

**CLASSIFICATION ISSUES IN THE CURRENT GATS
NEGOTIATIONS: A REVIEW OF THE DIFFERENT PROPSALS
AND SOME PRELIMINARY CONSIDERATIONS**

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I. INTRODUCTION

1. The main objective of this paper is to review some of the classification proposals that have been submitted so far by various WTO Members in the current GATS negotiations and to assist developing countries in understanding the implications of adopting these different classifications. After a brief introduction, the paper lists all the existing classification proposals and reviews in greater depth proposals relating to two specific sectors: energy services and construction services. The review of the two sectors includes some preliminary consideration on the implications that can be deduced of these classification proposals at the present stage. Finally, the paper concludes with some general objectives that developing countries may aim to achieve in relation to the classification issues.
2. This paper does not provide a technical analysis of the energy sector (i.e. it does not deal with the specifics of the oil, gas, electricity, coal and other sectors) but rather attempts to identify the strategic and legal implications for the negotiations, and specifically in terms of market access coverage, of the different proposals.
3. Classification issues have appeared in the context of the current services negotiations as many Members felt that the classification lists used for the previous round of negotiations were no longer necessarily adequate (i.e. they

are somewhat obsolete or too aggregated).¹ Some Members considered that classifications that better reflect the economic realities of today should be used. Others felt that the current classifications do not take into account the fact that services, currently classified under different headings, are part of an integrated group of activities.

4. The Committee on Specific Commitments (CSC) has been discussing classification issues since 1996. The work of the CSC over the last seven years has focused on examining the adequacy of the existing GATS classification list (including the revision of the UN CPC) and of *ad hoc* systems of classifications (e.g. created specifically by Members through collective agreement in such sectors as maritime services and basic telecommunications and which depart from the CPC). The work programme for the first phase of the services negotiations, approved by the Special Session of the Services Council in May, had set a best endeavour deadline for completion of the on-going work in the CSC by March 2001. This deadline could not be met and members are still discussing classification issues relating to 15 sectors or sub-sectors to this day.
5. At the same time, interested delegations are pursuing bilateral and plurilateral contacts on technical issues regarding classification.² The results of such consultations should then be reported to the Committee, which would be responsible for advancing work and taking decisions.³
6. The CSC has also discussed how to treat new services. WTO Members have insisted that talks remain technical deliberations and do not relate to market access issues. However, it is still unclear what the exact objective of the current discussions is. Will Members attempt to agree on new classifications that they will then formally adopt? Or will they simply seek to clarify the coverage of certain sectors and sub-sectors without attempting to introduce any formal changes to the classification lists currently being used by most Members?

¹ During the Uruguay Round, most Members based their commitments on the Services Sectoral Classification List of the Group of Negotiations on Services (MTN.GNS/W/120) and United Nations Provisional Central Product Classification. The UN CPC classification of products, based on the physical characteristics of goods and on the nature of services rendered, dates back to 1991. Though outdated to some extent, the list remains relevant as many of the binding commitments that countries made are based on this provisional list. It was revised and replaced by the CPC Version 1.0 (CPC Rev.1) in 1998. WTO Members are currently faced with the difficult issue of whether to move on to CPC Rev.1, even though many of their commitments were made based on the provisional CPC. The W/120 list which was created by the Negotiating Group on Services and is based in large part on the U.N was used by a majority of WTO Members when making their commitments in the Uruguay Round. It comprises 12 broad categories (including an 'other' category) and lists some 150 specific services. This list is now considered to be somewhat outdated, particularly with regard to some services in fast moving areas such as telecommunications.

² In the case of energy services for example, Canada, Chile, the EU, Japan, Norway, the US, and Venezuela have began meeting since October 2001 to deal with international trade and classification issues. See Evans, Peter C. (2002), *Liberalizing Global Trade in Energy Services*, Washington D.C., The AEI Press.

³ Committee on Specific Commitments, *Report of the Meeting Held on 11 July 2000*, S/CSC/M/16, 11 September 2000.

