

CLASSIFICATION IN SERVICES: AN OVERVIEW OF THE MAIN ISSUES FOR DEVELOPING COUNTRIES

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I. INTRODUCTION

1. The main objective of this paper is to provide an overview of the main issues related to classification within the context of the services negotiations and to assist developing countries in understanding the implications. The paper will provide background on the status of the use of the Services Sectoral Classification List (MTN.GNS/W/120 – referred to as the W120) and the UN Provisional Central Product Classification (referred to as the CPC) and an update of current discussions on classification issues within the Committee on Specific Commitments (CSC). This is followed by a summary of the main approaches used within existing proposals and their implications. Finally, the lessons from recent examples of dispute settlement cases in which classification issues featured, are highlighted. In light of the implications, the paper concludes with a summary of points on areas where developing countries may wish to focus their efforts in the context of classification issues.

2. This paper will provide an analysis of the broader issues and implications at stake with regard to classification issues from a development perspective, rather than a technical analysis of the proposals or the sectors/sub-sectors in which classification proposals have been made.

II. THE USE OF W120 AND CPC

3. There is no (legal) obligation on the part of Member countries to use one classification list¹. Commitments can be undertaken on the basis of the W120 and the CPC. The CPC was revised in 1997 and published in 1998 as CPC Version 1.0 (CPC Rev.1)². Part of the initial work of the CSC was to discuss the implications of moving commitments to the CPC Rev.1, upon which the WTO Secretariat undertook work. It was found that this approach would have its own set of additional and more complex problems³.
4. Although reference to the W120 and CPC is not compulsory, the WTO Secretariat's 'Guidelines for the Scheduling of Specific Commitments under the GATS' states that 'in general' the W120 'should' be used as the basis for classification of sectors and sub-sectors⁴. In addition, where further sectoral refinement is necessary, the guide suggests supplementing the W120 with the CPC or other internationally recognized classification systems⁵.
5. In cases where a Member country deviates from this 'general' practice, and wishes to use its own definitions and classifications, the guide suggests that it should be in 'concordance' with the CPC. However, even if this is not possible, there is still scope for a Member country to provide its own

¹ Although in the recent US Gambling case, the Panel referred to the CPC for establishing whether commitments had been made. See discussion under Section V of this paper.

² The CPC Rev.1 was undertaken by the Voorburg Group which was set up under as a Canadian initiative in 1987 and therefore Canada has been and continues to be a strong supporter of using the CPC Rev.1.

³ For further analysis see 'A Qualitative Assessment of the Relevance of the Changes Resulting from CPC Rev 1 for Trade Negotiating Purposes', WTO Secretariat, 9 October 1997, S/CSC/W/9Add.3.

⁴ S/L/92, Page 8.

⁵ This includes the Financial Annex. However, it is worth noting that there are various other systems of classification in use at national, regional and international levels. These can be categorised as transaction based (IMF BOP statistics), activity based (eg. International Standard Industrial Classification of all Economic Activities - ISIC) production based (eg. North American Industry Classification System - NAICS) and product based which is the nature of the CPC. At the OECD level there is the example of the Joint OECD-Eurostat Trade in Services Classification which aims to promote consistency amongst OECD Members in classification - this does take into account the CPC and the W120, but there are differing opinions on whether it is as detailed given it is based on the IMF-5 Balance of Payments Manual. At one stage there was work being done on making it consistent with the CPC Rev 1. See 'Measurement, Classification and Reporting: an international perspective, O. Wichard, 2000 for details.

‘sufficiently detailed definition’⁶.

