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Council for Trade in Services

CONSIDERATION OF ISSUES RELATING TO ARTICLE XX:2 OF THE GATS

Report by the Chairman of the Committee on Specific Commitments

1. At its meeting of 3 July 2003, the Council for Trade in Services (Regular Session) mandated the Committee on Specific Commitments (CSC) to consider issues relating to Article XX:2 of the GATS, with the request to report back to the Council before its first meeting in 2004.

2. This report seeks to inform the Council about the discussions that have taken place in the CSC over the course of three formal and one informal meetings.

3. In order to provide a basis for the discussions in the CSC, I presented a Chair Note (JOB(03)/213) which summarized the basic issue and outlined several conceivable approaches to address it. The delegation of Switzerland presented a document (JOB(03)/214), in which it addressed various aspects of the points raised in the Chair Note. A large number of delegations participated in the discussions of the issue. The records of the discussions are contained in documents S/CSC/M/30 and 31. No delegation took the floor on the issue at the meeting of the Committee on 22 March 2004. The written communications as well as the relevant portions of the minutes are annexed to this report.

4. The discussions revealed continuing differences between delegations on the legal interpretation of the overlap between Articles XVI and XVII of the GATS. While some delegations believed that a clear and consistent interpretation of the overlap was possible, others had doubts whether such an interpretation could be found. Several delegations expressed an interest in further exploring a practical solution of this matter in the context of the ongoing services negotiations. It was, however, also noted by some delegations that a practical solution should not extend to existing commitments and that the relationship between existing and future commitments would also need to be further explored..

5. It is my belief that the technical discussions Members held in the CSC have helped clarify possible implications of the various approaches to address the overlap between entries in the market access and national treatment columns. I am confident that we have obtained a deeper understanding of the issues involved. This understanding may assist Members in making clear and unambiguous commitments during the services negotiations. At this stage I feel that guidance from the Council might be needed to make further progress on the issue of Article XX:2.

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ANNEX I

JOB(03)/213

Committee on Specific Commitments 20 November 2003

CONSIDERATION OF ISSUES RELATING TO ARTICLE XX:2 OF THE GATS

Note by the Chairman

A. INTRODUCTION

1. At its meeting of 3 July 2003, the Council for Trade in Services (Regular Session) referred the issue of Article XX:2 to the Committee on Specific Commitments (CSC) for consideration, mandating the CSC to report back in time for the Council to take up the issue at its first meeting in 2004. This note has been prepared as a contribution to the discussion in the Committee, and focuses on the technical aspects of the issues identified. It is meant to enhance the understanding of the issues, as well as of implications of possible ways forward. In line with the mandate of the CSC, the note does not seek to address procedural questions relating to the implementation of any possible solution, or issues related to the services negotiations. The note first recapitulates the basic issue at hand, and then outlines possible approaches to the issue, thereby flagging a number of issues for further consideration. It draws upon previous contributions by delegations[1], as well as Secretariat background notes.[2] The note does not elaborate on questions that may arise with regard to the relationship between existing and new commitments, as these extend far beyond the question of the overlap, and are yet to be discussed by Members.

B. THE ISSUE

2. Paragraph 2 of Article XVI (Market Access) contains an exhaustive list of types of measures which a Member shall not maintain in a given sector where a full market access commitment has been undertaken. The measures a Member may list comprise four types of quantitative restrictions (sub-paragraphs a-d), as well as limitations on forms of legal entity (sub-paragraph e) and on foreign equity participation (sub-paragraph f). These measures are subject to the obligations of Article XVI regardless of whether they are discriminatory (within the meaning of national treatment) or non-discriminatory. While Article XVI is silent on this point, this is clearly stated in the scheduling guidelines.[3] Measures under sub-paragraph (e) that require specific types of joint ventures through which the service supplier may supply a service, as well as those under sub-paragraph (f) relating to foreign equity participation are by their very nature discriminatory, as they can only be imposed on foreign service suppliers.

3. According to Article XVII (National Treatment), a Member grants full national treatment in a given sector and mode of supply when it accords in that sector and mode to services or service suppliers of other Members conditions of competition no less favourable than those accorded to its

