

## Working Party on GATS Rules

### REPORT OF THE MEETING OF 30 NOVEMBER 2000

#### Note by the Secretariat

1. The Working Party on GATS Rules held its thirtieth meeting under the chairmanship of Mr. Tony Sims, from the United Kingdom. The agenda for the meeting was contained in WTO/AIR/1444. It consisted of five items: negotiations on safeguards 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 agenda for the meeting was adopted.

2. The Chairperson drew attention to an informal Note (Job No. 7352, 17 November 2000) he had circulated to assist delegations in their preparation for the meeting.

#### A. NEGOTIATIONS ON SAFEGUARDS UNDER ARTICLE X OF THE GATS

##### 1. Discussion on substantive issues

3. The Chairperson recalled that, at the last formal meeting of the Working Party, most of the discussion on emergency safeguard measures had taken place in informal session (See Job No. 3449/Add.2, 6 October 2000). Since that meeting he had issued a revised list of themes for discussion (Job No. 1979/Rev.1, 6 October 2000). From 1 to 3 November, the Working Party had held an informal meeting at which it had considered all the themes listed in Job No. 1979/Rev.1. A summary of the meeting, made under the Chairperson's responsibility, was contained in document Job No. 6943 + /Add.1 (3 November 2000). He would invite Members to comment on the papers submitted since the last meeting. The discussion was without prejudice to the issues of desirability and form of a possible safeguard mechanism. He asked the representative of Thailand to introduce, on behalf of the ASEAN Members, their Non-paper containing a Draft Agreement on Emergency Safeguard Measures for trade in services (Job No. 6830, 31 October 2000).

4. The representative of Thailand, speaking on behalf of the ASEAN Members, recalled that this Non-paper had been introduced at the informal meeting held on 1 and 2 November 2000. He said that, as was the case with the ASEAN "Concept-paper" (S/WPGR/W/30, 14 March 2000), this latest communication was not an ASEAN position paper, but was intended to assist the Working Party in carrying out its mandate under GATS Article X. The primary objective was to provide Members with a comprehensive Draft Agreement, containing workable provisions, which had the widest possible basis for acceptance by Members. This objective helped to explain that the ASEAN Members had needed time to produce it. The Draft Agreement followed the general approach of the Concept-paper, i.e. to devise a safeguard mechanism based on prior investigation and establishment of causal link between injury and increased supply or consumption of foreign services. In ASEAN's view, the records of the Working Party showed that a large majority of the Members were in favour of such a mechanism, as opposed to some kind of "automatic" mechanism, such as those existing in the areas of agriculture and textiles. The ASEAN Members believed that the Draft Agreement and the GATS had to be complementary and that there was no inconsistency between the two sets of rules. In fact, the Draft referred to definitions contained in Articles I and XXVIII of the GATS, and new definitions

were used only in cases of absolute necessity. Therefore, most of the key definitions under the general framework of the GATS, such as "trade in services", "supply of a service", "commercial presence", "juridical person", would apply to the proposed safeguards mechanism.

5. He noted that the main elements of the Concept-paper had been retained in the Draft. Many of them had been clarified, and some had been adjusted or developed further in the light of comments made in the Working Party. Timeframes were now specified. The proposed figures were believed to be reasonable and technically appropriate. On the other hand, ASEAN Member countries still proposed "options" in some areas where they wanted to share their thoughts and reflections with the Members. ASEAN hoped to hear views and comments from the Members, which hopefully would help to find solutions. The Draft also contained some new elements. There was no "options" with regard to the definition of domestic industry because the progress achieved in the discussion has suggested that, first, the issue of domestic industry was closely linked to the question of acquired rights, and second, if "domestic industry" were to be defined only for injury determination purposes, the debate could now focus on how broad or how narrow these rights should be defined. Therefore, the options were now proposed with respect to acquired rights. Therefore, Article I:2(a) had to be read in conjunction with Article II:4 of the Draft. Another new element were the lists of indicators, sources of information, and criteria for determining increased supply or consumption and serious injury or threat thereof, which were based on the Secretariat's Note, Job No. 5294 (/Rev.1 and 2). They were now incorporated in the mechanism. The proposed list was a non-exhaustive and non-mandatory one. The provision on surveillance was also new. It reflected discussions in the Working Party but Members had to further examine this issue. As a starting point, ASEAN proposed a provision based on the Agreement on Safeguards, with the Council for Trade in Services as the body to discharge these functions. To conclude his introduction, he said that ASEAN had tried to propose a Draft Agreement that was as comprehensive as possible at this stage of negotiation and hoped that it would be used in the discussion of the ten themes listed in Job No. 1979/Rev.1 (6 October 2000). He stressed that, in preparing this Draft, ASEAN's objective was to strike a balance between, on the one hand, what they believed to be a legitimate right for Members to have recourse to emergency action in response to emergencies that resulted from specific commitments and, on the other, the need to ensure that there was no abuse in doing so. As far as ASEAN was concerned, this discussion was without prejudice to Members' positions on the issue of desirability and the question of "horizontal v. sector-specific safeguards".

