

Committee on Specific Commitments

REPORT OF THE MEETING HELD ON 28 NOVEMBER 2000

Note by the Secretariat

1. The Committee on Specific Commitments held its eighteen meeting on 28 November 2000. The agenda for the meeting was contained in WTO/AIR/1448. The Chairman circulated under his responsibility a Note on "Classification and Scheduling Guidelines" (document Job No. 7294), which was meant to help delegations in the discussions of these two agenda items. No points were raised under other business.

A. CLASSIFICATION ISSUES

2. The discussions on the classification of services sectors were held in the informal mode. The agenda of these informal discussions was contained in a fax sent to delegations on 21 November 2000. The following is a summary of the informal discussion, prepared by the Chairman on his responsibility.

Production on a fee or contract basis

3. The Chairman asked delegations to address the following issues as outlined in the Chairman's Note for the meeting: (a) various services, that are supplied to manufacturers, are subject to the GATS and are classified or classifiable under W/120; (b) pure manufacturing should, however, not be classified as services, even if it is carried out on a fee or contract basis; (c) services incidental to manufacturing, such as drilling, should be treated on a case-by-case basis. He also invited delegations to voice their views on how best to treat this item in the future, that is whether the general debate should continue, or whether it would be better to make a preliminary conclusion at this stage and leave questions on future work to be dealt with on a sector-by-sector basis.

4. One delegation, while agreeing that all service supplied to manufacturers were subject to the GATS and should be classified or classifiable under the W/120, argued that question (b) relating to "pure manufacturing" had not been properly addressed thus far. In the view of his delegation, a manufacturing activity could not be considered a service if the manufacturer was also the owner of the raw materials. In contrast, this delegation agreed with the CPC approach, which classified as services manufacturing activities which were carried out "on a fee or contract basis", that is to say on raw materials owned by others than the manufacturer. Similarly, activities such as mining and refining performed on a fee or contract basis should also be considered services. However, the goods resulting from manufacturing processes performed on a fee or contract basis would still be subject to the GATT. On question (c) this delegation agreed to consider services incidental to manufacturing on a case-by-case basis, provided that this was without prejudice to the answer to be given to question (b).

5. Another delegation said that in their view the questions in the Chairman's note and in the Secretariat's paper were not properly posed. However, as they had been asked to provide an answer to such questions they would respond. In their view, the activities referred to in questions (a) and (b) were services while those in question (c) were not. The UN CPC and ISIC classifications were interrelated and that therefore they had to be read in conjunction to better understand the treatment reserved to manufacturing and services. From the joint reading of the CPC and ISIC it emerged that

all economic activities, including manufacturing on a fee or contract basis, could be classified as services with the exception of mining and agriculture, which could only be done at the site of production and therefore not “on a fee or contract basis”. Members had agreed to base their classification on the CPC and they should rely on it. There was thus no point in arguing about the coverage of services. In sum, it would be more appropriate to address the following issues in this debate: (1) Members should consider the possibility that all manufacturing activities may actually be subject to the GATS, if performed on a fee or contract basis; (2) if there are subsidies to certain manufacturing activities, care must be taken, unless those subsidies are listed in the national schedule; (3) if a foreign investment is made in a company producing on a fee or contract basis in the manufacturing sector, relevant GATS provisions and mode 3 commitments can apply; (4) attention must be given to the MFN obligation; this obligation is applied without any commitment in the schedule; (5) tariffs imposed on goods manufactured on a fee or contract basis may restrict the cross-border supply of a service.

6. All other delegations, however, found the questions posed in the Chairman’s Note to be relevant and agreed that all services supplied to manufacturers should be covered by the GATS (a). Most delegations also agreed that in principle manufacturing activities should not be classified as services (b), although some said that the fact that the CPC classified “manufacturing on a fee or contract basis” as a service should be given more attention. One delegation, while agreeing with the Chairman’s suggestion on question (b), pointed out that the conclusion should be that manufacturing activities were not services; they could not be classified as services under the GATS. The same delegation also argued, with the support of others, that it was questionable that it was within the mandate of the Committee to reach formal conclusions on such matters and that the general discussion on production on a fee or contract basis in the CSC had already reached the limit of its productivity. Other delegations, while not asking for formal conclusions, said that the work of the Committee on this matter should serve the purpose of providing some guidance to Members. Most delegations agreed to look at services incidental to manufacturing on a case-by-case basis (c), although one delegation noted that they were still considering this question. Some delegations questioned the view that the CPC approach to “manufacturing on a fee or contract basis” should prevail, arguing that the CPC classification was originally prepared for statistical purposes and that, although it could be used by Members for scheduling commitments, it neither constituted an agreed method of scheduling nor did it have any legal influence on the scope of application of the GATS.

