

Working Party on GATS Rules

REPORT OF THE MEETING OF 23 OCTOBER 2002

Note by the Secretariat¹

1. The Working Party on GATS Rules held its thirty-ninth meeting under the chairmanship of Mr. Thomas Chan, from Hong Kong, China. The agenda for the meeting was contained in WTO/AIR/1930. It consisted of five items: negotiations on emergency safeguard measures under GATS Article X; negotiations on subsidies under GATS Article XV; negotiations on government procurement under GATS Article XIII; date of the next meeting; and other business. The Chairperson drew attention to the Annotated Agenda (JOB(02)/144) in which he proposed themes for discussion under the three agenda items.

2. The representative of Thailand said he intended to make a statement under "Other Business". The Chairperson announced that he would inform delegations on a letter he had received from the Chairperson of the Committee on Trade and Development Special Session.

3. The agenda for the meeting was adopted.

A. NEGOTIATIONS ON EMERGENCY SAFEGUARD MEASURES (ARTICLE X OF THE GATS)

4. The Chairperson recalled that, under the Work Programme on emergency safeguard measures adopted by the Working Party in July,² Members were encouraged to put forward submissions as early as possible before 31 December 2002. Moreover, Members had agreed, *inter alia*, to identify, elaborate and consolidate elements of an ESM and to address the question of feasibility and desirability. It had also been agreed that the Chairperson would circulate a note by 15 March 2003 to report on the results of such work. The Annotated Agenda circulated prior to this meeting proposed that, for the purpose of identifying, elaborating and consolidating elements of an ESM, delegations might continue their comparison of the various proposals on the table. In his view, five broad approaches could be identified: (a) the "horizontal" safeguard mechanism; (b) the "scheduled" safeguard; (c) the "consensus-based" safeguard mechanism; (d) the "core" safeguard mechanism; and (e) no explicit safeguard mechanism. Based on the elements contained in the Synopsis³, Members might want to identify the main differences as well as possible common elements. The question of feasibility might also be addressed in this connection. This discussion was without prejudice to the question of desirability of an ESM. Members wishing to address this question were encouraged to present submissions.

5. The representative of the United States noted that, while items (a) to (d) (paragraph 2 of the Annotated Agenda, JOB(02)/144) could be interpreted as different "approaches", item (e) should be considered as an "outcome", based on a review of the issues of feasibility and desirability. It might be useful to reformulate (e) in this sense, since the negotiations on an ESM were without prejudice to an outcome.

¹ This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

² S/WPGR/7, specifically paragraph 3. See also S/WPGR/M/38.

³ JOB(01)/122 of 7 August 2001 and JOB(01)/122/Add.1 of 21 December 2001.

6. The Chairperson replied that the five approaches were based on proposals by Members and were intended to facilitate discussions. Item (e) included the situation, raised by some Members at previous meetings, where even in the absence of an established ESM, a Member decided to inscribe an ESM in its schedule of specific commitments. He stressed that the approaches – or outcomes – identified in the Annotated Agenda were not meant to prejudge the negotiations in the Working Party.

7. The representative of Switzerland said that the option described under (e) went beyond the particular situation just described by the Chairperson and deserved further consideration, in particular in discussing desirability of an ESM. The Chairperson said that Members were invited to address the issue of desirability in this meeting.

8. The representative of the United States recalled that her delegation had submitted a proposal on desirability and feasibility and noted that these issues had been raised by other Members as well in their proposals. Members were free to put forward more submissions, but contributions already on the table should not be forgotten.

9. The Chairperson proposed that the Working Party continue discussions on emergency safeguard measures in informal mode.⁴ It was so agreed.

10. In concluding discussions under this agenda item, the Chairperson stressed that substantive inputs were needed. He noted an interest to take up further the Australian proposal in order to see how it could be merged with other approaches on the table. Clearly, more work was required on desirability and feasibility. It was also important to discuss concrete cases in which safeguard measures might be needed. With respect to the request made during the informal session for inputs by the Secretariat, he suggested that the Secretariat could highlight core elements contained in the various written proposals on the table.

