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by

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1. Introduction

The World Trade Organisation (WTO) and its General Agreement on Trade in Services (GATS) were created nine years ago, and much has changed since then, both in the world economy and attitudes to integrating trade into national policies. The fourth WTO Ministerial Conference in November 2001, held in Doha, launched a negotiating round with a full agenda and a tight timetable: the so-called Doha Development Agenda, which highlights its relevance to developmental imperatives and concerns.

This paper focuses on the key issues arising for the service sector. The introductory sections describes some of the features of the service economy, the positions of business and the NGOs on liberalisation of international trade in services, the trend towards regional liberalisation and the situation of the services negotiations in the Doha round. Then the paper looks at two important features of the GATS framework: transparency and domestic regulation, followed by some market access issues. Consideration of developing country issues comes next, then negotiating modalities, and regional free trade agreements. The last section deals with two of the 'Singapore issues' - trade and investment, and trade and competition policy.

1.1 *Services in the global economy*

1.1.1 Contribution of services to GDP

World Bank data show that the contribution of the service sector to world gross domestic product was 64% in the year 2000, compared with 57% in 1990. Services now account for about half or more of the output of countries in Central and South Asia. Exports of services by developing countries in the decade to 2000 grew by 9%, which exceeded the level of 5.5% for developed countries, whilst that for the 49 LDCs was 6.3%. At least 25 developing countries depend on services exports for more than half their total export revenues. Services occupy a vital and growing role in the global economy, and the World Bank predicts that developing countries stand to gain most from the liberalisation of trade in services, perhaps \$6 trillion between 2005 and 2015.¹

By 1999 some 50% of the world inward foreign direct investment (FDI) stock was in the tertiary sector, compared with 42% in manufacturing, according to UNCTAD estimates.² About 57% was invested in the EU and USA, which together owned 73% of global outward stock of FDI.

Although international trade and investment is dominated by North-North flows, and between the EU and US in particular, trade between North-South, and South-South are both essential if the emerging economies are to develop.

¹ Data are taken from the WTO press release of 28 June 2002 (Press/300).

² 'World Investment Report -2001', UN, 2001 (tables A.II.4, B.1 and B.4).

1.1.2 Services increase as level of GDP per head rises

Nearly all economies show evidence that the development path results in ever higher proportions of services in employment and GDP. Most new jobs are created in the service sector, many at higher levels of pay, more than countering the loss of jobs in agriculture and manufacturing as time goes by. The higher the level of GDP per head, the more services predominate, and the more sophisticated they become. Leisure pursuits become possible, and consumers seek more and varied services.

Manufacturing firms have reorganised so as to focus on their core skills, and now buy in critical services which they no longer have the competence to provide for themselves, as well as routine services which have been outsourced for a long time. The relative value of physical materials in advanced goods products is steadily falling as such products increasingly need services systems to exploit their full potential over time. Furthermore, information and knowledge are becoming ever more important in productive processes.

1.1.3 Reflections on the economic background

The global services infrastructure has become more closely connected, whether it is the transport links for manufactured goods or air passengers, or the enormously increased capacity of the telecoms networks, which now carry packet data that is the lifeblood of electronic commerce and the World Wide Web. The financial markets operate around the clock, with trading closely connected in the capital, currency and commodities markets through innovative instruments such as derivatives.

In the advanced economies high added value arises from professional and business services, and intermediate services can account for half total market services production. They create the best paid jobs. Although the much heralded new economy has not yet arrived, the evolution has brought a new functionality. There is closer interdependence between making things and the services that support them. Services precede in planning and design, they accompany the manufacturing processes, maintain goods in use, and they follow in exit and recycling. Some products can be digitised for electronic delivery and then appear like services. Increasingly the value added arises from the performance of systems over time. Pricing includes future performance, and therefore has to take account of risk arising from uncertainty.

There are increased risks from large, complex, widespread, and inter-linked systems, and such risks have to be managed and insured. Not only are there natural catastrophes to provide for, but also human induced disasters of war and terrorism. Shocks from such events are transmitted quicker than ever through more efficient and connected financial markets, and due to lean supply chain, just-in-time management. Human perceptions ultimately are the drivers of spending and saving patterns and business investment decisions, where herding effects amplify volatility so evident in the recent stock market bubble and bust.

Those are some of the highlights in the background against which the GATS negotiations must be seen. The GATS represents just one part of the gradually increasing

international structure of the rule of law. To adapt the famous Churchillian aphorism - better to jaw, jaw about law, law than war, war.

1.2 Business advocacy

Business was pleasantly surprised by the institutional outcome of the Uruguay Round for services, because the WTO treaty and its important GATS pillar are more comprehensive and integrated than was expected.

Industry supports the basic aim of the GATS, which is made patently clear in the preamble: trade is recognised as important for growth and development. The GATS multilateral framework exists “with a view to the expansion of trade under .. conditions of transparency and progressive liberalisation” through “successive rounds of multilateral negotiations.” The preamble also states that GATS has some part to play for developing countries in “strengthening [the] domestic services capacity and its efficiency and competitiveness”. Thus the purpose of the GATS and its rationale were created to be positive for business interests.

Before and during the Uruguay Round negotiations, while the GATS was being conceived, governments sought out service sector business representatives (and others in an epistemic virtual community) so as to obtain information about specific sector characteristics and collect data, as well as seeking their views. Most trade officials are career civil servants with no personal experience of working in the private sector, and they needed also to get a feel of the commercial realities. The sector comprises an extremely wide range of heterogeneous services, often supplied jointly, and depending on other services to complete the supply chain. Some newer services are highly complex and information intensive. Officials could not possibly be experts over this whole area.

Industry holds strong views on where the negotiations should lead for a successful outcome. However private firms have no democratic legitimacy in the process: they are another voice in civil society. But they do have important commercial interests, and make an obviously significant contribution to society through their provision of employment and crucial infrastructure services on which economies depend. Their views deserve to be heard

Governments have to make up their own minds on what weight to give to the myriad views of companies and trade associations: this will be conditioned by the perceived expertise, degree of logic and integrity demonstrated, and depends also on the constituency which pays for any advocacy group. Governments need an interlocutor in many areas to obtain the necessary information to aid policy making. Thus in most countries, including the UK, they have had to kick-start the formation of coalitions.³

In no country, however, has the service sector has been able to create such a powerful voice and influence as the farmers or manufacturing industry, even though the contribution by services to the economy is far larger. The fact is that in international trade, manufacturing sales still predominate, which is due to the different nature of services, many of which must be produced locally within markets abroad rather than

³ In 1997 the author wrote a paper on “Forming and running a national Coalition of Service Industries – an action checklist”, and was happy when UNCTAD also asked to make use of it.

imported cross-border. This is not yet given due weight in official figures nor reflected in political debates.

