GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TBT/W/149
3 August 1990

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Committee on Technical Barriers to Trade

DRAFT MINUTES OF THE MEETINGS HELD ON 29 MAY AND 19 JUNE 1990

Chairman: Mr. W. Frei (Switzerland)

1. The Committee on Technical Barriers to Trade held its thirty-eighth and thirty-ninth meetings, respectively on 29 May 1990 and 19 June 1990.

2. The agenda of these meetings was as follows:

A. Statements on implementation and administration of the Agreement

3. The representative of the United States informed the Committee that her authorities had recently held consultations with the Republic of Korea concerning a requirement relating to the safety and labelling of imported foodstuffs. She urged the delegation of Korea to notify the proposed regulation, which might have a significant impact on the trade of other Parties.

4. The representative of New Zealand said that his authorities also had consultations with the Republic of Korea concerning the regulations recently adopted by the Republic of Korea. Labelling requirements were covered by the Agreement in terms of paragraph five of the Preamble. His authorities believed that the regulations might not fully conform to Article 2.1 of the Agreement. Furthermore, they had noted that the Republic of Korea had not abided by its obligations under Article 2.5 on notifications. It was important that all Parties were informed of any forthcoming regulations that would have an effect on their trade and that they had the opportunity to give their comments and to consult on an equal basis.

B. Technical regulations and standards as unnecessary obstacles to trade

5. The representative of Canada introduced the proposal entitled "Technical Regulations and Standards as Unnecessary Barriers to Trade (TBT/W/144). He stated that the two principles of the Agreement as outlined in its Preamble were to ensure that measures, including technical regulations and standards and conformity assessment procedures, adopted by governments for reasons of safety, health and environmental protection or other purposes did not create unnecessary obstacles to trade and that they were applied without discrimination between countries where the same conditions prevailed. His authorities noted that in practice it had not been possible to strike a balance between those two objectives. The provisions against discrimination had been more effectively used than those against unnecessary obstacles to trade due to the lack of meaningful guidance in the Agreement as to what constituted an unnecessary obstacle to trade. The provisions of Article 2.1 stipulated for non-discrimination and against the application of technical regulations and standards with the intent or with the effect of creating unnecessary obstacles to trade. The Agreement contained no specific provisions which allowed testing of the consistency of a measure with the requirements in Article 2.1. In practice it was difficult to prove or disprove the intent of a measure or to assess the effect of an unnecessary barrier to trade. The Committee had agreed on certain criteria for the determination of the significance of the effect on trade of technical regulations (TBT/16/Rev.1, section C.3). Experience with the implementation of the Agreement had not provided any useful guidance in this respect. He emphasized that their proposal did not aim to introduce new obligations but only suggested some clarifications of the existing provisions in the Agreement. They used the term "inter alia" before the sub-paragraphs that contained the qualifications to Article 2.1 because these did not represent a complete and exclusive interpretation of the provisions in question.

6. The representative of the European Economic Community considered that the proposal addressed a sensitive matter. It was difficult to be precise on certain concepts that often fell outside the scope of the existing provisions. The representative of New Zealand said that some additional precision to Article 2.1 would be welcome as problems were caused by technical regulations and standards that were not in keeping with the obligations or the spirit of the Agreement.

7. The representative of the United States said that the suggestions relating to technical regulations and standards should also relate to conformity assessment procedures.

8. The representative of Australia said the phrase "greater than necessary" in paragraph 2.1.1 of the proposed text left much room for interpretation. The representative of Finland, speaking on behalf of the Nordic countries, said that paragraph 2.1.1 should contain a qualification regarding a preference for the least trade restrictive measures. The representative of Hong Kong said that some of the language in the proposal could lend itself to arbitrary interpretation. He supported the proposal that the scope and the duration of regulations and standards should be proportional to the circumstances to which they were related.

9. The representative of Australia said that the provisions of Article 2.1.2 should provide a more objective basis for the concept of acceptable level of risk. The representative of Japan said that in this paragraph the term "acceptable level of risk" should be replaced by the term "necessary level of protection". The representative of the European Economic Community said paragraphs 2.1.1 did not explain who would be able to determine the acceptable level of risk and what constituted appropriate scientific and technical evidence. He recalled their proposal on conformity assessment procedures, which also referred to the concept of risk. The representative of New Zealand, joined by the representative of Finland, speaking on behalf of the Nordic countries, said that there should be a firm understanding of what was an acceptable level of risk and who would determine it.