B. NEGOTIATIONS ON SUBSIDIES (ARTICLE XV OF THE GATS)

11. The Chairperson drew Members' attention to the Work Programme agreed by the Working Party. He recalled that Members were encouraged to put forward submissions as early as possible before 31 March 2003, and that it had been agreed to continue discussion on the basis of submissions and materials available. He noted that, at the last meeting, there was a general feeling that more information on subsidies was needed. Members had been invited to give consideration to a simplified questionnaire put forward by the delegations of Argentina, Chile and Hong Kong, China, for the purpose of information exchange on subsidies (JOB(02)/84). Moreover, the Secretariat had circulated an updated summary of information on subsidies contained in TPR reports (S/WPGR/W/25/Add.3). He invited delegations to continue the discussion on information exchange on the basis of these documents. Members might also wish to consider if they had other suggestions to further the gathering of information, and any other technical and analytical work.

12. The representative of Chile said that this agenda item was particularly important for her delegation. In the course of the ongoing market access negotiations, her delegation had asked Members having sent requests to Chile to provide information on the subsidies they maintained in sectors they wanted Chile to open. But no information had been provided so far. Increasing transparency on subsidies remained a key objective and any type of information was useful. In a process of market opening, addressing the issue of subsidies was in everybody's interest. She noted that it had been said on various occasions that no sufficient information was available. However, the webpage of some Members contained a wealth of information on their subsidy regimes in different sectors. The problem was that this information did not always cover important elements such as

⁴ See *Summary of Comments Made During the Informal Meeting of 23 October 2002*, Note by the Secretariat, JOB(02)/159.

amounts, beneficiaries, etc. For the next meeting, specific questions could be made to these Members on their subsidy programmes. With respect to the Secretariat document W/25/Add.3, she noted that (i) the information focused on some services sectors only (mainly tourism, transport, financial services); (ii) it was not clear whether subsidies targeted services exports, and (iii) developing countries appeared to subsidize more than developed countries. She enquired which sources were consulted when drafting TPR reports.

13. The representative of Ecuador said that the examples in W/25/Add.3 were limited to some sectors and concerned mostly developing and least-developed countries. She drew attention to a submission that Saudi Arabia had circulated in the Committee on Trade and Environment and in the Committee on Trade and Environment Special Session on *Energy Taxation, Subsidies and Incentives in OECD Countries and Their Economic and Trade Implications on Developing Countries, in Particular Developing Oil Producing and Exporting Countries*⁵ and suggested that it be circulated in this Working Party because it contained interesting information on subsidies in the energy sector. It would be important for the Working Party on GATS Rules to be aware of this document.

14. The representative of Hong Kong, China suggested that, under this agenda item, Members might also want to address the issue of permissible subsidies, including schemes aimed at promoting government policies in the health and education sectors, or research and development.

15. The representative of Uruguay said that the Working Party was mandated by Article XV to develop the necessary multilateral disciplines to avoid trade-distortive effects. Technical work and negotiations on subsidies had to be carried out on this basis, taking into account the Work Programme on subsidies.

16. The representative of Cuba enquired why the simplified questionnaire put forward by the delegations of Argentina, Chile and Hong Kong, China (JOB(02)/84, 12 July 2002) had not included the question on the policy purpose of the subsidy which was contained in the original questionnaire (see S/WPGR/W/16).

17. The representative of the Republic of Korea said that the Secretariat's document W/25/Add.3 was a good basis for furthering the information exchange. Noting that this compilation focused on some services sectors of an infrastructural nature, she suggested that Members might be more proactive in other sectors. The document also concentrated on small economies where tourism was a key sector. It might be useful to refer to previous documents to have a more general view. More information would allow to work on the form, nature and definition of services subsidies. She wondered whether incentives provided to foreign investors should be addressed. In the goods sectors, investment incentives were not covered, unless there was a violation of the TRIMs Agreement. It was interesting that tariffs and tax exemptions on goods should be considered as incentives to some services, such as tourism. Other questions included whether consumer tax exemptions on oil used for airplanes and ships, or support provided to education and training of certain professionals should be regarded as subsidies. The definition of subsidy contained in the Agreement on Subsidies and Countervailing Measures was broad and more factual data on services subsidies were needed. Work on categorisation of various services-related subsidy programmes should also be considered. The Working Party should examine how to update the checklist on subsidies.

