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Negotiating Group on Basic Telecommunications

NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

Note by the Secretariat

Revision

1. At its meeting at Ministerial level in Marrakesh (12-15 April 1994), the Trade Negotiations Committee adopted the *Decision on Negotiations on Basic Telecommunications*. The Decision establishes a Negotiating Group on Basic Telecommunications (NGBT) and calls upon the negotiating group to hold its first meeting no later than 16 May 1994. This note is provided as background for the first meeting of the negotiating group (6 May 1994). It summarizes the current state of play with respect to work on basic telecommunications.
2. In mid 1992, interested participants in the Group of Negotiations on Services (GNS) began to discuss the possibility of extending negotiations on the liberalization of basic telecommunications beyond the completion of the Uruguay Round. It was noted that in this sector there were particularly rapid advances under way in regulatory regimes and technology and in the light of these and other factors it was felt that there was little likelihood of achieving a high level of commitments on basic telecommunications before the completion of the Uruguay Round. As a result of these discussions, the GNS agreed to extend negotiations on basic telecommunications and included the *Decision on Negotiations on Basic Telecommunications* and the *Annex on Negotiations on Basic Telecommunications* in the Final Act. For ease of reference these two documents are annexed to this paper.
3. The Decision states that the negotiations "shall be entered into on a voluntary basis with a view to the progressive liberalization of trade" in basic telecommunications and that they "shall be comprehensive in scope, with no basic telecommunications excluded *a priori*". It establishes the NGBT to carry out this mandate. It also contains a standstill commitment, which came into effect on 15 April 1994, under which "it is understood that no participant shall apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage". It further states that "it is understood that this provision shall not prevent the pursuit of commercial and governmental arrangements regarding the provision of basic telecommunications services". In a statement at the Informal GNS Meeting on 10 December 1993 (MTN.GNS/49), the Chairman said that it was his understanding that "measures to improve a participant's negotiating position and leverage could include any category of actions, not excluding MFN inconsistent measures" and that this standstill was "intended to serve a purpose and convey a level of commitment similar to that of" paragraph 3 of the Substantive Guidelines for the Negotiations of Initial Commitments in the Uruguay Round. The NGBT is responsible for surveillance of the standstill. The NGBT is directed to conclude the negotiations and make a final report no later than 30 April 1996. Upon completion of the negotiations, any resulting commitments are to be inscribed in Members' Schedules and enter into force "subject to all the provisions of the Agreement".

4. The Decision states that participation in the NGBT is open to all governments, and the European Communities, which announce their intention to participate. To date, 20 delegations have stated their intention to take part in the negotiations. These are: Australia, Austria, Canada, Chile, Cyprus, Egypt, the European Communities and their member States, Finland, Hong Kong, Hungary, Japan, Korea, Mexico, New Zealand, Norway, the Slovak Republic, Sweden, Switzerland, Turkey, and the United States.

5. The *Annex on Negotiations on Basic Telecommunications* provides that Article II of the GATS and paragraph 2 of the Annex on Article II Exemptions shall enter into force for basic telecommunications (except those which are now listed in Schedules) only on the date of implementation of the results of the negotiations mandated by the Ministerial Decision, or should the negotiations not succeed, on the date of the final report of the Negotiating Group. Once the commitments resulting from the negotiations enter into force, Article II and the Annex on Article II Exemptions will apply to them. Also at that time, Members may decide whether to list any measure inconsistent with most-favoured-nation (mfn) treatment for basic telecommunications. By virtue of these provisions it will be legally possible for Members to list Article II exemptions that were not listed at the conclusion of the Uruguay Round, notwithstanding paragraph 3 of Article IX of the Agreement Establishing the WTO (the waiver provision). On this basis participants were able to agree to withdraw, or in some cases to refrain from listing, Article II Exemptions relating to Basic Telecommunications as part of the Uruguay Round results. However, for commitments on basic telecommunications which are now included in schedules, Article II and its Annex apply.

6. During informal meetings among telecommunications experts, the discussions reviewed technical issues relating to the conduct of negotiations and ways of clearly reflecting commitments on basic telecommunications in schedules. The three issue areas discussed included coverage and definition, regulatory issues and practical considerations related to liberalization. As a result of these discussions, a draft model schedule of commitments on basic telecommunications was developed. The draft model schedule is appended to this document. It is stressed that this is a working document, not yet finalised. The draft model schedule was intended to help clarify and resolve technical concerns and to serve as a guide to the conduct of negotiations. In discussions leading to the elaboration of the draft model schedule, participants generally agreed on the following points:

- (i) that items listed in section 2.C(a)-(g) and (o) of the Services Sectoral Classification List (MTN.GNS/W/120) were considered an illustrative list of basic telecommunications, not necessarily complete due to rapid technological developments in the sector;
- (ii) that a "positive list" approach to scheduling the sector and its subsectors would best serve to provide clear and accurate commitments. Accordingly, a participant would list only those services or categories (see below) in which it is making a commitment; and
- (iii) that, in order to capture all relevant limitations, the "sector or sub-sector" column of schedules would also need to be complemented by a "positive" listing, as appropriate to the regulatory regime concerned, of categories covering geographical scope (local, long distance, international), technology (wire-/radio-based), means of delivery (resale/facilities-based), and end-use (public/non-public). It was felt that these categories would be the best means of adapting the requirements of Articles XVI and XVII to the regulatory complexities of the sector.

7. Some technical issues were identified in footnotes to the draft model schedule as requiring further discussion in order to complete the work on the model. These were:

- (i) the applicability of the Agreement to measures related to international agreements between operators;

- (ii) a need to determine whether any sector-specific clarifications of modes of delivery are required;
- (iii) whether or not to schedule non-discriminatory limitations on the number of service suppliers, that are established strictly for technical reasons, as limitations on market access; and
- (iv) whether certain measures suggested by some participants as candidates for additional commitments would need to be addressed in the context of negotiations and, if so, whether they are adequately covered by other provisions of the Agreements or whether they need to be addressed as additional commitments.

8. A few other technical issues were also raised as possible areas for further discussion in the context of determining how to proceed with negotiating commitments on basic telecommunications. These include:

- (i) the relationship between the disciplines of Article VI and the scheduling of certain types of telecommunications measures, particularly, but not limited to, licensing, approval, or standards setting procedures or criteria;
- (ii) the possible relationship between the Agreement on Technical Barriers to Trade and some measures considered to affect trade in basic telecommunications;
- (iii) how to deal with "new" basic telecommunications, which could in some cases fall under subsectors in which commitments had been made, but could require the implementation of regulatory constraints not in place at the time such commitments were made; and
- (iv) how to address "means" tests, involving what are sometimes referred to as public interest or public convenience criteria, often associated with granting access to telecommunications suppliers.

9. As a result of the Uruguay Round negotiations, 48 schedules contain commitments in the telecommunications sector. Of these, at least 22 schedules include commitments in basic telecommunications. However, the scope of commitments and the terminology used vary considerably. Regarding scope, a few schedules list a commitment on a single subsector such as facsimile services while some list commitments in a number of subsectors. Some commitments list a subsector such as telephone services, but are limited to a particular category of technology (e.g. mobile or cellular).

Note: The heading of this document, and the symbol, are to be regarded as provisional pending general decisions on document series and symbols. If necessary they will be revised and the document re-issued.

## **DECISION ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS**

*Ministers* decide as follows:

1. Negotiations shall be entered into on a voluntary basis with a view to the progressive liberalization of trade in telecommunications transport networks and services (hereinafter referred to as "basic telecommunications") within the framework of the General Agreement on Trade in Services.
2. Without prejudice to their outcome, the negotiations shall be comprehensive in scope, with no basic telecommunications excluded a priori.
3. A Negotiating Group on Basic Telecommunications (hereinafter referred to as the "NGBT") is established to carry out this mandate. The NGBT shall report periodically on the progress of these negotiations.
4. The negotiations in the NGBT shall be open to all governments and the European Communities which announce their intention to participate. To date, the following have announced their intention to take part in the negotiations:

Australia, Austria, Canada, Chile, Cyprus, European Communities and their member States, Finland, Hong Kong, Hungary, Japan, Korea, Mexico, New Zealand, Norway, Slovak Republic, Sweden, Switzerland, Turkey, United States.

Further notifications of intention to participate shall be addressed to the depositary of the Agreement Establishing the World Trade Organization.

5. The NGBT shall hold its first negotiating session no later than 16 May 1994. It shall conclude these negotiations and make a final report no later than 30 April 1996. The final report of the NGBT shall include a date for the implementation of results of these negotiations.
6. Any commitments resulting from the negotiations, including the date of their entry into force, shall be inscribed in the Schedules annexed to the General Agreement on Trade in Services and shall be subject to all the provisions of the Agreement.
7. Commencing immediately and continuing until the implementation date to be determined under paragraph 5, it is understood that no participant shall apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage. It is understood that this provision shall not prevent the pursuit of commercial and governmental arrangements regarding the provision of basic telecommunications services.
8. The implementation of paragraph 7 shall be subject to surveillance in the NGBT. Any participant may bring to the attention of the NGBT any action or omission which it believes to be relevant to the fulfilment of paragraph 7. Such notifications shall be deemed to have been submitted to the NGBT upon their receipt by the Secretariat.

