

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG9/11

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

MEETING OF 26, 27 AND 29 JUNE 1989

Note by the Secretariat

1. The Negotiating Group met on 26, 27 and 29 June 1989.

I. Proposals by participants

2. The representatives of the United States and the European Communities introduced their written proposals in MTN.GNG/NG9/W/23 and MTN.GNG/NG9/W/24/Rev.1 respectively. Several delegations made preliminary comments and sought clarifications on specific points of the proposals. These, together with the responses by the representatives of the United States and the European Communities, are summarized in the following paragraphs.

A. Proposal by the United States

(a) Definition

3. Several delegations said that the proposal did not draw a distinction between fair and unfair trade and therefore missed the fundamental point that a safeguards agreement should only cover measures taken under a fair trade situation. Furthermore, the attempt to define safeguard measures as encompassing trade restrictions designed to facilitate adjustment was alien to Article XIX. One delegation, however, supported the suggestion to address structural adjustment problems, saying that all "grey-area" measures stemmed from problems of a structural nature. Another delegation asked for clarification as to whether the definition would include actions taken to facilitate adjustment, in the absence of injury to domestic producers from increased imports. Several delegations concurred with the United States objective that any new safeguards agreement should cover all measures taken for safeguard purposes and that all existing safeguard measures inconsistent with its terms either must be brought into conformity or be phased out.

4. The representative of the United States said that the two fundamental issues underlying the negotiations in the Group were to bring the

"grey-area" measures under multilateral disciplines and to improve the existing disciplines in Article XIX. Therefore, the Group had to be realistic and pragmatic in its approach and conclude an agreement that would be workable in the real world. Most of the ideas in the current proposal were based on practical experience in the safeguards area over the past 40 years. He did not believe that it was helpful to make a distinction between fair and unfair trade because doing so would only create an enormous loophole for the justification of future "grey-area" measures. Under the proposed definition, trade restrictive measures taken to facilitate structural adjustment when there was no injury to domestic producers would be inconsistent with the terms of the agreement. The United States welcomed suggestions for a better definition that would be comprehensive in its scope.

(b) Objective criteria

5. Several delegations said that the attempt to broaden the concept of "domestic producers ... of like or directly competitive products" was inconsistent with the existing provisions of Article XIX. Some delegations expressed concern about the reference to increased imports "relative to domestic production" and asked if it implied some kind of fixed market shares or if it would lead to a situation in which an exporting country would be penalized by a safeguard measure when the production in the importing country was decreasing. With regard to the requirement that injury determinations be made by an "independent body", comments were made that this might not be feasible for many countries in view of the wide differences in national systems. What was important was that the determination of injury be made on the basis of objective criteria and that the process was transparent. Some significant additions and omissions were also noted in the list of factors to be considered in the determination of serious injury or threat thereof. Export performance was one factor left out of the list, while others such as prices, market share, and ability to raise capital for research and development and modernization, were added. Inclusion of import prices, which could only be a result of comparative advantage, was against the fundamental premise of the safeguards agreement which was to deal with fair trade situations. The potential of imports from small suppliers to cause injury was extremely limited and this was an important point to be included when dealing with determination of injury. Furthermore, the definition of "threat" of serious injury was not very precise.

6. Commenting on the concern about the notion of relative increase in imports, the representative of the United States recalled that as far back as in 1948, the Havana Conference had examined this issue and had concluded that it was a legitimate concept relevant to safeguard measures. The United States strongly believed it should be an essential part of a safeguards agreement. Proving serious injury to the domestic industry as a whole was more difficult than showing injury to some domestic producers.

Hence, the proposed broadening of definition of domestic producers to domestic industry would make it more difficult for importing countries to justify the application of safeguard measures. It was a valid point that for some countries, the internal decision-making process might not allow for an independent body to make injury determinations. However, an independent body would certainly operate in a more transparent manner than the Ministry responsible for trade policy. The proposed objective criteria were those that had been used for many years by the United States and considered to be relevant in determining whether or not serious injury was occurring to the domestic industry. The ability to raise capital for research and development and modernization was an extremely relevant factor in the examination of serious injury because if firms were unable to modernize and adjust in order to keep up with international competition, then it would affect the consideration of whether or not safeguard actions should be taken. The "threat" of serious injury as defined in the US paper had largely been accepted internationally over time and it was up to the Group to propose a more precise definition.

(c) Remedy

7. A number of delegations asked for more details about "other trade measures" as the form of safeguard measures. Some delegations said that the stipulation of a limit of 50 percentage points for tariff increases might not be sufficient in many cases to remedy the situation and, therefore, would encourage importing countries to act outside the multilateral system or to use quotas to provide the effective protection required.