7. One delegation said that this matter was still being studied in capital and that for the time being they preferred not to answer the questions posed in the Chairman’s Note. Regarding the proposal that services incidental to manufacturing be dealt with on a case-by-case basis (c), it had been said that this whole issue could be dealt with on a case by case basis. This delegation wanted to know what that meant. Would it be done on a sectoral basis? At dispute settlement? During the request/offer phase? In what body would it take place? This delegation also asked whether different approaches would be developed for different sectors or whether a general approach would be developed and whether such case-by-case work would take place before or after the request and offer process and in which body. The Chairman replied that he understood that case-by-case work on classification issues would take place before the beginning of the request and offer process in the CSC.

Energy services

8. The Chairman proposed to advance discussions on this sector by addressing the questions formulated in his Note for the meeting. He asked (a) whether delegations agreed with the statement by the United States that all activities in Attachment A were in principle already covered by W/120. If not, what elements of energy activities did not appear to be covered in W/120; (b) assuming that all the energy-related activities were already covered in W/120, would additional work still be necessary to improve classification in this sector? If so, what should this work be; and (c) did delegations agree to amend W/120 in view of establishing a new energy sector, as proposed by the US?

9. One delegation offered preliminary support to the US proposal to establish a new energy sector in W/120 and agreed with the United States that in principle all activities listed in Attachment A were already covered by the /120. This delegation, however, noted that “services incidental to mining” covered energy related as well as some non-energy related activities and that a possible improvement would be to divide this entry between “services related to the production or extraction of energy products” and “services related to the production or extraction of other products”. The same delegation argued that in their view some fairly central energy related activities, such as services connected to the to exploration and other supporting services related to oil and gas production, appeared not to be included in any of the three energy sub-groups proposed by the United States. There were no major objections to the US proposal of creating a new sector in W/120 on energy services by moving existing W/120 sub-sectors. However, one delegation noted that this was just a presentational exercise, while the substance of energy classification was addressed by questions (a) and (b) in the Chairman’s Note. Another delegation argued that, in the absence of more detailed proposals, to discuss such a change to W/120 was premature.

10. Some delegations expressed doubts on the inclusion in a new energy classification of some activities relating to production, which in their view might not be covered by the GATS. Other delegations, while in principle agreeing with the preliminary statement by the United States that all activities in Attachment A might already be covered by W/120, argued that more work was needed in this area on the correspondences with existing W/120 entries and with the CPC.

Legal Services

11. In the Note for this meeting the Chairman put forward for the second time the following three options for the classification of legal services: (a) maintaining the current definition of W/120, based on the provisional CPC, of which the relevant part was circulated at the last meeting; (b) adopting the definition of legal services frequently used in current schedules of Members; (c) introducing a new category of “foreign consultancy”, as proposed by the US and Japan and Korea. He also invited delegations to comment on terms, such as “international law” or “consultancy”, taking into consideration the Korean paper (document Job No. 4977).

12. At this meeting, the discussion on this sector did not progress in substance as delegations divided their support evenly among options (a) (b) and (c). One delegation supporting option (c) argued that foreign legal consultancy (FLC) should be limited to home country law and international law with the exclusion of host country law. Regarding the issue of the definition of international law, this delegation argued that the concept of international law did not include “private international law” meant as “conflict of laws” deciding upon the applicability of domestic laws among people with different nationalities. On the other hand, private international law, meant as the law that regulated international business transactions between private individuals, was to be included in the definition of international law to be practiced by foreign legal consultants. The same delegation proposed that in order to clarify whether international laws with the effect of domestic laws (due to internal ratification) were excluded from the scope of FLCs’ opinions, the following sentence be added to the definition of international law: “International laws include treaties, conventions, protocols and other bilateral or multilateral agreements which have come to have the effect of domestic laws in each individual country”. Finally, the delegation argued that the sources of international law enumerated in Article 38 of the Statute of the International Court of Justice (ICJ) were not relevant to the determination of the scope of international law for the purpose of defining a category of foreign legal consultants to be negotiated under the GATS.

