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MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Compendium

Enhanced Transparency on Export Licensing

Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Japan; Republic of Korea and the United States

The following communication, dated 7 December 2009, is being circulated at the request of the delegations of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Japan; Republic of Korea and the United States.

Protocol on Transparency in Export Licensing to the General Agreement on Tariffs and Trade 1994 (User Friendly Doc)

Members,

Desiring to ensure that export licensing procedures are not utilized in a manner contrary to the principles and obligations of GATT 1994;

Convinced that export licensing should be implemented in a transparent and predictable manner; and;

Desiring to bring transparency to the procedures and practices related to export licensing so as to inform traders and Members and facilitate trade in these products;

Convinced that access to information on export licensing measures benefits traders in both developed and developing country Members;

Recognizing that the obligations set out in this Protocol are without prejudice to a Member's rights and obligations under Article XX of GATT 1994;

Hereby agree as follows:

Question from Malaysia: What are the rationales of having separate protocol as various WTO provisions have addressed the issue of transparency of export regime, including export licensing:

- Article X.2 of GATT: all laws, regulations and administrative regulations relating to export restrictions to be promptly published;

- Article XI.1 of GATT: prohibits quantitative restrictions on exportation, except for critical shortage, application of standards or regulations for classification, grading or marketing;

- Article XIII.1 of GATT: non-discriminatory administration of export restrictions; and

- Article XIII.5 of GATT: extends the principle of disclosure of detailed administrative procedures of licensing to export restrictions, as far as applicable.

Malaysia is of the view that, there is no necessity to have a separate protocol and this proposal will set precedent on new disciplines, other than transparency. (JOB(09)/93C.1)

- Co-sponsors' answer: As the question states, GATT already includes various provisions regarding transparency of export restriction including export licensing and has made it clear that transparency with respect to export licensing regime is an important principles. The Protocol intends to enhance transparency by establishing procedural methods for notifying the Committee on Market Access and other Members upon request of aspects of such export licensing regimes. We are convinced that without such procedural rules instructing each Member how to meet the transparency requirements, it would be difficult to secure the effectiveness of the provisions mentioned and give substance to the ideal of transparency under GATT including Article X.2 and XIII.5 of GATT, which were listed in the question. As the Agreement on Import Licensing Procedures demonstrated, without those detailed procedural rules, the ideal and obligations of enhanced transparency on import licensing regimes would not have been implemented easily. The Protocol here is designed to fill up a gap by providing a set of procedural rules for Members to follow in order to achieve greater transparency in running their respective export licensing regimes in conformity with WTO obligations. Therefore, we must respectfully disagree with the opinion that there is no rationale or necessity to have this Protocol. Rather, the current WTO framework begs for a separate protocol as such to achieve the goal of enhanced transparency on export licensing. Also, we would like to emphasize that there will be no "new disciplines other than transparency" set up by this Protocol as it is neutral on what kind of export licensing is permitted and what kind is not. The Protocol does not affect the rights of a Member to implement export licensing measures consistent with WTO legal disciplines including GATT Articles XI, XIII.1 and XX. The Protocol only concerns certain procedural methods of bringing transparency to export licensing regimes that Members may operate, e.g., it requires the Member to notify its export licensing measures and answer questions posed by other Members concerning such measures. (JOB(09)/127)

Question from Malaysia: How this proposal will be legally effective as there is no specific provisions on general rights and obligations on export restrictions under GATT (unlike Article XIX which provides legal ground for the development of a separate Safeguard Agreement). (JOB(09)/93C.2)

- Co-sponsors' answer: As we mentioned in our answer C.1., this Protocol would further strengthens the principle of transparency that Article X.2 and XIII.5 of GATT establish. In this sense, Article X.2 and XIII.5 of GATT would be the legal basis of this Protocol. It should be noted again that the "Agreement on Import Licensing Procedures" was made to bring transparency to the import licensing procedures even though Article X, Paragraph 1, of the GATT requires Members to promptly publish and provide transparency for measures related to "exports" as well as "imports". Just as the "Agreement on Import Licensing Procedures" is legally effective, the Protocol's legal effectiveness would also not be an issue. This Protocol will bridge the gap between transparency disciplines on import and export licensing and thereby help traders in importing Members access information relating to export licensing procedures. Even if there may not be specific provisions in the GATT on general

rights and obligations on export restrictions, it is irrelevant to the legal effectiveness of the Protocol because the Protocol itself deals with ”transparency” of export licensing, not with any rights or obligations on export restrictions including export licensing. (JOB(09)/127)

