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**1 ARTICLE XX**

**1.1 Text of Article XX**

**Article XX**

*Schedule of Specific Commitments*

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- (a) terms, limitations and conditions on market access;
  - (b) conditions and qualifications on national treatment;
  - (c) undertakings relating to additional commitments;
  - (d) where appropriate the time-frame for implementation of such commitments;
- and
- (e) the date of entry into force of such commitments.

2. 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.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

## 1.2 Article XX:1

### 1.2.1 General

#### 1.2.1.1 Structure of the GATS

1. The Appellate Body in *US – Gambling* deduced that the structure of the GATS led to two consequences for the scheduling of a specific commitment covering a particular service:

"First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Secondly, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."<sup>1</sup>

2. The Panel in *EU – Energy Package* acknowledged the Appellate Body's interpretation in *US – Gambling* and emphasized that a Member's schedule should be considered as a whole, and sectors and subsectors must be mutually exclusive in line with the principle of mutual exclusivity.<sup>2</sup> In its assessment, the Panel noted that:

"[T]he fact that 'Transportation of bulk liquids or gases (CPC 72122)' encompasses transportation of LNG in sea tankers contradicts Russia's argument that LNG services fall under sector 11.G, 'Pipeline Transport [Services]'. The reason is that, if LNG services should be considered to fall under 'Pipeline Transport [Services]' on the ground that the essential role of re-gasification is to facilitate the transport of natural gas via pipelines, LNG services might also be considered to fall under 'Transportation of bulk liquids or gases (CPC 72122)' on the ground that liquefaction facilitates the transport of LNG in sea tankers. However, in accordance with the principle of mutual exclusivity of sectors and sub-sectors, LNG services cannot be classified at the same time under sector 11.A, 'Maritime Transport', and sector 11.G, 'Pipeline Transport'. Thus, we can only conclude that LNG services must be classified elsewhere. For the purpose of this dispute, we do not need to determine where LNG services should be classified in the W/120 or in the CPC, but we feel confident that they are not found in sector 11.G, 'Pipeline Transport [Services]'.<sup>3</sup>

#### 1.2.1.2 The words "None" and "Unbound" in GATS Schedules

3. The Panel in *US – Gambling* observed that the word "None", when inscribed in a Member's Schedule under "Limitations on market access, "is a treaty term since it is in [the United States] Schedule", but "is not defined in the GATS nor in any Members' schedules". Interpreting this word in accordance with the principles of treaty interpretation, the Panel concluded that "when a Member has the inscription "None" in the market access column of its schedule, it must maintain "full market access" within the meaning of the GATS, i.e. it must not maintain any of the six limitations and measures listed in the second paragraph of Article XVI".<sup>4</sup>

4. In the same case, the Appellate Body similarly concluded:

"In this case, the relevant entry for mode 1 supply in the market access column of subsector 10.D of the United States' Schedule reads 'None'. In other words, the United States has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of its subsector 10.D commitment. In so doing, it has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI:2."<sup>5</sup>

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<sup>1</sup> Appellate Body Report, *US – Gambling*, para. 180.

<sup>2</sup> Panel Report, *EU – Energy Package*, para. 7.325.

<sup>3</sup> Panel Report, *EU – Energy Package*, para. 7.333.

<sup>4</sup> Panel Report, *US – Gambling*, paras. 6.269-6.279.

<sup>5</sup> Appellate Body Report, *US – Gambling*, para. 215.

5. In the same Report, the Appellate Body also explained that the notation "None" is "the opposite of the notation 'Unbound', which means that a Member undertakes *no* specific commitment".<sup>6</sup>

6. In *China – Electronic Payment Services*, the Panel examined the meaning of the term "None" in the column entitled "Limitations on National Treatment" in China's Schedule. The Panel stated:

"Although no specific definition exists in the GATS of the term 'None', its ordinary meaning is clear when read in conjunction with the title of the column in which the term appears. It indicates that China has undertaken 'no' limitations – in other words, a full commitment – with respect to national treatment in this mode, unless otherwise inferred from its Schedule. Hence, as regards the supply of services in subsector (d) through mode 1, the entry of 'None' in the national treatment column suggests that China would be committed to providing full national treatment. This national treatment would extend to 'all measures affecting the supply of services', the scope of Article XVII as defined in that provision."<sup>7</sup>