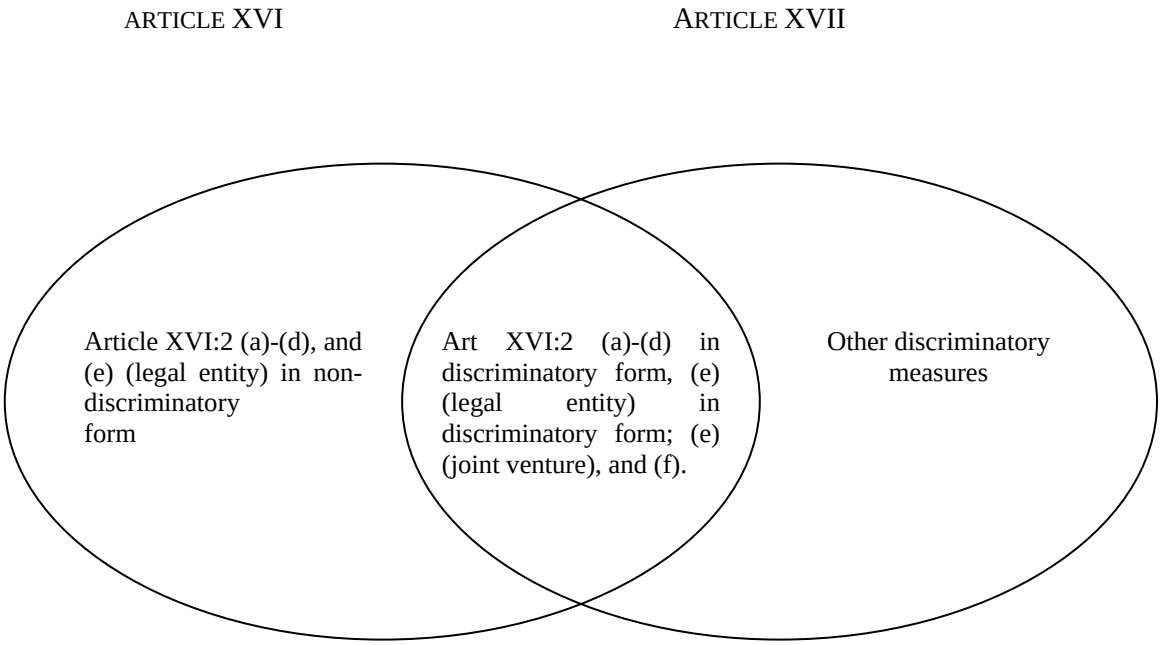
[1] Communication from Brazil, 13 December 2002, JOB (02)/215; Communication from Hong Kong, China, 21 February 2003, JOB (03)/34; Communication from Switzerland, 5 May 2003, JOB (03)/85.

[2] Secretariat background notes of 16 February 2001, JOB (01)/17; 16 July 2002, JOB (02)/89; and 24 October 2002, JOB (02)/153.

[3] See S/L/92, paragraph 8; MTN.GNS/W/164, paragraph 4.

own like services and service suppliers. Unlike Article XVI, Article XVII does not contain an exhaustive listing of the types of measures which would constitute limitations on national treatment.

4. Due to the scope of Articles XVI and XVII, certain types of measures are captured by both Articles. These are first all measures under Article XVI:2 (a)-(d) in their discriminatory form. Further, discriminatory restrictions or requirements of a legal entity and measures that require specific types of joint ventures through which the service supplier may supply a service (sub-paragraph (e)), as well as those under sub-paragraph (f) relating to foreign equity participation, also fall under the scope of both Article XVI and XVII.



5. This issue has been referred to as the "overlap" between Articles XVI and XVII.[4] The overlap does not pose a problem as long as, in relation to a given mode of supply, market access and national treatment are *both* bound or *both* unbound. If both disciplines are *bound* (each column contains an entry of *None*, or limitations are entered), then a Member may depart from full market access and national treatment only to the extent inscribed. In such cases, Article XX:2 provides that

> Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

6. Article XX:2 hence removes any need to duplicate the inscription, in both columns, of treatment inconsistent with market access and national treatment.

7. If, on the other hand, a Member has maintained, in a given mode of supply, no commitment in both the market access and national treatment column, expressed through inscribing *Unbound*, the Member may introduce or maintain any limitations it wishes in relation to that mode.

8. Discussions of the overlap have focused on the situation where a commitment has been inscribed in one column, and no commitment has been inscribed in the other column, i.e. an *Unbound* in either the market access or national treatment column. For example, if a Member entered *Unbound* under market access and *None* under national treatment, a question would arise as to

[4] See JOB (01)/17), JOB (02)/153)

whether that Member could maintain any discriminatory measures falling within the scope of Article XVI. Could it be argued that because there is no binding under Article XVI, any measure falling within the scope of that Article could be maintained? Or, conversely, could it be argued that because there is a full binding under Article XVII (with the entry *None*), no measure inconsistent with that Article could be maintained, including those falling within the scope of Article XVI? More specifically, would that Member be in a position to apply a limitation on the number of foreign suppliers only, or would it have to be a limitation on the number of all suppliers, of foreign and national origin alike?

9. Does Article XX:2 provide any solution to these questions? It was suggested that paragraph 18 of the Scheduling Guidelines[5] might provide an answer to the question at hand. Paragraph 18 states:

> When measures inconsistent with both Articles XVI and XVII are inscribed in the column relating to Article XVI (as provided for in Article XX:2), Members could indicate that this is the case (e.g. by stating 'also limits national treatment' in the market access column.

10. It appears that the paragraph addresses only the case where a specific limitation on market access and national treatment is to be entered in the market access column. It does not address the situation where either the market access or national treatment column remain *Unbound,* let alone how such an *Unbound* should be understood.