10. The representative of Canada said that the suggestion for the proportionality of measures to the level of risk involved was close to the obligations implicit in Article 2.4, which required that technical regulations and standards were specified in terms of performance. It was not expected that each technical regulation or standard be accompanied by a rigorous technical assessment of risk. When technical regulations or standards were drafted the conditions of use of a product should be taken into account to ensure the required level of protection or confidence. If requirements in regulations and standards were related to imagined conditions of use they would be more strict than otherwise necessary.

11. The representative of Canada said that the review of standards had been suggested in paragraph 2.1.3 in order to ensure that they were up to date with the current needs. They had introduced this obligation on degressivity to encourage Parties to examine their technical regulations periodically and to assess whether the reasons for which they had been originally adopted were still valid. It did not suggest that any criteria for automatic or detailed reviews be agreed upon. The review of standards was a the current practice both in the regulated and non-regulated sectors of standardization and in the international standardization organizations. In many cases the regulatory authorities conducted reviews to consider whether regulations involved an undue burden on producers. At the private sector level a standards body had to see whether their standards were adapted to a whole host of changes surrounding the production, marketing or distribution of a product.

12. The representative of the European Economic Community said that although there was no difficulty with the suggestion that a technical regulation and standard should be abolished if there was no reason for its existence, it might not be appropriate to lay down an obligation which would require the institution of a system of regular checking by all those active in this field. Market forces would decide whether a standard which no longer had a reason to exist should continue to be used. The representative of Australia said that it might be appropriate to keep a particular measure in place although the original circumstances might no longer apply. The representative of New Zealand said that it was not

always easy to assess whether alternative measures could be found which were less trade restrictive. The representative of Finland, speaking on behalf of the Nordic countries, said that this paragraph should be redrafted in the light of their proposal to amend Article 2.4 (TBT/W/141).

13. The representative of Canada said that the purpose of paragraph 2.1.4 was to avoid the adoption of technical regulations and standards which had an unnecessary or unwarranted regional bias. Parties would be encouraged to draft their regulations and standards without any mention of specific countries unless they were convinced that all products from a given country contained the undesirable characteristics that the regulation intended to avoid. The measure should not apply to all products coming from a specific country if the problem was localized.

14. The representative of Finland, speaking on behalf of the Nordic countries, said that the proposed paragraph might imply that certain countries would be prevented from adopting technical regulations and standards that were adapted to their particular national circumstances.

15. The representative of New Zealand questioned the need for paragraphs 2.1.5 and 2.1.6. These paragraphs could imply that a country might have to grant imported products more favourable treatment than domestic products in those cases where it applied a regulation which fully complied with international standards. It seemed to them to weaken the extent to which the Agreement advocated harmonization of standards. The representative of the European Economic Community said that the present text gave the impression that the use of international standards was questionable.

16. The representative of Canada said that the proposed paragraphs did not try to discourage countries from using international standards in all cases. The intent was not to introduce any stronger obligations than those already in Article 9.4 of the Agreement that referred to the application of international or regional certification systems.

C. Conformity assessment procedures

17. The representative of Brazil said that the proposal by the United States on systems for the accreditation or approval of testing laboratories, inspection or quality system registration bodies, suggested the extension of the rules on access of products in the present provisions of the Agreement to access of bodies. While access to accreditation systems in other countries would facilitate trade in products, accreditation or approval was related to transborder trade in services of laboratories and inspection agents. The obligation to accept the results of foreign laboratories might entitle a national producer or exporter to the right to use the services of the the laboratories or agents abroad and instead of trying to develop or improve domestic laboratory facilities. The Agreement should contain provisions that indicated that it did apply to trade in services in this area. The new provisions should also allow an accreditation body to require that the foreign body that applied for access

should have metrology that was compatible with the metrology applied by the body that was responsible for the accreditation. The representative of the United States said that the objective of their proposal was to introduce an alternative route that encouraged the acceptance of conformity assessment procedures in different countries. They considered the test data as being part of the product which was traded across the border. Acceptance of bodies might not be viable or commercially desirable in all circumstances. Accreditation or approval bodies could charge a fee for their consideration of applications from individual bodies.

18. The representative of Hong Kong said that provisions which allowed individual laboratories direct access to accreditation and approval systems in other Parties would create an imbalance against those Parties who had established national schemes. There would be less need for such provisions if Article 5.2, relating to unilateral recognition of conformity assessment, were strengthened. The representative of the United States said that the number of recognition agreements between accreditation schemes was limited compared to agreements on the acceptance of test data produced by laboratories.

