

## Committee on Specific Commitments

### REPORT OF THE MEETING HELD ON 4 DECEMBER 2003

#### Note by the Secretariat<sup>1</sup>

1. The Committee on Specific Commitments held a meeting on 4 December 2003. The agenda for the meeting is contained in WTO/AIR/2224. The Chairperson proposed to change the order of agenda items C (Scheduling Issues) and D (Consideration of Issues Relating to Article XX:2). He noted that the delegation of Hong Kong, China would introduce a paper under the item of scheduling issues.
2. The representative of the European Communities asked whether the paper by Hong Kong China should be taken up under Other Business, as it was a new paper. The representative of Hong Kong, China stated that he only wanted to distribute a room document on issues he wanted to address under the item of Scheduling Issues.
3. The agenda was adopted with the proposed changes.
4. The representative of Brazil noted that the communication put forward by Brazil at the last meeting under the item of Scheduling Issues (JOB (03)/189) was still on the table. As soon as the market access negotiations were to resume, his delegation would wish to revert to the issue. He requested that the document be listed in future Airgrams once the market access negotiations had resumed.
5. The representative of the United States stated that only part of her intervention concerning the submission of Brazil at the last meeting was reflected in the report(S/CSC/M/30). She would take this issue up at another time. In particular, her comment in paragraph 21 on a statement by Brazil (in paragraph 20) was reflected inadequately. Her delegation did not support the idea of a generic discussion of technical issues in the CSC, as paragraph 26 of the report might suggest. Rather, she had stated that it was very difficult to distinguish between technical and non-technical issues, a point that had been raised also by at least one other delegation at the last meeting.
- A. **ADOPTION OF THE ANNUAL REPORT TO THE COUNCIL FOR TRADE IN SERVICES**
6. The Chairperson recalled that in July the Committee had updated its annual report for 2002 to inform the Ministerial Conference of the developments in the first half of 2003. Hence, the present draft report only reflected the two meetings that were held after the adoption of the update of the 2002 report, i.e. the July and September meetings. The draft annual report (S/CSC/W/41) followed the traditional format for annual reports in that it was factual and summarized the main areas of activity of the Committee during the reporting period.
7. The Committee adopted the annual report.<sup>2</sup>

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<sup>1</sup> This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

## B. CLASSIFICATION ISSUES

8. The Chairperson stated that the delegation of Indonesia had circulated a proposal on the classification of energy services ahead of the meeting (S/CSC/W/42.) He invited the delegation of Indonesia to introduce its proposal.

9. The representative of Indonesia stated that since the communication had been circulated to all Members, he would outline only the general aspects. His delegation was open to any suggestions and happy to respond to any questions that Members wished to raise. The proposal was submitted without prejudice to Indonesia's position on this and other services sectors, or on any future proposal. His delegation reserved the right to modify the substance of the paper at any time.

10. In the current negotiations, several developed countries had included energy services in their requests to Indonesia, and had called on Indonesia to make, *inter alia*, additional commitments in the energy sector. Indonesia was continuing to conduct consultations on these and other issues under the services negotiations. The purpose of the communication was to suggest that the classification list in the Annex be used as a supplement to the classification of energy services in the sectoral classification list (MTN.GNS/W/120). He considered that the development of a more detailed list, which reflected the current commercial reality of the energy services market, was of key importance for the negotiations on specific commitments. Such a list would also enable Members to identify their specific interests selectively.

11. Indonesia had an abundance of energy resources and reserves, including oil, gas, and coal, as well as geothermal and renewable energies such as water, solar and wind power. In the paper, his delegation had classified energy services in five categories: (i) upstream activity, which comprised non-renewable as well as renewable energy; (ii) down-stream activity, which related to energy transformation, transportation and distribution services; (iii) energy commercialization, which consisted of the wholesale supply of energy, retail supply of energy and commission agent services; (iv) professional services, which included expertise supply services, as well as human resource training and development services; and finally, (v) other energy service activities, which covered any activity not listed above. In view of the strategic nature of the energy sector, the multilateral framework should respect the right of Members, and especially of developing countries, to regulate the supply of energy services within their territories in order to meet national policy objectives while facilitating their increasing participation in international trade in energy services through the strengthening of their domestic capacity, in accordance with the GATS preamble. The particular needs of developing countries, as well as their level of development, both overall and in the energy sector, needed to be acknowledged. In this regard, negotiations on trade in energy services should guarantee the latitude of developing countries to implement policies aimed at domestic capacity building, in particular that of their small and medium-sized energy service suppliers.

12. In recent years, the Indonesian government had been restructuring the energy sector by issuing three new laws, namely the Oil and Gas Law of 2001, the Electricity Law of 2002, and the Geothermal Law of 2003. The spirit of the new laws anticipated liberalization as well as the shifting of the paradigm from a centralized to a decentralized system of government. One of the benefits of the restructuring would be to raise the sector's energy service standards under the impulse of open competition. This restructuring effort had encouraged Indonesia to improve the existing energy services classification, which could be utilized for various purposes, including that of providing guidelines for the negotiation and development of energy services.

