GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

LIC/W/46
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Special Distribution

Committee on Import Licensing

WORK PROGRAMME

DRAFTING HISTORY AND INTERPRETATION OF VARIOUS PROVISIONS

Note by the Secretariat

I. Introduction

1. At the twenty-second meeting of the Committee, held on 12 September 1988, it was agreed that the discussion of the definition of "import licensing" in Article 1.1 would continue. It was also agreed that the Secretariat would undertake background work requested by the United States on the drafting history and interpretation, if any, given in the Agreement, the GATT and other Tokyo Round Agreements, to the following terms:

Article 1.8 - "Minor variations in value, quantity or weight"
3(h) - "reasonable duration" (of licence validity)
3(j) and (l) - "economic quantities"
3(k) - "fully utilized" (in relation to import performance of licence applicants)
3(l) - "reasonable distribution" (of licences to new importers)[1]

2. This note covers the origins and drafting history of the definition of "import licensing" in Article 1.1 and the other provisions specifically referred to at the twenty-second meeting.

3. It is perhaps worth briefly recalling the overall origins of the Agreement within Working Group 4 of the Committee on Trade in Industrial Products (CTIP), established by the Council in December 1967. Working Group 4 discussed specific trade barriers including, as well as licences, quantitative restrictions (including embargoes), bilateral agreements, "voluntary" export restraints, motion picture restrictions and minimum prices on textile imports. A distinction was drawn in the Working Group's first report (COM.IND/W/49 of 21 December 1970) between the treatment of quantitative restrictions per se and that of import licensing, in respect of which the Group focused on two questions: the extent and manner in which licensing itself constituted an import restriction and possible

[1] LIC/M/22, paragraphs 12 and 14

solutions to the restrictive effect of import licensing. In this connection, the Working Group agreed to review the licensing systems applied by contracting parties, on the basis of a questionnaire which subsequently became the regular GATT Import Licensing Questionnaire. At the same time a proposal was made for a code designed to reduce the barriers resulting from licensing; it was suggested that the procedures used in the OECD Standard Procedures for Import of Goods might serve as a basis (COM.IND/W/49, Annex 2). The Working Group then submitted two separate texts, on automatic licensing and on licensing to administer import restrictions, to the Committee in COM.IND/W/82. These texts were taken up as the basis for negotiation in the Tokyo Round (MTN/NTM/W/2). They continued to evolve separately until a late stage in the Round. The first draft of the Agreement in its present shape, including Article 1 covering general provisions, was presented in December 1978 as a text "circulated at the request of a number of delegations" (MTN/NTM/W/213), and further developed in March-April 1979 in MTN/NTM/W/231 and Rev.1 and 2.

4. Section II, following, sets out in schematic form the evolution of the drafting of the provisions on which information is requested by the Committee, as well as references to relevant points recorded in its Minutes. In this connection, it may be noted that in the second biennial review of the Agreement the Chairman proposed discussion of a number of vague phrases such as "a reasonable duration" or "a reasonable distribution of licences" in order to consider whether the Committee could agree on some minimum requirements in relation to the provisions in question (LIC/M/9, paragraph 20, third indent).

II. Specific provisions of the Agreement: Evolution during the Tokyo Round

(a) Article 1.1 - "For the purpose of this Agreement, import licensing is defined as administrative procedures" (i.e. those referred to as "licensing" as well as other similar administrative procedures) "used for the operation of import licensing régimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing country".

This provision emerged in the late stages of the negotiations on the Agreement (MTN/NTM/W/213 of 21 December 1978). This text was the first to contain an overall introductory section, "General Provisions" including a definition of import licensing. Previous texts had focused separately on "automatic licensing" and "licensing to administer import restrictions".

Evolution of drafting

MTN/NTM/W/2 (CTIP text) - Definition of "automatic licensing":

> "Licensing which is not used to administer import restrictions such as those employed pursuant to the relevant provisions of, inter alia,

Articles XI, XII, XVII, XVIII, XIX, XX and XXI of the General Agreement and when foreign exchange is granted automatically"... "The term "automatic licensing" covers technical visa requirements, surveillance systems, exchange formalities related to imports, and other administrative reviews of an equivalent kind effected as a prior condition for entry of imports."

MTN/NTM/W/11/Add.7 (Canada, March 1976) - "Documentation requirements shall, wherever practicable, be limited to those for normal customs entry purposes" (for automatic licensing).

MTN/NTM/W/88 (United States, March 1977) - "No document shall be required on application other than a pro forma invoice, or where strictly indispensable, other documents necessary to determine the nature and composition of the product ...". "No information or documents other than those necessary for normal customs clearance shall be required to accompany licensed imports" (Licensing to Administer Import Restrictions).