6. Whatever the basis may be for the undertaking commitments, the basis assumes a legal status once commitments have been scheduled according to it.
7. Overall, the W120 can be viewed as an abbreviated version of the CPC as it is based on it, with the latter providing a more comprehensive listing and description of sectors/sub-sectors and thus acting as a cross-reference for providing the scope of a specific commitment⁷. By nature, the CPC is disaggregated, distinguishing amongst almost 600 services, hence allowing for specific and targeted commitments and therefore less ambiguity especially in cases of dispute. Sectors listed in the W120 can be identified in the CPC by the corresponding number. Therefore there is an implicit relationship between the W120 and the CPC.
8. Most WTO Members used the CPC as the basis for scheduling their commitments under the Uruguay Round in nearly all sectors⁸. In some sectors where initially commitments were made in certain sectors such as financial services during the Uruguay Round, the definitions from the Financial Annex have subsequently been used.
9. As mentioned in the outset, one of the main reasons as to why Members took up the issue of classification was due to the technical inadequacies of the CPC in certain parts. For example, although the CPC’s coverage of sectors/sub-sectors is supposed to be mutually exclusive, there are so called errors whereby, for example, road transportation of mail and freight brokerage services are listed twice. Annex 1 presents an example of some of the sectors/sub-sectors in which current definitions could be problematic.

III. STATUS OF DISCUSSIONS

10. Originally, the scope of classification discussions in the CSC was decided based on the need for improving the technical accuracy and clarity of schedules and specific commitments in preparation for the next round of liberalization, and related to this, examining the adequacy of the W120. Whilst these concerns still underline the discussions, movement towards any solution is far from close. Discussions are still focused on sector specific issues which have been facilitated through the various proposals and

⁶ Guidelines for the Scheduling of Specific Commitments under the GATS, WTO Secretariat, Explanatory Note, S/L/92, Page 8.

⁷ See ‘Developments in International Services Classification Systems and Implications for Negotiations under the General Agreement on Trade in Services’, WTO Secretariat, 13 September 1996, S/CSC/W/2, for further background on the development of the W120 and the pros and cons of the CPC vis-a-vis other classifications systems.

⁸ It is worth noting that the US used the W120 without reference to the CPC to schedule its commitments, which was a major issue in the recent Antigua/US Gambling Case, as shall be discussed later.

communications submitted by Member Countries, both developed and developing – see Annex 2 for an update of proposals submitted since April 2003⁹. There appears to be a need for differentiating amongst the various approaches in the proposals as well as identifying the commonalities. However requesting the Secretariat to undertake analytical work on classification issues has become a sensitive issue given that it may be perceived as making value judgments rather than providing technical advice¹⁰.

11. Based on the direction of discussions at the CSC, it is unlikely that an entirely new classification system will be ‘adopted’ nor a complete informal move towards such a new system. A more likely scenario is the selective departure from existing classifications systems within certain sectors/sub-sectors, as demonstrated in the cases of various annexes such as in financial and maritime services.
12. Importantly, discussions on classification issues have been taking place in parallel to those in market access negotiations. However, Members have already been using new classifications in the context of the initial request-and-offer process. This can be viewed as unilateral re-classification and shall be discussed under section IV below.
13. This raises two important issues: first, given there is clearly no consensus on classification issues, the use of a range of different definitions/classifications can make it difficult to adequately assess the full value and implications of initial offers/requests; second, Members are taking an issue – for which there is a mandate to discuss at the multilateral level (i.e. the CSC) to a bilateral level, which could put considerable pressure on developing countries.
14. Whilst classification issues have been and continue to be discussed at bilateral and plurilateral levels through informal means such as ‘friends-groups’, based on meeting notes from the CSC it appears that some Members would like to see developments in such discussions to be shared at the CSC – the form in which this takes place (i.e. formal or informal) appears subject to differing opinions¹¹. At the 28 June and 2 July 2004 CSC meetings, based on informal consultations, the Chair decided to take the approach of supplementing the current practice of presentation of papers at formal meetings with prior informal consultations with interested delegations to decide on a number of sectors of interest for focus at the forthcoming CSC meeting – these would be announced in advance as well as whether such meetings would be formal or informal – in the case of the latter the Chairman would provide a non-attributable summary¹².

⁹ At the request of Members, the WTO Secretariat had prepared a Compendium of classification proposals to February 2003, JOB(02)/143/Rev.1.

¹⁰ S/CSC/M/33, Report of the Meeting held on 23 June 2004.

