

COMMUNICATION FROM THE UNITED STATES

Desirability of a Safeguard Mechanism for Services:
Promoting Liberalization of Trade in Services

The following communication is circulated at the request of the United States to Members of the Working Party on GATS Rules.

1. The United States offers the following proposal with the goal of focusing discussion in the Working Party on the fundamental question of the desirability of a safeguards mechanism for services. In the event that the Working Party concludes that such a mechanism is desirable, this paper suggests several approaches to making safeguards feasible; that is, designing a safeguard that would genuinely help promote GATS goals. This proposal is without prejudice to our final position on the need for safeguards in the GATS.

I. DESIRABILITY AND FEASIBILITY OF SAFEGUARDS FOR SERVICES

2. The United States continues to believe that the Working Party has not adequately addressed the fundamental issue of whether a safeguard mechanism is desirable in the services context. Further, the numerous, disparate approaches suggested by Members (e.g. ASEAN, Mexico) serve largely to raise even more questions about how a safeguard could be applied in practice. A number of delegations have voiced the opinion that a safeguard in Mode 3 would be counter-productive in that it would threaten foreign direct investment and could lead to forced disinvestment. This group may also wish to consider whether similar disincentives exist in Modes 1, 2 and 4. The possibility of cancellation of a long-term contract to provide, for example, long-distance telephone services, or the forcible expulsion of visa-holders under Mode 4 might also give pause to would-be investors and traders.

3. Further, we believe that no Member has yet made a convincing case in favor of safeguards. The GATS was designed to provide Members with significant flexibility in designing their schedules. No Member has to schedule a commitment with which it is not comfortable. Allowing access to a safeguard above and beyond the inherent protections of the positive-list approach might run counter to the GATS goals of promoting more open services trade. To date, no Member has shown that the existence of a safeguard mechanism would enable that Member to make more extensive commitments to liberalization than it could make without one. The United States believes that this case should be convincingly demonstrated in order for the Working Party to determine that a safeguard is desirable. Accordingly, we invite Members favoring a safeguard to provide examples of the additional commitments they would be prepared to undertake were a safeguard made available.

A Safeguard Must Encourage Liberalization

4. A central purpose of the GATS is to encourage liberalization of trade in services. The purpose of a safeguard mechanism is, theoretically, to allow Members, by providing them with a measure of security, to undertake more extensive liberalization commitments than they might otherwise make. WTO Members have committed to liberalizing trade in services and are working toward that goal. Since Members plan to take steps to open trade in services, a safeguard mechanism would be desirable only if its existence gave members the necessary confidence to make deeper commitments than they might already plan to make. For example, if a Member has already recognized the inherent value in opening its services market to foreign investment, that Member might consider whether the availability of a safeguard might lessen this benefit by discouraging foreign investment and international trade in services.

II. QUESTIONS REGARDING A POTENTIAL SAFEGUARD MECHANISM

5. Without prejudice to the outcome of discussion in the Working Party on the desirability of a safeguards mechanism in the GATS, the United States submits the following questions and observations for Members' consideration:

A. SAFEGUARDS SHOULD NOT APPLY TO EXISTING COMMITMENTS

6. The GATS has been in effect for more than five years. During that time, Members have not had recourse to a safeguards mechanism. Indeed, many Members have continued to open their markets and broaden their commitments. Clearly, such a mechanism is not necessary for the protection of commitments made in Members' original schedules, or subsequently in the absence of a safeguard. To apply a safeguard to existing commitments could be seen as regressive and even counter to GATS goals. The first paper the Secretariat prepared for this Working Party (S/WPGR/W/1) notes that Members entered into their initial GATS commitments without recourse to safeguards and that a safeguard would be best discussed in the context of higher commitments. Indeed, the Secretariat suggested that "the justification for designing any new safeguard mechanism would be its contribution to future market opening." This question is echoed in a later Secretariat paper (S/WPGR/W/15) which asks whether it is more appropriate to consider safeguards in the context of governments being more forthcoming in their commitments. A 1997 submission from Hong Kong China (S/WPGR/W/18) notes that Members have already willingly bound themselves to commitments in the absence of a safeguard and asks whether, therefore, a safeguard should only be related to future commitments. Consistent with our views on the GATS goals of liberalizing services trade, the United States believes that any potential safeguard should only apply to new commitments made by Members after the safeguards mechanism takes effect *and* which are more significant than the Member would have made if it had not had recourse to a safeguard.

B. A POTENTIALLY USEFUL PRECEDENT IN AGRICULTURE AGREEMENT

7. We have noted in the past that the goods model may not be appropriate for services. However, this should not preclude us from looking for useful precedents in other WTO agreements. While by no means a perfect example, the Special Safeguard in the Agriculture Agreement offers a precedent for linking access to a safeguard to new, demonstrably liberalizing commitments.