MTN/NTM/W/103 (Secretariat compilation, June 1977, on Licensing to Administer Import Restrictions):

"8. Application forms shall be as simple as possible. [No document shall be required on application other than a pro forma invoice, or where strictly indispensable, other documents necessary to determine the [value, quantity], nature and composition of product.]"

"18. Imports of goods under restrictions should, wherever practicable, be allowed on the basis of [normal customs procedures] [import permits issued by importing countries] ..."

MTN/NTM/W/111 (Secretariat compilation, August 1977, on automatic licensing):

"6. Application forms shall be as simple as possible. No document[s] shall be required on application other than [a pro forma invoice] [those required for normal customs purposes] ..."

MTN/NTM/W/127 (Secretariat compilation, December 1977):

- on automatic licensing:

"6. Application forms shall be as simple as possible. [No document[s] shall be required on application other than [a pro forma invoice] [those required for normal customs purposes].] [Together with the application, a pro forma invoice may be required] ..."

- on licensing to administer import restrictions:

["18. Imports of goods under restrictions should wherever practicable be allowed on the basis of [normal customs procedures] [import permits issued by importing countries] ..."]

MTN/NTM/W/213 (Draft text of an Agreement)

"General Provisions:

1. For the purpose of this Agreement, import licensing is defined as administrative procedures (e.g. those referred to as "licensing" as well as other similar measures) requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing country.

5. Application forms and, where applicable, renewal forms shall be as simple as possible. [No documents shall be required on application other than [a pro forma invoice] [those required for normal customs entry purposes] [or, where strictly indispensable, other documents necessary to determine [inter alia,] the value, quantity, nature, composition, [origin and country of consignment] of the product.]]"

MTN/NTM/W/231 (Revised draft)

In para. 1: the phrase "For example, those procedures referred to as "licensing" as well as other similar administrative procedures" inserted as footnote. Para. 5, second sentence replaced by "Such documents and information as are considered strictly necessary for the proper functioning of the licensing régime may be required on application"; this text carried forward to final Agreement.

MTN/NTM/W/231/Rev.1

Final version of footnote to para. 1 agreed.

The reference to customs procedures/purposes appears, therefore, to have been taken out of the operational part of the proposed Agreement into the introductory section. No clear indication is given in the final text of the Agreement as to what is meant by "customs purposes", although the drafting history suggests that a "common sense" kind of distinction was drawn between import licensing and "normal" or routine customs procedures.

References in Committee Minutes:

LIC/M/10, paras. 2-25; LIC/M/11, paras. 19-21; LIC/M/12, paras. 15-17; LIC/M/13, paras. 13-16; LIC/M/14/Rev.1, paras. 17-20; LIC/M/15, paras. 24-30; LIC/M/16, paras. 16-17; LIC/M/17, para. 27; LIC/M/18, para. 10; LIC/M/20, paras. 14-17; LIC/M/21, paras. 20-21; LIC/M/22, paras. 11-14.

(b) Article 1.8 - "Minor variations in value, quantity or weight"

GATT References: Article VIII:3 - "No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements."

MTN/NTM/W/2 (CTIP text): I.7 - "No application shall be refused for minor errors in documentation easily rectifiable."

MTN/NTM/W/88 (US): "... applications with easily rectifiable errors shall not be refused" - (para. 9).

MTN/NTM/W/104/Rev.1 (Secretariat): brings in this paragraph for the first time as para. 20 of the text on Licensing to Administer Import Restrictions, and cross-references GATT, Article VIII:3.

MTN/NTM/W/170 (Mexico) para. 12: "No adherent shall impose substantial penalties or refuse an application or form because of minor and easily rectifiable errors in the documentation annexed thereto. In particular, no penalty applied because of any omission or error in the documentation which obviously occurred without fraudulent intent or grave negligence shall be more severe than necessary to serve as a warning."

MTN/NTM/W/171 (Mexico) para. 8: "No application or form shall be refused by reason of errors that do not alter the basic data contained therein. No adherent shall impose substantial penalties or refuse an application or form because of minor and easily rectifiable errors in the documentation annexed thereto. In particular, no penalty in respect of any omission or error in the documentation obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve as a warning."

MTN/NTM/W/213, para. 7: "No application or form shall be refused for minor documentation errors which are easily rectifiable and which do not alter basic data contained therein."

MTN/NTM/W/213, para. 8: "Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the license due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice" (text as finally adopted).

MTN/NTM/W/231, para. 7: "No import licence application shall be refused for minor documentation errors which do not alter basic data contained therein".

MTN/NTM/W/231/Rev.1: Deletion of "import licence"; text as finally adopted.

References in Committee Minutes: none.

(c) Article 3(h) - "Reasonable duration" (of validity)

GATT reference: Article XIII:2(d) - "No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate."

