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**Organization of
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EXPLORING THE ISSUES OF THE GATS NEGOTIATIONS

Note by the UNCTAD Secretariat

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INTRODUCTION

This is a preliminary checklist of issues prepared by the UNCTAD's Trade Negotiations and Commercial Diplomacy Branch, on the basis of a first examination of the proposals presented by WTO Members in the context of the GATS negotiations.

The purpose of this preliminary checklist is to assist developing countries' delegations in their analysis of numerous proposals submitted to the WTO Council for Trade in Services. It is aimed at providing the first insight into the issues that are detailed in the proposals that may benefit from further attention and consideration by developing countries. The checklist is an overview of "new" issues in the sense that they have not been addressed previously in a particular context. It also aims at identifying those issues that may be commonly found in specific sectoral proposals. Further, an overview of issues contained in the proposals under the specific services sectors is presented. In principle, majority of the proposals have addressed the issues in accordance with the following general themes: 1) General position; 2) Classification and Coverage/Scope; 3) Market Access/National Treatment; and 4) Regulatory Issues.

The work presented is considered as work in progress. The checklist is being regularly updated to account for the forthcoming new proposals. It will be further evolving based on the reactions and feedback received from the delegations, capital based officials and other stakeholders in developing countries.

The issues identified in the checklist draw attention to some of them as contained in the proposals, and should not be interpreted as prejudging the issues for the services negotiations, nor as circumscribing the issues for the developing countries in these negotiations. The main purpose of the checklist is to serve as (non-exhaustive) factual tool. In follow up to the points raised in the checklist it is hoped that the position of the developing countries could be more readily elaborated as well as the issues of concern to the developing countries detailed. As it stands now, the checklist is addressing some preliminary views on possible issues of concern for developing countries. They are not intended to give a full picture of the issues contained in the proposals, nor of their implications but only meant to assist in the analysis of proposals and to stimulate their debate, without prejudging the positions of any WTO Member.

I. OVERALL VIEW OF THE PROPOSALS

Up until the last services week held on 9-18 May 2001, more than 80 sector-specific proposals had been presented. Proposals have been presented under all but health services sector. Such proposals cover the following services sectors: Accountancy; Air transport; Architectural services; Audiovisuals; Business services (other than Professional Services); Computer and related services; Construction and Related Engineering services; Distribution services; Energy services; Engineering services; Environmental services; Financial services; Higher (Tertiary) Education, Adult Education, and Training; Legal services; Logistics and Related Services; Land Transport; Maritime Transport; Postal/Courier services (including Express Delivery); Professional services; Telecommunications; and Tourism.

The WTO Members having submitted individual sectoral proposals are: Australia, Canada, Chile, the European Communities, Hong-Kong China, Japan, Korea, Norway,

Switzerland, the United States and Venezuela. The Dominican Republic, Honduras and El Salvador have tabled two joint submissions, and a third one together with Nicaragua and Panama. The EC, Hong-Kong, China, Japan, Korea, Norway, and Singapore, have also submitted a joint proposal. MERCOSUR countries as a group, have also submitted a proposal on distribution services.

Four more proposals have been tabled on the movement of natural persons/professionals/services suppliers (Mode 4) by Canada, the EC, India, and the United States. Canada has also presented initial negotiating proposals on Regulatory, Transparency and Predictability, and on Small- and Medium-Sized Enterprises. The ANDEAN group has also submitted a proposal on definition and criteria for classification of services.

This draft of a checklist covers at this stage all the sectoral proposals (individual and joint-proposals) submitted by WTO Members up until 14th May 2001. The check-list is divided into two parts: the first one presents possible cross-cutting issues, and the second one provides an identification of possible issues sector by sector.

II. CROSS-CUTTING ISSUES

- *Implementation of Article IV*: Most proposals do not address Article IV. Clear exceptions to this are the proposals by Venezuela (Energy), and The Dominican Republic, Honduras and El Salvador (Tourism). It seems that the only differential treatment for developing countries would be accorded in granting periods of transition (Canada) or to support trade liberalization by programs of capacity building (Australia). However, the proposals submitted by developing countries, for example as explicitly indicated by Mercosur, are indicating the sectors of the interest for developing countries in light with the Article IV.

- *Modes of Supply*: Most proposals put emphasis on Modes 3 (commercial presence through establishment) and 1 (cross-border trade). On Mode 4 (movement of natural persons), coverage is generally limited to intra-corporate transferees. However, the EC states in practically all its proposals to be open to hold further discussions on how to improve and facilitate the temporary movement of both intra-corporate transferees and “contractual service suppliers”¹ for the provision of specific services.

