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Rudolf Adlung*

Liberalizing Trade in Services: from Marrakech to Seattle

WTO Members are currently preparing the ground for a new services round to be launched in Seattle, in December 1999. This article reviews recent developments in services trade, the underlying economic factors and the political response given hitherto by WTO Members. Critical issues in the preparation of the new round, including the choice of the basic negotiating approach, are discussed.

Political and academic thinking about trade in services has evolved dramatically over the past two or three decades. In the 1970s, services trade was largely non-existent from a policy point of view, and would certainly not have been at the centre of big gatherings of trade ministers. Political insignificance was matched by academic disinterest. Trade in services was a blank spot on the landscape of most researchers, and no more than a handful of pundits might have been interested in a paper dealing with liberalization issues. This was for several reasons, including lack of data and sheer ignorance. Certainly more important was the fact that – on objective grounds – services were less tradeable than they are now:

□ Important services markets were firmly closed by law. Virtually no government in the world allowed private companies to offer telecom services, and it was not unusual for many countries to operate banking or insurance monopolies and strictly control access to air, road or rail transport.

□ The technical possibilities of trading services – in particular in the form of conventional cross-border transactions – were far more limited than they are today. Twenty or thirty years ago, cross-border services transactions mainly consisted of transport, communications, and travel services, and hardly anything more.

It is mostly through new telecommunications technologies, introduced since the early 1990s, that many professional, financial, health or education services

have become tradeable. Electronic banking, distance learning, tele-medicine, and electronic mail are commercial innovations of the past ten or fifteen years. Of course, the question arises whether these are 'old services in new clothing' or whether they are genuinely new products, involving hitherto unknown combinations of technology, design and materials and/or offering new possibilities for users. These developments may imply not only classification problems for statisticians and legal difficulties for regulators, but point out a crucial challenge for policy makers and the business community alike: the 'services universe' has been undergoing a process of rapid expansion, redefining the playing field on which companies develop their market strategies and locations compete for new investment.

The institutional framework for services trade has changed as well. In April 1994, the Marrakech Ministerial Meeting decided on a complete overhaul of the 'old' GATT system and the creation of new trade rules, within the framework of the WTO, for services.¹ However, Marrakesh was a first step only. WTO Members are currently preparing the ground for a new services round to be launched in Seattle, in December 1999. This article reviews recent developments in services trade, the underlying economic factors and the political response given hitherto by WTO Members. The final part then discusses critical issues in the preparation of the new round, including the choice of the basic negotiating approach.

¹ Other important results of the Uruguay Round, in particular in the area of intellectual property rights, would need to be added. For a complete overview see, for example, J. S. Thomas, M. A. Meyer: *The New Rules of Global Trade – A Guide to the World Trade Organization*, Toronto 1997.

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Trade Developments

Since the early 1990s, world services trade has shown more momentum than merchandise trade, with the relevant growth differential averaging about one percentage point per annum (balance-of-payments basis, Table 1). It increases by an additional point if the expansion of 'other commercial services' is used as a basis for comparison, thus focusing on modern services sectors like communications, banking, insurance, and computer and information services.² The difference between growth in services and merchandise trade might further widen if the conventional concept of services trade was expanded to include other forms of transactions, especially foreign affiliates trade. It is likely that, given a shift towards more open investment regimes in many parts of the world, such trade has increased particularly rapidly over the past decade. However, there are no comprehensive data series available to corroborate this assumption.

Recent estimates seek to capture services trade under the four modes of supply defined under the

Table 1
Services Trade Performance of selected
Countries and Regions
(Commercial Services), 1990-97

Average annual change (current prices and exchange rates),
per cent

Country/ Region	Exports		Imports		Relative export performance ¹
	1990-97	1997	1990-1997	1997	
Asia	12	5	10	2	3
Japan	7	3	5	-5	1
China	23	19	33	34	6
Korea, Rep.	16	12	16	0	5
Singapore	13	2	12	1	2 ^a
Hong Kong, China	11	0	11	6	12 ^a
Latin America	8	9	10	18	-2
Brazil	11	37	16	36	-5
Mexico	6	5	2	16	-9
Africa	6	3	5	8	3
Egypt	10	6	12	52	4
South Africa	5	11	6	4	1
North America	8	11	6	6	0
United States	8	11	6	7	0
Western Europe	5	1	5	-1	0
EC (15)	5	0	6	-1	0
World	8	3	7	2	1

¹ Difference between growth rates in services exports and merchandise exports, 1990 to 1997.

^a Growth rates for merchandise trade are based on domestic exports only.

Source: WTO: Annual Report 1998 – International Trade Statistics, Geneva.

General Agreement on Trade in Services (GATS): cross-border trade, consumption abroad, commercial presence, and presence of natural persons. They suggest that, in 1997, world services trade amounted to close to US\$ 2.2 trillion or 7.6 per cent of world GDP.³ Of this, trade through modes 1 and 3 – cross-border transactions and commercial presence (i.e. investment) – each contributed some 40 per cent. The remaining 20 per cent were accounted for mainly by the consumption abroad of travel and tourism services. Mode 4 trade, i.e. services supplied through natural persons, either self-employed foreigners or staff employed by a foreign-owned company, was found to be statistically insignificant. However, these results – in particular with regard to modes 2 and 4 – may suffer from serious data and interpretation problems.

Latin America is the only large region in the world where, on a balance-of-payments basis, merchandise trade has expanded significantly faster than services trade. Between 1990 and 1997, the relevant annual growth rates averaged 10 and 8 per cent, respectively. Without further study it is difficult to explain this untypical pattern: Is it due to the momentum of the manufacturing sector, which in several Latin American countries has been freed of the shackles of past import substitution policies? Has the region a competitive disadvantage in services trade? Or are there policy-induced impediments?

