

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

COM.TEX/SB/214
15 March 1977

Special Distribution

Textiles Surveillance Body

REPORT OF THE SECOND AND THIRD MEETINGS¹ (1977)

1. The TSB held its second and third meetings on 14-16 February and 24-25 February; and on 1-2 March 1977 respectively. The report of the first meeting was approved and has been circulated in document COM.TEX/SB/210 and Corr.1.
2. The TSB has received from the EEC a memorandum dated 20 January 1977 in response to its recommendations concerning the programmes for the elimination of pre-MFA restrictions applied to Brazil, Colombia, Hong Kong, India, Korea, Macao, Malaysia, Mexico, Pakistan, Singapore and Thailand. The text of this memorandum has been circulated to the Textiles Committee in document COM.TEX/SB/212.
3. In its memorandum to the TSB, the Community has expressed concern "regarding the manner in which the TSB has discharged its responsibilities in this important matter". The Community "considered in particular that the TSB did not take into account the fact that the Community's programme complements, both logically and legally, its selective approach to the product- and country-coverage of its bilateral agreements under Article 4".
4. The Community reiterated its position regarding the conformity of its actions under Article 2 of the MFA. The fact that this position is in conflict with the TSB's views on this matter was restated during the course of the present examination, by the member designated by the EEC.
5. During its examination of this memorandum, the TSB received from the Community on 23 February 1977 a paper on its legal interpretation of Article 2. The views expressed in this paper are reproduced in full in sub-paragraphs (a) to (f) below:
 - (a) Article 2 of the MFA was conceived in Geneva in 1973 to provide the means whereby participating countries might adapt quantitative restrictions in force prior to the MFA to the new régime for international trade in textiles.

¹Fiftieth and fifty-first meetings.

Four possible means were made available for bringing pre-existing restrictions into conformity with the MFA. They are:

- (i) maintenance under the provisions of the GATT (including its annexes and protocols);
 - (ii) inclusion in a programme under conditions laid down in Article 2(2)(i) of the MFA;
 - (iii) inclusion in bilateral agreements as provided in MFA Article 2(2)(ii);
 - (iv) inclusion in agreements negotiated on measures adopted pursuant to the provisions of Article 3.
- (b) In order to deal with the number and diversity of restraints which existed in the Community prior to 1974, the Community decided to employ two complementary instruments provided by Article 2.
- (i) the bilateral agreement negotiated under Article 4 but with a selective product coverage;
 - (ii) a programme for the elimination of residual restraints identified as a function of the bilateral negotiations under Article 4.
- (c) The provisions of Article 2 contemplate, in express terms, the complementarity of the programme and the Article 4 bilateral agreement: Article 2(2)(i) provides that the programme is to be adopted and notified "taking account of any bilateral agreement either concluded or in course of being negotiated as provided for in (ii) below," Article 2(2)(ii) provided for extensions of time for bilateral negotiations, by not more than one year. The Community considers that should such extensions of time not equally apply to the actions contemplated in sub-paragraphs (i) and (iii) of Article 2(2), a situation of gross inequity would arise.

The Community also considers that, in the event of an importing country choosing a selective product coverage for its Article 4 bilaterals, an extension of time for negotiations for such bilaterals must necessarily cover equally the adoption of complementary programmes.

- (d) The complementary and contingent relationship of the Community's programme to its bilateral agreements was made clear in its communication to the TSB of 27 March 1975, of its framework programme for the elimination of existing restrictions in order to satisfy the letter as well as the spirit of Article 2(2)(i). The Community stated that whereas for those countries with which Article 4 negotiations were not foreseen, a programme could be communicated immediately. In the case of those participating countries with which the Community wished to enter Article 4 negotiations "the Community will put forward its programmes ... as soon as negotiations ... have been concluded".
- (e) Further, the provisions of each agreement concluded with participating exporting countries under the arrangement expressly indicated the textile products to which that agreement applies and confirms that, subject to the provisions of the relevant bilateral agreement, the conduct of mutual trade in textiles shall be governed by the provisions of the Geneva Arrangement. Thus, the provisions of Article 2 other than its sub-paragraph (ii) clearly remain applicable to restrictions on products other than those dealt with under Article 2(2)(ii).
- (f) In conclusion, it should be observed that the conformity of the approach indicated above with the spirit and letter of the Arrangement has been accepted by a number of its negotiating partners, most evidently in those cases where programmes were the subject of detailed consultation in the course of a following bilateral discussion.

