

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG9/W/20
14 July 1988

Special Distribution

Original: French

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

SUBMISSION BY SWITZERLAND

The attached paper is being circulated to members of the Group at the request of the delegation of Switzerland.

The following reflections and proposals refer to and supplement the Swiss submission of 2 October 1987 (MTN.GNG/NG9/W/10).

I. Introduction

1. Safeguard clauses have a two-fold function: on the one hand, by offering certain possibilities for easing contracted obligations, they encourage importing countries to enter into commitments which would otherwise be of unconditional rigidity; on the other hand, the discipline that such clauses establish shelters exporting countries from arbitrary derogations. In other words, safeguard clauses facilitate liberalization and ensure that the rights and obligations contracted at multilateral level are kept in balance.

It is this two-fold rôle that makes safeguard clauses one of the keystones of GATT: indeed, the world trading system will function only to the extent that its safeguard rules are applied. Safeguard measures which are unlawful or are not covered by existing provisions - these make up the "grey area" - render the system inoperative and deprive it of credibility. In order to eliminate the grey area and thus restore the functioning of GATT, it is therefore necessary to improve the existing rôles and fill the gaps of the present system.

2. To be "adequate", safeguard clauses must take account of the situations they are intended to cover. Since there may be many differences in those situations, one global safeguard clause - under which one single measure would be applicable, a priori according to the same modalities, to all possible cases - is not conceivable. On the contrary, specific clauses are necessary, suited to the requirements of the various categories of cases.

These situation categories are summarized in the attached table (Annex 1).

3. At this stage of the discussion, the following considerations are focused on what are termed grey-area measures, it being understood that other safeguard cases can be examined at the appropriate time.

GATT SECRETARIAT
UR-88-0345

II. Considerations regarding cases of structural difficulties

1. As one can see, in the majority of cases grey-area measures are taken in response to difficulties of a structural character. Can one start from the premise that Article XIX, in its present formulation, is applicable to this type of situation?

2. In certain circumstances, Article XIX makes it possible to alleviate the unforeseen effects of action by the importing country itself - i.e. the effects of its import liberalization - by spreading them over time. Since such liberalization normally involves dismantling barriers at the frontier, safeguard action against its unforeseen effects logically consists of temporarily restoring those same barriers. In parallel, the "retaliation" envisaged - there is no question of compensation in Article XIX - comprises analogous suspension, under supervision by the CONTRACTING PARTIES, of the concessions granted as counterpart for the liberalization that the safeguard measure has postponed.

3. The situation is different in regard to grey-area measures, most of which are taken by reason of structural difficulties. Here, the conditions of competition have not been affected by any modification of trade régimes so that the importing country can neither neutralize, by offsetting it, any measure of unfair competition taken by the exporting country, nor postpone the effects of modification of its own import régime, as permitted under Article XIX. In fact, the "injury" to the importing country stems solely from loss of competitiveness of its own domestic industry.¹

4. Structural adjustment must be effected by market forces and without State intervention. For political reasons, it would be unrealistic to leave aside safeguard measures in cases of structural difficulties for this would imply abandoning any attempt to eliminate the grey area. One must therefore establish rules creating a discipline consistent with the GATT philosophy (competition) in regard to both measures at the frontier and domestic measures taken to deal with structural difficulties.

¹ Nevertheless, certain grey-area measures seem to have been taken in respect of unfair competition (e.g., in place of countervailing duties). Such situations generally occur when the exporting country is also faced with structural difficulties that have led it, for example, to support the "re-dimensioning" of one of its industries. In other terms, and contrary to the situation covered by Article XIX - where one importing country alone is in difficulty - the structural difficulties can affect one production sector in a number of countries simultaneously (e.g. steel). If, in such conditions, the applicable safeguard clause were Article XIX, there would inevitably be a proliferation of simultaneous restrictions on trade which, instead of remedying the national and international situation, would contribute to aggravate it still further. In contrast, measures allowing real restoration of the competitiveness of the industries concerned would have an incentive effect on international trade.

II. Elements to be negotiated

1. In the first place it would seem desirable to agree that any safeguard measure in respect of fair competition should operate in a non-discriminatory manner (erga omnes).

