MULTILATERAL TRADE NEGOTIATIONS
THE URUGUAY ROUND

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

MEETING OF 30 OCTOBER, 1 AND 2 NOVEMBER 1989

Note by the Secretariat

1. The Negotiating Group met on 30 October, 1 and 2 November 1989. It continued its section-by-section examination of the draft text of a comprehensive agreement on safeguards prepared by the Chairman (MTN.GNG/NG9/W/25). A summary of the main points made is in the following paragraphs.

A. Draft text of a comprehensive agreement (MTN.GNG/NG9/W/25)

Section III: Structural adjustment

2. The spokesman for a group of delegations said that he was sceptical as to the wisdom of giving structural adjustment such a prominent place in the draft text. The need for safeguard measures, in his view, might arise without the existence of structural problems. Several delegations supported this view. One of them said that safeguards and adjustment were basically different issues, but if a link had to be established between the two, it should be done very carefully. One delegation opposed any involvement by the government in the adjustment process. Governmental financial assistance was particularly difficult to get rid of as industries became dependent upon them. When import relief was provided, firms should be asked to undertake measures to become more competitive. Such adjustment measures undertaken by the industry should be subject to monitoring by the Safeguards Committee. One delegation expressed concern about the attempt in this Section to extend Article XIX to encompass a wide range of so-called structural adjustment measures and suggested the deletion of the entire Section. It was feared that any attempt to include adjustment measures in a safeguards agreement could create two kinds of safeguards, one subject to discipline and the other free of discipline.

3. Several delegations stressed that any reference to structural adjustment measures in a safeguards agreement should highlight the condition that such measures be consistent with GATT provisions. One delegation disagreed. In his view, safeguard measures interfered with the free play of market forces. They were derogations from the general rules

and therefore could never be consistent with the basic principles of GATT. Another delegation suggested the notion of positive structural adjustment measures which would include measures taken by the government or the private sector to promote the development of new economic structures, and not measures aimed at preserving declining industrial sectors such as steel, textiles and footwear.

4. The spokesman for a group of delegations said that the choice of measures available to bring about adjustment should be left to the contracting party wishing to take safeguard measures. It did not really matter whether adjustment measures were taken by the industry or the public authorities. This freedom of choice, however, was not very clear in the current wording of the draft text. Paragraphs 14-16 seemed to indicate that assistance measures were taken essentially by public authorities. Moreover, paragraph 14 which stated that "contracting parties may adopt structural adjustment assistance measures to support structural adjustment programmes by industries, independently of safeguard measures" might have the effect of sanctioning subsidies.

5. One delegation said that adjustment was an important element in a safeguards agreement. Mention should be made of the derogations that would be permitted under GATT to support a contracting party opting for structural adjustment measures rather than other forms of safeguard measures. Another delegation said that since contracting parties had the freedom to adopt adjustment assistance measures under current GATT provisions relating to subsidies, the Group should discuss the need for independent rules relating to assistance measures in a safeguards agreement.

6. One delegation said that paragraph 15 went beyond the scope of the Negotiating Group, which should avoid drafting new disciplines governing adjustment assistance measures. Another delegation pointed out that there was a contradiction in paragraph 15 which stated that adjustment assistance measures were "temporary in nature" and that measures should be applied "for the time as may be necessary". One delegation suggested that assistance measures applied in parallel to safeguard measures should also be eliminated in the time-limits provided for the latter.

7. The spokesman for a group of delegations referred to paragraph 16 and said that he agreed that it should be an obligation to provide all information on adjustment measures at the outset and that progress should be reviewed if an extension was sought. However, he was not sure of the purpose of notifying the CONTRACTING PARTIES of all the relevant information on structural adjustment assistance measures. It would be inappropriate for the CONTRACTING PARTIES to get entangled in the immense range of actions possible under structural adjustment, other than being satisfied that they were GATT-consistent and that it could be demonstrated that the adjustment measures notified at the outset were working. The representative of another group of delegations said that he did not foresee

any sort of supra-national authority judging whether or not the adjustment measures undertaken were sufficient. One delegation said that import relief to specific industries should preferably be provided through adjustment assistance measures rather than border measures. The Safeguards Committee should ensure that assistance measures did not retard the structural adjustment process.