Factors Promoting Services Liberalization

The momentum of modern services sectors has implied new policy challenges. Many of the rapidly expanding areas – including telecommunications and health – have long been considered public sector domains. Accordingly, administration of the relevant entities lay mainly in the hands of civil servants and funding was provided through semi-fiscal mechanisms. However, while such arrangements might have worked quite well in a relatively stable environment, they encountered difficulties in accommodating rapid change.

Investments in, and provision of, modern health, transport or communications infrastructures have

² Additional subsectors within 'other commercial services' are construction services, royalties and licence fees, and a residual group of business services (including trade-related services, operational leasing, and miscellaneous business and technical services).

³ G. Karsenty: Just How Big are the Stakes? An Assessment of Trade in Services by Mode of Supply, in: Services 2000: New Directions in Services Trade, Washington D.C. July 1999, at: www.brookings.edu/ES/Services2000.

strained the managerial and financial capacities of many public administrations. At the same time, reform efforts in more innovative countries created an incentive for internationally mobile users, including investors in downstream industries, to relocate in response to more advantageous combinations of price, quality and availability elsewhere. In turn, such reactions were facilitated by the proliferation of more efficient and less costly communications technologies. They increasingly allowed for services production, or at least some production segments, to be carried out at locations remote from use. And the old telecom monopolies might have wanted, but found it technically problematic, to constrain bypass technologies such as calling card or call-back services. (Leaving aside the question whether such restrictions would make economic sense.) Thus, it was essentially two factors that pushed services reform onto the political agenda: technical change, translating into administrative and budget constraints, and user response.

Certainly, demand factors have also played a role. On the one hand, as services demand tends to be income elastic, rising incomes have buoyed services growth in general. Among the main beneficiaries were internationally tradeable services such as travel and tourism. On the other hand, innovation in services and/or related manufacturing industries has created markets for new products. Mobile communications is a case in point.⁴

Defenders of the old monopoly regimes, not least in telecommunications, have stressed their positive impact on government income. The share of telecom revenue in GDP, generally between 2 and 3 per cent in OECD countries, may exceed 5 or even 10 per cent in some developing and transition economies. Telecom monopolies are the single most important source of government revenue in a number of East European and sub-Saharan African countries. However, these revenues need to be set against, first, the funds absorbed by investments in the industry and, possibly more important, the losses in overall economic efficiency incurred through high prices, poor quality, and rigid administration of a basic infrastructural

sector. And it is worth bearing in mind that privatization may in itself prove an important income earner. For example, the (partial) privatization of Deutsche Telekom, hailed in 1996 as the 'mother of all privatizations', raised over US\$ 13 billion.

Infant-industry considerations, traditionally used to justify benevolent government intervention, are not very persuasive either. How could a developing country's financial or telecommunications sector be upgraded without foreign capital, technology and managerial expertise? What sacrifices would a government be prepared to make – in terms of growth and efficiency losses in related sectors – for the sake of artificially promoting particular services industries? What could be the economic base of such industries, if the resources invested in their development had been diverted from, and impeded the growth of, potential users?

Of course, there are important non-economic considerations – related to national security, social and regional policy objectives, etc. – that governments may feel required to pursue. But these could well be satisfied through the use of specific exemptions or constraints within the context of a broadly liberal services regime. To give two examples:

□ Financial services liberalization under the GATS would not deprive a country of instruments it might want to use to prevent reckless business practices or to stem currency crises or capital flight. The prudential carve-out contained in the Annex on Financial Services is only one of several potentially relevant GATS provisions. It explicitly protects Members' rights to take measures for prudential reasons, including measures required 'to ensure the integrity and stability' of their financial systems.

□ The GATS Annex on Telecommunications allows governments to regulate their telecommunications sectors to ensure core public service functions. Liberalizing commitments under the GATS would not prevent Members from operating universal service funds or imposing pairing requirements with a view to obliging suppliers of profitable services (e.g. long-distance calls) to support others (local loop, public payphones, etc.).⁵ However, such obligations must not discriminate, in law or in fact, against foreign suppliers and supplies.

⁴ The ascent of new communication products also implied new challenges for international rule-making: the blurring of the borderline between goods- and services-related regulation. For example, it has become increasingly difficult to decide whether communications standards are services standards – thus subject to Article VI of the GATS – or whether, by virtue of their incorporation in products, they should be considered technical regulations as defined under the GATT Agreement on Technical Barriers to Trade. In the latter case, they would be subject to more stringent disciplines.

⁵ In a similar vein, non-discriminatory licensing conditions for private transport or hospital operators – requiring them to engage in certain socially desirable but not commercially lucrative activities – might be maintained even if the sector has been fully liberalized under the GATS.

Managing the Transition Process

The road to services liberalization is not without pitfalls, however. Trade policies are not formulated under 'pure' textbook conditions, but have to accommodate a variety of political, economic, and/or social constraints. These constraints may be particularly significant in infrastructural services, which are destined for both business use and final consumption. In turn, this may lead to tensions, *inter alia*, between efficiency and equity objectives. While under traditional services regimes, monopoly operators were normally entrusted with a variety of public policy tasks, related to employment, regional or social policy objectives, such tasks might risk the companies' survival under more competitive conditions. In other cases, if the dissolution of old monopolies is not accompanied by appropriate regulatory supervision, the incumbents may be able to perpetuate their dominant positions through predatory marketing strategies (cross-subsidization, denial of network access, etc.).

Reform-minded governments thus have to consider whether and how they need to

- ☐ replace previous entry restrictions with pro-competitive regulation to ensure open market conditions;
- ☐ sequence individual reform steps, from price deregulation to investment liberalization, to protect the transition process from slippages or reversals;
- ☐ set up independent supervisors in markets prone to business restrictions (e.g. due to information asymmetries or high start-up cost);
- ☐ ensure continued provision of the universal services deemed necessary on social or regional policy grounds; and, more generally,
- ☐ avoid social hardship and economic disruption.

