

## Council for Trade in Services

### REPORT OF THE MEETING HELD ON 3 DECEMBER 2001

#### Note by the Secretariat

1. The Council for Trade in Services held a meeting on 3 December 2001. The Council elected Ambassador Jara of Chile as interim Chairman for the meetings of the regular and special sessions, as the Chairman of the Council, Ambassador Amorim of Brazil, was unable to chair these meetings.

2. The agenda for the meeting is contained in document WTO/AIR/1683. The Chairman proposed that the Council adopt the agenda as circulated.

3. The Council so agreed.

#### A. ARTICLE II (MFN) EXEMPTIONS

##### (I) PROCEDURES FOR TERMINATION, REDUCTION AND RECTIFICATION OF ARTICLE II (MFN) EXEMPTIONS

4. The Chairman recalled that the Council had agreed at its last meeting to task the Secretariat with the preparation of draft procedures for the certification of rectifications, improvements and terminations of MFN exemptions, for consideration by Members at the present meeting. The draft procedures were contained in document S/C/W/202. In addition, and without prejudice to the outcome of the discussion, the Secretariat had also prepared a draft decision, contained in document S/C/W/203, to allow Members consideration of the text of the decision alongside the procedures.

5. A representative from the Secretariat stated that the draft procedures addressed three different cases, i.e. rectification of changes of a technical character, the possibility for improvements of the scope or level of MFN exemptions, and termination of MFN exemptions for which no termination date had been specified in the respective list. The draft decision had been presented to Members for sake of completeness and was without prejudice to the outcome of the discussions on the draft procedures.

6. The representative of Uruguay, speaking on behalf of Mercosur, stated that the request to the Secretariat to draft one procedures for the three cases mentioned had been without prejudice to the substance of these issues which required examination by the Council. He noted that the topics could also be taken up in the Committee on Specific Commitments.

7. The representative of Japan supported adoption of one procedure for the three cases of rectification, improvement, and termination, yet remained open to address only the situation of rectification for the time being. He noted that paragraphs 5 and 7 of the Annex on Article II Exemptions addressed cases in which an exemption would automatically terminate. It should be made clear that the procedures did not apply to cases governed by those paragraphs. Further, he wondered whether a mechanism needed to be devised to deal with cases where a Member objected to the certification; in building on the procedures contained in document S/L/84 in this respect, he considered that it might be useful to state explicitly that a Member retained the right to withdraw a request for certification throughout the process; in addition, the procedures should provide for

solutions to situations where despite a persistent objection by another Member the initial request for the certification was not withdrawn.

8. The representatives of New Zealand and Australia supported the removal of the brackets and adoption of the draft procedures in their present form. There was no need to refer this issue to any subsidiary body.

9. The representative of Turkey welcomed the text, and commented that for the case of termination of MFN exemptions, there was no need for a 45-day period for objection by other Members.

10. The representative of Hong Kong, China stated that his delegation was still reflecting on the possibility for reductions of MFN exemptions. Commenting on the draft procedures, he suggested that for reasons of transparency, the Member seeking certification should also indicate the background and reasons for the request. Furthermore, in paragraph two of document S/C/W/202, it should be made explicit that if more than one Member had raised objections, the withdrawal of all objections should be communicated to the Secretariat.

11. The representative of Hungary stated that in the present draft procedures, Members could end up with a situation whereby one Member could stop the termination of an MFN exemption by objecting to the certification. This was not a desirable outcome.

12. The representative of Mexico stated that in devising a process for further work on the issue, the establishment of additional groups should be avoided.

13. The Chairman noted that the discussion showed that the draft procedures prepared by the Secretariat provided a good base for further work. It had been mentioned that such work could be referred to the Committee on Specific Commitments for further study. However, he felt that the issues raised by Members may usefully be discussed through open-ended informal consultations, to be scheduled before the next formal meeting of the Council for Trade in Services.

14. The Council so agreed.

## **(II) OTHER ISSUES ARISING FROM THE REVIEW**

15. The Chairman recalled that the delegation of Mexico had presented a communication, circulated as document S/C/W/196, at the October meeting of the Council. In addition, a number of other issues had been highlighted in joint communication from Hong Kong, China; Japan and Korea, document S/C/W/173, and a separate paper from Hong Kong, China, Job No. 7775. He drew the attention of the Council to a recent communication from Korea, contained in document S/C/W/204.