18. The representative of New Zealand recalled that her delegation had submitted in 1997 a response to the subsidy questionnaire in S/WPGR/W/16/Add.2 and would endeavour to update this information. New Zealand would welcome if other countries, developed and developing, submitted information under the simplified questionnaire in JOB(02)/84. Her delegation was interested in any

⁵ Document WT/CTE/W/215 and TN/TE/W/9.

clarification that might emerge as to the scope of measures that were being addressed under this agenda item.

19. The representative of Chile recognized the importance of the policy objective behind subsidies. However, as a first step, it was important to obtain as much information as possible on subsidy programmes. She agreed with Hong Kong, China that the issue of permissible subsidies would need to be addressed. The representative of the Republic of Korea had raised a range of interesting questions. Chile welcomed New Zealand's intention to update its reply to the questionnaire and encouraged other countries to do the same. She enquired about the necessary procedure to circulate a document presented in one WTO body in another body.

20. The representative of Switzerland noted that W/25/Add.3 compiled information contained in documents which had been circulated in another WTO body. The Secretariat might provide via by e-mail the document referred to by the delegation of Ecuador, as it did for other documents. He wondered whether there were some guidelines for circulating documents in other bodies. Document W/25/Add.3 was a good basis. More information on the existing types of subsidies was needed in order to identify trade-distortive measures and proceed with this negotiation. Information was available because all Members should have a broad idea of the kind of subsidies they maintained. Switzerland was willing to go on with this exercise, but a critical mass of interested Members was necessary.

21. The representative of Chinese Taipei noted that some subsidy programmes listed in W/25/Add.3 were different from those in the SCM Agreement. Therefore, she agreed that, as mentioned by the Secretariat, the term "subsidy" and related concepts might not have been used in TPR reports with the SCM Agreement definition in mind. Those types included incentives and concessions relating to investment programmes, in particular in the tourism sector; subsidies through the procurement of goods and services from public entities; exemptions from indirect taxes, in particular VAT, usually not conformity with the SCM Agreement; most subsidies in W/25/Add.3 were specific, as required by the SCM Agreement. She wondered whether a broader definition would be needed in the services context, which would take into account the particular nature of services sectors. A first step would be to agree on the scope and definition of a subsidy for services. The SCM Agreement could offer some guidance, but it was not a panacea. It was not appropriate at this stage to discuss permissible subsidies before other issues, such as types and scope of subsidies, had been addressed.

22. The representative of the United States said that circulating documents from one body to another raised systemic issues and she preferred to consult her capital on this question. She supported Switzerland's practical proposal that each delegation should obtain information within its own government as quickly as possible. Further discussion was needed on what type of subsidies should be addressed under this mandate. It would be impossible to identify all subsidies. For instance, should scholarships be classified as subsidies? How many Members had such educational grants, should they be considered justified? Hence, the scope of subsidies should be discussed and only trade-distortive ones be addressed under this agenda item.

23. The representative of Paraguay said that information on services subsidies was useful in view of the ongoing market access negotiations. Members should provide information on existing subsidies, and discuss a definition for, and the scope of, services subsidies. Lack of information prevented many Members from opening their markets. His delegation supported proposals to improve transparency.

24. The representative of Mexico said that the information contained in W/25/Add.3 was limited but did nevertheless give a general idea of what types of subsidy programmes existed, and which sectors were concerned. Most subsidies granted in developing countries took the form of tax

exemptions, while other countries granted direct financial assistance for a number of policy purposes. Taking as a starting-point statistics on international trade in services, it should be possible to identify countries granting subsidies impacting on international services trade, and the sectors which were targeted. Each Member, developed and developing, could then provide information on subsidies in these sectors (type of programme, amounts involved, beneficiaries, etc.). Mexico would be ready to contribute to such an exercise. On the basis of the information collected, it could be possible to assess the potential for trade-distortive effects and identify legitimate support.