8. On paragraph 17, the spokesman for a group of delegations stated that the Negotiating Group should not try to devise complex rules to govern adjustment programmes and should not interfere with adjustment, which was an autonomous process. Several other delegations were opposed to making adjustment measures compulsory for the extension of safeguard measures, on the grounds that such mandatory measures might discourage industries from adjusting autonomously and might make them claim border protection as a precondition for adjustment. Some kind of recommendation regarding structural adjustment would be more appropriate in this regard. One delegation suggested the replacement of "the implementation of adjustment measures" by "evidence of adjustment" at the end of the paragraph, adding that what was important was not how many measures or programmes had been created or how much financial assistance had been provided, but how much the firms and the industry had done to make themselves more competitive.

Section IV: Notification and consultation

9. Some delegations stated that Section IV as a whole was acceptable. One delegation suggested that the notification requirement in paragraph 18 should be extended to import surveillance proceedings that might be part of the domestic procedures before safeguard actions were taken. Another delegation said that information to be provided to the CONTRACTING PARTIES should include reasons as to why an investigation had been initiated. The spokesman for a group of delegations said that it would be better to incorporate the word "non-confidential" before "necessary information" in paragraph 19. One delegation stressed that "serious injury or the threat thereof" should relate to particular products rather than to product groups. Some sought clarification of the term "any other pertinent data".

10. Several delegations suggested that countries seriously affected by a safeguard measure should also be able to request consultations with the country proposing to apply or extend the measure. Such consultations should not be limited to parties having a "substantial interest" as exporters of the product concerned. One delegation asked at what stage of the process consultations should take place. The time-limits for consultations should be defined so as to allow exporters to participate actively in the consultations. One delegation suggested that a party wishing to extend a measure should conduct a review of the original determination of serious injury in advance of the expiry of the safeguard measure, thus giving exporters adequate time for consultation. Such consultations should begin no later than three months before the expiry of the measure in question.

11. One delegation stressed the need for strict disciplines with respect to safeguard measures applied in a situation of "critical circumstances". The penalty for failing to fulfil the relevant requirements relating to notification and to the establishment of serious injury - the termination of the provisional measure - was an important counter-balance which needed to be spelled out explicitly. Several delegations said that the terms "forthwith" and "immediately" used with respect to provisional safeguard measures in paragraph 21, as well as the duration for such provisional measures, needed to be specified. One delegation suggested that the duration for provisional measures should be limited to three months.

12. The proposal relating to counter-notifications was welcomed by many delegations. One delegation believed that the Safeguards Committee could play a certain rôle in counter-notifications and consultations referred to in paragraph 22 of the draft text.

Section V: Response to safeguard measures

13. Many delegations considered the threat of retaliation to have a deterrent effect and were hesitant to limit the right to take retaliatory action to "parties seriously affected". "Parties having a substantial interest as exporters of the product concerned" should, as in Article XIX, have the right to retaliate. The spokesman for a group of delegations said that they strongly preferred compensation to retaliation. It was important, however, that parties retained the right to retaliation not only as a principle but also as a leverage in the consultation process. Suspension of the application of equivalent concessions or obligations should be subject to stringent procedures, as in Article XIX:3(a). One delegation said that any modification in the existing provisions of GATT relating to retaliation needed careful consideration, and that any modification would be dependant upon the deliberations of the Group in certain other areas of the safeguards agreement, including country coverage. One representative remarked that the deterrent effect of retaliation was over-rated since it was effective only among major trading partners and suggested that it would be better for the developing countries to give up the right to retaliation in exchange for strengthened safeguards rules.

14. Several delegations said that it was unreasonable to treat measures consistent with the rules in the same way as those contrary to the rules. They believed that retaliation should be permitted only if measures were inconsistent with GATT. One delegation asked whether the sanctions in the case of non-fulfilment of the rules should not be more severe. Another delegation said that Article XIX should come before Article XXIII in the sense that the disciplines for safeguard actions should not be stricter than their infringement. Otherwise there was no point in respecting those disciplines. Actions taken within the rules should be acceptable and those which violated the rules should be sanctioned. To be effective these sanctions should be collective.

15. One delegation asked whether sub-paragraphs 23(a)-(d) implied a unilateral right to retaliate or if retaliation had to be sanctioned multilaterally. It was also noted that under paragraph 20 there was no obligation on an exporting country to accept an invitation to consult. The requirement of sub-paragraph 23(a) could theoretically be met simply by inaction on the part of an exporting country. Another delegation suggested that paragraph 20 be amended in such a way that exporting as well as importing countries could request consultations. One delegation said that the objective of consultations under sub-paragraph 23(b) be specified. As regards sub-paragraph 23(c) concerning adjustment measures, some delegations reiterated their view that adjustment measures should not be a necessary condition for safeguard action and they therefore opposed this sub-paragraph. One delegation, noting that there were no time constraints in Section V, asked whether consultations referred to in sub-paragraph 23(a) should be held within 30 days. One delegation remarked that sub-paragraphs 23(a)-(e) contained an odd mixture of legal and illegal situations. A simpler approach would be to follow the current provisions of Article XIX which provided a balance between an escape from normal GATT obligations and the ultimate right of the affected parties to retaliate.