- *Standstill*: The US is suggesting that the starting point should be the present situation of liberalization. Both the US and the EC have proposed a commitment on *standstill*.² However, most other proposals consider the current schedules (i.e. binding commitments) as the starting point for negotiations.³

¹ I.e., the service is supplied, on the basis of a contract, by an employee of a company not established in the Member’s territory.

² See Communication from the EC on “Overall Approach to Services Negotiations” (S/CSS/W/15), 30 November 2000, and Communication from the US on “Framework for Negotiations” (S/CSS/W/4), 13 July 2000.

³ This is in accordance with what was agreed by WTO Members in the “Guidelines and Procedures for the Negotiations on Trade in Services”, adopted on 29 March 2001 (S/L/93). Paragraph 10. of these guidelines state that: “The starting point for the negotiations of specific commitments shall be the current schedules, without prejudice to the content of requests”.

- *Expanding the GATS Scope:* Some proposals mention goals such as “full privatization”, and deregulation (US, on telecommunications). The US proposal is actually more of a proposal on e-commerce than telecommunications. This was discussed at length during the last services week as most Members felt that it had gone far beyond a proposal on basic telecommunications. Some others address “ownership/acquisition of property or land” as National Treatment limitations (EC, on telecom; Japan on distribution services).
- *E-commerce* is in some cases mentioned as part of these negotiations: either through direct proposals to remove obstacles to the transmission of services across national borders through electronic means (e.g., US proposal on education services and Korea’s proposal on distribution services) and to work on extended sectoral coverage to include services that can be delivered electronically (e.g., US proposal on telecommunications⁴); by references to the relevance of the impact/role of e-commerce/Internet on trade in services (e.g., Canadian proposals on financial services and on distribution services; proposal by Hong Kong, China on “Logistics and Related Services”)⁵; or indirectly through proposals of certain definitions of services (such as express delivery - US) that include the use of electronic technologies, or proposals that state a need to respect the “principle” of “technological neutrality” (e.g., US on audiovisuals).⁶
- *Linking goods with services:* Some proposals, particularly on energy, environmental and on distribution services, address restrictions for the entry of goods/equipment and tools. Some of them mention the need for the “movement” (entry)/“temporary movement” (entry) of such goods/equipments and tools. Reference to the relevance of GATT disciplines is also made regarding audiovisuals (US proposal).
- *Classification issues:* Notwithstanding ongoing work in the Committee on Specific Commitments, in most sectors there are proposals that suggest sector-specific solutions (exceptions to this are proposals on air and on land transport, and, to a certain extent, on financial services (see below)). Most of these proposals relate to the “improvement” of classifications/broadening of coverage, to include “new” services (e.g., audiovisuals); “additional activities” (e.g., distribution services); “complementary” services (e.g., telecommunications); “related” services (e.g., energy services, environmental services, maritime transport (logistics) services, tourism services).
- *The “Cluster” approach:* Related to the above, many proposals (e.g., on energy services, on environmental services, on tourism services) suggest to consider “related-

⁴ In its proposal on telecommunication services (S/CSS/W/30), the US seeks commitments not only on telecom services as such, but also on « complementary services », as well as on all services that can be delivered electronically, like training, health care, professional services, etc. Under the heading « Classification Flexibility » of this proposal, the US suggests « to explore ways to ensure that commitments remain relevant to future technological developments. For example, for value-added service commitments to be meaningful, they must be able to incorporate technological developments such as the shift towards Internet-based services ».

⁵ In its proposal (S/CSS/W/68), Hong Kong, China announces that it will shortly submit a paper on how WTO could help promote a facilitatory environment for the conduct of e-commerce.

⁶ It must be noted additionally that in its « Initial Proposal on Small-and Medium-Sized Enterprises » (S/CSS/W/49), Canada notes that « Electronic commerce may be a preferred vehicle of delivery for many service SMEs. To the extent that they establish a commercial presence in foreign markets, entry and exit barriers in foreign markets may be barriers to their effective participation.

services” during sectoral negotiations through various options: 1) The “Cluster” approach as a basis for negotiations; or 2) the “Cluster” approach as a check-list to be used only as an *aide memoire*. In any case, a distinction between “core” and “non-core”/“related services” seems to be an issue in many sectors. The guidelines recognize that “The main method for negotiations shall be the request – offer approach.”

