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Working Party on GATS Rules

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COMMUNICATION FROM THE EUROPEAN COMMUNITIES

Government Procurement of Services

The following communication is circulated at the request of the European Communities to Members of the Working Party on GATS Rules.

1. Within the framework of the negotiations under the mandate given by GATS Article XIII:2, the European Communities (hereafter “the EC”) submitted in July 2002 a contribution with proposals on a framework for rules for government procurement of services that could be developed, and on the benefits that could be drawn from them. WTO Members have discussed this contribution and raised questions, which helped clarify their concerns and interests. The EC is hereby putting forward a new contribution aiming at suggesting practical steps and putting forward concrete proposals for the negotiations under the mandate of GATS Article XIII:2.

I. OBJECTIVES OF A FRAMEWORK FOR GOVERNMENT PROCUREMENT OF SERVICES UNDER THE GATS

2. The objective pursued is to offer a multilateral framework for rules for government procurement of services providing WTO Members with the possibility to open their Government procurement markets with maximum flexibility to modulate their level of openness to their development needs and their national policy objectives. The possibility to open up government procurement opportunities progressively and sector by sector would give WTO Members time to establish the relevant regulatory framework where necessary. This would also mean that a Member taking no commitment as regards access to, and national treatment in respect of, government procurement opportunities, would actually have no additional obligation in these regards as compared to the present situation.

3. In other words, the system proposed would offer the possibility for Members to open up their Government procurement opportunities if they so wish, sector by sector, partially or fully, now or at a later stage. WTO Members would open up government procurement opportunities in the sectors where they would most benefit from international services, at their pace and to the extent they wish to open up (e.g. the possibility to open up only certain activities, above certain thresholds, for selected procuring entities, and with scheduled limitations to National Treatment).

4. Procedural rules agreed multilaterally shall give assurance that access to procurement opportunities will be effective. The binding of such access will give legal certainty to service providers. The proposed framework would provide supplementary access to foreign government procurement opportunities, and would improve tender conditions where such access already exists by

introducing more transparency and certainty regarding applicable rules, and by cutting down discrimination.

II. SCOPE AND FORM OF THE AGREEMENT

5. WTO Members could approve the text of an Annex to the GATS, that would specify the conditions under which GATS would apply to Government procurement of services. GATS Article XIII could be amended to refer to that Annex.

6. **“Government procurement of services”** for the purpose of this “Annex to the GATS” should cover procurement of services by any governmental agency or body (see paragraph on procuring entities in part III. A. below). It should also cover procurement involving a combination of services and goods when the latter are necessary for the provision of the service considered and their procurement cannot be done separately, and presupposing that the value of the service is greater than the value of the goods.

III. MODALITIES FOR THE SCHEDULING OF COMMITMENTS REGARDING GOVERNMENT PROCUREMENT OF SERVICES (ACCESS TO OPPORTUNITIES TO BID AND NATIONAL TREATMENT), AND FOR THE APPLICATION OF THE MOST-FAVOURED-NATION PRINCIPLE.

A. GOVERNMENT PROCUREMENT COMMITMENTS

7. The EC suggests that a 4th specific column (“Government procurement” column) should be added to the existing three of the GATS Schedules of commitments of WTO Members (Article XVI, Article XVII and Article XVIII columns). WTO Members would indicate in that column, for each sector and each mode of supply, whether – and if so, which – specific restrictions apply to Government procurement, that would limit bidding opportunities for foreign service providers or impinge on the National Treatment principle.

8. For instance, **thresholds** above which tenders would fall under the scope of GATS, would be indicated in Members’ schedules of commitments in the Government procurement column, for each sector where Government procurement is opened to international competition.

9. Here also would be listed restrictions on the **procuring entities** to be covered by commitments. GATS Article I:3 provides that for the purposes of this Agreement, “measures by Members” means measures taken by central, regional or local governments and authorities, and by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. All these entities are therefore a priori covered and any exclusion of some of them for some specific sectors would have to be explicitly indicated in Members’ Schedules.

10. **Price preferences** would also have to be indicated in Members’ schedules of commitments in the Government procurement column, for each sector where Government procurement is opened to international competition.

11. These commitments for Government procurement would have to be read in conjunction (i.e. cumulatively) with Members’ existing Market Access and National Treatment commitments for the relevant sector (including horizontal commitments – or limitations).

12. An **“Unbound”** in the Government procurement column for a specific sector would indicate that the WTO Member concerned has made no commitment to provide foreign suppliers with opportunities to bid, nor made any National Treatment commitment for Government Procurement of Services.

