

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNG/NG9/15

12 April 1990

Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on Safeguards

MEETING OF 12, 13 AND 15 MARCH 1990

Note by the Secretariat

1. The Negotiating Group met on 12, 13 and 15 March 1990 under the Chairmanship of Ambassador G. Maciel of Brazil.

A. **Draft text of a comprehensive agreement (MTN.GNG/NG9/W/25/Rev.1)**

2. The Group continued its paragraph-by-paragraph examination of the draft text of a comprehensive agreement on Safeguards prepared by the Chairman (MTN.GNG/NG9/W/25/Rev.1). A summary of the main drafting suggestions made during this meeting, as well as those made at the previous meetings, are contained in Annex I. In response to the Chairman's invitation, some suggestions have been submitted to the secretariat in writing after the meeting. These are also included in Annex I.

B. **Other business**

3. It was agreed that the next meeting of the Group should be held during the week beginning 23 April 1990, and that a further meeting should take place on 28-30 May, and another one on 2, 3 and 5 July 1990.

Annex I

Section I: GENERAL PROVISIONS

Paragraph 1 "This Agreement covers all safeguard measures adopted by a contracting party to give protection to a domestic industry in the circumstances specified below."

Suggestions:

- (i) To ensure that all safeguard measures including measures with safeguard effect are covered, this Agreement should apply to "measures taken for the above purpose or having such effect not provided for under other GATT articles, agreements or arrangements".
- (ii) The word "adopted" implies intent. Suggest "... safeguard measures which provide import relief ..." to get the intention out.
- (iii) Use language in Mid-Term Agreement, "to re-establish multilateral control over safeguards by eliminating measures which escape such control" to ensure that all safeguard measures are covered.
- (iv) Add a second sentence to this paragraph: "Hereafter, there will be no safeguard action outside this Agreement".
- (v) Change "protection" to "temporary import relief".

Paragraph 2 "Safeguard measures consist of import relief measures that entail the suspension, in whole or in part, of obligations, or the withdrawal or modification of concessions under the General Agreement, adopted to prevent or remedy certain emergency situations, as provided for in Section II below, and to facilitate structural adjustment of a domestic industry or the reallocation of resources."

Suggestions:

- (i) It should be made clear that safeguard measures are border measures, different from structural adjustment.
- (ii) Replace the word "adopted" by "and that operate".
- (iii) Replace "certain emergency situations" by "serious injury to domestic industry".
- (iv) Delete "reallocation of resources".

- (v) This paragraph could be amended along the following lines:
"Safeguard measures are temporary trade restrictions that entail ..., adopted to prevent or remedy serious injury to a domestic industry, as provided ..., and to facilitate orderly adjustment".
- (vi) Delete last two lines of the sentence.
- (vii) Add "temporary" before "import relief".
- (viii) Add "as referred to in Section III" at the end of the paragraph and then delete the third paragraph.
- (ix) Change first line to "Safeguard measures consist of exceptional and transitory relief measures to deal with the effects of a rise in imports, both in absolute terms and in relation to domestic production, which entail the suspension, ...etc.".
- (x) After the word "adopted" insert "in terms of Article XIX of GATT".
- (xi) Add "as appropriate" before "to facilitate structural adjustment".

Paragraph 3 "Adjustment assistance measures are those adopted by a contracting party in support of structural adjustment measures taken by a domestic industry under the conditions set out in paragraphs 11 and 12 and Section III below."

Suggestion:

- (i) Delete this paragraph.

Section II: CONDITIONS

Paragraph 4 "A contracting party [or a customs union] may apply a safeguard measure to a product being imported into its territory only in a situation in which other provisions of the General Agreement do not provide specific remedies and on the conditions that:"

Suggestions:

- (i) Delete the phrase "only in a situation ... do not provide specific remedies and".
- (ii) Paragraph 5 without the footnote should be put in this paragraph.

- (iii) Add a new sub-paragraph (c) "the importing contracting party proves that there is a causal link between the elements referred to in (a) and (b) above".
- (iv) The title of this Section should be changed to "Conditions for border measures".
- (v) Delete the phrase "only in a situation in which other provisions of the General Agreement do not provide specific remedies".
- (vi) Combine sub-paragraphs (a) and (b) to make the causal link clearer.
- (vii) Reference to Article XIX of GATT must be made here.
- (viii) "Safeguard measures may be applied whenever the competent authorities of the importing contracting party [or a customs union] have established that a product is being imported in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause, or threaten to cause, serious injury to domestic producers of like or directly competitive products."

Paragraph 4(a) "there has been an unexpected, sudden and large increase in the quantity of such product being imported;"

Suggestions:

- (i) "There has been an unexpected, sudden and large increase, both in absolute terms and in relation to domestic production, in the quantity of such product being imported."
- (ii) "Sudden and large" should be replaced by "actual or relative".
- (iii) Whether the increase in imports is a principal cause or a negligible cause should be defined.
- (iv) Delete "unexpected".