6. A number of delegations thanked the ASEAN Members for submitting the Draft Agreement.

7. The representative of the Republic of Korea recalled that his delegation had tabled an informal communication at the last meeting on *Definition of the Domestic Industry* (Job No. 6034, 2 October 2000). In his view, the suggestions made in this paper had found a good adaptation in the ASEAN Draft Agreement.

8. The representative of the European Communities said that the ASEAN Draft Agreement contributed to identifying real problems. However, it did not make progress towards resolving most of the technical problems. She expressed concern regarding the lack of reference to "unforeseen developments". The object and purpose of an emergency safeguard mechanism (ESM) had to be discussed further. In her view, an ESM was a remedy to an extraordinary situation. The definition of "domestic industry" and its practical consequences also needed further consideration, as well as the standards for investigation, which should be high for a services safeguard. Invoking a safeguard measure in the area of services should not be easier than in the goods area.

9. The representative of Uruguay said that it was important to protect foreign investments. The definition of "domestic industry" and that of "acquired rights" were relevant in this regard. Acquired rights had to be protected. The representative of Argentina said that his delegation remained flexible on the issue of emergency safeguard measures and was ready to examine any workable alternative

which could be implemented within the current GATS framework. The representative of Mexico said that his delegation was particularly concerned with the protection of acquired rights of foreign investors. His delegation was ready to continue working on the ASEAN Non-Paper or on any other proposal.

10. The representative of Japan considered that feasibility of an ESM remained a key question, and its desirability was still a pending issue. Foreign investments had to be protected, hence the definition of "domestic industry" and the treatment of acquired rights were important issues. His delegation was concerned that some options might have a chilling effect on foreign investors. Moreover, it was fundamental to determine in which situations a safeguard measure could be justified. The representative of Colombia said that any definition of domestic industry should protect domestic production and employment. Therefore, a definition of "domestic industry" had to protect established services providers, regardless of ownership. Once foreign suppliers were established they should have the same rights as national providers, including the right to expand. Her delegation feared that an ESM would limit the growth of foreign participation (future foreign investments or the expansion of existing companies with additional foreign capital) in services activities in Colombia. The representative of India said that his delegation was still analyzing the ASEAN Non-paper and the comments made by delegations at the informal meeting on 1 and 2 November.

11. The representative of Norway said that it was crucial to protect foreign established suppliers. A great amount of work remained to be done. His delegation was willing to participate and to consider any proposal. The representative of Switzerland supported the comments made by the European Communities, in particular concerning the philosophy which should underlie a possible ESM. His delegation was ready to continue to discuss this subject-matter and to explore alternatives. Definition of "domestic industry", modal application of an ESM and the burden of proof were key issues. Safeguard measures should not be mere policy options. The credibility of any future mechanism that might be designed was crucial.

12. The representative of the United States believed there was common ground on some basic concepts concerning feasibility. In particular, there seemed to be a strong view that a possible ESM should not harm or discourage investments and that there should be high standards of investigation. A number of difficult issues remained to be addressed, such as the lack of reliable data for many sectors, modal application and how to avoid that an ESM would affect disproportionately mode 4.

13. The representative of Ecuador said that an ESM was important, not only as a mechanism to protect the domestic industry, but also as a tool which would facilitate Members' participation in the services round in general. Clear rules for the protection of "acquired rights" would help the opening of markets and the efforts to attract investments. An ESM would create a favourable climate for developing countries to liberalise their services sectors, knowing that they could rely on rules to protect themselves for a limited period and in a flexible manner.

14. The representative of Canada said that his delegation still had concerns regarding how an ESM would operate. Key conceptual issues, such as the definition of "domestic industry", the concept of "acquired rights", the determination of injury, had important policy implications. He was ready to continue discussion of these issues.

