



Working Party on GATS Rules

REPORT OF THE MEETING HELD ON 14 OCTOBER 2015

NOTE BY THE SECRETARIAT¹

The Working Party on GATS Rules (WPGR) held a meeting on 14 October 2015, chaired by Mr Don McDougall of Canada. The proposed agenda and the Chairperson's annotated agenda for the meeting were circulated in documents WTO/AIR/WPGR/3 and JOB/SERV/220 respectively. The agenda was adopted.

1 ITEM A – ADOPTION OF THE ANNUAL REPORT TO THE COUNCIL FOR TRADE IN SERVICES (S/WPGR/W/66)

1.1. Pursuant to the annual reporting requirements to the Council for Trade in Services, the Chairman invited Members to adopt the draft annual report of 2015 contained in document S/WPGR/W/66.

1.2. The Working Party adopted the annual report.²

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

2.1. The Chairman recalled that, in February 2014, Members had commenced a dedicated discussion on their experiences with services-related emergency safeguard provisions in their bilateral and regional trade agreements (RTAs). The discussion continued during 2014. At the Working Party's last two meetings, in March and June 2015, the proponents had re-affirmed their continued interest in pursuing work on emergency safeguard measures and invited Members to review again their 2007 proposal as contained in document JOB(07)/155. The Chairman opened the floor for Members' comments.

2.2. Turning to possible future work on emergency safeguard measures, the representative of the Philippines, on behalf of the delegations of Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Thailand and Viet Nam, encouraged Members to contribute to the dedicated discussion on emergency safeguard provisions in bilateral and regional trade agreements. Members were also urged to review the proponents' 2007 proposal for an "Annex on Article X Emergency Safeguard Measures" (document JOB(07)/155), which contained rules on establishing an ESM mechanism in Members' domestic framework. The proponents stood ready to hold informal consultations with interested delegations. In view of developments in data availability and their continued relevance in trade agreements, they called for continued work on emergency safeguard measures in conformity with the built-in mandate in GATS Article X, the Doha Development Agenda and the Hong Kong Ministerial Declaration. At the October 2015 meeting of the Council for Trade in Services in special session, the 'Friends of ESM' had reiterated their constructive engagement in all aspects of the services negotiations with the ultimate objective of achieving a development-oriented outcome in MC10 and post-Nairobi. This included their particular interest on emergency safeguards. The proponents hoped that the post-Nairobi agenda would include all the unfinished business in services, including the continued work on emergency safeguard measures based on the built-in mandate. He informed delegations that

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

² The Annual Report of the Working Party on GATS Rules to the Council for Trade in Services (2015) was issued in document S/WPGR/26, dated 15 October 2015.

the proponents were also contemplating possibilities to resume technical discussions on services statistics. The last time the Working Party had looked into ESM-relevant data dated back to March 2011.³ The 'Friends of ESM' envisioned holding a follow-up discussion focusing on new developments since 2011, and would consult with the Chairperson, interested Members and the Secretariat to that end.

2.3. The Chairman thanked the proponents for their statement. He suggested that the Working Party take note of the statement and revert to this issue at its next meeting.

2.4. 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 reminded delegations that, at the last meeting in June 2015, the delegation of the European Union had proposed that Members exchange information on existing practices regarding the treatment of foreign-owned or -controlled established service suppliers in government procurement procedures, notably with respect to national treatment. Further to a Member-led sharing of experiences based on a series of questions, the delegation of the European Union had proposed that the Secretariat be asked to analyse Members' practices in this regard as reflected notably in their trade as well as their investment agreements. In the subsequent discussion, some Members had asked the EU delegation to provide further details of its proposal in writing; this had been done in document JOB/SERV/215, which contained further details regarding the questions on which Members could exchange information. The Chairman opened the floor for Members' comments.

