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PREPARATORY COMMITTEE FOR THE WORLD TRADE ORGANIZATION

SUB-COMMITTEE ON SERVICES

REPORT OF THE MEETING HELD ON 16 DECEMBER 1994

Note by the Secretariat

1. The Sub-Committee on Services held its sixth meeting on 16 December 1994. The agenda for the meeting is contained in Airgram PC/AIR/52. In addition, under Other Business, the Chairman reported on the meeting of the Negotiating Group on Basic Telecommunications which was held on 12 and 13 December 1994. The Sub-Committee agreed to take up Item A on the Agenda at the end of the meeting.

Item B: Verification of Schedules

2. The Chairman indicated that an informal meeting of the Sub-Committee had been held on 15 December 1994 for the purpose of verifying schedules of commitments on which negotiations had been concluded. That exercise had essentially been one of clarification with respect to the technical accuracy of schedules as a reflection of the agreed results of negotiations as well as their consistency with the agreed Guidelines for the Scheduling of the Commitments. The meeting was not concerned with the substance of the commitments. Eight schedules had been examined, namely those of St. Kitts & Nevis, United Arab Emirates, Mali, Angola, Qatar, Burundi, Ecuador and Slovenia. Of these, the schedules of Ecuador and Slovenia were verified; in the case of the other six it was made clear that bilateral negotiations were not completed. The verification of these will take place after the negotiations are concluded.

3. As for individual schedules, the Chairman stated that Ecuador's schedule was verified and would be submitted to the Preparatory Committee for its approval at its meeting on 21 December 1994. Similarly, Slovenia's schedule was verified ad referendum to the meeting of its accession Working Party on 19 December 1994. The schedule would also be submitted to the Preparatory Committee for approval. In the cases of Burundi and Mali, which are least developed countries, bilateral negotiations on the substance of their schedules would continue into 1995. The deadline for the submission for their schedules is 15 April 1995. In the case of the other countries which had become contracting parties to the GATT in 1947 pursuant to Article XXVI.5(c), namely; St Kitts & Nevis, Angola, United Arab Emirates and Qatar, substantive negotiations would also continue on their schedules into 1995. In this context the Chairman referred to ongoing work in the Preparatory Committee concerning a draft decision to extend the negotiating period until the end of March 1995. The Secretariat was asked to bring these developments to the attention of those countries which have submitted schedules for verification but were not present at the meeting.

4. The Sub-Committee took note.

Item C: Other Business

5. The Chairman reported that the Negotiating Group on Basic Telecommunications had held its fourth meeting on 12 and 13 December 1994. The group had approved a request for observer status

from the Republic of Slovenia. As a result, the number of Governments participating in the negotiations remained at 25 and the number of Governments participating as observers increased to 28. The group continued to review participants' responses to the questionnaire on Basic Telecommunications: it had completed the review of the 20 responses submitted thus far. The group had also discussed outstanding technical and conceptual issues related to the negotiating and scheduling of commitments. Subsequent meetings of the group will focus on those issues. It had been agreed that the date of the next meeting of the group would be 27-28 February 1995 followed by bilateral consultations between delegations for the remainder of the week.

Item A: Issues relating to the Scope of the GATS

6. The Chairman recalled that at the first meeting of the Sub-Committee held on 15 July 1994, it was agreed that issues relating to the scope of the GATS should be a matter of priority to the Sub-Committee and he had been requested to start a process of informal consultations on the subject. The statement of the Chairman of the GNS of 14 December 1993 had stated that the result of the consultations would be reported to the Council for Trade in Services for appropriate decision. Accordingly, the Chairman of the Sub-Committee now submitted a draft report on the consultations for adoption by the Sub-Committee. The draft report had been subject to informal consultations prior to its submission at the formal meeting. Those consultations had revealed disagreement over the last sentence in paragraph 7 which read: "Accordingly, it has not been possible to reach agreement as to whether they are within or outside the scope of the Agreement". Nevertheless he was submitting the report as it stood in the hope that after further consideration, delegations would be able to approve it. The Chairman indicated that he was convinced that the draft report as it stood did not prejudice the position of any delegation. However, he would welcome any proposed language that would be acceptable to all Members of the Sub-Committee.