16. The representative of Korea stated that his delegation's paper highlighted three important issues related to MFN exemptions. First, research by Korea on the relationship between economic statistics and MFN exemptions suggested that higher income countries had a higher incidence of MFN exemptions on the whole as well as on average. Another study showed that the larger number of MFN exemptions came in conjunction with an overall higher number of commitments. The second issue addressed in the paper related to compliance with the MFN guidelines (Job 2061 of 15 September 1993). According to these guidelines, measures giving preferential treatment for certain countries were to be listed, not just the names of laws or agreements. The duration of such measures should not exceed 10 years in principle. According to an OECD paper, only 9 of the 424 exemptions applied for a duration of 10 years, and another 10 exemptions specified that the exemption measures were to be reviewed for removal. A Korean study further showed that as many as 98 measures explicitly or implicitly indicated future treatment, not existing treatment, and 111 measures did not clearly mention what the preferential treatment consisted of. Thirdly, in cases where specific commitments were made, and at the same time MFN exemptions were listed for those commitments,

such exemptions should not relieve a Member of extending its commitments to all other Members. However, a Korean study pointed to as many as 53 measures that potentially indicated less favorable treatment than contained in the schedule. He further noted that many MFN exemptions were too broad. Some 34 exemptions sought complete exemption for any measures in a given sector, or even across sectors. Certain measures required further examination as to whether they could be listed as exemptions. Examples included those which purported to give less favorable treatment for unilateral retaliation. In conclusion, Korea proposed that Members should give serious consideration to the voluntary removal of current MFN exemption measures at the earliest possible date. Members with many MFN exemptions should take the lead in removing exemptions. In parallel, a discussion in the Committee on Specific Commitments on the revision of the current guideline of listing MFN exemptions should be started. The joint proposal by Hong Kong, China; Japan; and Korea (S/C/W/173) would provide a good basis for such a discussion.

17. The representative of Japan stated that the findings in the paper by Korea were supported by analysis from Japan (S/CSS/W/42/Suppl.1) on MFN exemptions, which showed that only a handful of Members maintained a large portion of all MFN exemptions. Japan proposed that developed countries with many exemptions should take the initiative to reduce their exemptions as much as possible. He further shared the concern concerning MFN exemptions that purported to grant less favourable treatment than set out in the schedules, as well as a number of broad MFN exemptions covering entire sectors or applying even across sectors. He further supported the views expressed in paragraph 42 of a paper from Norway (S/CSS/W/59) that an MFN exemption list could not establish any right to introduce future restrictions beyond what was directly provided for by the GATS, and that MFN exemptions could not provide a basis for countermeasures.

18. The representative of Hong Kong, China stated that no Member had reasoned against the view that MFN exemptions could not grant less favourable treatment than set out in schedules of specific commitments. If Members were in agreement on this issue, he suggested that the Council might want to reach a decision by consensus to that effect. He also supported Korea's analysis and its call for removal of MFN exemptions at earliest date.

19. The representative of Mexico supported the analysis undertaken by Korea, which showed an imbalance in the incidence of MFN exemptions between higher and lower income countries. He supported the call for voluntary removal of MFN exemptions.

20. The representative of Hungary agreed with the assessment of Mexico that the MFN principle was of fundamental importance for the multilateral trading system. However, Mexico's paper on the duration of MFN exemptions (S/C/W/196) contained some analysis and conclusions which Hungary did not share. In particular, with regard to paragraph 14 of the Mexican paper, he stated that paragraph 3 of the Annex on Article II Exemptions did not create a condition for Members to establish an exact termination date for each MFN exemption. Where no specific date was indicated, the exemption was granted for a period longer than five years. He disagreed with the analysis advanced in paragraphs 18 and 19, that in cases where no particular timeframe was set, the Annex provided automatically for a duration of ten years. The qualification in paragraph 6 of the Annex made it possible for Members to maintain MFN exemptions beyond ten years. No provision in the Annex suggested that failure to specify a termination date would affect this possibility. Further, there appeared to be an inconsistency between paragraphs 14 and 18 of the Mexican paper: While the former paragraph suggested that the absence of a specific date made it impossible to determine whether an exemption was granted for more than five years, paragraph 18 concluded that in such cases, the Annex provided for a termination period of ten years. The representative of Hungary supported the view by several delegations that the best way to deal with MFN exemptions that exceeded the duration of ten years was through negotiations in the services negotiations.