MTN/NTM/W/2, Annex II, para. 11: "The validity of the licence shall be of reasonable duration, and in no case, except in special cases where imports are necessary to meet unforeseen short-term requirements, so short as to prevent imports from countries situated at a distance, taking into account transport and communications conditions."

OECD Standard Procedure (COM.IND/W/49, Annex 2), para. 13: "Licences should be valid for at least three months from their date of issue. However, a longer period of validity should be accorded when the distance of transport and communications makes this a legitimate requirement. Licences should also be easily renewable. Validity may nonetheless be for a shorter, but reasonable, period in special cases."

MTN/NTM/W/88 (US), para. 11: "The period of licence validity shall allow suppliers to receive, process, ship and receive payment for imports, and shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements".

MTN/NTM/W/103, para. 11: (Secretariat draft with alternative language) "[The validity of the licence shall be of reasonable duration] [The period of licence validity shall allow suppliers to receive, process, ship and receive payment for import] and shall not preclude imports from distant sources [taking into account transport and communications conditions] except in special cases where imports are necessary to meet unforeseen short-term requirements."

MTN/NTM/W/104: gives GATT references.

MTN/NTM/W/170 (Mexico) para. 13: "The validity of licences and of documents issued for the purposes of operation of other measures and practices having equivalent effects, and likewise any extensions thereof, shall be of reasonable duration and, taking into account transport and communications difficulties, shall in no case preclude imports from distant sources, except in special cases where imports are necessary to meet, in the short term, requirements that are unforeseen or subject to quota."

MTN/NTM/W/213, para. 12(h): "The period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements" (text finally adopted).

References in Committee Minutes: none.

(d) Article 3(j) and 3(l) - "Economic quantities"

GATT references: Article XII:3(c)(ii) - "not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade" (see also XVIII:10).

Article XIII:2 (head paragraph) - "In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions. ..."

Note to Article XIII:2(d) - "No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2."

MTN/NTM/W/2, para. 14: "Licences should not be issued to importers for goods in such small quantities as to make imports uneconomical and, so far as consistent with this, should not be allocated to an unduly small number of importers."

MTN/NTM/W/2, para. 15: "Consideration shall be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for goods in economic quantities."

MTN/NTM/W/11/Add.8 (Mexico): proposed dropping para. 14 because "it is difficult to define what is meant by "uneconomical" and "an unduly small number of importers".

MTN/NTM/W/88 (US) para. 13: "Import licences shall not be restricted to such small quantities as to make imports uneconomic and shall not be distributed to an unduly small number of importers."

MTN/NTM/W/100 (India) para. 14: "This is an area where there is a case for differential treatment in favour of developing countries where such countries would want to keep socio-economical objectives in view in allocating the quotas" (para. 14).

MTN/NTM/W/103 (Secretariat): sets all alternatives for 14 and 15 alongside.

MTN/NTM/W/104 (Secretariat): cross-references Article XIII.2(d) of GATT for 14 and XIII.2 (head paragraph) and (d) for 15.

MTN/NTM/W/213, para. 12(j): "When issuing licences, governments shall take into account the desirability of issuing licences for goods in economic quantities".

MTN/NTM/W/213, para. 12(l): "Consideration shall be given to ensuring a reasonable distribution of licences to new importers, [especially those importing goods originating in developing countries and in particular the least-developed countries], taking into account the desirability of issuing licences for goods in economic quantities."

MTN/NTM/W/231, para. 14(j): change "governments" to "Parties to this Agreement" and "goods" to "products".

MTN/NTM/W/231, para. 14(l): Text as finally adopted in Article 3(l) of the Agreement.

References in Committee Minutes: none.

(e) Article 3(k) - "Fully utilized"

GATT references: Article XIII:2(d) - "No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it ..."

OECD Standard Procedure (COM.IND/W/49, Annex 2), para. 11: "The authorities of the importing countries should take the necessary steps, when allocating quotas, to ensure that licences can be issued and importation effected within the periods prescribed for this purpose and to facilitate the full utilization of the quotas ..."

MTN/NTM/W/2, para. 12: "When administering quotas, the authorities of the importing country shall take all possible steps to ensure that licences will be issued and importation can be effected within the period prescribed for this purpose and to facilitate the full utilization of the quotas."

MTN/NTM/W/2, para. 13: "The administrative authority issuing the licence shall take into account inter alia whether licences issued to the applicant in previous periods have been utilized or not."

MTN/NTM/W/11/Add.8 (Mexico): proposed modification to 12 and new 13:
Add to 12 "wherever for reasons of economic policy, the conditions under which the quotas under reference were established remain in existence, in the opinion of the governments which established those quotas".
Change 13 to: "The administrative authority issuing the licence may take into account inter alia whether licences issued to the applicant in previous periods have been utilized or not, for which purpose it may require the production of the appropriate evidence."