13. He noted that a comparison with the energy service classifications submitted by other Members showed some similarities with the Indonesian classification. As an energy producing developing country, Indonesia had adopted policies aimed at developing a strong domestic energy

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<sup>2</sup> The annual report is contained in document S/CSC/9

services sector, especially in the upstream segment of the industry, as a stimulus to overall development. To achieve greater participation in the energy business, Indonesia needed to combine the export of energy sources with the enhancement of professional capacity, human resource training and technological progress in the services segment of the energy industry. It was his delegation's view that these developments, while creating export opportunities for local firms in the energy service and related sectors, would also enhance overall economic growth and diversification. The results of the negotiations should enable developing countries to use energy supply services as an instrument to boost their development and a means of both diversifying their economy and strengthening their private sector.

14. He finally noted that negotiations on energy services should accord individual developing country Members such as Indonesia appropriate flexibility to open fewer sectors, liberalize fewer types of transactions and to progressively extend their market access in line with their development situation, in accordance with Article XIX of the GATS.

15. The representative of Canada acknowledged the importance of the energy sector for economic development. Commenting preliminarily on the communication from Indonesia, it appeared that the classification proposal had a certain internal logic: it was helpful, for example, that all engineering services were grouped together irrespective of whether they were used by the environmental industry or the energy industry. This was a more appropriate reflection of how services were regulated. In particular, engineering services were normally regulated generally and it was not distinguished between energy engineering and environmental engineering. He believed that a document similar to the very detailed classification list in the back of the Indonesian document could be valuably used by Members as an *aide memoire* in the negotiations. The nature of some of the changes proposed in the document raised possible concerns for Canada in terms of legal stability, an issue which his delegation had been raising regularly in this Committee. He was also concerned about a possible imbalance as the proposal seemed to disaggregate energy services to a level that was much beyond the disaggregation in other sectors. Finally, some activities were included in the list which were equally relevant for other sectors. For example, technical testing and analysis services were used in the energy services area, but were also important for mining services or environmental services.

16. The representative of the European Communities considered that the paper by Indonesia built upon previous work, but added more detail. She welcomed the fact that the paper covered not only the areas of oil and gas, but also renewable sources of energy which were important for a large number of Members. It appeared that the paper supplemented what was already contained in the W/120 classification, and it clearly identified many other sub-sectors, which were relevant for making commitments in the energy sector. Spelling out the CPC codes in the way Indonesia had done allowed to align them under the W/120 headings. She noted that in the area of professional services, a good number of references were made to training and human resource development. These would probably fit normally under education services. She also noted that construction services appeared only as a minor element, i.e. a sub-division of engineering in the Indonesian paper, but that their importance for energy services would seem to warrant a broader inclusion. Her delegation saw construction as a sector in its own right with energy construction only forming a part of it.

17. The representative of Colombia stated that her delegation was very interested in energy services. Colombia was one of the few countries that had made specific commitments on energy and mining during the Uruguay Round and also was an exporter of energy services. She requested clarification as to the difference in approach between the Indonesian proposal compared to the proposals by the European Communities, Canada and other Members; as well as the proposal of Venezuela and Norway.

18. The representative of Chinese Taipei stated that her delegation was favouring a comprehensive approach to the classification of energy services, as was contained in the detailed proposals from a number of Members, including today's communication from Indonesia. She noted

that some service sectors included in the classification, in particular professional services such as education, training and other energy services, were closely related to other professional services and were already covered elsewhere.

19. The representative of the United States welcomed the proposal which added Indonesia to the growing number of countries who recognised the importance of being able to address energy services in a comprehensive and consistent manner in these negotiations. Indonesia's contribution underscored the importance of energy services to both developed and developing countries. The United States, together with Canada, Chile and others, were part of a group of countries that had tabled negotiating objectives for this sector. The US, EC and Japan had tabled a joint proposal for scheduling energy commitments and Venezuela had tabled a commercial reality paper. In looking at all these inputs, her delegation found that Indonesia's proposed classification shared a number of elements with other proposals. First, all papers acknowledged that energy services did not extend to ownership of natural resources. Along these lines, Indonesia's paper stated that the management and utilization of natural wealth and resources should not impair the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources. Secondly, like other proposals, Indonesia's paper applied to a range of energy sources including oil, gas, electricity and renewable energies. Third, the structure of Indonesia's paper was also similar in many respects to the scheduling guideline papers already tabled. For example, like the proposed guide for scheduling energy services commitments, Indonesia's proposed classification included headings for upstream services, i.e. exploration and development; downstream transmission and distribution services; energy commercialization; marketing services; and other energy services. At the same time, however, Indonesia's paper appeared to differ in certain respects from one or both guidelines that had been already tabled. For example, it covered not only different energy sources, but included mineral resources as well. Other papers did not extend beyond energy sources. She requested clarification as to whether Indonesia meant to limit the coverage to energy producing minerals such as coal. Also, Indonesia's classification proposal attributed a CPC number to the wholesale and retail sale of electricity. She was curious about the basis on which Indonesia had assigned a CPC number to these activities. Indonesia further appeared to take a broad view on activities included as energy services. She was interested how Indonesia had arrived at some of its conclusions. The proposed classifications included a separate section on professional services, a heading that did not appear in her delegation's guideline. It appeared to apply primarily to adult education services and other education services. She sought clarification for the rationale behind the inclusion of this section in the proposal. Finally, she noted that Indonesia's paper was presented as a classification of energy services, whereas the guideline that her delegation had proposed jointly with other delegations did not attempt to create new classifications for the sector, but rather to build on the existing W/120 structure to facilitate scheduling of a meaningful set of energy and energy-related services. She wondered whether the Indonesian paper was intended to serve the same purpose.