Business advocacy groups should hammer away at urging governments to remove nationality and residency requirements and other restrictions on the mobility of personnel, and the domestic regulations that limit investment, firm ownership, enterprise legal structures, and the use of brand names.

Annex 1 lists the most active services coalitions.

1.3 NGOs

Many civil society groups, headed by a few powerful NGOs with an international presence, are voicing fears over falling standards of healthcare and education, and the need for essential services to be universally available for deprived sections of society, whether in peripheral regions or for categories of poverty and hardship, invalids, the deformed, immobile and so on. This is surely understandable. Union groups deplore some US moves where prisons and schools have been outsourced to private firms, and fear its spread.

However, in this public debate many false allegations have been levelled at the GATS by some activist NGOs and the negotiators must not take fright at this threat. It is vitally important that the supporters of the services negotiations, government and business alike, counter destructive claims and assert the reality. Notably that services provided by governments on a non-competitive and non-commercial basis are beyond the scope of the GATS and not subject to negotiation. That the GATS does not require privatisation or deregulation of any service, nor have governments proposed so. The negotiating guidelines clearly recognise “the right of Members to regulate, and to introduce new regulations, on the supply of services.” They retain the right to assure universal service obligations, for example in the telecoms sector, as deemed necessary on social, regional or other policy grounds.⁴

The negotiating proposals tabled by 55 governments in Geneva were made public on the WTO website, and included those by 32 developing countries. None related to health services, only three to education services, whilst most related to professional services, tourism, telecoms, transport and financial services.

An irony is that the commercial drive for strong global brand images, which are designed to increase consumer confidence, particularly for supplies in new markets, collides with the resentment among some over the successive waves of people and products arriving from abroad. Appropriate and quality services supplied through commercial presence by firms employing local nationals, should be able to build consumer trust.

1.4 Unilateral liberalisation rather than multilateral commitments?

⁴ This paragraph is based on the WTO press release referred to in footnote 1.

In the GATS there seems to be a broad policy consensus that liberalisation of international trade in services can bring benefits resulting in a win-win situation for virtually all Members. The debate is rather over the priority which services liberalisation should be given in the context of vital policies on social and economic development, and the elimination of poverty. Issues of sequencing, phasing and pace are crucial for the regulated infrastructure services which are central to economic competitiveness and consumer service and choice.

An important dilemma appears to arise from the result of the more idealistic experiments to date in social engineering, in advanced and developing countries alike, aimed at providing for a fairer balance between the rich and poor, and between the wealthier cities and the deprived outer regions. They can easily end up in shrinking the resources available to alleviate the disparities, rather than enhancing such resources. This is because those policies to some extent fly in the face of the hard economic laws of supply and demand, economies of scale and scope, and comparative advantage.

The economies of developing economies cannot develop sustainably without great attention to human capital in healthcare facilities and education. Nor can they take off without legislating for private property rights. Nor will they prosper whilst officials demand payment for licences and approvals, for customs and trade facilitation, and the police do so while on traffic duty. Judicial courts need strengthening and to be educated in modern ways. Bankruptcy laws are needed for orderly market exit. Macro-regulatory systems have to be extended and improved in quality. State enterprises need to be corporatised to improve management, or be privatised. Better governance is needed, more pro-competitive regulation and transparency for legislative and enforcement. Then perhaps developing countries can be in a position to attract foreign direct investment for their services infrastructure. However, conceptually there is no one best model for social and economic growth and development and the elimination of poverty.

The three key determining realities facing the social and economic development of the poorer countries are: the existing state of services supply in their countries; the binding national resource constraints which condition essential macro-regulatory capacity building; and the need for foreign private sector investment in infrastructure services. These factors will take time to transform, extending well beyond the end of the Doha Round. A senior Canadian negotiator has written: “today’s trade negotiations are about good governance and democratic development: the creation of stable and transparent supervisory structures that ultimately provide a non-corrupt and predictable environment for traders, investors and consumers.”⁵

In Asia there are leading country proponents of liberal trade policies and the benefits of international competition: Hong Kong China and Singapore have for long been in the forefront, with Chinese Taipei and South Korea not far behind. Malaysia is fairly open, though less so for services. Thailand has experienced growing services exports for many years. China made significant commitments upon re-accession to the WTO in 2001 and seems set on the path of market reforms and progressive liberalisation. India is methodically engaged on major steps to open up, and to ensure fair and contestable

⁵ “Governance in the global age: a public international law perspective”, Jonathan T Fried, DFAIT, Canada, in ‘Seattle, the WTO, and the Future of the Multilateral Trading System’, Porter R B and P Sauvé, Eds., Harvard, June 2000.

markets. Its economy has experienced an extremely rapid growth rate in commercial services over the past decade.

The ASEAN free trade agreement for services reflects the intent to liberalise, though perhaps it has yet to move beyond GATS levels of commitments. Bilateral free trade agreements with trading partners outside Asia are hastening the process of liberalisation, though it could be the dawn of a preferential market access trend.

There seems no doubt that liberalisation will be an integral part of broader economic policies. The main question will be the tactical one of whether or not to bind any sectoral position under the GATS at the conclusion of the Doha Round. Some autonomous liberalisation may be left unbound so as to retain more flexibility for future regulatory measures, when more experience has been gained.

1.5 Services in the context of the Doha Development Agenda

The Doha Development Round is by far the most ambitious multilateral trade negotiating round so far, and all parts are joined together in its 'single undertaking' where 'nothing is agreed until everything is agreed.' No element can be dropped from the basket which took so much effort to put together at Doha.

It will be difficult to keep progress in step in each domain, and to date movement has been very uneven. Some observers point out that this rather ruthless inter-locked timetable is causing a hindrance to progress being made where it is possible, such as on non-agriculture market access. It will be more difficult to take decisions due to the slow down of the world economy, to currency instabilities, and due to the fragmentation caused by the rush towards regional trade agreements. In the EU much effort is being devoted to the enlargement process.

The WTO Director General is working hard to obtain the focus of governments to make the necessary progress before the stocktaking at the Cancun Ministerial Conference in September. At present the services negotiations show no dissension, just as was the case at Seattle and Doha, where there was overt consensus on what had to be done. This could well also be the case by Cancun. The developing countries feel that the market access aim is broadly the same for goods and services: the Quad must grant better access to their suppliers. The EU absorbs about 85% of the agricultural exports of developing countries. The 75 countries in the ACP group are looking for preferential access for their services in the EU countries also under the EU-ACP Cotonou Economic Partnership Agreement.

The Doha Ministerial benefited from a general feeling of solidarity in reaction to the terrorist outrage in the US on 11 September. The mood may well be very different later this year at Cancun should there have been a war in Iraq, and if the dictator in North Korea is still pushing his brinkmanship to the extreme. There are also serious issues dividing the EU and US such as GMOs, steel subsidies, Foreign Sales Corporations, patenting of life forms, and biodiversity. The time pressure of needing to conclude before the US elections and the change over at the European Commission are a feature that was not present in the Uruguay Round. If the time line were to be many years, then business support may fade.