¹¹ S/CSC/M/25; S/CSC/M/26; S/CSC/M/28.

¹² Committee on Specific Commitments, Report of Meeting, 11 September 2004 S/CSC/M/33.

15. The main drawback of reverting to the informal approach (which has been undertaken previously), is that it raises the points mentioned above in paragraph 13 and contributes to having classification issues discussed at the bilateral level. Moreover, the other disadvantage of this approach is that there will be an inherent bias towards certain issues if there is no systematic approach in undertaking such informal consultations (i.e. there is no guarantee that all Members or groups of Members will be consulted on a regular basis).

IV. SUMMARY OF APPROACHES USED IN PROPOSALS

16. There have been a considerable number of proposals submitted on classification, covering some 17 sectors/sub-sectors. Both developed and developing countries have consistently submitted proposals. Some proposals favour the creation of a new category altogether, whilst others support the idea of an annex or checklist (as a negotiating tool) attached as a supplement to the W120 (therefore not altering the W120), or an annex in its own right such as the existing one on financial services.
17. Regarding actual proposals, themselves, whilst it is beyond the scope of this paper to go into individual proposals or cases of reclassification¹³, it is possible to identify two main approaches being adopted: cluster and disaggregation.
18. The cluster approach tends not to distinguish between 'core' and 'non-core' services by placing them into a broader category of an integrated chain of services. This can include a 'checklist' or 'index' approach which lists all the sectors/sub-sectors which relate to the particular service classification. The European Communities' (EC) proposal on environmental services¹⁴ is an example of clustering whereby it includes those sectors/sub-sectors which are related to the environmental services sector, such as data modeling services. The United States' (US) proposals on energy¹⁵ which covered all energy services and energy related services is another example of a cluster based approach. This approach would mean that liberalization commitments would undertaken more deeply due to the all encompassing nature of the cluster approach. The link between core and non-core services in this approach could lead to disputes through a non-violation complaint given related sectors would also be subject to liberalization¹⁶.
19. The approach of disaggregation relates to breaking down the elements of a sector/sub-sector so as to allow for more specific and targeted commitments.

¹³ Please note that the proposals referred to below are purely for illustrative purposes and countries may have changed their position since or may change them in the future.

¹⁴ S/CSS/W/3. Incidentally, this proposal was based on a cluster approach.

¹⁵ S/CSS/W/24, 18 December 2000.

¹⁶ South Centre Analytical Note SC/TADP/AN/SV/1, Classification issues in the current GATS negotiations: a review of the different proposals and some preliminary considerations, April 2003.

For example in the case of energy services, Venezuela made a proposal which divided the energy sector into sub-sectors associated with the energy sources, together with the specific activities which relate to the various processes, distinguishing between core and non-core processes¹⁷. Indonesia has also taken the approach of disaggregation in its proposal for energy services¹⁸, having created five categories and identified some new sub-sectors.

20. Based on some proposals by developing countries, such as the ones on tourism by Dominican Republic, Honduras, El Salvador, Nicaragua and Panama¹⁹ and energy by Indonesia, it is worth highlighting that classification could be viewed as a mechanism for implementing special and differential treatment for developing countries²⁰. For example, the former proposal takes a cluster approach with a view to address anti-competitive behavior of tourism and travel related service providers from developed countries and seeks liberalization in a sector of interest to developing countries. In the Indonesian proposal, the importance of the energy sector was linked to economic development and the need to respect the right of Members to regulate the supply of services to meet their national policy objectives and therefore retain the flexibility to undertake commitments based on their levels of development.

V. CONSIDERATIONS IN ANALYSING PROPOSALS²¹

21. In undertaking analysis of the implications of proposals in classification or submitting proposals themselves for that matter, developing countries may wish to keep in mind the following points:
- identify whether the approach being taken is based on a reallocation of entries or clustering or disaggregation or a migration from the CPC to the CPC Rev.1;
 - in the case of where reclassification is being proposed in an offer, the new change should be highlighted through the 'mark-up technique';
 - the new classification should be presented by the proposing Member in concordance with the CPC and where this is not possible, the Members should be providing a full description to avoid any uncertainty regarding the scope of the commitment which is being undertaken;
 - the proposing Member would need to ensure that the proposed change be neutral to, or improve, the existing sectoral scope and modal binding;

¹⁷ S/CSS/W/69.