20. The representative of Australia stated that the Indonesian proposal on classification of energy services appeared similar to a working document developed by the APEC energy working group some years ago, as it broke the sector into five sub-sectors. His delegation believed that this was a useful sectoral breakdown with sufficient detail, providing clarity and reflecting commercial reality. Specifically, he requested clarification on the entry on pipeline services. Indonesia's description under 2.7.1 seemed to cover pipeline services, but the corresponding CPC number 7130 did not actually appear in the CPC classification list. He wondered if this was a technical error or whether Indonesia was in fact classifying this sector at the three digit level of 713 or at a more sub-sectoral level.

21. The representative of China shared Indonesia's view that since the energy sector was vital for economic growth and sustainable development, the multilateral framework should respect national policy objectives and Members' right to regulate. China took note that the fourth category of the classification in Indonesia's paper ("professional services"), which had not been separately indicated in previous proposals, had been independently listed as a main classification in the communication.

Professional services were a crucial element in the supply of energy services. Commenting on a proposal made by Venezuela at a meeting in July, he suggested to add one extra sub-category of storage services under item 9, that was “Offshore terminal support services and FPSO (Floating Production Storage Offloading)”. He further suggested to add “geologic log services” under item 1.

22. The representative of Norway stated that the energy sector was crucial to any society, and it was therefore of greatest importance to ensure maximum freedom and flexibility for Members to undertake commitments according to their level of development. He agreed with paragraph 7 in the Indonesian paper “that a detailed classification of the energy services sector offers a comprehensive and essential instrument for WTO members in negotiating specific commitments in energy services”. A list that helped to find individual commercial services in the classification system was needed. Venezuela had previously put forward a proposal for a detailed and comprehensive checklist that would assist Members in working out requests and offers according to their national interests. Indonesia had taken an equally comprehensive and transparent approach and had included all commercial services mentioned in the Venezuelan list, but had also added some new items, for instance related to thermal energy.

23. Commenting on the classification, he stated that it was his delegation's understanding that item 1A.2.1. “Rig positioning and preparation” related to offshore activities and included services provided by tug-boats. The correct CPC correspondence, as used in the Venezuelan correspondence, was 7214. Turning to “Vessel transportation and supply services”, item 2.4.4., he noted that such services, when supplied offshore, were provided by supply ships. The CPC correspondence was 7212. As CPC 7212 included a wide range of maritime transportation services, it should be indicated that the supply ship services only covered a part of the CPC 7212 correspondence. Item 2.4.4. “Vessel transportation and supply services” should therefore be moved to the upstream section.

24. He felt that the scheduling guidelines, S/L/92, should be the basis for commitments in energy services, as was the case for other areas. Norway's experience had shown that in order to fully realise the benefits of efficient, competitive energy services, one needed to consider the entire chain of activities involved. His delegation had included the value chain in its initial offer, and had attached an overview of the value chain to the offer to make it easier for Members to identify the energy related services in the schedule.

25. The representative of Chile stated that classification issues were of critical importance for the energy sector. One particular challenge arose from the fact that in order to cover the supply of energy services, commitments in several sub-sectors were required. Indonesia's paper reflected this commercial reality. The paper complemented earlier contributions and would help in the negotiating process.

26. The representative of the Philippines welcomed the premise set out in the Indonesian paper, particularly the recognition of Members' national policy objectives and the consequent right to regulate the supply of energy services, as well as Members' inherent right to the ownership of their natural resources. He understood that Indonesia's intention was to capture activities included in the proposed classification only in so far as they related to energy services. Given the scope of the proposed classification in certain instances, several activities could be interpreted as including activities falling under other sectors as well. He also was interested in Indonesia's view on the possible relationship of the proposal with discussions relating to core vis-à-vis non-core services in the energy sector.

27. The representative of Venezuela stated the similarity between the different proposals was interesting. In a preliminary reaction, she supported what was set out in paragraphs 5 and 7 of the proposal by Indonesia.

28. The representative of Indonesia, replying to the comment by Canada, concurred that the proposal also related to sectors that were not specific to energy services only. However, the proposed classification presented activities specific to the energy sector. On the comment by the European Communities regarding human resources development, she noted that the paper addressed the training and education especially for the energy sectors. On Colombia's question, the difference in approach to what had earlier been proposed by Venezuela was that Indonesia sought to integrate both up- and downstream services for all energy sources, including for renewable energy. Also, a large segment of professional services was included. Turning to the comment by the United States, she confirmed that wholesale electricity distribution was included for downstream activities. The classification had been developed with the help of the national stakeholders in the various energy sub-sectors. She welcomed the invitation that Indonesia join the 'friends of energy' group. It appeared that China agreed that there should be a special classification for professional services. She thanked Norway for pointing to certain CPC numbers and stated that she would revert to this question following a discussion in capital. She also thanked the other delegations for their comments and stated that she would reply to the questions in more detail at the next meeting.

