

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNS/CON/2
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Group of Negotiations on Services

NOTE ON THE MEETING OF 4-5 SEPTEMBER 1990

1. The Chairman welcomed delegations to the second meeting of the Working Group on Construction and Engineering Services (CES) and drew their attention to GATT/AIR/3059 which contained the agenda for the meeting. He said that at the working group's first meeting discussions had revealed certain specificities of the CES sector and some of the conflicting perceptions of delegations in this respect. It had been, however, too early to reach agreement as to whether an annex or annotations addressing specificities in this sector would be necessary. For some of the key issues in the sector, such as mobility of manpower, the widely adopted approach in the group had been to reserve judgment until the draft framework became available. Such draft was now available in the form of a text put forward by the Chairman of the GNS on his own responsibility in MTN.GNS/35. He reminded the group that the general guidelines for further work on sectoral annotations/annexes were contained in the statement made by the Chairman of the GNS at the meeting of 29-31 August 1990. Thus, in accordance with that statement, the Working Group on CES should give its assessment as to whether a specific annotation/annex was or was not needed in that sector and, if it came to the view that an annotation was needed, to identify the issues/provisions that needed to be annotated and to suggest, to the extent possible, the nature and content of such an annotation in relation to the specific provisions of the framework involved. He noted that the GNS had also agreed that an open-ended ad-hoc working group of GNS negotiators and sectoral experts would be established and meet as from the second half of October, with a view to taking stock of the situation in the light of the conclusions reached in the working groups and finalizing the draft texts of the annexes or annotations where these appeared necessary.

2. He then highlighted some specificities of the CES sector which had been revealed during the first meeting of the group. Regarding definitional issues, the main issue was whether there was a need for defining the scope of CES activities in sectoral annotations or whether provisions regarding definition and scope in the framework itself sufficed to address this sector. In that context, the group should also consider how to deal with the issue of movement of personnel, equipment and material. Another important specificity related to the scope of application of transparency obligations, particularly with regard to different levels of government (e.g. local/municipal, state, federal) and non-governmental entities (e.g. associations). Furthermore, government procurement constituted a widespread practice in the sector and some aspects of it might warrant clarification/modification/elaboration with respect to the related general provision in the framework. Also, the group should determine what should be the relationship between its discussions and those of the negotiating group on government procurement. Regarding

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development-related issues, the group should consider how to deal with the international competitiveness of CES firms; market access was increasingly determined by access to financing and firms able to win contracts in international markets were frequently those offering comprehensive packages of CES alongside the financing of entire projects. Access to modern technology was a determining factor in that respect as well. As concerned labour and professional mobility, annotations to this effect might depend on the results of the work being done in the working group on labour mobility. Also, the issue of mutual recognition and harmonization with relation to CES-related professionals (e.g. civil engineers and architects) bore a close relationship to the work of the working groups on labour mobility and on professional services. He then opened the floor for comments.

3. The representative of Korea, introducing an informal paper, said that the definition of trade in CES was a matter of controversy deriving from the fact that trade in the sector involved both physical construction and engineering activities. The essential features of services-related activities were especially evident in the engineering component of CES. This component, involving the work of professionals such as architects and engineers, justified the classification of CES as a services sector despite the fact that a durable good was the final product resulting from CES activities. Unlike most other services, physical construction services relied heavily on unskilled and semi-skilled labour alongside construction equipment and materials. Comparative advantage in the sector related therefore to the ability on the part of CES firms to move labour, equipment and materials across borders in much the same manner as technological and managerial know-how as well as financing capacity determined the nature of comparative advantage in other services sectors. The free movement of production factors was important so as to allow countries to exert their comparative advantage in the CES sector. If the movement of some production factors was restricted, the benefits of free trade would be biased towards certain countries. As issues relating to the mobility of labour across borders had universal impact across services sectors, it was best dealt with in the labour mobility working group.

4. Regarding market access, he said that in some countries overly restrictive guarantee systems were in place which constituted significant barriers to trade in the sector. With respect to the practice of requiring performance bonds at excessively high rates exceptions or improvements should be sought in order to facilitate market access for foreign contractors. In the course of inviting bids on construction projects, market access could be rendered impossible when: (1) excessive limitations applied to bidder qualifications; (2) entities placing orders applied excessive PQ standards or provided priority treatment to contractors with which they had pre-existing relationships; (3) designated competition or negotiated contracts existed. Whenever qualifications for bids were determined, objective and rational standards for judgement, such as performance on similar projects (including overseas projects), financial conditions and technical expertise, should be established and made public in advance. In order to avoid limiting the foreign contractors' ability to participate in the bidding process, sufficient time should be provided to

offer a proposal. These issues needed to be discussed by the group and might be reflected in the form of a sectoral annex or footnote to the framework.