8. The representative of the United States clarified that the term "other trade measures" meant primarily tariff quotas and not subsidies. The 50 per cent limit for tariff increases reflected the level reached through years of experience in the United States in this field. The intention was to encourage the use of tariff increases rather than quotas which, if limited to the most recent representative period, might not provide too much additional protection in certain cases.

(d) Coverage

9. A number of delegations requested the United States to give an early indication of their preference as regards the three options offered. Many expressed regret that none of the three contained a pure m.f.n. option. While Option A stipulated that all safeguard measures should be authorized only on an m.f.n. basis, it also provided for the establishment of a mechanism for addressing "grey-area" measures, rendering the m.f.n. commitment meaningless. Option B, which provided for the application of selective measures on a mutually agreed basis in exceptional circumstances, was unacceptable as mutual consent between two parties unequal in

bargaining power was only a myth in reality. The representative of a group of delegations said that he opposed any sort of mutually agreed bilateral solutions which would be influenced by the relative bargaining power of the two parties. It was important to retain the unilateral character of safeguard measures which meant equal rules for all and the same opportunity for all countries to take measures in accordance with these rules. Another delegation said that under Option C, selectivity would become the norm and hence was even worse than Option B. In general, many delegations opposed any sort of mutually agreed bilateral solutions or selectivity in the application of safeguard measures. Several delegations sought clarification on terms such as "exceptional circumstances" and "mutually agreed basis".

10. The representative of the United States said that the Group had to be realistic in its approach. He noted that certain delegations had indicated that Option A was not a pure m.f.n. option. He pointed out, however, that any comprehensive agreement reached in the Group had to contain some procedures for addressing measures which were inconsistent with the rules. He said that Option B was self-explanatory but he disagreed with the comment that Option C would make selectivity the norm. In fact, Section 201 of the United States Trade Act was largely a reflection of this option. Under the law, the President of the United States was free to take measures on an m.f.n. or selective basis. Nevertheless, of the 20 or 30 protective measures taken since 1947, only two or three had been applied on a selective basis. Referring to the comment that safeguard measures should retain their unilateral character, he asked how it would be consistent with Article XIII which stipulated that one had to consult one's trade partners in allocating quotas. The United States had no clear definition of the term "exceptional circumstances" mentioned in Option B yet. The MFA was not the only place where the term "exceptional circumstances" was used. It was mentioned in certain other places in the General Agreement such as in Article XXV.

(e) Duration and extension

11. Many delegations found the proposed maximum duration of eight years to be far too long, contrary to the underlying principle of Article XIX that safeguard measures were emergency actions which should be temporary. Some proposed a maximum duration of three years while others said that any measure which exceeded one year in duration would not be in the nature of an emergency action envisaged under Article XIX.

12. The representative of the United States said that the notion of a maximum duration of eight years for import relief was one created in 1974 and contained in the current US trade law. He cautioned that if the Group created rules that were more restrictive than the existing ones, there would be greater pressures on countries to resort to "grey-area" measures.

(f) Adjustment and degressivity

13. Many delegations shared the views advanced by the United States on adjustment and degressivity. A few asked whether the reference to coverage (Section (d) above) implied that degressivity would be applied in a selective manner.

14. The representative of the United States clarified that the reference to coverage only meant that one disincentive for selective actions under Option B could be a requirement that such measures must be more degressive than m.f.n. actions. On the question of adjustment, he stressed that GATT developed rules and obligations for governments; it would be a dangerous mistake if it sought to develop rules and obligations for firms. Hence, adjustment should be primarily determined by market forces. National governments should not be too involved in the decision-making of firms and GATT should not be too involved in deciding what was appropriate for firms.

(g) New measures

15. A few delegations enquired about the rationale for equating the time-gap for the reapplication of a safeguard measure to the duration of the original measure.

16. The representative of the United States said that the idea that the longer the duration of protection, the longer the industry would be ineligible for import relief, was found in the 1988 US Trade Act. This was a built-in incentive for firms to take a shorter duration in import relief, or to regain competitiveness as quickly as possible while they were receiving import relief.

(h) Compensation/Retaliation

17. Several delegations rejected the idea that compensation/retaliation rights and obligations should take into account trade liberalization by exporting countries.

18. The representative of the United States said that the threat of retaliation or demands for compensation, which often acted as a deterrent for providing import relief, was an important counter-weight to domestic pressures for safeguard measures and should not be given up. He suggested that the Group should give some thoughts to the current rather awkward situation in which there were established provisions for compensation or retaliation applicable to cases where multilateral disciplines were respected but no provisions to cases where these disciplines were not respected.

(i) Transparency/Notification/Consultation

19. Many delegations stated that the paper contained some useful suggestions on the subject except that some contracting parties might find it difficult in complying with all the requirements. Some delegations asked why a period of seven months was suggested for provisional application of measures in critical circumstances. Another delegation said that it would be necessary to establish specific time-frames for phasing out measures inconsistent with the agreement.