¹⁸ S/CSC/W/42.

¹⁹ S/CSS/W/19.

²⁰ Comments on Clustering as a negotiating approach in GATS 2000, V. Yu, March 2001.

²¹ This section draws on the Guidelines for the Scheduling of Specific Commitments under the GATS, S/L/92.

- however ultimately, the onus is on non-proposing Members to ensure whether any proposed commitment based on a different classification by another Member remains the same or not.

VI. EXAMPLES OF RELEVANT DISPUTE SETTLEMENT CASES WHERE CLASSIFICATION ISSUES HAVE ARISEN

22. Classification of a sector/sub-sector can have significant implications for Member countries as it can determine the nature and scope of any given commitment which is undertaken. This has been illustrated in various dispute settlement cases, as shall be briefly discussed.
23. The Mexico/EC Banana dispute²² illustrated the problems associated with definitions – in this case it was the definition of wholesale services. The EC had argued that wholesale trading starts after the banana ripening process is over and that any prior activity should be classified as part of the production process. However in its decision, the Panel found that the CPC did not make a distinction between green and ripened bananas and that the distribution of both types would be covered under the scope of the CPC category for wholesale services.
24. In the case of EC/Canada Certain Measures Affecting the Automotive Industry²³, after establishing that the case fell under the scope of the GATS in addition to the GATT, similar to the Banana case above, the Panel found that the import duty exemption did affect the wholesale trade services of motor vehicles or wholesale trade service suppliers in their capacity as service suppliers based on the CPC definition of wholesale services, which *includes* vertically integrated companies who may perform other functions in addition to wholesale trade services.
25. The panel ruling in the recent Antigua/US Gambling dispute²⁴ was based on whether the US had or had not made commitments on gambling services. The US had argued that it had not undertaken commitments in gambling services, claiming that its schedule excluded ‘sporting services’ – which the US argued covered gambling. However, based on the 1993 Scheduling Guidelines, together with a covering note to its schedule of commitments and a document issued by the US International Trade Commission which stated that the relevant sub-sector of the US schedule corresponded with the relevant CPC classification on sporting and other recreational services, the panel found that the US had in fact undertaken commitments on gambling because it had based its commitments on the W120 – which if cross-referenced with the CPC

²² EC – Regime for the Importation, Sale and Distribution of Bananas (complaint by Mexico), WT/DS27/R/MEX.

²³ WT/DS139/AB/R and WT/DS142/AB/R, 31 May 2000.

²⁴ US – Measures Affecting the Cross-border Supply of Gambling and Betting Services (complaint by Antigua and Barbuda), WT/DS285/R. This case is currently under appeal by the US.

incorporates gambling as a part of 'Other Recreational Services' (except sporting)²⁵. The US had argued unsuccessfully that its schedule had made no reference to the CPC, only the W120, which in any case is a guide for scheduling commitments.

26. The Mexico Telecommunications case²⁶ was partly centered on the meaning of 'cross-border' services. Mexico argued that the cross border supply of services between two Members occurs only if the supplier itself operates, or is present, on the other side of the border. However, in its ruling, the panel found that the definition of a cross-border supply of a service as per Article 1:2(a) of the GATS does not indicate that a single supplier must undertake the transmission of a call from the start to the point of the call. The panel confirmed this finding with the CPC description of the services and accompanying Explanatory Note from the Uruguay Round²⁷.
27. These cases clearly demonstrate the consequences of the difference of understanding in definitions and meanings in the context of schedules of commitments, further justifying the need for certainty and clarity of terms which is directly related to how well a sectoral entry is defined. In the US Gambling case, the US had not provided clear definitions in its schedule which is why the Panel felt compelled to refer to the CPC.
28. Related to this, the US Gambling case also has significant implications for the status of the W120 vis-à-vis the CPC, given that the ruling implies that members must be wary of scheduling their commitments based on the CPC if they are to use the W120 – whilst the reality is that a Member country can use one or the other or both – and it not being 'compulsory' in any of these cases. Despite the lack of legal status of the use of the W120 and/or the CPC, the Panel had used them both together with the 1993 Scheduling Guidelines as the basis for their ruling because these 'represented a common agreement among Members with respect to the content of schedules'²⁸. This ruling will also raise implications for the remainder of the US's commitments given it had based its Uruguay Round commitments on the W120 without reference to the CPC.