15. The representative of Australia said her authorities were concerned about the definition of "domestic industry" proposed in the ASEAN Draft Agreement, particularly because it seemed to provide a narrow definition for the purpose of establishing injury and a broader one for applying the remedy. Foreign established suppliers should not be excluded from injury determination or from requesting safeguard protection. Foreign established suppliers should retain all existing rights, including those of expansion. A safeguard measure should only be applied in the mode of supply causing injury. The necessity test proposed in Article IV:1 of the ASEAN Draft Agreement might not

deter an invoking party from applying measures going beyond facilitating adjustment of domestic industry. The effect of such a necessity test should be further considered. The possibility of investigating under one mode of supply and applying the remedy in another one was problematic. Her delegation wanted to further consider the link between "unforeseen developments" and "emergency situations", in the light of recent WTO case-law.

16. The representative of Brazil said that many issues remained to be further discussed, such as the definition of "domestic industry". Like others, his delegation attached great importance to the protection of foreign direct investments. An ESM should strike a balance between the burdensome resort to GATS Article XXI and too flexible a system which might give rise to abuse. His delegation was willing to continue discussion on the basis of the ASEAN text, as well as any further contribution. The representative of Costa Rica said that any ESM should protect the acquired rights of investors. The representative of Bolivia said that it was important to have an ESM in order to pursue the opening of services sectors. An ESM should not threaten foreign investments.

17. The representative of Thailand, speaking on behalf of the ASEAN Members, said that, in ASEAN's view, the Draft Agreement dealt with the issue of situations justifying safeguard action and already reflected the philosophy behind the concept of "unforeseen developments". With respect to the Communication by the Republic of Korea (Job No. 6034), the "third option" proposed by Korea was in essence quite similar to the solution proposed in the ASEAN Draft Agreement. The solution proposed by ASEAN was basically former Option 2 of the ASEAN Concept-paper, plus protection of acquired rights, or, said differently, former Option 1, minus injury caused by established foreign suppliers. This amounted to having *de facto* two different definitions of domestic industry: one for establishing injury (former Option 2 - narrower), and one for the application of the measure (former Option 1 - broader). On this particular point, ASEAN was basically saying the same thing as Korea, viewed from another angle. The definition in Article I:2(a) of the ASEAN Draft Agreement corresponded to the definition provided under paragraph 6 of the Korean paper. Article II:4 of the ASEAN Draft, with its three options, covered the issue of application of an ESM to established foreign suppliers, or non-application, as the case may be. In this sense, it corresponded to paragraphs 5 and 11 of the Korean paper. The ASEAN Draft did not define the extent of foreign suppliers' rights which should be shielded from safeguard action. ASEAN believed that the Korean paper left room for similar flexibility in paragraph 11, where it discussed the "appropriate form" in which ESMs might be applied. He asked whether the delegation of Korea agreed with this understanding. ASEAN found the result of this comparison encouraging as it might provide the "middle ground" that Members were looking for. If Members were able to agree on this point, the only remaining issue would then be how to define acquired rights. The representative of the Republic of Korea agreed that the two papers basically coincided in this regard. Korea's Option 3 was overall reflected in the ASEAN Draft. His delegation was still considering the issue of acquired rights. He noted nevertheless that the solution proposed in the Korean paper on this issue was slightly different from Option 1 of the Concept-paper. He enquired what was meant by "rights vested upon a service supplier" (Article II:4 of the ASEAN Draft).

18. The Chairperson noted a broad recognition by delegations that the two contributions made by ASEAN this year had helped to focus the debate. In his view, three key issues had to be addressed in priority: (i) situations justifying safeguard action; (ii) the definition of "domestic industry" and the concept of "acquired rights"; and, (iii) the standards of investigation. He suggested to meet informally at the beginning of next year, in order to address these issues. A date would be communicated to Members soon. He also intended to circulate an annotated agenda.

