

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

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TRADE IN SERVICES:
BRAZILIAN VIEW OF THE NEGOTIATING PROCESS

Statement Made at the General Debate in the
Group of Negotiations on Services by
Ambassador Paulo Nogueira Batista,
Head of the Brazilian Delegation

1. Developing countries have been very reluctant to accept the idea, vigorously advanced by some developed countries, of multilateral negotiations on trade in services, particularly if held in GATT. There are, of course, many good reasons for the developing countries' reluctance which go far beyond what has been described, inadvertently, by some of the proponents of those negotiations, as an expression of a protectionist stand.
2. This reluctance is a natural reaction of less powerful countries whose structural weaknesses in terms of negotiating strength are compounded, in the case of trade in services, by a very limited knowledge of the issues proposed for discussion and by a lack of negotiating experience in this complex new field. Given these facts and the particular circumstance that the "demandeurs" have already in place a much more developed service industry as well as a substantial amount of national regulations in all areas of services, it ought not to come as a surprise that developing countries, which do not find themselves in that privileged position, should have felt reluctant or even hostile to endorsing the proposed negotiations on trade in services. This is all the more justified for we will probably be faced in such a process with questions of a very delicate nature. These questions could have profound political and legal implications, affecting, in some instances, constitutional principles of our internal organization as sovereign States.
3. The reluctance of developing countries was partially overcome in Punta del Este when they gave their assent to a beginning of this process, in a demonstration of good will, by accepting to explore the possibility of arriving at a "set of multilateral rules on trade in services".
4. At this juncture, when we are preparing to start our collective endeavour, it would seem appropriate to recall the context in which such acceptance was given. The main point to be retained here is that the decision of our Ministers was taken in Punta del Este in an ad hoc intergovernmental meeting, parallel to the special session of the CONTRACTING PARTIES where a decision on a new round of negotiations on trade in goods in the GATT was simultaneously adopted.

5. The independent legal nature of the two meetings provided from the start a clear separate legal basis for decision making. Thus the Ministers established two legally distinct negotiating processes: one, on trade in goods, to be conducted in the GATT framework; the other, on trade in services, to be carried out in an ad hoc juridical frame of reference. In other words, the premise of trade-offs between the area of goods and that of services has been excluded from the start from our deliberations.

6. The launching of the "Uruguay Round" last September was indeed made possible by a compromise reached on the basis of consensus, at very high political level. Wisdom finally prevailed as it was acknowledged to be preferable to engage in negotiations on trade in services outside GATT, but with the participation of all, than to have such negotiations within GATT but decided by vote and excluding many from the negotiating process.

7. The recalling of the legal separation of the two processes cannot be construed as a move away, on the part of developing countries, from the decision to view both processes as integral parts of a single political undertaking. Brazil participated actively in the Punta del Este meetings and feels pledged to the attainment of all their objectives, as stated in the Ministerial Declaration, both in the area of goods and in that of services.

8. Brazil is prepared to fulfill the commitments assumed in Punta del Este, as long as and to the extent that other participants are equally ready to do the same. Foremost among those commitments are the ones related to standstill and rollback in the area of goods.

9. We are of the view that the adoption of a multilateral approach to deal with the question of trade in services is in any case a more appropriate way of handling the subject than that of seeking bilateral or even plurilateral solutions. This approach, if adopted, would almost certainly lead to discrimination in contradiction with the avowed liberalizing intentions of the proponents of this exercise. In this connection, one cannot fail to note with serious misgivings attempts to treat the problem of trade in services through bilateral dealings, in parallel and possibly in opposition to the aims of the negotiations we are about to undertake here at the multilateral level.

10. In the pre-negotiation stage of our process, the objective of which is to establish a factual basis for the continuation of this process, one fundamental principle to guide all phases in our collective endeavour should be stated from the outset. This process can only be a negotiation among States attempting in good faith to find solutions which by definition must be compatible with their sovereignty. I submit it would be unwise to start this exercise on the assumption that, in any agreement that may emerge, some governments, particularly those of less-developed countries, will be expected to assume more obligations than others or that private parties, as foreign investors, may be given a legal status similar to that

of "host countries", as is the case in the World Bank sponsored convention on dispute settlement. Such assumptions are simply not acceptable for they would imply the raising of grave constitutional questions, for many of the participants in these negotiations.