11. The Secretariat has noted that the wording and context of Article XX:2 within the GATS suggest that the paragraph is a scheduling convention and might be applicable only to situations in which bindings with limitations were inscribed in both columns[6]. This view has been supported by Switzerland.[7] In its paper, Switzerland argues that an *Unbound* in the market access column could not be considered as equivalent to a set of *inscribed measures* and, thus, could not imply an application of Article XX:2. In the same vein, the *Unbound* could hardly be assumed to "provide a condition or qualification" to national treatment as there is no other way of providing conditions than specifying them in the schedule. Switzerland further argues that in the reverse scenario, a *None* in the market access column could not be considered as an inscribed measure *inconsistent with both Articles XVI and XVII* and, hence, Article XX:2 would not apply.

12. Hong Kong, China, has questioned whether Article XX:2, especially the second sentence, presumed the existence of commitment in the national treatment column. A plain reading of Article XX:2 suggested that whether Article XVII would be conditioned or qualified by the inscription in the market access column would not depend on whether it had *already* been conditioned or qualified by the presence of commitments in the national treatment column.[8] It also appeared that the second sentence of Article XX:2 would not presuppose any commitment taken under Article XVII. Hong Kong, China further posed the question how an *Unbound* entry should be understood more generally, in particular whether such an entry implied the reservation of rights to undertake measures subject to the respective Articles; or whether it represented a listing of all possible measures that could be undertaken in the future. Could an *Unbound* be understood to meant that the Member does not undertake any obligation in respect of that mode of supply under the respective Articles?[9]

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[5] Scheduling Guidelines , S/L/92, para 18.
[6] See JOB(02)/89, para 9; JOB(02)/153, para 9.
[7] See JOB (03)/85, paragraph 4.
[8] See JOB (03)/34, para 7 (c)
[9] See JOB (03)/34, para 8 (c)

13. Brazil has stated that it could be argued that the intended effect of Article XX:2 could be to render equal, for scheduling purposes, measures that were exclusively quantitative and measures that are both quantitative and discriminatory, and distinguish them from measures that were exclusively discriminatory.[10] According to Article XX:2, quantitative limitations, whether discriminatory or not, would only be scheduled in the column related to Article XVI. This was tantamount to stating that only measures that were exclusively discriminatory (but not of quantitative nature) were to be scheduled under the national treatment column.

14. For the purpose of discussion, it would be useful to obtain an indication from other delegations as to whether they consider that paragraph 2 of Article XX applies to the situation where a commitment has been inscribed in one column, and no commitment has been inscribed in the other column, i.e. an *Unbound* exists in either the market access or national treatment column.

C. POSSIBLE APPROACHES TO THE ISSUE

15. Conceptually, five types of approaches are conceivable to allocate measures falling under the overlap to either Article XVI or Article XVII. These approaches are sketched out under points 1-5 below.

1. The area of the overlap would be allocated to the Market Access Column

16. One way could be to state clearly that all measures referred to under paragraph 2 (a) – (f) of Article XVI would fall exclusively under the scope of that Article, and that they would be excluded – even in their discriminatory form - from the scope of Article XVII. In other words, Article XVI would become the *lex specialis* for these measures.

- *Example: Under the situation of an Unbound in Market access and a None in National Treatment, any of the six types of limitations could be introduced, regardless of whether in non-discriminatory or discriminatory form. In the inverse situation where a commitment existed in the Market Access column, with an Unbound in the national treatment column, the Member would not be permitted to introduce any discriminatory market access type measures. The suggestions made by Brazil in JOB (02)/215) would produce this result.*

2. The area of the overlap would be allocated to the National Treatment Column

17. Under this option, it would be made explicit that Article XVI covers the types of measures listed in paragraph 2 (a) - (f) only in their non-discriminatory form. Any of those measures taken in their discriminatory form, would fall within the scope of Article XVII. Under such a solution, however, it would be necessary to exclude from the scope of Article XVI those measures referred to in sub-paragraphs (e) and (f) which could only be applied in a discriminatory form, such as joint-venture requirements and limitations on foreign share-holding.

- *Example: In case of an Unbound in market access and a commitment in national treatment, the Member would only be permitted to take market access measures in their non-discriminatory form. If the Unbound existed in the national treatment column, with a None under market access, the Member would be free to introduce any discriminatory measure, including any of those measures mentioned in Article XVI:2 (a-f) in their discriminatory form.*

3. The *Unbound* entry prevails over the entry containing the commitment

18. Under the third and fourth approaches, the overlap would be allocated according to entries in the schedule rather than by looking at the column in which the entries have occurred. Under the third

[10] See JOB (02)/215, para 5 and 1

approach, an *Unbound* entry in either the market access column or the national treatment column would permit a Member to introduce discriminatory measures falling under the overlap regardless of the entry in the respective other column.

- *Example: An Unbound in the market access column with a commitment in national treatment would allow the Member to apply any discriminatory market access limitation. We would obtain the same result as concerns the overlap area in the inverse situation: also an Unbound in national treatment together with a None in the market access column would permit the Member to apply any discriminatory measure, including those falling under Article XVI:2.*

4. The entry containing the commitment prevails over the *Unbound*

19. This option would allocate the overlap in the opposite way as in the third approach. The column containing the commitment would prevail insofar as the measures falling under the overlap could not be maintained or introduced if not specifically scheduled in either the market access or national treatment columns.

