

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

RESTRICTED

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Group of Negotiations on Services

WORKING GROUP ON TRANSPORT SERVICES
(Air Transport Services)

Note on the Meeting 27-28 September 1990

1. The Chairman welcomed delegations to the second meeting of the working group on air transport services and asked, under the first agenda item, a representative of the secretariat to describe the current state of GNS discussions on the elaboration of a multilateral framework for trade in services.

2. The representative of the secretariat said that the draft multilateral framework which group members had before them was an expanded and completed version of the text which the Chairman of the GNS had submitted in MTN.GNS/35 to the Trade Negotiating Committee in July 1990 under his own responsibility. He noted that the current version of the draft framework remained the responsibility of the Chairman and was not an agreed text. It remained, nonetheless, the basis of the current discussions in the GNS. He drew the attention of group members to the decision of the GNS to have the sectoral working groups conclude their work by 20 October 1990 to ensure that a full text of the multilateral framework along with any sectoral annotations be available in time so as to allow the GNS to fulfil its negotiating mandate by the end of the Uruguay Round. To this end, the sectoral groups had been asked to produce, by October 20, reports placed under the responsibility of their chairmen and whose object would be to state the need for annexes/annotations in view of the particularities of individual sectors and, if so, delineate to the extent possible both the nature and contents of such annexes/annotations.

3. The representatives of Egypt and Senegal wondered what the status of the draft multilateral framework was in relation to the group's work. Both noted that it would be most difficult to address substantive issues arising in the air transport sector without knowing in advance what the general agreement contained in terms of basic principles and rules.

4. The Chairman, felt that the multilateral framework, although still in draft form, had to be taken as the basis for the group's work. He said that the mandate of the working group was not that of developing or discussing the contents of the framework agreement per se, but rather to look at the particularities of the air transport sector which might warrant the clarification, elaboration or effective application of framework provisions.

5. The representative of the European Communities felt that the working group's first meeting had highlighted the widely held view that the peculiarities of the air transport sector, in particular the strong bilateral element which governs the sector's operation, implied the need for an annotation in the multilateral framework. This was why her delegation had decided to formally submit a draft annex with a view to better focus the working group's discussions during its current meeting. She recalled that the draft annex was based on her delegation's earlier proposal for a draft multilateral framework (contained in MTN.GNS/W/105). As far as the scope of the annex was concerned, she believed that all air transport services, including ancillary services, should be covered, noting that the latter category of services was directly related to the provision of air transported services as such. The main provision in the draft annex related to traffic rights and was contained in Article 2. It provided for the partial exemption of some aspects of air transport services from the application of the m.f.n. principle. Reference was also made in Article 2 to national treatment, as the EC's draft framework proposal envisaged some obligations under the national treatment principle, particularly in regard to a standstill. If the Community's approach was not retained in the GNS, i.e. if national treatment was not an a priori obligation but was rather subject to negotiations, such a provision would be pointless. The EC's proposal for an m.f.n. derogation in regard to traffic rights stemmed from a recognition that such reciprocity-based issues were generally addressed in bilateral agreements. She felt that the group should focus on the application of an m.f.n.-based approach to the liberalization of ancillary services or certain more general aspects such as the movement of capital in the air transport sector. The m.f.n. provision should apply to the designation of flight paths to be followed for overflights, as this was an area which was prone to discriminatory practices. She noted the considerable differences which existed among countries in regard to the regulation of establishment/acquisition matters in the air transport sector and said that her delegation favoured some rationalisation in this area. The provision on domestic regulation in the draft annex, while somewhat descriptive, attempted to highlight a number of considerations which would need to be kept in mind in applying the multilateral framework in the air transport sector. The proposed annotation on transparency would be directly related to the article on traffic rights and drew upon the far reaching provisions already contained in the Chicago Convention. She saw no need for a services agreement to duplicate such efforts. On subsidies, her delegation's proposal was more flexible than that contained in MTN.GNS/35.

6. The Chairman invited comments on the EC's proposed annex.

7. The representative of Senegal emphasized the role of ICAO as a competent forum in which to address air transport issues. He said that the regime which currently governed the air transport sector at the international level was acceptable to many countries, particularly developing countries. He recalled that all countries could not set up viable airlines and were thus prone to giving some protection to domestic carriers. The removal of such protection would in his view create grave difficulties for developing countries.

