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Committee on Specific Commitments

REPORT OF THE MEETING HELD ON 27 APRIL 1999

Note by the Secretariat

The Committee on Specific Commitments held its ninth meeting on 27 April 1999 under the Chairmanship of Mr. Juan Marchetti of Argentina. The agenda of the meeting was contained in airgram WTO/AIR/1062.

I. SCHEDULING GUIDELINES

1. In view of the preliminary nature of the comments made during the first discussion of the Note by the Secretariat on the revision of scheduling guidelines (S/CSC/W/19), the Chairman suggested conducting a full discussion of the text.

2. On paragraph 6, Canada indicated that it considered that revising the scheduling guidelines should be an evolutionary process which should continue during the preparation for the new services negotiations and throughout the negotiations to come. The goal of this process should be to develop one set of guidelines which will incorporate the results of the next services negotiations. The development of revised scheduling guidelines should not, however, affect the possibility of recourse to earlier versions of scheduled commitments in order to clarify elements of Members' commitments. In the event of ambiguity, Canada believed that previous versions may indicate the "common and ordinary meaning of the commitment" as expressed by the Member. It was apparent that different approaches to scheduling commitments existed. The discussion to revise the scheduling guidelines will likely make these differences even more apparent. Canada believed that it was appropriate to discuss these differences in this Committee. Canada also considered that several of the suggestions for revision in the Secretariat document appeared to reinterpret the GATS Articles and expressed concern about making any revisions to the scheduling guidelines that may have the effect of reinterpreting the GATS Articles. Such matters would be best addressed in the next services negotiations and not in the CSC. The European Communities supported in general the Canadian comments. The revised guidelines should not have a negative impact on existing commitments; scheduling guidelines were an issue to be discussed during the negotiations. The European Communities, while convinced of the need and utility of the scheduling guidelines, had no position yet on their future status and level of details.

3. Reacting to the comments by Canada, Hong Kong, China, considered that the revision of the guidelines had no legal status, but was an aid to Members to help them identify unclarities in the schedules and in the guidelines. Before dismissing any suggestions by the Secretariat as affecting the substance of the GATS itself, as requested by Canada, one should consider very carefully each of these proposals for the sake of transparency. India was also opposed to any a priori deletion in the text of the Secretariat.

4. On paragraph 7, answering queries by Japan, the Secretariat explained that the envisaged alphabetical index would be a simple table. Members could find for instance the number of the paragraphs in which terms such as "residence" had been mentioned and thus identify all relevant rules regarding the scheduling of residency requirements. Japan considered that the guidelines for MFN exemptions were an important issue and that the existing guidelines should therefore be attached. Japan enquired also about the status of the work of the Secretariat on the revision of those guidelines. The Secretariat stated that these guidelines did not have the same status as the guidelines governing the drafting of specific commitments (lack of formal character indicated at that time by a "green band") and indicated that no further work had been undertaken in that respect.

5. On paragraph 9, Canada agreed with the Secretariat's statement that, since schedules were records of legal commitments, nothing should appear in them which was not legally binding. Presumably anything contained in a schedule, in whatever form, was part of the treaty and thus had legal effect. Any entry would need to be interpreted in accordance with the ordinary and common meaning of the words used, and applied within the context of the treaty. While Canada agreed that Members should not inscribe matters that were not intended to have legal effect, it had concerns regarding the suggestion that elements of some entries might not have any legal effect. Canada expressed similar points of view on paragraphs 10, 11 and 12. Japan agreed with the statement by the Secretariat according to which references in a schedule to a measure inconsistent with one of the general obligations and disciplines in Part II of the Agreement would be inconsistent with the GATS. Schedules could not be used to subtract Members from their obligations under the Agreement. However, there were cases where explanatory notes to specific commitments contributed to the clarity and transparency of the commitments.

6. On paragraph 10, Japan agreed that footnotes should be in principle avoided. However, one should conduct a careful examination in order to see if the deletion of each footnote would make the commitment concerned unclear or not or if the footnote could be incorporated in the relevant columns.

7. On paragraph 11, Japan enquired if there were concrete examples of problems caused by headnotes and covernotes in existing schedules.

