

DISCUSSION PAPER

ON

ART. X GATS - EMERGENCY SAFEGUARD MEASURES

SUBMITTED BY THE MEMBERS OF THE EUROPEAN TRADEABLE SERVICES NETWORK TO THE EU COMMISSION

Introduction

1. This paper contains initial comments by the members of the European Tradeable Services Network (ETSN) on the question of the possible elaboration within the WTO of emergency safeguard measures under Art. X of the GATS, in response to the invitation by the EU Commission (DG I) for comments on this subject. It follows the WTO Secretariat note of 5/7/95 by limiting comments on Art. X at this stage to two basic questions: the objectives of emergency safeguard measures and the circumstances in which such measures would be justified.

Limiting the scope of a safeguard mechanism

2. Art. X GATS deals explicitly with 'emergency' safeguard measures. This wording has direct implications for the definition of the circumstances that might call for such measures to be taken. On the one hand, such circumstances should be of an exceptional, non-recurrent nature. Hence, the use of safeguards should be allowed only on a strictly temporary basis. On the other hand, the adverse effect on the trading environment should go far beyond the effect of normal economic fluctuations and thus be close to a 'catastrophic' effect. Safeguards should not be used to scale down normal trade, but only to redress patently abnormal trade situations.

3. Furthermore, any safeguard action taken under the GATS should be subject to proper notification and effective control, so as to contain the risk that states act without sufficient justification or take disproportionate measures. Such control should be exercised by WTO institutions, notably by means of the WTO dispute settlement mechanism.

4. The GATS contains several provisions which act as safeguards for specific areas or occurrences, i.e. Art. XII (restrictions to safeguard the balance of payments), Art. XIV (general exceptions inter alia for the protection of public morals and health) and Art. XIV bis (exception for the protection of essential security interests). The GATS also contains specific provisions addressing practices which may distort trade, i.e. Art. IX (business practices, such as dumping) and Art. XV (subsidies). In the light thereof, it would seem appropriate to argue that emergency safeguard measures, if any, should not be invoked to deal with matters for which the GATS contains separate provisions.

5. From a European perspective, another relevant consideration is whether any safeguard instrument is likely to be used primarily by less developed countries outside Europe. As this is by and large believed to be the case, the interests of the European services industry require the EU to concentrate in particular on the question how the scope of such an instrument, if any, can be properly limited, so as to minimize potentially major trade restrictive effects.

6. A further reason to exercise the necessary restraint as to the need for, and the scope and modalities of, any safeguard instrument in the services sector is the system under the GATS of *ex ante* circumscription of the level of liberalisation obligations and commitments, including eventual withdrawal of previously scheduled commitments. The WTO Secretariat's note therefore rightly states that "in considering the circumstances that might give rise to a need for safeguard measures in services, it is important to note that the GATS as it stands, and pending the achievement of higher levels of liberalisation, embodies considerable scope for limiting the extent of Members' obligations" (para. 6). This reasoning would seem to support the conclusion that, where only modest levels of liberalisation obligations and commitments apply, there would hardly be a case for safeguard measures. Clearly, this may differ from one services sector to another.

Objective of pursuing and grounds for using a safeguard mechanism

7. In this context, the WTO Secretariat further argues that the need to facilitate the acceptance by various WTO members of higher levels of commitment under the GATS may well be a principal rationale for developing some kind of emergency safeguard instrument (para. 8). In a preparatory note of 4/10/95 to the Member States the Commission (DG I) in principle shares this point of view and comes out in favour of a safeguard clause. Doubting whether existing mechanisms under the GATS, such as progressive liberalisation and modification of schedules of commitments, are sufficient to arrive at a higher level of liberalisation among GATS members, the Commission concludes: "a safeguard clause is probably a more attractive safety valve. Indeed, the mere possibility of having such a provision may contribute to further market opening and induce liberalisation".

8. At this stage, no evidence is offered to support this reasoning. In the absence of such evidence, liberalisation and safeguards under the GATS should each be pursued in their own right, and not by making the one dependent on the other. Furthermore, if the Commission's reasoning were to be followed, a safeguard clause would only have the desired effect (higher level of liberalisation) if it can be said to meet, in a reasonable manner, specific liberalisation concerns/hesitations of GATS members in the various industry sectors covered by the GATS. This would require proper analysis of such concerns/hesitations on a sector-by-sector basis, before drafting any safeguard clause.

9. The definition of the objective of a safeguard instrument, if any, is of key importance in properly limiting the scope of such an instrument. From what is mentioned above under point 4 it follows that a number of potential objectives have to be eliminated. The only important remaining objective, mentioned also in the WTO Secretariat's note, would be to protect domestic industry on a temporary basis from injury resulting from an unforeseen increase in imports of services in the country concerned under the GATS (under circumstances other than 'unfair trading practices'). In practical terms, this would mean that the only basic safeguard objective qualifying under Art. X of the GATS would closely resemble the basic safeguard objective specified in Art. 2(1) of the Agreement on Safeguards, drawn up in application of the GATT 1994 agreement. According to the latter provision:

" A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or indirectly competitive products."

