

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG9/8

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Group of Negotiations on Goods (GATT)

Negotiating Group on Safeguards

MEETING OF 26 AND 28 SEPTEMBER 1988

Note by the Secretariat

1. The Negotiating Group met on 26 and 28 September 1988. The following paragraphs summarize statements made during the meeting. Efforts have been made to avoid reproducing points already contained in notes of previous meetings of the Group.

I. General

2. The spokesman for the European Communities expressed disappointment at the lack of progress in the negotiations and said that all participants were responsible for it. He said that any solution on safeguards would involve difficult political decisions. Great efforts should be made so that the Group could present some satisfactory sign of progress, if not a complete solution, to the Ministerial meeting scheduled for December 1988 in Montreal. He said that he had unshaken faith in the most-favoured-nation clause which was the back-bone of the GATT system and a safeguard against threats like those in the United States Trade Act. On the other hand, the positions of Hong Kong and India, stating that the m.f.n. clause was non-negotiable, had led to a lack of interest in the negotiations. Selectivity could cause a great deal of harm, but too rigid a position on the m.f.n. clause could be equally harmful. The solution should be found somewhere between the rigid and unconditional m.f.n., which could not solve problems, and selectivity, which contained an element of risks of arbitrariness and bilateralism. The solution should also include transparency and surveillance. These were two pillars on which an agreement could be built. The Group was bound to find a solution to the question of safeguards, otherwise the entire Uruguay Round would be meaningless.

3. The representative of Switzerland said that he shared the concern of the spokesman for the European Communities. The issue of safeguards had to be approached by all participants as a priority subject in the negotiations. It was perfectly clear that without disciplines on the temporary withdrawal of concessions, the concessions themselves would be annulled and trade liberalization would never be possible. Worse than that, the lack of discipline in safeguards would even become a lever of

pressure and threats. It was therefore imperative to ensure the stability of the safeguards régime, which would promote the predictability of the behaviour of trading partners and preserve the contractual nature of the multilateral trading system. He said that the question of m.f.n. or selective application of safeguard measures was an important issue but not the only issue; nor was it the first one that the Group should be dealing with. Discussions in the last fifteen years showed that safeguards was a difficult problem, which should now be tackled from a different angle, for instance, by shedding new light on the "grey-area" measures.

4. The representative of Brazil said that it was also his preoccupation that the lack of progress in the negotiations on safeguards might give a negative signal to Ministers meeting in Montreal and might cast a shadow over progress made in the entire Uruguay Round of trade negotiations. He was sure this was the preoccupation of all participants. He appealed to the Group to make some real progress before Montreal.

5. The representative of Egypt said that the subject of safeguards was particularly important to developing countries and to the GATT as a whole. The tempo of some other negotiating groups had been held back because of the lack of progress in the safeguards negotiations. The mandate for the Group on Textiles and Clothing referred to the integration of the textiles sector into GATT under strengthened rules and disciplines. Some delegations maintained the link between the negotiations on textiles and on safeguards, saying that the negotiations on textiles would depend on the development of negotiations on safeguards. Hence, developing countries were keen to see quick progress made in the Negotiating Group on Safeguards. It was inconceivable for the Group to go to Montreal with no progress, especially when the subject was identified by Ministers in Punta del Este as a target for early results.

II. Proposals by participants

6. In response to comments by several delegations on the Swiss proposal in MTN.GNG/NG9/W/20, the representative of Switzerland said that a safeguards clause had to refer to specific situations. The Swiss proposal did not imply that any structural difficulties would justify safeguard actions, nor would such difficulties constitute a pretext for governmental interventions. The "grey-area" was a gap which had to be filled because it was not covered by Articles XIX or XXVIII. Article XIX should be invoked only during a certain period, five years for instance, after the entry into force of a concession. This five-year time limitation would be a reasonable one because the purpose of Article XIX was to allow countries, as a result of unforeseen developments and of the effect of the obligations incurred by them, to lessen such effect by suspending the concessions and to adjust themselves gradually. Besides, if a concession had been granted a long time ago, it would be difficult to identify those affected by the withdrawal of that concession. That was the situation described in

