MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND

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Group of Negotiations on Services

NOTE ON THE MEETING OF 15-17 SEPTEMBER 1987

1. The Group of Negotiations on Services (GNS) held its ninth meeting on 15, 16 and 17 September 1987. In the absence of Ambassador F. Jaramillo, Mr. M.G. Mathur acted as Chairman for the meeting.

2. As indicated in the airgram GATT/AIR/2454, the GNS discussed separately each of the five elements listed in the programme for the initial phase of negotiations (MTN.GNS/5). Regarding the attendance of international organizations, the Chairman indicated that the Trade Negotiations Committee at its meeting on 3 July 1987 had taken a decision in this respect and that he assumed therefore that the GNS would consider this issue settled.

Definitional and Statistical Issues

3. The Chairman recalled that at the last meeting of the GNS, participants had a thorough discussion of statistical issues with representatives of the United Nations Statistical Office (UNSO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Center on Transnational Corporations (UNCTC) and the International Monetary Fund (IMF). The Chairman referred also to documents MTN.GNS/W/17 and Addendum 1 which contained questions addressed by the Brazilian delegation to the representatives of the four international organizations at the last meeting, and the replies given by three of these organizations (UNSO, IMF and UNCTC). In addition, two communications by Brazil, one on the compilation of data in services in Brazil and one on definitional and statistical issues had been circulated as documents MTN.GNS/W/19 and 21.

4. With regard to statistical information on trade in services, one member said that this was an essential tool for carrying on the negotiations and that there was a need to see how, in a relatively short period, some progress could be made by the GNS in improving the availability of statistics for the purposes of negotiations. He proposed that the GNS informally agree to the following. First, while the exercise of standardizing, collecting and generally improving statistics in trade in services was a long-term process, it would be useful in the short-term if information available to countries who played a dominant rôle in trade in services and perceived an acute need for negotiations could be made available to all participants. Second, there should be an understanding

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that participation in meetings (even those outside the United Nations system) dealing with statistics on trade in services should include as many countries as possible, in particular, developing countries. The outcome of the meetings should also be made available to all participants in the GNS.

5. One participant said that without a minimal statistical knowledge of international trade in services, especially for developing countries, it would be difficult to evaluate the impact of the negotiations on trade flows in services. Furthermore, how trade in services was defined, that is the inclusion or exclusion of specific items, would have important consequences for the course of such negotiations. For example, the inclusion of transactions of multinational corporations in the definition of trade in services would necessarily lead to the inclusion of issues like restrictive business practices, codes of conduct for transnational corporations and transfer of technology. This member recalled that liberalization in trade in services was only appropriate if compatible with economic development.

6. Some delegations said it was important not to lose sight of the fact that the improvement of statistics depended ultimately on national efforts rather than the work of international organizations; it was the countries themselves which were responsible for the collection of statistics. International organizations only processed the raw information. One member noted the problem before the GNS was to define trade in services and then to review the available statistics - the problem was not to use the statistics with a view to defining trade in services. Another member recalled that the Chairman had said that the GNS should see how it could influence the ongoing work in other fora in the improvement of statistics and identify its needs in general terms (e.g. more disaggregated statistics, country-wise data) for the negotiations. The GNS should not enter into a highly technical discussion since it had neither the need nor the technical expertise for such a discussion.

7. It was noted by one member that, while the definition of trade in services was important for the purposes of the negotiations, the definition did not have to be decided on for the negotiations to proceed. In this respect, the speaker said it could be useful to set out the various options for definitions of trade in services and then, as negotiations proceeded, refer back to see what would be the implications of the various options for the sectors under consideration. Further, because of the heterogeneity of services activities, it was important in the future work of the GNS that general statements be made bearing in mind the sectoral implications of the general proposition. The member continued by noting that the statement that liberalization which was not compatible with economic development was unacceptable had a corollary; liberalization that was compatible with development was acceptable. In response to the earlier request that the major countries share their information on statistics, the member indicated that he would make available a paper explaining the work in progress in the statistical office of the countries he represented.