20. The representative of the United States stated that a seven-month period was suggested to reflect the relevant US legislation and procedures which required eight to nine months to make a final injury determination in a typical safeguard case. Though injury determination under critical circumstances needed to be made promptly, within a few weeks or months, there should still be a requirement that a final determination of injury be made and that the provisional action taken under critical circumstance be called off if the final determination was not one of serious injury.

(j) Non-governmental measures

21. A few delegations supported the US suggestion that parties should not promote or encourage non-governmental agreements which restrained export or import competition for safeguard purposes. One delegation, however, said that Article XIX actions were limited to governmental measures and incorporation of non-governmental measures into the subject required careful further reflection.

(k) Questions for further consideration

22. Most delegations felt that a comprehensive safeguards agreement should apply to all products in all sectors. They did not favour developing special rules for textiles, steel or any other sector.

B. Proposal by the European Communities

(a) Introduction

23. Several delegations remarked that the EC proposal did not define with precision all the elements of a safeguards agreement nor did it provide answers to the question of how "grey-area" measures were to be treated. Many did not favour any attempt to link the negotiation on safeguards with the progress achieved in other negotiating groups. Some particularly opposed the idea that specific safeguard rules be developed for the textiles sector during the process of its integration into GATT. One

delegation, however, shared the view that to achieve effective strengthening of the existing GATT safeguards régime there must be a parallel improvement in the disciplines in other areas of the GATT also subject to negotiations, particularly in the market access area.

24. The spokesman for the European Communities, admitting that their proposal lacked precision, said that their intention was not to present a draft agreement containing every detail at this stage, but to present a series of ideas for discussion. It was in this open frame of mind that they pointed out certain linkages between safeguard rules and other negotiating areas, particularly the relationship between safeguards and textiles. Similarly, the proposal stated certain realities concerning "grey-area" measures as well as selectivity. The objective of the Communities was to negotiate a set of regulations which in due course would be observed by everyone. It was the task of this Group to define with precision, on a collective basis, the elements of such an agreement.

(b) Existence or threat of serious injury

25. All delegations which spoke agreed with the view that the existence or threat of clearly established injury was the condition sine qua non for the introduction of any safeguard measure. One delegation asked for the rationale of including "relative increase in imports" as one of the factors for injury determination. Another delegation sought clarification on "minimum procedural guidelines" concerning internal investigations.

26. The spokesman for the European Communities said that it would be unrealistic to say that injury caused by an increase in imports in relative terms did not justify the application of safeguard measures. He believed that this was within the framework of Article XIX. He also believed that degressivity should be evaluated in relative terms and not only in absolute terms. Transparency in the conduct of internal investigations was an important element of any safeguards agreement. There should be a balanced consideration of all the elements in the introduction of minimum procedural guidelines for internal investigations, or else these requirements might be conflicting with different régimes of individual contracting parties.

(c) Time-limits and degressivity

27. Several delegations said that they shared the view of the Communities that a time-limit should be announced at the introduction of a measure, but they would welcome some more precise language on the "degressive mechanism" and the review "at a stage to be determined". Furthermore, a more precise wording on the renewal of measures would be preferable.

28. The spokesman for the European Communities said that it was important to define with clarity the concepts of the time-limits. The Communities at

this stage did not indicate what a reasonable period should be, because it was up to the Negotiating Group to do so collectively. If a safeguard measure was adopted for a rather long period of time, then it would be appropriate for the authorities of the importing country to review the situation to see if it was absolutely necessary to continue such a measure.

(d) Countermeasures

29. Many delegations stated that the right to compensation and retaliation which acted as an important deterrent should not be suspended. One delegation said that the proposed replacement disciplines needed to be carefully examined to ensure that the end result was a truly effective safeguards discipline. Another delegation said that whether temporary limitations of the right to take countermeasures was an acceptable suggestion depended on the shape of a strengthened safeguards régime. One delegation suggested that there should be no obligation to compensate for measures which lasted for less than one year. A few delegations remarked that the proposal seemed too benevolent towards contracting parties resorting to safeguard measures, neglecting the interests of affected exporting parties.

30. The spokesman for the European Communities said that the Community proposal was not seeking to eliminate countermeasures from the scope of Article XIX. It tried to see if such measures could be covered by a multilateral framework. As the largest group of trading nations, the Communities could live with the status quo concerning counter-measures. However, the main concern of the Communities was to see that safeguard measures be adopted within a multilateral framework and in this respect, it was necessary to find rules under which counter-measures could be applied. Compensation was a concept embodied in Article XXVIII and not in Article XIX. Nevertheless, the Communities did not preclude any discussion on the issue and was prepared to consider any proposal which would deal with compensation in a realistic way.