7. The same Panel also examined the meaning of the word "Unbound" in a GATS Schedule and stated:

"Although there is no specific definition in the GATS of this term, we note that a general dictionary meaning of the term 'bound' is to be 'compelled or obliged'. This sense is supported by a specialized legal dictionary, which gives a meaning of 'constrained by a contractual or other obligation'. Thus the term 'unbound' would indicate an absence of constraint or obligation. In the same vein, the Scheduling Guidelines instruct a Member wishing to retain the freedom to introduce measures inconsistent with market access or national treatment to record the term 'Unbound' in its GATS Schedule.<sup>8</sup> Since we have found subsector (d) to be unbound for market access, this suggests that China is under no constraint or obligation to grant market access within the terms of Article XVI:2."<sup>9</sup>

### 1.2.1.3 Nature of the elements to be specified pursuant to Article XX:1

8. The Panel in *Mexico – Telecoms* discussed the nature of the various elements that a Schedule must "specify" pursuant to Article XX:1 of the GATS:

"Article XX:1 provides that Members 'shall specify' certain elements in their schedules of specific commitments. The need to specify entries with regard to the *substantive* elements in Articles XVI (market access), Article XVII (national treatment), and Article XVIII (additional commitments) is dealt with in subparagraphs (a) to (c) of Article XX:1 respectively. Article XX:1 *reiterates* the need to 'specify' the limitations for market access to be scheduled under Article XVI. Article XX:1 appears however to *add* to the requirements for the scheduling of national treatment limitations under Articles XVII (which reads 'subject to any conditions and qualifications set out [in the schedule]'), and additional commitments under Article XVIII (which reads 'commitments shall be inscribed in a Member's schedule').

The need for specificity on the *temporal* aspects of commitments is dealt with in subparagraphs (d) and (e) of Article XX:1. Subparagraph (e) requires that each schedule shall specify the date of entry into force of the commitments undertaken. Subparagraph (d) requires that a schedule 'shall specify ... where appropriate the time-frame for implementation of such commitments'. The separate listing of temporal elements of entry into force and implementation in Article XX:1 confirms, in our view,

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<sup>6</sup> Appellate Body Report, *US – Gambling*, fn 257.

<sup>7</sup> Panel Report, *China – Electronic Payment Services*, para. 7.651. Panel Report, *EU – Energy Package*, paras. 7.347–7.348.

<sup>8</sup> (*footnote original*) 1993 Scheduling Guidelines, para. 11; 2001 Scheduling Guidelines, para. 18. See also Appellate Body Report, *US – Gambling*, fn. 257, which states: 'This notation is the opposite of the notation 'Unbound', which means that a Member undertakes *no* specific commitment.'

<sup>9</sup> Panel Report, *China – Electronic Payment Services*, para. 7.652.

that temporal elements are not part of the substantive elements that can be market access limitations under Article XVI:2."<sup>10</sup>

### 1.2.2 Article XX:1(d)

9. The Panel in *Mexico – Telecoms* examined the term "time-frame" in Article XX:1(d) of the GATS, and found:

"A 'time-frame' is defined as 'a period of time especially with respect to some action or project'. The term does not require the setting of a precise date, but it does imply a beginning and an end of a time period. Where not expressed by beginning and end dates, a time-frame may be also expressed in terms of maximum duration (for example: within three years). Unlike a condition which may or may not occur, a time-frame is not open-ended and does not leave the time of the occurrence in doubt."<sup>11</sup>

10. The Panel in *Mexico – Telecoms* then discussed how the words "where appropriate" in Article XX:1(d) of the GATS should be understood. The Panel found as follows:

"We consider that the obligation to specify 'where appropriate' a time-frame for implementation of a commitment must be considered in the overall context of Article XX:1. The wording of that Article seeks to ensure a high degree of clarity and specificity as to the exact terms of commitments made by Members. Members must be able to infer from each schedule the precise conditions for market access, national treatment and, where inscribed in the schedule, any additional commitments a Member has undertaken. By the same token, specificity as to when a commitment enters into force and when it has to be implemented is equally important. A market access commitment that leaves in doubt when a commitment takes effect is of little practical value. Unlike for the implementation of GATT tariff reductions which entered into force on 1 January 1995, and for which paragraph 2 of the Marrakesh Protocol provided a time-frame for implementation, the dates of entry into force and implementation of specific commitments under the GATS coincide in principle.

