



24 January 2014

(14-0431)

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Working Party on GATS Rules

REPORT OF THE MEETING HELD ON 29 OCTOBER 2013

NOTE BY THE SECRETARIAT¹

The Working Party on GATS Rules (WPGR) held a meeting in the morning of 29 October 2013, chaired by Mr Felipe Sandoval from Chile. The proposed agenda and the Chairman's annotated agenda for the meeting were circulated in documents WTO/AIR/4220 and JOB/SERV/166 respectively. The agenda was adopted.

1 ITEM A - ADOPTION OF THE ANNUAL REPORT TO THE COUNCIL FOR TRADE IN SERVICES (S/WPGR/W/63)

1.1. Pursuant to the annual reporting requirements to the Council for Trade in Services, the Chairperson recalled that the Working Party's Annual Report, as contained in document S/WPGR/W/63, had been circulated in advance of the meeting. Noting that the Report was factual and self-explanatory, he proposed that it be adopted and transmitted to the Council for Trade in Services.

1.2. It was so agreed.

2 ITEM B - NEGOTIATIONS ON EMERGENCY SAFEGUARD MEASURES (ESM) UNDER ARTICLE X OF THE GATS

2.1. Commencing with emergency safeguard measures, the Chairman reminded delegations that, at the March 2013 meeting, the proponents had suggested a discussion focused on Members' sharing of experiences with regard to emergency safeguard provisions in their bilateral and regional free trade agreements (FTAs/RTAs).² Such an exchange of information could help better understand the kinds of circumstances that might call for emergency action in services, as well as factors that might militate against. Similarly, it could be interesting to learn more about domestic legislation enabling safeguard actions in the services field. The Chairman then opened the floor for delegations' views.

2.2. The representative of the Philippines, also on behalf of the delegations of Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Thailand and Viet Nam, introduced the Communication entitled "*Emergency Safeguard Measures (ESM) in Regional and Bilateral Trade Agreements: A Proposed Dedicated Discussion*" (JOB/SERV/163). The Communication explained the purpose and suggested focus of a dedicated discussion. The proponents had carefully adapted their proposal to the state-of-play of the services negotiations. The discussion would follow the example of previous technical deliberations held in subsidiary bodies of the Council for Trade in Services. It aimed at a better understanding of emergency safeguard measures, not just from a conceptual, but also from an operational point of view. Delegations would be invited to describe, for instance, the approach adopted in their FTAs/RTAs, the ESM language used, circumstances giving rise to ESM, as well as implementation experiences (notably particular modes and sectors involved, statistical developments, concerns raised by stakeholder). Finally, the proponents stated their flexibility as to the timing of the proposed dedicated discussion.

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/M/80 of 24 May 2013, paragraph 1.6.

2.3. The representative of the United States thanked the proponents for their written submission, which clarified their views. In his delegation's view, the ESM discussions had always been predicated upon parallel market access discussions. As the latter were not currently ongoing in the WTO, his delegation wondered why the ESM issue was raised at this time. Its position regarding feasibility and desirability was unchanged. He would not stand in the way of a dedicated discussion, but wished his delegation's concerns to be duly reflected.

2.4. In view of the preceding, the Chairman proposed that, as a next step, a dedicated discussion would be held, hopefully during the Working Party's first meeting in 2014. He encouraged Members who wished to make any further contributions to submit them, preferably ahead of that meeting.

2.5. It was so agreed.

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

3.1. Turning to government procurement, the Chairman introduced the first, preliminary, version of the Staff Working Paper entitled *"The Relationship between Services Trade and Government Procurement Disciplines and Commitments based on relevant WTO agreements (GATS and GPA) and recent RTAs"* prepared in cooperation between the Secretariat's TRIPS Division, in charge of the GPA, and the Trade in Services Division. He stressed that the Staff Working Paper had been prepared by its authors in their personal capacity. Thus, the views expressed could not be attributed to the WTO or its Secretariat. The Staff Working Paper analysed commitments' coverage with respect to procurement of services and the different dimensions of "conditions of market entry and participation" including approaches to scheduling – both in the GPA and the GATS, and in the 68 regional trade agreements (RTAs) identified as covering service procurement. The Chairperson then passed the floor to a representative of the Secretariat's Intellectual Property Division in charge of the GPA to provide further details on the Working Paper's key findings.

3.2. Explaining that the Staff Working Paper still was at a preliminary stage, the representative of the Secretariat invited Members to convey their comments so that these could still be taken into account. He gave a presentation of the Paper's main findings focusing on the interface between the GATS and the GPA. Procurement was a major component of services trade, with some authors estimating its share as high as 30%. Often a service supplier's largest contract was with government entities. Thus, if a service supplier was to be excluded from these contracts, due to restrictions in the procurement process, this could affect his commercial viability irrespective of relevant GATS commitments. As shown in the Paper, recently, an increasing number of RTAs contained substantive chapters on government procurement. This had an influence on the viability, scale of operations and competitiveness of service suppliers in a number of sectors. Conversely, rights of establishment and/or of cross-border supply, as provided under the GATS, also had an important bearing on how GPA-covered procurement contracts could be performed. Indeed, the GPA did not address modes of supply, nor did it provide any rights of establishment or of cross-border supply.

