

# WORLD TRADE ORGANIZATION

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## Council for Trade in Services

### REPORT OF THE MEETING HELD ON 23 AND 24 NOVEMBER 1998

#### Note by the Secretariat

1. The Council for Trade in Services held a meeting on 23 and 24 November 1998. The agenda for the meeting is contained in WTO/AIR/971 and WTO/AIR/971/CORR.1. Under other business, the delegation of Ghana raised a point concerning the temporary reopening of the Fourth Protocol to the GATS for acceptance and the delegation of United States requested to make proposal for an information session on the telecommunications agreement.

#### **A. ELECTRONIC COMMERCE – IMPLEMENTATION OF THE WORK PROGRAMME**

2. The Chairman recalled that at its last meeting the Council had discussed how to organize the work programme on Electronic Commerce. The Secretariat had been asked to prepare a short note on the elements contained in the work programme as they related to the GATS framework. This note was contained in document S/C/W/68. It had also been suggested that the substantive discussions should be conducted in an informal mode and that the Chairman would make a summary of the discussion in the formal session.

3. The delegation of the European Communities introduced a short paper dealing with the organization of work on electronic commerce in the Services Council from the December meeting onwards. They divided the issues in two categories: those relating to clarification and analytical issues. In introducing the paper, the delegation of the European Communities stressed the importance of organising work in this area and that issues relating to scope and clarification should come first in the discussion, while more specific issue would follow thereafter. Several delegations made comments and suggested changes to the work schedule. It was suggested that the proposed calendar could be accelerated in order to cover as much ground as possible before the March meeting of the General Council, that work on clarification and on analytical issues were not mutually exclusive; and that the informal process should maintain a certain degree of flexibility so that, for instance, issues discussed at one meeting could be raised again by delegations at following meetings. The Chairman proposed the following calendar on a preliminary basis.

#### 14-15 December Council Meeting

- Scope (including modes of supply)
- Classification issues
- MFN
- Transparency
- Increasing participation of developing countries

### February Council Meeting

- Domestic regulation, standards and recognition
- Market-access commitments on electronic supply of services
- National treatment
- Access and use of public telecoms network and services

### March Council Meeting

- Competition
- Protection of privacy and public morals and prevention of fraud (Article XIV)
- Custom duties

Some delegations, however, said that they were not yet in the position to formally agree on a framework for discussion.

4. Upon the conclusions of the informal discussion, the Council resumed the formal meeting and the Chairman gave the following summary on his own responsibility:

Members comments on the Secretariat Note were of a preliminary nature. Since it was suggested that we should keep a record of progress in this area, I am going to present a relatively detailed description of our discussion.

### Scope

There was agreement that the electronic delivery of services falls within the scope of the GATS. Several delegations said that it was important to affirm the technological neutrality of the GATS but some delegations wished to see more discussion of this notion. The basic framework of the four modes of supply was generally perceived to be adequate to deal with the electronic delivery of services. There remained, nevertheless, a need to clarify the distinction between the first two modes, cross border supply and consumption abroad. While the approach to this problem suggested in paragraph 8 of the Secretariat paper was seen as useful, there was some concern that it might be simplistic. Practical examples were seen as a useful way to test the feasibility of the suggested approach. One delegation suggested that it may also be relevant to examine whether the location of internet servers in the territory of a Member may resemble commercial presence.

Some delegations suggested that the interpretation of the term "measures affecting trade in services" in a recent report of a WTO panel and the Appellate Body was unduly wide. One delegation noted that bodies which have responsibility for the administration or the assignment of domain names were not necessarily exercising powers delegated by governments.

### MFN

Delegations expressed the need for more discussion on the question of likeness and its relationship to the notion of technological neutrality. One delegation noted that while in principle intra-modal distinctions based on the technique of delivery could be challenged as inconsistent with MFN, it remained possible for a Member to make such distinctions when defining the scope of its specific commitments in a particular sector. The delegation pointed to the role played by the Chairman's Note dealing with technological neutrality in the basic telecommunications negotiations.

