
Working Party on GATS Rules

REPORT OF THE MEETING OF 21 JUNE 1999

Note by the Secretariat

1. The twenty-third meeting of the Working Party of GATS Rules was chaired by Mr. Siva Somasundram of Singapore. The agenda of the meeting was contained in WTO/AIR/1110. It consisted of five items: negotiations on safeguards under Article X of the GATS, including the extension of the deadline for the negotiations; negotiations on subsidies under Article XV of the GATS; negotiations on government procurement under Article XIII of the GATS; date of the next meeting of the Working Party; and other business.

2. The Chairman indicated that he had circulated a Note, Job No. 3432 dated 14 June 1999, to assist delegations in their preparation for the meeting. The Note recapitulated where the Working Party stood on its three negotiating issues and proposed a certain structure for the discussion.

ITEM A: NEGOTIATIONS ON SAFEGUARDS UNDER ARTICLE X OF THE GATS

(i) Extension of the deadline

3. The Chairman recalled that Article X:1 provided for multilateral negotiations on the question of emergency safeguard measures, whose results should have entered into effect not later than end-1997. The deadline was extended in November 1997 by the Council for Trade in Services to 30 June 1999. After it had become clear that the Working Party would not be able to conclude the negotiations by that date, he had held a number of informal consultations to explore Members' views on how to proceed. While there had been broad agreement that the safeguard negotiations should continue, delegations had voiced diverging views on their future timing and the need to coordinate them with the next services round. To a certain extent, interpretation problems surrounding the meaning of the first and second sentence of Article X:1 also played a role.

4. Two drafts had finally emerged from his consultations – a Chairman Communication to the Council for Trade in Services and a draft Council Decision on the safeguards negotiations - which tried to strike a fair balance between the views expressed. He drew attention to three elements of the drafts:

First, the draft Council Decision explicitly provided for a conclusion date of the negotiations, which had not been specified in Article X:1 and the 1997 Council Decision. The date was set at 15 December 2000, reflecting many delegations' views that the current momentum in the safeguards negotiations needed to be maintained and, if possible, increased.

Second, the draft Decision set a final date for the entry into effect of the results of the safeguards negotiations, mirroring language already used in Article X:1. This date should be no later than the date of entry into force of the results of the next services round. There would thus be sufficient time after the conclusion of the negotiations to enact any necessary changes

to GATS and national legislation, possibly in conjunction with the implementation of the results of the new round. By the same token, the Decision did not preclude the possibility of an earlier implementation date should Members deem it necessary.

Third, the Chairman's draft Communication summarized the broad parameters within which Members of the Working Party wished the deadline to be extended. In particular, it made clear that the extension would not prejudice any country's position on the desirability and feasibility of an emergency safeguard mechanism in services. The second paragraph of the Communication reflected the main thrust of opinions voiced, but not necessarily agreed, during his consultations. This part of the Communication represented a finely calibrated balance between various positions.

5. The Chairman asked delegations to approve the Communication and the draft Council Decision, as they had emerged from his consultations.

6. The representative of Brazil, noting he would have preferred a more balanced text, nevertheless commended the Chairman's efforts to reach a consensus. His authorities were concerned that the draft texts failed to give sufficient legal certainty that, should no agreement be reached by 15 December 2000, the Working Party was committed to further extending the mandate of the negotiations. Although many developing countries seemed satisfied with the decision as it stood, the record of the negotiations was not satisfactory from Brazil's perspective. However, his delegation did not want to block a consensus. The representative of Poland felt that the second paragraph of the draft Decision might not be sufficiently precise, pointing out a potential inconsistency with the second sentence of Article X:1. The Chairman explained that the Council Decision, which extended the deadline in 1997, already provided for an override over this sentence. The representative of Poland stated his delegation was ready to approve the draft texts in view of this clarification.

7. The Working Party approved the Chairman's Communication to the Council for Trade in Services and the attached draft Decision ("Second Decision on Negotiations on Emergency Safeguard Measures").

8. The representative of Egypt expressed concern that again it had been necessary to extend the deadline of the negotiations although, under Article X:1 of GATS, the results should have entered into effect in January 1998. His delegation was firmly convinced that emergency safeguard measures were part of the built-in agenda resulting from the Uruguay Round and, thus, were not linked to the impending negotiations under Article XIX of GATS. He urged all Members to work in good faith towards an early conclusion on safeguards; the results should be put into force immediately after 15 December 2000 and not be postponed to an – uncertain – later date. Serious discussions should be held on the shape, elements and model of a safeguard mechanism, whose existence would foster liberalization commitments in particular by developing countries. The representatives of Morocco and India shared these views.