At this point one cannot clearly foresee the political dynamic of the lead up to Cancun, and what positions are likely to be by 10 September. The developing countries have not yet been satisfied on how patented drugs can be supplied, nor on a range of implementation demands, and on how special and differential treatment will apply. This is mainly political rather than substance. Progress seems obdurately elusive in the agricultural negotiations, their highest commercial priority.

In parallel, for some months no overt progress has been made on GATS issues, while the extensive matrix of bilateral meetings discuss the initial requests sent out last year, and capitals formulate their initial offers soon to be revealed to each other.

Although no trade rounds have yet failed, they did become extended, and it will need dedicated leadership by the major economies, and flexibility on their part, to achieve timely success for the Doha round. No longer can they steamroller their way forward - nor perhaps rely on side aid and IMF conditionality to shepherd in developing country consent. The stakes are high, and the costs of failure enormous.

2. GATS Rules

2.1 Transparency (Article III)

This Article provides that Members “shall publish promptly and .. at the latest time by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement.” Any such new laws or changes to existing ones have to be notified to the Council for Trade in Services (CTS). A Member may ‘counter notify’ the CTS about any measure taken by another Member which is considered to affect the operation of the GATS.

Transparency provisions are not only included in this Article, but also in Article VI *Domestic Regulation*, the ‘Disciplines on domestic regulation for the accountancy sector’, and the Basic Telecommunications Reference Paper. However, the GATS rules are as yet relatively undeveloped and in general its disciplines are weaker than those found in other WTO Agreements.

Article III bis provides a ‘carve-out’ for confidential information that would “prejudice legitimate commercial interests of particular enterprises, public or private.”

The principle of transparency is potentially extremely powerful: it aims to make visible the legislative and regulatory processes, and to increase the dialogue between legislators, the executive branch and society, so as to achieve better regulation and compliance by the regulated commercial operators - which include, without discrimination, those that are foreign-owned - for the benefit of consumers and users. The application of transparency should reach right across the policy and executive operations of governments, of legislative activities and law enforcement. It lies at the core of good governance, not just in the fight against bribery and corruption, vital as this is, for example, in the Government Procurement setting.

A problem for business is that it is difficult to ascertain what measures exist in their markets abroad, and if known, to what exactly they apply, and the reasons for their enactment.⁶ The definition of how the confidential information ‘carve-out’ should be interpreted and applied is left to individual governments, so its application varies. It is felt that Article III does not go far enough in mandating how governments should publish their measures. The means and location of publication are not specified. This is complicated where there are two or more levels of authority such as in federal states. Notifications are slow in being submitted to the WTO, or are not being made. Potentially there is so much relevant paperwork that business cannot access all of it.

The services negotiators are grappling with ways in which the concept of transparency can be ‘operationalised’ (in their ungainly jargon !). A good idea of the direction this may take can be found in the ‘Disciplines on domestic regulation for the accountancy sector’ which were adopted by the WTO Council in December 1998. They represent the most advanced rules, in their objectives and rationale, within the WTO system. Although the disciplines are without immediate legal effect it is expected that they will be integrated into the GATS at the end of the Doha round.⁷

The Internet appears to be the best tool to solve the problems of gaining access to the information, if a central, properly indexed, repository web site were to be established in each country.

2.2 Domestic Regulation (Article VI)

In signing up to the WTO, governments have accepted legal obligations under the GATS of great consequence and deep effect. The Panel in the US-EU banana case found “..in principle, no measures are excluded *a priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services.”⁸

The Article on Domestic Regulation is in many ways a cornerstone of the GATS structure. Disciplines on domestic measures that affect trade in services form the *raison d’être* of the GATS. Much time and ingenuity has been expended on conceiving how to extend the existing language that calls for objectivity and removal of unnecessary burdensomeness.

At the heart of the debate on non-discriminatory regulation is how to balance the sovereign right to regulate, reflecting many different aims, against a key objective of the GATS which is to restrict trade in services as little as possible and in the least burdensome way where the quality of a service is to be assured. Article VI sets out the

⁶ In the GATS ‘measure’ “means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.” (Article XXVIII (a)) – a very comprehensive formulation !

⁷ Until so integrated, members are not to take measures inconsistent with the disciplines – a so-called ‘standstill’.

⁸ “European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States, Report of the Panel, Paragraph 7.285, page 361

starting point and has yet to be developed - in the meantime its precepts have to be observed where specific commitments are made: ie (a) based on objective and transparent criteria, such as competence and the ability to supply the services; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Developing countries are wary of any undue emphasis on amplifying or altering the GATS architecture by devising regulatory disciplines under Article VI, or inserting pro-competitive principles, which they feel has the effect of adding to the scope of negotiations.

As mentioned above, discussions are ongoing on how to develop operational criteria for the application of the principle of **transparency**, during and after law making, so that suppliers are not left in the dark or taken by surprise over the application of laws to their activities. Another issue of importance is how the '**necessity test**' will be used to determine whether measures to implement legitimate policy objectives are the **least trade-distortive** available when they have to constitute a necessary barrier to trade in services. The concept of '**legitimate objective**' is not defined - perhaps it would include the protection of consumers, the quality of a service (such as reliability, efficiency and comprehensiveness), and professional competence and integrity, all of which feature in the guidelines for accountants. The **regulators** have to be persuaded to take into consideration economic factors that drive gains from trade, and the GATS process has to obtain their 'buy in', and not so antagonise them that they block liberalisation.

Subsidiarity is seen as an important principle which has its place at the multilateral level, leaving governments free to observe principles in their own way to suit local conditions. So far the **precautionary** principle has not surfaced, though arguably prudential measures incorporate its aims, and the GATS has not defined the term prudential, for which a comprehensive exception was crafted in the Annex on Financial Services.

The concept of '**equivalence**' will also have to be addressed. This is in the context of the mutual recognition of qualifications, technical standards and licensing requirements. During an examination of each other's systems, two countries may conclude that although those systems are clearly different, for their purposes they can be deemed to be equivalent. It is more usual for this conclusion to be reached following some harmonisation of the underlying factors and procedures. Thus it will be necessary also to look at what **harmonisation** may involve. Lastly the field of **international standards** will be considered, how they are formulated, applied and recognised. The developing countries may find their application administratively burdensome, and they have precious little voice on the standard setting bodies, whether international governmental or in the private sector. This lack of equity has to be addressed.

The US has made a powerful case for increasing the pro-competitive nature of regulations, and for procedures greatly to improve the transparency of their formulation, legislation and enforcement. It has tabled explicit sets of guidelines for use in the financial services sector, and has probably sent those to all countries with its initial requests for further liberalisation. The input of their powerful private sector advocacy groups has left a clear imprint here.