### Transparency

It was noted that the application of Article III on transparency to electronic commerce was straightforward.

### Increasing participation of developing countries

Delegations emphasized the need to enhance participation of developing countries in electronic commerce. In this context, it was important to liberalize market access in areas of export interest for developing countries. Participation in electronic commerce did not necessarily require huge capital or sophisticated technology so even the small and medium enterprises in developing countries could compete. There were already numerous stories of successful participation by developing country firms in electronic commerce, and it would be helpful to collect more evidence of such successes. One delegation noted that limited access to encryption technology may pose a problem for developing countries. Another delegation noted that developing countries needed to liberalize access to their own markets so that their consumers could benefit fully from electronic commerce.

One delegation had hoped to see more detailed analysis of this item in the Secretariat paper. Future work should examine how electronic commerce would affect the supply and demand for services, as well as the competitiveness of developing countries; successful partnerships between developed countries and developing countries and between the public and private sectors; and difficulties and challenges for developing countries, in particular, their small and medium enterprises and the possible need for technical assistance. The need to take advantage of the work in UNCTAD and the Committee on Trade and Development was emphasized.

### Domestic regulation

More work was required to examine the implications of domestic regulation for electronic commerce. One delegation raised the question of how the issue of liability and the notion of "more burdensome than necessary" could be applied to electronic commerce. One delegation noted that paragraph 3 of Article VI of the GATS had not been mentioned in the paper and deserved attention. Another delegation noted that there was evidence that Member's commitments on Mode 4 referred to regulations which were more burdensome than necessary.

### Competition-related Provisions

In general existing GATS provisions, particularly the annex on Telecommunications and the Reference paper, were seen as adequately covering competition concerns. One delegation, however, wanted an assessment of whether there were any loopholes in existing provisions, and an analysis of how the existing provisions applied to internet access providers. One delegation doubted that the development of electronic commerce would reduce the scope for trade restrictive business practices, as had been suggested in the Secretariat Paper.

### Specific Commitments

Delegations generally agreed with the analysis in the Secretariat Paper. It was important not to undermine existing commitments by suggesting that electronic delivery of services was not covered by the GATS. But it was necessary, particularly in the light of paragraph 32, to discuss how restrictions on the technical means of delivery should be treated. The emergence of electronic commerce should not provide a reason to schedule new restrictions. Rather the specification of some modes in the schedules as unbound due to technical unfeasibility may need to be reviewed in the light of technological developments. It was also important to examine how the national treatment

commitment applied to the first two modes. Some delegations questioned the relevance of Article XXIII:3 dealing with non-violation complaints, as discussed in paragraph 32.

One delegation noted that in addition to the three types of transactions identified in paragraph 27, there may be a fourth where the internet was used to provide telecommunications services. It was also pointed out that the statement in paragraph 28 that electronic commerce required access to the internet was not accurate because there were forms of electronic commerce which relied on other electronic means. The importance of the distinction between the means of delivery and the content delivered was noted, though there was a recognition that the distinction may in some cases be blurred. Then need for work on classification was emphasized by several delegations, to deal with the emergence of new services as well as to clarify the treatment of internet access providers.

#### Customs Duties

The need was expressed for more study of this issue.

#### Classification

Delegations agreed with the analysis in the paper that electronic delivery of services was covered by the GATS. However, some delegations noted that the question of whether all electronically delivered products were services needed further examination. If certain electronically delivered products were deemed not to be services, then it would be helpful to have concrete examples. The issue of classification was of practical significance because it would determine the nature of the trade regime for the relevant products. In deciding whether some such products should not be treated as services, it was important to take into account the need to maintain legal clarity. It was agreed that the subject should continue to be discussed in the Council for Trade in Services. One delegation noted that it may be premature to reach a definite conclusion on the classification issue in the Services Council, since this was a cross-cutting issue which was also being discussed in the Council for Trade in Goods, and would eventually be taken up in the General Council.