29. The Chairperson suggested that the Committee take note of the statements made and revert to the paper by Indonesia and the questions raised at the next meeting.

30. It was so agreed.

#### C. CONSIDERATION OF ISSUES RELATING TO ARTICLE XX:2

31. The Chairperson recalled that the Committee had held a first discussion of issues related to Article XX:2 at its last meeting in September. Also, at a dedicated informal meeting on 20 November, he had presented a Chairman's Note (JOB (03)/213), in which he had tried to summarize the various issues as they had emerged from prior contributions and interventions by delegations. He had also sketched out possible approaches to the issue, some of which had been mentioned previously by various delegations. He felt that the Committee might provide some added value to the discussion of this issue by first considering its substance in a more clinical way before exploring how best to address the issue in practice. Ahead of this meeting, the delegation of Switzerland had submitted a paper, JOB (03)/214.

32. The representative of Switzerland stated that his delegation's paper had been prepared in response to the questions and options raised by the Chair and should be read together with the Chair's paper. The paper only dealt with approaches 1-4 of the Chair's paper and did not cover the issue of Article XX:2 per se, as this issue had been addressed in an earlier paper by Switzerland, JOB(03)/85.

33. The first issue that the paper tackled was the question whether there was a hierarchy between Articles XVI and XVII. Switzerland believed that there was no indication that would point towards such a hierarchy. In fact, the only possible source for such an indication was Article XX:2. If one supposed, for argument's sake, that Article XX:2 introduced a hierarchy, it would do so in a very indirect and unclear manner. However, if it was indeed the purpose of Article XX:2 to stipulate a hierarchy between Articles XVI and XVII, then the question arose why the Article was worded the way it was; rather than simply stating that market access extended into some elements of national treatment, or that there was a hierarchy between those Articles. However, it did not seem that Article XX:2 was designed to introduce such a hierarchy. Instead, it was worded as a scheduling convention. This was also made clear by the title of Article XX, which reads "Schedules of Specific Commitments".

34. The second issue that needed to be examined were the scheduling functions of "None" and "Unbound". Schedules were positive lists of commitments, in the sense that they listed sectors with partial or with full commitments. Where no commitments were intended, there was no need to list a sector and then inscribe "Unbound" for all modes under market access and national treatment. In

other words, not listing a sector at all, or listing a sector and scheduling "Unbound" everywhere would have the same meaning. From this, one could infer that "Unbound" had a different scheduling function than "None". The latter entry could not be ignored. For example, a Member could not introduce new legislation that would be inconsistent with the entry "None", while a Member could always alter its legislation where it maintained an "Unbound" in its schedule.

35. The next question to be tackled was the meaning of Article XX:2 within the four approaches identified in the Chair's Note. Under the first approach, market access essentially extended into national treatment as concerned the zone of overlap. This established a hierarchy between market access and national treatment. If this premise was accepted, there would be no purpose for Article XX:2. However, provisions of a treaty must not be interpreted in a way that made them redundant. Only one interpretation of Article XX:2 was possible, namely that the second paragraph was introduced solely to extend market access into national treatment. However, as we had pointed out before, if this was the goal of Article XX:2, why was it not stated in an unequivocal way? And why had it been included under Article XX on scheduling conventions, rather than under Part III of the Agreement? In sum, under the first approach, either Article XX:2 was totally useless, or it was drafted in a very unclear or even misleading way. Either interpretation should be avoided.

36. A similar reasoning would prevail for the second approach mentioned in the Chair's Note. Simply put, under this approach, national treatment would extend into market access. In this scenario, the wording of Article XX:2 would even be inconsistent with the second approach.

37. Under the third approach, an "Unbound" would override a "None". Again, there was no need for Article XX:2, which could even be deemed inconsistent with this approach in certain cases, namely in the event of a "None" for market access and a scheduled measure for national treatment.

38. Finally, approach four, where "None" would override "Unbound", was the only scenario from which it would follow that measures inconsistent with both Articles XVI and XVII would have to be inscribed in both columns to provide a condition or qualification to Article XVI and XVII. In other words, in the absence of Article XX:2, only the fourth approach would lead to double listings of conditions and qualifications. Since such double listings were cumbersome and should be avoided, Article XX:2, as a scheduling convention, served the useful purpose of streamlining the schedules.

39. Turning to systemic considerations, the representative of Switzerland stated that the second and third approaches would produce peculiar results. Namely, in cases where there was no limitation under market access, and national treatment remained "Unbound", the Member could introduce only discriminatory market access measures. Members thus would be induced to take such more restrictive measures compared to cases where they had no commitments whatsoever. This would run systemically against the principle of progressive liberalization. He was not advocating, however, that certain ways of scheduling should not be possible at all. Somewhere, there might be a political intention to inscribe contents of a restrictive nature, which technically would remain possible under conditions and qualifications. But more importantly, the preferred approach to choose should be, from a systemic point of view, in line with the overall aim of the GATS, i.e. progressive liberalization. Many other overlaps were conceivable, such as overlaps of modes or sectors. For systemic reasons, it seemed that the most coherent approach was to assume that full commitments remained full commitments, whether any overlaps could be found or not.