7. Careful examination of the effects of either newly adopted classifications or agreeing to some informal understanding concerning existing classifications, should be undertaken. The interpretation of Members' previous commitments should not be altered by the adoption of new classifications. Wherever Members are simply maintaining a standstill in their commitments, it may not be too difficult to preserve the scope of the original commitments. In the case of entirely new commitments also the situation is relatively straightforward as the scope of the commitment would simply be defined by the new classification. However, in the situation where Members have already taken commitments that they wish either to extend or modify, the implications of changing classifications should be assessed.

II. THE USE OF CLASSIFICATIONS IN INITIAL REQUESTS AND OFFERS

8. More recently with the start of the bilateral negotiations, and although the classification issues are still far from being settled, some Members have started including new classifications in the formulation of their initial requests and offers. The fact that discussion on classification issues were not concluded before the start of the request-offers phase of market access negotiations leads to a degree of uncertainty. One example of how this will affect the negotiations is Japan's claim that it reserves the right to modify, extend, add to, reduce or withdraw its offer both in technical and substantial manner, in those sectors where discussions on classification, definition and other technical and substantial issues are still under way.⁴ While Members have the right to use whatever definitions or classifications of services that they choose in their schedules, the fact remains that if several Members opt for different sectoral classification approaches they may find themselves in the awkward position of discussing requests and offers based on different definitions.
9. Work on classification issues will continue in parallel with the negotiations for specific commitments and the last deadline will be for the discussions on classifications to be concluded before the end of the market access negotiations as new classifications will probably be used in the GATS 2000 schedules of specific commitments.
10. The next section lists the different proposals that were made relating to classification issues. The section then moves on to describe the different classification proposals in energy services and construction services and to assess their implications in terms of the effect of the proposed classifications on existing commitments and on how they will shape the future commitments that are made.

⁴ The Ministry of Foreign Affairs of Japan, *WTO Services Trade Negotiations, Outline of Japan's Initial Offer*, April 2003, at <http://www.mofa.go.jp/policy/economy/wto/submit0304.html>.

III. REVIEW OF THE DIFFERENT CLASSIFICATION PROPOSALS

A. Brief Overview of the Different Proposals

11. At the request of Members, the WTO Secretariat has prepared a compendium of the classification proposals in order to facilitate discussions in the CSC.⁵ The compendium provides a sector-specific listing of all the negotiations proposals that were submitted by Members to the Special Sessions of the CTS and/or to the CSC. The document, however, does not attempt to provide an analysis of the proposals.⁶ The following table lists all the classification proposals that were made per sector and indicates the submitting country/ies.

Table 1: Classification proposals submitted in the context of the current GATS negotiations

Sector	Nb. Of proposals	Countries submitting proposals
1. Maritime Transport Services	8	EC; Japan; Norway; Hong Kong, China; Republic of Korea; Chile; Australia; and Colombia
2. Energy Services	7	US; Canada; Norway; the EC; Japan; Cuba; and Venezuela
3. Computer and Related Services	6	Canada; MERCOSUR and Bolivia; Costa Rica; India; the EC; and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu
4. Postal and Courier Services	6	US; the EC; Hong Kong, China; Switzerland; Chile; and Mexico
5. Environmental services	6	US; the EC; Switzerland; Australia; Colombia; and Canada
6. Telecommunication Services	5	Australia, the US; Switzerland; Chile and Mexico
7. Legal Services	5	US; Australia; Japan; the Republic of Korea, and the EC
8. Construction and Related Engineering Services	3	Brazil; Cuba; and New Zealand
9. Tourism and Travel-related Services	3	Bolivia, Dominican Republic, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Peru, and Venezuela; Switzerland; and Colombia
10. Air Transport	3	EC; Norway; and Chile
11. Mode 4:	2	India and the EC
12. Education Services	2	US and New Zealand
13. Consulting Services	1	New Zealand
14. Audiovisual Services	1	US
15. Distribution Services	1	Switzerland
16. Logistics and Related Services	1	Hong Kong, China

⁵ A first version was produced on 14 October 2002 under the document number JOB(02)/143, a revised version was produced on 24 February 2003 under document number JOB(02)/143/Rev.1.

⁶ Moreover, the compendium does not address the classification issues that were raised in relation to financial services as these are being dealt with by the Committee on Trade in Financial Services.

