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ELEMENTS FOR A POSSIBLE FRAMEWORK AGREEMENT
ON TRADE IN SERVICES

The following communication, dated 17 October 1988, is circulated at the request of the delegation of Brazil to the members of the Group of Negotiations on Services.

ELEMENTS FOR A POSSIBLE FRAMEWORK AGREEMENT
ON TRADE IN SERVICES

INTRODUCTION

1. The Punta del Este Ministerial Declaration launched negotiations with the objective of establishing a multilateral legal framework of principles and rules for trade in services, including the elaboration of possible disciplines for individual sectors, with a view to expanding such trade under conditions of transparency and progressive liberalization and so as to promote the economic growth of all trading partners and the development of the developing countries. This legal framework should respect the political objectives of national laws and regulations relating to services and should take into consideration the work of relevant international organizations.

2. Negotiations on trade in services should lead to the complete fulfillment of the Ministerial mandate. It is necessary to ensure that the objectives - economic growth, development and respect of the policy objectives of national laws and regulations - be reached through, inter alia, the expansion of international trade in services under conditions of transparency and progressive liberalization.

4. But these conditions - transparency and progressive liberalization - are not sufficient to attain those objectives. An agreement based exclusively on

liberalization could lead to an even greater concentration of international trade in services, which would frustrate the Mandate and result in scarce participation in an eventual framework.

4. Most of the proposals presented to the GNS by developed countries have emphasized aspects related to liberalization, in some cases going as far as to proposing a radical move to deregulation. Brazil considers it necessary to have a more balanced approach in order to obtain progress in the negotiations. With this purpose, the elements elaborated below should be included in the framework on trade in services. Some of these elements have already been presented to the GNS and several of them are contained in document GNS/W/34.

DEFINITION

5. The question of definition is a very difficult one. Thus, it is natural that some participants feel tempted to overcome this obstacle by pretending that it does not exist. However, one cannot expect participants to accept obligations without a precise notion of their implications. In fact, the objective of negotiations on trade in services is to increase and not to reduce transparency and predictability in this field. It is the Brazilian view that a multilateral framework would have more substance and wider participation and could be achieved more rapidly if there were a consensus on a simple and realistic definition of trade in services, to include only the transactions between residents and non-residents.

6. Services produced in a country are internationally traded when they cross national borders and are acquired and consumed by residents of another country. It is to be established during the negotiations if this definition would include the concept of the temporary presence of the producer or the consumer of the service within national borders, during the time period needed for one specific transaction. But it excludes, from the outset, the permanent presence of services enterprises inside national borders as well as related obligations, like the right of establishment. When a service is produced by subsidiaries of foreign companies and sold in the domestic market of a country, that operation is considered a domestic transaction. Any decision to be taken with respect to the need of the temporary presence of the producer or the consumer inside national boundaries for a certain services sector does not exclude the right of States to regulate the conditions of such a presence.

GENERAL CONCEPTS FOR THE FORMULATION OF PRINCIPLES AND RULES ON TRADE IN SERVICES

a) Transparency

7. In the framework of multilateral rules for trade in services, one could include the obligation to publish all laws or decrees related to international trade in services. It would be premature to conceive of a requirement for notification to be included in a multilateral framework, due to the specific nature of different kinds of services, as well as to the fact that

most national norms on services refer to objectives with no direct link to trade.

8. In order to be balanced and effective, however, the obligation of transparency should not only apply to governments, but also to enterprises that operate in international trade in services. The absence of rules which ensure the transparency of intra-enterprise trade can represent an obstacle to the expansion of trade in services greater than all national regulations. Similarly, the existence of too close a trade relationship between an affiliate enterprise and the transnational corporation in its home country can have distorting effects on international trade, in contradiction with the objectives of the Punta del Este Mandate.

b) Progressive liberalization

9. Multilateral rules should contribute to the gradual elimination of unnecessary restrictions to international trade in services, with a view to expanding this trade.

10. It would be unrealistic to assume that liberalization could be automatic or immediate. Progressiveness is an element of fundamental importance to establish a system of multilateral rules on trade in services. Progressiveness should be implemented in such a way as to assure a balanced participation of all countries in international trade in services. For instance, one could consider an initial liberalization of the markets of developed countries. One could consider

ways to establish preferential opportunities for developing countries in order to expand their share in trade (preferential access to developed countries' markets for services of special export interest to developing countries, such as labour-intensive services; unrestricted and unconditional extension to developing countries of the benefits resulting from agreements to liberalize trade in services concluded among developed countries; non-extensive concessions agreed only among developing countries). One should also consider the possibility of a faster liberalization of trade in services inside customs unions or free trade zones.

c) Preserving international competition

11. An important characteristic of the principal services sectors is their strong economic concentration. More than two thirds of world service exports are concentrated in a few developed countries. Apart from this, transborder service trade is controlled by a small number of countries, specially in sectors not covered by international disciplines.