Case no.3 of the Annex in document MTN.GNG/NG9/W/20. Article XXVIII negotiations would normally lead to permanent modifications of a given trade régime, unlike safeguard measures which by definition allowed only temporary modifications. This Article had its merits but, as with Article XIX, it could not deal with "grey-area" measures or structural difficulties. All safeguard measures in respect of fair competition should operate in a non-discriminatory manner. The typology as appeared in Annex I of the Swiss paper tried to provide a full list of safeguard clauses, including those contained in Article XVIII. The intention was to show the different characteristics and to draw comparisons of various cases. The idea was not to discuss all of them in the Group. The Swiss Protocol was not included in the Annex because it was not a safeguard measure. It was part of the system of GATT law.

III. Examination of individual specific elements

(a) Compensation and retaliation

7. One delegation said that Article XIX paragraph 3(a) was a crucial provision in the General Agreement as it represented one of the few instances in which unilateral retaliation was permitted. It was striking to note that the automatic retaliation permitted in this Article did not make any distinction between various situations under which safeguard actions were taken nor did it differentiate among the measures themselves. It would be interesting to explore if the Group could agree to limit retaliation only to cases where multilateral disciplines were not respected, or only to extensions of safeguard measures, or to measures which had exceeded a certain time span. Perhaps the Group could also agree that compensation and retaliation should be exempted in cases where safeguard actions were temporary and degressive in nature. Since the existence and proliferation of "grey-area" measures were closely linked to the fear of paying compensation and facing retaliation, to exempt these requirements might help to solve the problem of the "grey-area". One representative questioned the real benefit of compensation in economic terms and said that many beneficiaries would be unable to organize themselves in such a manner so as to realize the benefits of the compensations offered. One delegation supported this argument, and added that the history of GATT showed that the provision for compensation and retaliation was rarely used by small contracting parties and developing countries.

8. One representative said that to discourage governments from using safeguard actions too liberally, the provisions for compensation and retaliation should be retained. He did not believe that exemption from compensation and retaliation would persuade governments to transform existing "grey-area" measures into m.f.n. measures. Besides, any measure to legalize the "grey-area" would negatively affect the balance of rights

and obligations, to the detriment of small trading nations. Another representative said that the provisions for compensation and retaliation undoubtedly had a clear function to play and should be retained. Nevertheless, further thought should be given to the idea that harsher rules on compensation and retaliation be applied only to safeguard actions which did not respect the multilateral disciplines. There might be room for loosening such requirements if the disciplines were observed. One delegation pointed out that Article XIX paragraph 3(a) was in fact very severe because it not only referred to retaliation in terms of withdrawal of concessions but also in terms of suspension of other obligations. It was therefore open for a contracting party who was not happy with a safeguard measure, be it a developed or developing country, to retaliate by withdrawing, for example, the m.f.n. provision vis-à-vis the country applying that measure if it obtained authorization from the CONTRACTING PARTIES.

(b) Notification and Consultation

9. One delegation said that there was a wide disparity in the contents of the notifications made in respect of past safeguard measures. It was clearly impossible to have the same details in every case, but it would be useful if there could be some minimum requirements, or some indications as to the basic information which would have to be notified under the new comprehensive agreement. There was need for the agreement to attain maximum transparency, with provisions to ensure that measures with safeguard effects, not necessarily taken in conformity with the comprehensive agreement, would be brought to the attention of the Safeguards Committee which might be established. Reverse notifications should also be permitted. Article XIX provided for prior consultation, but this requirement could be waived under critical circumstances. This element must be retained because safeguard actions under certain circumstances had to be taken with a particular urgency. Article XIX paragraph 2 provided that countries taking safeguard actions should afford the CONTRACTING PARTIES an opportunity to consult. This opportunity had not been used frequently in the past. The Negotiating Group should examine the relationship between the bilateral and multilateral aspects of the consultations, the latter presumably would have to be conducted by the Safeguards Committee. In the context of enhanced surveillance, perhaps participants should agree that the Safeguards Committee would have a vital rôle to play in notifications and consultations in future.