6. The TSB regretted that the Community has chosen to express concern on the "manner in which the TSB has discharged its responsibilities in this important matter", and could not accept without comments the implication in this assertion.

7. In view of the contents of the EEC's memorandum, the TSB considered it necessary to state the grounds for the TSB's conclusions and recommendations on the Community's phase-out programmes. These essentially rest upon the provisions of Article 2 of the MFA, and are as follows:

- (a) Paragraph 3 of Article 2 specifically provides for the treatment of pre-MFA bilateral agreements. In terms of this paragraph, such agreements had either to be terminated or justified under the provisions of the Arrangement, or modified to conform therewith within one year of the coming into force of the Arrangement, i.e. by 31 March 1975. This paragraph does not at all provide for the introduction of phase-out programmes in respect of products covered by pre-MFA bilateral agreements and not incorporated in new bilateral agreements under the MFA. Thus, the residual bilateral restraints which had not been brought into conformity with the Arrangement lost their validity and legal basis on the expiry of one year of the coming into force of the Arrangement.

- (b) Paragraph 2 of Article 2 provides that all unilateral quantitative restrictions, and any other quantitative measures which have a restrictive effect other than those included in Article 3 or Article 4 agreements, have either to be terminated within one year of the coming into force of the Arrangement, i.e. by 31 March 1975, or to be included in a programme for their elimination within a maximum period of three years from the entry into force of the Arrangement, i.e. 31 March 1977, which programme should be adopted and notified to the TSB within one year from the date of the coming into force of this Arrangement, i.e. by 31 March 1975. Where phase-out programmes were not adopted or notified within the stipulated period, i.e. by 31 March 1975, all unilateral quantitative restrictions and any other quantitative measures which have a restrictive effect lost their validity and legal basis on 31 March 1975.

8. The TSB did not accept that the Community's notification of 27 March 1975, informing the TSB of its "intention" to introduce phase-out programmes, had met the provisions of Article 2, paragraph 2, requiring that the programmes should be adopted and notified to the TSB within one year of the coming into force of the Arrangement, i.e. by 31 March 1975.¹

9. The TSB recalled that it had considered the Community's contention that its programme complements both logically and legally the Community's selective approach to its bilateral agreements. It was pointed out at that time that the Community's reference to the selectivity of bilateral agreements was irrelevant to the examination by the TSB of the legal validity of phase-out programmes. The right of the Community or any other participant in the Arrangement to introduce phase-out programmes under Article 2 was never in dispute; the point which the TSB had to decide was whether or not the Community's programmes had been introduced in conformity with the provisions of Article 2, and it found that they had not.

10. The Annex to this report sets out the historical background of these phase-out programmes, as well as the conclusions and recommendations by the TSB as a result of its review thereof.

11. The TSB, in reviewing the EEC memorandum, noted the EEC's reference to its obligations under Article 11:8. The TSB regretted that it had not been possible for the EEC to eliminate all the residual restrictions in question.

¹The member designated by the EEC did not join in this; for his position with respect to the recommendations subsequently formulated by the TSB, see footnotes to paragraphs 5 to 7 in the Annex.

12. In its memorandum the Community notified that the elimination of some of the residual restrictions had been advanced in the case of the United Kingdom by three months to 1 January 1977, and in the cases of France and Ireland by two months to 1 February 1977. The Community also notified that some of the restrictions would remain in force in the United Kingdom and France until 31 March 1977, as originally stipulated in the phase-out programmes.