## **2. Extension of the deadline under GATS Article X**

19. The Chairman recalled that GATS 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. This deadline had been extended already twice by the GATS Council and would expire on 15 December 2000. Since the last formal meeting of the Working Party, he had held a series of informal consultations on this issue. At an informal meeting on 3 November, he had reported to the Working Party on the results of these consultations (Job No. 6944, 3 November 2000). In his report, he indicated that, while all delegations seemed to feel that the deadline for safeguard negotiations should be extended and that work should be concluded some time before the end of the current round of negotiations, views regarding the length of the extension ranged from three months to the end of the services negotiations. The weight of opinion was, however, between twelve and eighteen months. On 3 November, he had made a two-pronged proposal (Job No. 6947, 3 November 2000): (i) to extend the deadline for safeguard negotiations by 18 months, to 15 June 2002; and (ii) provide for a stock-taking exercise in December 2001 to review progress made and to plan for the final months of the negotiations. Since that date, a number of delegations had indicated, however, that they would not be in a position to accept this proposal. Therefore, he had held a further informal meeting, on 23 November, with the objective of reaching a consensus on this issue. The results of this last informal meeting had been faxed to Members on 24 November, and, on 28 November, a new proposal had been submitted. It included a draft communication by the Chairperson of the Working Party to the Council for Trade in Services, as well as a draft decision. In this draft decision, it was proposed to extend the deadline by 15 months, i.e. until 15 March 2002.

20. The representatives of Uruguay, El Salvador, Hong Kong, China, Norway, the Republic of Korea, Guatemala, India, and Brazil supported the proposal made by the Chairperson.

21. The representative of Pakistan said that his delegations was ready to join the consensus. He would nevertheless appreciate to hear information regarding the legal basis of the decision to extend the negotiating deadline, and, in particular, what was the meaning of the words "*Having regard to the provisions of Article X*" of the GATS.

22. In response, the Secretariat pointed out that the same language had been used in two previous decisions to extend the deadline for negotiations under Article X. The fact that these two decisions had been effective and unchallenged was a legal precedent which would appear to establish the ability of the Council for Trade in Services to take such decisions and given them legal effect. Indeed, over the past five years, the Council had taken a large number of decisions with more substantive effect, including the addition to the GATS of a very large number of new commitments. There was nothing in the GATS or in the WTO Agreement that would limit the power of the Council to take such decisions, except that in cases where formal interpretation or formal amendment of the GATS was in question, the formal procedures in the WTO Agreement might be invoked. This had never yet been found to be necessary.

23. A representative of the Secretariat further added that the legal basis for any action taken by the Council for Trade in Services was based on its mandate, as stipulated in paragraph 5 of Article IV of the WTO Agreement, namely to "oversee the functioning of the GATS". This would, in principle, entitle the Services Council to adopt any decision concerning the functioning of the GATS, unless otherwise provided for in the WTO Agreement. For example, the adoption of an authoritative interpretation of, or introducing an amendment to, a provision of the GATS would have to be decided upon by the General Council (or the Ministerial Conference), as stipulated in Articles IX and X of the WTO Agreement, respectively. The question of whether the Services Council had the mandate to adopt a decision postponing the deadline for a negotiation had been raised six months after the entry into force of the WTO Agreement in 1995 with respect to the deadline of the negotiations on financial services. That decision had legal implications that were going beyond simply extending the time for negotiations. It also extended the deadline for the listing of MFN exemptions by Members in that sector. The main legal question was then whether such an extension would constitute an "amendment" to the GATS within the meaning of Article X of the WTO Agreement. The legal analysis and the discussion of this issue at the time (the details of which could be provided if

Members so wished) had concluded that the mere change of a date (i.e. extending a deadline) should not in itself be considered an amendment to the GATS. Therefore, a decision on that matter would fall within the mandate of the Services Council. As regards the second point raised by the delegation of Pakistan, concerning the phrase in the Decision "*having regard to the provisions of Article X*" of the GATS, the representative of the Secretariat stated that this phrase did not contradict the essence of the Decision, which actually carried forward all the substantive elements of Article X. The only element in the Article that the Decision altered was the deadline for the negotiations.

24. The representative of Egypt noted that the reference to a stock-taking was included in the communication and not in the decision itself. His delegation was nevertheless still prepared to accept the text proposed by the Chairperson, on the understanding that there would be an opportunity to take stock of the progress made on the occasion of the next annual report of the Working Party. The Chairperson said that there was an agreement on this point.

25. The representative of Panama said that his delegations had some doubts regarding the language used in the draft decision and did not agree entirely with the explanation given by the Secretariat. He would, however, join the consensus.

