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ELEMENTS OF A CONCEPTUAL FRAMEWORK FOR TRADE IN SERVICESFOREWORD

In the context of the OECD work programme on trade in services and with a view to carrying out the mandates given by the Council at Ministerial Level, the Trade Committee has devoted itself since 1982 to exploratory work aiming to define the elements of a conceptual framework which would facilitate broadly the liberalisation of trade in services. This work has been based on the conviction that the liberalisation and expansion of trade in services under conditions of international competition, as in the case of goods, would stimulate growth and contribute to the development of the world economy. It has been recognised that national policies and regulations are an important element to be considered in the services field; and that the achievement of liberalisation in this area could be phased in as a result of negotiations.

This work has been broadly inspired by underlying concepts in existing instruments dealing with trade in goods, but also and especially with services, and by general and sectoral experience acquired in the OECD in this field. As can be seen from the attached document, the work has aimed particularly to identify some major themes which would be covered by multilateral commitments without always choosing between options or prejudging precise solutions. Moreover, reflection is continuing on these and other issues relating to trade in services.

The attached document takes stock of the work at this stage. It remains under the responsibility of the Secretariat and governments have not so far taken any position on it. In light of its relevance for those reflecting on the liberalisation of trade in services, the Secretary General, on the recommendation of the Trade Committee in February 1987 decided to make the document available to the public.

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ELEMENTS OF A CONCEPTUAL FRAMEWORK
FOR TRADE IN SERVICES

I. INTRODUCTION

1. This document does not constitute a first attempt to provide precise language for a conceptual framework for trade in services. On a number of points, discussion has been no more than preliminary and/or further work is needed. Moreover, while an attempt has been made to set out concepts in a systematic manner and to highlight their possible interrelationships, the order adopted is provisional and certain concepts do not necessarily appear in the order in which they would appear when the work is more advanced. Although the paper covers a number of concepts, it is not exhaustive. Some issues, such as government procurement, technical barriers, etc., have not been treated as separate topics, although it seems that they should be addressed in any framework on trade in services and that the concepts raised are also relevant to them. In another respect, i.e. the linkage between liberalisation of trade in services and economic development, consideration has not yet been given to the approaches which may be followed to address within the overall framework the problems arising from unequal economic development situations.

2. The idea underlying this paper is that a relevant conceptual framework can contribute to strengthening international cooperation as well as the liberalisation and expansion of trade in services, just as a framework of concepts provided the basis for the trading system for goods. The paper has been drawn up without any preconceived ideas as to either the context or the way in which it will be used. It might, for instance, be taken as the basis for a future framework agreement or as a reference source for the elaboration of separate agreements. The hypothesis is that of a multilateral approach. Although the framework is intended to constitute a starting point for future negotiations towards liberalisation, the modalities of such negotiations are not prejudged here.

3. It has been recognised that the expansion of international trade in services can, to a large extent, involve factors related to international investment. The present draft nonetheless focuses on "trade", it being understood that trade in certain services requires an extension of the traditional meaning of the word to include some elements of commercial presence (and if required of investment) without which trade cannot take place. The approach proposed thus includes trade together with those aspects of presence or investment related to trade. It also covers corresponding financial and payment operations.

4. The concepts envisaged in the framework should permit a high degree of liberalisation in trade in services. However, one should not prejudge here the speed of the liberalisation process leading to a full application of all the concepts. In this regard, it seems realistic to envisage a progressive liberalisation process. The objectives of an initial liberalisation phase remain to be specified depending on the context and circumstances. They will no doubt reflect any situations or concerns that may temporarily restrict the possibilities of countries to liberalise. It is in this spirit, keeping in mind the approach mentioned in paragraph 3, that the aim here has been to define the elements of a framework designed to contribute to progress in the

future, and in the first stage of the liberalisation process, to permit the objective of a maximum degree of reasonable and practicable liberalisation to be realised.

II. DEFINITIONS AND PRELIMINARY COMMENTS

The elaboration of definitions will have to be pursued in the light of progress still to be achieved in the conceptual approach. The following preliminary suggestions do not necessarily tackle all the aspects of trade in services relevant for the sake of applying the framework. In any event, agreeing upon exhaustive definitions should not be seen as a precondition for studying the concepts of the framework.

a) Definition(s) of trade in services

5. Several possibilities for definitions have been suggested in the discussions to date:

- one would make reference to "services produced by residents of one country and used/received/paid for by the residents of another country";
- another suggestion, deliberately presented in such a way as to allow a broad interpretation, proposes as a formula "services exported from a supplier country and imported into another country";
- finally, a version derived from the former suggestions, but taking more explicitly into account the source of value added (foreign and/or local), refers to "services essentially produced in one country and used/received/paid for by residents of another country". The notion of value added conveys the idea that services may be for the most part produced abroad by the parent firm of a branch or agency. This wording is not appropriate when services are traded by a subsidiary, a possibility which also has to be provided for in the definitions.