40. The representative of Australia stated that his delegation found the argument put forth by Switzerland in this technically complex area very persuasive. However, he also recognised that those delegations with opposing views were unlikely to be swayed to accepting a legal interpretation that was not in their favour. Clearly, there was a preference for technical issues like this to be kept separate from procedural considerations associated with the negotiations. However, in this instance, Members were faced with a technical problem on which there seemed to be little progress, and there was a negotiating round that offered the potential to deal with a quirk in legal interpretation or

scheduling patterns. The Committee could suggest to the Council for Trade in Services the option of setting the question of legal interpretation aside while encouraging Members to make offers during the negotiations that removed the existing ambiguities.

41. The representative of Chile remarked that the paper by Switzerland helped to better understand the problems at hand. Chile agreed that approaches one and two assumed a hierarchy which was not spelt out in the Agreement. While it might be difficult to arrive at a joint interpretation, approach number five in the Chair's Note might offer a realistic way out. This approach should be further explored.

42. The representative of Brazil stated that the discussion was not just a theoretical exercise but addressed very important issues, especially in a negotiating round. It was essential to understand what other Members were putting on the table, and how to express own intentions. Leaving this question aside with regard to the current schedules would not do anything to resolve existing problems, even if a solution was found for future schedules. Also, solutions for future schedules might have an impact on existing schedules. Therefore one should first try to clarify this issue and then find a solution.

43. His delegation agreed that there was no hierarchy between Articles XVI, XVII, and XX:2. It seemed that there were actually not only market access and national treatment restrictions, but a third category of restrictions that combined market access and national treatment restrictions. For these three restrictions, three Articles existed in the Agreement. Article XVI dealt with market access restrictions, Article XVII with national treatment restrictions, and Article XX:2 with those restrictions that combined market access and national treatment restrictions. Looking at those three Articles as having an independent justification would be consistent with Appellate Body jurisprudence that an Article of an Agreement could not be read to nullify another Article of the same Agreement. If every Article must be given meaning, it followed that the market access column actually addressed two issues. First, it could be used to schedule market access restrictions as stated in Article XVI, and secondly, it would also be used to schedule restrictions that fell under Article XX:2. An inscription in the market access column could hence stand for two different things because the GATS stipulated that two different types of information were to be scheduled in the same column. An "Unbound" under Article XVI could be understood to encompass both the restrictions set out in Article XVI:2 (a)-(f), as well as those in Article XX:2, because both Articles state that any inscription of the respective restriction should be made in the market access column. Having said that, it seemed that the first approach in the Chair's Note did not impose any hierarchy between Articles XVI, XVII and XX:2.

44. He thus disagreed with the statement in paragraph 20 of the paper by Switzerland, that the first approach presumed the existence of a hierarchy between Articles XVI and XVII. Although paragraph 19 of the paper stated that approach number four did not imply any hierarchy between Articles, it nevertheless advocated a solution by which a "None" would override "Unbound." This would in fact introduce a hierarchy between an "Unbound" and a "None." As the question of hierarchy was a central element of the discussion, he requested the Secretariat to prepare a compilation of jurisprudence regarding the question of hierarchy between Articles within the same Agreement.

45. The representative of Chinese Taipei stated that her delegation's preferred solution was to employ a schedule-based approach, along the lines of approach five in the Chair's Note. Approaches one and two introduced a hierarchy between Articles XVI and XVII, while there was no legal ground for assuming such a hierarchy. One needed to be careful with the third and fourth approach, because these approaches could lead Members to interpret the scope of commitments in a way that might either diminish the commitments or change their direction. The current negotiations provided an ideal opportunity to use bilateral negotiations in order to clarify certain entries in schedules that might be modified in the context of the schedule-based approach. Any new commitment in each Member's offer would then follow this approach.



46. The representative of Hong Kong, China welcomed the opportunity to address the problem on a technical basis and to put aside legal and procedural considerations for the time being. He agreed that the fifth approach was a pragmatic way of trying to avoid that the problem would repeat itself in respect of new commitments. Even if no decision came out of the current discussion, it had already achieved the purpose of raising Members' awareness of the problem. In the course of the negotiations, delegations would presumably be aware of the ambiguities arising from those entries and would try, as far as possible, to clear up those entries. It was now clear that the problem was wider than concerning only Article XX:2. It concerned more generally the overlap between Articles XVI and XVII and the resulting overlap of commitments in the market access and national treatment column in individual schedules of specific commitments.

47. These observations on the various approaches did not necessarily represent the interpretation of his delegation and were intended only to take the discussion forward. In his view, approaches one and two did not establish a hierarchy between Articles XVI and XVII, but actually aimed at eliminating the overlap by assigning the overlapping area to one of the Articles. In approach number one, the overlapping area would be assigned to Article XVI, and therefore Article XVI would govern all the measures in paragraph 2 (a)–(f) in both non-discriminatory and discriminatory form. Under both approaches, the intention was to eliminate the overlapping area and to draw a clear line between Article XVI and XVII. A measure would then either fall within Article XVI or Article XVII but not within both at the same time, thereby eliminating the need for deciding which Article should take precedence over the other because the two Articles would not be applicable at the same time.