Reform initiatives might prove politically unrewarding, whether in goods or in services. This is due mainly to the imbalance between those benefiting from liberalization – normally a large, but anonymous group of consumers – and those suffering from and/or screaming about income or job losses. The latter group tends to be smaller but better organized and, thus, more politically influential. Yet it may be easier to

overcome such problems in services than, for example, in sunset manufacturing industries. The power gap between users and producers is less deep in services than in manufacturing, in particular in basic infrastructural sectors. In important sectors – financial, telecommunications or transport services – strong commercial interests are on the user side as well.⁶

Some Anecdotal Evidence

A WTO Trade Policy Review of Uganda, conducted in 1995, paints an unimpressive picture of the country's regulatory regimes in, and the efficiency of, major infrastructural sectors such as telecommunications and electricity.⁷ At the time of the review, Uganda's Postal and Telecommunications Corporation was the monopoly owner and operator of one of the most expensive and least developed telecommunications systems in Africa and, possibly, the world. Call-back services were strictly prohibited. And no significant reforms were in the offing.

Nevertheless, about three years later, in late 1997, Uganda submitted a telecommunications schedule under the Fourth Protocol to the GATS. It was one of the five countries (in addition to Barbados, Cyprus, Kenya and Suriname) that did not initially participate in the negotiations on basic telecommunications, which had been extended beyond the Uruguay Round, but joined in later on a voluntary basis. The commitments submitted essentially provide for a duopoly regime in basic voice telephony without limits on foreign participation; further opening is to be decided in 2003. No reservations are made to cover restrictions on calling card or call-back services. In addition, Uganda adopted the so-called Reference Paper in telecommunications, committing it to submit its major supplier(s) to core competition disciplines in the sector (no cross-subsidization, cost-based interconnection, transparent licensing procedures, creation of an independent regulatory body, etc.).⁸

These may appear to be modest steps. However, they were taken by a least developed country and imply a level of liberalization that, no more than two decades ago, would have been considered revolutionary in virtually all countries in the world. It is

⁶ See R. Adlung: Adjusting to Services Trade Liberalization: Developed and Developing Country Perspectives, in: Services 2000: New Directions in Services Trade, Washington D.C. July 1999, at: www.brookings.edu/ES/Services2000.

⁷ WTO: Trade Policy Review – Uganda, Geneva 1995.

⁸ The Reference Paper was negotiated by a group of interested countries on the fringes of the extended negotiations on basic telecommunications. It is intended to ensure that the market opening measures bound in national schedules under the GATS are not frustrated by restrictive or non-transparent business practices on the part of major suppliers. Of the 72 governments that undertook commitments in these negotiations, 59 included provisions of the Paper, in full or in part, in their schedules.

worth noting, moreover, that the authorities did not liberalize in a negotiating context, possibly under international pressure, but exclusively for domestic economic reasons. They apparently sought to use the extended GATS negotiations to lock in sectoral reforms, actual and envisaged, and create a credible environment for traders and investors (including in user industries such as finance and tourism). The immediate results are telling: only one year after the second telephone licence was awarded in April 1998, the number of lines had increased by no less than 35 per cent.⁹

Given such cases of autonomous change, the questions arise what has the GATS actually achieved and what could it be expected to achieve in future? What has been the role of the Uruguay Round in services liberalization?

The Contribution of GATS to Domestic Policy Reform

In terms of actual liberalization, it is indisputable that the Uruguay Round has produced only modest results. In many areas, the level of policy commitments under the GATS has not exceeded the level of *status quo* bindings or, in various cases, has even remained below.¹⁰ The only significant exceptions are the extended negotiations on basic telecommunications and on financial services, concluded in February 1997 and December 1998, respectively, where a number of countries have scheduled genuine commitments to liberalize.¹¹ In other areas, it is difficult to associate current services schedules with significant reforms. This does not imply, however, that the schedules are economically meaningless: as noted above, participating countries may have seized the opportunity to bind existing access conditions and, thus, enhance predictability.

The substance of the commitments undertaken in the Uruguay Round varies greatly between WTO Members. Even in the extended telecommunications and financial services negotiations, where the ensuing commitments were estimated to cover some 90 per cent of the relevant world markets, the participation of smaller and more peripheral countries has remained

limited. Some 45 per cent of the WTO's 130-odd Members did not contribute in either area. For the time being, Uganda and the four other countries that made late submissions in telecommunications may thus be considered a vanguard among small developing countries.

The prospects are not bad, however, that others will gradually move in the same direction. Comparable countries, in terms of development levels or geographic location, may find it increasingly difficult to simply perpetuate the old regimes. As soon as investors react, reconsidering their previous locational priorities, entrenched regulation may no longer be deemed sacrosanct. By the same token, continued user pressure in liberalizing countries may prompt governments to extend their reforms in certain infrastructural services – e.g. finance, insurance and transport – to others.¹² A new services round would certainly provide additional impetus.

Regimes for services oriented towards private consumption may prove more immune to such stimuli. It is difficult in such services to detect economically powerful interests that could outweigh the incumbents' resistance to change. The political gravity-field in education, health and similar areas is more reminiscent of sectors such as agriculture, textiles or clothing, where vested interests have long defied reforms, than of telecommunications or financial services. Optimists may point out budget constraints, however, which in many countries have inspired reform discussions in the health sector.¹³

The Structure of Current Commitments

Current commitments under the General Agreement on Trade in Services may be described from three perspectives: the participation of individual WTO Members, the coverage of individual sectors, and the inclusion of the four modes of supply. Any perspective reveals significant imbalances, partly attributable to the fact that the GATS requires all

⁹ P.L. Smith, B. Wellenius: *Strategies for Successful Telecommunication Regulation in Weak Governance Environments*. Manuscript circulated at a Special Session on Telecommunications of the WTO Council for Trade in Services (Geneva, 25 June 1999).