(e) Types of safeguard and modalities of application

31. Most delegations stressed the importance they attached to adhering to the m.f.n. principle in the application of safeguard measures. Some expressed concern that the proposed modulation of quotas on the basis of imports from different sources would allow for some form of selectivity in the application of quantitative restrictions which was contrary to Article XIII. A few delegations disagreed with the idea of linking degressivity to the ratio of imports to consumption. Some delegations asked how small suppliers and new entrants would be treated under the EC proposal.

32. The spokesman for the European Communities said that the suggestion with regard to types of safeguard and modalities of application was in conformity with the m.f.n. principle. The volume of global quotas would be determined according to the degree of injury. The question relating to the treatment of small suppliers and new entrants was something that could be taken into account when the Group analysed in detail the concept of quota modulation.

(f) The two types of situation requiring safeguard action: Track I and Track II

33. Some delegations said that the distinction between the two tracks was not clear. There was no explicit indication as to whether measures under Tracks I and II were to be on an m.f.n. basis. Track II was particularly vague on the essential issues of structural adjustment, objective criteria, duration and degressivity. Some, noting the reference made to the insufficiency of "border measures alone" in the context of Track II safeguards, asked whether the proposal envisaged remedies in the form of measures other than subsidies covered by Article XVI. Another delegation said that border measures should not be used to correct problems of a structural nature. One delegation proposed a duration of one year for Track I measures and three years for measures under Track II. The same delegation suggested that short-term measures might only be taken within a period of five years after certain liberalization had been enacted on the products concerned. Such a requirement was not applicable to Track II measures because problems were caused not by the effect of liberalization of market access, but by fundamental structural problems which could be solved only by structural adjustment measures, to be decided upon and financed by individual contracting parties. To the extent that public funds were used, they should be subject to the rules and disciplines presently under negotiation in the Negotiating Group on Subsidies and Countervailing Measures. The representative of a group of countries said that the very aim of a safeguard measure should be to facilitate structural adjustment. A clear distinction should be made between the responsibility to undertake structural adjustment and the responsibility to fulfil GATT commitments and concessions granted in that respect. The former lied primarily with industry, the latter with governments. This meant that the commitments should be confined to restoring the GATT concessions temporarily withdrawn.

34. The spokesman for the European Communities said that clearer definitions of the types of situation requiring safeguard action had to be developed collectively by the Group. The question of structural adjustment within the framework of safeguards regulations had to be dealt with very prudently indeed. There had been a series of cases in which the Communities found that short-term safeguard measures could be sufficient to address the problems of serious injury. However, when faced with a more fundamental problem of structural adjustment, then the adoption of border measures alone were found to be insufficient. It would be a necessity that

domestic measures adopted by industry could be adopted by the governments as well. It was important that the freedom of choice on the type of adjustment measures rested with the countries concerned.

(g) Other situations

35. Many delegations expressed serious concern that selective specific remedies referred to in the paper would give legitimacy in the GATT to a bilateral approach to dealing with safeguards problems, without some of the guarantees provided in Tracks I and II. Some stated that selective measures, even if they were applied only to special circumstances, were simply unacceptable. Some delegations asked for clarification as to what the "stricter disciplines" might be for selective measures as well as what were the circumstances which would require a selective remedy.

36. The spokesman for the European Communities said that the idea put forward in the proposal represented the outcome of self-restraint by the Communities. It would be unrealistic for the Negotiating Group not to examine some circumstances which might require selective solutions.

II. Draft text of a comprehensive agreement

37. A draft text of a comprehensive agreement on safeguards, based on proposals by participants and drawn up by the Chairman as requested by the Trade Negotiations Committee, was circulated in document MTN.GNG/NG9/W/25. Introducing this document, the Chairman said that, while he had had help from the secretariat and while his consultations with delegations had been very helpful, the paper was presented under his own and exclusive responsibility. It was based on (a) proposals and suggestions made formally and informally in private consultations; (b) on debates that had taken place in the Negotiating Group; and (c) on provisions of the General Agreement. It was not intended to be a detailed draft agreement, but a framework and a general structure to which a lot of flesh would be added by future discussions. It was not a consolidation of all the proposals. A lot of ideas had been left out. Furthermore, no attempt was made to conciliate all divergent proposals. According to the mandate given by the TNC, the Chairman's draft was simply to serve as a basis for negotiation. He told the Group that he did not expect immediate reactions to his draft at this stage as he believed that most delegations would like to consult their capitals before making any comments. However, he would expect some substantive work on the draft next time the Group met.

III. Other business, including arrangements for the next meeting

38. It was agreed that the next meeting of the Group should be held on 11, 12 and 14 September 1989, and that a further meeting should take place during the week beginning 30 October 1989.