13. One delegation argued that the creation of a new category of foreign legal consultants was probably not necessary as the activities to be performed by FLCs were probably already covered by the CPC under legal advisory services. Another delegation questioned the fact that some delegations which supported option (a) had not followed the CPC in their Uruguay Round schedules, but opted for

an *ad hoc* classification distinguishing between advisory and representation services and host country, home country and international law.

Environmental services

14. The European Communities presented a revised draft of their proposal on environmental services, which attempted to provide a solution to the three main outstanding issues in the classification of this sector. The Chairman drew delegation's attention to the issues raised in the Chairman's Note concerning the revision of the classification of environmental services. The first issue concerned "water purification and supply services through mains, except for steam and hot water". He recalled that at previous meetings a large number of delegations shared the view that this sector was not covered by W/120 and, therefore, its inclusion in the "core" part would not give rise to any duplication problems. The main question was, therefore, whether or not this service should be included in the environment sector of W/120, considering the fact that the water collection and purification elements may be considered as part of the environment protection activities. Also relevant to this sub-sector was the question of "bulk water". The Chairman asked delegations whether they would have any objection that no particular reference be made to this matter, since the classification exercise did not force Members to liberalise a certain sector. Therefore, any necessary exclusion from liberalisation could be achieved at the time of making commitments. The second issue, concerning services related to recycling, prompted two questions: (a) whether recycling could be considered as a service covered by the GATS, or whether it should be considered as an act of manufacturing and, therefore, placed outside the scope of the GATS; and (b) assuming that recycling was a service, whether it should be considered as part of the environmental services sector.

15. Some delegations agreed that water purification should be classified as an environmental service, but wondered about the environmental relevance of water distribution and supply services, which in their view had a wider reach than the environment. One delegation expressed surprise that water distribution could be considered a "new service", not yet covered by W/120 and by the CPC. Another delegation supported the classification of water distribution, collection and purification as environmental services, but suggested that the concept of "substantial transformation" be used to distinguish between pure manufacturing processes and services. The delegations, which had asked for the exclusion of "bulk water" from water distribution services, argued that this related to the conservation of exhaustible natural resources and, therefore, should not be covered by the GATS. They were still consulting with their capitals on the suggestion made by the Chairman on this issue. Most delegations supported the moving of recycling services to the cluster section of the EC paper, while some other delegations continued to question the fact that recycling could be classified as a service, as it related to production processes.

16. One delegation said that it required more time to consider the issue of water distribution, collection, and purification services and like others had sub-federal concerns to consider. At this time, it was unable to support the EC proposal to include these services in the core list or even in W/120 at all. Since code 18000 was on the goods side of the CPC provisional, it was unclear what its inclusion in W/120 would mean. This delegation also noted that the Chair's comment in Job 7294 para 5c that "the classification exercise does not force Members to liberalize a certain sector ... any exclusion from liberalization deemed necessary could be achieved at the time of making commitments", did not address the complexity of the issue at hand. How, for example, should Members deal with "unbundled" services resulting from privatization of water services? Could these unbundled services be considered "new" services or should "new" services be only those which had been "invented" since the end of the Uruguay Round? The answer to these questions could potentially affect the schedules of commitments. This delegation inquired whether the EC thought water distribution, collection and purification services were not in W/120 and CPC provisional at all or whether they were covered, but not easily identifiable.

17. Some delegations supported a proposal by the Chairman that the Secretariat prepare a draft of a possible revision to the W/120 section on environmental services, based on the common understanding reached on the EC proposal. Other delegations, however, argued that it would be premature to start working on a W/120 revision, even if still limited to the environmental sector, due to the differences that still existed among delegations on the classification of this sector. One delegation expressed concern about introducing draft amendments to W/120 only in one sector. It was preferable continuing the work on a sector-by-sector basis and introducing changes to W/120 at a later stage, when common understandings on the classification of more sectors had been reached.

