

GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

TBT/W/148

3 August 1990

Special Distribution

Committee on Technical Barriers to Trade

DRAFT MINUTES OF THE MEETING HELD ON 30 APRIL 1990

Chairman: Mr. W. Frei (Switzerland)

1. The Committee on Technical Barriers to Trade held its thirty-seventh meeting on 30 April 1990.

2. The agenda of the meeting was as follows:

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A. Conformity assessment procedures

3. The representative of New Zealand noted that paragraphs 6 and 7 of the Preamble to the Agreement covered the substance of the proposal by the United States relating to unnecessary obstacles to trade (TBT/W/127/Rev.1, paragraph 9.1). He maintained that the demonstrable purpose of a measure should not be the sole consideration in determining whether a measure created unnecessary obstacles to trade (TBT/M/36, paragraph 8). A measure, the purpose of which could be demonstrated to be necessary, could inherently be more trade restrictive than other measures which achieved the same objective. The representative of Canada said that the proposal by the European Economic Community spelled out clearly the obligation to avoid the creation of unnecessary obstacles to international trade in the application of conformity assessment procedures. The proposal by his delegation on certification procedures was based on the existing text of Article 7.1 (TBT/W/135, page 3, paragraph 7.1). They would submit a new proposal entitled "Technical regulations and standards as unnecessary obstacles to trade" to clarify Article 2.1 (subsequently issued in document TBT/W/144). The representatives of New Zealand and the United States noted that the last sentence of paragraph 5.1.1 of the proposal by the European Economic Community (TBT/W/138) should be combined with the provisions relating to equivalency and recognition of conformity assessment procedures in paragraph 6 of the same proposal. In response, the representative of the European Economic Community said that recognition was an important means of

eliminating unnecessary obstacles to trade. The representative of Canada suggested that the phrase "where other conformity assessment procedures offer equivalent or better confidence" in this provision should be replaced by the phrase "where other conformity assessment procedures have less disruptive impact on trade". The representative of the European Economic Community said that although the scope of this provision was broader, it might be more difficult to implement in practice than their own proposal.

4. The representative of Finland, speaking on behalf of the Nordic countries, questioned the suggestions concerning access of bodies in paragraph 7.3 of the proposal by the United States on systems for the accreditation and approval of testing laboratories, inspection or quality system registration bodies (TBT/W/133). In its discussion on conformity assessment procedures, the ISO Working Group on Definitions had concluded that products had "access" to a market whereas bodies were "members or participants" in a system. The representative of the European Economic Community said that granting access to individual bodies would suggest conferring on them the right to participate in a conformity assessment system under certain conditions.

5. The representative of Hong Kong, supported by the representatives of Canada and Switzerland, reiterated the concerns that his authorities had with the proposal by the United States which required Parties to grant approval or accreditation to applicants from other Parties. An individual testing laboratory in the territory of a Party would be allowed to apply directly for accreditation or approval by an accreditation system in the territory of another Party, provided that it fulfilled the requirements of the system. The officials from an accreditation scheme in a Party would have to travel at regular intervals in order to verify whether the accredited or approved laboratories maintained their original level of credibility. The conclusion of mutual recognition agreements between accreditation schemes established at the national level in different countries was a far more efficient and cost-effective means of facilitating trade than direct access to accreditation schemes by individual laboratories. Applications for accreditation or approval submitted by foreign laboratories accredited under the schemes established at the national or regional level would be accepted under these agreements. Therefore any provisions which encouraged the establishment of national schemes would help to reinforce the worldwide trend towards mutual recognition between accreditation schemes. The representative of New Zealand said that any provisions to be agreed on accreditation should be consistent with the recommendations of the International Laboratory Accreditation Conference.