In any case, certain points linked to the definition still will have to be clarified. In particular, regarding a request to include labour and personnel services in trade in services, it was argued that temporary displacements of persons in the context of services transactions would have to be included in the trade in services exercise -- but not the whole issue of migration. Some additional remarks on the current status of these definitions and their relationship to statistical issues can be found in Appendix 1.

b) Relationship of the framework on trade in services to the various ways in which international service activities take place

6. The preceding paragraphs have demonstrated that the final definition will have to take into account the different elements which a possible trade in services framework should address. This framework might have to address movements of services and aspects related to activities abroad involving establishment, circulation of capital, of people, of information and of goods (certain barriers to trade in services are caused by obstacles to trade in goods). Efforts have particularly focussed on clarifying the relationship and the frontier between trade in services and international investment in services.

7. It is clear that trade in services represents only one aspect of international service activity and that investment also plays a major role. In some sectors (e.g. in the financial sector) international investment may be a requirement in order to gain access to substantial parts of the market concerned. It is believed that in many sectors and in some parts of others it will be possible to make considerable progress in liberalisation through an approach focusing on trade, but making due allowance for the conditions in which services are marketed. As in commercial matters, liberalisation would extend to payments corresponding to such trade.

8. So as to facilitate trade, it is accepted that "trade in services" may include sales via a local commercial presence in the customer country; the form of this presence has to be defined according to the circumstances, the sector, the country, and according to what is required in order to gain effective access to the foreign market. Such form may if necessary encompass the constitution of a company under local law where cross-border trade is not possible. Thus, some limited aspects of right of establishment, of direct international investment and of corresponding financial aspects may be considered part of trade in services in some sectors. These notions will have to be clarified in further work or in the course of negotiations. To sum up, it appears generally speaking that, to achieve optimum results towards liberalisation, actions in three areas will have to be combined -- i.e. relating to cross-border trade, to trade based on commercial presence and to inward direct investment where this is necessary for access.

c) The notion of market access in services

9. Reference has been made in the work to the concept of "market access". Liberalisation of trade in services implies that attention will have to be focussed on the various measures which have a bearing on the opening of market access. It should be understood from the preceding paragraphs that the concept of market access will have to be specified and translated into more concrete terms in due time through consideration of the conditions in which various categories of services are marketed in different countries. The following paragraphs do not take into account the specific problems of market access in State trading countries.

10. Broadly speaking, some elements of a positive definition of market access have been identified, in particular the right of foreign firms to sell services under conditions of fair competition. This implies effective access to an adequate distribution network. Other specific elements may include the right to sell under a brand name and access to qualified personnel. It has been noted that in order to sell his services efficiently the foreign provider of services might sometimes need to have direct access to users. It may also be necessary to foresee giving users access to services provided by foreign suppliers. Paragraph 8 above explained the relationship which may exist in certain circumstances with aspects of establishment and international direct investment when cross-border trade is not possible, and when these aspects are required for effective market access (notably when a regulation makes establishment a condition for marketing services). Initial establishment may therefore constitute an element of access in certain cases. A relationship has been established by some, as noted in paragraphs 17 and 18 below, between issues in connection with establishment and national treatment.

11. Negotiations on liberalisation will concern obstacles to trade in services which would have to be reduced or eliminated. The discussions have made it clear that these barriers would have to be identified in a concrete way for each sector and each country. Among those often perceived to be barriers are obstacles to cross-border trade such as prohibitions, restrictions or measures of equivalent effect; obstacles to certain transactions on the basis of local presence (firms or persons) such as restrictions on the granting of licences, authorisations, etc.; any discriminatory operating conditions which may accompany the granting of such licences and, more generally, discrimination within the customer country affecting marketing of services by foreign-controlled firms. The obstacles to be considered are those concerning access to private as well as public markets. Some obstacles may result from the practices of public or private monopolies or dominant firms or from distortions in conditions of competition. Financial and payments barriers would be taken into account to the extent that where they are connected with trade. Administrative formalities and controls which might serve as disguised impediments should also be taken into consideration.

d) Relationship of the framework on trade in services to the various service activities

12. The scope of the general framework would not a priori exclude any service activity which was important in terms of international trade. It will be necessary to review how to treat certain activities for which international arrangements reflecting different philosophies already exist (as those in the maritime or air transport sectors), without excluding the possibility that a liberalisation approach may come to prevail over time. Further study to ascertain the scope for coexistence of the general framework with existing multilateral sectoral agreements has been suggested. It was also suggested that each sector or type of service should be examined to identify any problems which might arise by addressing them through the framework.