¹⁰ B. Hoekman: *Assessing the General Agreement on Trade in Services*, in: W. Martin, L. A. Winters (eds.): *The Uruguay Round and the developing countries*, Cambridge 1996; R. Snape: *Reaching Effective Agreements Covering Services*, in: A. O. Krueger (ed.): *The WTO as an International Organization*, Chicago 1998.

¹¹ Nevertheless, a recent study of financial sector reforms in various Asian and American countries gives a relatively muted assessment of the relative importance of the Uruguay Round if compared to other impulses such as IMF-supported rescue programmes. See W. Dobson, P. Jacquet: *Financial Services Liberalization in the WTO*, Institute for International Economics, Washington D.C. 1998.

¹² See also R. Adlung: *Adjusting to Services Trade Liberalization: Developed and Developing Country Perspectives*, op.cit.

¹³ Anecdotal evidence suggests, however, that some past health sector reforms were driven by political concerns to not alienate the incumbents rather than by genuine efficiency objectives which may have inspired external and internal liberalization. WTO document S/C/W/50 (Secretariat Note on 'Health and Social Services', at: www.wto.org/wto/services/services.htm).

Members to schedule market access and/or national treatment obligations, but does not further specify their sectoral or modal coverage.¹⁴ The breadth (in terms of sectors included) and depth (in terms of modes committed) of country schedules is a matter of negotiation – and of national self-interest in external policy bindings.

A cursory look reveals that

□ out of the 160 or so services sectors identified for scheduling purposes under the GATS, one-third of Members have bound 20 sectors or less, another third have committed on up to 80 sectors and the remainder on up to some 145 sectors;¹⁵

□ among the large services sectors, tourism has drawn by far the highest number of bindings: close to 90 per cent of WTO Members have undertaken at least some form of commitment in this sector, which is about three times the number of commitments made on health and education services;

□ regarding individual modes, there is a sharp contrast between the commitments undertaken on consumption abroad (mode 2) and on presence of natural persons (mode 4). While almost half of all entries in current schedules do not contain any limitations on consumption abroad, the relevant shares are in the order of 25 to 30 per cent for mode 1 (cross-border trade), 20 per cent for mode 3 (commercial presence) and close to nil for mode 4.¹⁶

An additional source of imbalance between Members was the possibility, at the entry into force of the Agreement, of exempting measures from most-favoured-nation (MFN) treatment. Such MFN exemptions – an Annex to the GATS provides that they should not exceed ten years in principle – have been sought by about 70 countries in some 380 cases. (Due to imprecise descriptions, the scope of the exemptions, in terms of sectors, relevant measures and affected countries, is often difficult to assess.) The relevant provisions require that all existing exemptions be reviewed no later than five

years after the entry into force of the Agreement and be subject to negotiation in any future services round.

These observations should not detract, however, from the genuine importance of the GATS. The inclusion of services – heavily disputed no more than 15 years ago – constitutes the most important change to the multilateral system since the inception of GATT in 1948. The GATS contains an almost comprehensive set of rules for services trade (with some gaps in areas such as subsidies and safeguards), establishes certain core disciplines, which, in principle, are immediately applicable across all sectors (MFN treatment, transparency of regulation, access to domestic judicial mechanisms), and provides a framework for liberalization through autonomous and/or negotiated improvements of market access and national treatment in individual sectors. It would have been unrealistic to expect anything more from an Agreement that had just seen the light of the day.

The GATS not only ventured into an unknown area of rule making, in sectoral terms, but also used a new notion of trade. The classical concept of cross-border transactions was replaced by a far wider delineation covering three additional modes of supply. While this extension was deemed necessary to accommodate the specificities of services trade, including the need for simultaneous presence of producers and consumers in many areas, it also implied stronger and deeper constraints on domestic policy-making – or, in other words, broader guarantees for foreign suppliers – than tariff concessions under the GATT. For example, a country offering full market access under mode 3 (commercial presence) has forgone the possibility of operating foreign equity limitations or joint venture requirements and employing any restrictions, whether discriminatory or not, on production and investment in the sector concerned.¹⁷

Given the novelty of the concept, the uncertainties surrounding GATS obligations appear higher from a government's perspective than the implications of 'traditional' GATT concessions. Thus, it was not necessarily old-fashioned mercantilism, but risk

¹⁴ See R. Adlung: *Liberalisierung und (De-)Regulierung von Dienstleistungen in der Welthandelsorganisation: Versuch einer Zwischenbilanz aus EG-Sicht*, in: *Die Europäische Gemeinschaft in der Welthandelsorganisation*, edited by Peter-Christian Müller-Graff, Baden-Baden (forthcoming).

¹⁵ While it appears reasonable to hypothesize a positive relationship between a country's development level (measured as per capita income in purchasing power parities) and the number of sectors scheduled, a simple linear regression produces only a poor fit. The coefficient of determination is slightly below 0.50. WTO document S/C/W/94, at: www.wto.org/WTO/services/services.htm; see also B. Hoekman, *op.cit.*

¹⁶ Full commitments on market access (Article XVI of GATS) and national treatment (Article XVII) in a given sector and mode of supply imply that a country must (i) not impose any quota-type restrictions on the relevant transactions – Article XVI contains an exhaustive list of such restrictions – nor (ii) employ any other measures that would modify the conditions of competition to the detriment of foreign services or service suppliers. Any departures from these obligations need to be listed as limitations under the relevant sector and mode.