VII. SUMMARY OF CONSIDERATIONS FOR DEVELOPING COUNTRIES

29. In light of the discussion above, developing countries may wish to consider the following in their approach to classification issues:

²⁵ 'US unlikely to Comply with Gambling Ruling even if Appeal Fails', Inside US Trade, November 12 2004, Page 3.

²⁶ Mexico – Measures Affecting Telecommunication Services (complaint by the US), WT/DS204/R.

²⁷ South Centre Internal Note on Summary of Findings: Mexico-Measures Affecting Telecommunication Services, January 2005.

²⁸ South Centre Internal Note on Summary of Findings: US – Measures affecting the cross-border supply of gambling and betting services, January 2005, Page 1.

- in considering reclassification or undertaking analysis of proposals of others, distinguish between offensive and defensive market access interests (eg. a disaggregated approach will better serve defensive interests whereas a cluster approach will be more suitable for pursuing offensive interests); assess clarity, legal status and certainty whereby the scope and coverage of the sector/sub-sector is clear; identify the commonalities and differences; and assess the effect on existing commitments;

ensure classification issues are addressed prior to undertaking market access commitments;
- develop mechanisms in the CSC for ensuring that discussion on classification issues remains inclusive, transparent and multilateral;
- ensure Members undertake adequate steps when proposing reclassification, especially within the request-and-offer process, to allow for the proper assessment of whether the scope of existing commitments remain the same under any proposed changes;
- monitor classification developments in other fora, which would assist developing countries in anticipating the sectors/sub-sectors in which developed countries may seek modifications; and
- in light of the recent dispute settlement cases, wherever possible schedule commitments consistent with the CPC or use clear definitions.

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ANNEX 1: EXAMPLES OF DEFINITION ISSUES AND PROBLEMS FOR VARIOUS SECTORS/SUB-SECTORS²⁹

Sector/sub-sector	Examples of definition issues/problems
Computer and related services	<ul style="list-style-type: none"> • Possible overlap between telecommunication services and computer services
Architectural and engineering services	<ul style="list-style-type: none"> • Possible inconsistency between W120 between coverage of sub-sectors 'engineering services' and 'construction and related engineering services' and corresponding CPC sections
Postal and courier services	<ul style="list-style-type: none"> • Definitional ambiguities relating to 'mail', lack of clarity on exclusion of mail services based on air transport and lack of exclusion for transport of 'mail' by road - which can lead to overlap in coverage of commitments • Distinction based more on operator than by activity
Distribution services	<ul style="list-style-type: none"> • Possible implications of having no separate category for distribution of merchandise and related services for services alone³⁰ • Distinction between categories of distributors can be blurred
Legal services	<ul style="list-style-type: none"> • Various countries have based their commitments on the distinction between advice and representation in host country, home country and international law, whereas CPC makes a distinction between

²⁹ This table is not an exhaustive list. Rather, it provides examples of a range of classification 'problems' within some sectors/sub-sectors. The table largely draws on the sectoral analysis undertaken by the WTO Secretariat in 1998, at the request of the CSC and proposals for re-classification by Members.