8. The representative of the United States recalled that the US had been in the forefront of air services liberalisation, both domestically and internationally. At the same time, the US had an air service industry which was essential for carrying out certain national security requirements. His delegation believed for both reasons that there should be an annotation that would cover cabotage, procurement, the bilateral system as it applied to both hard and soft rights as well as to the dispute settlement mechanisms of bilateral agreements. His delegation had some concerns in regard to Part II obligations other than transparency, although it felt that the framework's provisions on transparency might not be strong enough. Turning to the EC's draft annex, he said that Article 1.2 did not appear to exclusively define soft rights and made it difficult to determine whether it applied to both domestic and international transport. He was unsure what the term "related provisions" meant in Article 2.1, wondering whether it included some soft rights. Article 2.2, which dealt with overflights, would pose problems for his delegation. On establishment (Article 3), he recalled that the US, like many countries, had a citizenship and ownership requirement for the establishment of air carriers which was founded on the need to ensure that US-owned carriers could be called upon for use in national emergency situations. He felt that the route which the EC was attempting to pursue in regard to establishment/acquisition matters was not a helpful one. He wondered whether there was a need for Article 3, noting that if m.f.n. applied to establishment, a country would not need to know what the ownership percentages of other countries were. He emphasized the point that the establishment requirements of carriers were a fundamental part of the bilateral system, adding that such requirements could not be conveniently bifurcated. He wondered what the EC had in mind in Article 4 when it spoke of working conditions and asked whether it would wish to provide partner countries with an opportunity to comment on the development of -or changes to- domestic regulations. On transparency, he wondered whether the EC was prepared to accept a transparency obligation such as that in the US which provided for advance notice and prior comment by foreign service providers on the development of procedures for ground handling, computer reservation services, air traffic control charges, airport charges, currency remittance and conversion procedures, customs and immigration procedures, aircraft repair and maintenance procedures, airport slot allocation, as well as security requirements. The article on subsidies contained in the EC's draft annex provided for considerable latitude in subsidizing air transport services. He recalled that the only subsidies that were provided in the United States were those designed to ensure essential air services between small communities, a program which the government was currently attempting to close down. He asked in regard to the definitions part of the EC annex what was meant by computer reservation systems and wondered why the right to advertise did not appear in the proposed annex. He noted finally that under no circumstances should aviation safety standards be tampered with as these were currently being handled in a satisfactory manner by safety regulatory authorities in close cooperation with each other and with the ICAO.

9. The representative of Brazil agreed to the need for a specific annex in air transport given that the sector was highly regulated and subject to

a complex web of bilateral agreements. His delegation largely agreed with the US delegation over the need for an m.f.n. derogation to extend to the air transport sector in its entirety and would not favour a division of the sector into soft and hard rights as suggested in Article 2 of the EC's draft annex. He did, nonetheless, express a note of caution in regard to the implications for the overall services process of seeking derogations from the scope of application of general obligations, noting that MTN.GNS/W/105 had foreseen the need for annexes to modulate the application of framework provisions while maintaining the principle of universal coverage. The idea of including in an air transport annex investment-related obligations was inappropriate in the view of his delegation as matters relating to investment fell outside the scope not only of the annex but of the trade in services agreement itself. He pointed out that a derogation from m.f.n. should not be construed as implying the non-application of the other obligations contained in Part II of the agreement, noting that his delegation would like to know with greater certainty what the framework would ultimately contain by way of Part II obligations before reaching any conclusions in the working group. It would be important to ensure that the provisions of the framework were not made more restrictive in an air transport annex. He felt that the EC draft annex would provide signatories with a broad invitation to subsidize their air transport sectors. He thought it unwise for a trade liberalizing agreement in the services area to promote such a wide loophole, particularly when based on the nebulous criteria of "adequate provision".

10. The representative of Poland wondered how Article 2 of the EC draft annex in regard to traffic rights related to the progressive liberalisation aspects contained in Part IV of the draft framework. He was interested in knowing more about the mechanics of liberalisation which the EC delegation foresaw in the air transport sector were its annex to be adopted. He said that once hard rights were exempted from the application of the m.f.n. principle, it might be difficult to liberalize soft rights.