7. The representative of Australia expressed his support for the draft report submitted by the Chairman. However, in an attempt to facilitate its adoption, he proposed an alternative language to that of the last sentence of paragraph 7 of the draft report which read: "Accordingly, as far as these measures are concerned, it has not been possible to reach agreement on the issues which have been the subject of consultations in the Sub-Committee". The Chairman then invited delegations to comment on this proposed language.

8. The representative of the European Communities took the view that the draft report submitted by the Chairman as it stood was an accurate reflection of the situation and should therefore be adopted by the Sub-Committee. Her delegation was not ready to engage in any redrafting exercise anymore.

9. The representative of Sweden speaking on behalf of the Nordic countries, agreed with the statement made by the representative of the European Communities. He, as well as the representatives of Switzerland and Japan, supported the draft report submitted by the Chairman as it stood.

10. The representative of India stated that his delegation had serious problems with the last sentence of paragraph 7 of the draft report submitted by the Chairman. Therefore, he could not agree to its adoption by the Sub-Committee as it stood. On the other hand, he expressed support for the alternative language proposed by the delegation of Australia.

11. The representatives of Hungary, Brazil, New Zealand, Canada, Argentina and Korea supported the adoption of the draft report submitted by the Chairman. They also expressed their willingness to accept the alternative language proposed by Australia for the last sentence of paragraph 7.

12. The Chairman concluded that it did not seem possible that a consensus could be achieved on alternative language for the last sentence of paragraph 7. Consequently, the draft report could not

be adopted by the Sub-Committee. He would therefore make a report to the Preparatory Committee and, eventually, to the Council for trade in services on his own responsibility.

13. The representative of Pakistan stated that the issue of the scope of the GATS had been deliberated at length for years. It had also been the subject of very spirited discussions during the course of 1994 on the basis of the statements of 10 December and 14 December 1993 by the Chairman of the GNS. During the entire course of those discussions, delegations had participated in the spirit of accommodation and cooperation. He expressed satisfaction that an agreement had been reached on measures relating to judicial administrative assistance and measures relating to the entry and stay of Natural Persons. His delegation was sorry that it had not been possible to reach a common understanding on the other three categories of measures. He recalled that the GATS "applies to measures by members affecting Trade in Services". It followed from this that the Agreement extends to all measures, unless it had been expressively provided to exclude some from its scope. This was reflected in Document MTN.GNS/W/177.Rev.1 where it states that paragraph 1 of Article 1 of the GATS was formulated in an inclusive sense and not in an exclusive fashion, which could be seen as an indication that the intent of the negotiations had been to widely cover any measure which affects Trade in Services. The statement by the Chairman of the GNS on 14 December 1993 was also, in essence, a confirmation of that understanding,. Therefore, it should be assumed that the coverage of the GATS with respect the measures affecting trade in services is, and has to be, universal unless otherwise decided or provided for.

14. The representative of Pakistan also stated that it was essential to preserve the unity and integrity of the GATS. Any attempt to interpret its provisions before their entry into force would only diminish its value and the commitment of participants to it. In the absence of an agreed common understanding on the outstanding issues, the only alternative was to accept the disagreement and reflect it in the report of the Sub-Committee. That report would not prejudice any position. Any future problems arising out of the implementation of the Agreement would be dealt with by the mechanism available under the WTO.

15. The representative of Sweden, speaking on behalf of the Nordic countries, stated that the unresolved issues relating to the scope of the GATS outlined in Document MTN/GNS/W/177/Rev.1 had been there for a long time in the services negotiations. The Nordic countries had referred to those issues on many occasions during the negotiations, and their position had always been that those measures fell outside the scope of the GATS. Despite the willingness of the Nordic countries to engage in discussions on the matter, the problem could not be solved in the process leading to the submission of the draft Final Act in December 1991. Further attempts were made in 1992 and 1993, but the results were not conclusive. During the negotiations, the Nordic countries had consistently reserved their position on this matter. The representative of Sweden recalled that the revised MFN Exemption List submitted by Finland in early December 1993 had stated that: "Over the past years, the Nordic countries have repeatedly raised questions concerning to what extent MFN exemptions have to be taken for certain measures, such as those contained in social security agreements. Our initial list of MFN exemptions reflected this uncertainty. The Nordic countries continue to have questions concerning those measures, and we believe that they are best dealt with through collective solutions. Due to lack of time, we are as well ready to seek procedural solutions which would allow us to address these questions properly at a later stage. However, Finland will not extend benefits contained in e.g. social security agreements on an MFN basis."