MTN/NTM/W/88 (US), para. 12: "Governments issuing licences shall take all possible steps to encourage the full use of quotas, taking into account inter alia whether or not licence holders have used licences issued in previous periods ...."

MTN/NTM/W/100 (India): supported Mexican text.

MTN/NTM/W/103 (Secretariat): sets all alternatives for 12 and 13 alongside.

MTN/NTM/W/104 (Secretariat): cross-references GATT Article XIII.2(d).

MTN/NTM/W/170 (Mexico), proposed following paras. 14 and 15:

14. "When administering quotas, the authorities of the importing country shall take all possible steps in order that licences and the documents relevant to the operation of other measures and practices having equivalent effects may be issued, that importation may be effected within the period prescribed for this purpose, and in order to facilitate the full utilization of the quotas. The foregoing shall be applicable for

developing countries wherever the conditions under which the quotas under reference were established remain in existence."

15. "In the examination for deciding on licence applications and the documents necessary for initiating the operation of other measures and practices having equivalent effects, governments may take into account inter alia whether import licences issued to the applicant in previous periods have been taken up or not for which purpose they may require the production of the appropriate evidence."

MTN/NTM/W/213, para. 12(k): "In allocating licences, governments shall consider whether licences issued to the applicant in previous periods have been utilized up to the amount provided for in the licence".

MTN/NTM/W/231, para. 14(k): Text as finally adopted in Article 3(k) of the Agreement.

References in Committee Minutes: LIC/M/6 (Austria, para. 16; Japan, para. 21; New Zealand, para. 22).

(f) Article 3(1) - "Reasonable distribution" (of licences to new importers)

GATT references: Article XIII:2(d) and Note thereto (see section on Article 3(j) and (l)).

OECD Standard Procedure (COM.IND/W/49, Annex 2), para. 11: "... Furthermore, where the size of quotas permits new importers should have the right to request a fair share of quotas."

MTN/NTM/W/2, para. 15: "Consideration shall be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for goods in economic quantities."

MTN/NTM/W/11/Add.7: Canada proposed substitution of "there shall be" for "Consideration shall be given to ensuring".

MTN/NTM/W/11/Add.8: Mexico proposed addition of provisions concerning differential treatment in favour of developing countries, i.e. "In the distribution of licences, developed countries should reserve a substantial share to new importers, in the case of new products originating in developing countries; in addition, they should authorize a larger number of licences for traditional imports originating in developing countries."

MTN/NTM/W/39 and Rev.1 (Secretariat): noted Canadian proposal and proposal saying "Consideration ... new importers, taking into account the desirability of issuing licences for goods in economic quantities and also the rights of traditional importers especially where quotas are applied for emergency protection purposes."

MTN/NTM/W/73/Rev.1 (Australia and New Zealand): "Consideration shall be given to ensuring a reasonable distribution of licences to new importers taking into account the desirability of issuing licences for goods in economic quantities and also the rights of traditional importers especially where quotas are applied for emergency protection purposes."

MTN/NTM/W/88 (US), para. 13: "There shall also be a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for goods in economic quantities."

MTN/NTM/W/100 (India): "This paragraph is of great importance as it has a bearing on the question of differential treatment in favour of developing country exports. Licences should be administered in such a manner as to

(a) ensure access for developing country exports; and
(b) free flow of goods from developing countries without disrupting their trade."

MTN/NTM/W/103 (Secretariat): sets all alternatives alongside.

MTN/NTM/W/104 (Secretariat): cross-references GATT Article XIII.2 (head para.) and XIII.2(d).

MTN/NTM/W/170 (Mexico) para.17: "In the allocation of quotas, a reasonable share shall be reserved to new importers, taking into account the rights of traditional importers. In complying with the provisions of paragraph 2 above, developed countries shall reserve a substantial quota share to new importers, in the case of products originating in developing countries; in addition, these countries shall increase the share of imports originating in developing countries, by authorizing larger imports under the quotas for traditional importers."

(Paragraph 2 of the Mexican text proposed that developed countries shall gradually remove non-automatic import licensing requirements, and any measures and practices having effects equivalent to these requirements, within a maximum period to be specified from the date of entry of the Agreement.)

MTN/NTM/W/213, para. 12(1): "Consideration shall be given to ensuring a reasonable distribution of licences to new importers, [especially those importing goods originating in developing countries and, in particular, the least-developed countries], taking into account the desirability of issuing licences for goods in economic quantities."

MTN/NTM/W/231, para. 14(1): Text as finally adopted in Agreement.

References in Committee Minutes: LIC/M/6 (United States, paras. 23-24).