³⁰ There can be storable services such as customized software on a diskette which is subject to distribution alone rather than the usual case of services production and distribution being supplied by the one supplier.

	advice and representation in criminal law and other fields of law
Audiovisual services	<ul style="list-style-type: none"> • National definitions used especially for MFN exemptions • Possible grey area between services under telecommunications and audiovisual services under sub-category of Radio and television transmission services
Accountancy services	<ul style="list-style-type: none"> • Subject to different definitions across countries due to different interpretations between accountancy services and services provided by an accounting firm
Environmental services	<ul style="list-style-type: none"> • W120 seen by OECD countries as limiting in the context of broader environmental policy objectives
Advertising services	<ul style="list-style-type: none"> • Coverage could be open to uncertainty due to composition of audiovisual services in CPC and correspondingly W120
Education services	<ul style="list-style-type: none"> • Pace of change in sector vis-à-vis its classification
Health and social services	<ul style="list-style-type: none"> • Coverage under CPC broader than that of W120
Tourism services	<ul style="list-style-type: none"> • Current definition does not include activities such as Central Reservation Systems, car rentals etc - an expanded definition to W120 is being supported by the World Tourism Organisation
Energy services	<ul style="list-style-type: none"> • No comprehensive category in CPC or W120 • May not reflect structure of energy sector • Uncertainty in CPC entry on 'services incidental to energy distribution' vis-à-vis the explanatory note (which is more comprehensive) – this uncertainty is also the case for the W120 •
Telecommunication services	<ul style="list-style-type: none"> • Correspondence issues between CPC and W120 for sub-sectors • Pace of change in sub-sectors vis-

	<p>à-vis its classification means blurred distinctions</p> <ul style="list-style-type: none"> • Convergence of broadcast, telecommunications and computer technologies and services could result in uncertainty
Financial services	<ul style="list-style-type: none"> • Differences between W120, CPC and GATS Annex on Financial Services³¹ and therefore consistent correspondence difficult • Definition of a 'new' financial service unclear • Scheduling commitments based on services provided rather than type of financial institution (which is what domestic laws are based) • Pace of change in sector vis-à-vis its classification

³¹ Some Members used original national classifications in their schedules.

ANNEX 2: UPDATE OF CLASSIFICATION PROPOSALS SUBMITTED IN THE CONTEXT OF CURRENT GATS NEGOTIATIONS SINCE APRIL 2003³²

Sector	Nb. Of proposals	Countries submitting proposals	Additional proposals since April 2003
1. Maritime Transport Services	8	EC; Japan; Norway; Hong Kong, China; Republic of Korea; Chile; Australia; and Colombia	
2. Energy Services	7	US; Canada; Norway; the EC; Japan; Cuba; and Venezuela	Indonesia
3. Computer and Related Services	6	Canada; MERCOSUR and Bolivia; Costa Rica; India; the EC; and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu	EC, Chinese Taipei
4. Postal and Courier Services	6	US; the EC; Hong Kong, China; Switzerland; Chile; and Mexico	
5. Environmental services	6	US; the EC; Switzerland; Australia; Colombia; and Canada	
6. Telecommunication Services	5	Australia, the US; Switzerland; Chile and Mexico	
7. Legal Services	5	US; Australia; Japan; the Republic of Korea, and the EC	EC (although this was submitted as a communication with no proposal for re-classification)
8. Construction and Related Engineering Services	3	Brazil; Cuba; and New Zealand	
9. Tourism and Travel-related Services	3	Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru, and Venezuela; Switzerland; and Colombia	
10. Air Transport	3	EC; Norway; and Chile	
11. Mode 4:	2	India and the EC	
12. Education Services	2	US and New Zealand	
13. Consulting Services	1	New Zealand	
14. Audiovisual	1	US	

³² The original table is taken from South Centre, Analytical Note SC/TADP/AN/SV/1, April 2003, page 4. Proposals relating to financial services are not covered in this table.

Sector	Nb. Of proposals	Countries submitting proposals	Additional proposals since April 2003
Services			
15. Distribution Services	1	Switzerland	
16. Logistics and Related Services	1	Hong Kong, China	
17. Sporting Services	1	New Zealand	



Chemin du Champ d'Anier 17
Case postale 228, 1211 Geneva 19
Switzerland

Telephone : (41 22) 791 8050
Fax : (41 22) 798 8531
Email : south@southcentre.org

Website:
<http://www.southcentre.org>