Standards are of intrinsic and systemic importance to the WTO. However, the conundrum is that the WTO is not a standard setting body, and will only recognise so-called international standards, again left undefined. It presents a great challenge of managing the interface with the myriad bodies that create standards, and co-ordinating the handling of their impact on trade. This paper cannot go into the systemic problem for the WTO of handling this interface, and how their standards can be recognised in the trade context. There are also concerns about the legitimacy of such bodies due to lack of representativeness and even ‘capture’ by first-mover multinational firms.

2.3 Mutual recognition agreements (Article VII)

The adoption of international standards paves the way to bilateral and plurilateral Mutual Recognition Agreements (MRAs) whereby the equivalence of regulatory measures is accepted even though they may be different. In most of these agreements there is a mixture of ex ante and ex post rules and procedures. The private sector must accept that legal clarity, and with it, transparency, is greater where sovereign nations, rather than lower level authorities or private bodies, create the direct legal obligations for MRAs, so as to maintain the line on democratic accountability and ensure legal security, predictability and transparency within a coherent international legal framework. Private associations should be collaborative, however, in both the negotiation and implementation of MRAs, for which private sector expertise and closeness to market conditions is essential.

Developing countries look on MRAs as an exception to MFN and as trade distortive in relation to the movement of persons. They may propose a mechanism for co-ordinating and monitoring effective access to MRAs. Another view holds that it is intrinsically impossible to apply MFN to MRAs as they are negotiated bilaterally at the outset, or among a few well-matched participants at most. Thereafter any expansion of membership has to proceed one country at a time to enable sufficient examination of standards and procedures to be successfully concluded either on the basis of full harmonisation, or partial harmonisation with acceptance of equivalence for the remainder.

The issues related to the mutual recognition of professional qualifications are described in Annex 2.

2.4 The completion of the GATS framework

At its inception, the main intent and structure of the GATS was well articulated - progressive liberalisation of international trade in services will be achieved through successive negotiations. Essential political decisions are left to sovereign will. The way in which developing countries handle liberalisation can be very flexible.

However, the GATS was so new in conception and form, that by the end of the Uruguay Round some parts were left incomplete. They include emergency safeguard measures, government procurement and subsidies, on which not a great deal of progress has yet been made in Geneva. The position on each is noted in Annex 3.

3. Market access

3.1 Existing investments in services

Many WTO Members have called for the recognition of existing investment positions in already established foreign affiliates, or in the trade jargon, grandfathering. This is especially the case where the bindings in the commitments are more restrictive than the actual position allowed in the past. Investors do not want to be forced to disinvest, and consider they have acquired rights, though that term does not feature in the GATS.

3.2 Sectoral issues

3.2.1 Overview

At the end of the Uruguay Round over half the WTO membership made some commitments in the following sectors: tourism (128), financial services (106), business services (103), communications (99), transport (84) and construction (74).⁹ However, these bare numbers do not reveal their extent.

The WTO Secretariat concluded from its study of specific commitments in Modes 1, 2 and 3 that “access regimes tend to be relatively liberal for human-capital intensive activities, such as data processing, management consulting and news agency services which are destined mainly for business clientele. Entry into sectors of general infrastructural importance and/or consumer-oriented services, including financial and telecoms services, is generally subject to more restrictive conditions.”¹⁰ Sectors with relatively fewer commitments overall were courier, audio-visual, distribution, education, environmental, health, and recreational services.

Restrictions were targeted at the number of suppliers and the types of operation for specific sectors, whereas “limitations on the value of transactions or assets are predominantly horizontal”, presumably “influenced by economy-wide considerations and constraints.”¹¹

As for tourism, the largest and fastest growing service sector, trading partners do not need to be persuaded to open up their markets. Rather domestic liberalisation can be the issue.¹² There is much still to do to achieve liberalisation in the transport sector, which of course is crucial for all trade.

With services trade and investment overwhelmingly North-North, there is likely to be some positive movement in this setting on sectors little visited during the Uruguay Round. These include wholesale and retail distribution, software, energy and environmental related services, recreational and construction services, and more controversially, health and education. Also there is government procurement of a wide

⁹ Maximum number was then 140. ‘Market access: unfinished business’, WTO, June 2001 Chart IV.2, page 107.

¹⁰ Document S/C/W/99, March 1999, § 8 (iii).

¹¹ ‘Market access: unfinished business’, WTO, June 2001, § 11.

¹² For fuller discussion see ‘Market access: unfinished business’, WTO, June 2001, pages 130-2.

range of services as public authorities outsource to obtain more complex services and a bigger bang for their tax buck.

Union pressure and NGO policing of government moves to privatise essential public services such as health, education, prisons and other social welfare, the utilities (water, sewage, gas, electricity) and transport, will fend off liberalisation to a great extent in many countries. Canada, for example, has declared it will always ring-fence its public health service. Cultural services will remain a politically hot potato, and national sensitivities will set up road blocks on audio-visual and heritage related services, with foreign entry permitted only on a highly selective basis.

Clearly within each sector its own specificities are all important, but in an overview paper such as this there is a limit to the depth which can be described. Just a few examples are included to give an impression of the challenges to be faced in market access liberalisation.

3.2.2 Financial Services

It was the lack of consensus on financial services sector that nearly aborted, the conclusion of the Uruguay Round, even though agriculture and some other highly sensitive issues had been settled. Negotiations were left over and were only finally successfully concluded in December 1997.

Bearing in mind the systemic importance of the sector, and its specificities, Canada even suggested that the negotiations on market access should be separate from the rest and conducted in special sessions of Committee on Trade in Financial Services, though this has not been picked up. They and others stress the importance of developing close links with the regulators at the international level because trade is greatly impacted by their decisions, yet the GATS does not set regulatory principles and supervisory standards. The bodies involved include the Basel Committee of Banking Supervisors, the International Organisation of Securities Commissions, and the International Association of Insurance Supervisors.

There is also the International Monetary Fund to consider. It uses selected international standards in connection with its Financial Sector Assessment Program being carried out with 35 countries. It has recognized eleven areas and associated standards as useful for its operational work - and that of the World Bank. These include data dissemination, monetary and financial policy transparency; fiscal transparency; banking supervision; securities; insurance; payments systems; corporate governance; accounting; auditing; and insolvency and creditor rights.

For financial services there is a fuzzy boundary between Modes 1 and 2 for some products, and proposals to join them together have been tabled. Alternatively commitments should be in parallel for each of the two modes so as to achieve legal certainty.

The sector already has its own classification for sub-sectors in the Annex, and proposals indicate that it has stood up well and does not need changing at this point.

The sector also has its own Understanding on Commitments in Financial Services, which sets a much higher standard of liberalisation, including adoption of full national treatment, the elimination of discrimination in government purchasing and so on. About 30 Members¹³ have adopted it, including a few developing countries.

Switzerland has proposed defining prudential measures in a way that would reduce its coverage.¹⁴ This would be a really hot topic to handle, some would say even toxic!