11. Developed countries have extensively and intently regulated, by national legislation, all service sectors, in the traditional as well as in the new technologically advanced areas. Developed countries have done so not only to promote undeniable security, social and cultural objectives but also to foster the equally unassailable aim of developing a competitive service industry. As a result of their stage of development, developing countries, however, have lagged behind in the pursuit of the same objectives. Existing national regulations, in their case, cover almost exclusively the traditional service sectors. We start thus our deliberations from a de facto acute asymmetry in the respective positions of developing and developed countries.

12. Unless one is prepared to work on the basis of the naive theoretical assumption of the free-trade school of thought the liberalization should be adopted, unilaterally, as something intrinsically beneficial, the correction of this fundamental asymmetry can only occur either as result of the extension by less-developed countries of the current breadth of coverage of their national regulations to the extent of those of the developed countries or by a decision of the latter to proceed, unilaterally or among themselves, to dismantle their own regulations.

13. Against such North-South background of disparity, it would be extremely difficult to conceive of the notion of a standstill commitment, in the area of services, even if worded along the lines of the very vague formulation contained in the 1985 OECD Declaration on Transborder Data Flows. After all, such best endeavours commitment by developed countries was only made possible, following four years of long and complex discussions, because signatories had already reached, in their own perception, a similar level of technological development and considered that regulations in place in the telematics sector were adequate and roughly in balance among participants to the Declaration.

14. The outcome of the negotiating process on trade in services cannot be the institutionalization of this asymmetric situation with some, in fact, assuming more obligations than others, for this would represent a denial of the ultimate objectives set out by our Ministers in Punta del Este.

15. The letter and the spirit of the text adopted in Punta del Este point necessarily in the direction of equitable solutions, capable of correcting the basic quantitative and qualitative absence of symmetry existing in this area, between developing and developed countries. If it is true, Mr. Chairman, that we have all accepted the political commitment to explore the possibility of establishing a "set of multilateral rules on trade in services", it is no less true that the pursuit of such an aim is to be

accomplished only to the extent that it can serve the intermediate aim of promoting expansion of trade in services and, in particular, the ultimate aim of promoting the economic growth of all participants and the development of developing countries.

16. As a consequence, it would be incorrect to assume that this process is an exercise to liberalize trade in services at any cost, that trade liberalization is an end in itself. The Ministerial mandate establishes liberalization and transparency as conditions under which the objective of expansion of trade in services could be attained, provided I underline that it does not conflict with the paramount objective of promoting economic growth and development of participants individually considered. Let it not be forgotten that our countries, the States we here represent, are the only actors in this negotiating process and as such, must be the ultimate beneficiaries of the results of our multilateral efforts. This is the reason why respect for the policy objectives of national laws and regulations is given such a central status in the decision of our Ministers, as the frame of reference, within which we have to confine our attempt to develop multilateral rules in trade in services.

17. In the exercise of their sovereign right to regulate the services sectors, governments take actions essential for the promotion of vital national policy objectives. Such actions are by definition legitimate and cannot be submitted to international scrutiny. What flows from our decision in Punta del Este is solely a political willingness to consider incidental positive or negative effects such regulations might have on the implementation of the negotiating objectives. In other words, we would be prepared to consider such possible effects on the expansion of trade without in any manner putting into question the legitimacy of the ultimate aim, common to both our national regulations and to this process of negotiation, that of furthering the individual economic growth and development of our countries.

18. In any negotiating process, the starting point has to be the establishment of a solid factual basis which will permit the clear identification of the problems to be solved and the appropriate negotiating techniques to arrive at such solutions. A precise diagnosis is required if negotiators are to be in a position to ascertain, with confidence, the nature of problems before them, to ask the correct questions and finally to provide the appropriate answers. These are of course will known de facto pre-conditions, that cannot be avoided, in order to ensure the success of any negotiating process, regardless of the subject matter. In the exercise we are about to begin, however, these pre-conditions demand close scrutiny.