- *Example: Under this situation, a commitment in the national treatment column, together with an Unbound under market access would allow the Member only to operate measures falling under market access in its non-discriminatory form. In the reverse case, i.e. a commitment under market access, and an Unbound under national treatment, the Member could operate market access measures only to the extent scheduled. The suggestions made by Switzerland in JOB (03)/85 would produce this result.*

5. Avoiding instances of the overlap in schedules of specific commitments

20. Another possible approach, albeit not of a general nature, would be to seek to avoid instances of the overlap in the schedules by introducing clarifying text as to the intended scope of the commitments. Elements of such a "schedule-based" approach have been outlined by Hong Kong, China.[11] Under this approach, the "issue" would not disappear, but cases giving rise to the issue would be reduced.

- *Example: If a Member wished to schedule a situation of an Unbound in market access and a commitment in national treatment, the Member would clarify in its schedule whether the area of overlap would be covered by the Unbound, or by the commitment. If the members wished to maintain a free hand with regard to discriminatory Article XVI-type measures, he could clarify this, for example, by inscribing under national treatment "None, except for discriminatory measures falling under Article XVI:2." Conversely, if the Member wanted to allocate the area of overlap to the area covered by the commitment, he could enter under market access "Unbound, except for measures falling also under Article XVII. Similar clarifications could be conceived of for the situation where a Member wished to inscribe None in the market access column, and Unbound in the national treatment column.*

[11] See JOB (03)/34, para 11-13

D. CONCLUSION

21. The description of the issue, and the various options outlined above are presented merely to provide a basis for discussion. It should, however, be noted that the approach mentioned last (under 5 above) would for future commitments not involve any particular formal procedure or agreement by Members.

ANNEX II

JOB(03)/214 27 November 2003

Committee on Specific Commitments

COMMUNICATION FROM SWITZERLAND

Consideration of issues relating to Article XX:2 of the GATS

The following communication, dated 25 November 2003 from the delegation of Switzerland is being circulated to the Members of the Committee on Specific Commitments.

I. INTRODUCTION

1. In a note dated 20 November 2003, the Chairman of the CSC presented some considerations of issues relating to Article XX:2 of the GATS and submitted some questions thereabout to the membership.[1] This paper aims at following up on this, addressing in particular the so-called "overlap" between "Unbound" and "None" in the Market Access and the National Treatment columns. In May 2003 Switzerland had submitted a communication focussing specifically on Article XX:2 of GATS.[2] The issue discussed in this present paper is, *per se*, independent of the issue discussed in that previous communication. The present issue would arise equally well even in the absence of Article XX:2 though, as shown *in fine*, there is a connection to Article XX:2.

II. THE ISSUES

2. The Chairman's note identifies several approaches to the meaning of a commitment where Market Access is not committed ("Unbound") and National Treatment is fully committed ("None"), or vice versa. They are numbered approach 1, 2, 3 and 4, plus a fifth approach which is procedural rather than substantial. The issue at stake is: which regime is applicable to measures that are both restrictions to MA and restrictions to NT. According to approach 1 the entry in the Market Access column prevails over the entry in the National Treatment column, while in approach 2 the NT entry prevails over the MA entry (whatever the content of those respective entries). According to approach 3, the "Unbound" would override the "None", while according to approach 4 the full commitment under None would prevail over the overlap zone. This paper aims at analysing the implications of each approach. An emphasis will be put on the internal consistency of the various approaches.

3. To start with, it must be recalled that the principle of symmetry has to be followed in any analysis. Symmetry means that, when going through the analysis of the implications of each approach, the same logic must apply in the case "Unbound – None" and in the case "None – Unbound".

[1] Note by the Chairman, 20 November 2003, JOB(03)/213.
[2] Communication from Switzerland, 5 May 2003, JOB (03)/85.

III. IMPLICATIONS OF THE VARIOUS APPROACHES

A. IMPLICATION ON THE HIERARCHY BETWEEN GATS PROVISIONS (APPROACHES 1 AND 2)

4. The main implication of approaches 1 and 2 seems to be that a hierarchy would govern various GATS provisions, namely between Articles XVI and XVII. To support any of these two approaches, it should thus be shown first where the legal ground for a hierarchy lies, and second why one of the two approaches (or hierarchy) is more likely to be valid than the other. We did not find any wording to that purpose. This must be considered in the light of the wording of Article XVII, which states that any limitation to NT is to be scheduled as such (and Article XVII makes no reference to the Article XVI measures). The wording of Article XVI makes it clear that any restrictions to MA must be scheduled in the MA column, as much as Article XVII makes it clear that all restrictions to NT must be scheduled in the NT column. This creates obviously room for an overlap, but Article XX:2 is precisely there to deal with this issue (as will be shown *infra*). In a hierarchical GATS, Article XX:2 would be worded differently. As to approach 2, it induces a further question as to why then would measure (f) is mentioned in Article XVI, if really anything scheduled in the NT column would prevail over the MA column.

