

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

MTN.GNS/W/110

6 November 1990

Special Distribution

Group of Negotiations on Services

REPORT BY THE CHAIRMAN OF THE SECTORAL
AD HOC WORKING GROUP TO THE GNS

1. At its meeting in August this year, the GNS agreed that an open-ended ad hoc Working Group consisting, as appropriate, of GNS negotiators and sectoral experts, should 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 sectoral working groups, and finalizing the draft texts of sectoral annexes or annotations where these appear necessary.
2. This report is presented following informal consultations within the ad hoc Working Group.
3. The ad hoc Working Group has had before it reports of the Chairpersons of the working groups on telecommunications, labour mobility, construction/engineering, professional, financial, land, maritime and air transport, tourism and audiovisual services.
4. From the discussions relating to these sectors, the following conclusions can be drawn:

Telecommunications Services

5. Some participants are unable at this stage to accept an annex or annotation on telecommunications services because, in their view, the concerns expressed can be dealt with by a provision of the framework relating to non-frustration or facilitation of benefits.
6. Some participants cannot undertake commitments in relation to basic telecommunication networks as a mode of delivery unless commitments can be undertaken by participants regarding labour as a mode of delivery.
7. A few participants are unable, at this stage, to accept that m.f.n. treatment can be extended to basic telecommunications services, on the ground that this would perpetuate existing unequal bargaining positions among participants within the sector or that there is need to take account of the acquired rights of corporate entities currently providing such services.
8. Most other participants consider it important that m.f.n. treatment should apply in this field, in order to encourage the development of

competition and to avoid the process of liberalization being impeded by considerations of sectoral reciprocity.

Labour Mobility

9. The discussion has addressed the possibility of establishing a classification of categories of physical persons related to skills and sectors, which could serve as a guide for negotiations on market access commitments relating to the temporary movement of persons to provide services.

10. It is recognized that once a commitment with respect to the temporary movement of particular categories of physical persons has been negotiated in accordance with Article XVI of the framework, such categories of persons should be free to move in order to provide the service. It has also been pointed out that once such a commitment has been undertaken it should not be frustrated through the application of laws and regulations relating to the movement of physical persons.

11. A certain number of issues have, however, been raised at this stage:

- (a) that negotiations in respect of commitments in this area should remain subject to laws and regulations governing the temporary entry of physical persons;
- (b) that except where market access commitments have been negotiated, the provisions of Article III of the framework shall not prevent parties from taking measures to protect their social and national security interests;
- (c) that there should be a provision in Article VI of the framework which would permit agreements or arrangements with the effect of the full or substantial integration of labour markets;
- (d) that problems relating to the application of Article III of the framework to visa formalities and to bilateral agreements regarding the movement of physical persons need to be addressed.

Construction and Engineering Services

12. Some participants have emphasized the relevance of measures relating to the movement of equipment and labour, as well as on financing, to the value of market access commitments in this sector. Some participants attach importance to government procurement in this sector taking place on the basis of m.f.n. and national treatment.

13. It was noted that many participants could not accept provisions on such matters as the movement of equipment, financing etc. in the schedules or other parts of the framework. It was also pointed out that provisions relating to government procurement would need to be addressed on a

horizontal basis in the framework. Thus, no specific annotation or annex for construction and engineering services is being proposed.

Professional Services

14. It is agreed that, subject to the further clarification and/or elaboration of particular provisions of the framework relating to harmonization and mutual recognition of regulations, standards or qualifications, there is no need for any specific annex/annotations in regard to professional services.

Financial Services

15. In the course of informal consultations, a certain number of drafting suggestions relating to the framework text have been put forward which, it has been suggested, might adequately deal with some horizontal issues which also relate to particular concerns in the financial sector.

16. There have also been discussions relating to the specific provisions which might be covered by a possible annex or annotations on financial services to supplement the framework. Proposals have been made concerning such matters as scope, prudential regulations, transfers and processing of information, institutional provisions and definitions. Suggestions which have emerged from the consultations relating to the elaboration of specific provisions in these two areas are attached.

17. There is no agreement at this stage on the inclusion in a possible annex of provisions relating to specific commitments.

Land, Maritime and Air Transport Services

18. A number of specificities have been identified in the land, maritime and air transport sectors and various approaches have been put forward by delegations to meet the concerns which were raised.

19. In relation to each of the three transport sectors there is no agreement that it can be covered by the framework without further elaboration.

20. Considerations in this regard are not necessarily the same for each of the three sectors.

21. While there is some common understanding on the need for annotations and/or derogations from at least some of the provisions of the framework in each of these sectors, there is no agreement on the precise content of such annotations and/or derogations.

22. There are differences of view as to what a possible m.f.n. derogation may cover in terms of arrangements, measures or activities in each sector.

23. The need for derogations or qualifications relating to other obligations and commitments contained in Parts II or III of the framework was also invoked by individual participants.

24. Although a few participants have reserved the right to exclude individual transport sectors from the coverage of the framework, there is a common concern that the framework should in principle extend to all sectors. At the present time, however, it is not clear how this result may be achieved in relation to these sectors.