19. This ambitious exercise will unavoidably be a time-consuming process. Given the complexities of the issues involved and the paucity of available information, a considerable amount of work will be required in preparation for meetings. Less-developed countries, starting as they are from a much lower level of knowledge of the issues, will be particularly disadvantaged

and cannot be expected to proceed as fast as developed countries, which, in the framework of OECD, have accumulated, over many years, a considerable degree of information and of negotiating experience on the very subject of our mandate and on matters related to it.

20. In attempting to accomplish the first step of establishing a factual basis, we will have to address ourselves to the existing international disciplines and arrangements relevant to the negotiations on trade in services. As it is well known, a number of services sectors are already regulated at the international level. Such international instruments which essentially deal with standards or norms of behaviour which all signatories are to follow may have in some cases an important bearing on trade in that services sector. This is, for instance, the case of the Convention on the International Maritime Organization which deals with trade in shipping in a rather extensive manner and does not confine itself only to the setting up of technical norms and standards. It is important that we look in depth into the work of such sectoral organizations as IMO in order to determine their experience in implementing rules which may have a bearing on trade in specific service sectors. The same practice should apply to other international organizations, of universal or regional membership, with responsibilities in areas relevant to our work like the OECD, where much useful work has already been carried out in related areas, either through the adoption of non-binding Codes on Capital Movements and on Current Invisibles Operations, or by means of best endeavour Declarations on the Treatment of Foreign Controlled Enterprises, on Guidelines to be observed by multinational companies and on Incentives and Disincentives given to Multinational Enterprises.

21. For doing this, the technical support of the Secretariats concerned will be certainly needed. We should then, as a priority issue, try to agree on the organizations that could be invited to present, within their specific spheres of competence, the issues which may be relevant to our endeavours, and on how their technical support could be provided.

22. In this initial phase of our work, it is highly advisable to keep in mind that we will have to overcome a major conceptual obstacle. Nowhere can one find generally accepted definitions of services, of what services can actually be traded across borders as well as, consequently, of what can, with precision, be described as international trade in services.

23. As relates to the definition of services, should we use a broad definition which would include construction, public administration and defense, utilities, trade, finance, transport, communication? Or should we work on the basis of a more restrictive approach, excluding for instance construction activities or both these and public administration and defense? Or even not to include utilities services, such as electrical power, in our calculations? On the other hand, if one speaks of trade in services, what will be the definition to be used as the basis for discussions? Shall we accept only what is actually traded across borders,

like shipping of goods, passenger transportation, communications, including eventually transborder data flows? Or shall we accept an expanded definition which would include domestic transactions between residents of one country, if the provider or the consumer of the service is a foreigner, as in the case of local sales of services by affiliates of a foreign company or in that of a tourist travelling abroad? It will be in fact quite difficult to proceed to agree on sectors to be considered for a possible framework of rules without a previous agreement on the question of definition of what services and trade in services actually are.

24. The absence of clear notions in this regard explains to a large extent the lack of adequate statistical information. Discrepancies in national accounting systems, absence of disaggregation at the sectorial level, shortage of historical data, inadequacy of data on specific sector activities, all these are well-known shortcomings in the areas of services and of trade in services. A picture of acute insufficiency of information confronts us both from a qualitative as well as from a quantitative viewpoint. We are faced with a scarcity of elementary tools of analysis, such as basic data indispensable for a serious evaluation of trends and for the development of an acceptable theoretical framework concerning the subject matter. In such context, international comparisons become in fact of doubtful value.