Paragraph 4(b) "the competent national authorities of the importing contracting party have established that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."

Suggestions:

- (i) Add "directly" before "causing or is threatening ...".
- (ii) Replace "or" by "and" in "like or directly competitive products".
- (iii) "an independent body has established, through a public domestic investigation and decision which included notice to interested parties, public hearings where importers and other interested parties could present evidence and their views, and a published report of the decision describing the factors considered, criteria applied and rationale used, that such increase is causing or is threatening to cause serious injury to the domestic industry that produces like or directly competitive products."
- (iv) Minimum domestic guidelines will have to be developed.
- (v) The "national authorities" should be an independent body.
- (vi) "the competent national authorities ... that such increase is direct and principal cause of the serious injury and threat thereof to the domestic industry that produces like or directly competitive products."

Paragraph 5 "Safeguard measures shall be applied to a product being imported irrespective of its source, subject to the provisions of paragraph 28 and 29 below.*"

Footnote

"* An examination of the possibility of admitting exceptions to the application of this principle has been initiated, but no form of words has yet been proposed to this effect."

Suggestions:

- (i) Delete the footnote.
- (ii) "Safeguard measures should be applied to a product being imported irrespective of its source [or selectively on a mutually agreed basis subject to stricter disciplines and surveillance] [or selectively on a mutually agreed basis]."
- (iii) "Safeguard measures shall be applied to a product being imported irrespective of its source. However, if the competent authorities of the importing contracting party establish that serious injury is primarily due to increased imports from certain identified sources, safeguard measures may be applied only to the products imported from those specific sources."

Paragraph 6 "Serious injury shall be understood to mean a severe or critical overall deterioration in the position of a domestic industry responsible for at least a major proportion of the domestic production of like or directly competitive products."

Suggestions:

- (i) "Major proportion" is to be defined and quantified.
- (ii) Replace "a major proportion" by "more than half".
- (iii) Replace "severe or critical" by "significant".
- (iv) New paragraph before paragraph 6: "Definition of product should not be subject to any device that would allow over-classification or selective definition of source such as price breaks".

Paragraph 7 "Threat of serious injury shall be understood to mean serious injury that is clearly imminent and is demonstrated to be a virtual certainty."

Suggestion:

- (i) "A determination of threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which imports would cause serious injury must be clearly foreseen and imminent".

Paragraph 8 "For the purposes of this Agreement, a domestic industry shall be understood to mean an industry operating within the customs territory of a contracting party [or within the customs territory of a customs union]."

Suggestion:

- (i) Delete the word "customs" in "customs territory".

Paragraph 9 "In the determination of whether or not serious injury or threat thereof exists, all relevant factors of an objective and quantifiable nature having a bearing on the position of the domestic industry shall be taken into account, such as: output, inventories, utilization of capacity, productivity, employment, wages, sales, market share, exports, domestic prices, import and export prices, pace of import increase, return on investment, profits and losses. This list is not exhaustive; neither one of these factors alone, nor even several of them may necessarily be decisive in the process of determination; but serious injury or threat thereof not causally linked to increased imports shall not weigh in the process of determination."

Suggestions:

- (i) First sentence remains as it is. First phrase of second sentence remains intact. Next phrase would be replaced by the following idea: "A minimum requirement for a finding of serious injury would be that certain, specified factors (such as lost sales and reduced profits, for discussion purposes) must be demonstrated. These factors would be necessary but not sufficient for injury to be found". Last phrase (on causality) should be clarified as follows: "Factors other than increased imports, in particular the prevailing market conditions in the domestic industry, shall be taken into account in determining whether injury is caused by increased imports".
- (ii) Paragraph 9 bis Consideration could also be given to indicators of the existence of serious injury such as the following: significant idling of productive capacity (including plants closures and significant under-utilization of production capacity); significant unemployment across the domestic industry; a significant number of firms carrying out domestic production operations at a reduced level of profit; and, significant decline in the proportion of the domestic market supplied by domestic products as compared to imports of a like or directly competitive product.
- (iii) Wages, domestic prices, import and export prices should be deleted.
- (iv) Add to the list "overall economic situation and consumption".
- (v) Modification of last phrase starting with "but serious": "The determination of principal cause shall be based on an examination of the effect of imports on one hand and on the other hand, all other relevant factors which, individually or in combination, may be adversely affecting the domestic industry".
- (vi) Replace last phrase starting with "but serious" by:
"Furthermore, serious injury or threat thereof cannot be deemed to exist where factors such as technological change or changes in consumer preference or similar factors are instrumental in switches to like and/or directly competitive products made by the same domestic industry".
- (vii) Delete "Market share".
- (viii) Add "competitiveness" to the list of factors.

Paragraph 10 "Safeguard measures shall be applied only to the extent as may be necessary to remedy or prevent serious injury or threat thereof and to facilitate adjustment. They should take the form of tariff increases, but may also take the form of quantitative restrictions. No safeguard measure shall have the effect of reducing the quantity of imports below a recent representative level."