Sector	Nb. Of proposals	Countries submitting proposals
17. Sporting Services	1	New Zealand

This paper will now review in greater depth two sectors of interest to developing countries, i.e. energy services and construction.

1. Energy Services

12. Energy services are one of the major areas where classification issues have appeared. This is not surprising as this is the only sector in which proposals have been made, where the W/120 list has no formal heading or separate division. The UN CPC also does not represent energy services very well.⁷ Energy services do appear in 3 areas of the W/120, i.e. as ‘services incidental to mining, rendered on a fee or contract basis at oil and gas field’; ‘transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas’; and finally as ‘services incidental to energy distribution’. However, these three categories are listed as sub-sectors to other generic services entries (e.g. transport services and business services). This is far from reflecting the whole range of services that are involved in the energy sector.
13. The proposal by the US proposes to address classification issues by using an ‘Index of energy activities’, provided as annex to the proposal.⁸ This index was to incorporate: all energy services and energy-related activities provided for within W/120, as well as those energy activities identified as not falling within the GATS. This would basically imply creating a new listing under W/120, based on the Index, which would include all services related to energy. The existing three categories of W/120 would shift to this general heading.
14. The Canadian proposal focuses on the oil and gas sector.⁹ Contrary to the US position, this proposal is based on the idea that all services in the oil and gas sectors can be found in the W/120, though they may be scattered under different headings. The Canadian proposal suggests that services related to the sector could still be subject to a special cluster or checklist that Members may use as an aide-mémoire during the negotiations.

⁷ Switzerland did however recall in a Special Session of the CTS that the CPC has undergone changes as compared to the preliminary version of 1991, and that some of the changes had been introduced to better identify energy-related services. The Swiss delegation therefore suggested that whatever solution might be adopted for the classification of energy be drawn up based on CPC Version 1. In any case, as was suggested by Venezuela, whatever list was finally agreed to, Members would then have to identify the correspondence of the list with the CPC and W/120. See Special Session of the Council for Trade in Services, *Report of the Meeting Held on 5, 8, and 12 October*, S/CSS/M/12, 28 November 2001.

⁸ Communication from the United States, *Energy Services*, S/CSS/W/24, 18 December 2000.

⁹ Communication from Canada, *Initial Negotiating Proposal Oil and Gas Services*, S/CSS/W/58, 14 March 2001.

15. The proposal by Norway suggests taking a broad approach to energy services which considers the entire chain of activities.¹⁰ Norway provides a preliminary checklist for energy-related services, for discussion purposes only, as annex to its proposal.
16. The EC considers in its proposal that there is a lack of a comprehensive approach to the classification of energy services.¹¹ The EC feels that it is important to develop the classification of energy services but they are keen to avoid double-listing due to the fact that some energy services are already covered elsewhere in the existing classification (e.g. professional, environmental, construction services). The proposal suggests a list of energy activities and states that it applies irrespective of the energy source concerned.
17. The proposal by Venezuela suggests revising the classification included in W/120 so as to divide services by sub-sectors associated with energy sources, specify the activities which correspond to the different processes, and to distinguish between core processes in the energy chain and non-core processes.¹² This new classification would reflect the fact that in the energy sectors there are clearly differentiated sub-sectors and would allow Members to make selective commitments through a greater disaggregation of services.¹³
18. The Japanese proposal suggests developing a new classification of the energy services sector for the sake of having consultations on energy services without deflecting to specific sectors/sub-sectors.¹⁴ The proposal suggests focusing initially on 'core' energy services. In the 'non-core' services, discussions on a classification of energy-related services would be useful as a checklist for reference purposes only.
19. The proposal by Cuba underscores the fact that the W/120 list does not accurately reflect the full range of existing services in the energy sector.¹⁵ The proposal suggests identifying the criteria for analysing and formulating concrete definitions which identify the activities corresponding to the different processes.
20. The US proposal for creating a new list of energy services and shifting the existing three entries to this new heading met with quite a lot of resistance. The focus then moved towards identifying, within the existing W/120, those activities that relate to services. An additional difficulty stems from the fact

¹⁰ Communication from Norway, *The Negotiations on Trade in Services*, S/CSS/W/59, 21 March 2001.

¹¹ Communication from the European Communities and their Member States, *GATS 2000: Energy Services*, S/CSS/W/60, 25 March 2001.