B. MOST-FAVOURED-NATION TREATMENT

1. Application of the MFN principle – Built-in exemption for GPA (*Agreement on Government Procurement*) obligations

13. The EC suggests that the “Annex to the GATS on Government Procurement of Services” provide that the Most-Favoured-Nation treatment should be applied to Government procurement, without prejudice to the obligations and rights under the Agreement on Government Procurement. This means that when a GPA-signatory accords to a WTO-Member in the framework of the GPA regime a more favourable treatment, this treatment would not have to be accorded on an MFN-basis to other WTO Members. Specific provisions would organise appropriate interface between the GPA and the “Annex to the GATS on Government Procurement of Services”.

2. MFN Exemptions

14. At the time when the GATS entered into force, WTO Members had the possibility to list MFN exemptions. GATS Article XIII:1 specifically provides that Article II on MFN does not apply to Government procurement. Since the agreement on procurement that will result from GATS Article XIII:2 negotiations should extend the application of MFN to procurement, consistency would require that this extension should be accompanied by the possibility to schedule MFN exemptions.

IV. PROCEDURAL RULES TO BE APPLIED

15. The EC, with its experience of the EC Single Market and of the GPA, is acutely aware that MFN and national treatment commitments are necessary but would not be sufficient to ensure in practice equal treatment and non-discrimination in the area of government procurement. In order to ensure effective market opening, procedural rules (on transparency, bidding periods etc.) have to be developed. This is why, at the time of the Uruguay Round, the EC and other WTO Members supported the decision that market access, national treatment and MFN obligations should not apply to government procurement until appropriate procedural rules are developed, and that the GATS should provide WTO Members with a mandate to negotiate these procedural rules multilaterally. The GATS therefore provides on the one hand in its Article XIII:1 that laws, regulations and requirements governing government procurement of services are exempted from the disciplines contained in GATS Articles II (Most-Favoured-Nation Treatment), XVI (Market Access) and XVII (National Treatment)¹, and on the other hand in its Article XIII:2 that WTO Members have a mandate to negotiate multilaterally on Government procurement².

16. In order to avoid duplication of work with the Working Group on Transparency in Government Procurement, the EC suggests that the “Annex to the GATS on Government Procurement of Services” to be negotiated refers to the future Agreement on Transparency and states that the provisions of that future Agreement will apply to Government procurement of services under the GATS.

¹ It is to be underlined that GATS Articles other than Articles II, XVI and XVII, do apply to Government procurement, since the exclusion provided for in GATS Article XIII:1 does not extend to them.

² Some WTO Members have tried to argue that the mandate of GATS Article XIII:2 excludes a priori discussions on market access. GATS Article XIII:2 however, does not provide for any exclusion: it provides for “multilateral negotiations on Government procurement”, without excluding any specific aspect from the negotiations. Obviously, this mandate was meant to negotiate first and foremost procurement rules and modalities for the binding of opportunities to bid and of non-discrimination commitments that would enable GATS principles to apply appropriately to Government procurement. GATS Article XIII:2 also indicates that these negotiations should be done “under the GATS Agreement”, i.e. not in other frameworks.

17. For information purposes, WTO Members will find in the Annex to this submission a reference to the elements that have been identified in the Transparency Working Group as the ones to be covered in a future Transparency Agreement.

18. The EC would like to invite Members to discuss procedural rules that they think have to be implemented to ensure the application of these transparency principles and the effectiveness of future GATS obligations regarding opportunities to bid, national treatment and MFN treatment.

V. ADDITIONAL PROVISIONS

19. One should note that the provisions of GATS, notably (but not only) GATS Article III on Transparency covering relevant measures of general application, GATS Article VI on Domestic Regulation (in particular as regards domestic review), GATS Article VII on Recognition, GATS Article XII on Restrictions to safeguard the Balance of Payment, GATS Article XXIII on Dispute Settlement and Enforcement, do apply to Government procurement of services.

ANNEX

Reference for Information, on the Elements identified by the Working Group on Transparency
in Government Procurement, that would apply to Government Procurement
of Services under the GATS.

The Working Group on Transparency in Government Procurement (WGTGP) has developed the elements to be included in a future Agreement on Transparency in Government Procurement based in the informal note by the Chairman: "List of issues raised and points made" (JOB(99)/6782) dated 12 November 1999.

The latest state of discussion on these issues is contained in the Secretariat's notes of 23 May 2002 (WT/WGTGP/W/32) and 3 October 2002 (WT/WGTGP/W/33).