5. We now turn in more depth to approaches 3 and 4.

B. SITUATION "UNBOUND – NONE"

6. According to approach 3 (overlap zone is unbound), any restrictions to Market Access that at the same time are discriminatory would be permitted, thus overriding the commitment not to introduce any discriminatory measure.

7. Under approach 4 (overlap zone is committed), such measures would not be allowed, consistent with the full commitment undertaken in the NT column. Put another way, Article XVI measures are allowed as long as they do not compromise the commitment under the NT column.

C. SITUATION "NONE – UNBOUND"

8. By way of symmetry, under approach 3, the situation would remain exactly the same: any measures which are inconsistent with both articles XVI and XVII GATS would be allowed. In spite of the full commitment "None" for MA, some restrictions to MA could still be freely introduced.

9. Under approach 4, again, such measures are not allowed as they are inconsistent with the commitment to grant full Market Access, i. e. the commitment not to introduce any measures of the types listed in Article XVI. Put another way, discriminatory measures are allowed as long as they are devised in a way that does not compromise the commitment under the MA column.

10. More specifically, under approach 3, Article XVI-type measures that are non discriminatory could no longer be introduced, but if the Member concerned still wanted to introduce an Article XVI-type measure, it could do so by devising it in a discriminatory way. For example, non-discriminatory economic needs tests could not be introduced, but ENT applied only to foreign service suppliers could. Obviously, the Member would be encouraged to choose measures that are more restrictive. This would run against the spirit of progressive liberalisation.

11. This further means that in approach 3 measures of type (f), i.e. limitations on foreign asset shares, could still be introduced in spite of the full commitment under MA.

D. CONNECTION WITH ARTICLE XX: 2

12. Obviously, the above considerations can be made even in the absence of Article XX:2. On the other hand, those who seem to lean towards approach 3 happen to coincide with those who argue that Article XX:2 does apply to the situation "Unbound – None". Assume for the sake of argument that Article XX:2 did effectively apply to such a situation. Approach 3 states precisely that in any case, the overlap zone remains unbound, i.e. any measure inconsistent with both Articles XVI and XVII is allowed as long as one of the two columns is unbound. What would then be the purpose of a provision like Article XX:2 stating that measures inconsistent with both columns must be inscribed in the MA column? In fact, under approach 3, Article XX:2 would have no added value and no *raison d'être*. Clearly, the two views can hardly be held simultaneously.

13. But in the more conservative view of Article XX:2, there are some considerations to be given. If, as assumed under approach 3, an "Unbound" overrides the "None", then it must be also assumed that a restrictive measure inscribed in any column equally overrides the "None" of the other column. When the "None" happens to be in the NT column, approach 3 would, as described in paragraph 12 above, be a sort of substitute for Article XX:2. Approach 3 would take away any purpose or *raison d'être* to Article XX:2. When "None" is in the MA column, it is even more serious since the reading of the commitment through approach 3 would run against Article XX:2. Approach 3 would say that the restrictive measure inscribed under NT extends over the MA column, while Article XX:2 would advise the scheduling member to inscribe that measure in the MA column with the effect of covering also NT concerns. Such a system would be unviable.

14. Going back now to approaches 1 and 2, the same difficulties appear in relation to Article XX:2. Approach 1 states that whatever the contents of the column, the measures scheduled under MA extend over the NT column. Why then would we need a provision like Article XX:2? The hierarchical construction of approach 3 would achieve an equivalent end as Article XX:2. Under approach 2, the same inconsistency as above under approach 3 would prevail. On the one hand one would assume that any measure inscribed in the NT column extends over the MA column, while on the other hand Article XX:2 would be there to advise to schedule that measure exactly in the reverse way.

15. Under approach 4 consistency is granted. Commitments taken in whatever column are deemed to be firm. Hence, when faced with a measure that restricts both MA and NT a Member would need to schedule the same measure in both columns. This would make the schedule relatively heavy. To streamline the schedules, the scheduling convention under Article XX:2 (and paragraph 18 of the Scheduling Guidelines) has a full *raison d'être* and is effectively needed.

E. CROSS MODAL CONSIDERATIONS

16. Approach 3 basically states that whenever a measure is relevant to both columns, the Unbound shall override the None. It is a matter of fact that measures can not only be relevant to two columns, some are also relevant to two modes. Why would people not attempt to apply the same approach to the latter too, since it is also a matter of overlap between Unbound and None? For instance, an obligation to incorporate is a mode 3 restriction. At the same time, it is a mode 1 restriction. Now, take the case of a full commitment under mode 3 ("None") and no commitment under mode 1 ("Unbound"). If approach 3 is to be transposed consistently to such a situation, it would mean that no restriction targeting only mode 3 could be made, but that an incorporation requirement that applies to both modes 1 and 3 could be introduced, because it is permitted under the (absence of) mode 1 commitment.

17. Under approach 4, on the contrary, any MA restrictions to mode 1 can be introduced, but only if they are devised in a way that does not compromise the mode 3 full commitment.