3.3. The representative of the Secretariat indicated that, out of the 250 relatively recent RTAs surveyed for the Paper, 68 had substantive provisions on procurement of services. Thus, even if they were not GPA Parties, some WTO Members might well be subject to similar disciplines based on their respective RTAs. Another contextual point to note was the convergence between the GPA and the RTA regimes, as the RTAs often used the GPA as a template. Overall, there was a surprising degree of convergence of international instruments and best practices with regard to government procurement. A looming question was whether these developments would facilitate the advancement of multilateral approaches to service procurement – to the extent that the methods applied under the different agreements were compatible with one another.

3.4. Addressing the complementarity between, on the one side, the GPA and government procurement obligations in RTAs and, on the other side, the GATS, he reminded delegates of the "mirroring provisions" (or reciprocal exclusions) in GATS Article XIII:1 and GPA Article III:3, which defined the two agreements' respective scope. The GPA's domain was "procurement policy as such"; it did not regulate modes of supply or provide rights to establish a commercial presence or to supply services on a cross-border basis. The revised GPA in its Article II:2(a) took up language

similar to the GATS' exclusion to define its scope of application. This separation of the domains between the two agreements in turn reinforced their complementarity. A further aspect of this complementarity was that a number of GPA Parties stated explicitly in their GPA services commitments that those commitments were "subject to the terms and conditions set out in their respective GATS commitments", or words to that effect. Having said that, he highlighted that some GPA Parties were of the view that such language was unnecessary because the terms and conditions set out in Member's GATS commitments remained relevant in any case. This "bifurcation" of coverage between "procurement as such" and services' commitments was also born out in RTAs and their schedules.

3.5. Regarding scheduling approaches under the GPA and the GATS, the representative of the Secretariat explained that the GPA covered procurement of both services and goods in separate Annexes. Unlike the GATS, neither the GPA nor the RTAs with government procurement chapters normally referred to "modes of supply". What was similar between GPA Annexes and GATS schedules, however, was their reference to the United Nations Provisional Central Product Classification (CPC) List and to the Services Sectoral Classification List (document MTN.GNS/W/120 of July 1991). Under the GPA, most Parties used positive lists to define services coverage, with some exceptions (United States and Armenia). He described the multi-dimensional structure of the GPA schedules, including detailed listings of the entities that were covered at the central and sub-central level, as well as separate Annexes on goods, services and construction services. When scheduling commitments on service procurement, RTA parties adopted both positive and negative lists (see also preliminary Staff Working Paper, Figure 8).

3.6. The representative of the Secretariat then commented upon the extent of GPA Parties' current commitments on service procurement. The sectors most often covered were business services (e.g. professional and computer services), telecommunications, construction, aspects of environmental services, financial, tourism and travel, etc. However, like other aspects of the GPA, services were also affected by country-specific derogations or reciprocity requirements, which had the effect of limiting coverage in some cases. Out of the 68 RTAs that included service procurement, 12 were between GPA Parties, 36 between GPA Parties and non-GPA Parties, and 20 between non-GPA Parties. A closer examination led to the following initial observations. Where GPA Parties were involved in RTAs, most often they either followed or stayed behind their revised GPA commitments with respect to services' as well as entity coverage – thus preserving a clear incentive for GPA accession. RTAs between GPA Parties and non-GPA Parties tended to be modelled on the GPA. However, the majority of them provided for less coverage of government entities, especially at sub-central level, than the GPA. Finally, some RTAs between non-GPA Parties, especially in the Latin American region, provided very broad entity coverage.

3.7. In conclusion, the representative of the Secretariat emphasized the strong complementarity between service procurement and the general disciplines and commitments governing trade in services, both multilaterally and in RTAs. This complementarity was recognized in the legal interface between the GATS and the GPA: namely the "mirroring provisions" that defined their respective domains. The same legal interface typically arose also in regional trade agreements. As far as procurement was concerned, RTAs were often modelled on the GPA text; and this could facilitate convergence towards common norms. Finally, notwithstanding some "outliers", in general, the (revised) GPA retained a deeper and broader coverage of service procurement as compared to the RTAs.

3.8. The Chairman summarized some of the key "take-home" messages of the presentation and then opened the floor to Members for questions and comments.

3.9. The representative of the European Union welcomed the comprehensive and clear Staff Working Paper as well as the presentation. Both, she felt, lent support to her delegation's stance, namely that government procurement was an important economic factor in many service sectors, notably construction, telecommunications and ICT, but also business services. Given the late distribution of the Paper, her comments were still preliminary pending a more detailed analysis by capital experts. For her delegation, the most important section of the Paper was Part 3, which focused on the interface between market access and national treatment commitments under the GATS, specifying the conditions to supply a service, and the government procurement commitments, setting out the right to tender. There was a link between the two, which currently was not addressed in the GPA. There could be a mismatch between commitments under both agreements. Over the past years, her delegation had made several proposals to bridge this gap.