Tourism Services

25. No specific annotation or annex has been proposed for the tourism sector. However, in view of the activities which are common to the tourism and transport sectors, some participants would see the need to review the situation before the end of the Uruguay Round if it appears that the transport sectors are not adequately covered.

Audiovisual Services

26. There has been a difference of views as to whether any derogation is needed in this sector, and over the range of activities that such a derogation may cover. It has also been indicated that cultural and other reasons may effect possibilities for participants to undertake market access and national treatment commitments in this area.

27. It has been agreed that, as a first step, a list of activities for which participants see the need for an m.f.n. derogation should be established. Thereafter, consideration should be given to the feasibility of defining the scope of a possible m.f.n. derogation, and to whether any specific qualification with respect to the application of the framework provisions on market access and national treatment needs to be provided.

28. At this stage, there would appear to be no need for annotations on subsidies in the sector. This question may be reviewed following developments concerning the provision on subsidies in the framework.

ATTACHMENT I

SUGGESTED POINTS RELATING TO FRAMEWORK PROVISIONS
emerging from the Ad Hoc Group financial sector discussions

1. Scope: Government authority (Article I)

Appropriate language should be included in Framework Article I providing for the exclusion from the Agreement of activities constituting the exercise of government or official authority, including that exercised by central banks.

2. Transparency (Article IV)

Suggested replacement for Framework Article IV:3

Each party shall inform the PARTIES at least annually of the introduction of any new, or any changes to existing measures which affect trade in services [covered by its specific commitments under this Agreement]. [Major] new measures [which significantly affect trade in [such] services] shall be notified promptly after their promulgation.

3. Transparency/confidentiality of information (Article IV)

Suggested additions to framework Article IV:6

The provisions of this Article shall not require any Party to provide confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice the legitimate commercial interests of particular service providers.

4. Domestic Regulation: application procedures (Article VII)

Suggested additional paragraph for Framework Article VII

Within a reasonable period of time after the submission of an application, where required for the provision of a service [on which a specific commitment has been made], considered complete under domestic laws and regulations, the competent authorities of a party shall inform the applicant of the decision concerning the application. [At the request of the applicant, the competent authorities of the party shall [promptly] provide information concerning the status of the application [and what may be necessary to reach a decision.]]

5. Harmonization and mutual recognition

Suggested new Framework Article

Arrangements and Agreements on Harmonization
and Mutual Recognition

1. Parties may undertake arrangements, including co-operative arrangements, or enter into agreements with other parties that provide for recognition or harmonization of [measures] [regulations, standards or qualifications] relating to the [provision] [supply] of a service, provided that they are willing to open such arrangements or agreements for participation by, or adopt comparable arrangements or agreements with, other parties [on the basis of negotiation].

2. Such arrangements and agreements shall not be formulated or applied in a manner which would constitute a means of [arbitrary or unjustifiable] discrimination between parties, and shall not create new barriers to trade in services for other parties. Parties shall administer these arrangements and agreements in a reasonable, objective and impartial manner.

3. Where such an arrangement or agreement provides for the facilitation of access to the domestic market of any party in a manner which is not generally available to all parties, it shall concern only materially different qualifications, standards or scope of practice among the parties, based on objective competence-based criteria.

4. In order to allow other interested parties an adequate opportunity to participate, parties shall inform the PARTIES of their intention to undertake negotiations concerning such arrangements or agreements.

5. Parties shall promptly inform the PARTIES of any new arrangements or agreements concluded pursuant to this Article and of any significant changes therein.

6. Monopolies and Exclusive Service Providers (Article VIII)

re: licensing of service providers

The group felt that language was needed to clarify the concept of exclusive service providers in framework Article VIII:5. Many participants were of the view that a general requirement for the authorization or licensing of service providers should not, in itself, cause such providers to fall within the scope of Article VIII. The need for an annex/annotation would depend on the content of the framework provision.

7. Measures to Safeguard the Balance of Payments (Article XI)

and

8. Payments and transfers (Article XII)

The group recognized that these provisions should be covered under the framework. Attention was drawn to the provisions regarding these two articles annexed to the Report forwarded by the Chairman of the Working Group on Financial Services to the GNS.

9. National Treatment (Article XVII)

The group recognized that the question of whether and how to ensure that Article XVII encompasses the concept of "equal competitive opportunities" needs to be addressed, if possible in the framework. Some members felt that if it were not adequately addressed in the framework the question, insofar as it relates to the application of prudential regulations, should be addressed in an Annex on financial services.

10. Personal privacy

Suggested additions to Framework Article XIV:1(b)

- (b) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to the prevention of deceptive and fraudulent practices and to the protection of personal data, personal privacy and the confidentiality of individual records or accounts;

11. Dispute Settlement and Enforcement (Article XXIII)

The group considered this an issue which should be resolved in the framework. The need for an annex/annotation may depend on the content of the framework provisions. Another horizontal issue identified, that the framework text may need to address in this context, was that retaliation should not affect the existing presence of service providers.