10. One representative said that prior consultation was really lacking in safeguard actions taken in the past. Some sort of mechanism on prior consultation should be developed so that any emerging trade problem could be dealt with before a crisis developed. Another representative said that prior notification and other requirements concerning consultation would certainly bring a degree of transparency, however, these obligations should

not become so onerous and burdensome as to lead parties to circumvent them by taking actions outside Article XIX.

(c) Coverage

(i) Product coverage

11. The Chairman said that he had detected from previous discussions of the Group a general feeling in favour of a comprehensive agreement on safeguards covering all products. If there were decisions during the Uruguay Round that special régimes should govern the trade of particular sectors like agriculture, textiles, high-technology goods or some other sectors, then these régimes would naturally prevail in respect of those sectors. The purpose of the Group was to attempt to negotiate a comprehensive agreement which should cover all products.

12. The Chairman's statement was supported by several representatives who spoke on the topic.

(ii) Geographic coverage

13. The Chairman recalled that in the general debate, much was said of the principle of non-discrimination, selectivity and the "grey-area" measures. Several proposals submitted by participants insisted on the m.f.n. principle as the basis for the safeguards agreement. Some participants considered that "grey-area" measures were illegal, or at least inconsistent with the basic rules of the General Agreement. In their views, the negotiations were expected to change rules but not basic principles. In this context, it had been argued that punitive measures or sanctions against unfair practices such as dumping could be selective in nature. On the other hand, other participants had said that selective measures were not necessarily illegal or inconsistent with the General Agreement because they were taken in a legal void. They applied mostly to situations not regulated by Article XIX. While not rejecting the m.f.n. principle, they had appeared to suggest that some flexibility be introduced in the implementation of the general rule. Nevertheless, no formal proposal had been advanced on this particular point. The idea that a legal void existed seemed to be accepted by certain proposals on structural adjustment which addressed long-term structural problems arising from fair competition.

14. Several delegations reiterated their statements that selective actions against imports had no place in Article XIX and that such actions should either be brought into conformity with the General Agreement or be eventually phased out. One of these delegations said that any discriminatory action, even under the strictest form of discipline, would work against efficiency. Once selective actions were allowed, pressure would build up in the importing countries to spread such actions against

the efficient exporters one after the other. One representative said that selectivity would lead to bilateralism, plurilateralism, discrimination, and arbitrary and artificial distribution of market access. He wondered why some participants were prepared to give up the fundamental principle of m.f.n. treatment simply because conditions for competition had changed. Another representative said that he was tired of hearing participants claiming that the General Agreement was not responding to reality or fact of life. To accept the facts of life meant the acceptance of many things unfavorable to his country. In an unequal world, the only protection to the poor and weak was the law. He was not prepared to accept any weakening of the law. Another delegation stressed that if negotiations in this Group failed to put an end to the erosion of multilateralism and to discrimination stemming from the "grey-area" measures, then the strengthening of the GATT system as one of the basic objectives of the Uruguay Round would not be achieved, and the whole negotiating package would become unbalanced.

15. One representative said that the increasing proliferation of "grey-area" measures and the lack of agreed approaches to the adjustment question in relation to border measures clearly indicated that the current system was not working effectively. Moreover, it would be unrealistic to expect some countries to restrict themselves to Article XIX action while others were seeking solutions to their difficulties through bilateral arrangements, especially when such arrangements did not take account of their impact on third countries. He said that the issue of selectivity must be faced squarely in the negotiations. His country had been a strong supporter of the application of safeguard measures on an m.f.n. basis and continued to believe that this approach was the correct one to strengthen the multilateral trading system. At the same time, it was prepared to consider reasonable proposals that would bring all safeguard measures within the ambit of GATT rules, subject to multilateral surveillance, review and discipline. Another representative said that the Group should try effectively and comprehensively to address the "grey-area" measures which were always selective in nature. The real challenge before the Group was whether at the end of the negotiations, it could come up with a truly comprehensive agreement which would be applicable to all products and to all parties, and which would ensure that all safeguard measures were taken under multilateral rules and discipline within the framework of GATT.