11. The representative of Korea felt that Article 2 of the EC's draft annex appeared to lack a mechanism with which to periodically review the scope of application of the m.f.n. principle to traffic rights. Concerning Article 3 on establishment, he indicated that a sectoral annex should not impose market access obligations as these were subject to negotiations among parties to the agreement, including potentially on matters relating to acquisitions. He saw no need for the sectoral annex to address the issue of subsidies as it was already done by the framework.

12. The representative of Tanzania said that whatever proposals were taken up in the GNS in regard to air transport services, group members had to be fully aware and take full cognizance of the fact that the sector was already regulated through the ICAO regime. It was his delegation's view that the existing international regime did take into account the objectives and problems encountered by developing countries in the air transport sector. As well, the ICAO played a central role in regard to matters relating to international standards, information, technical cooperation. He recalled that the ICAO was also planning to address the issue of

services trade liberalization in the sector, a development which the working group should also take into account.

13. The representative of Sweden, on behalf of the Nordic countries, said that the particularities of the air transport sector were such as to require an annex to the framework agreement. His delegation had much sympathy with what was contained in the EC's proposed annex but would be seeking clarifications on definitional issues as well as on establishment and the meaning of ancillary services.

14. The representative of Chile said that the bilateral basis upon which the air transport sector operated internationally was of fundamental importance. The predominance of bilateralism would likely remain a reality until a new system based on the multilateral exchange of concessions would come into effect. The m.f.n. principle should not be made to apply to air traffic rights and market access, both of which were inseparable.

15. The representative of Canada said that all services, current and future, should be covered by the framework agreement. His delegation was of the view that an annex was required in order to qualify and modify the application of the framework in the air transport sector. He expressed concern about the general thrust of Article 2 of the EC's draft annex, noting that his delegation did not see the rationale for separating out the integral pieces of the existing structure of agreements with a view to applying different treatment. He recalled that the five freedoms of the air had been defined and developed at the same time and belonged to the same body of rights. All of them were components and factors in the balance of economic opportunities provided by air agreements. His delegation saw the need for an m.f.n. derogation to cover the five freedoms without differentiation. As to the scope of the EC's proposed exception from the m.f.n. provision, he recalled that bilateral agreements covered a large number of activities, including so-called doing business issues, applicable to airlines as well as government administrative measures facilitating the operation of air transport services. He noted that not all of these provisions were directly related to routes, adding that the word "related" should perhaps be dropped from Article 2 as it introduced some confusion.

16. The representative of ICAO said that Article 2.2 of the EC's draft annex addressed the issue of first and second freedoms, noting that under the ICAO framework such issues were addressed in the International Air Services Transit Agreement (IATA). He pointed out that whereas one hundred and five countries were involved in GNS deliberations, the IATA agreement had one hundred members. However, only seventy seven countries were common to both the GNS and IATA. He felt that the fact that almost thirty states did not belong to the agreement which Article 2.2 intended to multilateralize could present some difficulties. Among the thirty were countries, such as Indonesia, Uganda, Tanzania, Uruguay and Canada, whose territories could not be easily bypassed. The article, as currently drafted, could thus be somewhat controversial. Also, Article 3, which dealt with matters relating to establishment, appeared to retain the substantial ownership and effective control formula common to most

bilateral agreements while opening the door to effective market access through foreign equity participation in national airlines. This was an important liberalizing measure but could nonetheless prove controversial for, despite the spread of privatization in the sector, most countries might not be prepared to welcome foreign equity in their airlines. In regard to Article 5 on transparency, it might be useful to refer to the legal drafting as contained in the Chicago Convention. He noted that the article said nothing about confidential side agreements, an issue of some importance. He indicated also that if so wished, he was prepared to comment on the issue of definition of computer reservation systems.

17. The representative of Japan said that his delegation's position remained unchanged since the last meeting of the working group. On Article 1.2 of the proposed EC annex, he was unsure as to what was included under the term "ancillary services". As well, he wondered what the EC had meant in Article 2.1 when talking of "trading conditions for non-scheduled air services" and sought clarifications on the meaning of "public policy considerations" in Article 4, particularly in regard to rules on the use of computer reservation systems and on the allocation of slots.