48. Another observation was that Article XVI:2 referred to well-defined categories of measures which, of course, were only a subset of the measures that were governed by the GATS. On the other hand, the scope of Article XVII was in principle the same as that of Article I of the GATS, capturing the discriminatory aspects of all possible measures. Conceptually and structurally, there might hence be merit in retaining the scope of Article XVII, but to reduce the scope of Article XVI because the latter contained a well defined subset of measures. This would ensure that the notion of discrimination was retained in its entirety in Article XVII. From a structural point of view, it might be less desirable to carve out segments from the scope of Article XVII and allocate them to Article XVI. Thus, approach two might have a merit over approach one. There were further practical considerations in comparing the two approaches. For instance, when Members crafted their schedules, they had to decide whether to inscribe limitations under the market access or national treatment column. If the national treatment column was reserved entirely to any discriminatory measures, and the market access column was entirely reserved for quantitative or other restrictions on legal form or equity, then a decision might be easier to make than a decision between measures which were quantitative and discriminatory and measures which were non-quantitative and discriminatory.

49. As an alternative to assigning the overlapping area to either one of the two Articles, it would be conceivable to simply require all measures falling into the overlapping area to be scheduled under either the market access column or the national treatment column. While the first two approaches outlined in the Chair's Note seemed to involve a change to the architecture of the GATS, the alternative merely required an agreement on where the entries under the two Articles should appear in the schedule. This alternative would of course not eliminate the overlap. Yet at least in terms of scheduling, it might provide greater clarity. In theory one could also envisage a scenario with three columns one of which was assigned specifically to the overlapping area. Conceptually, the alternative essentially tried to find a place for what was to be put in this third column.

50. Approaches three and four in the Chair's Note retained the overlap of the two Articles, but provided that the commitments in the overlapping area would be governed by the scope of commitments being undertaken in either column, i.e. either "Unbound" prevailed over "None", or "None" over "Unbound". In this regard, the paper by Switzerland contained a very interesting analysis. Contrary to that analysis, he believed that approaches three and four introduced a hierarchy, albeit not between Articles XVI and XVII, but between "None" and "Unbound". If one had only the

choice between approaches three and four, he would agree with Switzerland that approach four would appear more convincing. No matter how one read Article XX:2, if "None" was scheduled in the market access column, and "Unbound" in the national treatment column, it could hardly be argued that the Member could still introduce a measure under Article XVI which was discriminatory in nature, because such a measure, by the logic of Article XX:2, should have appeared in the market access column of the schedule. A "None" in the market access column could only mean that there was no such limitation in place. Another reason in support of approach four over approach three was that Articles XVI and XVII represented obligations that Members assumed by inscribing entries in their schedules. Scheduling an "Unbound" for a certain mode, or omitting a sector altogether from a schedule did not absolve the Member from any other obligations for the sector, such as the unconditional MFN obligation. By the same token, an "Unbound" in either the market access or national treatment column only meant that the Member did not assume obligations under that column. However, this did not absolve the Member from obligations assumed elsewhere, for instance through entering "None" in the corresponding other column. Seen in this light, there were good reasons that "None" should prevail over "Unbound".

51. To further the analysis of the four approaches, it seemed that the following issues needed to be examined: (i) whether there were any substantive differences between removing or retaining the overlapping area; (ii) whether the notion of market access restrictions should be reduced to their non-discriminatory form, and discrimination be reserved in entirety to national treatment, in terms of GATS architecture, conceptual tidiness and practical ease in scheduling; and (iii), whether there should there be any hierarchy between "None" and "Unbound".

52. The representative of Japan proposed to distinguish between the two scenarios at issue, depending in which column the "Unbound" was scheduled. Article XX:2 obviously related to a situation where a measure was inscribed in the market access column. Where a commitment was inscribed in this column, and an "Unbound" was entered in the national treatment column, it appeared that the commitment should not be decreased by that "Unbound". For example, if in the market access column no limitation was maintained except for a quantitative limitation on the number of licenses, and the national treatment column was left "Unbound," it would be unreasonable to assume that the Member would nevertheless be able to introduce restrictions for foreign capital because they were discriminatory in nature. As far as this particular situation was concerned, his delegation was basing itself either on the logic of approach one or approach four where the market access column or the commitment would prevail over the "Unbound" situation.

53. More problematic was the situation where the "Unbound" was in the market access column and a full or partial commitment was inscribed in the national treatment column. Having heard the different statements and different interpretations of the meaning of "Unbound," and also given that measures which would be subject to national treatment obligations were not specified in Article XVII, he believed that there was ultimately no other way of understanding the underlying intention of the schedule other than to seek clarification from the Member who had originally submitted that schedule. In other words, there was no choice other than option five for these cases. Of course, this would need to be done in a very cautious manner, so that the domain of "Unbound" would not prevail beyond the original intention of the Member who had made the commitment. Countries seeking an extensive interpretation of "Unbound" should be required to explain their intentions, and, so to speak, carry the burden of proof.