## **ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS**

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:
  - (a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,
  - (b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.
2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

## DRAFT                      **MODEL SCHEDULE OF COMMITMENTS ON BASIC TELECOMMUNICATIONS**

During the negotiations, explanatory information regarding the regulatory environment of a Member may be provided in a section such as this one, preceding the actual schedule. Such information would be provided for the purposes of transparency and in order to facilitate the conduct of the negotiations. Given the legal nature of a schedule, it should contain only descriptions of bound commitments. Thus, once the negotiations are complete and schedules are finalized, this additional information for transparency purposes should be removed. Upon entry into force of the Agreement, such information will be subject to the obligations of Article III.

<b>Sector or Sub-Sector</b>	<b>Limitations on Market Access</b>	<b>Limitations on National Treatment</b>	<b>Additional Commitments</b>
<b>2.C. TELECOMMUNICATION SERVICES</b> (a) through (g), and (o) <sup>ab</sup> 'Local/long distance/international service - wire-based - radio-based - on a resale basis - facilities-based - for public use - for non-public use	<i>Types of measures to be listed:</i> <sup>d</sup> (1) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, duopolies, etc.) total value of transactions, total number of operations or quantity of output.  2 }	<i>Types of measures to be listed:</i> (1) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies.        2 }	<i>Types of measures relevant to possible undertakings:</i> (Commitments on measures not subject to scheduling under Articles XVI and XVII, including but not limited to those regarding qualifications, standards, or licensing requirements or licensing procedures and other domestic regulations that are otherwise consistent with Article VI and the Annex on Telecommunications.)  e.g., Separation of regulatory and operational functions.

Modes of Delivery:<sup>e</sup>      (1) Cross-border supply      (2) Consumption abroad      (3) Commercial presence      (4) Presence of natural persons

<sup>a</sup>Refers to services mentioned in the *Services Sectoral Classification List* (MTN.GNS/W/120, 10 July 1991) which is considered as an illustrative list.

<sup>b</sup>Participants have been moving in the direction of agreeing to use a "positive list" approach to scheduling commitments on basic services. It has been noted that this approach is provided for by the Agreement and that it may result in a more clear and transparent listing of applicable limitations.

<sup>c</sup>Depending on the services being offered or on the limitations existing in the regulatory regime concerned, the specific commitments on these services may be subdivided in to the categories as noted.

<sup>d</sup>It has been noted that there is a need for further discussion of measures related to international agreements between operators and the applicability of the Agreement to such measures.

<sup>e</sup>There may be a need to determine whether any telecom-specific clarifications regarding modes of delivery are required.

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C.(a) through (g), and (o) (continued)	<p>(3) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, duopolies, etc.), total value of transactions or assets, total number of operations or quantity of output;</p> <p>Quantitative limitation on the number of available frequencies to be allotted to foreign service suppliers;<sup>f</sup></p> <p>Restrictions or requirements regarding the type of legal entity permitted to supply the services (also, a requirement of certain forms of commercial presence could rule out cross-border supply);</p> <p>Limits on foreign equity participation.</p> <p>(4) e.g., Limitations/needs test applied to the total number of natural persons that may be employed.</p>	<p>(3) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies;</p> <p>Limitations on the nationality or residency of directors or board members;</p> <p>Restrictions on foreign ownership of land, or foreign ownership of facilities.</p> <p>(4) }</p>	<p>Safeguards against anti-competitive practices (i.e., of monopolies and dominant providers);</p> <p>Procedures or requirements related to<sup>g</sup>:</p> <ul style="list-style-type: none"> <li>- licensing</li> <li>- allotment of radio frequencies</li> <li>- numbering and identification codes</li> <li>- type approval</li> <li>- interconnection;</li> </ul> <p>Pricing related measures, e.g. cost-oriented pricing<sup>g</sup>;</p> <p>Participation in the standards-setting process, including review and comment prior to adoption of new standards;</p> <p>Rights of way for the construction of infrastructure<sup>g</sup>.</p>

Modes of Delivery: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons

<sup>f</sup>This example is a discriminatory limitation. Some participants consider non-discriminatory limitations on the number of service suppliers that are established strictly for technical reasons (e.g. availability of frequency bands for radio-based services) to be covered by the disciplines of Article VI, rather than by Article XVI. This is not the view of all participants.

<sup>g</sup>Further discussion is required to determine whether these measures would need to be addressed in the context of the negotiations; if so, whether they are adequately covered by other provisions of the Agreement or whether they need to be addressed as additional commitments.