13. In connexion with paragraph 3 of the Community's memorandum, the TSB took note of the statement by the member designated by the EEC in which he assured the TSB that no restrictions under Article 2 of the MFA would remain in force after 31 March 1977, with respect to those participating countries for which the Community had notified phase-out programmes.

14. The TSB had received from Norway notifications of two bilateral agreements under Article 4. The first was concluded with Sri Lanka covering the period 1 May 1976 to 30 April 1978, and the second with Singapore covering the periods 1 January 1976 to 31 December 1977 for one category; and 1 October 1976 to 31 December 1977 for other categories. The TSB reviewed the two agreements and agreed to circulate them to the participating countries. This has been done in documents COM.TEX/SB/215 and 216.

15. Notifications had been received from Sweden of four bilateral agreements under Article 3 between Sweden and each of the following parties: (a) Thailand - in which case two agreements were concluded covering different products for the periods 1 December 1976 to 30 November 1978, and 15 January 1977 to 14 January 1979 respectively; (b) Malaysia - covering the periods 1 September 1976 to 31 December 1977 for some products and 1 November 1976 to 31 December 1977 for other products; (c) Macao - covering the period 15 July 1976 to 14 July 1978. These agreements were reviewed by the TSB and have been circulated as documents COM.TEX/SB/213, 217, 218 and 219 respectively. The TSB noted that these agreements contained no provisions for swing and assumed that the parties thereto had agreed to waive their rights to swing.

16. The TSB also reviewed an agreement concluded under Article 3 between Finland and Hong Kong and agreed to circulate it to the Textiles Committee. This has been done in document COM.TEX/SB/220. The TSB noted that there was no provision for swing from this agreement to the other agreement concluded between the two parties for the period 1 June 1976 to 31 May 1977 (COM.TEX/SB/184). In this connexion the TSB recalled its earlier discussion on swing provisions that when more than one agreement is concluded between a given importing country and a given exporting country, each or any of which covers only one product, it was recognized that the right of the exporting country to swing provisions as between the several agreements remains valid.¹

¹See COM.TEX/SB/196, paragraph 97.

ANNEX

1. On 27 March 1975, the TSB received a notification from the EEC under Article 2:4 informing it of its intention to introduce phase-out programmes in respect of those supplying countries with which bilateral agreements were to be concluded. These programmes would cover residual restrictions on products which were not to be included in the bilateral agreements. The identification of restrictions in this category had to await the conclusion of bilateral agreements. In reviewing this notification by the TSB, "disagreement was expressed with the Community's view" that the elimination of residual restrictions affecting these countries "must await conclusion of bilateral agreements and it was regretted that, as a result of this interpretation, these participants had been denied, pending the conclusion of their negotiations with the Community, benefits to which they were entitled under the MFA" (see COM.TEX/SB/98). In addition, the Chairman of the TSB was asked by members to bring to the attention of the Commission the concern expressed by them as to the Community's interpretation of Article 2:2(i) of the Arrangement. The Chairman's letter is attached herewith.

2. The EEC notified to the TSB, in accordance with the intent mentioned above, programmes for the phasing out of residual pre-MFA restrictions affecting¹ India and Pakistan (both in December 1975), Malaysia, Hong Kong, Macao, Singapore, Korea, Brazil, Mexico and Thailand (all in March 1976), Colombia (in May 1976). In all cases (other than Mexico and Thailand, with which bilateral agreements have not been negotiated) these were notified simultaneously with the bilateral agreements under Article 4 which have been negotiated with these countries. Since the agreements were notified when they had been initialled but before their formal conclusion, the TSB provisionally agreed to review the related phasing-out programmes after the formal conclusion of the agreements, in order to avoid prejudicing their conclusion or their negotiation where this had not been completed.

3. Following upon a formal complaint received from Pakistan in November 1975, the TSB reviewed the phase-out programme applied by the EEC with respect to Pakistan. In December 1975, the TSB urged the Community and Pakistan, in the spirit of Article 3:7, to enter into consultations promptly so as to ensure that trade would not be frustrated pending the conclusion of the TSB's examination of this complaint (see COM.TEX/SB/144).