8. One member agreed that it was important to have more information on services before deciding on a definition, but added that another element on the agenda - that is, "measures and practices" - was very relevant for defining trade in services. Another member said that different services activities had different income elasticities of demand and that this might be a useful characteristic to take into account in finding a definition for trade in services.

9. In concluding the discussion of this agenda item, the Chairman said that the process of consultations would continue to further clarify ideas on statistics.

10. In the discussion on Broad Concepts on which Principles and Rules for Trade in Services, including Possible Disciplines for Individual Sectors, might be based, views were expressed with regard to national treatment, non-discrimination and transparency on the basis of communications from members of the Group (MTN.GNS/W/12, 13 and 18).

11. The member who had circulated the communication on national treatment (MTN.GNS/W/18) said that when considering the basic principles or concepts to govern trade in services, the applicability of already existing GATT principles to trade in services had to be examined. The principle of national treatment was clearly stipulated in Article III of GATT. It was indispensable and one of the most fundamental principles. In his view, market access should be addressed separately as a component of the framework agreement on services; it was not dealt with in the paper under discussion. This view later received support from other speakers. Those forms of trade in services which should be subject to the national treatment provisions were described in MDF/W/59 (i.e. transborder transactions, temporary stay and establishment). A possible definition of national treatment for trade in these services could be the following: imported services, foreign service enterprises or sellers delivering the service, and agents thereof should be accorded treatment no less favourable than that accorded to like domestic services, domestic service enterprises or sellers. The sectoral coverage of the various types of transactions in international trade in services which would be subject to a national treatment obligation would need to be decided on. Regarding a possible application of a grandfather clause in trade in services, he said that laws and regulations inconsistent with national treatment obligations should be notified at the outset and phased out through a process of negotiations. He said it was also necessary to examine whether exceptions to national treatment in case of subsidies, government procurement and state trading enterprises should be applicable to trade in services. In his view, since the Committee on Government Procurement had experience in this area, matters relating to government procurement could, for the time being, be taken up in this Committee. State-trading enterprises could be dealt with as a general feature of the framework agreement rather than as an exception to national treatment. General and security exceptions as contained in Articles XX and XXI of the General Agreement might be applicable to trade in services.

12. In commenting on the document under consideration a number of speakers pointed to the differences between goods and services and how this necessitated a different interpretation of national treatment to that contained in Article III. Some members pointed out, for example, that the national treatment provision in Article III of the GATT was intended to protect the access granted for goods at the border from being weakened or nullified by internal fees, charges or regulations. Some members said that this provision had been set up for products, not for producers (or activities), and it was therefore difficult to see how it could be applied to services, the imports of which were not covered by customs duties at the border as was the case with trade in goods. The conclusion that one member drew was that national treatment would therefore be best applied to such services trade, the definition of which was as similar as possible to trade in goods; that is, only to those services which actually crossed international borders.

13. In the view of some members, the approach in MTN.GNS/W/18 was too "GATT like", and national treatment (for the reasons mentioned above) only had its full meaning with respect to a tariff-based system as it existed in GATT. One member said that in the case of goods, the tariff was the means of treating foreign suppliers less favourably than domestic suppliers; in the case of services non-national treatment was the means of treating foreign suppliers differently to national suppliers. In the context of trade in services, national treatment should thus be seen only as a yardstick and not as a basic obligation. He continued that he did not accept the implication in the document that restrictions that were "grandfathered" appeared to be the exception. He considered that there would be a very large category of governmental measures which would not conform to the national treatment yardstick, but which would be accepted in the beginning of the agreement as being legitimate. Nevertheless, there would be a presupposition that they would be negotiated away during the lifetime of the agreement, if they were found to be not in conformity with the definition.