8. On paragraph 13, Canada felt that the fact that schedules did not indicate the date of entry into force of the commitments was a problem related to the GATS itself and not to the scheduling guidelines. Any improvement with regard to this issue would have to occur only during negotiations.

9. On paragraph 14, Canada agreed with the new wording suggested by the Secretariat.

10. On paragraph 15, Canada felt that the use of the terms "pre-entry" and "post-entry" was confusing since they were not defined terms in the GATS Articles. It was not apparent that further clarification of the bolded paragraph 4 was needed. Japan, indicating that these elements were evident, was not convinced of the need for additional precision.

11. On paragraph 16, Canada considered that the revision would imply a reinterpretation of Article XVI. In addition, terms such as "national" and "foreigner" should not be used. These should be replaced by the terms used in the GATS. Japan indicated that these elements were self-explanatory and doubted the need for additional precision.

12. On paragraph 17, Canada agreed with the new drafting suggested by the Secretariat.

13. On paragraph 18, Canada felt that the level of detail of the suggested drafting regarding licensing requirements was unnecessary and would not solve the problem of distinguishing between Articles XVII and VI. The manner in which these two articles was distinguished was subject to each

Member's understanding. Canada therefore supported continued reliance on the bolded paragraph 29 of document MTN.GNS/W/164/Add.1.

14. On paragraph 19, Canada believed that, if a problem existed, it related to the GATS Articles and therefore was a problem of interpretation. Clarifying this problem via the scheduling guidelines should not be undertaken by the CSC. Japan was inclined to agree that the mention of minimum requirements as a restriction might be needed. However, several Members had not mentioned these minimum requirements in their schedules. In the event that they would be considered as a restriction, those Members might need to introduce new restrictions in their schedules, and one should find ways to address that problem as it might deteriorate the level of commitments. Korea considered that minimum requirements could operate as market access restrictions, but doubted that these types of restrictions could be incorporated in Article VI of the GATS. In cases of nullification or impairment of commitments. Article XXIII of the GATS would apply.

15. On paragraph 20, Japan thought that more discussion on the scheduling of residency requirements was needed as even in cases where they applied to a person not directly supplying the services, they could be well considered a market access restriction.

16. On paragraph 21, concerning the significance of the word "total" in Article XVI.2b, Canada felt that the Secretariat was highlighting a problem with the GATS Articles. Clarifying this problem via the scheduling guidelines should not be undertaken by the CSC.

17. On paragraph 22, Canada considered it unnecessary to suggest a possible example of both individual and aggregate foreign shareholdings.

18. On paragraph 23, Canada agreed with the suggested addition of the content of the relevant paragraph of document MTN.GNS/W/164/Add.1.

19. On the illustrative list of national treatment examples suggested in paragraph 24, Canada indicated that the focus of the revisions should not be on simply listing broad categories of measures relating to national treatment, but on identifying the discriminatory elements that might arise from each of the measures listed.

20. Korea indicated that such a list would be useful, but only if it was illustrative and not exhaustive. The subsidy-related example should be excluded from the list as there were no agreed definitions or disciplines for subsidies.

21. On the suggestion by the Secretariat regarding subsidies contained in paragraph 26, Korea considered this paragraph inappropriate as there was no agreed definition or disciplines for subsidies.

22. Canada did not support the proposal either. Further clarification of this issue was not required; bolded paragraph 10 was sufficient.

23. With regard to paragraph 27 relating to the scheduling of measures inconsistent both with market access and national treatment, Canada believed that clarifying this point via the scheduling guidelines should not be undertaken by the CSC. The Chairman suggested to Members to reflect on a compromise proposal to be included in the scheduling guidelines: continue scheduling measures contrary to both articles in the market access column, in order to respect Article XX:2, while indicating by a typographical convention that the measures were contrary to both market access and national treatment.

24. On paragraph 28, which raises the possibility of scheduling additional commitments for just one mode of delivery, Canada indicated that this was evident from the bolded paragraph 12 and therefore no addition was needed.