3.2. Highlighting the increased relevance of government procurement for trade in services, the representative of the European Union explained that, at the request of Members, his delegation circulated a proposal for future work in document JOB/SERV/215. It proposed that Members exchange information on their existing practices regarding government procurement, to improve mutual knowledge of existing regimes and pave the way for more concrete and better informed discussions. His delegation proposed to analyse how established (locally incorporated) service suppliers were treated in procurement procedures, notably with respect to national treatment. Information among Members could be exchanged notably on: (i) how Members treated foreign-owned or -controlled established service suppliers with respect to government procurement procedures, in comparison with local service suppliers; (ii) whether there was any discrimination and, if so, in what form or for which sectors or activities. Was the discrimination based on the origin (foreign ownership) of the established company? How frequent were discriminations on the sole basis of capital ownership? (iii) What good practices could be drawn from national experiences? Further to this exchange of information among Members, as a second step, the Secretariat could be asked to examine how these questions were addressed in Members' regional trade and/or investment agreements.

3.3. The representative of Turkey informed delegations that, as was the case in the European Union, companies legally established in Turkey were granted national treatment in government procurement procedures as a general principle. In this context, it might be worthwhile to analyse *why* mode 3 was commercially the most significant mode of supply (as mentioned by the EU delegation at the last meeting). Why were foreign service suppliers not able to participate in government procurement tenders via modes 1 or 4? Understanding the reasons behind this unbalance, and trying to devise ways to increase participation via modes 1 and 4, might be useful. Before delving into the questions contained in the EU proposal, the discussion should first focus on whether opening public procurement markets contributed to economic growth and development. Finally, she asked whether the delegation of the European Union had data regarding the share in the intra-EU procurement market of relatively less developed EU member States – including

³ See the report in document S/WPGR/M/73. This included presentations by the WTO Secretariat's International Trade Statistics Section on the statistics from official sources at the domestic and international level – including balance of payments (BOP), foreign affiliates' trade in services (FATS), and the extended Balance of Payments Services Classification (EBOPS). The Secretariat also presented the 'Services Profiles' with statistics on transportation, telecommunications and financial services for some 90 economies. The Secretariat's Rules division made a presentation on statistics and indicators used in safeguard investigations in trade in goods.

statistics broken down by: (i) company size (to assess which type of companies benefitted most from the Single Market); and (ii) modes of supply. Her delegation looked forward to receiving any information the European Union could provide in this regard, and stood ready to engage in bilateral consultations to help shaping the content of any future debate in a way reflecting the interests of the broader Membership.

3.4. The representative of Argentina thanked the EU delegation for its initiative. Without prejudging the scope of the mandate in GATS Article XIII:2 in relation to the application of GATS Articles II, XVI and XVII to the government procurement of services, his delegation wished to state that any exchange of information on existing practices regarding the procurement of services, as proposed by the European Union, should include also other modes of supply relevant for the government procurement of services – in particular modes 1 and 4. His delegation wished to stress that, thanks to ongoing technological developments, mode 1 had become the most dynamic mode of supply in many service sectors and had a high growth potential, notably for business services. That mode was of special importance for small and medium-sized enterprises (SMEs) engaging in international services trade and for developing countries more generally. Furthermore, the schedules of parties under the revised GPA, as well as under a large number of regional trade agreements with a chapter on government procurement, usually included service sectors involving mode 1 as a priority. As a consequence, a high degree of discrimination existed against third-Party suppliers from countries outside these agreements. Thus, his delegation advocated that the EU proposal include also modes 1 and 4.

3.5. The representative of Chile thanked the delegation of the European Union for its proposal. Echoing previous speakers, his delegation advocated including modes 1 and 4 as well.

