter was identified, the Group should then address related questions such as whether imports were to be considered as a cause, a substantial cause or a necessary cause of serious injury or threat thereof. Another related matter to be discussed was what producers constituted the domestic industry.

4. The representative of one delegation said that if the Group was addressing not only the traditional Article XIX, but also "grey-area" measures and situations not covered by the GATT, then he would have difficulties in assigning importance to the discussions on injury. In a situation where difficulties were caused by an industry's inability to adjust and remain competitive, the appropriate question to address would be structural adjustment. He asked if it was the intention of the Group to punish a successful fair competitor by defining the injury he was allegedly causing.

5. Another delegation said that discussions on injury were somewhat prejudiced in the sense that one could not speak of injury in the case of competition under fair trade. Adjustment measures should therefore replace import relief measures as the right kind of remedy to problems faced by industries which had lost their competitiveness. Such measures would also prevent the transfer of the burden of adjustment from the importing country to the exporting country. It was difficult to define "injury", and even more difficult to define "threat of injury", which could be more effectively dealt with under Article XXVIII of the General Agreement. While there was an obvious need to deal with the question of injury in the application of safeguard measures, but any attempt to change or modify Article XIX into an MFA-type clause would be very harmful to international trade and would stifle the efforts to strengthen GATT rules.

6. One delegation said that, apart from Article XIX actions, there were other border barriers to imports which had either very different standards on injury or no standard at all. Actions under Protocols of Provisional Application and the raising of unbound tariffs required no injury test. Recent analysis showed that one of the major attractions of "grey-area" measures was the absence of any demonstrated injury requirement. Some healthy industries had their home markets protected against import competition under the blanket of Article XVIII which applied quite different standards. A serious injury standard should apply to all kinds of measures in order to eliminate a built-in bias arising from the fact that there were tougher standards for Article XIX actions and lower or no standards for other alternative measures. All kinds of safeguard actions should be put under well-defined multilateral rules.

(a) National legislation and procedures to determine serious injury and threat thereof

7. The representative of the United States referred to document MTN.GNG/NG9/W/13, an information paper on the US legislation and procedures for making injury determinations in safeguard cases. He said that the United States had developed over time a set of transparent and objective procedures for making such determinations. Section 201 of the US Trade Act of 1974 was the law to implement Article XIX of the General Agreement. It provided that the US International Trade Commission, an independent, fact-finding agency of the US Government, was to determine "whether an article is being imported into the United states in such increased quantities as to be a substantial cause of serious injury, or threat thereof, to the domestic industry producing an article like or directly competitive with the imported article". The Commission considered this standard to require that all of the following three conditions be satisfied: (i) imports were in increased quantities; (ii) the domestic industry was seriously injured or was threatened with serious injury, and (iii) such increased imports were a substantial cause of the serious injury or threat thereof to the domestic industry. The Commission had six months to complete its investigation and to transmit its report to the President. It was required to hold a public hearing in connection with all Section 201 investigations. In making its determination, the Commission had to decide what producers constituted the domestic industry that was allegedly being seriously injured or threatened with serious injury. The domestic industry consisted of the producers of articles that were "like or directly competitive" with the imported articles. "Like" articles were defined as those which were "substantially identical in inherent or intrinsic characteristics" and "directly competitive" articles as those which "although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes". The increased imports requirement provided that the increase had to be "either actual or relative to domestic production". In determining whether imports had increased, the Commission generally examined import trends over the most recent five-year period. The US statute did not define the term "serious injury or threat thereof", but rather set forth certain economic factors which the Commission was to take into account. With respect to serious injury, such economic factors included, but were not limited to, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or under-employment within the industry. With respect to threat of serious injury, the factors included a decline in sales, a higher and growing inventory and a downward trend in production, profits, wages, or employment in the domestic industry concerned. The term "significant idling of productive facilities" included the closing of plants or the under-utilization of production capacity. The term "threat" was defined as occurring "when serious injury, although not yet existing, is clearly imminent if import trends continue unabated". The Commission generally interpreted this definition to require that serious

injury be a virtual certainty in the foreseeable future rather than a mere possibility. As for the term "substantial cause", Section 201 defined it as "a cause which is important and not less than any other cause". Thus, this criteria required a weighing of causes.

8. The representative of the EEC said that the Community's Regulation 288 was the equivalent of Section 201 of the United States legislation. The Regulation contained precise elements in determining injury which allowed a realistic implementation of the provision of Article XIX at the national level.