There is no doubt that foreign investment in this sector in emerging markets adds much needed capital strength, best practice know-how, new technology, innovative products, consumer choice, and lower prices due to economies of scale and scope.

It is interesting to note that China made extensive pre-commitments for further liberalisation in its accession schedule. However, the Transitional Review Mechanism being conducted under its accession obligations reveals that recent laws have raised prudential requirements far above comparable countries. There remains also a lack of transparency and considerable bureaucratic discretion, particularly in licensing processes. Indeed some firms are still unlicensed even though they have fulfilled all the high (and in some cases redundant) solvency requirements, including a massive increase in branch working capital.

3.2.3 Telecommunications

Telecoms is an archetypal service for the modern world: nearly everyone wants to be a user either now or not too far ahead. Telecoms services act as enablers for productive activity in every corner of the globe. The content that pours through the physical conduits is a fast growing tidal wave that seems set to expand indefinitely.

Privatisation is proceeding apace, but for fixed line voice telephony the most durable monopoly relates to the 'local loop' - the pair of copper wires that go into the premises of organisations and homes. Until this is opened up to competition the sector cannot be fully liberalised. For mobile services - the fastest expanding part - the allocation of scarce frequencies (a public good) is a central issue, and how governments can best capture the monopoly rent potential, such as through the auction of third generation licences which netted the German and UK governments sizable windfalls.

Small countries, where the potential usage is low, find they cannot attract enough competitors and monopoly rents can still be exacted by the incumbent.

Leaving aside the technical standards and protocols at different layers of the physical and symbolic or conceptual inter-connections, some other issues are: universal service obligation, access to networks, inter-connection charges, price setting for better services such as ISDN, resale of bulk capacity, competition with Internet Service Providers, and Applications Service Providers. Accounting rates for terminating international calls are set arbitrarily in bilateral horse deals. They should be progressively reduced to reflect costs and not be a form of hidden aid.

¹³ Counting the EC as one.

¹⁴ See WTO document S/CSS/W/71, paragraph 20.

Continued negotiations after the end of the Uruguay Round on financial services and basic telecoms finally resulted during 1997 in significantly improved commitments being made by a number of countries.

3.2.3.1 Electronic commerce and the GATS

As one WTO Director General put it “the GATS commitments are the only guarantee of the right to supply services electronically” and he saw success for further liberalisation as enhancing the security of Internet business. Electronic commerce relies on a physical infrastructure for its ‘transport’ or distribution. The telephone networks are owned by public operators in nearly all countries, whilst the broadband Internet backbone structure is almost wholly privately owned. The users of the Internet may have to pay for their telephone calls one way or another, and for the services of an Internet Services Provider (though some offer their services free), but there is no direct charge to the individual consumer for the transmission process over the Internet. The owners of this structure charge business users and telecoms network operators instead.

Thomas Friedman wrote graphically that: “Jobs, knowledge use and economic growth will gravitate to those societies that are the most connected, with the most networks and the broadest amount of bandwidth - because these countries will find it easiest to amass, deploy and share knowledge in order to design, invent, manufacture, sell, provide services, communicate, educate and entertain.”¹⁵

Of course, electronic commerce is not a sector of itself, but comprises many inter-locking services. It greatly empowers suppliers, including SMEs, and individual consumers. The main beneficiaries initially are enterprises which can minimise their physical stocks, streamline their supply chains, reduce transposition errors on orders, provide closer customer support and so on.

The GATS standard ‘exceptions’ language removes from its disciplines various issues of vital concern to electronic commerce such as security of information and payments - including encryption, payment security, digital signatures, and escrow keys - immaterial money, privacy, child morality, decency, advertising standards, fraud, liability for faulty goods and services and the jurisdiction for consumer redress.

For GATS coverage there are three aspects to consider: direct delivery of services in digital form to consumers, the purchase of physical goods via the Internet which are then delivered in the usual way, and the activities of Internet Services Providers (ISPs). At present the GATS makes no distinction as to the different ways in which services may be supplied: it is technologically neutral. The application of the WTO rules, including the GATS, depends not on how a traded product is produced or delivered, but on its nature. In this context electronic commerce is one way of doing business amongst others: and for some sectors, for example financial services, access to computer networks is essential. There are many types of supply that are becoming greatly dependent on telecoms.

Many governments are undecided on whether, and how, to apply VAT to purchases over the Internet. The Doha Ministerial Conference agreed that “Members will maintain their

¹⁵ “The Lexus and the olive tree”, Thomas Friedman, HarperCollins, 1999, page 169.

current practice of not imposing customs duties on electronic transmissions until the Fifth Session” - ie the Conference in Cancun in September 2003.

3.2.4 Transport

In transport the developing countries have either weak or non-existent maritime and air transport fleets, relying on major foreign operators. They desperately need foreign management and know-how to equip and run their **sea and air ports**. They may make some further specific commitments including additional commitments for port services which earn valuable foreign currency. **Air** transport will remain mostly carved out of the GATS, and blue water **maritime** transport is highly competitive in the main for high volume bulk trade and the fast growing higher value container traffic. **Cabotage** traffic will be kept off the table.

3.2.4.1 Logistics services

The services infrastructure is crucial for exports of agricultural manufactured goods and minerals. An ‘export logistics cluster’ includes road and rail transport, port services, trade financing and insurance, telecoms and some business and professional services. If there are poorly functioning services, restrictive regulations, and inefficient state monopolies and so on, an effective protection rate is imposed far above that of any tariffs applied to the physical products traded.

3.2.4.2 Express carriers

The private express carrier firms complain that competition is not yet fair. The state postal monopoly may internally cross-subsidise its own services which compete with them. There may be burdensome charges on the remailing of letters assembled into bulk abroad for onward delivery individually in destination states. The onus here is on the competition authority to assure a level playing field.

The state postal service may have an old boy’s agreement for preferential treatment with the customs authority and the other agencies that check on parcels, not only to collect duties, but for reasons of public safety, decency, human and plant health risks and criminal activities. The couriers also run up against anti-competitive practices at airports for handling their parcels, and with state-owned airlines that give preference to carrying the national mail.

The inter-modal linkages between private express carriers and the state transport systems can be a source of friction, for instance for the air cargo legs operated by flag airlines, the operation of their own rail wagons on state tracks, and restrictions on the pick up abroad of loads by trucks for the return journey home.

There seems to be evidence in China that acquired rights are being cut back by new weight and rate limitations, with the provincial authorities entrusted to deal with applications, so in effect the postal authority is both a competitor and has discretion to authorise or reject applications.

3.2.5 Business and professional services

The key professional and business services range from the highly regulated legal and accountancy professions, to the architectural, engineering and planning professions which tend to be less regulated. Advertising and PR services, management consultancy, computer software are not much regulated, if at all.