16. One delegation said that the Negotiating Group should perform the job of legislators who possessed a good sense of law and reality. To be credible, the Group had to prepare balanced, efficient and acceptable proposals in order to solve real problems. Negotiators should try to understand questions like what had caused the proliferation of "grey-area" measures, was Article XIX an efficient instrument to handle various types of situation, were there elements in Article XIX which motivated or even encouraged contracting parties to find solutions to their problems outside the General Agreement. They should also consider whether it was possible to seek a single solution to the "grey-area" measures, without reflecting the different circumstances leading to the proliferation of such measures.

One representative wondered why the m.f.n. principle should prevail in the use of all safeguard actions. He said that the principle was clearly the corner-stone of the General Agreement, the application of which would ensure that the most competitive exporters supplied the market. Another good reason to apply the m.f.n. principle was because selectivity very often simply did not work. What typically happened in a selective arrangement involving only a limited number of suppliers was that more and more suppliers would be added to the list of countries covered by the measure and in the end protection became global. In such a case, it would be better if the measure started off as a form of m.f.n. restriction. On the other hand, a strict application of the m.f.n. principle with no flexibility indeed ignored reality as it might drive countries more and more towards other restrictive mechanisms to solve safeguard problems. If the disciplines for invoking Article XIX today were further tightened, then there might be more and more use by parties of measures under other GATT Articles or even "grey-area" measures. The resolution of this problem required some original thinking. One option worth considering was to make m.f.n. application the general rule, with incentives like a longer duration for the measure, no compensation or retaliation requirements etc. Then selectivity would be permitted as an exception, with shorter duration, faster depressivity, harsher terms on compensation and retaliation, etc. Another option was to bring all selective "grey-area" measures into a safeguards agreement and subject them to the same set of disciplines on duration, injury determination, notification and others. Only measures taken outside this agreement would be subject to strong counter-measures.

17. One representative invited the Group to look at the question of selectivity from different angles. He said that a selective arrangement was appealing to an importing country at first glance because it would limit imports and would protect the domestic industry. At the same time, it avoided the retaliation provision of Article XIX and escaped the disciplines of Article XXVIII. The problem for the importing country was that it was under no pressure to undertake any structural adjustment. There was also no certainty that the country itself would not become a victim of selective measures in future. A selective arrangement was appealing for an exporting country because it allowed undisrupted export activities, and very often the negotiated level of export might contain an element of compensation in the form of a higher access than past performance. It provided the exporter a degree of economic rent because he was shielded from competition. The same problem of the lack of incentive to adjust was also true for the exporters who might be exporting the products of an inefficient industry. An exporting country not party to a selective arrangement was shut out of the market and was confronted by a lot of constraints in its decisions to invest, to further improve its comparative advantage or to move out of that industry in view of the uncertain market conditions. The way to handle the question of selectivity might lie in a re-balancing of rights and obligations in Article XIX. The provision of Article XIX paragraph 3(a) on retaliation was a good example where flexibility should be applied in order to achieve a new balance. It

was undesirable to abandon the m.f.n. principle purely because there was no solution to the "grey-area".

18. One representative said that the safeguarding of the GATT system was a joint responsibility of all participants. While he had no doubt as to the utility of the m.f.n. clause in the implementation of safeguard measures, especially those taken in respect of fair competition, he asked if the clause was in fact a principle or just a mechanism or a method of implementing the underlying principle of the General Agreement which was trade liberalization. Another representative suggested that since the term "selectivity" had the tendency to block the negotiations as it had done in the past, it might be easier if the Group could change the focus of the problem, by looking at safeguard actions not as import relief measures but as domestic adjustment assistance measures. In this way, the confrontational debate on m.f.n. versus selectivity would be avoided and reality brought into the discussions.