### **B. PREPARATION FOR NEGOTIATIONS UNDER ARTICLE XIX – EXCHANGE OF INFORMATION, SECTORAL DISCUSSIONS**

5. The Chairman invited participants to refer back to the five main questions which Members had agreed in order to structure the sectoral discussions: (1) What are the regulatory authorities, governmental and/or non-governmental?; (2) Are there any special or common problems encountered as regards transparency or the application of the most favoured national principle?; (3) What are the most prevalent types of restriction on market access or national treatment?; (4) Are there other types of regulation - for example in the areas of licensing, technical standards or qualification requirements - which commonly restrict trade in the sector?; and (5) What are the main barriers exports face in the markets of other Members?

6. The discussion focused on the following sectors: Land Transport Services, Air Transport Services and Maritime Transport Services. The Secretariat introduced the papers it had prepared on each of these sectors, in documents S/C/W/59 to 62. On Land Transport Services the Secretariat had prepared a paper in two parts, the first covering general land transport issues and road transport, the second covering rail transport. The Chairman also invited participants to raise points concerning sectors discussed at the last meeting of the Council.

7. The following informal papers were submitted by delegations on the services sectors under discussion: (a) Transport Services (general): Japan, and Poland; (b) Air Transport Services: Australia, New Zealand and Turkey; (c) Land Transport Services: Australia and New Zealand; (d) Maritime

Transport Services: Australia, New Zealand, Norway and Turkey. The United States submitted a formal paper on Transportation Services (S/C/W/71).

8. Regarding sectors discussed at the previous meeting of the Council, the delegations of Turkey submitted informal papers on Postal Services and on Tourism Services.

9. The Council followed the same procedure as at the previous meetings. It conducted the discussions in informal mode and reverted to formal mode at the end of the meeting. In the formal session the Chairman gave the following summary of the main points raised during the informal discussions on each of the sectors:

(a) Transport services in general

Several Members drew attention to the need for more active participation by Members in the information exchange process, in the transport sector as in others. Several delegations however circulated or announced papers either on the transport sector in general or on particular subsectors, describing their regulatory situation and in some cases making suggestions for further work.

Members noted the importance of transport as a service sector in its own right, which may represent up to 25 per cent of total service revenues in certain countries, and also as a vital input to the global economy, ensuring the efficient, safe and cheap movement of goods.

Speakers also noted a growing trend towards deregulation and privatization and the consequent link with issues such as public service, disciplines on monopolies, competition policy, regulatory policies in relation with Article VI:4 of the GATS, land planning and environmental protection. They also underlined the existence of intermodal competition between the modes of transport and the growing importance of multimodal door-to-door transport services, which might imply their need for a global approach in the future negotiations. The link between transport and postal and courier services was also mentioned.

Some delegations expressed caution with regard to the possible revision of sectoral classifications, while others considered that this problem needed to be addressed. The need for any revision of classifications to follow as closely as possible the economic and commercial realities of these industries was underlined. The question of the pertinent level of aggregation was also discussed, as well as the relevance of previous documents on classification produced in the context of the Committee on Specific Commitments .

(b) Land transport services: general issues and road transport

The information exchanged among delegations pointed towards a continuing relaxation of the controls on prices and quantities carried formerly exercised by many governments and increasing openness to foreign investment. The continuing existence of cabotage restrictions and of non-MFN situations (the principle of reciprocity being dominant in this sector) was also noted. Delegations also noted the existence of discrepancies between national schedules as to the technical feasibility of cross-border supply of maintenance services. A delegation underlined that the level of commitments in road freight transport was limited and that this sector should constitute a priority in the next round. Another underlined the need to address classification problems and departures from the MFN principle.

(c) Rail transport services

Delegations noted that the low level of commitments on rail transport could be explained by the existence in almost all countries, until very recently, of publicly owned monopolies as the dominant

form of business organization. Several delegations described the evolution of their regulatory regime towards liberalization, privatization and the acceptance of foreign investment.