14. It was also suggested by some delegates that national treatment need not be considered as a generally applicable principle. Its application to all services would presuppose a high degree of economic homogeneity of the various services sectors. One participant noted that there was no need to examine all national laws and regulations affecting trade in services as such but rather to examine only those provisions which restricted trade in services. In the view of one member, national treatment might well be applied in "concrete" specific situations or sectors, and not as a general principle as with Article III. In some specific cases (e.g. some foreign investment), what was needed was not simply national treatment, but national treatment "plus"; for example, it might be important to offer more favourable terms to foreigners to attract foreign investment than those offered to national investors. One member stated that given the different stages of economic development of various countries and the diversified characteristics of trade in services, he found it difficult to agree to a uniform application of national treatment to trade in services.

15. It was also suggested that the sovereign right to treat national services producers differently from foreign producers should be recognized. One member said that, in this respect, the expansion of the application of national treatment from products to producers was a "quantum jump". In the view of this speaker, the notion of a grandfather clause and the phasing out of national regulations which were inconsistent with a national treatment obligation could not be accepted as a general principle. He also raised questions whether national treatment was a concept that would promote economic growth and development, whether empirical evidence was available to substantiate this proposition and whether the approach outlined in the document was politically feasible. He posed the question what the implications of national treatment would be, for instance, in the financial services sector or the provision of labour services.

16. One participant drew attention to the fact that some services could only be provided with a commercial presence, either for the purpose of commercial facilitation or for the production of the service itself. All such services required a different concept of national treatment to that normally considered within the context of GATT. He suggested that the concept of national treatment in relation to trade in services should recognize the inseparability between the provider of a service and the service itself. Since national laws and regulations often limited the competitive position and market access of the foreign service provider, it would seem necessary to examine regulatory needs for such limitations and their implications. One view was that the national treatment concept would be determined by the coverage of the multilateral framework and that it was therefore necessary to know first the type of transactions to be covered.

17. Not all members accepted the definition of trade in services that had been adopted in the MTN.GNS/W/18 document. The question was raised as to whether the definition covered the situation when the consumer of the service crossed the border (e.g. for tourism, medical and educational services where the purchaser moved to the country of sale). Some members nevertheless were of the opinion that the GATT provisions on national treatment provided a useful starting point for considering the incorporation of this concept in a framework on services. Some others stated that the only starting point was the Punta del Este Declaration.

18. The member who had circulated the communication on non-discrimination (MTN.GNS/W/12) said that any agreement should attract the broadest possible membership. However, in the interest of liberalization, she thought that at least some of the benefits of a multilateral services agreement should be conditional as with the non-tariff barriers codes. Thus, the non-discrimination principle might in specific cases be in the form of conditional MFN. Her preference would be, however, for an unconditional agreement subscribed to by the largest possible number of contracting parties. The multilateral framework could be expected to determine which national regulations were acceptable in accordance with agreed principles. The purpose of the agreement would be to reduce or eliminate restrictions not in conformity with the principles. The sorts of discriminatory regulations that would be eliminated could be those which restricted or favoured the import of services by means of quotas, licensing or

preferential access. She also made the suggestion that some existing discriminatory measures could be brought into conformity with the principles by changing the nature of the measure. She mentioned, by way of example, that the non-discrimination principle may be adhered to by auctioning of quotas among foreign producers. Quotas, if purchased at auction, would then be more akin to tariffs on imports and therefore non-discriminatory. Non-discrimination, she said, was one of those principles of fairness in trade regulation which should be apparent as well as real to have effect; that is, regulations should be seen to be non-discriminatory if they were to have broadly based agreement. Parties to the multilateral framework would need to rely heavily on effective transparency and dispute settlement procedures to monitor the compliance of all parties with their obligations.