12. Efforts for liberalization will need some caution in order to preserve competition. It must not be forgotten that one of the premises implicit in defending the advantages of liberalization is that markets are competitive. As that is not necessarily the case of services, it is impossible to deal with this matter in the framework. Traditionally, governments have solved this problem in two ways: anti-trust laws or price-control. Both

methods would appear to be difficult to implement at the multilateral level. Thus, it is probable that participants would want to maintain a certain degree of freedom in this matter. However, there would be a need to agree on principles and rules for the control of restrictive business practices affecting international trade in services in order to establish obligations and disciplines for the operators of that trade and their home governments. Specific disciplines would anyway be necessary for every subsector, taking into account the existence or not of internal or external economies of scale.

13. The adoption of rules to guarantee free competition at international level will not imply a restriction to the rights of States to domestically establish monopolies or exclusive concessions in those sectors where they judge it necessary in order to promote their development objectives, to assure the well-being of citizens and national security, as well as to preserve social and cultural values.

d) Development compatibility

14. Nowadays very few countries draw up their strategies in the services sector on the basis of the traditional theory of the three stages of development (that is, the evolution from an agricultural economy to an industrial economy and, finally, a services economy). One increasingly notes that in the same way as there was a kind of "industrialization" of agriculture, there is a process under way of expanding the use of more and more

sophisticated services in agriculture and in industry.

15. One could hardly expect, therefore, countries to be willing to face the risk of losing control of their basic infrastructure in the development process. This is not the same as to advocate self-sufficiency in all services; it means solely the acknowledgement that the maintenance of a national productive capacity is a legitimate objective and becomes particularly important in those areas the performance of which reflects on the economy as a whole, as it is the case with the so-called producer services.

16. Besides access to latest developments in the services sector, one of the main concerns of developing countries is to provide access to basic social and economic services to large segments of their population. In this context the role of the State as provider of infrastructure services should be reinforced. This aspect must be taken into account in an agreement on trade in services.

17. Thus, every country has an interest in the development of the services infrastructure at the national and international levels, with access open to all. A multilateral framework on trade in services should also foresee the role of basic services as a development factor.

18. Another element to be taken into account is the increase of the export capacity of services, which is linked to the question of obstacles to the entry of new participants into some services markets. This is a difficult question, since it adds to the variety of services sectors

the diversity of the involved actors , divided among the different stages of development. One could consider the creation of financial rules and mechanisms in order to facilitate the participation of competitive services suppliers from developing countries in international tenders, where today they are in a disadvantageous position due to their lesser financial power (for instance, pre-requisites for participation in tenders, the creation of rules for export financing). Equally important would be to foster the diffusion of modern technologies and to avoid monopolies resulting from the restrictive enforcement of intellectual property rights.

e) Respect of the policy objectives of national legislation

19. The respect for policy objectives of national laws and regulations should be ensured while implementing the framework. In particular, national regulations designed to strengthen services capacities of developing countries in order to increase their participation in international markets should be respected by all participants.

f) Standstill

20. The regulatory status of the services sectors is another field in which the asymmetry between countries in different stages of development turns out to be perverse. The distinct characteristics of the regulating process in developed and developing countries should be

observed. In the former, services have undergone a period of extensive regulation, which permitted their growth and served the economic and social objectives of those countries. In developing countries, due to the non-existence of more advanced services, two possible situations may arise: in many countries there has not yet been a need to regulate services, while in many others regulation is necessary for the preservation and expansion of their national capacities and for the attainment of their national development objectives. This unequal situation must be taken into account during discussions on standstill.

g) International Organizations

21. The GNS can only gain with the experience of international organizations and agreements in the field of services. Existing international disciplines should not be considered as a constraint, but as a context which, in some cases, might be totally adequate and in conformity with the parameters of the Punta del Este Ministerial Declaration.

22. It would therefore be convenient to include in an eventual multilateral legal framework on trade in services a clause explicitly recognizing that it will be applied in a way compatible with existing international instruments.