Article XX:1(d) permits Members who wish to depart from this general rule to specify a 'time-frame' within which they implement their commitments. We consider that the words 'where appropriate' in that subparagraph must be understood to refer to situations where the date of implementation differs from the date of entry into force of a commitment. The consistent practice of WTO Members in the scheduling of commitments supports this understanding. During the extended negotiations on basic telecommunications alone, twenty-seven Members who attached schedules of commitments to the Fourth Protocol, but wished to implement their commitments at a later time than the entry into force of their schedule, specified a time-frame for implementation – typically by entering dates upon which certain limitations would be removed. We consider that Article XX, the objective of which is to ensure clarity and precision with regard to the scheduling of commitments, cannot be interpreted to allow a window of discretion with regard to temporal aspects of these commitments that could erode the practical value of a commitment."<sup>12</sup>

11. In light of the foregoing analysis, the Panel in *Mexico – Telecoms* explained the role of Article XX:1(d) as follows:

"We therefore consider that subparagraph (d) of Article XX:1 requires the specification of a time-frame for implementation should a Member wish to implement a commitment *after* its entry into force. Where a Member does not specify a time-frame, implementation must be deemed to be concurrent with the entry into force of the commitment."<sup>13</sup>

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<sup>10</sup> Panel Report, *Mexico – Telecoms*, paras. 7.360-7.361.

<sup>11</sup> Panel Report, *Mexico – Telecoms*, para. 7.366.

<sup>12</sup> Panel Report, *Mexico – Telecoms*, paras. 7.367-7.368.

<sup>13</sup> Panel Report, *Mexico – Telecoms*, para. 7.371.

12. Referring to the circumstances of the case, and in particular the length of a time-period within which the implementation of Mexico's commitment might reasonably have been concluded, the Panel in *Mexico – Telecoms* stated:

"We have seen that the entry in Mexico's Schedule does not contain language that expresses a condition 'whether' regulations and permits would be issued, but only 'when' the permits would be issued. Interpreted in the context of Article XX, this entry implies that regulations were not in place when Mexico finalized its commitments on 15 February 1997, but expresses a commitment that these regulations would be issued. Even if Mexico had needed time to complete the issuance of the regulations beyond the time of entry into force of its commitment on 5 February 1998, Mexico should, at the very minimum, have initiated that process leading to the issuance of the regulations. There is no evidence, however, that Mexico has taken *any* steps to comply with its commitment. We do not consider it necessary to rule on the length of a time period within which the implementation of Mexico's commitment might reasonably have been concluded, as more than five years have passed since the entry into force of Mexico's commitment, and Mexico still has indicated no date by which it intends to issue the relevant regulations and permits. Therefore, we find that Mexico's refusal to authorize the supply of services by commercial agencies is inconsistent with the market access commitment inscribed in its schedule."<sup>14</sup>

### 1.3 Article XX:2

13. The Panel in *China – Publications and Audiovisual Products* observed that WTO Members "employ a uniform format for their services schedules".<sup>15</sup> The Panel explained:

"Each schedule consists of four columns. The heading of each column reads: (i) sectors or sub-sectors; (ii) limitations on market access; (iii) limitations on national treatment; and (iv) additional commitments. In the second and third columns, inscriptions are made for each of the four modes of supply: cross-border, consumption abroad, commercial presence, and presence of natural persons, and may be taken in three forms: 'Unbound', 'None' and specified limitations, to indicate no, full and partial commitments. As part of the schedule format, there is a separate section at the beginning of a schedule where a Member may inscribe market access and national treatment limitations that apply to all scheduled sectors, unless otherwise specified. Inscriptions in this section are called 'horizontal commitments'.

This schedule structure gives each WTO Member flexibility in defining the precise scope of its commitments. Having chosen on which service sectors it wishes to commit, a Member may specify the exact extent to which these commitments are to apply by indicating full market access and national treatment, or partial or no commitment with respect to the four modes of supply. As stated, this case involves only the supply of distribution services through 'commercial presence', also known as 'mode 3'. In the case of making partial commitment, a Member may inscribe limitations in one of the two columns: either under 'limitations on market access' or under 'limitations on national treatment'. If a limitation affects *both* market access and national treatment then, by a convention set out in Article XX:2 of the GATS (avoiding the need to repeat an inscription), it is to be inscribed *only* in the market access column."<sup>16</sup>

14. Article XX:2 of the GATS was applied for the first time by the Panel in *China – Electronic Payment Services*. The Panel assessed, with respect to the sector and mode at issue, the effect of the inscription "Unbound" in the market access column on the scope of the national treatment commitment, the entry for which was "None".<sup>17</sup> The Panel considered that "the main issue [was] not an ambiguity over the scope of Article XVI and the scope of Article XVII", but rather "a lack of clarity about the scope of the *inscriptions* 'Unbound' and 'None' when applied, in China's Schedule, to measures that conflict with both market access and national treatment obligations". The Panel

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<sup>14</sup> Panel Report, *Mexico – Telecoms*, para. 7.371.