26. The representative of Thailand, speaking on behalf of the ASEAN Members, noted that it was not the first time that the deadline needed to be extended. In the view of the ASEAN Members, it would have been possible to complete the work within 12 months with the necessary political will. The ASEAN delegations would nevertheless not stand in the way of the consensus solution proposed by the Chairperson, but hoped it would be the last extension, and that an agreement would be reached by 15 March 2002.

27. The Chairperson concluded that the Working Party approved the Chairperson's communication to the Council for Trade in Services, as well as the draft decision. He would submit the draft decision to the Council for approval. It was so agreed.

#### B. NEGOTIATIONS ON SUBSIDIES UNDER ARTICLE XV OF THE GATS

28. The Chairperson recalled that, at the last meeting, Members had addressed in informal session, item 1 of the Chairperson's Checklist on Subsidies, i.e. *Definition of a subsidy (including relevance of the definition in the Agreement on Subsidies and Countervailing Measures* (Job No. 4519, 17 July 2000). A summary of the meeting was contained in the Secretariat's Note Job No. 6142 (9 October 2000). A revised Checklist had been circulated as Job No. 4519/Rev.1 (6 October 2000).

##### 1. Examination of evidence

29. The Chairperson invited delegations to address item 2 of the Checklist (Job No. 4519/Rev.1): *Examination of any evidence of subsidies which may have distortive effects on trade in services (including production, distribution, consumption and export subsidies). Consideration of sources of information*. He stressed that contributions from Members were needed in order to make progress on this point. With respect to data gathering, he recalled that, in their communication presented in March (S/WPGR/W/31, paragraph 9), Argentina and Hong Kong, China had made various suggestions to improve the data situation. Moreover, the Secretariat had updated two previous notes: (i) S/WPGR/W/13/Add.1 presented subsidy-related entries found in schedules attached to the Fourth and Fifth Protocol, as well as in schedules of Members which had acceded to the WTO since January 1996. In S/WPGR/W/25/Add.1, the Secretariat had compiled subsidy-related information extracted from 37 Trade Policy Reports published since December 1997.

30. The representative of Argentina said that his authorities had begun to review some practices relating to services export subsidies, a subject which had received little attention so far in the Working Party. They had gathered information on export credits for services concerning about thirty countries, based upon publicly available information. Normally, the subsidy element of an export credit resulted from the soft conditions attached to it, for instance the interest rate. Such programmes generally referred to the export of services in general. Some countries were more specific and the beneficiary sectors included construction, environmental projects, consulting services, engineering services. There was no reliable data as to the subsidy component of these programmes. Only one country had recently begun to publish information indicating the subsidy rate which, for some years, exceeded eight per cent. From an economic point of view, there should be no reason why a government practice which might distort trade in goods, would not distort services trade, if applied in the same manner. These practices affected sectors where many developing countries had competitive advantages. An UNCTAD communication (see Job No. 4235, 16 July 1999) noted, in paragraph 17, that businesses in developed countries normally benefitted from financial support of their governments. It stated, for instance, that trade flows in construction services were affected by heavy government subsidies to exporters, tied aid, external financing packages, etc.

31. The representative of Hong Kong, China said that his authorities were still consulting with the industry. It was hard to come up with concrete details because governments did not seem to be willing to state exactly what sort of subsidies they were undertaking. Many of these subsidies might be at a sub-federal level, or involve tax-related matters. The scope of the problem was potentially large. As said by Argentina, export-enhancing and import-substituting subsidies would probably have the strongest effects. But efforts to attract investments could also affect trade in services. Subsidies in the goods area could have a negative effect on trade in services. For example, it was conceivable that subsidies for a very large aircraft or for building new headquarters could have a distortive effect on related trade in services. The distortive effect would depend on the type of subsidy, how specific it was and whether it was given on a national treatment basis. Subsidies given on a national treatment basis had a less injurious effect. In turn, this called for more commitments in the national treatment area. His delegation would try to present more concrete examples.

32. The representative of Brazil said that his authorities were coordinating with the private sector and other pertinent government agencies in order to assess the types of subsidies having trade distortive effects. He noted with interest what had been said by Argentina. In that regard, the OECD document on "Arrangement on Guidelines for Officially Supported Export Credits", the so-called "yellow book", was a useful source of information to identify sectoral subsidy programmes. Another source was the compilation of Trade Policy Reports prepared by the Secretariat (S/WPGR/W/25 and -/Add.1). He suggested that this document could be updated to include the latest TPR reports. This document clearly indicated the existence of subsidies in some sectors, like maritime transport. Brazil also attached great importance to the discussion of disciplines to avoid trade-distortive effects in services. Several delegations supported Brazil's request for an update of the Secretariat's Note on Trade Policy Reports.