19. The Chairman concluded the discussions in this topic by saying that participants in general had accepted the m.f.n. principle but that there had been a call from several quarters for some kind of flexibility in its application. The question to ask was how the m.f.n. principle would be applied with flexibility; and in which cases and under what circumstances would measures be applied to sources A and B but not C and D. He expressed the hope that some concrete examples could be provided in future discussions.

(d) Multilateral surveillance and dispute settlement

20. Several delegations said that it was difficult to be definite about the mechanism for surveillance and dispute settlement until other related elements became clearer in the whole package. One delegation remarked that this was particularly so because if non-m.f.n. measures were allowed in the final package, then obviously there would be a need for very severe terms on surveillance, notification and other conditions. One delegation said that Article XIX, as structured, was essentially silent on the question of surveillance although there were some limited requirements on notification and consultation. Whether a surveillance body should be set up hinged very much on the amount and the type of activities the body was expected to undertake. If its work related only to those actions taken under Article XIX, then there might not be any need for the creation of a new body. If, however, discussions were to lead to a comprehensive régime that covered "grey-area" measures and more effective rules for Article XIX actions such as duration, degressivity, consultation, calculation of compensation, etc., then obviously the case for a surveillance body would be much stronger. One of the unique features of Article XIX was the provision on selective retaliation which was related to the question of dispute settlement. Depending on the outcome of the negotiations, it was conceivable that provisions relating exclusively to dispute settlement on safeguards would be appropriate as was now the case under the Subsidies

Code. Alternatively, one might find that the outcome of the work in the Negotiating Group on Dispute Settlement was adequate to deal with problems in the area of safeguards.

21. One delegation said that one of the important duties of a Safeguards Committee would be to deal with dispute settlement cases. Such a Committee could convoke dispute settlement panels composed of a specific number of non-governmental experts, with specific time limits for them to complete their work. Another delegation advocated the establishment of a Safeguards Committee which would report to the CONTRACTING PARTIES. This would contribute to the goal of transparency, which would be especially important after the introductory phase of safeguard measures. The rôle and responsibility of such a Committee should be rather specific in terms of requirements to notify, consult and review. The introduction of safeguard measures should retain its unilateral character and should not be subject to any prior approval by the Committee. Furthermore, any revised safeguards mechanism should not affect the basic right of contracting parties to seek recourse to the normal dispute settlement mechanisms of GATT.

22. Several delegations remarked that multilateral surveillance might be an area in which a new balance could be achieved. It was important that any form of surveillance should not be so stringent as to force parties to move away from the system. One of these delegations suggested that the Safeguards Committee could have the following functions: to monitor the implementation of the agreement; to review notifications including cross-notifications on a regular basis; to facilitate consultations between contracting parties as appropriate; to play an advisory rôle in the dispute settlement procedure by making factual assessment of the cases; and to make recommendations to parties in the dispute. One representative asked if surveillance alone would be sufficient to guarantee that the rules would be respected by all. He said that the most important point for consideration was what the power of the body responsible for the management of the safeguards agreement should be, especially in cases when the established rules were violated and sanctions were called for.