21. The representative of Brazil stated that the issue of MFN exemptions had increasingly become of interest to his delegation, particularly with a view to the present services negotiations.

Commenting on the paper of Korea, he stated that it could not be taken as a general assumption that the higher incidence of MFN exemptions in schedules of Members with a high level of commitments did not adversely affect these Members' level of liberalization.

22. The representative of Switzerland stated that he could go along with the Korean proposal that Members give serious consideration to the voluntary removal of current MFN exemption measures at the earliest possible date. In general, however, he believed that this was a matter for negotiation. He further stressed that many MFN exemptions were legitimate beyond specified time-periods. However, he agreed with Korea that all MFN exemptions needed to be clearly scheduled and easy to understand.

23. The representative of Costa Rica supported the analysis and suggestions made in the Korean paper, and supported the call for voluntary termination of MFN exemptions which were not necessary, or gave less favourable treatment provided for in the schedules, as well as those that were entered at the end of the Uruguay Round as bargaining chips for future negotiations.

24. The Chairman proposed that the Council take note of the statements made and revert to the item at the next meeting.

25. The Council so agreed.

## **B. PROPOSALS FOR A TECHNICAL REVIEW OF GATS PROVISIONS**

26. The Chairman stated that at its October meeting, the Council had continued its discussion on proposals for a Technical Review of GATS provisions, an exercise intended to provide greater legal consistency and clarity to the provisions of the Agreement. The discussion had been organized around a number of substantive topics raised by Members, but also addressed procedural issues. He recalled that while no delegation had expressed outright opposition to a technical review, there was some discussion as to whether the technical review should proceed on the basis of a definite list of issues and with a fixed time-frame, or whether issues should be addressed as and when they arose from Members' submissions. At the close of the discussion, Members had agreed to continue discussing the substantive issues raised. These issues included the relationship of Articles XVI and XVII, together with Article XX:2; paragraphs 1 and 2 of Article XVI; and Article XXVIII:(g) and paragraph 5(b) of the Annex on Financial Services. He drew the attention of Members to a recent communication by Brazil, contained in Job (01)/165 on MFN, national treatment, and like circumstances.

27. The representative of Brazil observed that Members should decide on the mandate and procedure for a technical review before embarking on the substance of such work. For example, there should be an understanding on the legal procedure to be followed with regard to the results of any technical review. While there was no agreement on a review as of to date, Members did not disagree that the GATS contained a number of grey areas or opacities. Identifying these issues was important to come to a conclusion on the scope of a possible review. Other than the question of MFN, national treatment and like circumstances, two issues were of interest to Brazil: first, the definition of supply of services in Mode 3, in light of definitions contained in Article XXVIII (d), (g), (l), and (m); secondly the limitation in Article XVI:2 (e). The question was whether restrictions on the type of legal entity could be considered as a domestic regulation barrier, provided such measures were not discriminatory and were required on grounds of prudential reasons or to achieve other legitimate objectives.

28. Brazil's communication in Job (01)/165 addressed a question on the scope of most-favoured nation and national treatment obligations, with regard to the four modes of supply, given that GATS defined trade in services through 4 modes of supply. Consideration must be given to the terms "like services and services suppliers." There was nothing in the language of Articles II and XVII that suggested that the mode of supply was a consideration in defining the "likeness" of a service or of a

service supplier, because those basic provisions referred to services and service suppliers. However, GATS commitments were inscribed in national schedules by mode of supply, allowing for the perception that the whole architecture of the Agreement stemmed from the clear separation between the four modes. Even when full commitments were entered in all four modes in a given sector or subsector, the extent to which services and services suppliers operating in different modes could be considered “like” remained unclear. There were two ways to interpret this situation. First, likeness could be interpreted without regard to the mode of supply, i.e. on the basis of the nature of the economic activity performed regardless of the territorial presence of the supplier and the consumer. Such an interpretation drew on the jurisprudence established in the area of trade in goods, which defined likeness in terms of the essential characteristics of products. The second possible interpretation would hold that MFN and national treatment applied within each mode of supply individually, based on a comparison of service suppliers that operate in “like circumstances”. This second interpretation drew on another approach to likeness identified in jurisprudence on trade in goods, which was to define it on the basis of the “aims and effects” or of the regulatory objective being pursued by a certain measure affecting the product or its producers. In this connection, services and/or service suppliers would be considered “like” only if they were subject to the same regulatory framework, which did not mean that they necessarily had to be in compliance with the same regulatory framework. In practice, likeness would become a function of the mode of supply, being defined only within each mode individually.