¹⁷ Members may, however, invoke exemptions similar to those provided for under the GATT to cope with balance-of-payments crises, protect public morals, or prevent threats to life, health, and national security.

aversion, that prevented many countries in the Uruguay Round from committing more than the minimum required under the Agreement or requested by trading partners in return for access guarantees to commercially attractive markets abroad. (Very few terms and concepts of the Agreement have hitherto been given authoritative interpretation by dispute settlement panels.)¹⁸ In addition, administrations and regulatory agencies in services sectors had rarely been exposed before to trade negotiations and, thus, had reason to establish links with their counterparts on the trade side. For lack of prior experience many may have hesitated to undertake fuller commitments during the GATS negotiations. Concerns that the ensuing rules could compromise regulatory functions and alienate traditional 'constituencies' might have played a role as well.

The Focus of the New Round

The drafters of the GATS were well aware of the need for more negotiating effort. Article XIX explicitly provides for a process of successive rounds of

negotiations with a view to achieving a progressively higher level of liberalization. The first round is to begin not later than five years from the date of entry into force of the Agreement, i.e. January 2000.

The commitment to future negotiations is without precedent in the GATT. Past GATT rounds were initiated by large Members, mostly the United States, who felt that the time was ripe to bring tariffs down further, flesh out existing provisions (on technical regulations, subsidies, anti-dumping, etc.) and close perceived loopholes in the system. The launch of a new round essentially depended on the existence of a leader with political and economic vision – the vision of a price-based, non-discriminatory trading system and of competition as an engine of prosperity. The fact that the GATS has institutionalized the objective of successive rounds may be attributed, at least in part, to the exigencies of a broader-based and increasingly diversified trading system. Its membership and coverage (in terms of sectors and measures) have multiplied since the early days of the GATT. Rather than relying on a leader's vision, and accepting the uncertainties involved, Members have developed a preference for legal provisions.

The stage has thus been set for a new round of services negotiations, but its substance and content remain to be defined. While Article XIX contains a few

¹⁸ The most prominent case to date has been the 'banana dispute' between the European Communities and several American countries where services-related aspects, including the interpretation of the MFN requirement under Article II of GATS, were of importance. See W. Zdouc: WTO Dispute Settlement Practice Relating to the GATS, in: Journal of International Economic Law, 2, 1999, pp. 295-346.

Franco Ferrari (ed.)

The Unification of International Commercial Law

Tilburg Lectures

Since the unification of transnational commercial law promotes certainty of law and, by doing so, the flow of international trade, there is a strong tendency to unify the rules governing situations linked to a plurality of countries.

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This book collects the 12 speeches delivered on the occasion of the Lectures held in Tilburg from 2-4 April 1996, including a draft of Transnational Rules of Civil Procedure.

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general parameters to be applied within the overall objective of liberalization (respect for national policy objectives and development levels of individual Members, emphasis on sectors and modes of supply of export interest to developing countries, recognition of autonomous liberalization undertaken since previous rounds, etc.), it does not provide more concrete guidance. Article XIX:4 stipulates that the liberalization process be advanced through bilateral, plurilateral or multilateral negotiations, thus leaving the door open for any particular approach. What contributions are to be expected from individual Members at various levels of development? What are the appropriate negotiating structures and procedures to promote such contributions? Are there reasonable alternatives to conventional request/offer negotiations as conducted in the Uruguay Round? Could the liberalization process be advanced through the use of broader-based formula or model approaches?

In specified areas, the mandate of Article XIX is complemented by more detailed provisions and decisions. In particular, these relate to the review and renegotiation of current MFN exemptions; new negotiations on commitments in maritime transport; and review of the current (non-)coverage of GATS of air transport.¹⁹ In addition, Part II of the GATS, which spells out the General Obligations and Disciplines under the Agreement, earmarks technical or institutional issues for future rule making: emergency safeguard measures, subsidies, government procurement, and disciplines for domestic regulation. While these provisions apply in any event, it would be naïve to assume that the negotiations – in particular, on safeguards – would not be influenced by what is going on in the new round. Finally, there is a yet undefined range of negotiating issues that may be identified by Ministers in Seattle in December or by delegations at later stages of the round. One potential candidate is electronic commerce, where a work programme, initiated two years ago, has identified potential areas for further interpretation or rule making.²⁰ Other candidates are perceived structural problems in the Agreement, which have been

identified in recent years. The new round might offer an opportunity to negotiate treaty amendments or, possibly easier to achieve, agreed interpretations addressing such problems.²¹ However, these negotiations are part of a wider package whose basic *raison d'être* is contained in Article XIX.

Critical Issues

The current imbalance in scheduled commitments – across Members, sectors and modes – essentially defines the starting line for the new round. In keeping with the liberalizing mandate of Article XIX, participants might be expected to work towards more uniform levels of commitments and, at the same time, promote broader coverage of the GATS. This should lead to the inclusion of 'sensitive' sectors (e.g. maritime, health, and education services) and modes (presence of natural persons), which have eluded significant inclusion in many schedules.

By August 1999, some 20 WTO Members had developed ideas, in the form of written submissions, on negotiating guidelines and procedures for the new round. (It is difficult to provide a precise count of all relevant submissions and distinguish them, for example, from issue-specific proposals, which may be dealt with either in the context of a new round or as part of the WTO's regular work programme.) In general terms, virtually all contributions emphasize the need for comprehensive negotiations covering all services sectors and modes of supply. In most cases, request/offer negotiations between interested trading partners are expected to be the main vehicle. Other – cross-cutting – approaches have been discussed as well, but not normally with great impetus. For example, the idea has been raised of giving priority to the abolition of certain access restrictions (for example, discretionary economic needs tests or tight foreign equity limitations) and/or the liberalization of specified market segments (for example, certain professional services) in all scheduled sectors. Proposals have also been made to specify sectoral clusters for inclusion in schedules or to prescribe minimum levels of (new) commitments on a sub-sectoral or modal basis.