16. Many delegations stressed the importance of compensation, particularly for small countries with little retaliatory power, and suggested that the text in paragraph 24 be further strengthened. There should be some linkage between the concepts of compensation and retaliation. The wording "may give" in that paragraph seemed to weaken that important right. Perhaps the paragraph dealing with compensation should precede the paragraph dealing with retaliation so as to indicate this order of preference. One delegation said that it was important that compensation was provided to developing contracting parties by developed contracting parties when the latter took safeguard actions which did not meet the requirements of paragraph 23. One delegation suggested that compensation should be offered on an m.f.n. basis.

17. Several delegations expressed concern at the suggestion in paragraph 25 that contracting parties would lose their right to take counter-measures when safeguard measures were of a short duration. One delegation stressed that this suggestion needed careful consideration as the rules for the whole agreement were being developed. Several delegations said that clarifications were needed because the paragraph as drafted gave the impression that even illegal actions would be free of counter-measures as long as they did not exceed a certain duration. The spokesman for a group of delegations said that a definitive stand on the proposal concerning the suspension of counter-measures in certain situations would depend on the obligations to be included in other parts of the agreement.

Section VI: Developing countries

18. Many delegations stressed the importance of special and differential treatment envisaged for developing countries in this Section. The draft text did not, however, reflect fully the situation of developing countries. As exports of developing countries were inevitably concentrated in a few product sectors, their shares of the market for such products might not always be "minimal". Hence, reference to minimal market shares in paragraph 26 should be deleted. Several delegations suggested that the word "minimal" be defined, either by some objective criteria or in terms of a percentage. One delegation welcomed the inclusion of the concepts of new entrants and small suppliers in the Section. As small developing country suppliers or new entrants would not be the cause of serious injury, their exports should not be subject to safeguard action. One delegation said that safeguard measures should not be applied when they caused serious injury to exporters in developing countries. If such measures were imposed their duration should not be more than one year and any imposition of safeguards affecting developing countries should be subject to multilateral examination.

19. One delegation stated that Article XIX actions must be taken in respect of products and not in respect of suppliers. It was fundamental that emergency safeguard actions must be non-discriminatory. The m.f.n. principle was paramount and no exceptions or exemptions should be allowed. While not insensitive to the situation of the less-developed countries and particularly to that of the least-developed countries, this delegation feared that special and differential treatment might open the door to selectivity in the application of future safeguard measures. Given the experience with the MFA, it might go against the interests of less-developed countries as exporters. Common sense made it clear that developed importing countries would never agree to take safeguard actions among themselves. This was not the right area to seek special and differential treatment. Perhaps it would be possible with respect to compensation.

20. One delegation said that some participants seemed to want rights without any obligations and asked why Article I of the General Agreement was not relevant to this Section. It further disagreed with the view that new entrants would not cause serious injury to domestic producers in importing countries and that their exports should not be subject to safeguard action. In establishing disciplines for safeguards, it was important for the Negotiating Group to keep in mind broader objectives, such as eliminating "grey-area" measures and bringing textiles and clothing under GATT rules. A safeguards agreement loaded with too many exceptions in some areas and rigid disciplines in other areas would limit the ability of contracting parties to use its provisions to meet emergency needs in an effective way. One representative, sharing the above views, stated that safeguard measures were emergency actions taken to provide relief in situations of serious injury caused by imports irrespective of their

source. Moreover, paragraph 26 referred to "minimal" cause of injury and not necessarily to special and differential treatment. The concept of modulation of quotas took into account this particular point. The spokesman for a group of delegations said that the exceptions foreseen in paragraph 26 might make developed contracting parties more hesitant to take on new commitments as they would be unable to take any action to deal with serious injury or threat of serious injury caused by imports from developing countries. The specific problems of developing countries could best be taken into account in the negotiating groups dealing with concrete obligations to be undertaken as a result of the Uruguay Round. It was also in those groups that participants should primarily seek the ways and means to enhance the growth of exports of developing countries. He therefore disagreed with paragraph 26, which could have far-reaching consequences for the General Agreement.