Suggestions:

- (i) The tariff increase should "in no case exceed 30 per cent of the bound tariff".
- (ii) Delete "but may also take the form of quantitative restrictions".
- (iii) Delete the first sentence.
- (iv) Drop the second sentence.
- (v) Add to the end of the paragraph "In calculating the recent representative level, any period during which imports of the product concerned were insignificant should be excluded".
- (vi) The maximum tariff increase by 50 percentage points.
- (vii) "Safeguard measures shall be applied only to the extent as may be necessary to remedy or prevent serious injury and to facilitate adjustment. They should take the form of tariff increases, but may also take the form of quantitative restrictions. No quantitative restriction shall have the effect of reducing the quantity of imports below a recent representative level unless use of such a recent representative level would not prevent or remedy injury, nor shall any increase in tariff exceed that necessary to prevent or remedy injury and facilitate adjustment."
- (viii) Add wording to indicate "recent representative level" to mean imports of the last three years.
- (ix) Delete reference to structural adjustment.

Paragraph 11 "A safeguard measures shall be applied only for the time as may be necessary to remedy or prevent serious injury or threat thereof and to facilitate adjustment. If the expected period of application exceeds (x) year(s), the measure must be coupled with structural adjustment measures."

Suggestions:

- (i) Rewrite paragraphs 11 and 12 as follows: "A safeguard measure shall be applied only for the time as may be necessary to remedy or prevent serious injury or threat thereof and to facilitate adjustment. Initially, it shall be applied for a period of not more than three years. Exceptionally, a safeguard measure may be extended, provided it is demonstrated that the situation justifies it, adjustment has commenced during the initial period of application and the pertinent rules of Sections III and IV are observed".
- (ii) Delete reference to structural adjustment.
- (iii) Initial period limited to two years.
- (iv) Delete last sentence.
- (v) Merge paragraphs 11, 12, 13 and 19 as follows: "A safeguard measure shall not be applied for longer than necessary to remedy or prevent serious injury. A safeguard measure shall not exceed (x) year(s). It may be extended, but only once, for a period of (y) year(s) provided that: (i) it has been established by the competent national authorities that there is continuing serious injury; and, (ii) there is evidence that adjustment is taking place. A safeguard measure shall not be applied to the import of a product which has been subject to such a measure for a period equal to that during which such measure was applied.
- (vi) "A safeguard measure shall be applied only for the time as may be necessary to remedy or prevent serious injury or threat thereof. This period shall in no case exceed three years."
- (vii) Rewrite paragraphs 11, 12 and 13 as follows: "All safeguard measures shall be temporary. The initial period of any safeguard measure shall not exceed (x) years. Exceptionally a safeguard measure may be extended, provided it is demonstrated that the situation justifies it and that structural measures were in place. In no circumstances shall the total period of application of any safeguard measure exceed (y) years".

Paragraph 12 "The initial period of application of a safeguard measure may be extended, provided it is demonstrated that the situation justifies it, structural adjustment measures are taken and pertinent rules of Sections III and IV are observed."

Suggestions:

- (i) Delete the whole paragraph.
- (ii) Add "exceptionally" to the extension of the initial period.
- (iii) Drop the word "pertinent".
- (iv) The period of extension should not exceed six months.
- (v) "The three-year period mentioned in the previous paragraph may be extended only provided it is demonstrated that the situation justifies it, structural adjustment measures are taken and pertinent rules of Sections III and IV are observed. Such extension shall not exceed two years."
- (vi) Insert the following between this paragraph and paragraph 13:
"Safeguard measures limited to specific sources of imports may not exceed a maximum duration of (m) months. In cases in which the extension of such safeguard measure is justified under the provisions of paragraph 12, the measure shall be made applicable to all sources of imports. If, at any time during the period of application of safeguard measures limited to specific sources, it appears that imports from non affected suppliers are increasing significantly, the measure may be applied to those suppliers."

Paragraph 13 "The total period of application of any safeguard measure shall not exceed (y) years."

Suggestions:

- (i) Four years.
- (ii) Five years.
- (iii) Three years.
- (iv) Eight years.
- (v) Two and a half years.

Paragraph 14 "If the expected duration of any safeguard measure is over one year, it shall be progressively liberalized during the period of application. As soon as feasible, the contracting party adopting the measure shall review the situation and, if possible, withdraw the measure or increase the pace of the liberalization."

Suggestions:

- (i) "If the expected duration of any safeguard measure is over three years, it should be progressively liberalized during the period of application. As soon as feasible, the contracting party adopting such measure shall review the situation and, if possible, withdraw the measure or increase the pace of the liberalization."
- (ii) Make the method of degressivity operational by specifying that if the safeguard action is a tariff increase, then the tariff will be reduced by a specific percentage each year; and if it is a quantitative restriction, then the quotas should be increased each year by a specific percentage.
- (iii) The review should be mandatory. Delete "if possible" in the last sentence.
- (iv) The plan for the rollback should be announced at the outset.
- (v) The following sentence could be added at the end: "In the case of an extension, the safeguard measures must not be more restrictive than the last phase of the initial measure, and should continue to be degressive."
- (vi) The Committee may play a rôle in the exercise of progressive liberalization.