16. The representative of Sweden added that the same, or very similar statements were contained in corresponding submissions by the other Nordic countries. In addition, the Nordic countries had reserved the right to revert to the issue of social security measures in their schedules of commitments in the absence of a collective understanding providing for legal certainty. He then referred to the statements made in documents MTN.TNC/W/62/Rev.4 for Finland, MTN.TNC/W/74/Rev.3 for Iceland,

MTN.TNC/W/63/Add.1/Rev.4 for Norway and MTN.TNC/W/59/Rev.4 for Sweden. Without prejudice to the final outcome on the matter, Finland and Sweden had introduced National Treatment reservations for social security measures in their respective draft schedules. Against that background, it was clear that the uncertainty regarding the measures referred to in document MTN.GNS/W/177/Rev.1 had created difficulties for the Nordic countries during the negotiations in 1993. Therefore, the Nordic countries had welcomed the statement of the Chairman of the GNS dated 14 December 1993 (MTN.GNS/W/260), which provided more time to consider the matter with a view to reaching a common understanding on the issues. After the Chairman had made that statement in the meeting of the GNS of 14 December, the spokesman for the Nordic countries declared that those of them that had introduced National Treatment reservations for social security measures would withdraw their reservations in order not to prejudge the outcome of the discussions. That action was taken in good faith. In addition, the Nordic countries had refrained from filing MFN exemptions on measures referred to in the Chairman's statement. He added that the discussion had clearly shown that most delegations had concluded that the unresolved measures listed in document MTN.GNS/W/177/Rev.1 fell outside the scope of the GATS. The Nordic countries realised that it had not been possible to reach a better common understanding of the ways in which those measures affect trade in services and therefore to agree on whether they fall within or outside the scope of the GATS. Against that background the Nordic countries maintained their position that the measures concerned fell outside the scope of the GATS.

17. The representative of Switzerland recalled that during the Uruguay Round negotiations it had not been possible to achieve agreement on whether, and if so the extent to which, certain types of measures identified in document MTN.GNS/W/177/Rev.1 were within or outside the scope of the GATS. As a result the Chairman of the GNS had issued a formal statement (MTN.GNS/49) on 10 December 1993 assuming that participants would refrain from taking issues arising in this area to dispute settlement. The Chairman had also stated that participants must assume their own responsibilities. Subsequently, at the GNS meeting on 14 December 1993 it was agreed by all participants that an additional period of time up to 15 December 1994 would be provided for further consultations with a view to reaching a better common understanding of the ways in which measures of this kind may affect Trade in Services. The result of this work was to be reported to the Council for Trade and Services for appropriate decision (MTN.GNS/W/260). In view of this decision, and in order not to prejudge subsequent discussions, Switzerland had refrained from tabling MFN exemptions relating to social security measures in its final submission on 15 December 1993 (MTN.GNS/W/211/Rev.2). Switzerland's previous submission dated 12 December 1993 (MTN.GNS/W/211/Rev.1) had contained the following statement: "At present no exemption is submitted for measures taken under statutory systems of social security. Switzerland reserves the right to examine these measures in light of the approach taken by other participants". In spite of extensive consultations during 1994, there were still several categories of measures, in particular those relating to social security, on which it had not been possible to arrive at a common understanding on whether they fell within or outside the scope of the Agreement. In the absence of a common agreed understanding there continued to be no basis on which participants could exercise responsibilities. The task agreed on 14 December 1993 remained unfinished. The representative of Switzerland stressed the willingness of his delegation to continue work on the outstanding issues with a view to reaching substantive solutions meeting the concerns of all participants.

18. The representative of Japan stated that in spite of his delegation's appreciation for the work done so far, it was regrettable that it had not been possible to reach a common understanding on the outstanding issues, including social security, which would have enabled delegations to assume their responsibilities. He reiterated Japan's position that social security measures should be considered outside the scope of the GATS since those measures would not substantially affect trade in services. He stated that there was a need to continue multilateral work on those issues. In the meantime, delegations were not able to assume their responsibilities concerning their schedules and MFN Exemption lists.