D. Second level of obligations

19. The observer from the ISO introduced the feasibility study prepared by the ISO Central Secretariat (TBT/W/146), which identified the possible implications of the implementation of the Code of Good Practice for the preparation, adoption and application of standards (TBT/W/137), from the standpoint of the various bodies that would participate in the proposed exchange of information, notably the standardization bodies at regional, national or local level, including the members of the ISO Information Network (ISONET). There were more than seventy national members, associate members or international affiliates of ISONET. The conclusion of the study was that the bodies concerned within the ISO and IEC system could meet the obligation foreseen in the proposed Code of Good Practice without significant technical obstacles.

20. The representative of Japan noted that the obligation to publish work programmes at least once every six months appeared to be more onerous than the obligation to notify technical regulations. In response, the representative of the European Economic Community said that Parties were required to notify every proposed technical regulation which had a significant effect on trade of other Parties whereas they would only be required to update the work programmes on standards every six months.

21. The representatives of Japan and Canada asked about the possible need for additional financial resources and the expected increase in the subscriptions of the ISONET members required to implement the proposal by the European Economic Community. The observer from the ISO said that the report included the financial consequences for the members of ISONET as regards their contribution to the ISO Central Information Centre. It had not been possible to evaluate the cost to be incurred by each ISONET national member or international affiliate as this would largely depend on

local conditions. In a country with a centralized system, the cost would already be covered by the current costs of the ISONET member. In a country with a decentralized system, the cost might be substantial. The economic aspects of the proposal, and in particular the financial consequence of the standardizing bodies adhering to the Code of Good Practice, would have to be studied more thoroughly in due course. The cost to be incurred by standardizing bodies for adjustments to and publication of their work programme would have to be assessed by them as it would depend on their structure and volume of work. Standardizing bodies varied from large organizations that published as many as eight thousand standards a year and small bodies that published not even one standard a year. The burden on standardizing bodies and the ISO Central Secretariat in meeting the various requirements of the Code of Good Practice appeared to be modest. The standardizing bodies would have to adjust the documents that they already published. The cost to be incurred by the ISO Central Secretariat Information Centre would depend on the number of standardizing bodies adhering to the Code of Good Practice. The price of publications giving the names and addresses of standardizing bodies would be calculated on a cost recovery basis.

22. The representative of Japan asked about the cost of the development of the classification systems suggested in the proposal by the European Economic Community. The observer from the ISO said that it might be difficult to evaluate the cost of finalizing the development of the classification system. In principle, such systems were developed on the basis of no exchange of funds. Experts participating in the project covered their own expenses and it was difficult to make a meaningful estimation of their costs. The development of the classification system was an ongoing work which was rather complicated and time-consuming. Costs might be higher if the system had to be developed in a shorter time-frame than anticipated. The representative of the European Economic Community said that the implementation of their proposal would speed up the finalization of the current work on the alphanumerical system of classification.

23. The representative of the European Economic Community noted that the feasibility study concluded that there was no significant technical obstacle to the implementation of the Code by all parties concerned. There seemed to be no great financial burden to any party in complying with the proposed Code of Good Practice.

24. The representative of the United States said that the study by the ISO would contribute to the analysis of how the implementation of this proposal would affect administrative arrangements and resource commitments of those organizations that would be involved in the implementation of the Code of Good Practice.

25. The representative of the United States also said that her delegation wished to retain the provision in paragraph 1 of their proposal on regional bodies (TBT/W/113), relating to the right of participation of foreign companies in regional bodies or systems.

E. Definitions

26. The observer from the ISO introduced the draft amendment sheet to ISO Guide 2:1986 "General Terms and Their Definitions Concerning Standardization and Related Activities". This document had been approved by the ISO Committee on Conformity Assessment (ISO/CASCO) and by the Committee on Standardization Principles (ISO/STACO). It would be submitted to the approval of the ISO member bodies and of the IEC national committees. The amendment sheet was expected to be published before the end of the year. His organization would appreciate the reactions and comments of Parties concerning the draft amendment sheet before the revision of the ISO/IEC Guide 2:1986 was finalized.

27. The representative of Finland, in his capacity as the member of the ISO Working Group on definitions, informed the Committee that different concepts and terms relating to conformity assessment had been placed in a general framework. He drew attention to the definition of the term "inspection" which had been requested by the Committee. The ISO Working Group had noted that there was no commonly agreed definition for the term "inspection", which had different meanings in different connections. The Working Group had concluded that the only way to give a clear definition to the term was to depart from different uses of that term in everyday speech and to give it a specific content as stated in clause 12.7 of the draft amendment sheet.

28. The representative of Finland, speaking on behalf of the Nordic countries, introduced the Nordic proposal on definitions (TBT/W/147). The observer from the ISO said that they would have certain comments about the difference between the definition of the term "standard" in the Nordic proposal and in the ISO/IEC Guide 2.