Implementation problems

10. Transposition of this GATT provision on safeguards, if any, in the field of services would have to be carefully assessed, in particular considering the four modes of supply. The note from the WTO Secretariat suggests that the difference between existing safeguards in goods and those that might be developed in services may be a complicating factor in this respect. In particular, safeguards in services "would have to deal both with cross-border service supply and with establishment-based service supply, whereas safeguards in the field of goods are only concerned with cross-border trade" (para. 6). Elsewhere in the note it is mentioned that "complexities of a kind not encountered in the field of goods may arise as Members attempt to define available safeguard measures and the circumstances of their application" (para. 10). Indeed, it is clear that a GATT-type safeguard concept as mentioned above, which was developed for cross-border trade, would not be suitable for application in the case of establishment abroad, which is typical for several services industries.

11. Also the Commission, in its preparatory note of 4/10/95 to the Member States, recognizes that there are many obstacles on the road to defining the modalities of a safeguard action, such as:

- the difficulty, in many cases, to identify who is the service supplier and to determine which economic activities belong to a sector (example: tourism services);
- the problem of applying a safeguard clause to the different modes of supply, particularly supply through commercial presence (difficulty to distinguish between imports and domestic production);

- the problem of defining the conditions/criteria which have to be satisfied to justify a safeguard action;
- the fact that the nature of the remedies under a safeguard action will very much depend on the commitment appearing in the schedule of commitments, and more in particular on the sector and/or mode(s) of supply.

In the light of these problems concerning the modalities of a safeguard action, the Commission concludes that "it may be useful to reflect for which sectors (and modes of supply) a safeguard action is mostly needed."

Conclusion

12. The foregoing can be summarized as follows:

Firstly, no convincing case has been made so far of the need at this stage for a safeguard mechanism under the GATS.

Secondly, to avoid abuse, any safeguard provisions should be defined in strict terms, for application on a non-permanent basis, and the use thereof should be subject to appropriate prior notification and *ex posteriori* controls within the WTO.

Thirdly, as in the case of trade in goods, the only acceptable overall objective of any safeguard system for trade in services should be the protection of domestic industry against serious injury due to excessive production by foreign service suppliers. However, such a safeguard, which was developed for cross-border trade in goods, would not be suitable for application in the case of establishment abroad.

Fourthly, it remains to be clarified whether the removal of obstacles to further liberalisation of trade in services should be a primary aim of a safeguard system. If and to the extent this would be the case, such a system should be based on a proper prior assessment of such obstacles.

Fifthly, because of the special characteristics of the different sectors of the services industry, the modalities of any safeguard action in each sector and mode of supply require detailed consideration.

The latter two points support the conclusion that the formulation of any horizontal safeguard provisions under the GATS should be preceded by a sector-by-sector assessment of:

- (a) the main obstacles to further liberalisation which a safeguard clause should realistically seek to overcome;
- (b) the type of safeguard measures suitable for the sector and mode(s) of supply concerned.

**ETSN MEMBERS SUPPORTING THE DISCUSSION PAPER
ON EMERGENCY SAFEGUARD MEASURES**

Fédération Bancaire de l'Union Européenne - FBE/EBF
rue Montoyer, 10 - B - 1040 Bruxelles

European Telecom Network Operators - ETNO
boulevard Bischoffsheim, 33 - B - 1000 Bruxelles

Groupement des Unions Nationales des Agences et Organismes de Voyages de l'UE
- ECTAA
rue Dautzenberg, 36-38/bte 6 - B - 1050 Bruxelles

European Community Shipowners' Association - ECSA
rue Ducale, 45 - B - 1000 Bruxelles

Fédération des Experts Comptables Européens - FEE
rue de la Loi, 83 - B - 1040 Bruxelles

European Federation of Engineering Consultancy Associations - EFCA
avenue de Cortenberg, 79 bte 7 - B - 1040 Bruxelles

EuroCommerce
rue Froissart 123-133 - B - 1040 Bruxelles

Association of European Airlines - AEA
avenue Louise 350 bte 4 - B - 1050 Bruxelles

European Community's Independent Airline Association - ACE
minervastraat, 4 - Keiberg 2 - B - 1930 Zaventem

European Society of Chartered Surveyors - ESCS
avenue de la Joyeuse Entrée 1/5 - B - 1040 Bruxelles

Conseil des Architectes d'Europe - ACE
avenue Louise 207 bte 10 - B - 1050 Bruxelles

Union des Confédérations de l'Industrie et des Employeurs d'Europe - UNICE
rue Joseph II, 40 bte 4 - B - 1040 Bruxelles