25. The representative of Mauritius enquired whether the compilation of TPR-related information on subsidies undertaken by the Secretariat covered all TPR reports since 1995.

26. The representative of Brazil said that it would be difficult to deviate from the requirement in Article XV to exchange information on all subsidies related to trade in services that were provided to domestic suppliers. This information exchange was a first and important step, and had proved to be difficult since the beginning of the negotiations. He doubted whether scholarships should be a focal issue in terms of trade-distortiveness. When negotiating the Tokyo Round Subsidy Code and the subsequent SCM Agreement, governments had moved into the negotiating phase once they had obtained all the information available on subsidies. Some information was thus needed. In the Working Party, the questionnaire W/16 had been the first procedural step to comply with the information exchange. Few delegations had replied, none of them was a large trading partner. The simplified questionnaire in JOB(02)/84 would hopefully provide more input. In addition, Members might wish to consider further refining the mechanism that had been used in order to obtain information. Information drawn from TPR reports appeared to be significantly limited since the TPR mechanism operated along specific procedures and all TPR reports had the same structure. The review of a Member's trade policy was conducted in the light of Members' obligations in the WTO, with a view to increasing transparency. In preparing the reports, the Secretariat did not focus on services subsidies since those were not the object of specific rules. For instance, the questionnaire submitted to Brazil by the Secretariat staff drafting the TPR report in 1996 and 2000 did not contain questions on services subsidies. Members could consider ways of ensuring that, in future, the TPR Division take into account the negotiations in this Working Party and include information on services subsidies, without prejudice to the question of trade-distortiveness. Seeking information in other fora had already been proposed in this Working Party. Brazil had suggested that the OECD could play an important role in providing information on export credit. The Secretariat had prepared a note on the *Arrangement on Guidelines for Officially Supported Export Credits*, including on the so-called *Yellow Book*⁶, but no data had been available on subsidies *per se* because, in his understanding, the OECD had not been in a position to provide such information. Members might want to explore again the idea of involving the OECD in the process of information gathering. Finally, it should be kept in mind that Members' schedules contained limitations for discriminatory subsidies and, hence, could be a source of information.

27. The representative of Guyana said that the GATS, and in particular Articles IV, V and XV, aimed at promoting economic development, but also ensuring the participation of developing countries. Those countries, especially the small economies, relied on services and needed to be able to use subsidies to stimulate economic growth. He wondered whether the information contained in TPR reports was accurate and reliable. For instance, the information provided, on page 16 of W/25/Add.3, on subsidies in the United States did not coincide with the relevant limitations in the US schedule of specific commitments. On the other hand, detailed information was provided for Dominica and other Members. On page 29, regarding subsidies in the TPR report of the European Communities, it was stated that "no figures are available on subsidies granted by the 15 Member States". Countries did not seem to provide the same type of information and there was a need to have a clearer view before addressing the issue of trade-distortiveness.

⁶ JOB(01)/66.