¹² Communication from Venezuela, *Negotiating Proposal on Energy Services*, S/CSS/W/69, 29 March 2001.

¹³ Venezuela received many questions from delegations concerning this distinction between core and non-core services. Venezuela provided the following examples: a core service would be the drilling activity, while a non-core service would be construction (e.g. of a refinery for oil processing).

¹⁴ Communication from Japan, *Negotiating Proposal on Energy Services, Supplement*, S/CSS/W/42/Suppl.3, 4 October 2001.

¹⁵ Communication from Cuba, *Negotiating Proposal on Energy Services*, S/CSS/W/144, 22 March 2002.

that there are many related services that need to be performed in conjunction with energy services. These include *inter alia*: construction services, R&D services, legal services, and environmental services.¹⁶ It was suggested to determine the strictly speaking energy services as core services and the related services and non-core services. This option would have in effect created a cluster of services. Finally, it was suggested that a checklist of energy services could be used. This would not require changing the W/120 but countries would simply have a better view of all the services that need to be liberalised in order for the industry to function well. Agreement still needs to be reached as to the level of disaggregating that would be ideal. This too may affect the type of commitments that will be made.

Table 2: **Main Features of the Energy Classification Proposals**¹⁷

Country	Distinction between core and non-core services	Distinction by sources of energy	Favours the creation of a new list of energy services ¹⁸	Provides a specific list	Favours the checklist approach ¹⁹
US	no	no, though some entries of its Index refer to specific sources	yes	yes, the Index of Energy Activities	no
Canada	no	yes, proposal relating only to oil and gas	no	no	yes, as aide-mémoire for the negotiations
Norway	no	no	no	no	yes, or model schedule as negotiating tool
EC	no	no	yes, but avoiding double-listing	yes	no
Venezuela	yes	yes	yes, by disaggregation	no	no
Japan	yes	no	yes, without deflecting specific sectors and sub-sectors	no	yes, for non-core services
Cuba	-	-	-	no	-

N.B. The elements from this table were generally taken from the initial proposals of the submitting countries, as they are listed above. Members may since have altered their positions.

¹⁶ Some countries are likely to insist that such services as energy-related shipping also be taken into account. However, it is very likely that the US will oppose such an inclusion.

¹⁷ The different boxes have been filled in light of information explicitly or implicitly contained in the proposals. In the case of Cuba, most of the features could not be determined conclusively as the proposal was of a very general nature.

¹⁸ 'Favouring the creation of a new list' here implies bringing modifications to the W/120. This option goes further than the 'checklist approach'.

¹⁹ The 'checklist approach' refers to using a new classification list simply as a negotiating tool and not altering the W/120 list.

Some Preliminary Considerations on the Implications of the Energy Classification Proposals

21. The first general statement that can be made is that the principal concern for most countries submitting proposals is to increase their access to their trading partners' markets. The proposals are therefore structured so as to achieve meaningful commitments - the recording of commitments from the market access negotiations being the end goal of the whole exercise. The implications of the proposals should therefore be seen principally in terms of their effect on market access coverage. There are other issues that are currently being discussed in the context of liberalisation of energy services and which are relevant to the question whether making commitments in energy services in the current round would be beneficial to developing countries. These include issues such as the use of additional commitments for energy services, the ownership of natural resources, the accessibility of energy services for the population and protection of the consumers, the role of regulation, and the proposal by Venezuela to take into account the developmental aspects of energy services. Though these elements are crucial to achieving a balanced result in the negotiations and though developing countries may wish to pay great attention to ensuring that they are duly taken into account, this paper will not discuss these issues in detail here as the main focus of this paper is classification.

i. The effect of the proposed classifications on existing commitments

22. Legal certainty: The main issue here is that of legal certainty. An interesting example is the case of electricity and the entry titled 'services incidental to energy distribution'. At the time the Uruguay Round commitments were taken, the type of services that Members had in mind included such things as management, repair of the network and meter reading. However, Members have now come to realise that the actual transmission and distribution of electricity could also fall under this category. Since only eight countries took commitments under this entry, some quarters are suggesting changing these entries to include the transmission and distribution of energy and allow those eight countries to modify their schedules without penalty if they feel the change extends their commitments.²⁰ Similarly, if the new classification list suggested for energy services modifies the scope of existing entries and creates new ones the difficulty will be in ensuring that the same level of commitment, covering the same scope can effectively be reproduced with the new entries. This implies that the coverage of commitments are not increased but also that the coverage of exclusions are not reduced.

ii. The manner in which the proposed classifications will shape the future commitments

²⁰ See Evans, Peter C. (2002), *Liberalizing Global Trade in Energy Services*, Washington D.C., The AEI Press.