19. The representative of Austria stated that his country had included in its draft MFN Exemptions on 13 December 1993 a list of "measures relating to the preferential use of social security schemes as well as measures relating to investment protection". Subsequently, in the light of the Chairman's statement of 14 December 1993, and in order to avoid prejudging the results of the consultations, Austria had withdrawn those reservations. He expressed the disappointment of his delegation with the outcome of the consultations, as well as the inability of the Sub-Committee to adopt the draft report submitted by the Chairman. He also stated that his delegation was still convinced that all five categories of measures referred to in the Note by the Secretariat (MTN.GNS/W/177/Rev.1) were outside the scope of the GATS and therefore it reserved its rights.

20. The representative of the European Communities stated that her delegation would like to reserve its rights to comment on the Chairman's draft report at the meeting of the Preparatory Committee on 21 December. She regretted the fact that it was neither possible to achieve a better common understanding of the issues, nor to agree on the adoption of a report of the Sub-Committee. What had struck her delegation throughout the process of consultations was that it had not been possible to reach a conclusion or a better common understanding despite the fact that there had been a large majority of countries that believed that the measures in question were outside the scope of the GATS. Her delegation was among those. They had participated seriously in the consultations, presenting substantive arguments and concrete examples demonstrating how a number of those measures might affect trade in services, rather than approaching the matter from a rhetorical and dogmatic point of view. As a result of that work, it had been possible to build up a large majority which came to the same conclusion that these measures did not affect trade in services and therefore were outside the scope of the GATS. Since it had not been possible to reach an agreed conclusion, the fundamental question of whether these measures were inside or outside the scope of the GATS remained unsettled; there was therefore no legal basis to assume that they were inside the scope of the Agreement. It was on that basis that her delegation had not taken MFN exemptions or reservations from National Treatment at the end of the Round. The legal situation remained unchanged. Her delegation reserved its position and would take up the matter further in the Preparatory Committee.

21. The representative of India stated that it was important to outline the historical background to the issues relating to the scope of the GATS. This issue had been subject to discussion before 1993, but it had not then been possible to agree on a common understanding. At a formal meeting of the GNS on 1 October 1993, that the Chairman had invited delegations to submit to the Secretariat questions relating to the scope of the GATS. On the basis of those questions the Secretariat had prepared the Note in Document MTN.GNS/W/177/Rev.1 dated 4 November 1993. India had not been a party to those questions and thought at the time that it was extremely inappropriate to raise questions of such a kind as to cast doubts on the very scope of the GATS. The delegation of India nevertheless took note of the document prepared by the Secretariat and participated in the discussions that ensued. On 11 December 1993 the Chairman had made a statement, following consultations on the subject, making it clear that pending further clarifications of issues relating to the scope of the GATS, participants must assume their own responsibilities in deciding whether any measures that they maintain should be scheduled or made the subject of MFN exemptions. The only other qualification in the statement was an encouragement in the form of best endeavours to delegations to show restraint with regard to MFN exemptions and Dispute Settlement. In so far as the statement of 14 December 1993 was concerned, the manner in which it had been introduced and adopted could be questioned. Nonetheless, the delegation of India had accepted the statement in good faith and participated in the discussions that took place during the period of one year which ended on 15 December 1994. The representative of India did not agree with those delegations that claimed that the statement of 14 December, coming as it did so soon after that of 11 December, somehow caused participants to rethink and refrain from assuming their own responsibilities. In any case, the statement of 14 December in no way superseded the statement of 11 December. It merely gave extra time to participants with a view to reaching a better common

understanding on the ways in which certain measures affect trade in services. He stated that any other interpretation of those two statements would be inconsistent with both the letter and spirit of the GATS itself.

22. He added that the delegation of India had approached the consultations in good faith but had been clear from the very beginning that the following fundamental objectives could not be compromised: (1) that the integrity of the GATS must not be undermined in any way, (2) that MFN and National Treatment are unassailable principles and cannot become a matter of convenience and, (3) that it would set a dangerous precedent to try to interpret the GATS even before it entered into force. It was against this background that the Indian authorities had carefully considered the issues relating to the types of measures referred to in document MTN.GNS/W/177/Rev.1. After deliberation and reflection, it seemed clear that it would be impossible to say with any degree of certainty that any of those types of measures are not measures affecting trade in services. Throughout the consultations some participants had persistently sought legal cover for measures they maintained which were inconsistent with the GATS rather than making a good-faith effort to find ways in which such measures could be brought into conformity with it. The GATS, like other Agreements resulting from the Uruguay Round, was a leap of faith for all participants. Members must make their own judgement and assume their own responsibilities.