With the finalisation of the GPA reform and new trends emerging from a number of RTAs, circumstances might currently be more favourable to discuss rules for service procurement, possibly based on a recalibrated new proposal. She suggested that Members reverted to the Staff Working Paper in more detail at the next meeting.

3.10. The representative of Switzerland thanked the authors for their comprehensive Working Paper. He remarked that among the 250 RTAs analysed in the Paper,³ 68 covered public procurement in services sectors – meaning that 182 RTAs did not. Was there a structural explanation for this? Did the latter RTAs exclude all procurement or just service procurement? Did they include a services chapter or not? Were there any RTAs that incorporated a chapter on government procurement, but none on trade in services? Was the propensity to cover service procurement higher in RTAs that had a procurement chapter modelled on the GPA and a GATS-type services chapter; or was there no such correlation? The representative of Switzerland observed that the complementarity analysis between GPA and GATS addressed in Section 3.1 of the Paper (and in particular Figure 3, p. 15) omitted to mention mode 4. It would be useful to examine whether, and to what extent, GATS commitments on mode 4, in particular on contractual service suppliers, had an impact on government procurement. This would be particularly relevant in sectors such as business services, and construction and related engineering services. To what extent did mode-4 commitments and the recognition of diplomas – or absence thereof – affect the implementation of procurement contracts? He also encouraged the authors of the Paper to discuss, at a technical level, the underlying issues, merits and feasibility of *multilateral* rules on service procurement, as compared to the current dispersal of agreements.

3.11. The representative of India thanked the representative of the Secretariat for an excellent presentation. Her delegation was still examining the Paper and reserved the right to come back with more detailed comments at a next meeting. She regretted that the Paper, in its current version, did not address the development challenges of public procurement liberalization, and notably the high compliance costs that could affect developing countries and LDCs (notably the prohibition to use preferences to promote certain national policy objectives). The 68 agreements identified in the Paper as having service procurement coverage provided a developed-country, i.e., very narrow, focus. It would be interesting to study how RTAs in other parts of the world were handling government procurement.

3.12. The representative of the Secretariat thanked delegations for their thought-provoking initial comments. The authors of the Paper would reflect further on the points raised and try to address them in a forthcoming version, after receiving more comments at the next meeting. Regarding the development dimension, he drew Members' attention to the explanations contained in the current version of the Staff Working Paper regarding new transitional measures for developing countries under the revised GPA (Paper p. 5, Figure 1).

3.13. The Chairman thanked the authors for their Paper and delegations for their inputs. He suggested reopening the discussion on the Paper at the next meeting allowing for more delegations to examine and comment upon it. Thereafter, he suggested, the authors would produce a revised version of the document.

3.14. It was so agreed.

4 ITEM C - NEGOTIATIONS ON SUBSIDIES UNDER ARTICLE XV OF THE GATS

4.1. Turning to subsidies, the Chairman recalled the Working Party's constructive discussion at the previous meeting, in June 2013, based, inter alia, on the Secretariat's Background Note entitled "*Subsidies for Services Sectors – Information contained in WTO Trade Policy Reviews*" (S/WPGR/W/25/Add.6). One proposition made on that occasion had been to "slice" the Note to render it more "digestible" and discuss the measures on a sector-by-sector basis. This could easily be done since the overview table (Table 1) was already organized in that way. He then opened the floor for Members' comments.

4.2. The representative of the United States raised concerns over that proposal since Members had not yet reached a consensus on what constituted a subsidy in services. He reminded

³ Number of RTAs notified to the WTO before the end of August 2013 that are in force. For the full list of analysed agreements, see Appendix Table 1 of the Staff Working Paper.

participants of his delegation's Communication, circulated in 2010, with questions to facilitate an informed discussion of services subsidies under GATS Article XV (S/WPGR/W/59). No proper answers had been received thus far.

4.3. The representative of Switzerland noted that his delegation had provided responses to the US questions (see WPGR meeting report S/WPGR/M/69, paras. 51-56). The Secretariat's Background Note, in particular its Table 1 (S/WPGR/W/25/Add.6, pp. 4-12), he thought, had provided a slightly more coherent global view of existing measures. Despite its many inherent gaps, the Note showed that subsidies existed in many important service sectors that were open to trade. His delegation supported any re-organization of the Secretariat Note that could improve delegations' understanding of the information provided.

4.4. Following a second intervention by the US delegation reiterating its concerns, the Chairman noted the lack of convergence among Members on how to move ahead. He suggested that he would approach some delegations ahead of the next meeting, and that Members revert to this item for further discussion.

5 ITEM D: OTHER BUSINESS

5.1. No topic was raised under this agenda item.

5.2. The meeting was adjourned.