Paragraph 15 "No safeguard measure shall be applied to the import of a product which has been subject to such a measure within the preceding (z) years."

Suggestions:

- (i) "After a safeguard measure and any permissible extension have been provided, safeguard measures on the affected product may not again be introduced for a period equal to the number of years for which the original measure and any extension was in effect."
- (ii) (z) years equals the period equal to the total number of years of application of safeguard measure plus a number to be agreed. The idea is to make it more difficult to use safeguard.
- (iii) "Before a safeguard measure may be reapplied to a product which has previously been subject to a safeguard measure within the importing contracting party concerned, a period of time must have elapsed which is no less than the total period of application of the earlier measure, provided that such a period is greater than 24 months."

- (iv) There must be provisions for short period of protection for seasonal products.
- (v) There should be a minimum period of one year for products of a seasonal character.

Section III: STRUCTURAL ADJUSTMENT

Suggestions:

- (i) Delete Section III.
- (ii) Absolutely necessary to maintain Section III.

Paragraph 16 "In circumstances provided in Section II, a contracting party may adopt adjustment assistance measures to support structural adjustment measures taken by an industry without adopting safeguard measures, in order to avoid the application of the latter."

Suggestions:

- (i) Some reference to the relevant GATT articles must be made, such as "any structural adjustment assistance measures must be in conformity with the relevant GATT articles".
- (ii) Delete the phrase "in order to avoid the application of the latter".
- (iii) Substitute "safeguard measures" by "border measures".
- (iv) Delete this paragraph.
- (v) "In conjunction with a safeguard measure, a contracting party may adopt GATT-consistent adjustment assistance measures to facilitate adjustment measures taken by firms or workers. However, countries adversely affected by such adjustment assistance measures retain their rights provided under the General Agreement to respond."
- (vi) Replace "support" by "stimulate".

Paragraph 17 "Adjustment assistance measures shall be applied only to the extent and for the time as may be necessary to support the industry concerned to remedy the serious injury, to prevent the threat thereof, to recover competitiveness or to reallocate resources, as the case may be."

Suggestions:

- (i) In order not to provide a blank cheque to subsidization, a reference to the obligation under the General Agreement is needed here.
- (ii) It is not acceptable to limit the possibility of providing assistance only if there is serious injury.
- (iii) Delete paragraph 17.

Paragraph 18 "If structural adjustment measures or adjustment assistance measures are taken in association with safeguard measures or in place of safeguard measures, the contracting party applying them shall provide the CONTRACTING PARTIES, through the Safeguards Committee, with all the relevant information on such measures."

Suggestions:

- (i) Delete paragraph 18.
- (ii) This transparency requirement should be more appropriate in Section IV.
- (iii) Transparency can only cover governmental measures and not private measures.

Paragraph 19 "There shall be no extension of any safeguard measure in the absence of evidence of adjustment."

Suggestions:

- (i) Delete paragraph 19.
- (ii) This paragraph can be combined with paragraph 12.
- (iii) Paragraph 12 can be merged with 19 in the following manner:
"An initial period of application of a safeguard measure may be extended, provided that the authorities of the importing contracting party have demonstrated that the situation justifies it, and structural adjustment measures are being taken and pertinent rules of Sections III and IV are observed".
- (iv) "Evidence" can be clarified in order not to provide carte blanche to subsidization.

Section IV: NOTIFICATION AND CONSULTATION

Paragraph 20 "Before taking or extending any safeguard measure, a contracting party shall notify the CONTRACTING PARTIES, through the Safeguards Committee, of:

- (a) the initiation of an investigatory process relating to serious injury or threat thereof and the reasons for it;
- (b) the finding of serious injury or threat thereof; and
- (c) the decision to apply or extend the safeguard measure."

Suggestions:

- (i) Delete "and the reasons for it" in sub-paragraph (a).
- (ii) Add "import surveillance" to sub-paragraph (a).
- (iii) Sub-paragraph (a) should refer to more details concerning the determination of injury and the causal link of injury to imports. Other details like product description, etc. should also be provided.
- (iv) Sub-paragraphs (b) and (c) can be combined.

Paragraph 21 Once a contracting party has established the existence of serious injury or threat thereof and has decided to take a safeguard measure, it shall also provide the CONTRACTING PARTIES with all necessary information both on the establishment of serious injury or threat thereof and on the measure it proposes to adopt, the precise description of the product involved, the proposed date of implementation, expected duration, time-table for phasing out the measure and any other pertinent data.

Suggestions:

- (i) The exact timing of the notification, "evidence" on serious injury or threat thereof, causal linkage between increase in imports and injury, should be provided by the importing countries.
- (ii) "These requirements should also apply to extension of safeguard measures. In those situations there should be a requirement to provide the CONTRACTING PARTIES, through the Safeguards Committee, with the necessary information on evidence of adjustment and on progress thereafter."