25. With regard to the suggestion on prudential measures contained in paragraph 29, Japan underlined that prudential measures only existed in the financial services sector and did not yet have a precise definition. Hence it was doubtful whether a Member would want to take additional commitments in this area which, in turn, suggested that the proposed addition was not necessary. Canada indicated it had no evidence that there was a problem, and expressed interest in other Members' views. Would an additional commitment have the effect of waiving an exception? Canada would be concerned about anything that would have the effect of reducing the ability to implement prudential carve-out.

26. On paragraph 1, page 13 - so numbered as a consequence of a technical error -, Canada supported this statement and the Secretariat's proposed drafting. However, the reference in the revised text should have been to "version 1.0" and not "revision 1" in line with the United Nations Document ST/EDA/SER:M/77 ver 1.0 which was cited in footnote 5 of the Secretariat document.

27. On paragraph 31, Canada supported the Secretariat's statement that detailed definitions were essential for the purpose of transparency and disciplines when a Member scheduled commitments without using the CPC code as reference. In any case, the scheduling guidelines indicated in bolded paragraph 16 that "Where it is necessary to refine further a sectoral classification, this should be done on the basis of the CPC or other internationally recognized classification". The United States considered that work on the classification part of the scheduling guidelines was premature as it anticipated the work of the Committee on classification. The United States therefore suggested setting aside those paragraphs for the time being. In addition, the guidelines should in future require Members to indicate precisely to which version of the CPC they were referring to. Norway supported this position.

28. On paragraph 32, Canada considered that the distinction between modes of delivery was a significant issue and beyond the scope of the revision of the scheduling guidelines. It should therefore be considered elsewhere. Referring to discussions on financial services and electronic commerce, Norway emphasized the need to provide as much clarity as possible on the distinction between modes in the scheduling guidelines. This should not be left to future negotiations. The United States suggested waiting until other bodies such as the Financial Services Committee had come to a conclusion on that issue, which was more than a pure technical question.

29. On paragraph 33 and the suggested addition of the paragraph of document MTN.GNS/W/164/Add.1 relating to the scheduling of residency requirements, Canada considered that clarifying this issue via the scheduling guidelines should not be undertaken by the CSC.

30. On paragraph 34 relating to the combination of horizontal and sectoral entries, the United States was not convinced of the need for the first indent of the suggested drafting as it did not capture the issue of Article XX:2.

31. On paragraph 35, suggesting the inclusion of the paragraph of document MTN.GNS/W/164/Add.1 dealing with references in schedules to general legislation, Canada indicated that an additional clarification or an example would be helpful in this paragraph. The Secretariat indicated that this, being part of document MTN.GNS/W/164/Add.1, had already been agreed by Members and that it was referring to entries of the type "all other laws and regulations apply". The United States indicated that there remained some grey areas in this context.

32. On paragraph 36 relating to the scheduling of the lack of technical feasibility, Japan and Korea supported the suggestion by the Secretariat to delete the relevant paragraphs in MTN.GNS/W/164 and MTN.GNS/W/164/Add1. Canada supported in principle that there should only be limited use of the term unbound.

33. On paragraph 38 dealing with the relationship between entries in the market access and national treatment columns, Canada indicated that the CSC should not attempt to clarify the legal relationship of commitments under Articles XVI and XVII via the scheduling guidelines.

34. On paragraph 42, relating to the scheduling of measures subject to GATT disciplines, Canada considered that the comment by the Secretariat questioned the scope of the GATS and, therefore, could not be addressed via the scheduling guidelines. The United States indicated it considered this clarification unnecessary.

35. On paragraph 45 on foreign exchange controls, the United States reserved its position. Canada indicated that it needed to understand the range of measures covered by the term "restriction on international transfers and payments" in order to determine if there was an overlap with measures deemed restrictions on market access or national treatment.

36. After a short debate on how to proceed, the Chairman suggested that the Secretariat produce an informal document on the basis of S/CSC/W19 which would summarize after each paragraph the comments made by delegations during the two discussions of the paper. The Committee so agreed.

II. CLASSIFICATION

37. The Chairman recalled that this part of the meeting was to be conducted in informal mode. As agreed at the last meeting, discussions on classification would be recorded in a regularly updated informal document. Details of the discussion on this agenda item can be found in document Job No. 205/Rev.2.