<sup>15</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.920.

<sup>16</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.920-7.921.

<sup>17</sup> Panel Report, *China – Electronic Payment Services*, para. 7.649.

further observed that "the basic scheduling rule in Article XX:1 [...] does not determine how a Member should inscribe a limitation in such a case" but that, "[i]nstead, a special scheduling rule in Article XX:2 aims to resolve this lack of clarity".<sup>18</sup>

15. The Panel inferred from the wording of Article XX:2 that this provision "confirms the basic point that measures exist that are inconsistent with both market access and national treatment obligations", thus indicating that "the scope of Article XVI and the scope of Article XVII are not mutually exclusive". Rather, according to the Panel, "[b]oth provisions can apply to a single measure".<sup>19</sup> The Panel explained:

"As Article XX:2 makes clear, a single measure can contain or give rise to two simultaneous inconsistencies: one with respect to a market access obligation, the other with respect to a national treatment obligation. To maintain or introduce such a measure, the normal rule for inscribing commitments in Article XX:1 might suggest that a Member needs to enter an explicit limitation in both the market access and national treatment columns. In such cases however, the special rule in Article XX:2 provides a simpler requirement: a Member need only make a single inscription of the measure under the market access column, which then provides an implicit limitation under national treatment."<sup>20</sup>

16. The Panel in *China – Electronic Payment Services* discussed whether the scheduling rule in Article XX:2 of the GATS applies to an "Unbound" inscription in the market access column or whether this rule applies only when "measures" are inscribed in that column. The Panel stated:

"We see nothing in the text of Article XX:2 that would constrain the latitude of a Member to inscribe the 'measures' excluded from Article XVI:2 either individually or collectively. In our view, it would be incongruous if an inscription of 'Unbound' had an effect different from that of inscribing individually all possible measures within the six categories foreseen under Article XVI:2. To take a different interpretation would be to elevate form over substance. In our assessment, therefore, an inscription of the term 'Unbound' in the market access column should be viewed as an inscription of 'measures', specifically of all those defined in Article XVI:2, which a Member may not maintain or adopt, unless otherwise specified in its schedule. For this reason, we find that Article XX:2 does apply to situations where a Member has inscribed 'Unbound' in the market access column of its schedule. In the Panel's view, the inscription of 'Unbound' in the market access column of China's Schedule has the equivalent effect of an inscription of all possible measures falling within Article XVI:2."<sup>21</sup>

17. Having found that the scheduling rule in Article XX:2 of the GATS applied to the "Unbound" inscription at issue, the Panel in *China – Electronic Payment Services* then considered the effect this has on the scope of the relevant national treatment commitments:

"The Panel recalls that Article XX:2 provides, in the case of measures inconsistent with both Articles XVI and XVII, that the measure inscribed in the market access column encompasses aspects inconsistent with *both* market access and national treatment obligations. Consequently, an 'Unbound' inscription in the market access column encompasses inconsistencies with Article XVII as well as those arising from Article XVI. The inscription of 'Unbound' will therefore, in the terms of Article XX:2, 'provide a condition or qualification to Article XVII as well', thus permitting China to maintain measures that are inconsistent with both Articles XVI and XVII. With an inscription of 'Unbound' for subsector (d) in mode 1 under Article XVI, and a corresponding 'None' for Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether discriminatory or not."<sup>22</sup>

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<sup>18</sup> Panel Report, *China – Electronic Payment Services*, para. 7.656.

<sup>19</sup> Panel Report, *China – Electronic Payment Services*, para. 7.658.

<sup>20</sup> Panel Report, *China – Electronic Payment Services*, para. 7.658.

<sup>21</sup> Panel Report, *China – Electronic Payment Services*, para. 7.660.

<sup>22</sup> Panel Report, *China – Electronic Payment Services*, para. 7.661.