33. The representative of Guyana said that subsidies were necessary for his country to help its services suppliers to catch up. As in the goods context, a different treatment was needed for developing and least-developed countries.

34. The representative of the Republic of Korea noted that the fact that GATS dealt with four modes of supply, as opposed to one in the goods sector, complicated the issue. However, the concepts used in the goods context might be imported into the services context. More attention should be paid nevertheless to national treatment. He noted that it was difficult to define "regulatory subsidies"; in this context, other provisions of the GATS might be relevant. He understood the concerns regarding infrastructural services, but caution should be exercised in this regard. For instance, education provided by a government should not be considered a subsidy, but what about telecommunications?

35. The representative of the United States agreed with Argentina that, intuitively, there should be no economic reason why government action in the goods sector should be more likely to distort trade than the same type of action in services. However, in spite of efforts by his authorities to obtain inputs, US companies had not yet reported on problems they might face with distortive subsidies, and the reasons for this silence were not clear. It might be that subsidies were less prevalent in services as opposed to goods. This issue would be worth considering. It might also be related to national treatment implications and whether national treatment obligations might curb some of the more potentially distortive subsidies.

36. The representative of Argentina said that subsidy disciplines should take the need for special and differential treatment into account. From an economic point of view, the effect of subsidies granted by the fifteen main exporters in the world, who captured 82 per cent of international trade in services, was different from a subsidy granted by a relatively marginal country. He agreed that policies in some services sectors were based on legitimate objectives on which all Members could agree, such as health or education. But some subsidies were granted to sectors which had nothing to do with such objectives. There were practices directly affecting exports of services, or subsidies granted to sectors which in most cases had an international dimension, such as shipping. More information was needed in order to carry out the Article XV mandate.

37. The representative of Thailand, speaking on behalf of the ASEAN Members, said that the second item was linked to other issues on the Checklist, and flexibility was necessary in addressing them. In the light of the fact that the national treatment obligation was subject to commitments, subsidy disciplines should apply only in committed sectors. With respect to the third point of the Checklist, the representative of Panama said that it would be important to clarify the incidence of the lapsing of certain disciplines of the Agreement on Subsidies and Countervailing Measures. The role of subsidies in development and the need for special and differential treatment should also be examined. The possibility that goods subsidies could also affect services trade should be analysed, but only once a services subsidy was defined. The representative of Mexico drew attention to the legal aspects involved in subsidies. Programmes for export credits might legally not be considered a subsidy, but they nevertheless had trade-distortive effects. How Members would define a subsidy was therefore important. All programmes that had trade-distortive effects should be taken into account, whatever their legal structure. The representative of the European Communities noted that S/WPGR/W/25 merely listed subsidies, without prejudging their potential distorting effect on trade. The difficulty was to establish a benchmark to decide at what level services subsidies had trade-distortive effects. The representative of Canada said that there was no evidence of trade-distortions in this area. Many forms of government assistance were not relevant to the discussion. His delegation was interested in examining further data on governmental assistance, and in particular the effects of such assistance on services trade.

38. The Chairperson said that the starting point for some delegations was that, in principle, government assistance for services should be no more trade-distortive than for goods. Lack of empirical evidence was a problem and the reasons for it were unclear. When subsidies were identified in a given sector, this did not necessarily imply that they were trade-distorting. If Members were to start drafting some disciplines, they needed to identify such distortions. He noted that some delegations had promised written contributions. As requested by delegations, the Secretariat would update S/WPGR/W/25 to include information from new Trade Policy Reports. However, empirical evidence of any trade-distortive effects should come from Members.



## 2. Definition of "subsidies"

39. The Chairperson thanked the delegation of Argentina for the Non-paper on *Definition of subsidies in services* (Job No. 6629, 24 October 2000). Delegations were invited to address this Non-paper, as well as the Communication introduced by Hong Kong, China at the last meeting of the Working Party, *Definition on subsidies in services* (Job No. 5870, 27 September 2000).

40. The representative of Argentina said that the Non-paper presented by his delegation took the definition contained in the Agreement on Subsidies and Countervailing Measures (ASCM) as a starting-point. Central elements of that definition, such as "financial contribution" or "specificity", were relevant. Subsidies had to be distinguished from other regulatory practices which, although they might benefit suppliers, should fall under other disciplines of the GATS.