6. The representative of Finland, speaking on behalf of the Nordic countries, suggested that the provision relating to the processing period of applications for conformity assessment should read: "conformity assessment procedures shall be undertaken and completed without undue delay and in a no less favourable order for imported products than for like domestic products". The representative of Canada said that there could be discrimination if the different applications submitted at the same time were not processed with the same priority. In the proposal by the European

Economic Community (TBT/W/138), the provisions on the processing of applications in paragraph 5.1.1 and non-discriminatory treatment of applications in paragraph 5.1.3 should be coupled. The representative of Finland, speaking on behalf of the Nordic countries, considered that the reference to non-discriminatory treatment of imports in the provisions relating to the specific aspects of administrative procedures was superfluous. The representative of the United States said that there might be benefit in spelling out clearly the obligations in the relevant provisions. The representative of Hong Kong said that the relevant provisions should incorporate the principles of national treatment and non-discrimination.

7. The representative of New Zealand said that Article 5.1.6 of the Agreement should be strengthened. Joined by the representative of the United States, he asked what were the limits on confidentiality set by guidelines or recommendations issued by international standardizing bodies referred to in the proposal by the European Economic Community (TBT/W/138, paragraph 5.1.6). The representative of Switzerland said that the criteria for confidentiality should be based on the national law of the country of the applicant. The representative of the United States said that the present provisions in Article 5.1.6 should be retained. The representative of the European Economic Community, joined by the representative of Finland, on behalf of the Nordic countries, said that the new provisions should fully guarantee the confidentiality of information. However, it belonged to governments, individually or collectively, rather than to non-governmental international standardizing bodies, to set up any rules on confidentiality.

8. The representative of Japan considered that their proposal that the standard processing period be published or the anticipated processing period be notified to the applicant upon request (TBT/W/115/Rev.1), was more concrete and clear than the proposal by the European Economic Community which suggested that applicants be informed of the progress of their applications (TBT/W/138, paragraph 5.1.3). The representative of the European Economic Community felt that it might not always be practical to determine the standard processing period at the outset. If the establishment of a standard processing period were made compulsory, the bodies concerned might be tempted to allow themselves the maximum amount of time for the processing of applications. The proposal by his delegation further suggested that applicants should be given the reasons for any delays in the progress of their applications and that they should also be informed of any deficiencies in their application.

9. The representative of the United States considered that the proposal by Japan would improve transparency on the progress of applications. It did not require the establishment of an artificial time-frame for processing of applications. An anticipated period would enable applicants to be aware of any delays in the processing of their applications. The representative of Hong Kong also felt that, rather than creating distortions, the publication of standard processing periods would allow the applicants to have timely information on the status of their applications. Any relevant obligations, even if of a "best endeavours" nature, would lend

some predictability and transparency to the processing of applications. The representative of Canada said that the suggestion by the European Economic Community, that any problems related to their applications be communicated to applicants, would enable them to make any appropriate adjustments. Applicants should have information on the progress of their applications, including information on the time required for the processing of applications. Supported by the representative of Finland, speaking on behalf of the Nordic countries, he said that the proposals both by Japan and the European Economic Community had a common objective. The representative of Switzerland considered that the requirement to inform applicants of any deficiencies discovered in their application might be too burdensome for the bodies concerned. In response, the representative of the European Economic Community said that it was essential to inform applicants in time of any deficiencies in their application forms or in the product itself that might impede the progress of applications. The representative of New Zealand suggested that the publication of a standard processing period should be an alternative to providing an anticipated processing period.

10. The representative of Canada asked whether the requirement on individual specimens in the proposals on testing and inspection procedures and product approval procedures (TBT/W/126/Rev.1 and TBT/W/127/Rev.1) should extend to all conformity assessment procedures. Such requirements were less important towards the end of the process of determination of conformity of a product with technical regulations and standards. The representative of the European Economic Community said that the general principle of unnecessary obstacles to trade should also apply to this aspect of administrative procedures. The representative of Canada said that excessive requirements on individual specimens could be burdensome for traders. The relevant provisions should be as explicit as possible.

11. The representative of Finland, speaking on behalf of the Nordic countries, said that technical evidence referred to in the proposal by the United States (TBT/W/127/Rev.1) should not be the only basis for approval of products.