IV. CONCLUSION

18. This paper has attempted to go through all implications of approaches 1 to 4 of the Chairman's note. It was seen that many approaches raise logical inconsistencies when they are considered under all their contours. Or they lead to scheduling results that are definitely unwelcome and could hardly be the idea behind the GATS provisions (e.g. that under "None - Unbound" a limit on foreign shareholding could be introduced). Or they are not compatible with the spirit of the agreement (e.g. by encouraging Members to take more restrictive measures when less restrictive measures are not allowed under a full ("None") commitment).

19. It seems to us that approach 4 is the only one that does never show any internal inconsistency, even when considered in the more global construction of GATS: all restrictions to MA must be scheduled in the MA column while all restrictions to NT must be scheduled in the NT column. This creates an overlap zone. Measures inconsistent with both MA and NT should thus *a priori* be scheduled in both columns (this is by the way the explicit working assumption of Article XX:2). Since this would make the schedules somewhat cumbersome, a scheduling convention had to be added in this system to ensure streamlining. This is why Article XX:2 was needed. Furthermore, approach 4 does not need a hierarchy to be introduced between various GATS provisions. Finally, Approach 4 does not compromise the principle that a commitment is there to be applied: restrictions allowed under other columns (or modes) can still be maintained, but they must be devised in a manner that does not compromise the "None".

20. Approach 1 could be seen as the "second-best" from the logical perspective. It does not show any internal inconsistency *stricto sensu*. But it pre-assumes the existence of a hierarchy between legal provisions – a hierarchy that is not supported by any GATS wording. Furthermore, one could wonder why then Article XVI was drafted in an universal manner (all limitations to NT are to be scheduled), and why it was complemented by Article XX:2, if in final analysis Article XVI is to override both provisions anyhow as assumed in approach 1.

21. As to approaches 2 and 3, they suffer from very serious internal contradictions.

22. On a more political score, it must be noted that in national legal regimes policies of the type "Unbound – None" are commonplace. It is very often the case that national legal orders aim at granting a full national treatment, while leaving room for a set degree of – non discriminatory – limitation to market access. This is precisely the purpose achieved with "Unbound – None" under approach 1.

23. As mentioned in our communication of May 2003, we still believe that the prime avenue to solve the problems that some Members may face is by applying systematically the Scheduling Guideline, in particular its paragraph 18.

ANNEX III - EXCERPT OF DOCUMENT S/CSC/M/30

C. CONSIDERATION OF ISSUES RELATING TO ARTICLE XX:2 OF THE GATS

28. The Chairperson recalled that the Council for Trade and Services, at its last meeting, had referred the issue of paragraph 2 of Article XX to the CSC for consideration. The Committee was asked to report back in time for the Council to be able to discuss this item at its first meeting in 2004. The present meeting offered the first opportunity for the CSC to take up the issue. The mandate to consider technical aspects of course did not prejudice any delegation's position on a technical review of GATS provisions. Neither did the mandate foresee that the CSC would prepare any type of solution when it reported back in early 2004. However, he believed that Members should reflect on how the Committee could provide a useful input or value added. There would be three formal meetings to discuss this matter, including the present one. Turning to the issue itself, he stated that a lot of detailed technical work had already taken place in the Services Council. Several contributions had been received, namely from Brazil (JOB (02)/215), Hong Kong, China (JOB (03)/34), and Switzerland (JOB (03)/85), and the Secretariat had prepared two background Notes (JOB (02)/89 and JOB (02)/153).

29. In reviewing these papers, numerous delegations seemed to concur that the second paragraph of Article XX did not provide a solution to all interpretive issues involved in what had been labelled as the overlap between Articles XVI and XVII of the GATS. In particular, situations of an 'Unbound' in the market access column and a commitment in the national treatments column, but also the reverse case, provided interpretational difficulties at least for some delegations. Other delegations felt reasonably comfortable with their interpretation, while a third group thought that for reasons of clarity and legal certainty it would be useful to arrive at a more widely shared understanding. The Chairperson invited comments on how delegations considered that the CSC could add value to the discussion of this topic.

30. The representative of Switzerland stated that his delegation would remain engaged on this issue. The report to the Council for Trade in Services should primarily be a report from the Chairman, complemented by the reports of the meetings in which the issue had been discussed. He considered that the issue under discussion was relevant for existing schedules as well as the ongoing negotiations. As far as the latter were concerned, the debate could help all Members to clarify some technical aspects of their offers. With regard to existing schedules, he thought that while several interpretations might be conceivable, there had certainly been only one intention by the drafters of the GATS. He was willing to discuss any difficulty that delegations might have with this issue, but it had not yet been raised in bilateral meetings.

31. The representative of Hong Kong, China noted that the diversity of positions was the core of the problem. He concurred with Switzerland that the issue could be divided into two parts, which he considered to be interlinked. His delegation was concerned in particular about the clarity of schedules that would result from the present negotiations. He hoped that the Committee could take forward the discussion as far as possible and, perhaps, even explore possible solutions, even though these were not mandated by the Council.