Delegations also noted the existence of discrepancies among schedules on the question of the technical feasibility of cross-border supply of maintenance services. One delegation suggested that additional work should be undertaken on scheduling questions and on a possible reference paper on the question of access to and use of transport infrastructures.

(d) Air transport services

Several delegations described their national regimes, notably in terms of standard clauses in their bilateral agreement and in terms of opening to foreign investment, both in airlines and also in airport activities.

One delegation expressed the view that more extensive commitments were needed in the three areas covered by the Air Transport Annex (computer reservation services, repairs and maintenance and selling and marketing). As far as hard rights were concerned, however, the system based on the Chicago Convention provided a sufficiently flexible framework, and therefore no extension of the present scope of the annex was needed. In response to another delegation which expressed regret that this conclusion should be suggested before the review of the Air Transport Annex had commenced, it was explained that this was the current position, but that it would participate actively and constructively in the review.

Another delegation highlighted recent developments in the air transport industry, including the development of global commercial alliances, as well as changing regulatory approaches in the sector, such as the greater number of "open skies" agreements. The delegation suggested that it would be useful to discuss soft rights and ground services in greater detail and that as a first step information might be collected through a questionnaire on ground handling access, tariff provisions, multiple designation of airlines, foreign ownership of airlines and individual freedoms of the air. This delegation also suggested that the Secretariat should gather information on work undertaken in other bodies and expand its analysis of the ICAO model clauses. Other delegations expressed interest in such work and indicated they were undertaking a similar review internally with a view to the forthcoming negotiations. It was agreed that these proposals would be discussed at a later stage, in the context of preparations for the review under paragraph five of the Annex on Air Transport Services.

One delegation expressed the view that non-transport air activities were relatively insignificant in terms of international trade, that ancillary services listed in the Secretariat paper were directly related to hard rights in so far as they were mentioned in bilateral agreements and that rental and leasing with crew, as opposed to the leasing of aircraft without crews, was normally regarded as an air transport service and would therefore be excluded from the present scope of the GATS. The ICAO representative delivered a statement which is reproduced in an informal document (Job N°6541).

(e) Maritime transport services

Several delegations described their national regimes. Regret was expressed at the low level of commitments in this sector, especially given that existing regimes are relatively liberal – more so than in other modes of transport. It was pointed out that the phenomenon of "de-flagging" vessels was a response to tax considerations as well as to operational costs. Attention was drawn to the importance of harbour services, nearly half of the output of which is delivered in developing countries.

Several delegations suggested that additional work on classification was needed, notably on dredging, on the question of multimodal transport (bearing in mind cabotage regulations) and on a possible

composite list combining W/120 and draft model schedule items. The link with the work undertaken on trade facilitation under the aegis of the Council for Trade in Goods was also underlined.

(f) Services auxiliary to all modes of transport

One delegation expressed the view that that freight inspection services were not services supplied in the exercise of governmental authority, as had been indicated in the informal Secretariat document Job N°5156, but services auxiliary to all modes of transport and were covered by CPC item 7490 and by the commitments made under this item.

**C. COOPERATION BETWEEN THE INTERNATIONAL TELECOMMUNICATION UNION (ITU) AND THE WTO**

10. The Chairman recalled that at the last meeting of the Council the Secretariat had been requested to prepare a short note indicating the main benefits, as perceived by the Secretariat, that would be derived from an agreement with the ITU. This note had been circulated as document (S/C/W/64). The Chairman drew attention to the key elements in the agreement, namely technical cooperation and exchange of information. He encouraged delegations to look at this matter in a positive light and to move towards a decision on it.

11. The representative of India said that his delegation was not yet able to accept a formal agreement, but that it remained open to a different type of arrangement. He also said that he would suggest to his authorities in capital that it would be desirable to reach a decision on the matter by the December Services Council meeting. The representative of Mexico said that her delegation could agree on an arrangement for technical cooperation and exchange of information, but it still had doubts on the form such arrangement should take. The representatives of Brazil, Japan and United States said that it would be desirable to have a revised text of the draft agreement at the next meeting of the Council so that delegations could forward with specific suggestions and changes.