3.6. The representative of India thanked the EU delegation for its written submission. Her delegation asked for further information regarding the purpose and final objective of the envisioned information exchange, after completion of its first two steps. More clarity was needed also concerning the interplay between the mandate in GATS Article XIII and the GPA. It was important to understand the scope of the negotiating mandate of Article XIII. In the past, an information gathering exercise on national procurement regimes had taken place, and a series of communications from the European Union and some other Members had been discussed in the Working Party. However, her delegation believed that there had been no convergence amongst Members to engage in a substantive debate to establish disciplines, or decisions, on services procurement. Members had not been convinced that this would yield benefits for developing countries. How did the opening of public procurement markets help developing countries' economic growth and development? That question needed to be answered first. There were many issues, which needed further discussion before delegations could embark upon any exercise of the kind suggested by the European Union. Her delegation had no appetite for this proposal at this stage, especially at this critical juncture of preparations for the forthcoming ministerial conference.

3.7. The representative of Canada thanked the European Union for submitting its proposal in writing. An exchange of views on countries' existing practices in relation to mode 3 suppliers could be useful, particularly regarding good practices that could be drawn from national experiences. The scope of the EU proposal was, however, very ambitious and gathering the amount of information suggested might be burdensome for Members. Therefore, his delegation suggested that the exercise be simplified in order to create a way forward that would reveal useful information without being overly burdensome. To this end, his delegation sought clarification on: (i) whether the European Union intended to include its Member States; (ii) how "foreign-owned" or "foreign-controlled" would be defined (e.g. 51% ownership, 100% ownership, or the nationality of the board members); and (iii) whether it would be more useful to examine the treatment of foreign-owned enterprises in general. Members of the Secretariat in their personal capacity had already produced a detailed paper on the relation between services and government procurement commitments, including in the context of RTAs. His delegation wondered, with respect to paragraph 4 of the EU proposal,⁴ what *additional* information it suggested the Working Party requested from the Secretariat.

3.8. Summarizing the interventions, the Chairman took note that there were a number of Members interested in exploring whether modes 1 and 4 should be included in the information exchange. Some Members expressed an interest in having consultations on how to shape a

⁴ Contained in document JOB/SERV/215 of 25 September 2015.

possible future discussion. He also took note of India's concern about having this kind of conversation at this point in time. He suggested that he would undertake consultations with interested Members in early 2016 on how to move forward on this issue – including holding an open-ended informal meeting.

3.9. The representative of the European Union stated his delegation's readiness to work together with the Chairperson and interested delegations to further clarify the issues raised at the meeting. In response to the questions posed by the representative of Canada, he explained that concerning the definition of "foreign-owned or -controlled", the idea was to rely on the definitions in GATS Article XXVIII(n). Regarding the meaning of "established" service suppliers, he referred to the definition of "commercial presence" in GATS Article XXVIII(d); a subsidiary would be the starting point. His delegation was open to cover also other modes of supply. The proposal's starting point had deliberately been precise and narrowly-defined as, in the past, the European Union had been criticised over too comprehensive/ambitious proposals. His delegation stood ready to work with the Chairperson and other interested delegations to draft a work program covering the different modes of supply. In response to the last question posed by the representative of India, he wished to clarify that there was no precondition to prove any given topic's pro-development impact in order to be able to discuss it. This being said, his delegation was open to address this point in the course of the discussions.

3.10. The Chairman suggested that the Working Party take note of the statements made and that he start consultations with Members on how to take the work forward in the New Year.

3.11. It was so agreed.

4 ITEM D – NEGOTIATIONS ON SUBSIDIES UNDER ARTICLE XV OF THE GATS

4.1. Turning to subsidies, the Chairman observed that the discussion had stood at an impasse for some time. No new ideas on how to carry forward the work in this area had emerged from his informal outreach to Members preceding this meeting. Following these introductory remarks, the Chairman opened the floor for Members' observations. No delegation asked for the floor.

4.2. The Chairman invited the Working Party to revert to this item at its next meeting.

4.3. It was so agreed.

5 ITEM E – OTHER BUSINESS

5.1. No matters were raised under this agenda item.

5.2. The meeting was adjourned.