23. The representative of India also stated that his delegation could not associate itself with any statement which gave an impression that there were doubts concerning the scope of the GATS. The consultations had shown that there were profound divergences on this matter which were more likely to increase than decrease if this kind of discussion were to continue. The expiry of the deadline of 15 December 1994 exhausted the mandate given by the Chairman's statement of 14 December 1993. Members were free to raise any issues in the Council for Trade in Services under the WTO within the rights and obligations of the GATS. Even if this should happen, it should be delinked from the consultation process which ended on 15 December.

24. The representative of Australia, speaking on behalf of Australia and New Zealand stated that towards the end of the Uruguay Round, there had been much uncertainty amongst delegations about the extent to which certain categories of measures identified in MTN.GNS/W/177/Rev.1 fell within the scope of the GATS. As a result, the Chairman of the GNS issued a statement at an informal meeting on 10 December 1993 in which he noted that the consultations which had been taking place on those measures had relevance for their scheduling and for the question of MFN exemptions (MTN.GNS/49). He recalled that there had been a widespread concern at that time that in the absence of some shared understanding about how such measures related to the scope of the GATS, which could form the basis for all participants to take their own responsibilities in respect of all avenues then open to them, precautionary decisions by some delegations to schedule Article XVII reservations and MFN Exemptions would have been duplicated by others leading to the "telephone book" scenario which most delegations wished to avoid. It was in this context that the Chairman, in issuing his 10 December 1993 statement, urged participants to exercise restraint. After consulting with concerned delegations, the Chairman issued a subsequent statement on 14 December 1993 providing an additional period for further work to be done to arrive at a clear understanding of the ways in which the categories of measures identified in MTN.GNS/W/177/Rev.1 may affect trade in services. It had been noted that the results of that work would be reported to the Services Council for an appropriate decision. That statement had the intended effect, nearly all delegations either withdrawing their existing draft reservations/exemptions or withholding such entries which they had intended to table on the final day of the negotiations, 15 december 1993.

25. He added that pursuant to the 14 December 1993 text, the Sub-Committee had engaged in intensive work, particularly in informal session, in seeking to reach a common understanding which would serve as a basis for participants to assume their responsibilities. While a better understanding

had been achieved on a number of issues, it was regrettable that there remained several categories of measures, including those relating to social security, on which it had not yet been possible to arrive at an agreed common understanding of the ways in which measures of this kind might affect trade in services. In the absence of such an understanding, there continued to be no basis on which delegations could exercise responsibilities. The task set by the GNS Chairman in his 14 December 1993 statement, in order to give effect to the intention of that element of the 10 December 1993 statement on responsibilities, remained unfulfilled.

26. The representative of Australia concluded that the combination of these events meant that the situation outlined in the 10 December statement remained current, pending an agreed outcome of multilateral work on the scope issues where no consensus had been reached, delegations were not yet in a position to exercise responsibilities with regard to the scheduling or exemption of measures in those areas. It was the view of the delegation of Australia that, in order for responsibilities to be exercised, multilateral work needed to be completed. That would ensure that the rights of all delegations would not be prejudiced.

27. The representative of Egypt reserved the right of his delegation to make a full statement at the meeting of the Preparatory Committee on 21 December. Nonetheless, he had some brief comments to make. He stressed the importance of the rule of consensus in the conduct of work under the WTO and recalled that the statement of 14 December 1993 had been adopted hastily and in the absence of some delegations. His delegation believed that the statement was a recipe for confusion since it did not provide for a clear conclusion to the process of consultation. He appreciated that some participants had withdrawn measures from their schedules and MFN exemption lists, which was why his delegation was open minded regarding the question of providing legal coverage for them. In his view, however, the Chairman's statement of 14 December 1993 did not represent a sufficient basis for the serious action of withdrawing such measures from schedules and MFN exemption lists.

28. The representative of Mexico stressed that there must not be any unilateral interpretation of GATS provisions resulting from the absence of agreed conclusions.

29. The representative of Korea stated that he regretted the fact that no agreement was reached and reserved the right of his delegation with respect to MFN exemptions and National Treatment reservations. The representative of Turkey also reserved the rights of his delegation concerning MFN exemptions.

30. The Chairman expressed his regret that no agreement had been reached in spite of the sincere efforts by many participants.