21. Many delegations welcomed the concept of flexibility envisaged for less-developed contracting parties in paragraph 27. The term "flexibility" could perhaps include longer time-frames for the application of safeguard measures and shorter gaps between two safeguard measures on the same product. Or it could include gradual and progressive liberalization by developing countries given the specific situations of these countries. Several delegations, disagreeing with the concept of flexibility, stated that it implied wide exceptions to the safeguards agreement and allowed less-developed parties almost a free hand in defining and implementing the provisions of the new régime. Giving such extreme flexibility to less-developed parties, as in Article XVIII, would be counter-productive and would create major problems for the General Agreement. One delegation responded to the above statement by saying that safeguard actions had, in most cases, been applied only to imports from developing countries. Another said that if developed countries did not apply selective safeguard actions, and actions did not exceed, say, two years, then the developing countries would not require special and differential treatment in this area.

Section VII: Governmental and non-governmental measures

22. Many delegations supported the objective of transparency with regard to non-governmental measures. Some of them said that the terms "non-governmental" and "whether or not covered by the provisions of the present agreement" needed a clearer definition. One delegation suggested the compilation of a complete inventory of industry-to-industry arrangements. One delegation expressed the fear that closing the door to so-called "grey-area" measures might foster a new darker "grey-area" in the form of industry-to-industry restraint arrangements. It would, therefore, be necessary for governments to undertake best efforts to deter enterprises from entering into non-governmental arrangements which had the effect of safeguards. Another delegation preferred the notification requirement to cover all governmental measures, including

those in which governments were minimally involved. It did not favour the notification of industry arrangements as governments might not be aware of what was happening in the private sector. Hence the notification of non-governmental measures should not be strictly obligatory. Some delegations shared this view and supported the idea of making the notification requirement in paragraph 29 a "best endeavour" undertaking. Several other delegations did not believe that a "best endeavour" approach would suffice to ensure transparency. One of them asked how industry-to-industry agreements could exist without government involvement or encouragement. Another said that the emphasis in paragraph 29 should not be placed on notification but rather on discipline. The spokesman for a group of delegations suggested a system of counter-notification concerning non-governmental measures.

23. Many delegations agreed that all safeguard measures inconsistent with the provisions of the new agreement should be phased out or brought into conformity with the agreement within a specific time-frame. It would also be important to have a commitment to proscribe similar measures in the future. One delegation said that this was a major question in the negotiations: it was important that the scope of the final agreement would correspond to reality and the provisions would be respected by all. One delegation suggested that perhaps the Safeguards Committee could play a rôle in the phasing out of "grey-area" measures.

Section VIII: Surveillance and dispute settlement

24. Several delegations said that the membership of the Safeguards Committee should be open to all interested parties. One delegation believed that the surveillance function would be better carried out by a Body consisting of a few independent experts who would have an open mind when discussing "grey-area" measures.

25. One delegation suggested that, in addition to the functions listed in paragraph 31, the Safeguards Committee should also monitor new measures introduced under the agreement as well as adjustment activities taken in association with safeguard measures. Another delegation suggested that the Committee should monitor the phase-out of safeguard measures inconsistent with the agreement annually, and that this exercise should be based on annual reports provided by the contracting parties maintaining the measures. In order to make the surveillance and monitoring function more efficient, the secretariat should be given an active rôle in compiling the relevant information. One delegation said that the review function of the Safeguards Committee provided for in sub-paragraph 31(b) should not, however, become a harassment. Clarification was sought by many delegations as to what was meant by "to develop agreed solutions" in sub-paragraph 31(d). Some also asked what the relationship was between sub-paragraph 31(e), which provided for the Committee to make "recommendations ... to the CONTRACTING PARTIES", and the GATT dispute settlement provisions referred to in paragraph 32.

Chairman's concluding remarks

26. The Chairman said that he would produce a revision of his draft text (MTN.GNG/NG9/W/25) to take into account the suggestions and comments made by delegations during its first reading. His intention was to tidy up the draft without attempting to deal with specific points which would require further substantive negotiations in the Group. He stressed that the revised draft would still be a Chairman's text and that it served, as before, as nothing more than a basis for negotiation. The Group should start a second reading of the text based on the revised draft at its next meeting, when he would expect from participants specific suggestions, even drafting suggestions. His revised draft would be circulated around the middle of January 1990.

B. Other business

27. It was agreed that the next meeting of the Group should be held on 29, 30 January and 1 February 1990, and that a further meeting should take place on 12, 13 and 15 March 1990. The secretariat was also asked to make arrangements for a meeting to be held towards the end of April or early May 1990.