23. The reclassification or new classifications of services could have broadly two main types of effects that would influence future commitments. The first would be to produce a cluster effect, the second to disaggregate a general category in several new categories. Distinguishing energy services by sources of energy will also affect future commitments.
24. Clustering: Some analyses of the cluster approach have warned that it may lead to disputes through a non-violation complaint. Indeed, if, as is currently being suggested, the link is made between core and non-core energy services, a Member will be able to complain that a commitment in energy services is frustrated by government measures in related sectors. This could may Members extremely cautious about taking commitments in services where clusters of related services have been identified.²¹ The distinction between core and non-core can probably fit into this discussion as the fact of not distinguishing between core and non-core can have the effect of creating a larger cluster of energy-related services. Whereas distinguishing between core and non-core and deciding to focus only on core energy services will limit the expansion of coverage.
25. Disaggregation: The disaggregation of services or narrowing of definition may be useful if it allows Members to target a specific service or sub-sector to determine whether they wish to make a commitment in this area. Major players may favour a more aggregated classification as their service providers (large MNCs) can provide the whole integrated chain of services. Providers of the smaller players and SMEs probably have expertise in one or several, but not all services activities, so it may be in their interest to have a disaggregated list of energy services which will allow them to push for liberalisation in those sectors and sub-sectors where they are more particularly interested. On the defensive side, a disaggregated list also allows a Member which is beginning to enter the services market to protect those specific services where it deems that its providers have potential competitiveness (thereby limiting the protectionism needed to achieve its objective) and to liberalise those services where it has not identified potential for its providers.
26. Another element that should be kept in mind is that a very disaggregated list may better reflect a highly privatised and deregulated market, while many Members may still have some level of government participation and a highly regulated market.
27. Distinction by sources of energy: As for an approach which distinguishes by sources of energy, it may allow Members to target those sectors for liberalisation where it does not have the natural resources and supply capacity and to liberalise more selectively those sectors where it has or hopes to develop export capacity. This distinction by sources of energy seems quite logical for most Members as they probably do not have, produce, or export all types of energy. It allows them to adopt a differentiated negotiating position whether they are producers or not. However, it must be recalled that even if

²¹ Raghavan, Chakravarthi (2000), *Services Talks Advancing to Negotiations*, 7 December.

the classification that is finally adopted does not distinguish between sources of energy this does not prevent Members from including, in their schedules of specific commitments, specificities (including limitations and conditions) by sources of energy.²²

1. *Construction and Related Engineering Services*

28. The proposal by New Zealand was the first to touch upon classification issues in construction services.²³ The document notes that service suppliers are engaged in 'mutli-stage' construction projects, ranging from pre-erection work to building completion and finishing work and suggests a new category for 'integrated construction services'. Indeed, New Zealand considers it would be adequate to remedy the lack of an entry for multi-stage construction projects.
29. The Brazilian proposal relates to the scope of construction services.²⁴ The text highlights the interrelation between the supply of construction services and the supply of architectural, engineering, integrated engineering and urban planning and landscape architectural services. The text also highlights that the latter services are categorised separately in the W/120, under the heading of professional services. This does not reflect market reality as very often firms provide all these services in an integrated manner.
30. The proposal by Cuba indicates that Members should hold discussions on the interrelationship between construction and related engineering services and architectural, engineering, integrated engineering, and urban planning and landscape architectural services to examine possible definitions which would enable services related to this sector to be more comprehensive and focussed.²⁵
31. Subsequent discussions in the CSC have highlighted that some Members feel that if a Member made a commitment on all the sub-sectors identified in the current W/120 classification, it would not be necessary to make commitments on a new category called 'integrated construction services'. The question was also raised whether this new category would be a combination of existing W/120 entries or whether it would include some new services. The idea of a new 'core service' as opposed to a cluster of services was introduced.
32. The parallel was drawn with the entry titled 'integrated engineering services'. Some Members indicated that the experience from this category shows that having such an entry is not sufficient to produce meaningful commitments. Other Members highlighted the risk that the New Zealand proposal would lead to the risk of duplicating the existing classification. So a new classification

²² This will be all the more necessary as some activities relate only to a specific energy source (e.g. the frequency control in the area of electricity).