5. Government procurement issues should be considered by the group in light of the fact that procurement measures were very prominent in the CES sector. For that reason, excluding the application of the principles of m.f.n. and national treatment to government procurement could defeat the purpose of liberalizing CES trade. Further discussion was needed in this working group on whether such an exclusion was indeed appropriate.

6. The representative of Egypt said that a crucial link existed between labour mobility and the competitiveness of CES firms. He agreed with the representative of Korea that government procurement constituted a very important issue in CES trade and suggested that some aspects of transparency could warrant treatment in a sectoral annotation.

7. The representative of the United States noted that matters relating to market access could be dealt with effectively through negotiated commitments under the framework. Also, questions regarding bidding procedures, performance bonds and government guarantees could be negotiated among countries through the provisions contained in part III of the draft framework. Issues relating to subsidies and government procurement had considerable relevance for many services sectors but it might be unrealistic to expect a more comprehensive treatment of these issues beyond what was implied in the related provisions appearing in the draft framework.

8. The representative of India suggested that a distinction should be maintained between the physical construction and the engineering design element of CES activities. The representative of Malaysia suggested further sub-divisions including the physical construction, the design, the design-and-construct, the build-operate-and-transfer types of construction work alongside construction management aspects of the sector. He said that the provision of engineering and architectural services should be discussed under professional services and not CES since such services involved technical design, advisory contract management services and not the traditional services provided by a contractor in the construction sector. He said also that the consideration of the CES sector could not be divorced from the consideration of the movement of labour across borders to provide services linked to physical construction. His delegation supported article XIII of MTN.GNS/35 on government procurement.

9. The representative of Poland suggested that issues relating to the package character of the CES sector, involving the cross-border movement of manpower and equipment along with financing aspects of specific projects might require elaboration through sectoral annotations. In his view, labour mobility should be taken up in this group rather than in the working group on labour mobility since this issue was especially relevant to CES. The working group should qualify the type of labour mobility in question, limiting it to temporary movement required for the fulfilment of specific contracts. It had been the practice of firms from his country not to move

unskilled labourers across borders but only specialized personnel and highly-skilled architects and engineers. He agreed that government procurement practices could function as barriers to CES trade alongside with quality-control of manpower and measures limiting the cross-border movement of equipment. His delegation was therefore of the view that given the package character of CES trade and the contractual nature of transactions in the sector an annex was necessary for CES.

10. The representative of Australia was confident that the framework agreement would enable countries to negotiate wide-ranging liberalization in the CES sector in the absence of an annex or specific annotations. She asked whether the Korean delegation had found performance bonds to be a means to discriminate among countries and/or grant preferences for nationals. She wondered whether the barriers to market access listed by the Korean delegation could also be related to m.f.n. or national treatment. She suggested that transparency provisions or provisions relating to domestic regulation in the draft framework might address the concerns of the Korean delegation regarding bidding qualifications. She agreed that liberalization of CES trade should affect government procurement practices but warned against an imbalance being created between goods and services in terms of obligations in that area. Ideally, subsidies should also be affected by the liberalization process under the framework but little time remained before the end of the negotiations to improve the related provision in the draft framework.

11. The representative of Mexico agreed that the issue of labour mobility should be treated in a horizontal fashion since it had implications for many services sectors and not only for CES. He also shared the views of the representative of Korea on market access issues (e.g. guarantee systems) and on subsidies and government procurement.

12. The representative of India said that criteria regarding the level of skills of manpower should not be used to exclude certain transactions from the scope of consideration of the group. Market access should not be impaired or nullified by measures which rendered such an access ineffective. It should be noted that government procurement did not apply directly to services but to entire projects. The issue of labour mobility had an important bearing on this sector.

13. The representative of the European Communities agreed with others that the package nature of CES activities including the movement of equipment and labour across borders constituted a significant specificity of the sector. She said that though labour mobility constituted a horizontal issue, sector-specific commitments would be made in its respect. As stipulated in article XIII of MTN.GNS/35, neither m.f.n. nor national treatment should apply to government procurement in this or other sectors. Barriers to market access could be phased-out through exchange of concessions among countries. She warned against too great a disaggregation of CES activities.

14. The representative of Hungary agreed that the package nature of CES trade constituted an important specificity of the sector. Another

specificity was the movement of labour across borders which should not be limited to key personnel or highly-skilled labour. He agreed with the representative of the European Communities that barriers to the movement of labour and market access in general could be addressed through negotiated commitments as provided under the framework. He did not see the need for a specific definition of CES activities in an annex on the sector. While he saw no need for either an annex or specific annotations regarding CES trade he reserved his position until further agreement was reached on the framework.

15. The representative of Austria said that the movement of labour across borders was governed in her country by social and immigration regulations. Barriers to market access should be addressed through national schedules while standards and qualifications should be respected in accordance with the provisions of the framework. She agreed that the principles of m.f.n. and national treatment should not apply to government procurement in the CES area. There was a need for a provision on emergency safeguard measures.