- (iii) "All necessary information" should be more clearly defined by the use of, for example, a standard format for the contents of such notifications.
- (iv) Delete "any other pertinent data" at the end of the sentence.
- (v) Add at the end of the sentence "any contracting party may request other information considered relevant".
- (vi) We must not overwhelm ourselves with a series of notification requirements. Notifications should include just the essential information like the duration and the time-table for the rollback.
- (vii) Notification should be made before action is taken and also before consultations are held. There should be language to indicate which exporting countries would be included for consultations.
- (viii) Notifications on domestic procedures should be included.

Paragraph 22 A contracting party proposing to apply or extend a safeguard measure shall request, and give adequate opportunity for consultation with those contracting parties affected by such a measure. These contracting parties may also request consultations with the importing contracting party, with a view to reaching agreement on the application of the proposed measure.

Suggestions:

- (i) A contracting party proposing to apply or extend a safeguard measure shall give adequate opportunity for consultation with those contracting parties affected by such a measure. In the case of an extension, such consultation should take place no later than three months before the expiry date of the safeguard measure concerned. Contracting parties affected by the safeguard measure may also request consultations with the importing contracting party, with a view to reaching agreement on the application of the proposed measure or the proposed extension.
- (ii) Replace "request" with "provide" or "offer" because it is usually the exporting country which requests consultations.
- (iii) The wording in the first sentence, "those contracting parties affected by such a measure" should be replaced by "those contracting parties having a substantial interest as exporters of the product concerned".
- (iv) Insert after the first sentence "When a Contracting Party considers that it has a substantial interest as an exporter of the product concerned, it is entitled to request consultations and, thereupon, such consultations shall be held promptly".

- (v) Add, at the end of this paragraph, reference to the following effect: "Such consultations are to be held before the proposed measure is taken. Unless otherwise agreed among the parties in the consultations, the proposed measure is to be put into effect (x) months/days after the request for consultations."
- (vi) "A contracting party proposing to apply or extend a safeguard measure shall offer, and give adequate opportunity for consultation with those contracting parties affected by such a measures. The purpose of the consultations shall be to reach agreement on the application of the proposed measure."

Paragraph 23 In critical circumstances where delay would cause damage which it would be difficult to repair, a safeguard measure may be adopted provisionally before the consultations referred to above take place, provided the CONTRACTING PARTIES are notified forthwith and the said consultations are effected immediately after the provisional measure is taken. The period of application of the provisional measure shall not exceed (z) months, within which the pertinent requirements of this Section and of Section II must be met.

Suggestions:

- (i) "In critical circumstances, as provided for under Section II, a safeguard measure may be adopted provisionally before the consultations referred to above take place, provided the CONTRACTING PARTIES are notified forthwith and the said consultations are effected immediately after the provisional measure is taken".
- (ii) New paragraph under Section II along the following lines: "In critical circumstances where delay would cause damage which it would be difficult to repair, a provisional safeguard measure may be taken pursuant to a preliminary determination of reasonable indication of serious injury or threat thereof. The period of application of the provisional measure shall not exceed (z) months, within which the pertinent requirements of this Section and Section IV must be met".
- (iii) Add "and never beyond the period of one month" after the word "immediately".
- (iv) (z) months equals six months.
- (v) (z) months equals eight months.
- (vi) (z) months equals seven months.
- (vii) (z) months equals three months.

- (viii) In critical circumstances where delay would cause damage which it would be difficult to repair, a safeguard measure may be adopted provisionally before the consultations referred to above take place, provided the CONTRACTING PARTIES are notified forthwith and the said consultations are effected immediately after the provisional measure is taken. The period of application of the provisional measure shall not exceed three months, within which the pertinent requirements of this Section and of Section II must be met.
- (ix) Replace "forthwith" by "within one week after the adoption of the provisional measure" and "immediately" by "within two weeks".
- (x) The term "forthwith" should be replaced by "before". It is proposed to clearly provide "within (W) days after the provisional measure is taken", instead of merely stating "immediately after".
- (xi) If perishable goods are involved, then consultations should be held immediately after the arrival of such goods.
- (xii) New paragraph to be inserted following paragraph 23: "In the case of safeguard measures limited to specific sources, the parties shall endeavour through consultations to reach agreement with a view to minimizing the effect of restrictions on the trade of the affected contracting parties. Before the adoption of provisional measures under the provisions of paragraph 23, the authorities of the importing contracting party shall give the opportunity of urgent consultations, to be held within 10 working days of the request by the importing contracting party, with the contracting parties affected by such a measure. Consultations may be continued throughout the period of application of provisional or definitive measures at the request of any of the parties concerned".

Paragraph 24 Contracting parties may counter-notify measures taken by other contracting parties which have failed to make the proper notifications. Counter-notifications shall entail consultations under the provision of this Section.