12. Institutional Machinery (Article XXV)

Suggested addition to 2nd sentence in Framework Article XXV:3

It may also establish subsidiary bodies, including those relating to particular service sectors, as may be necessary for the effective discharge of its functions.

(See also Attachment II, Ad Article XXV)

13. Non-application (Article XXX)

The group considered this an issue which should be resolved in the framework.

14. Definitions (Article XXXIV)

The group considered that definitions would need close attention in the context of the framework. Certain definitions relating to specific types of financial service may need to be included in the Reference List of Sectors. In the meantime, it called attention to the following suggestions for definitions which might be taken into account in the context of the framework:

1. A service provider of a party is a national of a party or a company of a party wishing to provide or providing services. A company of a party is:

- (a) established in the territory of that party, or
- (b) established in the territory of a party which is owned or controlled by a citizen of a party or by a company of a party.

The term "service provider" does not include a public entity established by a party which provides services for governmental purposes.

3. A company of a party is a company legally constituted under the laws of that party including a sole proprietorship, partnership corporation, or other organization.

A company or a service provider is owned by nationals of a party if more than 50 per cent of the equity interest is beneficially owned by nationals or companies of a party.

A company or service provider is controlled by nationals or companies of a party if nationals or companies of a party have the ability to name a majority of the directors of the company or otherwise direct the actions of the company or service provider.

4. Non-resident provider of services means a service provider of a party which provides a service into the territory of another party from an establishment located in the territory of whatever party [country], regardless of whether such a service provider has or has not a commercial presence in the territory of the party in which the service is provided.

5. Commercial presence means an enterprise within a party's territory for the provision of services and includes wholly-or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations.

6. Payments and transfers for current account transactions means those payments and transfers so identified by the IMF.
7. Payments and transfers for capital account transactions means payments for the purpose of transferring capital that are not identified as payments and transfers for current account transactions by the IMF.
8. Measure means any law, regulation, international agreement, judicial decision or administrative guideline, ruling, decision or practice.
9. Public entity means an agency, department, instrumentality or other entity of a party that carries out governmental functions or activities for governmental purposes.

ATTACHMENT II

SUGGESTED POINTS WHICH MIGHT BE COVERED IN AN
ANNEX OR ANNOTATION ON FINANCIAL SERVICES¹
emerging from the Ad-hoc Group financial sector discussions

Ad Article I: Scope

For the purposes of paragraph -- of Article I of the Framework, trade in financial services does not include the following:

- (a) Activities carried out by central banks or by any other public institution in pursuit of monetary and exchange rate policies.
- (b) Activities conducted by central banks, government agencies or departments, or public institutions, for the account or with the guarantee of the government, except when those activities are permitted to be carried out by financial service providers in competition with such public entities.
- (c) Activities forming part of a statutory system of social security or public retirement plans, except when those activities are permitted to be carried out by financial service providers in competition with public entities or private institutions.

(Note: The group has suggested that appropriate language should be included in Article I of the framework providing for the exclusion of activities consisting of the exercise of government or official authority, including that exercised by central banks.)

Ad Article XIV: Prudential Regulation

The "measures" referred to in Article XIV:1 of the Agreement shall include reasonable measures taken for prudential reasons to assure the protection of investors, depositors, policyholders or persons to whom a fiduciary duty is owed by a financial service provider, or to ensure the integrity and stability of a party's financial system.

¹Except where specified in Ad Article XXXIV, "Definitions" below, the definitions of terms used in the draft Framework Agreement will apply to these points.

Ad Article VII: Transfers of information and processing of information

Notwithstanding the provisions of Article VII of the framework, parties shall not take measures that prevent transfers of information or of the processing of financial information, including transfers of data by electronic means [as provided under the Annex on telecommunications services,] which are necessary for the conduct of the ordinary business of a financial service provider.

(Note: A provision covering movement of information by electronic means has been proposed in paragraph 5.6 of the Telecommunications Annex as follows:

5.6 Parties shall ensure that service providers of other parties may use public telecommunications transport networks and services for the movement of information within and across borders, including intra-corporate communications, and for access, where authorized, to information contained in data bases or otherwise stored in electronic form in the territory of any Party.

The group considers that if its concerns are adequately covered in the Annex relating to telecommunications services, the above Article of the financial services Annex could be deleted.)

Ad Article XXV: Institutional Provisions

[The PARTIES shall establish a subsidiary body [which will draw upon the expertise of the financial authorities of the parties] to deal with issues arising from the operation of the Agreement with respect to trade in financial services.]

(Note: The view was expressed that this matter might be more clearly dealt with through an "understanding" noted in the Minutes of the GNS.)

Ad Article XXXIV: Definitions

Definition of a new financial service

A new financial service is a [new] service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not provided by any service provider in the territory of a particular party but which financial service providers of a party provide in the territory of any party.

(Note: The group considered that other definitions relating to activities included in the terms "financial services" should be included in the Reference List of Sectors.)