9. The representative of the United States said his delegation looked forward to the Working Party resuming its work on safeguards. While delegations might have different views on the question of an emergency safeguard mechanism (ESM), it was important to reach an understanding on its own merits and not to create links with other issues, such as the next services round. Since Article X:1 clearly called for negotiations on the question of safeguards, Members needed to decide first, if such a mechanism was necessary at all and then determine its elements. His delegation had been willing to take part in hypothetical discussions on what form safeguards might take, but this willingness should not be misconstrued as agreement to ESM in principle. Discussions on whether and how such a mechanism should be constructed would help Members to work through their differences more effectively, with mutual respect for each other's views.

10. The representative of Thailand, reserved the ASEAN delegations' position on the interpretation of Article X. However, if there were differing views, these should not affect Members' efforts to cooperate and come up with a concrete result. The representative of Argentina stated that Article X contained a clear mandate for negotiations on ESM; the Working Party needed to make it operational. The representative of Uruguay concurred; the safeguards negotiations were part of the Uruguay Round built-in agenda.

11. The representatives of Switzerland and Japan stated that their acceptance of the Chairman's Communication and the draft Decision did not imply an obligation to create an emergency safeguard mechanism. Questions related to the desirability and feasibility of such a mechanism were still open.

(ii) *Situations justifying the application of safeguards measures*

12. The Chairman recalled past discussions about the concept of "unforeseen developments". Some delegations had viewed it as a useful – or even pivotal – concept to govern the invocation of a potential safeguard mechanism. Others had felt, however, that it could not serve a reasonable purpose given, *inter alia*, its vagueness and scope for discretion. While rehearsing this debate might not be productive, he encouraged delegations to advance any new ideas and, in particular, explore the related concept of "unforeseeable developments".

13. The representative of Thailand, speaking on behalf of ASEAN, noted the customary definition of the term "unforeseen developments" in the GATT context. As explained on previous occasions, the term was intended to capture developments which negotiators of the invoking party could or should not reasonably have foreseen at the time of scheduling. Despite subjective elements, this was a meaningful and viable concept from a legal point of view. A degree of discretion, to be exercised within legal limits, was recognized in any system and did not preclude the effective application of a legal concept. It would thus be premature to reject the notion of "unforeseen developments" without discussing its possible scope for objective application. Moreover, he was not convinced that the concept of "unforeseeability" would be less subjective; the borderline between the two concepts seemed to be thin.

14. The representative of Australia said that her delegation's previous introduction of the term "unforeseeable developments" had been intended to distinguish the role of subjective and objective factors in the invocation of a potential safeguard mechanism. Australia was concerned about the potential for abuse; the distinction between "unforeseeable" and "unforeseen" developments was a secondary issue. Her delegation remained interested in developing objective tests for emergency situations, based on readily available information or standard practice.

(iii) *Concepts of injury and causality*

15. The Chairman suggested that delegations focus first on the individual indicators proposed in Venezuela's informal paper of May 1999 (Job No. 2860). On that basis, they might explore two issues raised in his preparatory Note: Should the reasons contributing to increased imports be relevant in determining the permissibility or the actual form of a safeguard action? What degree of flexibility should Members have in selecting adequate indicators? He drew attention to relevant provisions of the Anti-Dumping Agreement (Article 3:4), which allowed for some flexibility, and recalled a proposal by the Polish delegation to set up a non-exhaustive "checklist" of the injury and causality indicators discussed in the Working Party.

16. The representative of Thailand, speaking on behalf of ASEAN, suggested that the Working Party, as a starting-point, consider the relevant indicators in the goods area. They might need to be adapted to reflect the specificities of services trade. However, Venezuela's informal paper demonstrated that effective indicators could be developed. In response to the two questions raised by

the Chairman, he observed that the reasons contributing to increased imports should be taken into account in the application of safeguards and that, although Article 3:4 of the Anti-Dumping Agreement was a useful model, greater flexibility might be needed in the services context. The proposed checklist might prove a useful instrument. The representative of the Republic of Korea concurred that an injury determination could be based on statistical criteria. She stressed that objective indicators were essential to prevent the abuse of a safeguard mechanism. The paucity of statistics did not imply that there was no injury and that no safeguards were needed. The burden of proving injury and causality should rest on the invoking party, however. Venezuela's paper could be used as a starting point for setting up the checklist proposed by Poland.

17. The representative of the European Communities said that injury and causality indicators needed to be defined and applied more flexibly in services than in goods trade; the greater their number, the greater the possibility of providing evidence. The representative of the United States said it was necessary first to examine and apply the proposed indicators, before the need for flexibility could be discussed. He reiterated his delegation's request that concrete examples be provided to test various concepts.

18. The representative of Poland noted that the checklist proposed by his delegation would be useful in keeping track of discussions in the Working Party and identify elements on which agreement had been reached. The representative of Japan sought further clarification on various terms contained in the Venezuelan paper; the Chairman undertook to convey the relevant questions to the delegation of Venezuela.