Suggestions:

- (i) Counter-notifications can be made in all situations.
- (ii) Counter-notifications should be dealt with under Section VII if it deals with the "grey-area".
- (iii) The word "proper" does not mean the degree of perfection. Rather it means the existence of such notification. The word "proper" can therefore be deleted and replaced by "notifications under this Section".

- (iv) "Contracting parties may also notify measures taken by other contracting parties when the latter have failed to do so. The provisions of this Section shall apply to such notifications."

Section V: RESPONSE TO SAFEGUARD MEASURES

Paragraph 25 A contracting party affected by a safeguard measure may, within (n) days, suspend the application of equivalent concessions or obligations under the General Agreement to the trade of the contracting party applying such a measure in one or more of the following circumstances:

- (a) consultations referred to in paragraphs 22, 23 and 24 above have not been held;
- (b) agreement has not been reached with the importing contracting party in the consultations in which the affected contracting party has participated;
- (c) measures under the provisions of paragraphs 11 and 12 and Section III above have not been taken;
- (d) the maximum period allowed for the application of the safeguard measure has expired; or
- (e) it has been found by the Safeguards Committee or through a dispute settlement procedure that the safeguard measure does not conform to this Agreement.

Suggestions:

- (i) Sub-paragraphs (a) and (c) are very subjective and imply automaticity. They should be deleted.
- (ii) Sub-paragraph (b) should read: "Agreement has not been reached through consultations, including solutions by means of compensation."
- (iii) Sub-paragraph (c) should be deleted because it refers to structural adjustment.
- (iv) In sub-paragraph (e), the timing of the procedure should be specified. Presumably it refers to the time after a final report is adopted and not after the dispute settlement procedure is initiated.
- (v) Sub-paragraphs (a)-(d) are different in nature from sub-paragraph (e). There seems to be no need to specify those conditions in sub-paragraphs (a)-(d).

- (vi) "A contracting party affected by a safeguard measure may, upon the expiration of thirty days from the day on which written notice is received by the Safeguards Committee, suspend the application of substantially equivalent concessions or obligations under the General Agreement to the trade of the contracting party applying such a measure in one or more of the following circumstances;
- I. Adequate information is given to the Safeguards Committee that one or more of the following conditions for the application of safeguard measures has not been respected:
 - a. the importing contracting party has not given the opportunity for consultations as provided under paragraphs 22 and 23;
 - b. the importing contracting party has not provided information on the adoption of adjustment measures as required under paragraphs 11 and 12;
 - c. the maximum period allowed for the application of the safeguard measure has expired.
 - II. Measures are limited to imports from specific sources, unless agreement has been reached with the supplying countries concerned.
 - III. It has been found through dispute settlement procedures that the safeguard measure does not conform to this Agreement."
- (vii) Sub-paragraph (a) should be redrafted to indicate that in spite of the request, consultations have not been taken.
- (viii) Sub-paragraph (e) should make it clear that the Safeguards Committee will not interfere with the normal GATT dispute settlement procedure.
- (ix) The order of paragraphs 25, 26 and 27 should be rearranged by putting paragraph 26 first, followed by paragraph 27 and then paragraph 25 because compensation should go before retaliation.
- (x) This Section is closely linked to Section VI. Any rules on responses to safeguard measures will be acceptable if the measures do not apply to developing countries.
- (xi) Only sub-paragraph (e) is necessary.

- (xii) Sub-paragraphs (a), (d) and (e) deal with cases of violation of this agreement; as such, is it more appropriate to handle these cases in the dispute settlement procedure rather than through "retaliation"? Or, should the affected exporting country be allowed to take retaliatory measures for limited duration, for example, only until dispute settlement procedures are completed? How does one provide multilateral discipline to such "retaliation"?

Paragraph 26 A contracting party taking a safeguard measure may give compensation to the affected contracting parties. A contracting party agreeing to receive compensation shall not be entitled to suspend equivalent concessions or obligations.

Suggestions:

- (i) "A contracting party taking a safeguard measure or seeking an extension of such a safeguard measure may give compensation to the affected contracting parties. A contracting party agreeing to receive compensation shall not seek to exercise the right to suspend equivalent concessions or obligations."
- (ii) The first sentence should read "compensation shall be given to the affected contracting parties". Then keep the second sentence.
- (iii) Counter-measures should be collective.
- (iv) Article XIX does not mention compensation although it has been a GATT practice that compensation is granted to other products normally in the form of tariff reductions. Compensation gives rise to difficulties in real life because of (a) the choice of product and (b) a political judgement to make sure that the cost for one industry is not higher than the benefit for another industry.
- (v) Compensation will generate internal pressures and might be equally effective as retaliation in terms of removal of the safeguard measure.

Paragraph 27 The suspension of equivalent concessions or obligations and compensation shall not apply in the case of safeguard measures of duration not exceeding the period of (x) year(s) indicated in paragraph 11 above, provided such measures conform with the provisions of this Agreement.