Question from Malaysia: Please clarify on whether this Protocol is covered by Dispute Settlement Mechanism, should Member failed to conform to its obligations under this proposed Agreement. (JOB(09)/93C.3)

- Co-sponsors' answer: Yes, it is our view that this Protocol should be covered by the WTO Dispute Settlement Mechanism, although there may be relatively fewer cases where the interpretation of the provisions of this Protocol is in dispute. (JOB(09)/127)

Question from Malaysia: Japan's communication on 26 March 2007 indicated that this proposal covers finished goods and not agricultural products which are under the purview of agricultural negotiations. Are there any changes to the proposed product coverage?(JOB(09)/93C.4)

- Co-sponsors' answer: No, we have not changed our position on the proposed product coverage. The proposed agreement covers finished goods as well as raw materials. Agricultural products should not be included because the Negotiating Group on Market Access does not have a mandate to negotiate on agriculture. Also, Art.12 of the Agreement on Agriculture has its own system on transparency with regard to export regimes, which requires Members to notify export prohibitions or restrictions in respect of food-stuffs. (JOB(09)/127)

Question from Singapore: Will the co-sponsors consider providing additional phase-in periods and technical assistance for developing country Members and least developed country Members to meet these transparency obligations? (JOB(09)/22 E.1)

- Co-sponsors answer: The co-sponsors (Japan, the Republic of Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States) acknowledge the importance of technical assistance provisions. The co-sponsors draw Members' attention to the fact that this proposal already includes some flexibility: Article 3.1.(b) requires Members to submit certain types of information only where available; and Article 5.1. provides that Members shall review the implementation and operation of the notification requirements at least every 2 years. Nevertheless, the co-sponsors are ready to listen to any suggestions concerning what kinds of additional assistance would be necessary for developing and least-developed Members. (JOB(09)/41)

Article 1: Definition of Export Licensing

For the purposes of this Protocol, export licensing means any administrative procedures involving the submission of an application or other documentation (i.e., other than that required for customs purposes) to the relevant administrative body or bodies as a prior condition for exportation from the customs territory of the exporting Member.

Question from Malaysia: Noted that the proposed definition is using Import Licensing Agreement as a basis. With regards to export licensing, in most instances, the license would ultimately be required by customs to facilitate shipment activities. Do the end result involving customs substantiate “customs purposes”? (JOB(09)/93C.5)

- Co-sponsors' answer: We understand this question to be about the linkage between the Protocol and “customs purpose”. The ultimate purpose of this Protocol is to bring transparency of export licensing regimes. We are open to discussion as to the definition of the

"export license" in this regard if there is any ambiguity, including with regard to the phrase "customs purposes." (JOB(09)/127)

Article 2: Notification

4. Any interested Member which considers that another Member has not notified a new or existing measure on export licensing or modification thereto in accordance with the provisions of Paragraphs 1 and 2 may bring the matter to the attention of such other Member. If notification is not made promptly thereafter, the interested Member may itself notify the measure on export licensing or changes therein, including all relevant information.

Question from Malaysia: Interested party can notify on behalf of the implementing parties, should implementing countries fail to do so. It would not be appropriate for interested party to notify on behalf of the implementing party due to accuracy of information. How the interested party can verify the accuracy of the information for notification purposes? (JOB(09)/93C.6)

- Co-sponsors' answer: We think this is important point and we are working to further develop idea to address this issue. While we very much welcome any constructive comments with respects to this issue, we would like to clarify that this option is intended as a supplementary element in addition to the regular notification by implementing parties. Only when the implementing parties were not reporting the required information regarding its own export licensing regime, then the interested parties would have the opportunity to do so. Such supplementary approach would help ensuring greater transparency even when implementing parties were unable to fulfil their obligations in making such notifications. (JOB(09)/127)

Article 3: Requests for Information

1. A Member shall provide to any Member, upon request:

(a) all relevant information concerning:

(i) the administration of the measure on export licensing , including the information listed in Paragraph 2 of Article 2;
(ii) the export licenses granted over a recent period; and
(iii) measures, if any, taken in conjunction with export licensing, including but not limited to restrictions on domestic production or consumption, and governmental stabilization plans for a good; and

Question from Malaysia: Need clarification on the definition of "government stabilisation plan". Does this mean that Members have to notify all policy updates and changes related to specific industries of which export licensing are being implemented? (JOB(09)/93C.7)

- Co-sponsors' answer: Article 3(a)(iii) of the proposal is not a general notification requirement, but is instead triggered only if a Member requests information. Upon receiving a request regarding export licensing implemented in conjunction with a government stabilization plan, the Member should supply all "relevant" information concerning the government stabilization plan for the good(s) referenced by the requesting Member. (JOB(09)/127)