12. The representative of Hong Kong said that the basic principles of national treatment and most-favoured-nation treatment should be coupled in the provisions relating to fees imposed for conformity assessment procedures. The representative of Canada suggested that the fees charged should cover the cost of services necessary for conformity assessment procedures, including the cost of capital, the cost of communications and transportation arising from differences between geographic locations of facilities.

13. The representative of Canada said that in Articles 5 to 9 a reference to international and regional certification systems and international guides and recommendations would promote the relevant international practices in the area of conformity assessment. The observer from the ISO said that, should the Agreement extend to other conformity assessment procedures, the relevant guides, in addition to those mentioned in the relevant recommendation of the Committee, should be considered.

14. With regard to transparency in the agreements concluded within the scope of the Agreement, the representative of the European Economic Community supported the proposal by the Nordic countries which suggested the use of the facilities of the enquiry points for the exchange of information (TBT/W/141). The representative of the United States recognized that certain countries did not wish to undertake additional obligations on notification. However, the notification procedures suggested in their proposal (TBT/W/128/Rev.1) would be a more effective way of enabling interested Parties to obtain information on agreements concluded between Parties.

15. The representative of Hong Kong said that his authorities reserved their position on the criteria enumerated in paragraph 6(c) of the proposal by the European Economic Community (TBT/W/138) as regards "a balanced situation" in the negotiations for the conclusion of mutual recognition agreements. The present provisions of the Agreement encouraged Parties unilaterally to accept test results, certificates or marks of conformity issued by relevant bodies in the territories of other Parties based on a satisfactory evidence that the methods employed in the territory of the exporting Party provided a sufficient means of determining conformity with the relevant technical regulations and standards. The provisions that would be introduced by the European Economic Community seemed to go against this fundamental and workable feature of the Agreement and might lead to a great deal of uncertainty. Who would have the authority to determine "a balanced situation" and which criteria would be used? Under the present provisions of the Agreement a Party granted recognition unilaterally once it was satisfied with the conformity assessment practices of the other Party on technical grounds. He asked what kind of quid pro quo was envisaged by the European Economic Community for granting recognition to a Party's practices and results. The representative of the United States said that the suggested criteria could weaken the present provisions, which encouraged Parties to enter into consultations in order to arrive at a mutually satisfactory understanding. Her delegation did not agree to the inclusion of a criterion in the Agreement which called for a "balanced situation". The representative of Finland, speaking on behalf of the Nordic countries, believed that the criterion in paragraph 6(c) of the proposal by the European Economic Community might introduce an arbitrary and subjective element to the conclusion of mutual recognition agreements. A Party could claim that advantages were not in balance and thereby deny the conclusion of an agreement. It was more essential for Parties to have equal rights and obligations rather than to have a balanced situation with regard to the advantages derived. The representative of Japan said that the criterion in paragraph 6(c) was unreasonable and would not contribute to eliminating technical barriers to trade. Mutual recognition agreements were concluding with the aim of securing equal opportunity of access to markets. The condition of balanced advantages in negotiations could be used by a Party as a pretext for not concluding mutual recognition agreements. The representative of Canada said that the suggested paragraph 6(c) would appear to have the potential of compromising the existing provisions in the Agreement on recognition. Furthermore, negotiations based on the criterion suggested by the European Community could also contradict the basic provisions in the Agreement concerning national treatment, most-favoured-nation treatment and the use of international recommendations and guides as a basis for recognition as suggested in the proposal by his delegation (TBT/W/135).

16. The representative of the United states said that other proposals on different aspects of conformity assessment procedures were consistent with the existing provisions of the Agreement which encouraged consultations and recognition of results. The representative of Finland, speaking on behalf of the Nordic countries, said that those proposals mainly reflected the principle of equivalency.

17. The representative of the European Economic Community said that mutual recognition agreements were already used as an important tool in facilitating trade and it would be unrealistic not to take account of the recent developments in this respect in the Agreement. The representative of New Zealand said that, while the negotiation of mutual recognition agreements was a widely used process, its acknowledgement in the amendments to Article 5.2 should not be at the expense of the existing obligations in the Agreement.