9. The representative of Australia said that the Industries Assistance Commission Act of 1973, as amended, was the current relevant legislation governing all changes to Australian protective measures including Article XIX actions. Any decision to take Article XIX actions was referred to the Industries Assistance Commission (IAC) which invited submissions from all interested parties, conducted public enquiries and prepared reports and made recommendations. Article XIX actions might arise from IAC enquiries under either Section 22 or Section 29A of the IAC Act. Section 22 of the Act set general policy guidelines for the Commission which included encouraging efficient Australian industry, facilitating structural adjustment, and recognizing the interests of other industries and consumers. Section 29A set policy guidelines for enquiries for temporary assistance and specified that such assistance should be provided "only if there has been a change in the circumstances in the relevant industry that (a) is largely outside the control of the industry, (b) is peculiar to the relevant industry, and (c) has caused, or threatens, serious injury to the relevant industry". The IAC enquiry process culminated in a published report that included recommendation for action. These recommendations were considered by a number of Government departments to assess their implications including Australia's obligations under bilateral or multilateral trade agreements such as the GATT. The report and subsequent comments were submitted to the Government for a final decision. If Article XIX actions were taken, notification would be made to the GATT. The Industries Assistance Commission legislation did not explicitly specify objective criteria with regard to the determination of serious injury or threat of injury when decisions were made to take Article XIX actions. However, the IAC enquiry process traditionally involved detailed analysis of the conditions of the relevant industry, such as import, employment, investment and profitability. It also took into account the current circumstances of the domestic market of the industry like level of imports, market shares, orders and stocks, and other factors affecting the local industry's competitive position.

(b) Objective criteria

10. Many delegations stressed that common objective criteria should be established for the determination of serious injury and threat thereof, in order to avoid arbitrary use of safeguard measures. One delegation said

that a balance had to be struck in order to also take into consideration the interests of exporting countries. Some stated that the rules governing injury determination had to be based on the provisions of Article XIX, even though they could go beyond those provisions. Many delegations said that the rules should be clear, transparent and stringent and that factors to define injury should be concrete and quantifiable. Some pointed out that it was unrealistic to set quantitative standards or automatic criteria for the determination of injury because not all factors were quantifiable and mathematical formulae could not be applied to all sectors of industry. Instead, economic factors and indices should be considered together with some subjective parameters. It was not possible to determine the order of priority for various factors when determining injury or threat thereof.

11. In the discussion, it was suggested that the following factors should be considered in the determination of serious injury and threat thereof: output, sales, inventories, cash flow, liquidity, market share, growth, profit, prices, domestic employment, wages, capacity utilization, productivity, return on investment, ability to attract debt and equity capital, capital movement, rate of increase in imports, changes in technology and changes in consumer preference. Several delegations pointed out that factors like changes in technology and consumer preferences should not be taken into account because they were irrelevant in the determination of injury caused by imports, and were too subjective.

12. One delegation said that safeguard actions should not be taken against small suppliers from developing countries whose market shares were less than an agreed minimum of the import market in the specific product. Several delegations said that the potential of imports from developing countries, especially small suppliers, to cause injury was extremely limited and that this was an important point to be included in the determination of serious injury.

13. One delegation disagreed with the suggestion that "threat of injury" should be dealt with by Article XXVIII negotiations and not in the context of safeguards. Another delegation stated that "threat of injury" should be included in the scope of safeguard actions because a threat represented an emergency. This delegation suggested that the recommendations covering the determination of "threat of material injury" in the Committee on Anti-dumping could be used as a reference by this Group.

(c) Cause and effect of serious injury and threat thereof

14. Many delegations said that it should be demonstrated that the cause of serious injury and threat thereof derived from sharp increases in imports, and that a major part of domestic producers were adversely affected. Some delegations said that the causal link between increased imports and the overall decline in the conditions of domestic producers had to be clearly established. One delegation said that if there were a multitude of causes,

then it had to be established that increased imports was the principal cause, not just an important or substantive cause. Another delegation said that the difference between absolute and relative increases in imports as well as the difference between seasonal trends and sudden and substantial increases in imports had to be considered when determining serious injury. A fundamental objective of the General Agreement was the expansion of trade which entailed increases in imports and exports. Hence an increase in imports per se should not be the determining basis for emergency action, especially in the case of well-established industries in developed countries.

15. One delegation said that, while not directly related to the existence of injury, it was important that the public interest be taken into account when any safeguard action was under consideration because greater aggregate injury could be caused to the economy as a whole through harm to consumers, competition and the users of imputs and components.

(d) Domestic producers of like or directly competitive products

16. Many delegations stressed that "domestic producers" and "like or directly competitive products" had to be clearly defined in order to avoid the abusive use of safeguard actions. One delegation said that there should be limits on both the up-stream and down-stream of products to qualify as like or directly competitive products.

