

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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Trade in Services: Framework Concepts
The Principle of Non-Discrimination

The attached communication is circulated at the request of the delegation of Australia to the members of the Group of Negotiations on Services.

TRADE IN SERVICES: FRAMEWORK CONCEPTS
THE PRINCIPLE OF NON-DISCRIMINATION

SUMMARY:

1. The Uruguay Declaration calls for the establishment of a multilateral framework of principles and rules for trade in services, with a view to the "expansion of such trade under conditions of transparency and progressive liberalisation...".

2. A number of representatives at meetings of the GNS have expressed the view that the agreement should embody principles similar to those found in the GATT: eg. non-discrimination, national treatment, transparency of regulations.

3. This paper examines the application of the Most Favoured Nation (MFN) principle in a services framework agreement. It considers the question of the application of this principle to the liberalisation and expansion of services trade.

DISCRIMINATION:

4. Discriminatory trade agreements are those in which one or more countries provide benefits to, or impose obligations on, certain trading partners that are not applicable to all trading partners. Often, the discriminatory provisions of these agreements reflect an existing relationship between the members of the agreement such as bilateral trade imbalances, competition for shares of the same market or close political or geographical relations.

5. MFN treatment, which each GATT Contracting Party extends to all other Contracting Parties (subject to certain exceptions specified in the Agreement), is one defence against the spread of discrimination in trade.

6. The principle of MFN requires that each CP extend to all other CPs, immediately and without discriminatory conditions, the most favourable trade concessions it has granted (or may grant) to any third CP.

7. The concessions on which MFN treatment is offered are principally access conditions.

8. There are important economic considerations behind the central role of the unconditional MFN principle in the GATT. The liberal trading system as envisaged by the GATT allows prices to play the pivotal role in the allocation of resources. Prices will not, however, act in response to demand and scarcity if distorted by discriminatory policy barriers to trade.

9. There is every reason to expect these same considerations to apply in services trade. Although there is still some dispute about the application of the concept of comparative advantage to services trade, there is a growing consensus that gains from trade in services can be explained in the same way as the gains from trade in goods.

10. By opening markets to a wide range of entrants the principle of MFN laid the foundation for the enormous trade expansion of the post-war period. The MFN principle also reduced the cost of information about trade opportunities. MFN agreements are, by their nature, transparent; there is no need to disguise a benefit which is unrestricted.

CONDITIONAL AND UNCONDITIONAL MFN:

11. The GATT's embodiment of MFN has been called "unconditional MFN" by which is meant that such treatment is offered by CPs on a universal basis to other CPs without regard to factors such as participation in the exchange of concessions which led to a particular MFN agreement (eg. a market access agreement).

12. It does not mean that no conditions attach to the grant of MFN treatment. Clearly, membership of the GATT itself can be one condition of receiving MFN.

13. In dealing with non-tariff barriers, however, an unconditional agreement may not create the incentive necessary to ensure a comparable standard of treatment of imports is met by all members. There tends to be a "free rider" problem.

14. The term "conditional MFN" is often applied to the non-tariff barrier codes negotiated in the Tokyo Round in which non-discriminatory treatment is conditional on an explicitly reciprocal exchange of rights and obligations, including access concessions, among members of the agreement. The Government Procurement Code is an example of an agreement which places access concessions on a strictly conditional basis.

15. The conditionality of these codes is non-discriminatory because it relates to membership of the agreement rather than to external factors.

16. The distinction between a "conditional" agreement such as the NTB codes and an "unconditional" agreement such as the GATT is thus a matter of degree. A "conditional" agreement is more explicitly reciprocal than an "unconditional" agreement.

17. It has often been argued in favour of certain conditional MFN agreements that they promote the expansion of trade by reducing the impact on members of the agreement of tariff and non-tariff barriers that would not otherwise have been negotiable.

18. But there is concern that some conditional MFN agreements have limited the scope for liberalisation of trade by entrenching the restrictions concerned in trade with non-members of the agreement. That is, they may have created selective protection.

THE APPLICATION OF MFN TO SERVICES TRADE:

19. Access to services markets is typically controlled by non-tariff measures which are entrenched in domestic regulatory frameworks.

20. The services framework agreement will deal both with these access barriers and with other measures which impede the liberalisation or expansion of services trade. Liberalisation of services trade is one of the key goals for the negotiations.

21. As to the nature of access barriers, there is reason to believe that discrimination among foreign suppliers to services markets may be growing. Governments faced with strong bilateral pressure for access to national services markets are likely to make the most limited concessions possible given the policy uncertainty surrounding service issues, the pace of change in markets and the lack of current obligations to open markets widely.

22. It must be acknowledged that in some services sectors participants in an agreement might not wish to completely open entry to a market because of the nature of the market or because of national policy objectives. For example, governments frequently limit the number of television licenses made available in a geographical market for a variety of commercial, social and cultural reasons.

SOME QUESTIONS:

23. Because the barriers to services trade tend to be non-tariff barriers is it possible to have an effective framework agreement on trade in services which is unconditional?

24. Would it be possible to have a conditional agreement under which all the benefits of that agreement, including identical terms of market access, would extend to all members by virtue of their membership of that agreement? That is, can we assume that the MFN principle will apply even if the agreement is conditional?

25. Would it be acceptable to limit market access in some sectors depending on the nature of the market in that sector or according to the national policy objectives that each government has set?

26. Is it agreed that these exceptions providing for restricted access should be non-discriminatory; that is, that the exceptions should themselves be applied on an MFN basis?

27. Would it be acceptable to leave the specification of terms of access to individual "sectoral" agreements, or should the framework agreement also contain a guarantee of non-discrimination?

28. What measure would be needed to ensure that sectoral agreements containing exceptions to the principle of MFN met the negotiating objectives of liberalisation and transparency in services trade?

29. How can the exceptions be controlled to be the minimum necessary to meet national objectives?

30. In some conditional MFN agreements the precise obligations of each party to the agreement can vary. For example, in the Government Procurement Code, each Party may exempt certain sectors (such as defence purchasing) from the obligations of the Code. Should the same provisions apply in the market of every member of an agreement on services, or should some countries be permitted to apply different/broader exceptions than others? Should these exceptions be reciprocated by other members of the agreement?

31. Considering the variety of services industries and rapidly changing comparative advantage in the sector, it may be necessary to ensure that any access restrictions permitted, even if non-discriminatory, do not have the effect of freezing new entrants out of national markets in favour of established suppliers.

32. If some benefits of the framework agreement are to be highly conditional, would it be possible to identify some elements that could be relatively unconditional?

33. An objective of the framework agreement must be to create some universal principles applying to services trade. The unconditional extension of certain benefits to all countries would help to establish these universal principles on a de facto basis.

34. For example, would there be value in establishing certain "basic obligations" that could be of benefit to all trading partners, whether or not they were signatories to the agreement? For example, transparency of regulations, avoidance of burdensome regulation, avoidance of subsidisation?