25. We have been insistently told that services is presently the most dynamic sector in the world economy at the national as well as at the international level. It has even been suggested, in line with this reasoning, that economic development evolves, more or less automatically, as a result of the free play of market forces, from an initial stage of primary production to an industrial phase and finally to a services economy. In conjunction with this approach, the view has been advanced that the structural shift of the developed economies to the post-industrial stage could indeed be facilitated by an agreement on multilateral rules on trade in services. Such agreement would promote a new international division of labour within which the more advanced less-developed countries would specialize in the export of traditional manufactures and the now industrialized countries would concentrate in supplying high-technology goods and services. Such suggestions, done certainly in good faith, have little to stand on for they are raised in countries where the least propensity to assume minimum commitments is to be found in regard to an opening of their markets for developing country's manufactures and where actually prevails open resistance to even limited political undertakings not to increase their existing level of protection.

26. Such arguments are of course essentially very much dependent on the academic assumption, supported by some international organizations, of the validity of the classical theory of free trade in goods which is taken to be applicable as well to the area of services, in its purest formulation, that is to say, that of autonomous liberalization carried out as a unilateral decision. Such conceptions have obviously a very loose relationship with what happens in the real world of notorious conditions of

imperfect competition or even with the concept of free trade based on reciprocity and mutual advantage which is embodied in the General Agreement on Tariffs and Trade. Such generalizations are hardly tenable particularly in the context of trade practices which less and less conform to GATT rules and are even more debatable, and perhaps totally irrelevant, in the light of the state of knowledge that we now possess as regards trade in services.

27. The suggestion to apply the theoretical principles of comparative advantage to trade in services gives evidence, in effect, to some inherent contradictions which surface quite clearly in the light of an expanded definition of trade in services advanced by the supporters of the free-trade approach. Their definition would go beyond services that can actually cross borders and would include the notion of "establishment" or "presence" in the foreign market by the provider of services which cannot be shipped or transmitted by telecommunication. Such a notion of movement of capital and labour across frontiers would hardly conform though with the key assumption of the international immobility of factors of production, a central tenet of the classical theory of free-trade.

28. The idea put forward in some quarters that establishment should be a "right" to be ensured in foreign markets to the provider of services is by itself in contradiction with the right of States to regulate the entry of foreign investment and the conditions of establishment of foreign enterprises; such a right has been expressly acknowledged by the international community, at the United Nations level, by the Charter of Economic Rights and Duties of States and, at the regional level, by the OECD member countries when dealing with the question of national treatment for foreign controlled enterprises.

29. When advocating that trade in services should be negotiated in GATT, some countries advance the proposition that this would be justified to ensure that one aspect of the GATT principle of non-discrimination, that of national treatment, should be automatically extended to the foreign suppliers of services. The supporters of this approach had little to say however about the most important and basic rule of GATT, that of unconditional m.f.n. treatment, in other words, of non-discrimination as regards countries of origin of a product.

30. It is to be regretted that the voluminous literature already produced in support of a free-trade approach to services does not yet provide an in-depth assessment of GATT principles and of their operation which would give us guidance as to their relevance to the new area. A fundamental characteristic of the GATT notion of "national treatment" for example is generally not appreciated, that of its applicability not to the producers as such of the goods but solely to goods themselves and only after they have entered the territory of the importing country. In this connection, it should be noted that, under GATT, though imports or exports cannot be forbidden by governments, there is for governments or for private parties no legal obligation as such to import, or conversely, to export. As a corollary, there is no right of access to markets or any reciprocal right

of "access to resources". The request in the area of services of a "right of establishment" to be granted to foreign companies and of a "right to national treatment" as they are established would indeed go much further than what is foreseen for goods in GATT, an agreement in force now for more than four decades.

31. Many of the conceptual difficulties with which one is confronted in this debate on whether and particularly on how to regulate by international agreement trade in services have to do with the need to differentiate between the notions of trade and of investment activities. In the area of goods, these activities are normally seen as alternatives. Foreign direct investment, unless to ensure access to resources available only at specific locations, is not expected to take place when there is an opportunity for direct exports. This is by the way the rationale for current efforts of "home countries" to introduce, in GATT discussions on goods, the so-called issue of trade-related investment. The idea is that capital should not move across borders if trade can be assured by the free play of market forces. The reasoning behind such ideas is that import substitution, or export promotion, should not take place as a result of trade policy measures, specially when adopted by capital importing countries. As regards services, the approach taken by "home countries" seems nevertheless to be radically divergent from the one adopted in the area of goods. Direct investment abroad is seen in the field of services not as an alternative to exports but as a complement to it if not the main means for making possible the rendering of services to foreign consumers. The notion that capital, as foreign direct investment, should be granted a "right of access" would however raise naturally an equally difficult and complex proposition regarding the right of labour to migrate freely.