¹⁹ The Agreement's scope in the latter area is confined to three types of ancillary services (repair and maintenance, selling and marketing, and computer reservation system services), but does not extend to traffic and landing rights.

²⁰ For example, there is the question of whether Internet networks are public telecommunications networks and whether the guarantee of non-discriminatory access, conferred on users of public telecom networks and services under an Annex to the GATS, applies to the Internet as well. Doubts have also been expressed over whether all products supplied electronically are services and, consequently, fall under the GATS.

²¹ Cases in point are definitional uncertainties, in particular in electronic trade, which may blur the distinction between commitments on cross-border trade and consumption abroad, or overlaps between the market access and national treatment obligations under Articles XVI and XVII, which may complicate the interpretation of current commitments. See A. Mattoo, P. Low: Is there a Better Way? Alternative Approaches to Liberalization Under the GATS, in: Services 2000: New Directions in Services Trade, Washington D.C. July 1999, at: www.brookings.edu/ES/Services2000.

Such general approaches were used, to a limited degree, as guidelines in the first services round. However, they remained confined to certain sectors (an Understanding on Commitments in Financial Services, a Model Schedule of Commitments on Basic Telecommunications and a Draft Schedule on Maritime Transport) or regulatory issues (the Reference Paper in basic telecommunications) and, moreover, were made available on a voluntary basis only.²² It might be argued that the model schedules were conducive to rationalizing the negotiating process and ensuring relatively homogenous levels of commitments in specified areas and among groups of Members. They might have contributed to the transparency and clarity of commitments, but did not directly advance the liberalization process. The negotiating proposals for the next round, which have been tabled by various WTO Members to date, would not significantly change this role.

Negotiators' emphasis on request/offer procedures is understandable, given the absence of tariff protection in services, the broad modal structure of the GATS and the wide range of measures impinging on services trade. Moreover, sector-specific negotiations, based on request/offer, may help to mobilize domestic lobbies with strong export interests and, thus, prove more politically rewarding than formula-based negotiations. The extended negotiations on basic telecommunications and financial services show that significant results can be achieved within a relatively short timeframe. This should not lead to the conclusion, however, that they are a politically and economically preferable model for future rounds as well.

Request/offer negotiations tend to focus on areas (services and modes) championed by economically strong sectors in economically strong countries. The driving force of the extended negotiations was the concept of 'critical mass' under which the large

players, in particular the United States, conditioned their own MFN-based offers on other Members making economically significant contributions in the same sector. While the outcome was undeniably positive from a sectoral perspective, little was achieved in terms of integrating commercially non-lucrative markets and economically weak countries in the GATS system. Request/offer can hardly succeed in areas in which the large players are not commercially interested, but in which they could benefit from liberalization (possibly including maritime transport, construction, health and social services) and might need external prodding to overcome domestic resistance to change.

Formula-Type Approaches: Where and How?

Previous tariff negotiations, in particular in the Tokyo Round, provided scope for the use of general reduction formulae. These were calibrated to produce disproportionately large cuts of relatively high rates, thus harmonizing (nominal and effective) border protection across sectors in participating countries. The ensuing benefits of removing economic distortions were complemented by a political advantage: the liberalization process was partly rendered anonymous. Since the tariff cuts resulted from an abstract formula applied in principle across all sectors, it was politically easier for governments to defend them against vested interests at home: they had not surrendered to foreign negotiating pressure, but accepted the results of a genuinely 'neutral' process.

Given the particular structure of the GATS, the potential use of formulae is broader than would be conceivable in the area of goods. There are in principle two areas of application: formulae might be used either to fill gaps in the spectrum of sectors scheduled by Members or to improve the quality of the commitments made (Table 2). Such qualitative improvements could consist, for example, of common undertakings banning certain types of limitations; parallel liberalization of related services in order to exploit cross-sectoral synergies; or agreements to more closely align the bindings undertaken in individual areas with actual trading conditions (the concept of 'status quo' or 'standstill' obligations).

Formulae Promoting Broader Sectoral Coverage

The most radical approach to ensuring – or enforcing – broad commitments across services would be to automatically consider all sectors as

²² The Understanding on Commitments in Financial Services contains a range of obligations to financial sector liberalization that are automatically assumed by countries referring to it in their schedules, notwithstanding further qualifications. The commitments include at least a binding of all existing sectoral restrictions at status-quo level ('standstill'); non-discrimination in government purchases of financial services from all domestically established suppliers; full commitments on cross-border supply (mode 1) and consumption abroad (mode 2) of a specified range of services (e.g. reinsurance and retrocession); and liberalization of commercial presence (mode 3). The Understanding is basically different from the Reference Paper in telecommunications in so far as the former focuses in particular on market access and national treatment obligations under Articles XVI and XVII, while the latter introduces additional commitments related to transparency, impartial domestic regulation, and competition policy with a view to preventing access commitments from being frustrated by market distortions.

covered. Market access and national treatment would be bound across the board at current levels or, depending on any additional undertakings, somewhere above. The potential advantages, political as well as economic, are evident: the onus would no longer be on trade administrations to persuade reticent lobbies of the benefits of liberalization, but on those demanding exceptions; transparency would be enhanced since all (remaining) barriers in all sectors

and all modes would need to be listed; and any new service would automatically be covered.