19. One member asked whether there were elements in a framework agreement that could be relatively unconditional. In the view of another participant the answer should be affirmative and she gave examples including transparency of regulation, avoidance of burdensome regulations and avoidance of subsidies. A number of countries agreed that the MFN principle, the cornerstone of the GATT, would be equally fundamental to any agreement on trade in services. One representative noted that once the broad concepts were agreed on, other areas of negotiations would progress - particularly questions of definitions and coverage. Also, despite the fact that differences in trade in goods and services could be identified, there was no evidence that the concepts as applied to trade in goods (transparency, national treatment and non-discrimination) should be rejected. Since these concepts were known to have worked for trade in goods, they should be considered for international trade in services. Further, in order to promote the economic growth of all trading partners and the development of developing countries, the benefits should be unconditional and applied on a most-favoured-nation basis. While the benefits would be maximized by ensuring that consensus was reached on the most substantial multilateral framework possible, it might be appropriate to consider a different approach to sectoral arrangements. This would allow disciplines to be taken further in specific areas by those contracting parties who were in a position to make such commitments, but could also allow time for other sectors to be brought progressively into conformity with the provisions of the more general framework agreement. In this respect, another member indicated that thought should also be given to an optional MFN clause with automatic reciprocity which would allow interested countries to contract agreements among themselves and which would permit third countries to adhere subsequently to these agreements.

20. One member pointed out that the MFN clause implied that an advantage given to one party should be given equally to all. Conversely, non-discrimination meant that no one should be disadvantaged in a way that others were not. One could perhaps conceive of the application of GATT principles to trade in services in the context of a two-tier framework, i.e. one level of agreement containing the basic principles for general application, and a subsidiary level of understandings defining how these

basic principles would apply in specific sectors. It was here that the fundamental differences between goods and services would be brought out. The sectoral rules should be broadly in line with the broad principles, but some principles might not apply directly in some sectors or be applied with some variations. This would also be the case for market access and national treatment. Issues such as the adoption of commonly acceptable standards in respect of, for example, professional services or the regulation of the activity of telecommunication service providers would have to be treated in the sectoral understanding. But they should not distract from the fundamental principles being stated in a fairly pure and unconditional form in the multilateral framework.

21. The point was also made that the important element was not the conditionality or the unconditionality of the MFN clause, but the equitable nature of the arrangements among countries. Moreover, any implicit or explicit bilateralism in these arrangements should be a consequence of the proper characteristics of each sector or sub-sector and not a negative incentive through the conditional nature of the MFN clause.

22. The member who had circulated the communication on transparency (MTN.GNS/W/13) said that this was a working paper with no definitive prescriptions. One member said that transparency, as dealt with in this document, was looked at from a biased and erroneous angle. Transparency should not mean international negotiation of each law and regulation as in this document. This view was supported by some other delegations. He continued by saying that it was important to determine the parameters for a definition of trade in services before identifying the barriers. He specifically drew the attention of the GNS to three such parameters. The first was that national legislation and regulations on foreign investment were not in themselves a barrier to trade in services. The second was that when legislation and regulation of a sector had an impact in the same way on import trade and domestic trade it could not be considered a barrier to international trade. Finally, in developing countries, legislation and regulations applied to new services could not be considered as a barrier to trade in either the framework for general application or in each sub-sector that would be negotiated.

23. For another member, transparency served two purposes. First it was a necessary element for the conduct of the negotiations and, second, it was necessary once an agreement was decided on to assure that new actions did not contravene obligations undertaken in the agreement itself. Since trade in services presented different problems from those affecting market access for goods, the negotiations and the protection of their results might require an even more ambitious approach to transparency than the one provided for trade in goods in the General Agreement.

24. Another member stated that the ideas advanced in MTN.GNS/W/13 were too ambitious and went beyond the existing GATT provisions on goods. The transparency provisions (e.g. procedures for prior notification and consultation) were not even available to national operators; it would be all

the more difficult to grant them to foreign operators and would raise also question of national sovereignty. As far as notifications were concerned, such an obligation should cover only measures having a direct impact on trade.