41. A number of delegations thanked the delegation of Argentina for submitting this Non-paper.

42. The representative of Kenya said that only rich countries could afford significant levels of subsidies. With respect to the notion of "specificity" of a subsidy, referred to in paragraphs 10 and 11 of the Argentinian paper, it was relatively easy to distinguish between general measures of economic policy and those benefitting certain firms, in particular in the context of goods. However, the distinction might be blurred in some contexts. For instance, a subsidy extended to a bank, in order to prevent it from going bankrupt and, thus, harming small-scale savers, could be said to be specific, but would in fact have wider economic policy implications. He agreed that, as stated in paragraph 14 of the Argentinian Non-paper, the definition of the ASCM might need to be further refined.

43. The representative of New Zealand agreed that the definition of the ASCM could be used as a starting-point for any services subsidy disciplines. The notions of "financial contribution" and "benefit" were important. He also felt that this definition might need to be refined, in the light of the specific mandate of Article XV. His delegation was open-minded as to the scope of any definition, and in particular as to whether regulatory measures should be included. As shown in paragraph 11 of the EC Communication (Job No. 4302, 6 July 2000), some economic advantage could be conferred by granting a services provider privileged access to infrastructure, for instance. When exploring the notion of "benefit" and "financial contribution", implications related to regulatory practices should be borne in mind. Discussion of these issues should not be foreclosed, even though it might lead to the conclusion that these practices should be dealt with under Article VI:4 of the GATS.

44. The representative of Hong Kong, China said that regulatory measures might fall under other provisions of the GATS and should not be tackled under Article XV. Introducing regulatory interventions into the equation could complicate matters. He agreed with paragraph 11 of the Argentinian Non-paper, but enquired what level of specificity would be relevant. The question of special and differential treatment was an important one. Developed countries had more resources to use for the purpose of subsidizing. In his view, disciplines should apply across the board, but the issue of whether they should apply only to committed sectors was worth discussing. He was conscious of the political realities and difficulties surrounding social subsidies and wanted to protect the WTO from being accused of telling governments what to do in the education or health sectors. He agreed with the EC that definitional elements were needed to determine trade-distortiveness. Having classes of subsidies, as in the ASCM, might be the best way to address this problem.

45. The representative of the United States considered that the Argentinian Non-paper was a constructive effort, although his delegation could not endorse all the points made. On paragraph 6, he agreed that GATS Article XIII carved-out government procurement from GATS disciplines, but would not necessarily reach the same legal conclusions. It was true, however, that government procurement might potentially confer an indirect benefit in commercial services. The analysis in paragraph 7 deserved further consideration. He noted the concerns raised in paragraph 8 regarding

measures of a regulatory nature, but wondered whether the terms used ("income or price support") would actually embrace this type of measures. The analysis on "specificity" was very sound. As pointed out by Hong Kong, China, a definition of subsidies could refer to different classes of subsidies, in terms for their potential for distortion.

46. The representative of Switzerland said that, at least at the beginning, the debate should focus on the financial nature of subsidies. Regulatory matters would fall under other provisions of the GATS. For the sake of coherence, the definition of "public body" should refer to GATS Article I (paragraph 7 of the Argentinian paper). He enquired what idea stood behind the second sentence of paragraph 8. The notion of specificity was a pragmatic approach to consider the notion of trade-distortions. Another issue was whether a subsidy in the area of goods could also affect services: if the good was not exported, it would probably be covered by GATT disciplines, but might nevertheless affect services trade.

47. The representative of Japan said that defining the scope of "subsidies" was a prerequisite to establishing disciplines. Using the ASCM as a starting-point was a good approach. He agreed that entities granting subsidies should be defined by reference to GATS Article I:3(a). Japan was interested in further discussing the issues raised in paragraph 8 of the Argentinian paper and asked what was meant by "income or price support". The representative of Canada said that, while the issue of definition was important conceptually, his delegation had not determined yet whether specific subsidy disciplines were relevant for services. With respect to paragraph 9 of the Argentinian paper, he wondered how the notion of benefit could have the effect of narrowing the scope of the definition. In the goods context, two conditions had to be satisfied for a subsidy to be deemed to exist, namely "financial contribution" and "benefit". The representative of the European Communities disagreed with the last sentence in paragraph 6 of the Argentinian paper because there were no disciplines yet on government procurement. The issue of regulatory interventions should be given further consideration. The representative of Brazil said that Article 1 of the ASCM provided a good basis for further work. The four types of financial contribution and the specificity of the subsidy were key elements. It was important to provide for a carve-out for GATS Article XIII:1. His delegation was still reflecting on the question of regulatory interventions. He concurred with the conclusion expressed in paragraph 12 of the Argentinian paper.