Two regional trade agreements, the North American Free Trade Agreement (NAFTA) and the Australia New Zealand Closer Economic Relations Agreement, may serve as models.²³ They are based on the principle of full services liberalization, across the board, except in areas expressly listed as exempt ('negative listing'). Available evidence does not suggest that participants

Table 2
Possible Liberalization Formulae for Services Negotiations

Formula	Basic Principle	Example/Model	References
Negative listing ('top down' approach)	All sectors are automatically subject to market access and national treatment obligations across all modes of supply. Exceptions must be listed in schedules.	Services Chapters of the North American Free Trade Agreement (NAFTA) and the Closer Economic Relations Agreement between Australia and New Zealand.	B. Hoekman, op.cit.; R. Snape, op.cit.
Tariffication	Barriers to cross-border trade are replaced by tariff-like charges which, in turn, may be made subject to negotiated reductions.	Tariffication of border measures under the WTO Agreement on Agriculture.	R. Snape, op.cit.
Model schedule	Members undertake standardized commitments in individual sectors.	Understanding on Commitments in Financial Services; Draft Schedule on Maritime Transport Services; Model Schedule of Commitments on Basic Telecommunications	WTO Secretariat Informal Note of 15 April 1996 (NGMTS, 1872) and WTO Website (www.wto.org/wto/services/services.htm).
Cluster approach	Commitments are not assumed for individual sectors but, where relevant, for clusters of related sectors.	Proposals to encourage complementary commitments on: courier and related transport services (e.g. road freight transport); various environmentally important services; health care and health insurance services; and multimodal transport services (maritime transport and related road and waterways transport).	WTO documents S/C/W/39, 46, 50 and 62 (WTO Secretariat Notes on Postal and Courier Services; Environmental Services; Health and Social Services; and Maritime Transport Services; at: www.wto.org/wto/services/services.htm).
Minimum sectoral coverage			
(i) 'Qualitative' approach	Obligation to include certain economically important sectors in all schedules.	Proposals to achieve more comprehensive coverage of telecommunications and financial services and liberalize all services that are transmitted over telecom systems.	G. Feketekey, op.cit.
(ii) 'Quantitative' approach	Obligation to include a minimum number of sectors in all schedules.	Members could undertake to commit at least X sub-sectors out of the 11 large areas specified for scheduling purposes under GATS (Document MTN.GNS/W/120).	R. Adlung: Adjusting to Services Trade Liberalization: Developed and Developing Country Perspectives, op. cit.
Standard commitments			
(i) 'Negative' approach	Members refrain from operating and/or scheduling measures considered to be particularly restrictive or distortive.	(i) Current undertaking not to impose duties on electronic transmissions. (ii) Proposals for the next round to exclude specified transactions from economic needs tests (e.g. access under mode 4), and review the role and restrictiveness of nationality requirements, foreign equity ceilings, etc.	Ministerial Declaration on Global Electronic Commerce (25 May 1998). Communications from individual WTO Members in preparation for the 1999 Ministerial Conference.
(ii) 'Positive' approach	Members undertake additional disciplines in specified areas.	Competition disciplines in basic telecommunications ('Reference Paper').	L. Tuthill: The GATS and new rules for regulators, in: Telecommunications Policy, 21 (No.9/10) 1997, pp. 783-798.
(iii) 'Standstill'-type commitments	Members bind their currently applied regimes in scheduled sectors (or across the board).	Understanding on Commitments in Financial Services.	Communications from individual WTO Members in preparation for the 1999 Ministerial Conference.

have found it particularly difficult to adjust to the structure of these Agreements and comply with their obligations. However, the underlying principle – full services coverage – is certainly easier to implement between countries that are relatively homogenous (compared to the WTO membership) and strongly economically integrated, than at multilateral level. In the GATS, 'negative listing' may, instead, prove a recipe for delay and confusion: Is it realistic to assume that all WTO Members have the internal mechanisms enabling them to identify all restrictions – at all government levels and for all modes – affecting market access and national treatment in services?²⁴ Given the risks involved, would governments be willing to subscribe to commitments whose full legal and sectoral implications they find difficult to predict?²⁵ How real are the gains in transparency for potentially interested foreign administrations and companies if these were confronted with long lists of exceptions?²⁶ Could the 'price' of achieving comprehensive sectoral coverage be the creation of an easily accessible safeguards mechanism? If so, what would have been achieved in substance?

Full sectoral coverage therefore does not seem to be a realistic, and possibly not even a desirable, policy objective for the foreseeable future, at least not in the GATS context. In the absence of vocal domestic or external demands, some WTO Members may not have even considered the pros and cons of meaningful policy bindings; and certainly they do not want to venture into the unknown. The first step would be to familiarize such governments with the Agreement and, possibly, encourage them to assume some clearly defined commitments in areas where they feel confident.²⁷ For the time being, the precise sectoral range of these commitments and their depth – in

terms of modes liberalized – would be of secondary importance.

This suggests that any (quantitative) formula related to sectoral coverage would need to be soft and flexible. It could consist, for example, of a minimum number of services sectors that countries at various levels of development are expected to include in their schedules. To achieve relatively broad coverage, these numbers might be broken down into sub-targets for large sectors, such as business services, communications, finance, health, environment, distribution, and transport. Particular emphasis could be placed in this context on commitments in basic infrastructural services whose efficiency is likely to engender economy-wide gains. In the case of more advanced countries, additional criteria might be added – banning, for example, particularly restrictive or distortive measures – to promote the quality of the commitments.

Formulae Improving the Quality of Commitments

Given past GATT experience with tariff reduction formulae, it is tempting to explore their significance for services. A potentially relevant approach has been used in agriculture where tariffication established a common, price-based yardstick for an otherwise non-comparable maze of access restrictions. In turn, this has paved the way for coordinated access liberalization across countries and individual subsectors. In the same vein, tariffication of scheduled services limitations could be expected, first, to promote transparency and, second, to provide an underpinning for predictable and harmonized liberalization moves. As noted by Snape,²⁸ the use of tariffs or tariff equivalents in services could require, however, that the modal focus of GATS commitments be limited to cross-border trade. Measures related to other modes, in particular commercial presence and natural persons, might then be covered by separate agreements. (Issues related to investment and movement of persons have also been treated in different chapters under NAFTA.)