2. Next, one should differentiate clearly between cases resulting from a modification of trade régimes (Article XIX) and cases in which those régimes have not been modified (structural difficulties).

3. It would thus be desirable to confirm that Article XIX on "emergency action on imports of particular products" is applicable only where the importing country has modified its contractual trade régime. Accordingly, recourse to Article XIX it should be permitted only during a certain period (five years, for example) after the entry into force of a new concession and solely in response to difficulties that have resulted directly from it.

4.1 New provisions in respect of "other measures concerning particular products" should be elaborated so as specifically to cover the case of structural difficulties. Those provisions could contain the following elements:

4.2 In the first place, it would be appropriate to confirm that:

- structural adjustment is a permanent necessity tied to competition and in the first instance is a matter within the responsibility of the industry concerned;
- consequently, government intervention should remain of a subsidiary character and be reserved for cases where an industry's loss of competitiveness results in a substantial increase in imports.

4.3 The measures in question are designed to support the structural adjustment effort of the producers concerned in order to:

- (a) restore their competitiveness; or
- (b) progressively dismantle a production activity with a view to closing it down.

4.4 In the event that a government finds itself obliged to intervene to support an industry's structural adjustment efforts, it should have the choice between:

- internal measures (e.g. investment credits or equivalent measures);

- measures at the frontier.¹

4.5 As regards internal measures, it would be appropriate to stipulate:

- the nature of permitted measures; and
- the discipline to be observed in their application.

Permitted internal measures must necessarily be of such a nature as to act on the competitive capacity of the industry in difficulty, and not on the conditions in which it operates. Any such measure must comprise punctual action (e.g. investment credit facilities) that can bring durable consequences (e.g. rationalization). Measures whose effect would last only so long as they remain in force (e.g. lowering of selling prices through subsidies) should be banned. Such measures should be subject to a strict discipline which, to be effective, should primarily bear on verifiable elements such as the form of the measures concerned, their implementing modalities and their duration. Any infringement of the discipline rules should occasion the application of strict and unconditional sanctions.²

¹It should be borne in mind that in any event, both measures at the frontier (imposed by the importing country or, as in the grey area, by the exporting country) and internal measures constitute government interventions likely to distort the free play of competition. Both these types of measure constitute equivalent departures from the orthodoxy of GATT and of any liberal economic order. Nevertheless, they differ from each other in that internal measures can directly support the structural adjustment efforts of an industry that is in difficulty, whereas measures at the frontier are only symptom therapy.

²It would perhaps seem desirable also to define the conditions in which recourse would be had to such measure. In the case of structural difficulties, however, the justification of a safeguard measure can depend on a considerable number of economic and political factors; it would be very difficult through rules alone to estimate and weigh those factors in advance with sufficient precision to ensure objective and foreseeable application. Before deciding that a measure is justified, contracting parties should be able to guarantee its result. Even if that were possible, by so doing they would be sharing in a responsibility that should be incumbent only on the government and the economy of the importing country. It would be difficult for contracting parties to envisage sanctions against measures that they themselves had advocated. For all these reasons, it would no doubt be preferable not to have any rules on the conditions for recourse to safeguard measures in the event of structural difficulties, for such rules might weaken the discipline aimed at instead of strengthening it.

In order to prevent any misuse, i.e. a situation where an internal measure presented as a safeguard might be used to conceal a subsidy, payments out of public funds should be reimbursable. Indeed, reimbursement would constitute the only tangible proof of the fact that the measure has indeed succeeded in restoring an industry's competitiveness. Clearly, reimbursement is impossible if industries close down their activities. That is why it would be appropriate to establish a rule under which, if an industry has not closed down its production within (x) years after the entry into force of a measure in its regard, it must reimburse an amount equivalent to that involved in the measure within a period not exceeding (x) years.

4.6 As regards measures at the frontier that modify conditions of competition unilaterally to the detriment of fair foreign competitors, the rules should be more restrictive than those in respect of internal measures. Such rules could in particular cover the following elements:

- the measures will be non-discriminatory;
- they will be of short duration and will be abolished as rapidly as possible, but not later than (x) years after their entry into force;
- they may be extended only once for a period of (x) years;
- their progressive dismantlement will take effect not later than (x) months/years after their entry into force;
- they may not be reintroduced before (x) years have elapsed since their elimination.