- (i) This paragraph seems to be based on the assumption that there will be an automatic waiver of retaliation rights for safeguards with short duration. This is unnecessarily complicated and can be arbitrary. Contracting parties should retain the ultimate right to retaliate on grounds of principle as well as leverage.

- (ii) "When the safeguard measure exceeds a period of two years, the suspension or compensation shall be applied for a period equivalent to the duration of the safeguard measure from its introduction until its final elimination."
- (iii) Safeguard measures taken for very short periods will nonetheless disturb the balance of rights and obligations. A balance would be maintained if the rights contained in paragraphs 25 and 26 would be automatically triggered when safeguard measures exceed a certain period of time.
- (iv) Paragraph 27 may not be necessary because of the existence of sub-paragraphs (b) and (e) of paragraph 25.
- (v) Change (x) years to (t) years and then delete "indicated in paragraph 11 above".
- (vi) It might be too much to talk about compensation and retaliation if safeguard actions are shorter than one year.
- (vii) This paragraph will provide an incentive for contracting parties to use the rules rather than going outside. The question is whether the benefits are worth the cost because there might be more and more safeguard measures later on.

Section VI: DEVELOPING COUNTRIES

Paragraph 28 Safeguard measures shall not be applied to exports of the least-developed contracting parties irrespective of whether these countries, individually or collectively, are principal suppliers or not.

Paragraph 29 Safeguard measures shall not be applied against products originating in less-developed contracting parties whose market shares in the products concerned are minimal [%].

Suggestions:

- (i) We are not in favour of having a separate Section to deal with the question of developing countries. This does not mean that the concepts of s & d cannot be introduced in relation to specific paragraphs in the text. Paragraphs 28 and 29 clearly imply an exception to the m.f.n. clause. We cannot discuss s & d in a vacuum. Specific areas where s & d can be discussed include, for instance, injury.
- (ii) The m.f.n. principle already embodies an exception for developing countries through the Enabling Clause, the GSP, the Protocol of 16 and Part IV of the GATT. This is recognized in the Punta del Este Declaration and should be seen in the light of the whole negotiations.

- (iii) If Article XIX is to be changed, there has to be something for the developing countries. Right now developing countries are not affected by Article XIX at all.
- (iv) The practical effect of paragraphs 28 and 29 is to drive contracting parties to the "grey-area".
- (v) This concerns the fundamental issue to m.f.n. There should be no discrimination by source. Measures should be taken by products and not by individual contracting parties.
- (vi) The term "shall not" in paragraph 28 is too strong.
- (vii) The selective non-application of rules and disciplines to developing countries would constitute a serious exception to the m.f.n. principle. We are not in favour of retaining paragraphs 28 and 29 as drafted in the present text.
- (viii) Add a new paragraph after paragraph 29: "In addition, these measures shall not be applied to the products originating in developing contracting parties with serious balance-of-payments difficulties".

Paragraph 30 Less-developed and least-developed contracting parties shall have the flexibility in the conditions defined by the provisions of this Agreement to apply safeguard measures, structural adjustment measures and adjustment assistance measures which their individual development, financial or trade situation requires.

Suggestions:

- (i) We have a major reservation on paragraph 30 because the rules should apply to all countries as a safeguards situation is a common problem.
- (ii) "Flexibility" under paragraph 30 is not a blank cheque and should be defined.
- (iii) Paragraph 30 will be acceptable if it covers only the least-developed countries.

Section VII: GOVERNMENTAL AND NON-GOVERNMENTAL MEASURES

Paragraph 31 Contracting parties shall keep the CONTRACTING PARTIES informed of their laws, regulations and administrative procedures relating to safeguard measures.

Suggestion:

- (i) "Contracting parties shall notify the CONTRACTING PARTIES of their laws, regulations and administrative procedures relating to safeguard measures as well as of modifications made to them."

Paragraph 32 Contracting parties shall notify the CONTRACTING PARTIES of all existing safeguard measures and other measures having the effect of safeguard measures as defined by this Agreement, whether or not covered by its provisions, and keep the CONTRACTING PARTIES informed of all new measures.

Suggestions:

- (i) Delete the phrase "whether or not covered by its provisions".
- (ii) "Contracting parties shall notify the CONTRACTING PARTIES of all existing safeguard measures and other measures having the effect of safeguard measures as defined by this Agreement and of all new measures."
- (iii) Replace "whether or not covered by its provisions" by "unless covered under other GATT provisions".
- (iv) Sections IV and VII can be merged.

Paragraph 33 Contracting parties undertake to notify and keep the CONTRACTING PARTIES informed of all non-governmental measures on which information is available to them.

Suggestions:

- (i) We should be more specific about non-governmental measures by adding "which have a safeguard effect".
- (ii) At the end of the paragraph add "and shall undertake best efforts to deter public and private enterprises from pursuing or entering into such agreements".
- (iii) The phrase "on which information is available to them" seems to be one step forward and two steps back. It should be deleted.
- (iv) The whole paragraph should be deleted because we are not going to denounce actions by the private sector.
- (v) Paragraphs 31, 32, 34 and 35 can go to the notification section. Then paragraphs 33 and 36 can be merged to become one paragraph on "grey-area" measures.