²³ The EC Treaty may be considered as 'the' prototypical regional trade agreement, but it is too ambitious in scope and depth to be considered a model in this context. The same applies to some of the Communities' agreements with neighbouring countries (European Economic Area with Norway, Iceland and Liechtenstein and Europe Agreements with central and some eastern European countries). For more information see WTO: Trade Policy Review – European Union, Geneva 1995.

²⁴ The MFN requirement under Article II of GATS already applies across all sectors, as noted above. There are indications, however, that various countries found it very difficult to establish all inconsistent measures and list them as exemptions, if needed, at the time they negotiated their schedules.

²⁵ With regard to mode 4 (presence of natural persons) a similar obligation – 'negative listing' of remaining barriers in scheduled sectors – has already been turned on its head. Virtually all Members have inserted cross-cutting limitations for that mode, exempting all categories from commitments which are not expressly listed, at the top of their schedules. Little would be gained if this practice was repeated at sector level.

²⁶ Current schedules already add up to some 4,000 pages.

²⁷ According to Fekete-kuty, the issue is not primarily what approach – positive or negative listing – should be used but, rather, the degree of precision with which commitments are specified. There is a huge difference in whether a sector is simply scheduled as unbound, a broad limitation is made for a law, which may include some inconsistent provisions, or the effects of this law on market access and national treatment are spelled out in detail. G. Fekete-kuty: Setting the Agenda for the Next Round of Negotiations on Trade in Services, in J. J. Schott (ed.): *Launching New Global Trade Talks: An Action Agenda*, Institute for International Economics, Washington D.C. 1998.

²⁸ R. Snape: *Reaching Effective Agreements Covering Services*, op. cit.

No other approach seems to offer similar advantages in terms of transparency, predictability and inter-sectoral neutrality. However, the risks are formidable too. Opening the basic structure of the GATS – or at least of current schedules – for reconsideration could unravel the Uruguay Round *acquis* without guaranteeing any (better) results soon. In addition, there are serious technical difficulties. In the tariffication process, where would the borderline be drawn between the trade-inhibiting effects attributable to domestic regulation – including non-discriminatory quality standards, which no Member might want to sacrifice – and genuine market access and national treatment problems? And, given the uncertainties involved, how could administrations be prevented from scheduling artificially inflated tariffs in order to create scope for future reductions?

Again, the question arises, what alternatives are available to large-scale changes of current rules and practices? Table 2 lists various approaches, sector-specific or general, that may be relevant in this context. They could be applied individually or in combination. For example, agreed restrictions on the use of certain measures which, although possibly covered by the GATS, are deemed excessively discretionary or distortive (e.g. non-specified economic needs tests), might coincide with sector-specific standstill obligations (possible candidates: environmental, distribution, and telecommunications services) and the definition of sectoral clusters for parallel liberalization.²⁹

Cluster models may help to improve the – economic, social or environmental – value of commitments undertaken in complementary sectors. (Such complementarities can exist in production and/or consumption.) As a case in point, commitments on the consumption of health services abroad could be upgraded by parallel undertakings ensuring insurance portability under public health schemes. Commitments on environmental services, currently confined to end-of-the pipe technologies, might benefit if environmentally-relevant activities were reallocated from other sectors (e.g. engineering, testing, and analysis services) and earmarked for priority liberalization. Given intensive links between courier services and various (other) transport activities or the gradual transformation of maritime into multimodal transport services, it would only be reasonable to commit the relevant sectors in tandem.

The availability of quality-related formulae could help, in turn, to clarify and improve commitments undertaken under quantitative approaches. The

availability of such 'package solutions' is likely to benefit in particular small and economically weak countries, short of negotiating resources and expertise, and enhance their ability to participate effectively in the new round.

Concluding Remarks

Developing countries may raise doubts, nevertheless. Would formulae be used to drawing them into over-ambitious commitments? Would they create a straitjacket for future policy making? Would the outcome be compatible with GATS provisions guaranteeing developing countries 'appropriate flexibility' for opening fewer sectors and liberalizing fewer types of transactions (Article XIX:2)? Such doubts may be inspired by negotiating tactics, but could also reflect real economic and legal concerns. However, it is difficult to see why a formula-based approach should be more problematic in this regard than request/offer negotiations. All conceivable formulae (Table 2) could easily incorporate graduation factors to accommodate development-related considerations; and it may be easier to jointly negotiate such factors than to claim preferential treatment in a bilateral context.

This does not imply that request/offer has no role to play. No Member can reasonably be expected to rubberstamp whatever results are produced by a general negotiating formula. Request/offer procedures may help to ensure, in particular, that governments have something to deliver to economically important constituencies, thus enabling them to politically survive the resistance of 'losers'. The crucial challenge is, however, to establish the appropriate balance. To promote broader and deeper liberalization in services, WTO Members may need to rethink their initial preference for request/offer.

Finally, it may be worth recalling that negotiating procedures are instruments, but not ends in themselves. They can facilitate the process, and they will certainly influence its direction. However, they cannot generate momentum *per se*. No procedures, formulae or other technical arrangements can ever substitute for political resolve. Implementation of the concept of progressive liberalization, as laid down in Article XIX of GATS, remains crucially dependent on the readiness of a broad majority of WTO Members to participate and contribute – in whatever negotiating framework.

²⁹ See, for example, R. Thompson: Formula Approaches to Improving GATS Commitments. Some Options for Negotiators, in: *Services 2000: New Directions in Services Trade*, Washington D.C. July 1999, at: www.brookings.edu/ES/Services2000.