Since the difficulties which are the grounds for such measures are not caused either by infringement of any commitment under the General Agreement, or by any other modification of the trade régime, there is no objective yardstick for determining the appropriate coverage of measures at the frontier in the event of structural difficulties.

That is why it would no doubt be desirable also to provide that such measures will not reduce imports to a level below that recorded during a recent reference period (to be defined).

4.7 To ensure the proper functioning of the provisions proposed, adequate transparency of the measures taken will be necessary:

- Before taking any of the measures in question, contracting parties will advise the CONTRACTING PARTIES as long in advance as possible, through a notification containing all relevant information as to its nature, objectives and expected effects, volume and likewise, where appropriate, the duration of its application;

- they will offer to interested contracted parties the possibility of holding consultations;
- they will report periodically - every (6) months - on the application of their measures, dismantlement thereof or on reimbursement of funds made available;
- any contracting party may, after consultation with the contracting party concerned, bring a non-notified measure to the attention of the CONTRACTING PARTIES.

4.8 The CONTRACTING PARTIES will examine notifications received and periodic reports. They will determine whether the measures have been taken and are being applied in accordance with the established rules. After adequate notice, any infringement of the relevant rules which the CONTRACTING PARTIES find to have occurred should be liable to unconditional collective sanctions which may consist of a temporary increase in customs duties on imports from the country responsible for such infringement.

5. Safeguard clauses and their application should be supervised and managed within GATT by a Committee on Safeguards.

6. The discipline to be established for the type of subsidy or measure with equivalent effect envisaged by the provisions mentioned above must be consistent with the general disciplines to be negotiated in regard to subsidies (Article XVI).

7. Safeguard clauses in the area of agriculture must be negotiated in the negotiating group on agricultural trade which has primary responsibility for all aspects of agriculture.

IV. Conclusions

Most of the points mentioned can be further clarified and will then have to be negotiated. It would be desirable, nevertheless, for agreement to be reached by the end of the year on the following fundamental points:

1. Different safeguard measures will have to correspond to different situations. Accordingly, the General Agreement should contain as many safeguard clauses as there are types of situation to be covered. A standard safeguard clause is not desirable, whether in the form of a general clause, or in the form of extensive interpretation of one particular clause.

2. Difficulties of a structural character constitute a situation that is not specifically covered by the provisions of the General Agreement.

3. Having regard to the needs that emerge in practice, it is therefore desirable to fill this gap in the General Agreement through new provisions specially devised to cover this type of case.

In a second phase, the negotiation would bear on detailed definition of the disciplines that would govern application of the options open to governments so as to allow them to support the efforts of an industry faced with difficulties of a structural character.

ANNEX 1
Typology of Safeguards

Case no.	Situation	Subject of protection	Conditions of competition: yes no	Type of conditions	Origin of modification	Type of competition	Relevant provisions of GATT
1	Subsidies contrary to GATT	National producers of importing country	X	Commercial (micro-economic)	Exporting country (government)	Unfair	XVI, VI
2	Dumping	National producers of importing country	X	Commercial (micro-economic)	Exporter (private)	Unfair	VI
3	Unforeseen consequences of contractual liberalization	National producers or importing country	X	Commercial (micro-economic)	Importing country (government)	Fair	XIX
4	Balance of payments	National producers of importing country	X	Non commercial (macro-economic)	Fluctuations? Excessive disparities in exchange rates	Fair	XII, XVIII
5	"Infant-industries"	National producers of importing country	X	-	-	Fair	XVIII A
6	Drop in competitiveness	National producers of importing country	X	-	-	Fair	-
7	Public health, security, etc.	Other goods	X	-	-	Fair	XX, XXI

Remarks:

- This table gives a simplified typology, i.e. it is reduced to the principal cases encountered in practice. It does not, therefore, show all the cases that are logically conceivable.
- One will note that, for example, it does not include a (theoretical) case 4(a) in which trade conditions would be modified by a private importer; indeed, such a case could not be the subject of a safeguard to the extent that, in principle, no-one should gain any advantage from his own misdeeds.
- We have likewise deliberately refrained from attributing any origin to exchange-rate disparities.