25. Some members said that the communication (MTN.GNS/W/13) presented an ideal situation where all new provisions proposed at the national level were made known to all parties and were subject to comments. The GATT Agreement on Technical Barriers to Trade required prior notification of proposed government standards that might affect trade. One should consider the appropriateness of such an approach to trade in services. It was, however, necessary to determine what could be notified as a barrier to trade and how legislative procedures in one sector would vary from another. One way to avoid burdensome administrative routine in the early stages, might be to adopt a system of notifications on demand.

26. One member suggested it would also be wise to assess the applicability of the OECD list of appropriate reasons for the introduction or maintenance of domestic regulations in the services area, as suggested in the OECD conceptual framework. Governments had the sovereign right to regulate, regulations were essential and legitimate in many areas, and the multilateral framework was not intended to undermine this situation. Nevertheless, clarity and predictability were essential for the smooth flow of international trade in services.

27. One member noted that a fundamental negotiating objective was the economic growth of all participants and development of developing countries. This represented a "criterion of criteria" against which to test each of the concepts to see if they promoted the objectives as contained in the Punta del Este Declaration. He questioned how the notion of transparency as presented in the communication would advance the development of developing countries. To the extent that developing countries, for instance, were affected by transnational corporations, transparency should apply with respect to restrictive business practices of transnational corporations if one was concerned about development objectives. This had not, however, been addressed in the document on transparency. It was also unrealistic to expect that developing countries could meet the administrative demands placed on countries by the proposed transparency provisions. He said that advance notice, for example, was something that was not even given to national operators. As far as he was concerned, it was for businesses to inform themselves about existing measures and not to be "spoonfed" by government. Besides the exceptions foreseen for safety, health, environmental protection or national security reasons, other exceptions should be introduced that would "marry" the approach proposed in the submission on transparency, for example, with the objectives of development of developing countries.

28. During the discussions of national treatment, non-discrimination and transparency, there were a number of general comments that applied to all the concepts. It was stated by a number of members, for example, that these concepts were interlinked and could not be looked at in isolation.

29. It was suggested, for example, that both the concepts of national treatment and of MFN had reference to the concept of non-discrimination. National treatment dealt with discrimination between foreign and domestic sources of supply and MFN dealt with non-discrimination as between different foreign sources of supply. The success of any agreement in meeting its objectives would depend very much on how these two concepts could be dealt with jointly.

30. One member requested the delegations which had circulated the three communications on national treatment, non-discrimination and transparency to illustrate the application of these concepts to all movements of factors of production across the board, including labour and labour intensive services.

31. Commenting on all the communications, one member said that they should not be viewed as position papers, but rather information papers to provide a basis for discussion. Responding to a comment made earlier, he stated that he viewed the development objective of the Punta del Este Declaration to be less of a direct objective than the objective of trade expansion. He said, for example, that the GNS should not look for rules that would reduce trade even if there was an argument that they were promoting growth and development. In short, while development was an important criteria, rules were to be checked against the absolute criteria of expansion of trade. Also, it would have to be tested whether these concepts should be applicable in all cases or whether there should be exceptions in well-defined cases. The same member also indicated that it was necessary to ascertain what was ideally desirable and then to weigh this against the feasibility of implementation. He noted the inability of some countries (particularly developing countries) to make available information on all existing government measures. In the same vein, he posed the question as to whether it was feasible to be transparent with respect to all operators in the market place, for instance, transnational corporations. He was of the opinion that the GNS had identified two criteria against which future discussions should be evaluated, namely how far did different concepts conform to the objectives set out in the Punta del Este Declaration and how far were general propositions appropriate in individual sectors? In addressing the latter point, the GNS needed to look at an illustrative list of sectors.

32. With respect to the discussion under this element, the Chairman drew attention to the fact that a number of members had stressed the interlinkages between the concepts and that observations had been made which covered all three concepts.