16. The representative of Korea said that though certain government regulations might be addressed through specific commitments in national schedules, there were measures derived from general practice which could escape the purview of the framework and might therefore need to be addressed through a sectoral annotation. He considered the separation of physical construction from engineering design activities to be practically difficult and ultimately undesirable. The group should not defer consideration of government procurement until after the conclusion of the negotiations of the Code on Government Procurement since there were important issues to be resolved with respect to procurement in the CES sector which were not at all addressed under the draft framework. In addition, the Code was limited in its membership while a considerably larger body of countries participated in the deliberations of the GNS and this working group.

17. The representative of the United States said her delegation had not identified issues in the CES sector which demanded resolution before the end of the Uruguay Round. She suggested that the work of this working group be suspended until after the conclusion of the GNS negotiations. The representative of the European Communities said that her delegation along with others had indicated several specificities of the CES sector the consideration of which would point towards the need for a further meeting of the working group. This view was shared by the representative of Poland who emphasized the usefulness of an annex as a means to facilitate the progressive liberalization process in the CES sector.

18. The representative of Sweden, on behalf of the Nordic Countries, urged those delegations who were seeking an annex to come forward with written submissions on the specific aspects they would like to see annotated. The representatives of New Zealand, Australia, Austria, Japan and Hungary did not see sufficient justification for an annex or annotations on the CES sector. The latter agreed with the representative of the European Communities that it was premature to suspend the work of the group at this

point in time and joined the Swedish delegation in urging others to submit written proposals as soon as possible.

19. The representative of Korea stressed again that certain aspects of CES trade warranted annotations since otherwise they would remain outside the purview of the framework agreement. Private practices common in many countries constituted barriers to market access and might not be touched by negotiated commitments without further elaboration in an annex or annotations. His delegation was willing to accept an obligatory clause in the annex as a means to address issues which could not be addressed through specific negotiated commitments on market access and national treatment.

20. The representative of Chile said that sectoral annotations should not constitute exceptions to the provisions of the framework. Annotations should clarify or interpret provisions whenever it was evident that this was necessary for the liberalization process to take place under the framework.

21. The representative of Malaysia agreed with others that there was no overriding need for specific annotations relating to the CES sector. He clarified that the practice of requiring foreign CES providers to produce a performance guarantee from a bank recognized by the Central Bank of the host country was a widely-accepted means of ensuring the completion of international projects. Often Central Banks accepted guarantees only from foreign banks which already operated in the host country so as to facilitate claiming the guarantee in the event of non-performance by the foreign CES provider.

22. The representative of Mexico said his delegation had not yet reached a decision on the need for a CES-specific sectoral annotation or annex. He underscored the importance of the following issues in CES trade: transparency, CES-related goods trade, subsidies and government procurement.

23. In responding to the suggestion by the representative of Korea that some countries demanded performance bonds with excessively high rates, the representatives of the United States and Malaysia pointed to the fact that the rates of such bonds obeyed risk considerations specific to each individual CES project. The representative of Malaysia added that the rates attached to performance bonds were most commonly applied on a m.f.n./non-discriminatory basis across countries and also reflected the severity implied by the completion time originally agreed for individual projects. The representative of Australia recognized the importance of the issue of performance bonds but did not think it needed to be reflected in an annotation.

24. The Chairman noted that certain issues had surfaced in the discussion, including labour mobility, market access and government procurement. Some delegations, notwithstanding the absence of a final agreed text on the framework, were confident that the specificities of the CES sector did not warrant elaboration through annotations or an annex. Other delegations considered it premature for the group to come to a conclusion in that

respect, given the status of the draft text on the framework and the absence of written proposals on which to base the group's deliberations. In that context, some delegations favoured a further meeting of the working group while others did not share a similar perception. The task ahead of the group could be facilitated by informal consultations among delegations. He suggested that those delegations seeking annotations should make an effort to put their views in writing for future consideration by the group.

25. The representatives of the United States and Australia stressed that it would be very difficult to continue the work of the group in the absence of written proposals. The representatives of India, Yugoslavia and Poland were against the submission of written proposals as a pre-condition to the furtherance of the group's work. The representative of Yugoslavia added the issues of labour and equipment-related qualifications/standards, temporary equipment imports and financing issues to the list of issues mentioned by the Chairman as having surfaced in the discussions.

26. The Chairman discerned no consensus as to the need for sectoral annotations on the CES sector. He said that to some extent the problems ahead of the group were beyond its control since they hinged on agreement being reached in the GNS at large. He understood, however, that it would be possible for participants of this working group to engage in deliberations towards resolving disagreements relating specifically to CES. The next meeting of the working group on construction and engineering would take place as scheduled, on 10-11 October 1990.