18. The Panel clarified that its findings "imply that a measure that is inconsistent with both Articles XVI and XVII, and that is inscribed in the market access column of China's Schedule, could not be found to be in breach of China's full national treatment commitment. The relevant measure would not be subject to China's full national treatment commitment as it would be covered by the market access limitation."<sup>23</sup> The Panel made the following concluding remarks:

"In the present case, we consider that our interpretation of the meaning of 'Unbound' when inscribed in the market access column of a schedule gives full meaning to that term. By inscribing 'Unbound' under market access, China reserves the right to maintain any type of measure within the six categories falling under Article XVI:2, regardless of its inscription in the national treatment column. We observe, however, that our interpretation also gives meaning to the term 'None' in the national treatment column. Due to the inscription of 'None', China must grant national treatment with respect to any of the measures at issue that are not inconsistent with Article XVI:2. China's national treatment commitment could thus have practical application should China, for example, choose to allow in practice the supply of services from the territory of other WTO Members into its market, despite the fact that it has not undertaken any market access commitments in subsectors (a) to (f) of its Schedule.

We point out that our conclusion on the relationship of the inscription 'Unbound' under Article XVI with that of 'None' under Article XVII preserves the freedom of WTO Members, when taking services commitments, to choose the combination of market access and national treatment limitations, if any, that they wish to maintain. Our conclusion does not narrow the range of options available to WTO Members to limit their market access and national treatment commitments. It focuses solely on how to interpret through scheduling rules, notably Article XX:2, the inscriptions that a WTO Member has chosen to enter in its schedule. We emphasize as well that we do not find that either of Articles XVI or XVII is substantively subordinate to the other. We find simply that Article XX:2 establishes a certain *scheduling* primacy for entries in the market access column, in that a WTO Member not wishing to make any commitment under Article XVI, discriminatory or non-discriminatory, may do so by inscribing the term 'Unbound' in the market access column of its schedule."<sup>24</sup>

## 1.4 Article XX:3

### 1.4.1 Interpretation of GATS Schedules – General principle

19. The Appellate Body in *US – Gambling* found that, as in the context of the GATT 1994, the interpretation of Schedules of specific commitments under the GATS must be based on the customary rules of interpretation, codified in Articles 31 and 32 of the Vienna Convention.

"In the context of the GATT 1994, the Appellate Body has observed that, although each Member's Schedule represents the tariff commitments that bind *one* Member, Schedules also represent a common agreement among *all* Members. Accordingly, the task of ascertaining the meaning of a concession in a Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members, and is to be achieved by following the customary rules of interpretation of public international law, codified in Articles 31 and 32 of the *Vienna Convention*.

In the context of the GATS, Article XX:3 explicitly provides that Members' Schedules are an 'integral part' of that agreement. Here, too, the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. Like the Panel—and, indeed, both the participants—we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the *Vienna Convention*.<sup>25</sup>

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<sup>23</sup> Panel Report, *China – Electronic Payment Services*, para. 7.662.

<sup>24</sup> Panel Report, *China – Electronic Payment Services*, paras. 7.663-7.664.

<sup>25</sup> Appellate Body Report, *US – Gambling*, paras. 159-160. See also Panel Report, *US – Gambling*, para. 6.45.

The Panel in *China – Publications and Audiovisual Products*, referring to Article XX:3 and prior Appellate Body pronouncements, stated that '[w]e recognize that GATS schedules are an integral part of the GATS<sup>26</sup>, and are thus legally part of the WTO Agreement. Consistent with Article 3.2 of the DSU, we interpret commitments in schedules according to the 'customary rules of interpretation of public international law' which include Articles 31 and 32 of the Vienna Convention."<sup>27</sup>

20. The Panel and the Appellate Body in *US – Gambling* considered that the need for precision and clarity in scheduling commitments is consistent with the preamble of the GATS. See the Section on the Preamble of the GATS.

21. The Appellate Body stated that it was not persuaded that the meaning of the terms "sound recording" and "distribution" had changed between the time of China's accession to the WTO (2001) and the time of the Panel's interpretation (2009). Moreover, the Appellate Body considered that the terms of a GATS Schedule should be interpreted in accordance with concept of evolutionary interpretation:

"More generally, we consider that the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995."<sup>28</sup>

We further note that interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations<sup>29</sup>, and which must be interpreted in accordance with customary rules of interpretation of public international law."<sup>30</sup>

#### **1.4.2 Use of industry sources to establish ordinary meaning**

22. In *China – Electronic Payment Services*, the Panel assessed whether it was appropriate to examine industry sources in addition to dictionaries to determine the ordinary meaning of a term appearing in a GATS Schedule. The Panel stated:

"We acknowledge that, sometimes, industry sources may define a term in a way that might reflect self-interest and, thus, might be 'biased and self-serving', as argued by

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<sup>26</sup> (footnote original) Article XX:3 of the GATS provides: "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

<sup>27</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.922. See also Panel Report, *EU – Energy Package*, para. 7.294.