32. The scope for different interpretations had been well explored and the question now arose what options would be open to delegations in general. One option was to leave the issue to be settled through future dispute settlement, which would amount to keeping the status quo. Another option would be to find a solution for the ongoing negotiations, and then to see how it could be applied to the existing commitments. His delegation had no particular stance on this matter, but preferred generally not to leave ambiguities or uncertainties for future dispute settlement.

33. Without prejudice to Members' interpretation of the issue, he felt that there was a need to address both new and existing schedules. He looked forward to exploring the scope for pragmatic solutions. He suggested that the Chairperson conduct consultations to try to reach some common understanding as to what could be included in the final report to the Council. In the Chairperson's report to the Council, his delegation preferred a practical approach in view of the ongoing negotiations. He took note of Switzerland's willingness to address difficulties also in a bilateral context. However, this might result in different interpretations by different Members, which would be a sub-optimal outcome.

34. The representative of Brazil felt that the discussions on this issue had been useful. His delegation had benefited from the arguments presented by Switzerland, Hong Kong, China and other Members. They would certainly help to prepare Brazil's initial offer. His delegation welcomed any form of consultations the Chairperson might wish to hold to prepare a possible solution.

35. The Chairperson suggested that the issue be addressed in a dedicated informal meeting ahead of the December formal meeting; he also considered circulating a Note or checklist of issues to structure further discussions.

36. The representative of Switzerland stated that a formal discussion would be desirable ahead of an informal meeting, if only to take stock of and address questions that had already arisen in earlier meetings. A checklist might be more useful after the issue had been discussed at least once.

37. The Chairperson noted that he had no intention to preclude a discussion on substance at this meeting. Alternatively, the dedicated meeting in November could consist of a formal and an informal part. The conditions for spontaneous and interactive discussion could more easily be created in an informal context.

38. The representative of Hong Kong, China recommended that a formal discussion be initiated at the present meeting. He was also interested in an informal discussion to explore possible common ground. A checklist of relevant issues might be helpful.

39. The representative of Switzerland, turning to substance, mentioned that everybody seemed to agree that there was no hierarchy between entries in the national treatment column and those in the market access column. Secondly, he thought that any interpretation had to be symmetrical, meaning that if applied from market access to national treatment, it had also to apply vice versa. A 'None' indicated that a Member would not maintain any measure inconsistent with Articles XVI or XVII, while 'Unbound' meant that it was not taking any commitment on either of those Articles. In the case of an 'Unbound' for market access and a 'None' for national treatment, the Member concerned committed not to discriminate under any circumstances, but did not take any obligation regarding market access. The Member could not introduce discriminatory measures even if these qualified also as market access restrictions. A problem would arise with regard to Article XVI:2 (f), which by definition provided cover for discriminatory measures. He did not see any compelling reason why in this case a Member would be allowed to introduce such a measure simply because it would always be discriminatory, while measures falling under subparagraphs (a) through (e) could not be used in a discriminatory form. He had a fundamental problem with this approach which would compromise the commitment under national treatment.

40. The above reasoning could be applied symmetrically to a scenario where a 'None' was entered in the market access column, and an 'Unbound' in the national treatment column. In this case, the Member would grant full market access, but had reserved the right to discriminate. This should not imply that any national treatment restriction could be used even if it fell also under market access, as there was a 'None' in the relevant column. It was hard to believe that the drafters of the agreement would have wanted Members that had a full market access commitment to be able to introduce market access limitations in their more restrictive discriminatory form.

41. His delegation felt that the problem was fairly limited in practice. It related to subparagraph (f), and he was not aware of any concrete case where the problem had arisen as most 'Unbound/None' situations occurred under Modes 1 and 2 where the relevance of subparagraph (f) was almost nil. In Mode 3, limitations of the type set out in subparagraph (f) were usually scheduled or a double 'Unbound' existed. He suggested that the Secretariat screened the schedules to allow delegations to assess the size of the problem. He was willing to consider any difficulty a delegation had concerning subparagraph (f), if it had intended to capture such limitations under an 'Unbound' in market access. The Committee could seek to find a solution.

42. The representative of Hong Kong, China noted that the limitations in Article XVI:2 (a)–(e) could also exist in discriminatory form. Following the interpretation of Switzerland, a Member, which had an 'Unbound' in the market access column and a 'None' in the national treatment column, could not apply any of the measures in Article XVI:2 (a)–(e) in discriminatory form. If that was the case, how would this scenario compare with a case where a Member which had scheduled discriminatory market access measures under all types mentioned in Article XVI:2 (a)–(f), had scheduled 'None' under national treatment? According to the Swiss interpretation, the Member that had scheduled 'Unbound' in the market access column would not be able in future to change its schedule by introducing a discriminatory measures which fell under Article XVI:2 (a)–(f). On the other hand, the Member that had scheduled specific limitations rather than 'Unbound' in the market access column would be able to maintain those, and any elimination of one of them would still be considered an improvement. Perhaps there was no presumption under Articles XVI, XVII or XX as to the level of openness that a Member was supposed to inscribe in its schedule of commitments. He wondered what a Member was supposed to do if it wanted to reserve the right to introduce in future any or all of the measures that were within the scope of Article XVI, including those which could be discriminatory in nature.