(iii) The question of horizontal versus sector-specific safeguards

19. The Chairman recalled that previous discussions in the Working Party had focused on four principal types of safeguards: horizontal, generally available safeguards; sector-specific, generally available safeguards; sector-specific, scheduled safeguards; and sector-specific safeguards to be scheduled in accordance with a generally agreed framework. He also introduced two questions raised in his preparatory Note, which were intended to explore differences and, possibly, similarities between general (horizontal) and sector-specific safeguards. Assuming that there was a generally available ESM, would it be possible for Members under Article XVIII of GATS to forego the right to invoke it? Should the relevant invocation criteria be related to the existence of scheduled limitations in individual sectors? If delegations' answers to these questions were in the affirmative, the distinction between general (horizontal) safeguards and scheduled safeguards might prove less strict than it appeared on the surface. Responding to questions raised by the representative of the United States, he stressed that his questions were merely intended to stimulate the discussion, but not to express a position on any of the options.

20. On the question of horizontal versus sector-specific safeguards, the representative of Thailand, speaking on behalf of ASEAN, expressed a preference for a horizontal mechanism. However, he was also prepared to consider the possibility of sector-specific safeguards, in various forms, as long as these were not related to scheduling. Such a link would not be acceptable to his delegation. The conceptual and practical distinction between scheduled and non-scheduled safeguards had to be maintained; emergency safeguard measures under Article X:1 needed to be available regardless of scheduling. Members would then be free to forego, or place additional limitations on, their use.

21. The representatives of Argentina, Hong Kong, China, Guatemala and Uruguay also expressed preference for an horizontal approach to safeguards. The representative of Japan, noting that his delegation's position was still open in this respect, suggested that a horizontal approach might be used as a working hypothesis to advance discussions. The representative of Hong Kong, China observed that, while sector-specific and horizontal safeguards might achieve similar effects, a horizontal mechanism was preferable for transparency purposes. He also wondered whether Article XVIII was

conceived to allow for the suspension of general rights, which one day might include an ESM, conferred on all WTO Members under GATS. The representative of Argentina expressed similar reservations. Moreover, he rejected the idea of establishing a link between the level of commitments in a given sector and the possibility of invoking a safeguard. This would imply value judgements on the restrictiveness of limitations and, thus, introduce an element of subjectivity. He failed to see why, for safeguards purposes, full commitments should be treated differently from cases where limitations had been scheduled.

22. The representative of the United States recalled a submission which his delegation had made in March 1997 (circulated as S/WPGR/W/17). It was meant to contribute to the discussion on horizontal versus sector-specific safeguards, provided Members had decided to create an ESM. The submission explained why a horizontal approach to safeguards was neither feasible nor desirable, and then listed ten considerations relevant for developing a framework for sector-specific, scheduled safeguards. He felt that some of the comments made by proponents of a horizontal approach were not too distant from these considerations. They would also prevent the proliferation of different types of mechanisms across sectors and countries and, thus, address concerns raised by Hong Kong, China. Even if that there was no legal basis in the GATS for scheduled safeguards, as suggested by some Members, the Services Council would be free to endorse such an approach.

23. The representative of Thailand, speaking on behalf of ASEAN, noted that, while nothing in the GATS might prevent Members from scheduling sector-specific safeguards, this was not the approach foreseen in Article X.

24. The representative of the European Communities felt that considerations listed in the United States' submission could be applied to horizontal safeguards as well. As sector-specific safeguards would need to accommodate the specificities of individual sectors and modes, they could lead to a maze of different mechanisms in schedules, and further complicate the interpretation of commitments. She also wondered whether Members were able to clearly anticipate emergency situations at the level of sectors and modes.

(iv) Other issues

25. The Chairman proposed further exploring the question of compensation and the possible use of Article 8 of the Agreement on Safeguards as a model. On previous occasions, several delegations had pointed out definitional and analytical problems, raising the question whether compensation should be required at all. Alternatively, compensation could remain confined to negotiations under Article XXI, which would be triggered automatically once a pre-defined "safeguards period" had expired. It was also conceivable to establish a compensation requirement in principle which could then be waived if a country undertook genuine efforts to promote adjustment.

26. The representative of Thailand, speaking on behalf of ASEAN, expressed preference for an approach based on Article 8 of the Agreement on Safeguards. The main challenge was to define the level of "equivalent" adjustments to compensate adversely affected Members. In ASEAN's view, safeguards actions would consist of the suspension of market access and/or national treatment obligations; and the requirement to compensate would depend on the measures adopted. This issue had to be kept separate from negotiations under Article XXI. Safeguards were temporary measures which should not be confused with longer-term protection as available under Article XXI.