<sup>28</sup> (footnote original) We consider such reading of the terms in China's GATS Schedule to be consistent with the approach taken in *US – Shrimp*, where the Appellate Body interpreted the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. (Appellate Body Report, *US – Shrimp*, paras. 129 and 130)

We observe that the International Court of Justice, in *Costa Rica v. Nicaragua*, found that the term "comercio" ("commerce"), contained in an 1858 "Treaty of Limits" between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and trade in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods. (International Court of Justice, Judgment, *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009)

<sup>29</sup> (footnote original) The GATS Uruguay Round specific commitments entered into force on 1 January 1995. The specific commitments on the movement of natural persons, attached to the Third Protocol to the GATS, entered into force on 30 January 1996; the specific commitments on financial services, attached to the Second Protocol to the GATS, entered into force on 1 September 1996; the specific commitments on basic telecommunications services, attached to the Fourth Protocol to the GATS, entered into force on 5 February 1998; the specific commitments on financial services, attached to the Fifth Protocol to the GATS, entered into force on 1 March 1999. The specific commitments of individual acceding countries entered into force at the time of each accession.

<sup>30</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 396-397.



China. To that extent, we see some merit in China's concerns about relying on such sources, without more. Nevertheless, we see no basis to completely disregard industry sources as potential relevant evidence of an ordinary meaning of a specific term in a particular industry. Indeed, we see no reason why a panel's search for the ordinary meaning of any term should always be confined to regular dictionaries. A panel's initial task in interpreting treaty provisions is to determine the ordinary meaning of the words used. If industry sources can be shown to assist with this task in a particular dispute, we see no reason why a panel should not refer to them. As with a panel's consideration of dictionary definitions, however, panels must be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretative task accordingly."<sup>31</sup>

23. In *EU – Energy Package*, the Panel stated that like the panel in *China – Electronic Payment Services*, it would use industry sources and specialized publications to determine the meaning of a terms appearing in a GATS Schedule. However, it cautioned that in doing so, panels should be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretive task accordingly:

"Both parties refer to more specific glossaries and industry sources when discussing the ordinary meaning of 'pipeline transport services'. The panel in *China – Electronic Payment Services* considered it appropriate to examine industry sources as potential relevant evidence of the ordinary meaning of a specific term in a particular industry, in addition to general dictionaries, for the purpose of determining the meaning of a term appearing in a GATS Schedule.<sup>32</sup> With this guidance in mind, we shall examine the meaning of the terms 'Pipeline Transport [Services]' in industry sources and specialized publications provided to us by the parties."<sup>33</sup>

#### **1.4.3 Other Members' Schedules as relevant context**

24. The Appellate Body in *US – Gambling* stated that other Members' schedules could be relevant context for the interpretation of a particular Schedule:

"Both participants, as well as the Panel, accepted that other Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule. As the Panel pointed out, this is the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are 'an integral part' of the GATS. We agree. At the same time, as the Panel rightly acknowledged, use of other Members' Schedules as context must be tempered by the recognition that '[e]ach Schedule has its own intrinsic logic, which is different from the US Schedule.'"<sup>34</sup>

25. In *China – Publications and Audiovisual Products*, the Appellate Body observed that the Panel had "considered the GATS schedules of other Members together with other elements of context".<sup>35</sup> The Appellate Body then noted:

"Yet, in so doing, the Panel expressly stated that it was mindful of the fact that, although the GATS Schedules of Members are treaty text reflecting the common intentions of all WTO Members, each Schedule has 'its own logic'<sup>36</sup> and thereby acknowledged that recourse to other Members' Schedules may be of limited utility in elucidating the meaning of the entry to be interpreted."<sup>37</sup>

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<sup>31</sup> Panel Report, *China – Electronic Payment Services*, para. 7.89.

<sup>32</sup> (footnote original) Panel Report, *China – Electronic Payment Services*, para. 7.89. That panel cautioned, however, that "panels must be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretive task accordingly". (Ibid.)

<sup>33</sup> Panel Report, *EU – Energy Package*, para. 7.306.

<sup>34</sup> Appellate Body Report, *US – Gambling*, para. 182.

<sup>35</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 383.

<sup>36</sup> (footnote original) Panel Report, para. 7.1210 (referring to Appellate Body Report, *US – Gambling*, para. 182; and Panel Report, *US – Gambling*, para. 6.98).