32. The very idea of the more dynamic nature of services and of trade in services - which is taken for granted in the current debate on the subject - does not seem to find support on the data available. This can be seen quite clearly, for example, in relation to any of the concepts that have been so far advanced for definitions of trade in services. The most reliable information available - that supplied by the IMF of invisible transactions in current account - indicate that trade in goods, in the last decade, has shown a higher propensity to grow than in services. Payments for all non-factor services - which would correspond to an expanded definition of trade in services - amounted in 1970 to US\$72 billion that is 26.8 per cent of merchandise exports; in 1980, they reached US\$388 billion but fell to 22.1 per cent as a proportion of the exports of goods. This declining trend is also present when a more precise concept of trade in services is adopted, applying only to transactions between residents and non-residents. In this case, when services involved actually cross an international frontier, trade in services accounted for 13.5 per cent in 1970 and a mere 11.4 per cent ten years later, as a ratio of merchandise exports in the same years.

33. Indeed, such figures can make one ponder the validity of such statements as the one that the goods sector is no longer the centre of economic development or that the world economy has already entered an irreversible process of internationalization or globalization where services would play a leading rôle.

34. Given what seems to be the essentially intangible character of services and the simultaneity and indivisibility of its production and consumption - that is to say, services are normally consumed when and where they are produced - it is in fact widely acknowledged that services cannot be generally traded internationally. The provider or the consumer of services has usually to move across borders to make possible the rendering of services. Changes in technology, in the field of telematics have, however, increased the "tradability" of services, by removing the time and location constraints which affect some services transactions.

35. Transnational companies - it is important to note - are the main providers and users of the new communication technologies.

36. This is a factor which makes particularly relevant, in the context of our discussions, the examination of the business practices of those companies, especially as regards transactions taking place between parent and affiliated firms. To what extent, for instance, the absence of regulations to ensure transparency of intra-company trade may affect the growth of trade in services and the promotion of the national interest of "host countries" as well as of "home countries"? These are questions which are certainly pertinent if one is engaged in an earnest attempt to remove any constraints to the expansion of trade and to economic growth and development.

37. Transnational companies are certainly a most dynamic factor in international trade and should be given the opportunity to continue to play their important rôle. But as recognized by the US Department of State in its report on the Havana Charter for an International Trade Organization, "it would be largely futile to remove discriminations and reduce or eliminate the trade barriers imposed on a product by governments if business enterprises were free under the Charter to create them".

38. That we will have to proceed vigorously but with great care in the pursuit of our "negotiating objectives" seems to be an unavoidable conclusion of the above considerations. In every stage of the process we have just started - the establishment of a factual basis, presentations by relevant international organizations, discussion of techniques and modalities of negotiations, the presentation of proposals, the definition of a common negotiating approach and the final negotiations to establish agreed texts - we must fully cover the ground before us, in a logical sequence.

39. The very fact that in Punta del Este we were able to agree on negotiating objectives and that four months later we managed to come to an understanding on the initial phase of the work is in itself of great political significance, an achievement which should not be minimized. For the sake of the final success of our common enterprise, it would be very important however to avoid the temptation of imposing time constraints, ignoring the concrete difficulties that have to be overcome. The tempo of this negotiating process cannot be unrealistically shortened, for the variety of reasons already mentioned. There are intrinsic problems of a technical as well as of a legal nature that cannot simply be set aside. In any case, by no stretch of imagination, can one conceive of the services exercise being carried out at a faster pace than that of the negotiations on goods. Here, in goods, we have an enormous amount of information and preparation work already in place and an established legal framework within which negotiations can take place. These negotiations on goods could and should naturally move quicker than those on trade in services.