18. The representative of the European Economic Community said that a "balanced situation" was a concept which did not have well-defined limits. Article 5.2 of the present Agreement contained a reference to "mutually satisfactory understanding" without setting out any criteria to define this concept. Only Parties themselves could judge whether a balanced situation existed before concluding an agreement. The references to unilateral recognition and mutual recognition in the text of the Agreement was not sufficiently strong to enable the facilitation of trade. They suggested the inclusion of multilateral aspects of recognition in the Agreement in order to complement the present elements on unilateral recognition. A balanced situation as regards advantages should be taken into account as a way of promoting and encouraging the use of mutual recognition. A balanced situation might relate not only to the specific agreement concluded but to the negotiations of several instruments between Parties. Even situations which might seem unbalanced might be satisfactory for the parties concerned. He disagreed with the view that the terms of paragraph 6 contradicted the basic principles of the Agreement on national treatment and most-favoured-nation treatment as these principles were clearly spelled out in the Agreement.

19. Joined by the representative of Switzerland, the representative of Finland, speaking on behalf of the Nordic countries, said that agreements were not concluded if parties did not derive advantages. Even if in a given agreement advantages might appear not to be in balance, considered together with other agreements concluded between Parties, there might be a balanced situation on the whole. The representative of the United States said Parties did not usually conclude agreements unless there was some sort of a balanced situation.

20. The representative of Finland, speaking on behalf of the Nordic countries and supported by the representative of Canada, said that the proposal on mutual recognition of conformity assessment was not in contradiction with the provisions of Article 5.2. They saw merit in having provisions which covered not only unilateral recognition of results but also multilateral or mutual aspects of recognition. The provisions in the

Agreement should continue to encourage Parties to recognize unilaterally results from other Parties as far as possible. In practice it was easier to recognize results that were based on mutual understanding between Parties.

21. The representative of Canada said that the provisions in the Agreement relating to national treatment, most-favoured-nation treatment, use of international recommendations and guides already provided a basic set of provisions that Parties could use for concluding mutual recognition agreements.

22. The representative of the United States said that the provisions on recognition should take into account the differences in systems and product approval practices in different Parties. She suggested that the term "discussions" in paragraph 6, replace the term "negotiations" in order to bring those provisions more in line with the existing provisions of Article 5.2 which encouraged Parties to discuss a satisfactory solution between them. Mutual recognition should not be conditioned on negotiations but rather on evaluation of confidence, for example through access to accreditation schemes. The representative of Canada said that in agreements on recognition Parties might refer to accreditation criteria or to the use of practices that were consistent with international guides.

23. The representative of Hong Kong asked for the definition of the term "quality assurance" used in the explanatory note to the definition of the term "conformity assessment procedure" in the proposal by the European Economic Community (TBT/W/138).

B. Second level of obligations

24. The representative of Finland, speaking on behalf of the Nordic countries, noted that the exchange of information proposed in the Code of Good Practice for the Preparation, Adoption and Application of Standards by the European Economic Community (TBT/W/137) required the active participation of the partners of the ISO/IEC system. In order to guarantee that the ISO fulfilled its role in the operation of the Code of Good Practice a contract should be concluded with the ISO. A draft agreement should be prepared for the consideration of the Parties to the Agreement and the ISO. The representative of the European Economic Community said an appropriate instrument could be in the form of a gentleman's agreement or exchange of letters. In view of the internal procedures in the ISO, the preparatory work on an agreement should begin as soon as possible.

25. The observer from the ISO informed the Committee that any new arrangements had to be approved first by the ISONET Council and the ISO Council. The ISONET Council met once a year and the ISO Council every three years. However the ISONET members were also consulted by correspondence. Before they agreed to commit resources, ISONET would need to know whether the proposal by the European Economic Community received general support. The ISO Secretariat was prepared to begin a study of the feasibility of the code of practice from the standpoint of the bodies concerned within the ISO/IEC system.