Postal and courier services

18. In his Note, the Chairman had asked delegations: (a) whether they were satisfied with the current classification, which distinguished postal services from courier services, based on whether they were operated by the national postal administration or by private operators. Or, rather, whether they wished to change the classification based on the EC's proposal; and (b) to add express services as a new service to the current W/120, in accordance with the proposal by the US.

19. One delegation asked the EC and the United States to provide more detailed information on their proposals on the classification of postal and courier services. The United States restated their proposal of creating a new and separate classification entry for "express delivery services" and argued against combining postal and courier services in a new classification. Delegations continued to question the EC and the US on the details of their respective proposals, but were not able yet to reach a common understanding.

Construction services

20. At previous meetings, following a proposal on the classification of construction services by New Zealand, the Committee had asked the Secretariat to consult with the Statistical Office of the United Nations on the coverage of CPC 512 and 513. At the last meeting, the Secretariat had informed delegations that The United Nations technical sub-group on classification was holding a meeting on the coverage of the CPC with respect to integrated construction services on October 16 and that, hopefully, some input would be available on this matter after that date. The Chairman asked the Secretariat to report to the Committee on its consultations with the United Nations and sought further views from delegations on the classification of construction services.

21. The Secretariat informed delegations that, on the question posed by the Committee on the classification of construction services, the United Nations Statistical Office had replied that its technical sub-group on classification had reached the following decision: "In the case of construction turnkey projects, it was agreed to place these products with their largest value-added contributor. This will put them in construction services". The UN Statistical Office also added that additional details on this matter would be transmitted, as soon as the final report on this meeting of the technical sub-group had been prepared. One delegation pointed out that a seminar on construction services had been held by UNCTAD a few weeks earlier and that it would have been useful to its work on the classification of this sector if the Committee had acquired the acts of this seminar.

22. On production on a fee or contract basis, the representative of Canada said that her delegation was still studying the matter and that for the time being they preferred not to answer the questions posed in the Chairman's Note. Regarding the proposal that services incidental to manufacturing be dealt with on a case-by-case basis (c), she asked whether different approaches would be developed for different sectors or whether a general approach would be developed from the analysis of various sectors and whether such case-by-case work would take place before or after the request and offer process and by which body. The Chairman replied that the idea was that case-by-case work on classification issues would take place before the beginning of the request and offer process in the CSC. On environmental services, Canada called for the specific exclusion of bulk water from water

distribution services and said that they were still reflecting on the proposal by the Chairman on this issue. On water distribution, its representative expressed surprise that this could be considered a “new service”, not yet covered by W/120 and by the CPC. On recycling, she argued that her delegation considered it to be a production process and that the treatment of this activity for GATS purposes depended on the outcome of the general debate on production on a fee or contract basis. In any case, she supported the moving of recycling services from the “core” to the “cluster” section of the EC proposal.

23. The representative of Venezuela made a statement for the record on the classification of energy services referring to a possible approach to follow in amending W/120 in this area. He argued that in its current form, the W/120 did not adequately reflect the market reality of WTO Members in the energy sector and that his delegation supported an amendment of it, which introduced a new classification of energy services based on a distinction between energy sources. For example, a new energy section in W/120 could distinguish between services relating to hydrocarbons, services relating to electricity and services relating to other energy sources. In addition, such classification should distinguish between “core” energy services, which intervened directly in the energy value-added chain and services which relate to processes, which are incidental to the value-added chain. Examples of the first case would be evaluation and exploration, drilling, completion and development, while examples of the second would be design and construction of energy production facilities, design and construction of energy networks, maintenance and repair. According to Venezuela, however, a new energy classification in W/120 should exclude any activity which did not constitute a service subject to the GATS.

