

Committee on Specific Commitments

REPORT OF THE MEETING HELD ON 19 MARCH 2019

NOTE BY THE SECRETARIAT¹

The Committee on Specific Commitments (CSC) held a meeting on 19 March 2019 chaired by Mr. Nurbek Maksutov from the Kyrgyz Republic. The agenda for the meeting as contained in document WTO/AIR/CSC/8 was adopted.

The Chairperson indicated that last time the Committee had met was on 15 March 2017. He recalled the Committee's terms of reference as contained in document S/L/16 which consisted of functions in three aspects. The first was to "oversee the implementation of specific commitments in all modes of supply, including specific commitments relating to the movement of natural persons". The second was to examine Members' specific commitments with a view to improving their technical accuracy and coherence in the future. The third was to oversee the application of the procedures for the modification of schedules pursuant to GATS Article XXI. In view of the Committee's broad mandate the Committee had been underused and many issues within the mandate had never, or not fully, been addressed. The Committee's work, like the WTO, should be Member-driven and Members should consider how to make better use of this institution to serve their interests.

The Chairperson noted that the handover of the chairmanship of the Committee should normally take place at the end of the first meeting of the year. However, since the consultations conducted by the out-going Chair of the CTS were still underway, the handover was postponed until the consultations concluded. Consequently, the Committee did not address the item on the appointment of the new Chairperson at this meeting.

1 ITEM A - SCHEDULING ISSUES

1.1. The Chairperson stated that since taking over the chairmanship of the Committee in June 2018, he had held extensive consultations with Members. In this context, one view was that scheduling issues had not been adequately addressed in the Committee. Some delegates had particularly mentioned the possibility to examine scheduling issues arising from electronic supply of services, such as "unbound" with asterisk under modes 1 and 2. He noted that paragraph 47 of the Scheduling Guidelines (S/L/92) stated that "where the mode of supply is thought to be inapplicable is in fact applicable or becomes so in the future, the entry means "unbound"." Since digital technologies had made almost all services tradable, he asked if Members wanted to revisit this paragraph in the Scheduling Guidelines. Another issue that some Members had mentioned was the distinction between modes 1 and 2 as far as online transactions were concerned, or the line between market access and national treatment for some measures such as data localization requirements. He encouraged Members to consider whether it was desirable for the Committee to consider these issues and whether they would like to make contributions in this regard.

1.2. The representative of the Kyrgyz Republic presented his delegation's Communication regarding mode 4 related scheduling issues, which had been circulated on 6 March 2019 (JOB/SERV/287). For the Kyrgyz Republic, as for many other developing Members, mode 4 was considered as an area of comparative advantage and constituted an important component of its economy. The Kyrgyz Republic was one of the leading countries to export services, relative to its population and size of economy, having almost one third of its active population working abroad

¹ This document has been prepared under the Secretariat's own responsibility and is without prejudice to the positions of Members or to their rights and obligations under the WTO.

and receiving remittances which reached 30% of its GDP. Mode 4 appeared to be a meaningful area of concern for the Kyrgyz Republic. It was a high priority to promote progress in the WTO by bringing certainty and predictability to services trade under Mode 4. The Kyrgyz Republic wanted to focus Members' attention to certain issues related to the scheduling of Mode 4 commitments which were, from the point of view of this delegation, still in need of clarification and understanding by the Members. The Kyrgyz Republic found that many Mode 4 entries were vague and ambiguous, which might have laid the ground for significant administration discretion. To some degree, lack of clarity and transparency in mode 4 commitments entailed legal uncertainty and thus undermined the value of specific commitments. The Communication highlighted some common scheduling issues under mode 4, including those related to: economic needs tests (ENTs); categories of natural persons scheduled; and relationship between horizontal commitments and sectoral entries. Not intended to be exhaustive, the purpose of the Communication was to revive the discussion in the Committee and to invite Members to consider possible future work. The first scheduling issue related to Mode 4 reiterated again the issues earlier raised by some WTO Members, but with more focus on Mode 4 itself. Despite the requirement and guidance which showed explicitly that ENTs should be expressed in quantitative terms, rather than qualitative as could be found, the lack of clarity and specificity constituted the main scheduling problem in Members' schedules. Another issue concerned categories of natural persons, such as intra-corporate transferees, business visitors, contractual service suppliers, independent professionals, etc. The categories were either not well defined or differed widely in their scope and coverage from schedule to schedule. The absence of agreed definitions for different mode 4 categories and vague inscriptions in many schedules further increased the uncertainty of commitments under Mode 4 as they might be subject to arbitrary implementation. The third issue was about the relationship between horizontal and sector specific entries, where horizontal commitments were combined with "none" or "unbound" at the sectoral level. As stated in the Secretariat Background Note on the Presence of Natural Persons (Mode 4), this raised a question of interpretation as "it is not always clear whether this is to be read as a full commitment, as no commitment, or whether the horizontal entry is supposed to prevail" (S/C/W/75). The Scheduling Guidelines were silent about "none" or "unbound" entries in the sectoral section under mode 4. Inconsistency between horizontal and sectoral entries would add more uncertainty to mode 4 commitments. Keeping in mind that other scheduling issues were worth discussing, this Communication was intended to serve as the first step to revive the discussion in the Committee with a view to improving the clarity and accuracy of commitments. The Kyrgyz Republic suggested the following questions for discussion:

- a. Should a Member decide to specify its ENT entries under mode 4, what might have been the common elements, especially for labour market tests inscribed in the horizontal section?
- b. Was it desirable to develop common definitions of the categories of mode 4 persons? If so, what might have been the basis for such common definitions? Alternatively, how could clarity and predictability be enhanced for scheduled mode 4 categories? Could a checklist of key definitional elements be developed, for instance?
- c. Would it be useful to clarify the relationship between horizontal and sector-specific commitments in the case of mode 4?
- d. To add clarity and accuracy to commitments under mode 4, would Members consider applying the Procedures for the Certification of Rectifications or Improvements to Schedules (S/L/84)?

1.3. The representative of India stated that the issues presented in the Kyrgyz Republic's Communication were pertinent and should have been addressed long ago. She indicated that India had tabled several proposals in these areas, some of which had also been referenced in the document JOB/SERV/287. India strongly recommended the Membership to jointly work in the identified areas. Firstly, there was a need to be fully transparent about the criteria on which ENTs were based. Secondly, for an objective evaluation of an application, it was critical to develop key definitional elements for committed categories of mode 4. For instance, service suppliers from India had faced difficulties due to subjective assessment of an applicant's qualifications especially in the case of the "specialist" sub-category of Intra-Corporate Transferees (ICTs). Thirdly, it would be extremely helpful to clarify the relationship between horizontal and sector-specific commitments in the case of mode 4. In some Members' schedules, there was a conflict between

mode 4 commitments in the horizontal and sectoral sections, which needed to be clarified or amended at the earliest. Finally, concerning the suggestion that Members consider applying the Procedures for the Certification of Rectifications or Improvements to Schedules, India wanted to hear from Members on other possible options to address these critical scheduling issues.

1.4. The representative of Tajikistan shared some initial observations. The purpose of the Kyrgyz Republic's Communication was to promote liberalization of mode 4 trade in services, which was of interest to developing countries. Mode 4 was defined as the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. ENTs constituted one of the most important market access and national treatment barriers to international trade in services under the GATS, affecting a wide range of sectors relevant for mode 4. Tajikistan noted that ENTs were not equally registered by all Members and these measures could generally be considered as a quantitative restriction to foreign services and services suppliers. Thus, all proposals and negotiations should aim at considering the development and the increasing participation of developing countries in international trade in services, with a focus on sectors and modes of supply of export interest to developing countries. Tajikistan was willing to participate in further discussions and looked forward to constructive work to reach a reasonable outcome.

1.5. The representative of China echoed India's statement that this kind of discussion was long overdue. China was willing to contribute to the technical discussions on the relevant issues raised in the proposal. Regarding the ENT issue, China welcomed relevant discussions based on the Background Note by the Secretariat. Specifying Members' ENT requirements under mode 4 would improve the predictability and certainty of commitments. China encouraged Members to exchange their own practices and experiences in this regard, however, such technical discussions should be without prejudice to Members' rights to regulate in line with their commitments. Regarding the common definitions of the categories of natural persons, China agreed that they would be desirable. The Secretariat Background Note had provided preliminary definitions on terms such as independent professionals, contractual service suppliers, intra-corporate transferees and business visitors, etc. These definitions could serve as a good basis for the future discussion. China supported further clarification on the relationship between horizontal and sector-specific commitments in the case of mode 4, which would contribute to enhancing the consistency of Members' commitments, and therefore improve their implementation. Regarding applying the Procedures for the Certification of Rectifications or Improvements to Schedules, since the Certification was subject to the acceptance of all WTO Members, the completion of such a process could not be successful without mutual understanding and consensus among all Members. Therefore, relevant technical discussions on improving the accuracy of Members' commitments would be more practical. China indicated that it was looking forward to further discussion of these issues.