43. The Chairperson suggested that Members take note of the statements made. He proposed to consult on the precise format of a dedicated meeting in November. As there were no interventions under the agenda item of Other Business, he suggested that, in accordance with the practice of grouping meetings of subsidiary bodies close to meetings of the Council, the next formal meeting be held before the next CTS in December.

44. The Committee so agreed.

ANNEX IV - EXCERPT OF DOCUMENT S/CSC/M/31

C. CONSIDERATION OF ISSUES RELATING TO ARTICLE XX:2

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

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

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

34. The second issue that needed to be examined were the scheduling functions of "None" and "Unbound". Schedules were positive lists of commitments, in the sense that they listed sectors with partial or with full commitments. Where no commitments were intended, there was no need to list a sector and then inscribe "Unbound" for all modes under market access and national treatment. In other words, not listing a sector at all, or listing a sector and scheduling "Unbound" everywhere would have the same meaning. From this, one could infer that "Unbound" had a different scheduling function than "None". The latter entry could not be ignored. For example, a Member could not introduce new legislation that would be inconsistent with the entry "None", while a Member could always alter its legislation where it maintained an "Unbound" in its schedule.

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

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

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

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

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

40. The representative of Australia stated that his delegation found the argument put forth by Switzerland in this technically complex area very persuasive. However, he also recognised that those delegations with opposing views were unlikely to be swayed to accepting a legal interpretation that was not in their favour. Clearly, there was a preference for technical issues like this to be kept separate from procedural considerations associated with the negotiations. However, in this instance, Members were faced with a technical problem on which there seemed to be little progress, and there was a negotiating round that offered the potential to deal with a quirk in legal interpretation or scheduling patterns. The Committee could suggest to the Council for Trade in Services the option of setting the question of legal interpretation aside while encouraging Members to make offers during the negotiations that removed the existing ambiguities.

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

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

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

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

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

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

47. These observations on the various approaches did not necessarily represent the interpretation of his delegation and were intended only to take the discussion forward. In his view, approaches one and two did not establish a hierarchy between Articles XVI and XVII, but actually aimed at eliminating the overlap by assigning the overlapping area to one of the Articles. In approach number one, the overlapping area would be assigned to Article XVI, and therefore Article XVI would govern all the measures in paragraph 2 (a)–(f) in both non-discriminatory and discriminatory form. Under

both approaches, the intention was to eliminate the overlapping area and to draw a clear line between Article XVI and XVII. A measure would then either fall within Article XVI or Article XVII but not within both at the same time, thereby eliminating the need for deciding which Article should take precedence over the other because the two Articles would not be applicable at the same time.

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

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

50. Approaches three and four in the Chair's Note retained the overlap of the two Articles, but provided that the commitments in the overlapping area would be governed by the scope of commitments being undertaken in either column, i.e. either "Unbound" prevailed over "None", or "None" over "Unbound". In this regard, the paper by Switzerland contained a very interesting analysis. Contrary to that analysis, he believed that approaches three and four introduced a hierarchy, albeit not between Articles XVI and XVII, but between "None" and "Unbound". If one had only the choice between approaches three and four, he would agree with Switzerland that approach four would appear more convincing. No matter how one read Article XX:2, if "None" was scheduled in the market access column, and "Unbound" in the national treatment column, it could hardly be argued that the Member could still introduce a measure under Article XVI which was discriminatory in nature, because such a measure, by the logic of Article XX:2, should have appeared in the market access column of the schedule. A "None" in the market access column could only mean that there was no such limitation in place. Another reason in support of approach four over approach three was that Articles XVI and XVII represented obligations that Members assumed by inscribing entries in their schedules. Scheduling an "Unbound" for a certain mode, or omitting a sector altogether from a schedule did not absolve the Member from any other obligations for the sector, such as the unconditional MFN obligation. By the same token, an "Unbound" in either the market access or national treatment column only meant that the Member did not assume obligations under that column. However, this did not absolve the Member from obligations assumed elsewhere, for instance through entering "None" in the corresponding other column. Seen in this light, there were good reasons that "None" should prevail over "Unbound".

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

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

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

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

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

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

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

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

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

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

course of action was followed, it would have to address the question of the potential overlap between old and new commitments.

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

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

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

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

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

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

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

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

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

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

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

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

73. The Chairperson stated that the purpose of the consultations was merely to clarify the intended scope of the request by Brazil. There was no prejudice to the question whether such a paper should be prepared or not. He proposed to consult whether a further informal meeting prior to the next cluster was needed. Due to the time constraints at this meeting, item D (Scheduling Issues) would be taken up at the next meeting. He suggested that Members take note of the statements made. As there were no interventions under the agenda item of Other Business, he suggested that, in accordance with the practice of grouping meetings of subsidiary bodies close to meetings of the Council, the next formal meeting be held before the next regular meeting of the CTS.

74. The Committee so agreed.