- *Approaches to the scheduling of commitments*: Different notions/formula are suggested in different proposals, like the use of models schedules setting up well defined benchmarks for liberalization (maritime transport, energy); the use of pre-determined sets of commitments (Understanding on commitments in financial services).⁷

- *Lack of clarity when addressing barriers*: Many proposals (especially from the US on education, express delivery, distribution, and tourism services) address the question of barriers to trade without differentiating between market access restrictions, and national treatment limitations, and barriers resulting from domestic regulatory provisions.

- *Additional Commitments on Regulatory Issues*: The content of some proposals may raise questions on whether domestic regulatory issues should be solved horizontally (in the Working Party on Domestic Regulation)⁸, or through sectoral-specific negotiations. Many of such proposals address issues related to “transparency” of procedures and “fairness of administration” (e.g., distribution services, education services, environmental services, express delivery services). Most US proposals suggest additionally considering other regulatory principles/disciplines (e.g., the US proposal on financial services considers “prior comment” provisions, and other improved/far-reaching “regulatory principles” pertaining to development, adoption and application/enforcement of regulations).⁹

- *Anti-competitive practices*: Related to the above, the need for Members to establish a pro-competitive regulatory framework in the energy sector is addressed in the form of an invitation (by the EC), as well as in the form of a proposal (by the US and by Norway), for developing a reference paper (RP) in line with the one established for telecommunication services. Regulatory issues, as well as sector-specific “Competitive Safeguards”, also similar to the provisions established for telecommunications, are proposed by The Dominican Republic, Honduras and El Salvador to be applied in tourism. A reference paper is also suggested by the EC for the postal/courier sector; this proposal though, does not specify if such an instrument would be meant to prevent anti-competitive practices. No proposal refers to the need to strengthen Article IX on Business Practices.¹⁰

⁷ Different approaches used for scheduling may have different impact on the use by developing countries of principles such as gradualism and flexibility contained in Article XIX.

⁸ This being probably the preferred approach for developing countries. In this regard, it may be relevant to note that the « Initial Negotiating Proposal on Regulatory Transparency and Predictability » from Canada (S/CSS/49), suggests the exploration of current best practices with Members with respect to regulatory transparency and determine whether, on the basis of developments in this area, existing GATS provisions in this area (preamble to the GATS, Articles III, IV, VI and several other elements of the agreement) can be enhanced.

⁹ In any event, it may be worth noting that as from the experience in the accountancy sector (where specific disciplines on domestic regulation have been elaborated and adopted), additional commitments regarding regulatory issues apply only to sectors/sub-sectors where specific commitments are undertaken (as per GATS Article VI:1).

¹⁰ Even though the issue of anti-competitive practices is common to many services sectors. See comments in sectoral tables: e.g., audiovisuals, maritime transport, distribution services.

- *Limited reference to Subsidies:* Except for EC proposal on construction services, no proposal addresses really the issue of distortive effects of trade-related subsidies when referring to barriers to trade. The only clear and specific reference to subsidies appears in the proposal by the US on audiovisuals.¹¹ Also, in its proposal on environmental services, the EC states its intention to deal with subsidies, among other “horizontal issues”, in a possible future proposal. Subsidies are also enumerated as horizontal restrictions in some EC proposals, like for instance on distribution services and on financial services.
- *Technological neutrality:* The US refers in several proposals (e.g., audiovisuals, energy, telecommunications) to the notion of "technological neutrality".¹²
- *Absence of proposals on Health services:* There are proposals on practically all services considered in the WTO W/120 classification, except on health services.

¹¹ A permissive subsidies regime applicable to this sector is suggested, as an alternative to an outright exemption for cultural services.

¹² This notion is not developed in the GATS agreement itself, but was introduced in the negotiations on Basic Telecommunications. The thrust of this notion is that where no specific references are made towards the type of technology used in providing basic telecom services, specific commitments would automatically cover all means of technology, i.e. services transmitted via all types of cable, wireless or satellites. Nevertheless, where different measures were applied by Members in regulating market access or national treatment depending on the type of technology, WTO Members scheduled them in their commitments. If a similar goal is pursued in the framework of the negotiations of other sectors, countries may wish to consider whether this approach would affect their flexibility to open their markets and whether they may need some legal clauses to retain their right to limit the coverage of their commitments depending on the technology used. Since proposals in different sectors may address this notion, a relevant question would be whether it would be appropriate to discuss it on a sectoral basis or rather as a horizontal issue.