

## COMMUNICATION FROM MERCOSUR

### Economic Needs Test

The following communication has been received from the delegations of Argentina, Brazil, Paraguay and Uruguay, with the request that it be circulated to the Members of the Council for Trade in Services.

#### I. INTRODUCTION

1. The States Parties to MERCOSUR (Argentina, Brazil, Paraguay and Uruguay) submit this proposal for consideration by Members.<sup>1</sup> Its purpose is to promote the liberalisation of trade in services in sectors and modes of supply of export interest to developing countries. Article IV of the General Agreement on Trade in Services ("Increasing Participation of Developing Countries"), states in paragraph 1:

"The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

c) the liberalisation of market access in sectors and modes of supply of export interest to them."

2. Also, the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93) adopted on 28 March 2001, state, among other elements, that:

- the current negotiations "...shall be conducted ... as a means of promoting ...the development of developing countries" (paragraph 1),
- the current negotiations "...shall aim to increase the participation of developing countries in trade in services" (paragraph 2),
- "...Special attention shall be given to sectors and modes of supply of export interest to developing countries" (paragraph 5).

3. Economic needs tests constitute one of the most important market access and national treatment barriers to international trade in services under the GATS, affecting a wide range of sectors mostly in mode 3 (commercial presence) and mode 4 (movement of natural persons).

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<sup>1</sup> This proposal is not a legal text. It is submitted solely for the purpose of negotiation and does not prejudice the position of MERCOSUR or its States Parties regarding the issues raised in it. Mercosur and its States Parties reserve their right to modify or complement the contents of this proposal at a later stage.

4. According to information found in documents elaborated by WTO, UNCTAD and the OECD around 90 Members of the WTO have inscribed in their schedules a total of 253 potential ENTs, of which 156 in mode 3 and 45 in mode 4. The vast majority of ENTs in mode 3 (146) are scheduled in specific sectors, whereas in mode 4 most of them (39) appear as horizontal limitations. Among the most affected sectors are tourism, distribution, professional, telecommunication and financial services.<sup>2</sup> It should be noted that ENTs are not equally registered by all Members. Rather, a handful of Members, all of which are developed countries, account for approximately 53 ENTs (28 in Mode 3 and 25 in Mode 4). It is true that the occurrence/frequency of ENTs in individual schedules has to take into account the level of sectoral coverage of a Member's commitments. However, it should also be pointed out that there are a number of developed country Members who have bound the majority of the sectors of the W/120 in their schedules having listed very few ENTs or none at all.

5. In spite of the lack of definition of ENTs in the GATS, these measures can generally be considered as a quantitative restriction to foreign services and services suppliers on the basis of the extent of existing local suppliers in the domestic market.

6. The restrictive effects of ENTs as a quantitative limitation to trade in services are further compounded by the fact that in most cases the criteria for their application are generally vague or simply non-existent. This allows for a large degree of discretion in the administration of these barriers thus seriously undermining the legal certainty and predictability of market access and national treatment commitments. Furthermore, the use of ENTs can represent in some instances a form of safeguard measure albeit without the benefit of any "checks and balances" which would be ensured by disciplines in this area. Also, the imposition of ENTs restricts not only the entry of foreign service suppliers but can also limit the conditions of operation of foreign suppliers already established in the host country. This situation seriously affects market opportunities in sectors and modes of supply of export interest to developing countries.

## II. PROPOSAL

7. In light of the above, and within the framework of Article IV of the GATS (Increasing Participation of Developing Countries) and the "Guidelines and Procedures for the Negotiations on Trade in Services,"<sup>3</sup> the States Parties to MERCOSUR propose that during the current negotiations developed country Members eliminate their ENTs in sectors and modes of supply of export interest to developing countries.

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<sup>2</sup> See documents S/CSS/W/118, by the WTO Secretariat (30/11/2001), ITCD/TSB/8, by the UNCTAD Secretariat (06/09/1999), and TD/TC/WP(2000)11/REV1, by the OECD Secretariat (04/05/2000).

<sup>3</sup> Document S/L/93, adopted by the Special Session of the Council for Trade in Services on 28 March 2001.