54. The representative of Canada stated it was difficult to deal with the issue in a purely clinical way, because any solution had implications for Members current and future schedules. These implications needed to be taken into account. His delegation was still examining the Chair's Note and in particular the question posed in paragraph 14. His delegation was further exploring the exact meaning of "Unbound", and whether, as had been suggested in an earlier paper by Hong Kong, China, it could be understood as a listing of all existing and possible limitations.

55. The representative of the United States, in making preliminary comments, stated that one of the important questions in the debate related to the meaning of "Unbound". More precisely, the question was whether "Unbound" was equivalent to what Article XX:2 described as measures inconsistent with both Article XVI and Article XVII, if it was inscribed in either place. Was an "Unbound" tantamount to a measure inconsistent with something? Looked at the question in that way, one found oneself going back to the title of Article XX "Schedules of Specific Commitments," and the first paragraph which set out how to schedule specific commitments. The question arose whether inscribing "Unbound" actually meant listing a specific commitment. One should also ask whether paragraph 2 of Article XX should in any way be read in conjunction with paragraph 1 in order to determine what was meant by "measures inconsistent with both Articles XVI and XVII". On the issue of hierarchy, one needed to distinguish between hierarchy of substance and hierarchy of how to inscribe. Some guidance was given by paragraph 18 of the scheduling guidelines which she reiterated should be looked at. However, she noted that the Chair's Note stated that paragraph 18 might be deficient to resolve the issues at hand. She did not suggest, however, that paragraph 18 needed to be revised to incorporate some of the many questions at hand, since the discussion was nowhere near a solution.

56. She recalled that, in the informal discussion, Chile had asked whether situations involving an "Unbound" were actually situations where Article XX:2 applied. It had been pointed out that an "Unbound" might include some restrictions that were not in effect at the moment, but could be introduced at a later stage. The "Unbound" would also reserve the right to inscribe limitations at a later stage. On the question of whether Article XVII should be viewed as the only domain for discrimination, she noted that Article XVI:2 (f) already covered discriminatory measures. Following this approach might require to amend Article XVI to clean up any indication of discrimination. She therefore urged for restraint in the debate. Her delegation appreciated Australia's suggestion. The present debate should not lead to a legal interpretation, and she was not suggesting to tamper with existing commitments. As for future commitments, one would of course have to take into account some of the questions that had been raised in the various papers and discussions. She suggested that Members started to think in that light, also because the Committee had to report back to the Council for Trade in Services. Members were relying on the Chair in finding the best way to produce a report.

57. The representative of Singapore stated that his delegation was broadly inclined towards the first approach. As everyone recognized, Article XVI dealt with both discriminatory and non-discriminatory aspects of the six types of measures contained therein. Thus, the "Unbound" entry in the market access column should by definition apply to both the discriminatory and non-discriminatory aspects of the six measures. If there was a "None" entry in the national treatment column, it should only apply to those measures that fell strictly under national treatment. Given the structure of Article XVI, as it applied to both the discriminatory and non discriminatory aspects of the six measures, option one would not create a hierarchy. His delegation was still assessing this complex issue. The current round presented a useful opportunity to clarify ambiguities. In this regard, his delegation was also looking at approach five with an open mind. That approach could provide a useful modality for future work in this area, although it might not solve ambiguities with respect to existing commitments, as some delegations might regard certain interpretations as a nullification of commitments. This created a major challenge, namely how to balance the integrity of current commitments with Members' interpretations of their existing schedules. These problems might not necessarily be resolved through bilateral negotiations, as Members held differing views on these issues.

58. The representative of the Republic of Korea stated the discussions thus far had proceeded in two parallel tracks without much convergence of ideas. Korea was of the view that the fifth approach was most appropriate at this moment. He fully appreciated that this would not solve existing problems, but hoped that all Members would try to reduce discrepancies by maintaining effective market access liberalization.

59. The representative of Australia said that option five should only relate to new or improved commitments, but could not serve to clarify existing problems through applying any of the less liberal interpretations or approaches such as, for example, option three. A Member could also choose to resolve an ambiguity in existing commitments by making an offer consistent with the most liberal interpretation, which was option four, or by unambiguously expanding its obligations. For example, a situation of "Unbound" and "None" could become "Unbound except for measures falling under Article XVII" and "None," or it could become "None" and "None". There might be concerns about how to give credit in the negotiations for improving schedules in this way, which was one issue his delegation was looking into. Australia was preparing a paper to explain its position.

60. The representative of the European Communities stated the Chair's Note and the paper from Switzerland were currently examined in Brussels. The latter paper seemed to follow a very clinical approach; however, its paragraph 23 also implied the possibility to look at approach number five. The Chair's Note provided a useful summary of the debate so far. It was clear from paragraph 21 in the Chair's Note that approach number five might only help in relation to future commitments, and that there was a reluctance on the part of many Members to apply it to existing commitments. Whatever course of action was followed, it would have to address the question of the potential overlap between old and new commitments.