(e) Special and differential treatment for developing countries

23. One representative said he did not accept the argument that special and differential treatment for developing countries in the application of safeguard measures would open the door for selectivity. When he examined the export performance of the majority of developing countries, he could not see any possibility for these countries to cause injury or threat thereof. Safeguard measures might serve as a safety net for importing countries, but they represented a constant menace against any increase in exports by developing countries. Some sort of exceptions or waivers were therefore needed to take care of the special interests of the developing countries, both as exporters and importers. Several delegations agreed that the concept of special and more favourable treatment for developing

countries should be recognized in the agreement on safeguards, as it was recognized as an integral part of the General Agreement and as a general principle in the Uruguay Round of negotiations. However, most of them said that it was premature to discuss how this principle could be translated into concrete rules and procedures at the present stage of the negotiations. One representative suggested that there were two areas where the interests of developing countries could be taken into consideration. One was in the matter of a developing country wishing to seek compensation or retaliation. Since that country had little leverage or negotiating power, it would be a case for the Surveillance Body to make recommendations and directives rather than for the country to negotiate bilaterally with the importing country. The second was when a developing country was taking a safeguard measure. In such a case, the special and differential treatment could take the form of a longer period of application or a more sympathetic extension of the measure. Another representative said that the notion of special and more favourable treatment for developing countries should form an integral element of the new Article XIX, a constitutional part of its foundation, rather than a mere exception to the general rule.

24. One representative said that his country was a strong supporter of the principle of special and differential treatment for developing countries. On safeguards, however, there was a problem of logic. If a country took a safeguards action at the border because imports were causing injury, it would have to identify the source of the injurious imports. If that source happened to be a developing country, then action had to be taken against that country. He added that it was difficult to discuss special and differential treatment for developing countries in a vacuum. It would be easier if there were already an agreement, as participants could then discuss how they could help developing countries to comply with the terms of such an agreement. Another representative announced that his government was currently re-examining its views on the principle of special and differential treatment for developing countries, which was built largely on the import substitution theory which did not really facilitate the development of a country. As far as the subject of safeguards was concerned, the notion of new entrants to a market had to be taken into account. If a quantitative restrictions were used, then the allocation of quotas would have to depart from the historical pattern, otherwise the trade of new entrants would be frozen at very low levels. If the developing country concerned were a traditional or major supplier, then of course special and differential treatment would not be needed for them. This representative said that he could not understand how some delegations could argue for the m.f.n. concept and said that selectivity was the worst thing for the General Agreement and yet say that selectivity was needed for the developing countries.

25. One representative asked if it were conceivable, possible, or desirable to have negative selectivity. He expressed doubt on the wisdom of trying to establish which source of supply was causing injury and which source of supply was innocent. He said that this was an unresolved problem

from the Tokyo Round of negotiations and warned that for the Group to work towards that direction would certainly lead to selectivity in the end.

IV. Future work and date of next meeting

(a) Synopsis of proposals

26. The Chairman said that in response to requests by some delegations, he had asked the secretariat to compile, on its own responsibility, a list summarizing proposals and statements made in the Negotiating Group in respect of specific elements enumerated in the Ministerial Declaration as well as those identified by the Group. The secretariat would circulate that paper before the Montreal meeting.

(b) Contribution to the Montreal meeting

27. The Chairman said that in accordance with a decision by the Group of Negotiations on Goods, he would like to propose to the Group that he, as Chairman of the Negotiating Group on Safeguards and on his own responsibility, should submit a report to the GNG. This report would be drafted with the help of the secretariat which would consult with participants. He said that the report he had in mind would contain an objective description of proposals and discussions held in the Group, and of the Group's plan for its future work. On the question of future work, he recalled that the negotiating plan stated that "proposals by participants would be examined with a view to drawing up a draft text of a comprehensive agreement as a basis for negotiation". He proposed to the Group that he should be authorized, with the help of the secretariat, and in consultation with participants, to start in 1989 to draw up elements for inclusion in such a draft text. He believed that this decision on future work would, if reflected in his report, give some realistic and positive impression to the meeting in Montreal.

28. The Group agreed to the Chairman's proposal on future work. It was also understood that participants would be free, before or after the Montreal meeting, to present draft texts or proposals of a general or specific nature, and that they would be taken into consideration by the Group in the negotiations.

(c) Date of next meeting

29. It was agreed that the Group should meet on 14/15 November 1988 if consultation on the Chairman's report were necessary. It was also agreed that after the Montreal meeting, the Group would meet during the second week of March 1989.