The highly regulated, so-called 'liberal', professions will remain so, and mutual recognition agreements will remain stubbornly difficult to negotiate and agree (see Annex 2).

Developing countries will be wise to make commitments for the professional and business services both the regulated and those subject only to the general consumer protections and competition laws. Many enterprises need growing inputs of the high value added professional and business services. Local professional and business services firms in developing countries will need training in business and management skills from their counterparts with international experience.

The liberalisation for the specialist and engineering services allied to the utilities and environmental facilities¹⁶ will reflect the extent to which these industries are privatised, and where not, will depend on the degree of outsourcing of government procurement to the private sector and policies on national preference. Governments in developing countries will be looking at how to use their purchasing power to kick start the development of certain services and by so doing provide experience for the SMEs supplying them.

3.2.5.1 Computer software and consultancy

The issues arising in this field are in the main related to the workers rather than the regulation of their activities. There can be societal strains caused by the need to fill skill shortages from abroad, access for workers on short contracts, and even fears over brain drains.

3.2.6 Tourism and cultural services

The liberalisation of **tourism** is not so much to do with a few restrictive measures relating to tourist guides, but the development of hotels, restaurants, water and electricity supplies, and the liberalisation of a wide range of supporting services, from transport in many forms, to distribution and financial services. There must also be well presented **cultural** attractions and heritage sites to see and unique natural scenery and habitats to visit, in addition to leisure facilities and sporting events.

3.2.7 Construction and related services

Construction exhibits a wide range of features involving many aspects of the GATS. The classification of the sector puts it between goods and services, since it is an activity that produces material artefacts in the form of built structures. The process needs many types

¹⁶ The GATS sectoral list mentions sewage treatment, refuse and sanitation services.

of materials and equipment to incorporate in those structures. These are the purview of the GATT, and obtaining temporary entry of heavy equipment on a duty-free basis is of vital importance to the service, which then has to be re-exported afterwards.

The personnel involved include the engineering, architectural and surveying and other professionals, the managers and skilled site supervisors. The building workers can be numerous and semi-skilled and unskilled. Permitting the entry of high numbers of the latter can be of major social concern.

Construction firms in developing countries are virtually all SMEs, and cannot undertake major infrastructure contracts which therefore have to go to multinationals. So the focus has to be on sub-contracting with the transfer of technical and management skills, on how to plan large undertakings and use expensive and high-tech equipment, and on the testing of materials and constructed elements. Developing countries may want to modify their existing horizontal or sectoral commitments to achieve such aims, for which they should not be expected to pay compensation - in effect be given a waiver.

3.2.8 Distribution

Although the wholesale and retail aspects of distribution are quite distinct, many of regulatory issues arise from similar causes: the need for land and buildings which are controlled by regulations for town and country planning purposes and transport access.

Trade liberalisation will take second place to planning policies based on societal objectives and expressed through land use zoning and limits on numbers and size of super and hyper markets, and wholesale storage and distribution units. However, the regulations deemed necessary should be the least trade restrictive practicable, as required by the GATS.

3.2.8.1 Wholesale

Some service sectors have a wholesale portion that can be supplied cross-border. The regulations that undoubtedly can restrict this class of transaction are not usually targeted at the wholesale function as such but rather at wider policy aims. The transactions will be between enterprises that do not normally need to be protected as closely as individual consumers, if at all. Re-insurance and corporate lending by banks come to mind, and in many countries are fully liberalised. Resellers of bulk purchased services feature in sectors such as telecoms, travel related and transport services, and to some extent in the media (news and audio-visual). Energy related services are associated with reselling of capacity, but do not themselves have a wholesale stage.

3.2.8.2 Retail

Retail distribution in all countries comprises a sector predominantly of family and other small outlets, and the large groups only gain a foothold in developing countries as income rises, and then in the larger cities. Supermarkets and hypermarkets are usually constrained by local politics for licensing, and town and country planning zoning regulations. These restrictions are likely to remain in place.

3.2.9 Education and health care

In the education and health sectors, the likelihood is that the basic majority of provision will remain in state hands, and outside the GATS remit. However, nearly all countries allow private provision of these services in parallel to the public services. They are highly regulated and in developing countries mostly are on such a small or unprofitable scale as to be marginal and mainly catering for expatriates and a few wealthy and influential persons.

3.2.10 Environmental and energy related services

The EC and US propose definitions for new environmental and energy-related services not well catered for or absent in the services sectoral classification list of 1991.

Many developing countries will need to employ experts to advise on the impact on the environment of their plans to develop tourism, as well as the agriculture, extractive and manufacturing sectors. Environmental services are involved with local, regional and global environmental problems. Consultancy advice helps governments solve the tough issues posed by pollution, environmental degradation, tourist intensity and so on. The foreign expertise is not usually regulated.

The pace of privatisation and the degree of outsourcing affects the operation of water and sewage treatment, and refuse disposal facilities. Land use issues arise for sites where the processes are carried on. The degree of liberalisation will be subject to environmental standards.

Countries with oil and other energy resources will want advice from energy consultants. Their advice is related to the exploration, production and distribution of fuels, and the operation of the networks of the major utilities - such as for electricity, oil, and gas. Newer services comprise the operation of spot markets and auctions for the purchase of supplies. These services are not a prime target for regulations, even though the utilities themselves usually are.

4. Developing country issues

4.1 *Continuous graduation*

It is important to bear in mind that the WTO is a means to aid economic growth and development, and its disciplines are not ends in themselves. However, the rule of law applied to the means of increasing national wealth, is certainly an important feature that the WTO brings to the development scene. Neither is the GATS a development vehicle, even though the development dimension is better handled than in other parts of the WTO.

The flexibility in the GATS for developing countries has already been stressed. The framework incorporates a continuous graduation mechanism, and yet does not place countries into different categories. In that sense special and differential treatment is built in and does not have to be added as a distinct feature.

4.2 National economic plans

Before developing countries can settle on their negotiating stance in the GATS they have to formulate their national priorities and economic plans. They know that the services infrastructure is vital for higher growth rates in all sectors, and thus for social development and the elimination of poverty. They are adamant that their trading partners should not use a sledgehammer for market access opening due to sensitive and central social and development dimensions. Governments must stay in control of the sequencing, phasing and pace of trade liberalisation to match the underlying social, economic and regulatory imperatives.

A major problem in formulating their negotiating position is the lack of data on their own economy and services trade, the lack of cost benefit or other assessment studies on the impact of liberalisation and investment on development. Politically they have a serious optical problem to overcome due to the fact that almost the only funds forthcoming for the advanced services infrastructure emanate from a handful of multinational firms.

Their own firms are SMEs, with a preponderance of micro-enterprises, ill suited to face foreign competition or develop an export capability. Even in the advanced economies, the multinationals are a small proportion of firms, comprising merely 0.02% of the total in the EU for example. Governments should however be heartened by the fact that over 200,000 SMEs in the US are exporters. Some services provide an excellent chance for women to enter the labour force, a resource being wasted in many developing countries. The provision of micro-finance is an important for individual service sector entrepreneurs.