28. A representative of the Secretariat, replying to the question by the delegation of Chile, said that, in drafting TPR reports, the Secretariat relied primarily on information provided by the Member under review, but also on any pertinent source (Internet, for instance). A questionnaire was used as a working document, in particular when information was difficult to find in the public domain. It was sent to the authorities of the Member under review. Its structure reflected that of the final report. Information was sought primarily in sectors with strong government involvement. In many countries, this was typically the case for tourism, transport, telecom, etc. Other sectors, which may be economically important, but where governments intervened to a lesser extent – construction, professional services – attracted less attention. It had to be kept in mind that TPR reports were not meant to provide a systematic picture on subsidies (whether for goods or services), but focused on Members' trade policies and practices from a broad perspective with a view to enabling a multilateral assessment of the effects on the world trading system. Regarding the proposal by the delegation of Ecuador to circulate, in the Working Party on GATS Rules, a document of Saudi Arabia, which had been initially distributed in the Committee on Trade and Environment, she said that she was not aware of specific procedures in this respect. However, there might be systemic implications, and the position of the submitting delegation might need to be taken into account. She noted that the contribution in question was an official WTO document, which each delegation was free to consult; a reference to this document would be recalled in the minutes of the meeting.⁷ With respect to the question by the delegation of Mauritius, she confirmed that all TPR reports had been reviewed in the compilations undertaken by the Secretariat since 1995, which were contained in documents S/WPGR/W/25, including Add.1 to 3. With respect to the comment by Brazil regarding subsidy-related limitations in Members' schedules, she recalled that the Secretariat had compiled relevant entries in document S/WPGR/W/13 and Add.1.

29. The representative of Chile suggested that Members having scheduled limitations relating to subsidies could provide information on these subsidies.

30. The Chairperson noted that the exchange of information mandated in Article XV remained an important issue. Various delegations had referred to other possible sources of information, including the simplified questionnaire. He drew attention to the Work Programme which stipulated that the discussion should continue on the basis of submissions from Members as well as from materials available. Members should use existing sources to the fullest extent possible. Mention had been made to the need to categorise subsidies and/or clarify scope and definition of services subsidies. These issues could be further discussed at the next meeting. He was ready to update the Checklist of Issues, but substantive input from Members was needed, in particular on the issues raised during this meeting.

C. NEGOTIATIONS ON GOVERNMENT PROCUREMENT (ARTICLE XIII OF THE GATS)

31. The Chairperson drew attention to the Work Programme on government procurement agreed by the Working Party. He recalled that Members were encouraged to put forward submissions as early as possible before 31 March 2003, and had agreed to continue discussion on the basis of submissions from Members and materials available. At the last meeting, the European Communities and their Member States had introduced a communication on government procurement of services (S/WPGR/W/39), which delegations might want to further discuss.

32. The representative of the European Communities replied to questions raised at the July meeting.⁸ Concerning the coordination of work between this Working Party and the Working Group on Transparency in Government Procurement (WGTGP), he said that GATS Article XIII contained a general mandate for government procurement in services, while WGTGP's mandate was limited to

⁷ See paragraph 13 above.

⁸ See S/WPGR/M/38.

transparency, in both goods and services. Addressing transparency issues in both fora should not be problematic and discussion should continue in parallel, since progress in one forum could facilitate progress in the other. Consistency should be ensured and information exchanged so that compatible disciplines could be developed on both sides. With regard to the relationship between horizontal and sectoral disciplines, the EC was ready to discuss various approaches. He felt, however, that there was a preference for horizontal disciplines, which could be complemented, whenever necessary, with sectoral rules.

33. The representative of Chinese Taipei noted that the negotiation under Article XIII included two main aspects, i.e. procedural and market access-related issues. On procedural aspects, including transparency, general rules could be modelled on those of the Agreement on Government Procurement. It was important to ensure that challenge procedures be in the hands of independent entities. The intangible nature of services was likely to influence the nature of the contracts, and she supported a discussion on sector-specific rules. The proposal to undertake market access commitments on a sectoral basis was an interesting aspect of the paper. The Working Party should examine the provision of government procurement under the various modes of supply and their respective implications. In that respect, modes 3 and 4 seemed to be most relevant. It was important to foresee the possibility of thresholds in order to limit the administrative burden .

34. The representative of India said that the mandate contained in Article XIII paragraph 1 exempted government procurement from the application of Articles II, XVI and XVII. The discussion on government procurement in the Working Party should respect this exclusion. He noted with concern that the paper by the European Communities referred to Articles II, XVI and XVII and wanted to register his delegations's disagreement with this approach.