26. The representative of Japan asked whether the application of the Code of Good Practice would imply additional financial contributions from ISO member bodies.

27. The representative of the United States said that her delegation reserved its position on the proposal by the European Economic Community and considered that it would be premature to consider the drafting of a legal text. They had no objections to the preparation of a feasibility study by the ISO. It would not be possible to advance beyond the stage of informal consultations with the ISO before the proposal for a Code of Good Practice was accepted.

28. The representative of the European Economic Community said that the preparation of a draft instrument did not commit Parties to accept the Code of Good Practice. Although the number of bodies that would subscribe to the Code of Good Practice was uncertain, the ISO should prepare a study. It was essential that interested parties were informed on the feasibility of the application of the proposed Code for ISO partners and its resource implications before the end of the negotiations.

29. The Committee agreed to request the ISO Central Secretariat to prepare a study on the feasibility of the implementation of the Code of Good Practice by ISO partners, including the ISO Information Centre, ISONET national members and international affiliates and standardizing bodies on a national, local and regional level.

30. The representative of the European Economic Community recalled their proposal which suggested that local government bodies should undertake obligations similar to those of central government bodies as regards the notification of proposed technical regulations that had a significant effect on trade of other Parties (TBT/W/113). Their proposals on the Code of Good Practice (TBT/W/134) and conformity assessment procedures (TBT/W/138) also referred to the activities of local government bodies. The representatives of Finland, speaking on behalf of the Nordic countries, and New Zealand supported the thrust of this proposal.

31. The representative of Finland, speaking on behalf of the Nordic countries, said that they supported the thrust of the proposal by the United States on the activities of regional bodies (TBT/W/112). He asked the delegation of the United States to indicate the elements in that proposal which they considered as not being covered by the proposal on a Code of Good Practice and the set of proposals relating to conformity assessment procedures. The representative of the European Economic Community said that in their proposal on a Code of Good Practice they had taken into account the activities of regional bodies. The representative of Japan supported the proposal by the United States (TBT/W/112). Rather than the suggestion in paragraph L of the Code of Practice which allowed for comments from the standardizing bodies that had adhered to the Code of Practice, he supported the proposed provision by the United States that allowed the acceptance of comments from interested parties in the territories of other Parties.

C. Improving the provisions of the Agreement on transparency

32. The Committee agreed to discuss the redrafting of Article 10 of the Agreement on the basis of the proposal by the Nordic countries (document TBT/W/141).

D. Processes and production methods

33. The representative of Finland, speaking on behalf of the Nordic countries, supported the definition of the term "technical specification" suggested in the proposal on processes and production methods by the delegation of New Zealand (TBT/W/132). He noted that Parties had divergent views on the hierarchy between different types of technical regulations and standards in Article 2.4. Their proposal gave sufficient guidance to Parties for the drafting of technical regulations in the least trade restrictive way but allowed them flexibility in choosing the type of technical regulations. The marking requirements referred to in their proposal were usually the least trade restrictive and in certain cases they were sufficient to meet the purpose sought by the regulation. However, the least trade restrictive method of drafting a technical specification might not always be feasible for technical or economic reasons. In such cases it would be up to the importing party or the country establishing the technical specification to use the method that it considered to be the least trade restrictive. However, if an exporting Party considered that the specification used was not the least trade restrictive it should have the possibility of entering into consultations with the importing Party. If a dispute arose, it would be up to the exporting Party to demonstrate that a less trade restrictive method for specifying the technical regulation in question existed which was also economically and technically feasible. The representative of the United States recognized that Parties could specify technical regulations in terms of PPMs in order to meet legitimate domestic objectives.

34. The representative of Finland, speaking on behalf of the Nordic countries, considered that, while in most cases requirements drafted in terms of product characteristics were less trade restrictive than those based on PPMs this was not always the case. For example, as regards foodstuffs, PPMs in the facilities where they were produced could be inspected at regular intervals. If the requirements were met satisfactorily, the foodstuffs from that facility would be accepted without the inspection of every delivery of products. In such cases technical specifications based on PPMs relating to the sanitary and hygienic conditions of the production facility were less trade restrictive than technical specifications based on product characteristics where the conformity of products with technical regulations or standards had to be verified. In the sector of semi-conductors, a regulation that provided for the checking of compliance of the quality assurance system of the production facility was less trade restrictive than the one which required the checking of every component.