13. In any event, references at this stage to various sectors do not prejudice which of their constituent activities might be addressed in a trade liberalisation initiative. The sectors in the following list (without being exhaustive) are considered to be of importance for international trade in services: insurance, commercial banking and other financial services, construction-engineering and related consultancy services, shipping, aviation and other modes of international transport, tourism, the audiovisual sector, computer and data services, telecommunications, advertising, accounting, management and other business services, artistic and cultural services and medical and hospital services.

III. PRINCIPLES

As mentioned earlier, the sequence in which the concepts are set out does not prejudice their relative importance. The various principles are to be interpreted subject to the "exceptions" referred to at the end of this chapter.

a) Opening up market access

14. While no final formulation has as yet been attempted, the notions relating to this concept are the following. Clearly, working towards liberalisation (which is the objective of this framework) means opening up

access to markets. Countries will provide the conditions necessary to the expansion of international trade in services by opening up access to their markets as widely as possible. This includes providing foreign service industries or suppliers the right to sell those services on the national market under no less favourable conditions than those accorded to national industries. More precisely, this means allowing effective access of foreign suppliers or suppliers of imported services to the national distribution systems for the services concerned and access to local commercial presence as required. To this end countries would aim to dismantle or phase out any unjustified measures hampering trade in services; successive stages which may be contemplated to carry out this process are referred to in Section VI.

b) Transparency

15. Transparency in laws, regulations and practices relating to trade in services is acknowledged to be an essential ingredient and a necessary condition of international co-operation concerning such trade, just as it is for trade in goods. Several suggestions were put forward regarding commitments which might form part of a framework on trade in services. While recognising that the means of ensuring transparency in countries' measures still require thorough examination and that the specific provisions will depend upon the legal framework under which commitments would be taken, the following general approaches were put forward. It was suggested that countries should agree to make public all laws and regulations relating to trade in services; they should also agree to notify their trading partners of any aspects of their laws and regulations which can affect foreign suppliers of services. Countries should also accept to reply to requests for clarifications from their trading partners (counter notifications). These commitments would also apply to proposed changes in regulations or the adoption of new regulations. Governments should also aim at making clear and predictable the treatment of foreign suppliers in the context of their regulations and provisions concerning trade in services.

16. These procedures would be effective upon the implementation of a framework and would be applied thereafter. It will also be necessary for the countries participating in such a negotiation on trade in services to have an accurate idea beforehand of the conditions under which each country enters into the liberalisation process. This work is related to the preparatory stage discussed in Chapter VI, regarding the identification of aspects of regulations to be included in the negotiations and that of the instruments of protection (see paragraphs 55 and following).

c) National treatment

17. National treatment has been suggested as an important element of the conceptual framework. Indeed, it appears to be an essential instrument in eliminating the protectionism which is often applied through domestic measures (for similar reasons, some believe that the full application of national treatment may have to depend on whether alternative means of protection exist). In the present case, this concept would draw on the concepts contained both in the GATT for trade in goods and in the OECD instrument concerning international investment, without adhering strictly to either. It would be understood as treatment no less favourable than that granted to domestic firms and which would be given to imported services or to foreign service firms in a number of areas. These areas concern regulation, taxation, and possibly others (e.g. access to government assistance or to appeals

procedures). One way to achieve market access could be to consider regulations which deny national treatment as inappropriate or unacceptable [a notion which is discussed hereafter in e)] (1). As far as the framework is concerned, the concept of national treatment might be defined in a deliberately flexible way, since it must be sufficiently adaptable to apply to a number of different situations -- cross-border trade with no local presence; trade with a local presence; full establishment if this is required by local regulations for the marketing of certain services. The concept may cover, according to circumstances, either "similar" or "equivalent" treatment so as to take account of the conditions for applying regulation to foreign firms in the regulated sectors. In relation to what was explained in paragraph 8 above, it is felt by some that the granting of a licence to a foreign firm to set up a first establishment, in compliance with local regulations on the marketing of services and under conditions similar to those applicable to national firms, should be viewed as the application of national treatment with respect to access and establishment.