35. The representative of Pakistan supported the statement made by the delegation of India.

36. The representative of Egypt said that market access-related issues should be addressed in the Committee on Government Procurement. He asked the European Communities to elaborate on paragraph 7 of W/39, which stated that "MFN and national treatment requirements are not sufficient to ensure equal treatment and non-discrimination in the area of government procurement" and that "domestic procedural principles" should be developed. Finally, his delegation was of the view that MFN, national treatment and market access issues should not be addressed under Article XIII.

37. The representative of China enquired about the relationship between the MFN obligation, referred to in the EC paper, and the Agreement on Government Procurement. She supported the statements made by the delegations of India, Pakistan and Egypt regarding the scope of the mandate.

38. The representative of the European Communities recalled that their communication proposed a flexible framework for commitments on government procurement. Members could undertake such commitments on a voluntary basis, by sector and mode, whenever suitable. Some modes of supply were irrelevant for some sectors (for instance, mode 1 in the construction sector). He noted that in the Understanding on Commitments in Financial Services, some Members had opened their government procurement under mode 3 only. He agreed that it was important to allow for thresholds and it could be left to each Member to determine their level. Disciplines should be developed with respect to transparency and internal proceedings, with a view to ensuring effective market access and national treatment. The MFN obligation should apply as soon as a framework on government procurement was developed. Signatories to the Agreement on Government Procurement should be able to take MFN exemptions so as to grant more favourable treatment to other signatories.

39. The representative of the United States wondered how discussions should proceed in this Working Party in order to avoid duplication, or even contradiction, with the WGTGP.

40. The representative of the European Communities replied that an important amount of work had already been carried out in the WGTGP and could be used in this Working Party. *Vice-versa*, any relevant work in the WPGR could be useful for the WGTGP. Information could be exchanged between the two fora so as to ensure compatibility – or perhaps even identity – of disciplines.

41. The Chairperson noted that a number of interesting questions had been discussed in relation to the EC contribution. Some interventions had also been made on the scope of the mandate. He invited the Working Party to take note of the statements made and revert to this issue at the next meeting.

D. DATE OF THE NEXT MEETING

42. The Chairperson indicated that the next formal meeting of the Working Party was expected to take place during the next cluster of services meetings, which had been tentatively scheduled from 2 to 13 December. The Working Party would meet during the first week of the cluster and the exact date would be communicated to delegations in due time.

E. OTHER BUSINESS

43. The representative of Thailand informed the Working Party that his delegation had organised a brainstorming session on emergency safeguard measures in services on 26 September 2002. The purpose had been to allow Members to exchange views in a free and non-committing manner. Thailand noted with grave concern that slow progress had been made during the negotiations on ESM, even after three extensions of the mandate, over the past seven years. His delegation was of the view that the brainstorming exercise would be useful for those who had been working for some time in the field, and also for newcomers with whom Thailand would work closely in the future, to facilitate progress in the Working Party. Thailand had sent invitations to more than 30 delegations from all regions. Around 30 participants had been able to attend the seminar. Thailand wished to thank them for their active interest, as well as the Chairperson of the Working Party, and the WTO and UNCTAD Secretariats.

44. The Chairperson informed the Working Party that, on 22 October, he had received a letter from Ambassador Smith, Chairman of the Special Session of the Committee on Trade and Development. He recalled that, during its meeting held on 28 January – 1 February 2002, the TNC had agreed that "...the review of all special and differential treatment provisions with a view to strengthening them and making them more precise, effective and operational provided for in paragraph 44 of the Ministerial Declaration shall be carried out by the Committee on Trade and Development in Special Sessions." Pursuant to that mandate, the Chairperson of the Special Session of the CTD was now requesting information on any discussions or other developments relating to special and differential (S&D) treatment that had taken place in the Working Party on GATS Rules. This information should be conveyed to the Special Session of the CTD by 30 November 2002. Therefore, he intended to write a letter to the Chair of the Special Session of the CTD, recalling the mandate of this Working Party and informing him, in a factual manner, on S&D-related issues that had arisen in the Working Party, if any, under the three agenda items. This report to the CTDSS would be without prejudice to the position of any Member on the issue of S&D. It was so agreed.