Developing country governments are also too aware that multilateral trade rules have alas not prevented disasters for some small countries reliant on the export of bananas, sugar and tuna fish. Indeed these governments resent being swept aside and compelled to swallow more than they bargained for in the Uruguay Round. Those that did not participate generally in that round for lack of resources, feel let down because they accepted the outcome whole.

Some economic analysts and NGOs suggest that the developing countries should emulate the policies implemented by the advanced economies when they were starting to industrialise. These included supporting national champions, protecting infant industries with import bans, quotas, and high tariffs, and subsidising exports.¹⁷

However, this analysis appears to ignore the paradigm change to the services and information economy, and the crucial role of high value-added inputs of professional and business services. Due to globalisation, the infrastructure is now networked and increased competition is unavoidable and ultimately beneficial. The services parts of the economy cannot be 'protected' by tariffs, nor much by quotas. The infrastructure sectors must connect, adopt international standards of performance, and attract foreign direct investment to leverage up efficiency and competitiveness. Service sector workers need a good education and knowledge of information technology techniques: they should create network links, and exploit export capabilities for niche outsourcing. Monopolies and

¹⁷ For more on this analysis, see 'Kicking away the ladder' by Ha-Joon Chang, of Cambridge University.

protected sectors should only remain so while they are upgraded and made competitive, otherwise they hold back the whole economy. Aid may be needed to cover the adjustment costs of such restructuring.

4.3 Service export interests

It is important that developing country governments study what their services import and export interests are, and prioritise them, so as to draw up appropriate conditions for inward foreign direct investment, and formulate requests related to their export interests. Most have long been focusing on what they can gain from inward investment and will want to leverage its benefits even further. They should examine their neglected services export interests, some of which also need the benefit of the transfer of technical and management know-how.

Work done over recent years primarily for the International Trade Centre (ITC) in Geneva (the offspring of the WTO and UNCTAD) shows clearly that: “Despite their smaller size and more limited resources, many services firms in developing and transition countries are already successful exporters. Although government officials in these countries often focus primarily on tourism and the movement of labour, their private-sector services firms report a wide range of profitable export activities.”¹⁸ Governments overlook “the rapidly expanding South-South services trade. Regional integration agreements also continue to support growth in services exports by liberalising market access and national treatment within regions, and by encouraging alliances among services firms in development and transition countries.”

The ITC booklet gives examples of services currently exported by developing countries, of which 15 or more are already exported by most, and a further 20 or more by some.¹⁹ The preponderance of these are in the ‘Business and professional services’ sector, probably most of which are rendered to business firms rather than to private consumers. This is an important trend for governments to note, as is pointed out “In developed economies producer services average at least 50% of total services production, with a value at least double that of manufactured outputs.” “Information technologies, coupled with telecommunications, have made virtually all services tradable through one mode of supply or another” and these “information technologies are supporting the unbundling of production and consumption, thereby allowing for more specialised producer services inputs” and organisations are increasingly “outsourcing their non-core producer services inputs” which create “new producer services opportunities.”

Governments of developing countries should also be aware that the diaspora of their countrymen abroad can be an important export resource. Those individuals who become successful businessmen abroad often invest in their home country, and stimulate commercial skills lacking there, by setting up subsidiaries and joint ventures. Skilled workers travel in both directions now that transport and communication costs have decreased, which is an added value dimension to the still important but traditional flow of remittances back to developing countries.

¹⁸ Quoted from the invaluable booklet ‘Business Guide to the General Agreement on Trade in Services’ revised edition, ITC, Geneva 2000. It was written by Dr Dorothy Riddle, President of Service-Led Growth Consultants, Inc., Vancouver, Canada.

¹⁹ Ibid. See its table 6 on page 9.

Presumably any increase in North-South trade and investment in their infrastructure services will depend on the perceived investment climate in developing countries, as well as the level of GDP per head. Crucially tourism is bound to increase - terrorism permitting - since in the main it is unfettered from government measures, apart from those making air fares too high. However, tourism does greatly depend on the state of the local infrastructure services.

South-South trade in services will increase faster than GDP growth as the burgeoning regional trade agreements implement opening up, connect transport networks, and harmonise procedures and standards - and even usher in common currencies. All are influenced, of course by the usual trade determinants of proximity, history, language, customer tastes, business methods and so on.

4.4 The Movement of Natural Persons - worker mobility

The temporary entry of workers to supply services is of major concern to many Members, even though the statistics show that the foreign currency earnings from such cross-border trade are a small proportion of the total. The way this so-called Mode 4 is defined is rather woolly. It is clear that it includes employees of firms going abroad to assist with the supply of a service where their firm is not established, usually as part of a contract for services, and also the self-employed in the same way.

It also includes foreign workers who are employed by foreign affiliates which constitute Mode 3, commercial presence. However, some even contend that it includes foreign workers employed by firms wholly owned by nationals of the host country - and even domestic workers.

The asymmetry between advanced and developing countries is perhaps most stark in Mode 4 where there are far fewer commitments than any other. They mostly relate to professional and managerial or expert business persons employed in the commercial presence affiliates ie Mode 3, where there are most commitments.

The advanced economies are experiencing labour shortages at all levels of skill. Some of them are actively seeking recruits in technical and medical fields from developing countries sources. Indeed private and public services already have begun to rely on unskilled foreign workers where such work does not appeal to those nationals who are better educated and trained.

Economic needs tests also often restrict the entry of workers, as discussed later in this section.

4.4.1 Semi-skilled and unskilled workers

The developing countries do not have the capital and expertise to set up subsidiaries abroad, but their semi-skilled and unskilled workers are numerous and have the comparative advantage to exploit of lower pay rates. This differential is the very foundation on which the win-win of trade liberalisation is based.

There are many sectors where semi-skilled and unskilled workers are needed. They include health care, hotels and restaurants, construction, building cleaning and civic services such as street cleaning and refuse collection, increasingly being outsourced to the private sector.

4.4.2 Immigration and the temporary movement of workers

Immigration authorities and labour ministries will be put under acute pressures by the growing need in the service sector for personnel to travel abroad to supply services, whether through subsidiaries established abroad or to assist the supply from the home base. The issues raised by the entry of migrant workers can have broad political ramifications as the successive referenda in Switzerland testify. Clearly the remit of the GATS is far removed from the issues of mass migration and the acceptance of refugees fleeing persecution and seeking asylum. However, the same authorities are involved in controlling the movement of workers who wish to be present only for a year or two, as well as those who aim to become permanent residents.

Governments have a range of policies and techniques for approving entry terms for each individual, as persons cannot be treated in groups like classes of identical goods products. In some service sectors foreigners are banned from working, in others only enough are permitted entry to satisfy insufficient local supply, and conditions for issuing visas and work permits often include specific requirements about location, sector, occupation and employer.