33. In the discussion on Coverage of the Multilateral Framework for Trade in Services, views were expressed on the treatment of labour and labour intensive services. The point was made by one participant that from his countries' perspective, all movements of factors involved in the production of services should be covered by the multilateral framework. This included not only capital, but also skilled and unskilled labour. However, the movement of labour and capital for the production of manufactured goods was not to be covered. Thus, as far as the discussions in the GNS were concerned, the movement of factors of production was only relevant if it

concerned the production of services. Another participant challenged this view by saying that a number of services were inputs into the production of products, so the dividing line between trade in services as such, and trade in services producing goods, was very thin. As an example, he mentioned specifically a case where consultancy was an input into chemical engineering and therefore the production of chemical products. Should all such services be left out of the coverage?

34. Some members said that they did not have a clear idea of the concepts they wished to see embodied in the framework, and only when this became clearer could they determine what the coverage of the framework should be. The determination of coverage would be a dynamic and evolving process. This provoked an exchange on the sequential order for the discussions of the elements listed in the programme for the initial phase of the negotiations. The point was made by one member that the question of what to include in the coverage of any agreement merited more discussion by the GNS as this would determine a number of subsequent issues. He said that the sectors should first be identified for inclusion in the coverage before deciding what concepts would be appropriate. The reverse view, as stated earlier, was that one should decide first on the concepts and then determine the sectors to which these concepts may be applied.

35. One member said that definition and coverage were closely linked. He found it unacceptable to agree to a coverage that was biased in the interests of any one country or groups of countries. Another delegate said that at the outset, all services should be included in the coverage. When the GNS came to concepts, however, it needed to see to which extent it was feasible to apply these concepts to the activities covered. It was also pointed out that trade in services could be considered as complementary to trade in goods or as a new area for negotiation. In any event the coverage should include the movement of labour and labour-intensive services.

36. The Chairman recalled that the question of the order of discussion of the elements had been discussed earlier and this had been set out in the report of the Chairman on the programme for the initial phase of the negotiations.

37. On Existing International Disciplines and Arrangements, preliminary views were expressed with regard to the factual background paper prepared by the secretariat (MTN.GNS/W/16) in response to a request by the Group (MTN.GNS/8, paragraph 46). The note summarized the main features, coverage and objectives of existing international disciplines and arrangements relevant to trade in services and contained also general comments on the nature of these arrangements. The Chairman drew attention to the preliminary nature of the document and noted that it was subject to revision in the light of comments made. He indicated that it may be found that the information contained in the document could be further developed or completed.

38. A number of delegations said they needed more time to study the document. Others noted that it was a background document that would be utilized in discussions in the GNS when more sector specific considerations were addressed.

39. Noting that the various disciplines and arrangements in the document involved a process of consultation by the secretariat, some members considered that not all the arrangements or disciplines dealt with in the secretariat paper had the same status, since some of them were not universal in character.

40. It was noted that most of these arrangements were highly technical in nature and that many of them were not principally concerned with the trade aspects of services and, in particular, the liberalization of markets for the expansion of trade. One delegate said it was not the rôle of the GNS to become involved in the technical aspects of these arrangements nor should the work of the group supplant them. Work in the GNS should, however, aim to complement the arrangements to ensure that services were traded in accordance with the provisions of the Punta del Este Declaration - that is under conditions of liberalization and transparency. However, should these arrangements maintain or endorse measures that adversely affected trade régimes in services they would have to be subjected to the contractual obligations adopted as a result of the GNS negotiations.

41. No specific views were expressed on the element dealing with Measures and Practices Contributing to or Limiting the Expansion of Trade in Services, Including Specifically any Barriers Perceived by Individual Participants, to which the Conditions of Transparency and Progressive Liberalization Might be Applicable.

42. In concluding, the Chairman said that the next meeting would be held on 3-6 November 1987. He invited delegations to submit written suggestions and proposals on the five elements of the programme for the initial phase of the negotiations.