61. The representative of Switzerland replied to the comments. He did not agree with the view taken by Brazil that there were three types of measures and three corresponding GATS provisions to deal with them for mainly three reasons. First, the structure and sequence of the GATS, which placed the substantive provisions on commitments in Articles XVI and XVII in Part III and Article XX in Part IV, preceded by Article XIX on negotiations. . Article XX had the heading "Schedules of Specific Commitments," and was a technical provision aimed at setting out how to draw up schedules, which was different from the substantive provisions on market access and national treatment in Part III ("Specific Commitments"). Secondly, the wording of Article XX:2 clarified that it was merely a scheduling convention. Third, if Article XX:2 indeed contained a third type of measure, it would be difficult to see why Article XVI:2 (f) already covered a measure of this third type, which would fall under the Brazilian approach under Article XX:2.

62. If the second approach in the Chair's Note was correct, there would be no possible way to explain why Article XVI explicitly covered a measure which was discriminatory in nature, namely maximum foreign capital participation (Article XVI:2(f)). It was always possible to find specific arguments in favor of any of the four approaches. Switzerland, in contrast, had tried to consider all approaches in a holistic manner and test each approach against any possible internal inconsistency, taking into account the architecture of the GATS. In doing so, only approach number four had proved to be truly robust. Even if one accepted that approaches one and two did not imply a hierarchy, but only an allocation of the overlap zone, the questions would remain the same. It was not clear where such an allocation was provided for in the GATS. The existence and content of Article XX:2 could not be explained, if an allocation was already foreseen in other GATS provisions such as Articles XVI and XVII. And, finally, the mere existence of Article XVI:2(f) raised problems especially if one wished to follow approach two.

63. Turning to process, he felt that the discussions on this issue had been exhausted. It was unlikely that the Committee would be able to reach a consensual conclusion. It was thus up to delegations to consider the ideas exchanged in the Committee and draw their own conclusions. In this context, it was certainly helpful that the discussions had occurred at the start of the request and offer process. Finally, the mandate received by the CSC was limited both in terms of time-frame and scope. The Services Council had referred the item to the CSC for consideration on the understanding that the Chairperson of the CSC would report back to the Council on the discussions, complemented by the reports of the relevant CSC meetings.

64. The Chairperson stated that he sensed that some delegations were still looking at the issues. These delegations would need at least another formal meeting. As the next such meeting was the last possible opportunity before the report to the Services Council was finalized, he requested delegations to consider whether another informal meeting would be of use. After the next formal meeting, he would prepare a technical report to the CTS under his own responsibility.

65. The representative of Brazil stated that consideration of the issue should continue even after the report to the Services Council had been made. It was important to find a possible solution for future schedules, even if it appeared that a solution for the current schedules was not possible. He was in favour of convening an informal meeting.

66. The representative of Switzerland stated that prior to deciding on the need for an additional informal meeting, one should consider the purpose of such a meeting. He was not opposed to an informal meeting if it served to bring any additional views into the discussion. He suggested that the Chairperson consult on the issue.

67. The representative of the United States concurred with the point made by Switzerland. If there was an urgent need to have an informal meeting, she would like to hear more about the reasons.

68. The representative of Canada supported the Swiss suggestion. The Chairperson could undertake consultations to determine what exactly would be discussed at an informal meeting. Members could then decide whether they wanted such a meeting to take place.

69. Further to the comments made by delegations, the Chairperson suggested that he would explore with delegations whether any additional material for discussion or other motivation for an informal meeting existed among delegations. He would ensure that the next formal meeting was convened for a full day to avoid the time constraints that had handicapped the present meeting. He felt that the discussion had been very deep and substantive. As some delegations had indicated, the discussion itself had raised awareness of the issues involved and would help delegations during bilateral and other negotiations. He noted a sense of pragmatism on the part of several delegations, as well as expressions of concern by some other delegations about how to deal with the relationship between old and new commitments.

70. Addressing the suggestion by Brazil for Secretariat research on the question of hierarchy in WTO Agreements, a representative of the Secretariat noted that there were some clear principles establishing hierarchy, for example between exception provisions and provisions establishing obligations. If one wanted to look into other more subtle distinctions, it might be useful to clarify the parameters of such a paper. He felt that the relationship between Articles XVI and XVII was not so much a question of hierarchy, but rather one of the delineation of the scope of these provisions. He requested more time to reflect and discuss the question with the delegation of Brazil.

71. The representative of the United States stated that her delegation would like to be a part of any consultation on this issue. She reiterated that her delegation did not want to see a legal interpretation. However, if the request was merely to factually compile what panels had said about certain provisions, there could be consultations.

72. The representative of the European Communities stated that it would be useful to come back to the CSC and report on any consultations before the Secretariat was tasked with the preparation of a paper.

73. The Chairperson stated that the purpose of the consultations was merely to clarify the intended scope of the request by Brazil. There was no prejudice to the question whether such a paper should be prepared or not. He proposed to consult whether a further informal meeting prior to the next cluster was needed. Due to the time constraints at this meeting, item D (Scheduling Issues)

would be taken up at the next meeting. He suggested that Members take note of the statements made. As there were no interventions under the agenda item of Other Business, he suggested that, in accordance with the practice of grouping meetings of subsidiary bodies close to meetings of the Council, the next formal meeting be held before the next regular meeting of the CTS.

74. The Committee so agreed.

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