40. The undertakings assumed in Punta del Este, important as they are, should not be over-estimated. We have committed ourselves to negotiate but we are not bound to come, at any price, to final agreement. Final agreement is not an end in itself; it would be made possible only when a balanced result of mutual advantages for all - developed and developing participants - can be effectively assured. The record of international negotiations, in the political as well as in the economic fields, is not short of examples of negotiating processes, started in good faith, that did not materialize. The Havana Charter on the International Trade Organization in the forties and the OECD member countries' fruitless attempt to conclude in the sixties a convention on the Protection of Foreign Property are concrete indications of such failures. In any case, agreements which do not represent a fair distribution of advantages among parties are intrinsically vulnerable, problematic in their implementation, if not short-lived.

41. Indeed, the very nature of any possible agreement that may hopefully emerge at the end of our deliberations cannot be conceived at this initial stage of our discussions. The greater or lesser formality of eventual engagements will be a function of how much ground we may be tempted to cover. Whether of a simple exhortatory character, as those existing in an OECD context, or of a more contractual kind, as is the case in GATT, any agreement we may arrive at will have to be the product of consensus, understood both as the technique of negotiation and as the mechanism for the adoption of decisions. This was what finally prevailed in Punta del Este and what made possible the launching of the "Uruguay Round". Observance of consensus has to be the governing principle for our deliberations. This is, as we recall, the central meaning of the reference to "GATT practices" in the Ministerial decision on trade in services.

42. As I come to the final part of the Brazilian contribution to this general debate, allow me, Sir, to refer to a specific point which is at the

heart of our concept of the "Uruguay Round" as a "single political undertaking" comprising two legally independent negotiating processes, one on goods within GATT and the other outside GATT on services. Brazil does not reject ab initio the consideration of the possibility of applying to trade in services certain basic principles embodied in the General Agreement. We would be in principle prepared to look with sympathy to the relevance in this new area of such principles as unconditional most-favourable-nation-treatment.

43. What we would find particularly difficult to conceive, if not impossible to accept, is the notion of cross-linkages between concessions in the area of goods and in the area of services. Such a notion, being economically unjustifiable and technically unfeasible, would degenerate into opportunities for very unbalanced and unfair trade-offs between the more powerful developed countries and the weaker developing nations. Such an outcome could freeze an inequitable international division of labour and represent an unacceptable limitation to our legitimate aspirations of also becoming producers and suppliers of high-technology goods and services.

44. To conclude, let me explain how we address as regards this process the question of differential and more-favourable treatment to less-developed countries. In the context of trade in goods that notion was conceived as an afterthought to the GATT, as a right to derogate on an ad hoc basis from the general rules, provided that certain conditions were observed by developing countries. In the case of trade in services we will have to start from a totally different standpoint. The objective of development will be, as provided in the Ministerial Declaration, the kernel of the exercise. We are mandated, it is appropriate to recall, not to further the best theoretical possible allocation of resources at the world level, a result which in the end might work mainly for the advantage of a few more advanced States or of transnational corporations. Ministers decided that the set of multilateral rules on trade in services, that hopefully will be the outcome of our collective efforts, shall be a means of promoting economic growth of all and of contributing to the development of developing countries. Development shall have to be thus, not a basis for derogation to possible general rules, but an integral part of any set of rules we may eventually devise. As a consequence, it is bound to remain very much at the heart of our concerns, at each phase of the negotiations we are now entering into.

45. My delegation reserves of course its right to make, as our work progresses in this initial phase, comments of the same general nature as the one I have just delivered. Let me simply finish at this point by saying that, as we proceed in the examination of the elements of our work, we will be prepared to make specific interventions and to put forward some concrete organizational suggestions. We have in mind, in particular, a proposal for an information gathering programme in the area of one of our most striking deficiencies, that of lack of statistical data in services and in trade in services.