18. The representative of Australia said that a sectoral annotation was necessary in the air transport sector in order to ensure that scheduled international air services were excluded from the application of m.f.n. but that ancillary services and, possibly, non-scheduled services were covered by such a provision. Her delegation saw no need to extend derogations to national treatment or market access provisions as these would be adequately covered by the reservation procedures which countries could adopt in putting forward their national schedules. Her delegation hoped to see a provision made for an agreed sectoral annotation to be reviewed after a specified number of years; three years could be an appropriate amount of time in this regard. The EC draft annex formed an adequate basis for negotiation in the sector and broadly accommodated a number of elements of her delegation's position, although it did have a few problems with it. In particular, she noted in regard to Article 2 that her delegation saw no need to derogate from national treatment as this could be adequately covered by reservations lodged in individual country schedules. Her delegation did not currently see a need for an m.f.n. derogation to extend to non-scheduled airline services although it would not oppose a consensus on this question. Her delegation, like others, had serious difficulty with the EC's treatment of establishment/acquisition matters in Article 3, and could not support the imposition of obligations with respect to establishment, foreign investment or equity via a sectoral annex or annotation. The EC proposal in her view appeared to restrict the right of individual countries to reserve against national treatment and market access in regard to establishment. This stood in contradiction to the intention of the framework agreement and she doubted that many countries would seriously consider such a proposal. Her delegation supported the language contained in Article 5 on transparency, particularly as it acknowledged the relevance and complementarity of the Chicago Convention. She saw little need for an annotation on subsidies in the sector and did not see support arrangements in aviation as being substantially different from those found in other sectors. The issue should thus be addressed at

the level of the framework. As currently drafted, the EC proposal on subsidies was too vague and left too much scope for abuse. Her delegation had difficulties with some of the definitions contained in Article 7, particularly in 7e(i), which appeared to remove the current flexibility to designate a foreign-owned airline to operate an international service on one's behalf.

19. The representative of Argentina felt that it was most difficult in practice to distinguish and seek different treatment for hard and soft rights in an air transport annex. Any attempts in this direction would in his view lead to endless definitional discussions. It was clear in his delegation's view that a derogation for m.f.n. was needed in the sector since the current bilateral regime could not be changed overnight. Any such derogation however would need to be of a temporary nature and subject to review as it was essential to leave open the possibility for progressively applying the m.f.n. principle to air transport in the future. He recalled that the air transport sector was undergoing far-reaching changes which might soon make possible the application of an m.f.n.-based regime. In particular, he noted that the current tendency toward over-concentration in the sector may well increase the need for a regime based on non-discrimination and the multilateral exchange of rights on an m.f.n. basis. In regard to Article 3 in the EC draft annex there could be no automatic rights of establishment as these had to follow from negotiations among parties to the services agreement.

20. The representative of Mexico said that the drafting of Article 1 of the EC's proposed annex was attractive to developing countries as it would allow them to enhance their competitive abilities in a wide range of aviation services. His delegation shared in the belief that a temporary derogation from the m.f.n. principle was appropriate in the sector. His delegation could not accept the EC's proposal on establishment in view of the sensitivity of the issue as well as the heavy involvement of governments in this area. He emphasized the importance of adequately regulating the use of computer reservation systems as these were a key ingredient in the competitiveness of airlines.

21. The representative of the United States recalled that his delegation still retained the right to exclude sectors that were particularly sensitive, noting that the outcome of the group's work would be a critical element in determining his delegation's final decision on coverage.

22. The representative of Yugoslavia believed that an annex was necessary in the air transport sector. The EC proposal constituted an excellent basis for the working group's final draft although her delegation shared the concerns expressed earlier by the representative of ICAO in regard to Articles 2, 3 and 5 of the proposed EC annex.

23. The representative of Hungary said that the framework agreement should cover air transport in its entirety without any exclusions. There was in her view a need for a very precise annex to handle the particularities of the sector and due attention had to be given to existing bilateral agreements in developing annex provisions. She felt as well that the issue

of progressive liberalisation as it would apply in the air transport sector had to be spelled out as precisely as possible. She was unclear as to where, when and how the EC planned to apply m.f.n. and national treatment in the air transport sector. There might be a potential contradiction if the EC's proposed article on establishment was meant to apply whilst traffic rights were not covered by the m.f.n. provision. She wondered as well why the EC had retained a single majority shareholding system in its proposed annex.