1.6. The representative of South Africa delivered a statement on behalf of the African Group. The Group welcomed reinvigorating work in the CSC after a two-year hiatus. The African Group recognised the importance of scheduling issues as they related to Members' schedules of specific commitments. It also acknowledged the relevance of Mode 4, an area of longstanding interest to developing and least developed countries. Members could benefit from a deeper discussion on these issues and could go along with supporting future work in the CSC. The Group pointed out that this future work should include all relevant scheduling issues, not only limited to Mode 4. These included discussions on the classification of computer and telecom services, and the Mode 1 delivery of services.

1.7. The representative of Thailand welcomed the efforts to revive the discussions in the Committee. Thailand supported a Member-driven process and was therefore open for an information or experience sharing exercise on topics falling within the mandate of the Committee that might be of Members' interest. Such an exercise should be conducted on a voluntary basis and without prejudice to Members' existing commitments.

1.8. The representative of Turkey reiterated her delegation's position that Mode 4 had been the most neglected mode in terms of existing commitments and of the work undertaken to further the benefits of existing commitments. As previously stated by the Turkish Ambassador in the TNC meeting, Members were negotiating issues related to mode 1 and 2 through the e-commerce initiative and mode 3 through the investment facilitation initiative, although not all Members participated in those. Although Turkey welcomed all initiatives and negotiations per se, it also

wanted to draw Members' attention to the lack of an initiative and/or negotiations on Mode 4 which exacerbated the imbalance of commitments under other modes and this mode. Turkey was again struck by how few commitments Members had undertaken in Mode 4, which were also ambiguous with strong links to Mode 3. Although not directly relevant to the discussions, the main reason for so few commitments and such ambiguity, seemed to stem from the fact that while undertaking commitments Members had not at hand the tools to differentiate between temporary and permanent stay, work permits, and between a service supplier as defined under GATS and a regular applicant for the domestic labour market. Members apparently still did not have such tools. The Background Note by the Secretariat (S/C/W/301), stated that "even the concessions granted in Preferential Trade Agreements have only provided rather limited advances over GATS mode 4 commitments". When market access negotiations re-started, this might be the first challenge to tackle. In the meantime, Members should at least try to develop understandings and disciplines to better harness the benefits of the existing commitments. Kyrgyz Republic's submission had successfully put forth possible future work that could be undertaken before market access negotiations start. Turkey also provided some answers to the questions raised in the Communication. The answer to the first question lay in the fact that Members' entry, temporary stay and work permit procedures did not differentiate between temporary and permanent migration. Labour market tests might have proven to be unnecessary for natural persons as defined under GATS if migration authorities had a way to distinguish them from regular foreign applicants for the domestic labour market. For the second question, common definitions should be developed. The basis for such common definitions could be the existing entries of the Members which were already compiled by the Secretariat in its Informal Note contained in document JOB(03)/195. For the third question, it would be very useful to clarify the relationship between horizontal and sector-specific commitments in the case of mode 4. However, when clarifying the relationship between horizontal and sector-specific commitments, all modes of supply should be included. Concerning the last question, Turkey would not hesitate to activate the procedures of a Certification process if it was so agreed, but this would be difficult given the burden of the process and the conflicting interests of Members at that point in time.

1.9. The representative of Uganda delivered a statement on behalf of the LDC Group. The LDC Group attached utmost importance to mode 4 issues, and this had been reflected in the Collective Request Pursuant to the Bali Decision on the Operationalization of the Waiver Concerning Preferential Treatment to Services and Service suppliers of Least-developed Countries (S/C/W356). In the collective request the Group called for the removal of ENTs. Specifically, under point A.2, the LDC Group asked Members to "waive all economic needs tests and labour market tests, or other procedures of similar effect, for LDC suppliers entering in accordance with a bona fide contract for a duration of two years renewable." Going forward in the discussion, the LDC Group was interested in hearing whether Members with ENTs would be willing to waive those in favour of service suppliers of LDCs that successfully attracted consumer's interest in their mode 4 services. In this regard, contractual service suppliers and independent professionals were desirable categories.

1.10. The representative of the Bolivarian Republic of Venezuela noted the importance of the topic for developing economies and hoped to have in-depth discussions on all the elements that were pertinent in that context.

1.11. The representative of Pakistan noted the questions and issues raised as relevant and important. Pakistan looked forward to participating in any discussion on this subject and the specific submission of the Kyrgyz Republic.