F. Dispute settlement procedures

29. The representative of Finland, speaking on behalf of the Nordic countries, introduced their revised proposal on dispute settlement procedures (TBT/W/134/Rev.1).

30. The representative of New Zealand said that it was appropriate to discuss the improvements to the dispute settlement procedures under the Agreement on the basis of the proposal by the Nordic countries. The dispute settlement procedures in the MTN Agreements and Arrangements did not seem to be an issue of high priority for the work of the Negotiating Group on Dispute Settlement (NG 13). The representative of Mexico said that NG 13 had noted the possibility of having a common text on dispute settlement procedures for all the MTN Agreements and Arrangements. The representatives of Brazil and Canada supported the idea of adapting any results achieved in the mid-term review to the procedures in the Agreement.

The representative of Canada said that it was not clear whether further guidance should be expected from the NG 13 as regards the dispute settlement procedures under the MTN Agreements and Arrangements. The discussion on the special requirements for dispute settlement procedures under the Agreement should continue. The representative of Finland, speaking on behalf of the Nordic countries, said that any new results from NG 13 should be taken fully into account in the work on dispute settlement procedures as soon as they were available. However the discussion on further development of the dispute settlement procedures under the Agreement should continue.

31. The representative of New Zealand considered the Technical Expert Group (TEG) provided for in the Agreement as an attractive alternative to the more cumbersome and politically charged process of a panel. It seemed to provide an opportunity to proceed more rapidly with the matter under dispute than the panel procedures. In the past the effectiveness of the relevant provisions in their present unilateral form had been questioned. It was felt that a complainant party would have difficulties in obtaining satisfaction by invoking the provision relating to TEG if the defendant party was reluctant to settle the issue through a TEG. To maintain the present position of the TEG as an alternative to the establishment of a panel might be preferred in cases where the two parties to the dispute agreed to the establishment of a TEG. He also acknowledged that the panel itself could need technical advice on specific issues. The procedures under the Agreement provided that a TEG could make not only scientific judgements but also findings concerning the necessity of a measure.

32. The representative of Mexico said that the advice of technical experts could be used at any phase of the dispute settlement procedures. The representative of Brazil said that TEG should not be called upon only by the panel but that any participant should be able to request a TEG at any time during the dispute settlement procedures. The representative of Canada said that the activities of technical experts at all levels had to be consistent with the trade policy obligations laid down in the Agreement. Furthermore, the differences of views on specific regulations and standards and conformity assessment procedures in different countries were often resolved by bringing together officials who had the technical expertise or even those who were responsible for administering these measures in different countries. The issues that the Agreement addressed were technical and trade policy administrations should rely on experts when seeking to resolve a dispute. Under the relevant procedures, comments on proposed measures were discussed with the parties concerned after their notification. Consultation with interested parties before the adoption of the measure often resulted in an early resolution of a dispute. Similarly, Article 14.8 provided for consultations with competent bodies and experts in the early phase of dispute settlement. The involvement of technical experts should be preserved throughout the dispute settlement procedures in the Agreement. They saw some value in leaving the provision of Article 14.9 which provided an opportunity for a TEG to contribute to the resolution of disputes.

33. The representative of the United States said that it was a good opportunity to look at the procedures in the light of the discussions that were being held in NG 13. They had problems in evaluating the full merits of the Nordic proposal on TEG as the operation of the existing procedures of the Agreement had not been fully tested. The commitment and willingness of parties to a dispute was essential to resolve disputes.

34. The representative of Finland, speaking on behalf of the Nordic countries, said that paragraph 14.10 of the proposal stated that competent bodies and experts in matters under consideration may be consulted at any phase of the dispute settlement procedures including the earliest phase. They fully agreed that technical experts should be used whenever needed. They were concerned that the present provisions for the establishment of a TEG could be used to prolong the dispute settlement procedures unnecessarily. According to the present text, if a TEG was established first, the panel procedures could be started only after the TEG had presented its report to the Committee and the Committee had considered the findings of the TEG. There were indeed very few examples of how the dispute settlement procedures worked in practice. Sometimes a defendant Party might ask for the establishment of a TEG even if the dispute did not involve any technical aspects simply in order to prolong the procedures. Under of the present provisions, the TEG would require six months to finalize its work. The main aim of the proposal was to have provisions on dispute settlement procedures which did not allow Parties the opportunity of prolonging the procedures unnecessarily. It was suggested that the TEG and panel should work simultaneously rather than consecutively. It was sometimes difficult to draw a clear line between technical and non-technical aspects of a dispute and to define the terms of reference of a TEG.

G. Date of the next meeting

35. The Committee agreed to hold its next meeting in September 1990.