24. The representative of Turkey saw a clear need for an annex in the air transport sector. His delegation broadly supported what was contained in Articles 2, 4, 5 and 6 but considered that further discussions were needed in regard to Articles 3 and 7.

25. The representative of India had reservations about the suggestion to differentiate hard and soft rights in the air transport sector, noting that the sector should rather be addressed as a whole. Commenting on the Article 3 of the EC's draft annex, he emphasized that no additional obligations could be imposed on contracting parties in a sectoral annex, particularly in regard to issues that were either subject to negotiations or fell outside the scope of a trade in services agreement.

26. The representative of Singapore introduced her delegation's non-paper by noting that it was a checklist of suggested provisions for a sectoral annotation on air transport. She recognized the difficulties faced by some countries in light of the peculiar characteristics of the air transport services sector. In fact, this explained why an annotation was required. The ultimate purpose of an annotation should be the progressive liberalization of air transport services. Singapore's paper proposed the initial and temporary derogation of the m.f.n. principle for certain elements of air transport. A regular periodic review of such a derogation was provided for in the non-paper and was in accordance with the spirit of the framework agreement. Similarly, the principles of national treatment and market access would not initially apply but would be taken care of under the progressive liberalisation provisions of the framework. She emphasized the importance of coordinating with the activities of the ICAO and noted that several provisions in her delegation's non-paper gave effect to this aim whenever this was possible. Article 3 provided for a temporary derogation of the m.f.n. principle to certain rights such as for scheduled or charter flights, destination, capacity, frequency and pricing conditions. The non-paper allowed for review procedures after a number of years to be agreed within the group. The same logic of periodic review applied in regard to the framework articles dealing with market access and national treatment under specific commitments. The transparency obligations foreseen in her delegation's non-paper were similar to those of the EC but the possibility of covering side letters and confidential memoranda of understanding under transparency obligations should be examined after a certain period of time to be decided upon in the working group. The non-paper provided a minimal clause on the increasing participation of developing countries in the air transport sector and listed the types of measures that could be taken for purposes of domestic regulation. The latter measures had to be applied in a manner which would

not distort trade and be consistent, wherever applicable, with standards developed within the ICAO.

27. The representative of the European Communities responded to the various comments that had been made on her delegation's submission to the working group. She recalled that her delegation was looking for an annex with the widest possible scope of application but noted that a precise definition of the term "ancillary services" remained unclear in the current state of discussions and should therefore be left open. As concerned the general thrust of Article 2, although there were aspects of bilateral agreements which could not be disassociated from such agreements, there remained elements of air transport services which, even if currently negotiated bilaterally, were not necessarily inherent to the bilateral system. There was some misunderstanding in regard to Article 2.2, which did not aim to cover the first and second freedoms of the air but merely flight paths as opposed to overflights. As concerned Article 3 on establishment/acquisitions, any market access commitment involving the possibility of establishment could be nullified if establishment rules were such as to prevent participations in domestic airlines. As concerned domestic regulations, the provisions in her delegation's text were merely descriptive and the term "working conditions" referred to all the conditions applied to employees in the air transport sector, including those in the field of ancillary services. On transparency, her delegation's reference to the Chicago Convention was meant to facilitate the application of transparency obligations to traffic rights. Her delegation would welcome the assumption of additional transparency obligations if this was the desire of group members. Her delegation did not wish to open up the door to the legalisation of subsidies in the air transport sector but rather aimed at developing a framework of rules should subsidies be permitted. In view of the existing drafting of the subsidies provision in the framework, her delegation might not feel the need to see the issue addressed in an annex. She agreed that the definition of computerised reservation systems given in Article 7 could be improved.

28. The Chairman opened the floor to a discussion of agenda item 5, which dealt with the relationship of a services agreement with existing international arrangements and disciplines. He drew attention to Article XXVII of MTN.GNS/35 and noted that the first paragraph of the article appeared to deal with technical co-operation matters by emphasizing the complementary of work done in a future GATS and, in this case, the ICAO, as well as the need to avoid a duplication of efforts. He believed that the intention of the second paragraph of the article, which had yet to be drafted, was to suggest means of dealing with existing obligations (in this case, those of the Chicago Convention).