²³ Communication from New Zealand, *Negotiating Proposal for Construction and Related Engineering Services*, S/CSS/W/91, 26 June 2001.

²⁴ Communication from Brazil, *Construction and Related Services*, S/CSS/W/113, 5 October 2001.

²⁵ Communication from Cuba, *Negotiating Proposal for Construction and Related Engineering Services*, S/CSS/W/145, 22 March 2002.

entry would have to go beyond a simple sum of existing sub-sectors and contain some value-added.

Some Preliminary Considerations on the Implications of the Construction Classification Proposals

33. In the discussions on construction services there are also many elements outside of the classification discussions that will influence the final outcome in terms of achieving a balanced result for developing countries. These relate to such elements as the transfer of technology and know-how, the importance of professional experience as opposed to licensing and other qualifications for recruitment, government procurement practices, and the importance of the construction sector for development. Notwithstanding the importance of these issues, the following paragraphs will focus on the implications of the classification proposals only.

i. The effect of the proposed classifications on existing commitments

34. Legal certainty: The main question is to know whether it is useful to have a separate entry for what appears to be a gap in the W/120 (integrated construction services) or whether it is better to rely on existing entries, even though they are scattered throughout the W/120 list. If a new entry is created, this would involve at a minimum reproducing the same level of commitment as was achieved by the previous commitments. However, there would most certainly be pressures for Members to take advantage of the modifications to further extend their commitments. A standstill in terms of Articles XVI, XVII and XVIII may be easier to achieve when modifications are not made to the classification entries.

ii. The manner in which the proposed classifications will shape the future commitments

35. Clustering: One issue here is the effect that the creation of interlinkages and even more so of clusters of services will have on the negotiations. While most Members may not oppose the clustering of construction services with architectural and engineering services the use of clusters may lead to a precedent that some Members will try to replicate in less obvious cases.²⁶ Moreover, the creation of a new core sector which in fact will involve several stages of services will probably tend to have a multiplier effect or greater market access for a sub-category of suppliers. Indeed, Members may question why a commitment is made which allows a supplier who performs a multi-stage product to perform service x and that this service x is not otherwise liberalised for suppliers who perform only that service. The proposed

²⁶ The OECD already drew the links between construction services and other sectors such as tourism and environmental services at an UNCTAD expert meeting on construction. See UNCTAD (2000), *Report of the Expert Meeting on National Experiences with Regulation and Liberalization: Examples in the Construction Services Sector and Its Contribution to the Development of Developing Countries*, TD/B/COM.1/32, TD/B/COM.1/EM12.3

classification entry of 'integrated construction services' may in the end favour MNCs which perform the whole range of integrated construction activities at the expense of smaller suppliers and SMEs which are competitive only in one or several, but not all, construction services.

IV. CONCLUSION

36. In terms of process, developing countries Members may wish to continue to push for classification issues to be addressed in the multilateral setting of the CSC and rather than to be discussed in the bilateral request-offer negotiations where individual developing countries may not have the bargaining weight necessary to refuse classifications that are not in their interests.
37. Wherever possible, developing countries Members may wish to promote the adoption of a common ground among the various classification proposals in order to simplify discussions on specific commitments.
38. Developing countries may also wish to insist that negotiations on classifications are concluded as early as possible so that they know exactly the scope and coverage of services in which they are considering to take commitments.
39. The principal overall objective of Members should however remain to adopt and use whatever classification which will produce a clear and transparent situation and which will in no case alter the balance of rights and obligations of Members negotiated during the Uruguay Round.²⁷

²⁷ Legal predictability remains a major concern for some Members and this has been expressed in the classification discussions by a reluctance to modify the existing classification.

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