¹The countries mentioned here are only those referred to in the EEC's memorandum of 20 January 1977.

4. The TSB continued its examination of this matter at its meeting held on 27-29 January and 2 February 1976. The TSB was of the view that, in substance, the restrictions and/or restraints maintained under previously existing bilateral agreements were of a bilateral nature and therefore concluded that they should have been dealt with under the provisions of Article 2, paragraph 3, rather than Article 2, paragraph 2. Accordingly, the TSB urges both parties to review jointly and forthwith the restrictions in question notified by the EEC in respect of Pakistan, with a view to reaching a mutually acceptable understanding on the treatment of these restrictions, and to report progress to the TSB by 29 February 1976. The TSB noted the stated willingness of the EEC to take steps to ensure the avoidance of damage to Pakistan's textile trade in the interim period (see COM.TEX/SB/147). On 19 February 1976, the Commission of the EEC informed the Director-General of GATT of the Community's disagreement with the TSB's position regarding the provisions of Article 2 of the MFA as they affect the phasing-out programme notified with respect to Pakistan. The Commission's letter, together with the Director-General's reply, are attached herewith.

5. In the light of statements made by the representatives of Pakistan and the EEC on the outcome of their joint review, the TSB reverted to the matter during its meeting held on 20-23 July 1976. Recalling its conclusion of 2 February 1976, "the TSB was of the opinion that the phasing-out programme notified by the EEC was not in conformity with the provisions of the Arrangement and, in particular, with Article 2:3 thereof. The TSB accordingly recommended¹ that the EEC review promptly the restrictions embodied in the phasing-out programme with a view to their elimination. It requested the EEC to report on the outcome of this review as soon as possible, and in any case not later than 31 December 1976. The TSB urged the EEC and Pakistan to consult mutually, in accordance with the provisions of the Arrangement, after the elimination of the restrictions embodied in the phasing-out programme, with a view to finding appropriate solutions to any textile trade problems that exist or may arise" (see COM.TEX/SB/188).

6. At that meeting the TSB also reviewed the phase-out programmes notified by the EEC with respect to India and Hong Kong. "The TSB was of the opinion that the actions taken by the Community were not in conformity with the provisions of the Arrangement and, in particular, with Article 2:2(i) and 2:3 thereof. Accordingly the TSB recommended² that the EEC review the relevant actions which it has taken with a view toward elimination of such restrictions and requested a report on the outcome of this review as soon as possible, and not later than 31 December 1976.

¹In accordance with the procedure established by the TSB, the consensus within the Body on the form and content of the recommendations did not require the assent or concurrence of the member designated by the EEC.

²The member designated by the EEC did not join in the consensus, nor did he oppose it.

The TSB further urged the EEC and the exporting countries concerned to consult promptly under the provisions of the Arrangement with a view toward finding pragmatic solutions to any textile trade problems that exist or may arise" (see COM.TEX/SB/188).

7. At its meeting held on 16 November and 22-23 November 1976, "the TSB reviewed the remaining phase-out programmes notified by the EEC which apply to Brazil, Colombia, Korea, Macao, Malaysia, Mexico, Singapore and Thailand, and found them, in all essential respects, similar to the programmes notified by the EEC with reference to India and Hong Kong and previously reviewed by the TSB. Accordingly, the TSB was of the view that the findings and recommendations¹ applicable to the India and Hong Kong programmes (see paragraphs 11, 12 and 13 of COM.TEX/SB/188) would also apply to the eight programmes listed above" (see COM.TEX/SB/206).

¹The member designated by the EEC did not join in the consensus nor did he oppose it.

19 June 1975

Dear Mr. Meynell,

Report by the European Economic Community
under Article 2:4 of the MFA

You will be aware that during its latest meeting, the Textiles Surveillance Body concluded its review of the Community's report under Article 2:4 and agreed to circulate it to the Textiles Committee. It was not found possible to conclude that the actions reported were wholly in conformity with the Arrangement for reasons which will appear in the draft report of this meeting of the TSB. We understand, however, that there is a possibility that positions to be adopted by the Community in coming weeks will remove some of the concerns expressed by TSB members.