**D. ARTICLE VI:4 WORK PROGRAMME**

12. The Chairman invited the delegation of New Zealand to introduce the paper it had submitted on the Article VI:4 work programme, contained in document S/C/W/66. The representative of New Zealand stressed the importance of working on Article VI:4 at the horizontal as well as at the sectoral level, but suggested that the logical starting-point should be issues of a more general application. She reminded participants of the Council Ministerial mandate to take up work on Article VI:4 as far as possible before the commencement of the next round of liberalisation negotiations and said that such work should not be subject to any further delay. She suggested that work might begin by: (i) looking at how domestic regulation has so far been dealt with under the GATS in the various services sectors; (ii) examining experiences on domestic regulation in other WTO areas; (iii) gathering information on work undertaken in other international and regional organizations; (iv) gathering factual background information on recent work by relevant international bodies on technical standards; and (v) convening an informal session of the Services Council to examine this material and to determine a future work programme.

13. The representative of the United States agreed with New Zealand that the Ministerial mandate required the Council to begin work in this area without further delay and possibly at the end of the information exchange exercise. He said that the horizontal and the sectoral approaches were not incompatible and that horizontal and sectoral work could also take place at the same time. He suggested that the Secretariat prepare a paper extracting information on Article VI:4 from the Secretariat's sectoral papers and from the delegations' papers and statement prepared for the information exchange exercise. Such a paper should also take account of work done on domestic regulation so far under the GATS, in particular in the telecommunications and accountancy sectors.

Several delegations agreed that it would be desirable that the Secretariat prepare a background paper and that the Council hold an informal session devoted to this matter. Some delegations, however, underlined that work at the horizontal level should not prejudice the work which was being done at the sector specific level on accountancy in the Working Party on Professional Services, but should take full advantage of it.

**E. REPORTING ON REGIONAL TRADE AGREEMENTS – RECOMMENDATIONS BY THE COMMITTEE ON REGIONAL TRADE AGREEMENTS**

14. The Chairman drew attention to the recommendations of the Committee on Regional Trade Agreements (CRTA) to the Council for Trade in Services adopted on 20 February 1998 with respect to how the required reporting on the operation of regional trade agreements should be carried out. These recommendations were contained in document WT/REG/5. They were communicated to the Chairman of the Services Council by the Chairman of the Committee on Regional Trade Agreements for the attention of the Council. The nature of these recommendations was essentially procedural and their implementation did not entail any change in Members' legal rights and obligations. They aimed at standardizing the presentation of reports on regional trade agreements to WTO Members. As the CRTA had prepared these recommendations in fulfilment of its mandate, the Chairman suggested that the Council take note of them.

15. The representative of the European Communities said that his delegation found the recommendations very useful, however, he pointed out that, with respect to point one in the Annex to the recommendations, Article V required Members' agreement for the referral of an economic integration agreements to the Committee on Regional Trade Agreements for examination.

16. The Council took note of the recommendations.

**F. ANNUAL REPORT OF THE COUNCIL TO THE GENERAL COUNCIL**

17. The Chairman drew attention to document S/C/W/67, which contained the report on the activities of the Council for Trade in Services for 1998. Normally, the report should have covered the activities of the subsidiary bodies on the basis of reports by them. However, due to the fact that the final meeting of the Services Council for 1998, on 14 and 15 December, would take place after the final meeting of the General Council on 9 and 10 December, the Council needed to approve its report at this meeting. Since the subsidiary bodies of the Services Council had not yet held their final meetings for 1998, the Council agreed to attach the reports of subsidiary bodies to its report once those reports have been finalized by the relevant subsidiary bodies.

18. The Chairman proposed that a paragraph on the work done by the Council on electronic commerce be inserted in the report and suggested that the Council adopt the report.