29. In analyzing these options, the delegate of Brazil pointed out that interpreting likeness on the basis of like circumstances would follow the modal logic that pervaded the Agreement. This logic implied that services and services suppliers operating through different modes could not be treated as “perfect substitutes” because, in practice, they would be subject to different regulatory frameworks. This approach was in keeping with the “principle of equality” (from the concept of like circumstances derived), according to which the same treatment must be accorded to persons under the same condition and similarly situated.

30. The representative of Cuba reminded delegations that there was no consensus yet on embarking upon a technical review. Questions of procedures and modalities needed to be clarified before such a decision could be made.

31. The representative of the European Communities, supported by Australia, stated that it needed to be decided case by case whether an issue was suitable for a technical review, or whether it was a negotiating issue. On Article XX:2, she believed that Members had worked on the issue to the extent possible most recently through the revised scheduling guidelines. An examination of the relationship between Article XVI and XVII was a useful exercise, suitable for a technical review.

32. The representative of Canada stated that the objective of a technical review on the basis of specific proposals by Members was to ensure the legal consistency and improve the clarity of GATS provisions. Issues that altered the substantive legal content of GATS obligations were more suitable for a negotiating context.

33. The representative of Brazil stated that the examination of paragraphs 1 and 2 of Article XVI was possibly an issue for a technical review. It was Brazil's view that the list of measures in Article XVI:2 was exhaustive. Any hypothesis of an open-ended list would create serious problems for distinction of market access limitations and measures that did not require scheduling, such as measures falling under Article VI. This was an issue that he hoped could be clarified before initial offers were submitted.

34. The representative of Mexico, commenting on Brazil's paper, stated that his delegation had always understood that likeness had to be seen within each mode of supply, and not across modes.

35. The Chairman stated that delegations had brought up several issues where greater clarity could be brought to the Agreement. If such a review was to underpin the mandated negotiations on services,

substantive work would need to be carried out over the next months. Perhaps a clearer view could be obtained by the time of the next meeting on how and to what extent this work should proceed. He proposed that the Council take note of the statements made and revert to the item at the next meeting.

36. The Council so agreed.

**C. REVIEW OF THE UNDERSTANDING ON ACCOUNTING RATES IN TELECOMMUNICATIONS**

37. The Chairman stated that the Council had continued its discussion of the review of the Understanding on accounting rates in basic telecommunications at its October meeting. The delegation of Australia had submitted two papers in the past months, Job(01)/73 and Job(01)/111.

38. The representative of Australia stated that Members should consider winding up the review at the March stock take. She reiterated that the purpose of the review was to agree whether a new understanding on dispute settlement was required; secondly, whether measures affecting accounting rates and termination services should be excluded from the GATS; thirdly, not renewing the understanding on dispute settlement would not affect the right of governments to regulate; fourth, developing countries were the most negatively affected by the understanding. At a recent symposium, speakers had confirmed Australia's view that accounting rates and their system were unsatisfactory, mainly due to its ad hoc application, the lack of cost-relation, little accountability of use of funds. Accounting rates were much less used these days, as more and more carriers bypassed the system. Accounting rates were also a much less important source of revenue now than at the time when the understanding had been put into place. These points raised during the symposium did reinforce to position that no new understanding on accounting rates should be established.

39. The Chairman proposed that the Council take note of the statement made and revert to the item at a future meeting.

40. The Council so agreed.

**D. NOTIFICATIONS MADE TO THE COUNCIL PURSUANT TO GATS ARTICLES III:3 AND V:7**

41. The Chairman drew Members' attention to the notifications made pursuant to Article III:3 of the GATS from Japan (S/C/N/179) and Poland (S/C/N/180-182). He then drew Members' attention to a notification New Zealand and Singapore, contained in document S/C/N/169, pursuant to Article V (Economic Integration). The Chairman suggested that the Council take note of the notifications and proposed that the Council refer the economic integration agreement between New Zealand and Singapore to the Committee on Regional Trade Agreements (CRTA).

42. It was so agreed.

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