29. The representative of the European Communities said that it was essential take into account the work of other institutions operating at the international level. His delegation fully agreed that an agreement covering air transport services should not conflict with existing arrangements. It was important to look for complementary rules rather than conflicting ones. His delegation fully recognized the important role played by ICAO as the international body responsible for setting

aviation standards applicable at worldwide level, standards which could in no way be weakened by the outcome of the working group's endeavours. At the same time, the ICAO had not always been able to develop operationally meaningful multilateral rules on market access or national treatment in the sector. There was thus some room for looking at additional arrangements which should not conflict with the ICAO machinery while making use of this machinery when looking for additional measures at the multilateral level.

30. The representative of Singapore said that the working group needed to recognize the work which ICAO had done in the technical, legal and operational aspects of civil aviation but noted that its past attempts at furthering market access opportunities at the multilateral level had not met with much success. He asked the ICAO representative whether he had any suggestions as to how the working group could achieve progress in the sector on a multilateral basis.

31. The representative of the ICAO said that attempts at pursuing widely-based liberalization in the sector dated back to the beginning of the ICAO in 1944 when a multilateral agreement on economic, regulatory and trade aspects was negotiated without success. There were nonetheless numerous examples of ICAO initiatives in the economic and regulatory fields which counter-balanced the inability of member states to reach agreement in the early days of the organisation. Much information on the latter activities could be found in the response of the ICAO to an earlier questionnaire of the GNS (MTN.GNS/W/16). He cited current examples of ICAO work in the economic and regulatory fields, e.g. on guidance material for the establishment of fares and rates clauses, on the development of a code of conduct for computer reservation systems, on the future of so-called Chapter 2 aircraft and the economic implications of noise restrictions, etc.

32. The Chairman opened the floor to a discussion of agenda item 6 dealing with the chairman's report to the GNS. He invited delegations to make specific suggestions on what they would like to see in a report whose object was to lead to the drafting of a sectoral annex if possible. He said that in drafting both his report and a possible annex, opportunities would be given to delegations to discuss preliminary drafts before those were sent to the GNS.

33. The representative of Canada felt that, with few exceptions, the essential elements of the report could be found in the summing up which the chairman had given during the morning's informal session. He suggested that a comment on cabotage should appear in the report to reflect the concerns raised by a number of delegations and noted that the concerns of delegations in regard to the possible need to annotate Part II obligations should also be mentioned.

34. The Chairman said that it was his intention to circulate a draft report and, if possible, a draft annex ahead of the working group's next meeting, which he indicated would be held on an open-ended and informal basis on 20-21 October 1990.

35. The representative of the United States felt that the working group's discussion of the application in the air transport sector of the framework provision on domestic regulation would need to be reflected in the chairman's report.

36. The representative of the European Communities said that his delegation would appreciate seeing the chairman's report include the question of whether a widespread derogation from the m.f.n. principle would still fulfil the objective of universal coverage.

37. The representative of Israel hoped that the comments he had made during the morning's informal session on the chairman's summing up would be taken into account in drafting the report to the GNS.

38. The representative of India indicated that it was essential that the report sent to the GNS provide it with proper guidance. He wondered whether the report and/or a possible draft annex would be sent under the chairman's own responsibility or represent multilaterally-endorsed texts, adding that it might be necessary in the latter case to convene another meeting to remove the brackets which such texts were likely to contain.

39. The Chairman said that although he would prefer to send to the GNS a text which group members had fully endorsed, the current time constraints placed before the working group meant that he would most likely have to submit his report to the GNS on his own behalf.

40. The representative of Yugoslavia asked the Chairman whether the working group was meant to meet as planned on 1-2 November 1990 or whether he expected group members to complete their work during the meeting of 20-21 October.

41. The Chairman said that the possibility of meeting on 1-2 November would be maintained but indicated that he hoped on 21 October to provide the GNS with sufficient guidance to allow the GNS ad hoc sectoral group to continue work in the sector. He closed the meeting as there were no questions raised under Other Business (agenda item 7).