I am writing now with respect to one major concern which is not mentioned in the report but which I have been asked by TSB members to bring to the attention of the Commission. This is the Community's legal interpretation of Article 2:2(i) of the Arrangement. The Community maintains that, with respect to those residual restrictions which will not be covered in the bilateral agreements to be negotiated under the MFA, it retains the right to introduce a phased programme of elimination after the conclusion of these agreements has revealed restrictions which do indeed fall within this category. Its position is that the two functions are inseparable. On this point, some TSB members have expressed the view that since the agreements are to be selective in nature it should already have been, and still is, possible to identify and eliminate residual restrictions; and that if this is not done the supplying countries in question will be denied important benefits to which they are entitled under the Arrangement. Further than this, a majority of TSB members take the view that the right to introduce such a programme of elimination expired on 31 March 1975, at the end of the first year of the Arrangement, unless the programme had been notified beforehand. They regard it as unreasonable that in bilateral negotiations with its partners, the Community should place itself in a position, should the supplying countries be unwilling to agree restrictions on a given product, to maintain such restrictions unilaterally until near the end of the life of the Arrangement.

This view was not reflected in the draft report of the meeting because members felt that it would not be constructive to invite debate on what may yet transpire to be no more than a hypothetical problem. I should, however, be grateful if, in considering the comments made on the Community's report in the draft record of the meeting, you would also take this point into account.

Yours sincerely,

P. Wurth
Chairman, Textiles Surveillance Body
Arrangement Regarding International Trade in Textiles

Mr. B. Meynell
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European Economic Community

Brussels, 19 February 1976

Sir,

The Community has taken cognizance of document COM.TEX/SB/147, drawn up by the Textiles Surveillance Body following its examination of the complaint by Pakistan regarding the notification of the Community's programme for phasing out quantitative restrictions.

The Community notes with concern that some question has arisen of the interpretation to be placed on Article 2 of the MFA. Since such an interpretation could at a later stage become a factor of importance, I am instructed to inform you, both in your capacity as Director-General of GATT and as Chairman of the Textiles Committee, that the Community does not share the view taken by the TSB, more particularly that the restrictions notified by the Community under Article 2 "should have been dealt with under the provisions of Article 2, paragraph 3, rather than Article 2, paragraph 2".

The Community feels that it would be inequitable and wrong if this view came to be accepted as constituting in any way a correct judicial interpretation of the MFA provisions in question.

It is the Community's wish that bilateral differences should be settled in the consultations which it offered to hold with Pakistan by its note verbale of 11 December 1975, and those consultations are currently taking place.

Accept, Sir, the assurances of my highest consideration.

(signed) B. Meynell

Mr. Olivier Long,
Director-General,
General Agreement on Tariffs and Trade,
Palais des Nations
Geneva

24 March 1976

Dear Mr. Meynell,

Thank you for your letter of 19 February informing me of the Community's disagreement with the TSB's position regarding the provisions of Article 2 of the MFA as they affect the phasing-out programme notified by the Community with respect to Pakistan.

Since you have asked me not to circulate this letter, I have not discussed it with the members of the TSB, but I am in no doubt that the conclusion recorded in the report of the TSB's January meeting accurately represents a consensus reached after long and careful consideration (a consensus from which the member nominated by the EEC abstained, in accordance with the procedures adopted by the TSB in cases of dispute involving a country whose national is sitting on the Body). This is confirmed by the Chairman of the TSB, whom I have consulted. For my own part, I must say that the TSB appears to me to have reached the right conclusion. However, I take note that the Community holds a different view.

I too hope that these difficulties can be resolved bilaterally. It was in the belief that both parties were willing to consult with a view to finding a mutually satisfactory solution that the TSB urged that such consultations should be undertaken, abstaining at this stage from a formal recommendation.

Yours sincerely,

Olivier Long
Director-General

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