1.12. The representative of the United States noted that the Kyrgyz Republic's Communication referred to the Secretariat Background Note on Mode 4, and asked what new developments were sought. Some of the suggestions in the Communication would be challenging for the Committee, such as agreeing on common criteria, definitions or categories. The United States noted that recently acceded Members typically had undertaken more comprehensive commitments covering all areas as opposed to original Members. This might be worth examining. It was said that mode 4 commitments were weak, but this was often due to the lack of sectoral coverage. The fact that many original Members' schedules did not have a comprehensive sectoral coverage weakened entries in all modes. The United States supported South Africa's statement that there were issues to be considered beyond mode 4. For instance, certain Members had yet to submit updated schedules after new legislation had passed, although they had indicated they would do so in their original schedules. This was long overdue.

1.13. The representative of the European Union welcomed the fact of putting forward some substantial work for the Committee which could add value to what had been done over the past years. On the first question raised the Kyrgyz Republic's Communication, the European Union's approach would be not to impose ENTs for the category of intra-corporate transferees. For the other categories it might be very difficult to establish common ENT criteria as practices amongst Members differed, rendering the identification of common elements difficult. But Members could be encouraged to be as clear as possible when scheduling mode 4 commitments. On the second question on common definitions of categories of mode 4 persons, the European Union's position had always been that this would be a valuable exercise. An existing communication by the European Union and other Members of 18 February 2005 (TN/S/W32), suggested the adoption of common categories for mode 4 commitments. Concerning the third question on the relationship between horizontal and sectoral commitments, the European Union would be happy to discuss this, but did not see the issue at stake. The fourth question might be premature, in the view of the European Union.

1.14. The representative of Colombia agreed that there was space for improving the transparency of ENTs. Mode 4 commitments could be more beneficial. Discussions could be based on the existing elements in Members' commitments. There was a huge need for more in-depth work to improve the clarity of horizontal and sectoral entries.

1.15. The representative of Peru believed that the issues raised were relevant and could be fruitfully discussed in the Committee. Peru was very interested in mode 4, but also in other modes of supply. If other Members engaged in this, Peru would welcome informal discussions based on questions and statements that were made by the Kyrgyz Republic.

1.16. The representative of Mexico supported the comments made by Colombia. But, given that national systems differed greatly, it might be difficult to identify common denominators and definitions. Mexico would also be interested in discussions regarding horizontal and sector specific commitments. A lot remained to be done in that respect and the Background Note from the Secretariat was very useful.

1.17. The representative of Australia viewed Mode 4 as an important mode of supply, as well as it did for the other three modes. Australia was ready to engage in any future technical discussions on the issues raised in the Kyrgyz Republic's Communication.

1.18. The representative of Chile echoed the support for the re-establishment of the dialogue in the Committee and in all services regular bodies. Some greater clarity on ENTs could be achieved and would be useful. Chile's experience in negotiations, including regional, showed that defining common categories or definitions for mode 4 was difficult, as domestic regulations differ between countries. Chile viewed the clarification of the relationship between mode 4 horizontal and sectoral commitments worth discussing. Chile agreed that some schedules had created some doubts and needed clarifications.

1.19. The representative of the Kyrgyz Republic thanked delegates for their high-level interventions and interest in the topic. He emphasized that, as could be witnessed in Member's comments, even if the Committee could not reach a solution and move to the next steps, the goal was to increase awareness of these issues. The WTO bodies should create a discussion platform to enable Members to express their opinions, including opposing views. This would improve Members' knowledge of the magnitude and nature of the problems, as well as find solutions for the future.

1.20. The Chairperson invited Members to reflect on his introductory remarks of this agenda item regarding the consideration of scheduling issues arising from electronic supply of services or on-line transactions. Noting that no delegation was seeking the floor, he suggested that the Committee take note of the statements made and revert to this item at its next meeting. He would continue to consult with Members on how the Committee should move forward under this agenda item.

1.21. It was so agreed.

2 ITEM B - CLASSIFICATION ISSUES

2.1. The Chairperson recalled that since June 2018 he had been holding extensive consultations. There was persistent interest expressed in having discussions on classification issues related to online transactions. One specific issue suggested was the classification of platform services: were they covered by W/120, and if so, where should they fall? For example, the sharing economy had become an important business model, cutting across many various sectors such as distribution, transport or entertainment. It involved platform-based on-line transactions and facilitated access to goods and services. Amazon, Uber, eBay or Airbnb were well known examples. The chairperson invited Members to consider whether and how the Committee should undertake meaningful work in this area.

2.2. The Chairperson proposed that the Committee revert to this agenda item at the next meeting. He would continue to consult with Members on how the Committee should move forward under this agenda item.

2.3. It was so agreed.

3 ITEM C – OTHER BUSINESS

3.1. No delegation made interventions under this item.

3.2. The Chairperson indicated that he would hold consultations on the timing of the next meeting and inform Members in due course.

3.3. The meeting was adjourned.