18. It was also noted that in areas where access to the activity concerned is closed to all new firms, national or foreign (for example, by virtue of regulation), "national treatment" in the formal sense would have no effect. Such regulation might also be questioned as inappropriate in a liberalisation context and special concessions might be necessary in order to achieve liberalisation. Thus concessions relating to the national treatment concept, and any necessary additional supplementary measures, could be clarified according to the individual context and in the course of negotiations.

19. It was noted that awarding national treatment with regard to internal regulations might not always be an immediate answer to all kinds of difficulties resulting from regulation, especially where certain disadvantages for foreign firms might result from existing national regulations which do not serve restrictive or discriminatory purposes. Furthermore, differences between institutional or regulatory systems may cause problems. When entering into commitments, and during negotiations, some adaptation measures may be warranted.

d) Non discrimination

20. The question as to what kind of non-discrimination clause will be included in a framework, with what implications and where it would appear has to be studied further. A separate question, which is dealt with in Chapter VI, concerns whether negotiation techniques based on MFN can be used.

21. Including a non-discrimination clause in the framework would seem important in order to guarantee that liberalisation of trade in services takes place under an open and multilateral system. It would seem that when a country is making moves towards liberalisation it should be ready to allow all its partner countries, without discrimination to share in such moves. Domestic regulation is however an important aspect of the proper functioning of some service industries. The need for countries opening their markets to each others' industries to obtain certain guarantees in this area may justify attaching an element of conditionality to non discrimination. Countries which negotiate concessions and advantages should be willing to enter into similar negotiations with other countries ready to contribute in the same way.

22. A number of important questions still have to be considered. It was observed that reciprocity clauses are frequent in the area of services, and that they occur in particular with respect to direct investment and establishment in some sectors, and to movement of persons. The impact that existing clauses would have on a multilateral framework still has to be assessed, as does the way they would be dealt with in that framework. It would also have to be considered whether new reciprocity clauses would be acceptable in the future. It has been postulated that reciprocity could under certain circumstances be a way of progressing from a closed-market situation to a selective opening-up which would subsequently be expanded. However, the fear was also expressed that this approach, if pursued, would accentuate market compartmentalisation. It may also appear desirable to look into the implications of non discrimination clauses included in a number of bilateral treaties. From the point of view of an open and multilateral system, one should also reflect on the implications of bilateral liberalisation agreements which may occur in trade in services.

23. Opinions have differed as to whether or not there should be provision for a "regional integration" exception to non discrimination. Such a provision is considered essential by some to guarantee the right to liberalise more rapidly in a regional framework, but what this would mean in practice have not been discussed at any length.

e) Objectives to be taken into account in national regulations

24. Service industries are on the whole more regulated than goods industries, with regulations often applying to the service firms themselves and to their operation (access, investment, setting up of companies, conditions of operation, business practices, surveillance, control of activities etc.). In many instances the regulations reflect accepted needs and the exercise by governments of their nationally recognised responsibilities. But the regulations also have a bearing on trade liberalisation which they may facilitate or hinder in some cases.

25. Regulation bears a relationship to most other headings in the framework, for example: transparency (and the identification of protective measures applied to services); access (which depends on regulations concerning the marketing of services from abroad or on the basis of presence of foreign firms); national treatment (which precisely covers the field of domestic regulation). While it may be concluded that the main concepts already developed in the preceding parts are applicable to regulations, it seems that the framework should include a separate heading to resume some important elements of the issue of regulation. This issue has two aspects which are summarised by the notions, on the one hand, of "appropriate" or "acceptable" regulations and, on the other hand, of "inappropriate" or "unacceptable" regulations.

26. In the first case, the idea is to clarify the principles or objectives towards which governments should aim so as to ensure that national regulations are "appropriate" from the viewpoint of trade liberalisation. Such principles would be included in the framework to provide guidance to governments or regulatory authorities in the future. In the second case, the purpose would be to try and agree on the way in which regulations, or certain aspects thereof, may be made the subject of negotiations, once they are deemed "inappropriate". It is obvious that regulations which deliberately restrict trade, or which would be acknowledged by governments as non-conforming to the framework, would come within the realm of a liberalisation exercise; governments may also request that certain regulations of other countries,