27. The representative of the European Communities concurred that the level of compensation had to be determined in view of the actions taken and their effects on other Members. For example, degressive application of safeguards might require less, if any, compensation. In the event of systemic problems in major sectors, Article XXI might come into play. However, this was to be decided case-by-case, possibly based on some general principles.

28. In summing up, the Chairman noted the range of views expressed on the principle approach - horizontal or sector-specific mechanism - to be adopted for safeguards. On some more technical issues, positions seemed to be closer. He proposed that, at the next meeting, the Working Party take up again the issues of causality and injury, based on the Venezuelan paper and other contributions. Members might also want to deepen their understanding of the basic rules and disciplines needed for any type of safeguards mechanism. In addition, he offered to identify further points, based on document S/WPGR/W/27/Rev.1, which had not drawn sufficient attention to date. These points, possibly including the question of applicable measures, would be flagged in his preparatory Note for the meeting. The Working Party agreed.

ITEM B: NEGOTIATIONS ON SUBSIDIES UNDER ARTICLE XV OF THE GATS

29. The Chairman recalled that, at the previous meeting, some delegations had expressed interest in exploring issues raised in a Secretariat document of March 1996 (S/WPGR/W/9). In the main, these revolved around the question of "import substituting" and "export enhancing" subsidies – their empirical relevance, their treatment under current GATS provisions and the need for any additional disciplines. He invited delegations' comments and called for concrete examples of trade-distorting subsidies encountered in foreign markets.

30. The representative of Hong Kong, China indicated that his delegation might make a written contribution in respect of the information exchange exercise mandated under Article XV at the next meeting. On the cross-modal effects of subsidies, he drew delegations' attention to some basic questions which needed to be further examined. For example, although a Member had undertaken full commitments under the national treatment column for one mode, certain policies falling under that mode might affect competitive conditions under other modes. However, the structure that had been chosen for scheduling seemed to imply that there were no such cross-model impacts. On the other hand, Members were committed under Article XVII:1 to ensuring national treatment in respect of "all measures" affecting the supply of a service.

31. The representative of New Zealand said that his delegation also hoped to have a paper ready for the next meeting. He stressed his authorities' continued interest in subsidy-related issues and called for further work on the trade-distortive effects which might arise in particular from export-enhancing subsidies.

32. The Chairman reiterated the importance of the information exchange exercise mandated under Article XV.

ITEM C: NEGOTIATIONS ON GOVERNMENT PROCUREMENT UNDER ARTICLE XIII OF THE GATS

33. The Chairman recalled that several delegations had suggested definitions – or elements of a definition – of government procurement of services. The notion of financial responsibility seemed to be widely considered one suitable criterion. He invited delegations to introduce additional elements

34. The representative of Thailand, speaking on behalf of ASEAN, stressed the need for continued efforts to define government procurement under Article XIII. While the concept of financial responsibility was relevant, it was not sufficient in itself. "Government purpose" was another key term. However, more work was needed to arrive at a satisfactory definition.

35. The representative of Australia suggested developing a hierarchy of procurement activities, reflecting the level of government involvement. Japan's informal paper on concessions could be a starting-point. For instance, activities could be ranked as follows: government purchases for

consumption by the government; government purchases for consumption by the public; contracts with private companies for the purpose of constructing and managing industrial sites, railways, etc.; and contracts with private companies for the purpose of developing natural resources. The latter example was not to be considered government procurement.

36. The representative of New Zealand recommended that the Working Party focus on the definition of government procurement, rather than on surrounding concepts such as concessions. The criterion of financial responsibility was very useful; it implied the assumption of the financial risks and benefits of providing a service on a commercial basis. At the request of another Member, he explained that, in his delegation's view, the concept of concessions implied that a private party carried the risk of operating a service and was entitled to charge a fee in return. Thus, the private operator was financially responsible.

37. The Chairman concluded by drawing attention to three questions contained in a European Communities' informal paper of February 1998: what transactions constitute procurement?; who is the procuring entity?; and what is being procured? He felt it might be useful to further examine the range of entities which might be considered to conduct procurement activities. Some Members had expressed the view that, in principle, entities at all Government levels should be covered and that government ownership and control were important criteria. It had also been noted that the focus should be on entities enjoying some degree of exclusivity, i.e. entities not fully subject to market disciplines. He suggested that, at the next meeting, the Working Party tried to further clarify this question, in addition to advancing the discussion on definitional issues. The Working Party agreed.

ITEM D: DATE OF THE NEXT MEETING

38. The Chairman suggested holding the next meeting on Tuesday, 27 July 1999. The Working Party agreed.

ITEM E: OTHER BUSINESS

39. No matters were raised under this agenda item.