17. One delegation said that safeguard measures must be conceived and applied strictly to domestic industries in the domestic market only, and not given wider application through measures sought in respect of third markets. In industries where there might be a prevalence of multinational companies and where practices such as transfer pricing or restrictive business practices within industries or between industries across borders occurred, objective information concerning the health of the domestic industry would be difficult to obtain. In such cases, "domestic producers" had to be clearly identified.

18. One delegation said that, in respect of customs unions, the determination of injury should be based on the effects on producers of the entire customs union, and not on individual member states.

(e) Transparency and multilateral review

19. One delegation stated that transparent procedures of investigation to determine the existence of serious injury was the most effective guarantee of uniform and equitable practices. One other delegation commented that transparency on its own was not a guarantee but had to be accompanied by a set of multilaterally agreed rules.

20. Several delegations said that a multilateral surveillance body should be set up within GATT. This body should be one that was in a position to pronounce on the existence or the absence of serious injury or threat

thereof, and the causal link between imports and serious injury or threat of serious injury. Several other delegations said that the determination of serious injury or threat thereof and the decision to take appropriate safeguard actions should rest with importing countries and it was not appropriate to authorize such powers to an international body. One delegation suggested that a sub-committee of the Safeguards Committee could be set up to deal with disputes or problems arising from different interpretations on factors leading to safeguard actions. One delegation suggested that the objectivity and transparency of mechanisms for determining injury could be substantially enhanced by techniques such as making the assessment process adversarial and quasi-judicial. During any subsequent multilateral review the examinations could be more effective when the assessment process involved more discretion and less transparency.

(f) Other

21. One delegation said that the distinction between agricultural and manufactured products should be drawn in considering the question of safeguards. Another delegation said that the Group should examine the link between Article XIX and Article XI. The discussions on "grey-area" measures would be greatly facilitated if it was established that all non-tariff restrictions, unless permitted by an exception under the General Agreement, were prohibited.

22. In response to a question raised by a delegation, the representative of the United States said that the procedures the US Government took in the determination of injury under Article XIX cases were followed in some but not all cases when the United States took "grey-area" measures. This was because "grey-area" measures were taken for a variety of reasons. As far as the United States was concerned, these reasons had not been associated with the inability to obtain a determination of serious injury. He gave the example of the US steel programme and said that a determination of serious injury had been made under a Section 201 investigation, but that the President had rejected the recommendation that import relief measures be taken under that Section but instead directed the Administration to seek voluntary export restraints with those countries whom the United States regarded as trading steel products unfairly.

23. One delegation commented that from the US statement above one could observe that Article XIX and "grey-area" measures were not clearly related. Some might think that "grey-area" measures were exclusively alternatives for Article XIX actions, when in fact they were actions against a mixture of fair and unfair trade. It also seemed that certain actions might be taken at the request of unfair traders. The reason for this was that the exporter was not seen as an unfair trader and was able to, for instance, avoid anti-dumping actions. Hence, voluntary export restraint arrangements could be the result of both fair and unfair trade. However, if a particular VER derived from unfair trade, it should be susceptible to a test of material injury under Article VI and not serious injury under Article XIX.

(g) Chairman's sum-up

24. The Chairman summed up the discussions on his own responsibility by drawing attention to some points which he had personally noted. The contributions by several delegations on their national legislation and procedures for the determination of serious injury and threat thereof had been very helpful to the discussion. Overall, he found that the Group should address problems arising from fair trade conditions, because unfair trade conditions were dealt with by other Articles of the General Agreement or by other GATT fora. There was still no agreement on the question of whether an increase in imports should be sharp, sudden, or unforeseen, nor was there a consensus on whether the increase should be absolute or relative. There seemed to be agreement that there should be a direct, demonstrable causal link of imports to injury, although there were various opinions on whether increase in imports should be an essential, substantial, or important cause. The listing of the various criteria for the determination of serious injury or threat thereof was an important one, and the Group seemed to agree that these criteria should be objective, demonstrable, and quantifiable in most cases. The Group had been looking at the overall decline of the conditions of the domestic industry as a whole, which did not necessarily mean all but certainly the majority of domestic producers. One opinion was that determinations of injury should be made by the national authorities and another was that such determinations should be made by an international body. The Group had not addressed thoroughly the concept of "threat of injury", but it had been indicated that a threat should also be demonstrated, and that it had to be a virtual certainty and not a mere possibility. The Group had also touched on the questions of "like or directly competitive products".

III. Future work and date of next meeting

25. The Chairman said that his intention was to continue the approach of addressing individual specific elements during the next meeting of the Group, at which time it should explore in greater depth the concepts of "threat of injury" and "like or directly competitive products", and begin examination of concepts like "temporary nature" and "degressivity" and other related issues.

26. It was agreed that the next meeting of the Group should be held during the week beginning 30 May 1988, and that a further meeting should take place during the week beginning 11 July 1988.