<sup>37</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 383.

#### 1.4.4 Instruments potentially relevant for the interpretation of GATS Schedules

26. In *China – Publications and Audiovisual Products*, the Panel summarized the guidance provided by the Appellate Body on instruments that have potential value in the interpretation of GATS Schedules:

"Apart from the WTO Agreement and its constituent parts, various instruments have been recognized in previous dispute settlement cases as having potential value in assisting the interpretation of GATS schedules. These instruments include the 1991 United Nations Provisional Central Product Classification (hereafter 'CPC') and the GATT Secretariat document 'Services Sectoral Classification List' (MTN.GNS/W/120, hereafter 'W/120'), both of which deal with the classification of services. The Appellate Body has identified document W/120 and the 1993 Guidelines for the Scheduling of Specific Commitments under the GATS (hereafter the '1993 Scheduling Guidelines'), which are not binding on WTO Members, as supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention.<sup>38</sup><sup>39</sup>

##### 1.4.4.1 The 1993 Scheduling Guidelines<sup>40</sup>

27. The Appellate Body in *US – Gambling* found that the 1993 Scheduling Guidelines were a "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", in terms of Article 32 of the Vienna Convention.<sup>41</sup> The Appellate Body noted, nonetheless, the importance of the Guidelines (and document W/120) which were:

"[P]repared and circulated at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. These documents undoubtedly served, too, to assist parties in reviewing and evaluating the offers made by others. They provided a common language and structure which, although not obligatory, was widely used and relied upon."<sup>42</sup>

28. The Appellate Body in *US – Gambling* therefore set aside the Panel's finding that the 1993 Guidelines are "context" under Article 31(2) of the Vienna Convention. Explaining its disagreement with the Panel's justification that these documents "were agreed upon by Members with a view to using such documents, *not only in the negotiation* of their specific commitments, but *as interpretative tools* in the interpretation and application of Members' scheduled commitments"<sup>43</sup>, the Appellate Body stated:

"In our opinion, the Panel's description of how these documents were created and used may suggest that the parties agreed to use such documents in the negotiations of their specific commitments. The Panel cited no evidence, however, directly supporting its further conclusion, in the quotation above, that the agreement of the parties encompassed an agreement to use the documents 'as interpretative tools in the interpretation and application of Members' scheduled commitments.'"<sup>44</sup>

29. The Appellate Body in *US – Gambling* stated that the 1993 Scheduling Guidelines also do not constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention:

"Although they may be relevant in identifying the United States' practice, they do not establish a common, consistent, discernible pattern of acts or pronouncements by Members as a whole. Nor do they demonstrate a common understanding *among*

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<sup>38</sup> (footnote original) Appellate Body Report, *US – Gambling*, para. 196.

<sup>39</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.923.

<sup>40</sup> Scheduling of Initial Commitments in Trade in Services: Explanatory Note (MTN.GNS/W/64, 3 September 1993).

<sup>41</sup> Appellate Body Report, *US – Gambling*, paras. 188-189.

<sup>42</sup> Appellate Body Report, *US – Gambling*, para. 204.

<sup>43</sup> Panel Report, *US – Gambling*, para. 6.82.

<sup>44</sup> Appellate Body Report, *US – Gambling*, para. 177.

*Members* that specific commitments are to be interpreted by reference to ... the 1993 Scheduling Guidelines."<sup>45</sup>

#### **1.4.4.2 The 2001 Scheduling Guidelines<sup>46</sup>**

30. The Appellate Body in *US – Gambling* stated that the 2001 Scheduling Guidelines do not constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention, with respect to pre-existing commitments:

"Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services, this was in the context of the negotiation of *future* commitments and in order to assist in the preparation of offers and requests in respect of such commitments. As such, they do not constitute evidence of Members' understanding regarding the interpretation of *existing* commitments."<sup>47</sup>

31. The Appellate Body in *US – Gambling* stated that the Guidelines for the Scheduling of Specific Commitments do constitute 'supplemental means of interpretation' of GATS, in accordance with Article 32 of the Vienna Convention.<sup>48</sup> The Appellate Body found that the Panel had erred in characterizing the Guidelines as "context" under Article 31 of the Vienna Convention.<sup>49</sup>