35. The representative of New Zealand said that their proposal concerning the provisions on hierarchy shared the same objective (TBT/W/132) as the Nordic proposal. However, the proposal by the Nordic countries involved technical judgements as well as commercial and economic judgements. If the objective element of Article 2.4 was removed, it might be difficult to determine in a dispute whether the process used was more trade restrictive than another. The hierarchy that his delegation had proposed was flexible and applied in every case where there were distinct alternatives.

36. The representative of Finland, speaking on behalf of the Nordic countries, said that the use of requirements based on PPMs were necessary in many high technology industries because a performance standard could not be used to guarantee the required objectives adequately. The hierarchy proposed by his country applied to cases where regulatory authorities had alternatives. Their proposal simply required that the use of PPMs should be justified upon request. In most cases requirements based on PPMs would allow some flexibility to manufacturers in choosing the processes they use to meet the requirements. In cases where alternative choices were available, then the hierarchy suggested by New Zealand should be applied. The concepts in the two proposals could be combined taking into account the objective of using the least trade restrictive regulation.

36. The representative of the European Economic Community said that it would be worthwhile to examine the question of hierarchy on the basis of the existing text of Article 2.4. They felt that the Nordic proposal was more realistic. The examples they had given illustrated that the concepts of PPMs and conformity assessment were closely related. The implications of PPMs should be viewed in a larger context. In the present discussion, no distinction had been made between problems of different natures, namely, those related to agricultural and industrial PPMs. Furthermore, the use of certain PPMs were related to concepts such as protection of environment, social order, workers' health and safety.

37. The representative of Canada believed that there was a need for a hierarchy which discouraged the use of PPMs. PPMs imposed constraints on the ability of manufacturers to choose the most cost-effective means of production. While they recognized the need for a more flexible approach to the issue of hierarchy, they wished to retain some of the existing provisions in Article 2.4. They recognized that in certain instances technical regulations and standards drafted in terms of PPMs might be preferable. The examples given by the Nordic countries somehow appeared to underline the close relationship between regulations based on PPMs and conformity assessment practices. He noted, however, that the example of the quality assessment of semi-conductors appeared to relate more to conformity assessment procedure and not to PPMs-based regulations.

E. Dispute Settlement Procedures

38. The representative of New Zealand said that there were three possible approaches that could be adopted to improve the dispute settlement procedures under the Agreement. The provisions of the Agreement on dispute settlement could be amended independently of other work on dispute settlement in the Uruguay Round; the new procedures to be agreed by the Negotiating Group on Dispute Settlement could be made part of the dispute settlement procedures in the Agreement; the dispute settlement procedures under the Agreement could be adapted to make them compatible with the improvements to the procedures agreed to in the mid-term review. His delegation supported the Nordic approach because it enabled Parties to retain the valuable elements in the dispute settlement procedures discussed in the Negotiating Group on Dispute Settlement and in the procedures set out under the Agreement. Even if a uniform set of procedures in GATT were to be agreed, it would be useful to retain some of the specific procedures in the Agreement. It was essential to have a set of procedures that worked effectively and ensured that, as far as possible, disputes were settled without delay. The effect of the proposal by the Nordic countries would be to make it impossible to have recourse to a technical expert group before the establishment of a panel. As suggested in the Nordic proposal, rather than being independent, a technical expert group could assist a panel in a process of dispute settlement. It might be worthwhile to identify the types of disputes that could be addressed by a technical expert group. The Nordic proposal seems to prolong the consultation phase unduly. The provisions on enforcement could be strengthened in the light of any further results in the Negotiating Group on dispute settlement.

F. Date of the next meeting

39. The Committee agreed to hold its next meeting on 29 May 1990.