Paragraph 34 Contracting parties may counter-notify measures dealt with in paragraphs 32 and 33 above which have not been notified.

No Suggestion.

Paragraph 35 The provisions in paragraphs 20, 21, 24, 33 and 34 above shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Suggestion:

- (i) Change "legitimate commercial interests" to "legitimate business proprietary interests".

Paragraph 36 Contracting parties agree to phase out promptly all safeguard measures inconsistent with the provisions of this Agreement or to bring them into conformity with these provisions.

Suggestions:

- (i) "Contracting parties agree to phase out all safeguard measures inconsistent with the provisions of this Agreement, or to bring them into conformity with these provisions, in accordance with an agreed time-table."
- (ii) "Contracting parties agree to phase out all safeguard measures, and other measures having the effect of safeguard measures unless otherwise provided for in GATT, inconsistent with the provisions of this agreement or to bring them into conformity with these provisions."
- (iii) Replace "inconsistent with the provisions of this Agreement" by "not explicitly provided for in this Agreement".
- (iv) The time-limit for phase-out should be spelt out during the Uruguay Round.
- (v) Add "definitively" after the word "promptly".
- (vi) We should ensure that measures inconsistent with the GATT are brought into conformity with the GATT. The way to do it is to provide some flexibility. In Article XXV paragraph 5 of the GATT, for example, each country should be invited to put forward a rollback programme within a timetable which will be respected.
- (vii) The time-limit or the calendar for phase-out depends on individual cases, sectors and markets. It should be agreed upon by partners of "grey-area" measures. It should not be imposed by contracting parties or by a Committee.

- (viii) The diversity of "grey-area" measures and the clear distinction between old and new measures suggest that the time-table for phase-out has to be negotiated.
- (ix) This paragraph creates difficulties because measures inconsistent with the GATT should be eliminated before the end of the Uruguay Round.
- (x) After the word "promptly", add "within (x) months/years starting from the time of the adoption of this Agreement".

Section VIII: SURVEILLANCE AND DISPUTE SETTLEMENT

Paragraph 37 There shall be a Safeguards Committee under the authority of the CONTRACTING PARTIES, with the following functions:

- (a) to report annually to the CONTRACTING PARTIES on the general implementation of this Agreement and make recommendations towards its improvement;
- (b) to monitor the application of all measures taken under the provisions of this Agreement and report, as appropriate, to the CONTRACTING PARTIES;
- (c) to monitor the implementation of Section VII of this Agreement, especially the phase-out of measures not consistent with it;
- (d) to review at any time, at the request of an affected contracting party, any measure that is, prima facie, inconsistent with this Agreement;
- (e) to assist contracting parties, as appropriate, to develop agreed solutions to problems arising from the application of safeguard measures; and
- (f) to perform any other duty connected with measures dealt with in this Agreement that the CONTRACTING PARTIES may determine.

Suggestions:

- (i) Sub-paragraph (c) should read: "to agree the time-tables for the elimination and phase-out of measures notified under Section VII and to monitor implementation".
- (ii) The Committee should have more than a simple monitoring rôle. It should be able to make a judgement.
- (iii) Sub-paragraphs (a) and (b) can be merged.

- (iv) Sub-paragraph (c) should include some "judgement" or "approval" power. In GATT practices, measures that are prima facie inconsistent with the Agreement will be cases of nullification and impairment.
- (v) The Committee should also have to examine the conditions for retaliation.
- (vi) Prima facie is a new and confusing concept. If there is such a problem, one may go straight to paragraph 28 which is the dispute settlement mechanism.
- (vii) There must be a reference to paragraph 25(e) in this paragraph.
- (viii) In sub-paragraph (c), add "total elimination" after "phase-out".
- (ix) New sub-paragraph (f): "to decide and examine the period of application of safeguard measures".
- (x) There is a clear distinction between surveillance functions and dispute settlement functions under normal GATT practices. It is meaningless to wait for a dispute settlement procedure to end in order to retaliate because it will be too late.
- (xi) Sub-paragraph (g): "to examine the conditions for the suspension of equivalent concessions or obligations under the General Agreement as established in paragraph 25".
- (xii) If the functions of the Committee include conciliation, then the provisions in this paragraph are inadequate.
- (xiii) What relationship does the Safeguards Committee have with normal dispute settlement procedures? Does the Safeguards Committee automatically address the GATT consistency of all notified measures even when no contracting party makes such requests? Under what provision can an affected contracting party request the Safeguards Committee to examine certain safeguard measures that are not prima facie inconsistent with the Agreement?
- (xiv) A provision on the constitution of the Committee is needed.
- (xv) In sub-paragraph (b), replace "as appropriate" by "at least annually".