#### **1.4.4.3 Services Sectoral Classification List (document W/120)<sup>50</sup>**

32. The Appellate Body in *US – Gambling* found that document W/120 was a "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion", in terms of Article 32 of the Vienna Convention.<sup>51</sup> The Appellate Body noted, nonetheless, the importance of document W/120 (and the 1993 Scheduling Guidelines) which were:

"[P]repared and circulated at the request of parties to the Uruguay Round negotiations for the express purpose of assisting those parties in the preparation of their offers. These documents undoubtedly served, too, to assist parties in reviewing and evaluating the offers made by others. They provided a common language and structure which, although not obligatory, was widely used and relied upon."<sup>52</sup>

33. The Appellate Body in *US – Gambling* therefore set aside the Panel's finding that document W/120 (and the 1993 Scheduling Guidelines) are "context" under Article 31(2) of the Vienna Convention. Explaining its disagreement with the Panel's justification that the documents "were agreed upon by Members with a view to using such documents, *not only in the negotiation* of their specific commitments, but *as interpretative tools* in the interpretation and application of Members' scheduled commitments"<sup>53</sup>, the Appellate Body stated:

"In our opinion, the Panel's description of how these documents were created and used may suggest that the parties agreed to use such documents in the negotiations of their specific commitments. The Panel cited no evidence, however, directly supporting its further conclusion, in the quotation above, that the agreement of the parties encompassed an agreement to use the documents 'as interpretative tools in the interpretation and application of Members' scheduled commitments'."<sup>54</sup>

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<sup>45</sup> Appellate Body Report in *US – Gambling*, para. 194.

<sup>46</sup> Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (S/L/92, 28 March 2001), adopted by the Council for Trade in Services 23 March 2001 (S/C/M/52, para. 11).

<sup>47</sup> Appellate Body Report, *US – Gambling*, para. 193.

<sup>48</sup> Appellate Body Report, *US – Gambling*, para. 197.

<sup>49</sup> Appellate Body Report, *US – Gambling*, para. 197.

<sup>50</sup> Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 July 1991.

<sup>51</sup> Appellate Body Report, *US – Gambling*, paras. 188-189.

<sup>52</sup> Appellate Body Report, *US – Gambling*, para. 204.

<sup>53</sup> Panel Report, *US – Gambling*, para. 6.82.

<sup>54</sup> Appellate Body Report, *US – Gambling*, para. 177.

34. The Appellate Body in *US – Gambling* noted a direct reference to W/120 in the DSU, providing direct support for the relevance of W/120 in identifying services sectors in GATS Schedules:

"Article 22.(f) of the DSU provides that, for purposes of suspending concessions, 'sector' means ... (ii) with respect to services, a principal sector as identified in the current 'Services Sectoral Classification List' which identifies such sectors'. A footnote adds that '[t]he list in document MTN.GNS/W/120 identifies eleven sectors.' This reference confirms the relevance of W/120 to the task of identifying service sectors in GATS Schedules, but does not appear to assist in the task of ascertaining within which *subsector* of a Member's Schedule a specific service falls."<sup>55</sup>

#### **1.4.4.4 The UN Provisional Central Product Classification ("CPC")<sup>56</sup>**

35. The Appellate Body in *US – Gambling* clarified the relationship between the different levels of disaggregation within the CPC:

"As the CPC is a decimal system, a reference to an aggregate category must be understood as a reference to all of the constituent parts of that category. Put differently, a reference to a three-digit CPC Group should, in the absence of any indication to the contrary, be understood as a reference to all the four-digit Classes and five-digit Sub-classes that make up the group; and a reference to a four-digit Class should be understood as a reference to all of the five-digit Sub-classes that make up that Class."<sup>57</sup>

#### **1.4.4.5 Document published by a government agency**

36. The Appellate Body in *US – Gambling* observed that, given the findings it had already made in the case, it did not need to determine whether the Panel had erred in using a USITC document to confirm its interpretation of the US Schedule.<sup>58</sup> The Panel had found that the USITC document, which related the service sectors in the United States' Schedule to corresponding CPC classifications, had "probative value as to how the US government views the structure and the scope of the US Schedule, and, hence, its GATS obligations".<sup>59</sup>

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<sup>55</sup> Appellate Body Report, *US – Gambling*, para. 181.

<sup>56</sup> United Nations, Statistical Papers, Series M, No. 77, 1991.

<sup>57</sup> Appellate Body Report, *US – Gambling*, para. 200.

<sup>58</sup> Appellate Body Report, *US – Gambling*, para. 212.

<sup>59</sup> Panel Report, *US – Gambling*, para. 6.133.