8. Article 5 of the Agreement on Agriculture provided a special safeguard mechanism to Members, but there were three important conditions applied on the application of the safeguard. First, it is only available with respect to products having been designated in the Member's schedule as subject to the safeguards provision, and this eligibility was linked to the commitment to remove non-tariff measures. Second, specific triggers were established for implementing the safeguards, and establishment and implementation of the safeguard mechanism is scrutinized by the Committee on

Agriculture. Third, the special agricultural safeguard is of limited duration - only to be applied during the reform process and a number of countries have proposed termination in the current agriculture negotiations. When scheduling commitments, Members could consider whether these commitments might result in a sudden surge in imports that threatened domestic suppliers. If a Member believes its commitment was deep enough to pose a risk, the Member could schedule access to a safeguard. The "special agricultural safeguard" was directly linked to commitments undertaken by a Member which were recognized as being more liberalizing than the status quo - it is only available for products that were subject to the tariffication process which removed non-tariff measures. The United States has proposed a similar approach for services (S/WPGR/W/17) and we continue to believe that, if the working party determines that a safeguards mechanism is desirable, Members should schedule access to the mechanism based on new commitments which they feel to be particularly risk-prone and meritorious of special protection.

C. PREDICTABILITY IN APPLICATION

9. We have noted in the past that the presence of a safeguard mechanism, especially if available in Mode 3, could have a potentially chilling effect on investment. A scheduling approach would help to mitigate this negative impact. A potential investor would be able to see in advance whether a particular sector might be the subject of a safeguard action and could choose whether to take on this added risk. A non-specific, horizontal safeguard might, conversely, lead investors to conclude that the risk of sudden, unforeseen legal barriers renders a market unattractive. It would be unreasonable, and in many cases could amount to expropriation, to invite in a foreign investor and then require him to dismantle and remove his investment. Of course it might also be counter-productive for a country to dis-allow its own citizens from, for example, seeking legal advice from attorneys of a country in which they planned to do business. And the possibility of the instantaneous unilateral termination of a temporary visa could further deter foreign services providers. In short, the availability of a safeguard in any sector or mode of supply could have a deterrent effect on international trade in services and might therefore be seen as contradictory to GATS liberalization goals and to a Member's own economic interests. The transparency of a scheduled safeguard might help to mitigate these problems.

D. SAFEGUARDS LINKED TO LIBERALIZATION

10. In order for a Member to schedule access to a safeguard, the Member would need to demonstrate that access to the safeguard would enable that Member to schedule more significant liberalization commitments than would be possible in the absence of the safeguard. We offer the following examples for consideration and discussion:

- A Member offers to bind a commitment which is less liberal than existing practice, e.g. a Member currently allowing foreign executives a six-month temporary working stay binds a commitment allowing a three-month stay. Should this be seen as liberalization simply because there was no previous binding? If so, is it enough to merit access to a safeguard?
- A Member with no binding in a sector binds existing practice. In the first example, the Member would bind at six months. This might be seen as liberalization, but perhaps not significant enough to merit a safeguard since it does not seem to put the Member at any additional risk.
- A Member offers to bind a commitment that is broader than current practice. To use the same example, the Member which currently allows foreign service providers a six-month temporary working visit binds an offer permitting multiple entries and stays of up to one year. This would appear to represent a significant opening of the Member's services market and could be seen as risky enough to merit the special protection of a safeguard.

- It is also useful to consider market access and national treatment. For example, access to a safeguard could be limited to commitments of “none” in these areas.

11. We have argued that the scheduling nature of the GATS allows Members to include in their schedules access to safeguards-type protections. Should the Working Party agree on a structure for a safeguards mechanism, we would propose that this be the only safeguard to which Members would have access. If this group reaches consensus on the desirability of a safeguard and subsequently designs a feasible mechanism that promotes opening of markets, it would be confusing and ultimately counter-productive for Members to schedule ad hoc safeguards without regard for the agreed-upon structure. Additionally, when considering whether to schedule access to the safeguard, Members would benefit from considering whether existing access to relief under GATS Articles XXI and XII offers sufficient or more appropriate protections.

III. CONCLUSION

12. The United States has offered the foregoing proposal as an invitation to Members which feel the need for a safeguards mechanism to offer evidence that such a mechanism would promote the fundamental goals of the GATS. We continue to believe firmly that it should not be the role of this Working Party to promulgate rules that run counter to the over-arching objectives of the GATS. In sum, if we cannot delineate any direct connection between safeguards and liberalization of trade in services, we should consider whether it would be desirable to have such safeguards. Only when we have determined that safeguards will lead to more open services markets can we begin to address the methodology to definitively link a safeguards mechanism to concrete commitments to liberalize services markets.