B. SCHEDULING GUIDELINES

24. At the last meeting, the Committee had considered a first consolidated draft of the revised scheduling guidelines (document Job No. 5415), which had been prepared by the Secretariat on the basis of the outcome of previous meetings. The discussion focused on three outstanding issues and on other comments on the entire text of the revised guidelines. The three outstanding issues were (i) the scheduling of measures inconsistent with both Articles XVI and XVII according to Article XX:2 of the GATS; (ii) mode four commitments without specified duration; and (iii) the illustrative list of national treatment restrictions. At an informal meeting held on 31 October, Members had further advanced their work on the outstanding issues and on the text of the draft guidelines. After that meeting the Secretariat had been asked to prepare a revised version of the draft guidelines, which was circulated to delegations at this meeting as document Job No. 5415/Rev.1 (7182).

25. The Chairman proposed that discussions at this meeting took place on the basis of the new text by the Secretariat, which took account of the comments made by delegations on the first draft of the revised guidelines at the past meetings. He suggested that delegations begin by focusing first on the three contentious issues, followed by other comments on the entire text of the guidelines.

Measures inconsistent with both Articles XVI and XVII

26. The Chairman said that his current proposal provided Members with a certain flexibility to make clear whether a limitation inscribed in the market access column was also meant to apply as a national treatment limitation. He noted that without such a reference, it would be for a panel to make the ultimate decision. He invited delegations to express any views they might have developed since the last meeting, including on the most desirable and realistic way to succeed, given the limited time period until March 2001.

27. Several delegations supported the Chairman’s proposal, which in their view clarified the language of Article XX:2 GATS without being incompatible with the text of this Article. Other delegations continued to express reservation on the language proposed by the Chairman and said that their authorities were still considering the matter. Some delegations suggested softening the language

in the Chairman's proposal, by changing "should" into "could" or "are encouraged to" in line 2 and adding the words "for the sake of clarity" after "Members could/are encouraged to indicate" in the same line.

Mode four commitments without specified duration

28. The Chairman recalled that at the last informal meeting, there was a useful suggestion from one delegation, reflected in the revised draft of the Secretariat, which could constitute a basis for building consensus. This consisted in deleting the third sentence of paragraph 32 and inserting paragraph 32/Add.1 as third and fourth sentence of paragraph 32. Given the number of discussions the Committee had had so far, he said that the time was ripe for reaching a compromise on the issue. He asked delegations if there were any serious objections to this revised draft.

29. Canada said that they could support the Chairman's proposal if it was specific that the reference in the text was to "maximum" duration. India and Brazil expressed a preference for keeping paragraph 32 unchanged, while Hong Kong, China supported the Chairman's proposal in its entirety. Hong Kong, China also said that in their view it was not desirable to refer to "maximum" duration as the treatment specified in the schedules represented a "minimum", so that it would have been better to leave the term "duration" unqualified.

Illustrative list of national treatment restrictions

30. The Chairman recalled that at the previous meeting the delegation of the United States had proposed to fully delete attachment 1, which contained the illustrative list. At the last informal meeting, however, a number of delegations expressed their wish to maintain the current list in the guidelines. In the interim, the Chairman and the Secretariat had received a useful suggestion from the delegation of Uruguay whereby the list would be retained, provided that the chapeau was expanded by making the following three points very clear: (a) that the measures on the list came from Members' schedules; (b) that the list did not prejudice the position of any Member with regard to the interpretation of Article XVII of the GATS; (c) that the list remained of an illustrative nature and was by no means exhaustive. The Secretariat had incorporated this suggestion in the new draft of the revised guidelines.

31. Several delegations supported the inclusion of attachment 1 in the guidelines with the caveats proposed by the Uruguay for the chapeau. The United States said that they were still concerned about attachment 1, but could be flexible with the changes made to the chapeau.

32. Due to time constraints, delegations could not discuss the entire text of the draft revised guidelines page by page, as originally planned. Delegations concurred that, with the best endeavour deadline of March 2001 approaching, the Committee should reconsider its organization of work and give priority to the completion of work on the revision of the scheduling guidelines. It was the general view that this objective could realistically be achieved by the best endeavour deadline set for the on-going work of the CSC. The Chairman would consult on the possibility of calling informal meetings to advance work in this area as much as possible before March 2001. On classification, Members agreed to continue working at the current pace.