48. The representative of Chile commented on the exclusion of government activity from subsidy disciplines, raised in paragraph 3(d) of the Communication by Hong Kong, China (Job No. 5870, 27 September 2000). Such exclusion might have the consequence that different Members with different situations might have different disciplines. On the other hand, it should be remembered that government services not supplied on a commercial basis could have distortive effects on international trade when the relevant markets were open to competition (this was the case in air and maritime transport, for instance).

49. The representative of Argentina said that the distinction, in paragraph 6, between government procurement of goods and subsidy disciplines aimed at maintaining a distinction which already existed in goods trade, where it was recognized that public procurement as such did not fall under the ASCM. The same standard should apply in services trade. Paragraph 8 raised the question whether the concept of "income or price support" could be transferred in the context of services. It might be said that any regulatory intervention could imply price support to the extent that it granted a competitive advantage (see, for instance, footnote 5 of the Non-paper). The notion of "benefit" (paragraph 9) should not be considered in isolation, but in relation to the concepts of financial contribution and specificity. Any definition should be precise enough to avoid circumvention.

50. Responding to the comment made by Chile, the representative of Hong Kong, China pointed to paragraph 8 of Job No. 5870. The definition contained Article I:3(b) stated, *inter alia*, that services provided in the exercise of governmental authority were services not supplied on a commercial basis.

51. The Chairperson noted that the Argentinian paper had been well-received. Several topics had been identified, such as: using the ASCM definition, and its various elements, as a basis for further work; the issues of regulatory interventions and social subsidies; whether it was opportune to establish classes of subsidies. This listing was not exhaustive. At the next meeting, he would invite Members to address item 3 of the Checklist (*To what extent do WTO rules, in particular the GATS and its national treatment and most-favoured-nation disciplines, already discipline services subsidies or provide the means to do so? This would include consideration of technical issues related to the GATS, including mode specificity and the concept of "like service"*). Delegations would have an opportunity to come back on points 1 and 2 as well. He suggested that it might be useful for the Working Party to discuss these issues informally and invited reactions from delegations in this regard. As agreed earlier, the Secretariat would undertake a further update of S/WPGR/W/25.

C. NEGOTIATIONS ON GOVERNMENT PROCUREMENT UNDER ARTICLE XIII OF THE GATS

52. The Chairperson said that, as agreed at the July meeting, the Secretariat had circulated two documents under this agenda item: (i) a list of documents dealing with relevant activities in the Working Group on Transparency in Government Procurement and the Committee on Government Procurement (Job No. 7053, 7 November 2000); and (ii) a factual note compiling services concessions made in the framework of the Agreement on Government Procurement (Job No. 7072, 8 November 2000).

D. DATE OF THE NEXT MEETING

53. The Chairperson indicated that the next formal meeting of the Working Party would take place in March 2001, as part of the cluster of services meetings. The exact date remained to be determined. He recalled that he would convene an informal meeting on the issue of emergency safeguard measures at the beginning of next year.

E. OTHER BUSINESS

54. The Chairperson recalled that, on 3 November 2000, the Secretariat had circulated draft annual reports from the Council for Trade in Services, the Special Session of the Council and the subsidiary bodies (see Job No. 6990). The annual reports had to be adopted by the Council for Trade in Services and its subsidiary bodies prior to their submission to the General Council on 7 December. Moreover, the reports had to be circulated in their final form at least 10 days before the General Council meeting. Given this requirement and the time constraints imposed by the schedule of services meetings, it had been necessary to resort to a written procedure for adopting these reports. The draft report for the Working Party on GATS Rules was contained in document S/WPGR/W/35. Delegations had been invited to communicate to the Secretariat by 17 November 2000 any views or comments they might have on these draft reports. In the absence of any comment, the report had been considered to be adopted on 17 November 2000; it had been issued in its final form on 23 November 2000 in document S/WPGR/5.

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