19. The Council so agreed.

**G. DERESTRICTION OF SECTORAL PAPERS BY THE SECRETARIAT**

20. The Chairman recalled that at the last meeting he had suggested that the Council take a decision to derestrict the papers written by the Secretariat for the sectoral discussions in the context of the exchange of information exercise. He stressed that there was nothing confidential in the documents. He introduced document S/C/W/65 dated 6 November 1998, which contained a list of the sectoral papers which had been produced so far.



21. The representatives of Brazil and Mexico said that they agreed to the derestriction of the first 13 papers listed in document S/C/W/65 (documents S/C/W/37 to S/C/W/52) provided it was clear that this decision did not prejudice the on-going debate in the General Council on derestriction.

22. The Chairman suggested that the Council agree to derestrict the Secretariat papers contained in documents S/C/W/37 to S/C/W/52, while a decision on the papers contained in documents S/C/W/59 to S/C/W/62 would be considered at the next meeting of the Council. He underlined that the decision to derestrict these documents would be based on the existing rules on derestriction and that it would not be prejudging the outcome of the debate in the General Council on rules for derestriction. He also stated that any decision on whether or not to derestrict further papers of the same kind would only be considered after such papers had been discussed by the Council.

23. The Council so agreed.

## **H. STATUS OF ACCEPTANCES OF THE FIFTH PROTOCOL**

24. The Chairman stressed the importance of having this as a formal item on the agenda, considering that the deadline for the acceptance of the Fifth Protocol on financial services (29 January 1999) was getting very close. Since the last meeting of the Council on 14 October, Egypt and Switzerland had accepted the Protocol, bringing the total number of acceptances to 13. There were also two signatures subject to ratification. The Chairman urged all Members concerned to bring this matter to the attention of their authorities in capitals responsible for the domestic ratification procedures. He noted that in the past there had been difficulties with the entry into force of earlier protocols because of delays in acceptance, therefore, everything should be done in this case to avoid similar difficulties. He reminded participants that on 20 November the Director General wrote to the Ambassadors of all those Members concerned which had not yet accepted, urging them to expedite procedures in capitals. He welcomed this initiative and expressed the hope that the Council would reinforce the message.

25. The representative of the European Communities said that five Member States had completed internal ratification procedures and that all the remaining Member States were expected to complete their internal procedures in time to meet the deadline. The representative of Venezuela informed the Council that her government had reached the final stages of the internal ratification procedure. The representative of the United States informed the Council that his government was in a position to accept the Protocol and will proceed to do so. He expressed the hope that this would represent an encouragement for other to do the same.

## **I. OTHER BUSINESS**

26. The representative of Ghana said that his government had accepted the Fourth Protocol to the GATS in November 1997, subject to ratification. The final acceptance was deposited with the Legal Affairs Division of the WTO Secretariat on 28 October 1998. The deadline for accepting the Protocol was 31 July 1998. He asked the Council to re-open temporarily the Fourth Protocol in order to allow his government to accept it.

27. The Chairman asked the Secretariat to prepare a draft decision on re-opening of the Fourth Protocol, which would be considered by the Council at its December meeting.

28. The representative of the United States proposed that the Council hold an information session on the Telecommunications Services Agreement. He said that such a session would be useful to exchange views among Members on the results of the agreement and to discuss any technical assistance which might be needed. He stressed that such technical assistance was particularly needed by those Members who were undertaking regulatory reforms. He informed participants that the

United States was already involved in technical assistance in the telecommunications sector. The Chairman took note of the statement made by the representative of the United States and proposed to inscribe the proposal as an item on the agenda of the next meeting of the Services Council.

29. The Chairman reminded participants that upon completion of the information exchange exercise in December, the Council was called upon by Article XIX of the GATS to carry out an assessment of trade in services and to establish negotiating guidelines and procedures for the next round of liberalisation negotiations. He proposed that although the assessment might begin in February, at its next meeting in December the Council might have a preliminary exchange of views on this subject. Several delegations expressed support for the Chairman's proposal.

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