The WTO Secretariat identified 38 MFN exemptions specifically applying to the movement of natural persons. Of these, 32 are of a preferential nature, and the rest cover reciprocal arrangements. Two cases refer to geographical zones, though without clearly defined borders, while one exemption covers an unspecified range of countries selected on the basis of language. In eight instances, reference is made to members of a regional organization which are not further specified, possibly implying that any future members would also be covered.

Immigration Ministries have everywhere been left in full control, and their procedures are not designed to differentiate between (a) foreign 'business' persons entering on a temporary basis for work, and (b) those foreigners seeking employment in the labour market, or migrating with the intention of permanent residence, and even change of nationality. One problem is that 'temporary' is not defined in the GATS, and can last from months to a few years. It will be a big challenge to separate out temporary business presence from immigration.

The GATS disciplines will put pressure on the authorities to review their policies, since quotas and economic needs tests are prohibited, and to greatly simplify and speed up their procedures for approving and processing visas and work permits.

The activities for which business visitors may be admitted can be simply described, even if they cover a wide range: examples would be research and development, marketing, sales, distribution, after-sales services, professional, management and supervisory activities, PR and advertising, tourism related activities and translators and interpreters. The professional categories can include not only the traditional liberal professions, but

also economists, computer analysts, consultants in agriculture and forestry, librarians, scientists, teachers and so on. There might be a need for a separate category for traders and investors

The overall aim is to facilitate on a reciprocal basis the temporary entry of persons in relation to the supply of services. In all cases transparent criteria and procedures for temporary entry need to be established that avoid unduly impairing or delaying trade in services or the conduct of investment activities. To succeed in this aim it is necessary to develop and adopt common criteria, definitions and interpretations for implementation. These might include internationally agreed definitions of occupations as set out in the ILO publication “International Standard Classification of Occupations” that covers all skill levels. Any grant of temporary entry can only be for those who are otherwise qualified for entry under laws relating to public health and safety and national security. Persons refused entry should be notified of the reason in writing, and the fees for processing applications limited to the approximate cost of the vetting procedure. A consolidated document containing explanatory material regarding requirements for temporary entry should be published, and data on the grant of temporary entry collected and made available to signatories.

The administration of visa regimes could be streamlined and specific commitments made for the automatic issue of visas, or of visas permitting multiple entry, for specified categories of occupation in the sectors selected and agreed for trade-related movement. A ‘GATS visa’ might be evolved to allow expedited entry clearance for persons with technological skills which are in short supply. The same approach could apply to the issue of work permits.

As human capital is so important in the equation of the movement of the factors of production, and mutual recognition agreements such a brick wall, some system of defining various occupations and skill levels will have to be devised, so that the education types and levels can be accredited as deemed equivalent. The GATS Article VI.6 requirement on procedures for verifying the competence of professionals will have to have some life breathed into it as well.

4.4.3 Private sector proposal for a fast track procedure

At the WTO-World Bank symposium on the ‘Movement of Persons’ in April 2002, a private sector proposal was made for a ‘fast track procedure’ to enable certain types of employee to enter a jurisdiction temporarily to work for subsidiaries or on contracts for the supply of services - in effect a ‘GATS work permit’.²⁰ It also called for improved transparency on visa procedures and criteria for the operation of economic needs tests. A Model Schedule was tabled by which means WTO Members could implement such a scheme. This schedule has been endorsed by the European Services Forum and is supported by the US and Hong Kong Coalitions of Services Industries and the Keidanren of Japan.²¹

²⁰ “The Protagonists’ View”, presented at the WTO-WB Symposium by Mark Hatcher, PricewaterhouseCoopers, London - the rapporteur on the Movement of Natural Persons for the European Services Forum.

²¹ The Japanese Federation of Economic Organisations.

4.4.4 Mutual recognition of regulated qualifications

Many of the professions are key to the functioning of modern society. They are highly regulated both so as to protect consumers and society at large, and also to prevent monopolistic feather bedding and exclusion. There are a plethora of licensing and registration procedures differing from one country to the next. A detailed look at how mutual recognition agreements are formed is given in Annex 2.

4.5 Economic Needs Tests

The GATS does not define economic needs tests (ENTs), nor provide criteria for their application. The operation of ENTs can lack transparency and be discriminatory, render market access unpredictable, and form a significant barrier to trade in services. Many self-elected criteria are in use such as adequacy of local supply, the needs of the population, age, geographical spread, the death rate, and so on, which can at once be uncertain, inconsistent and subjective.

The main aim here will be to gain more transparency, and reduce the scope for discretion which might hide discrimination.

Some developing countries have asserted that their use is legitimate as an important policy instrument for ensuring the accrual of maximum benefits in selected sectors of developing countries' economies, and providing for stable market conditions.

They appear predominantly as limitations on market access and the movement of natural persons (ie Modes 3 and 4), in that they restrict the entry of foreign suppliers by reference to the extent of local supply. Their rationale varies from protecting jobs for local workers, to avoiding social or ethnic imbalances, and can be very sensitive politically. Perhaps some sectors were inscribed to increase the apparent coverage of commitments, and then their commercial value curtailed by the inclusion of ENTs ?

There are various proposals to deal with ENTs for Mode 4: the principle ones rely on greater transparency, and the negotiation of exceptions for specific categories of occupation, based on the ILO International Standard Classification of Occupations, in specified sectors. Options for dealing with ENTs for Mode 3 principally include working up a definition, rules on transparency and ideas for their operation according to agreed criteria.

UNCTAD proposes that countries bind the sectors or sub-sectors where ENTs do not apply, and the types of personnel and occupations which are not restricted by ENTs. Other ideas include the creation of a 'Reference Paper' to improve the transparency of the operation of ENTs by establishing the principles and detailed standard criteria to be applied, so as to move towards reducing discrimination. The policy objectives, duration, tests and administration of ENTs might have to be notified to the WTO.

Common definitions and terms should be developed for key business personnel and intra-corporate transfers, and transparent procedures developed for co-ordinated treatment under the different modes of supply.

It should be noted here that ENTs are a form of safeguard which protects local jobs: safeguards are discussed under Article X *Emergency Safeguard Measures* in Annex 3.

4.6 Assessment of trade

An ‘assessment of trade in services in overall terms and on a sectoral basis’ was mandated in GATS Article XIX.3, and has been placed as a standing item on the agenda of the Council for Trade in Services. As part of the preliminary exchange of information in 1998, the WTO Secretariat produced papers on twenty service sectors, and one each on the presence of natural persons and electronic commerce. In November 2001 the WTO Secretariat prepared a paper on the ‘potentially relevant considerations and criteria’ for an assessment of trade, which focuses on changes affecting individual services markets and the potential impacts on relevant policy objectives, such as prices, quality, equity and so on.

It is noteworthy that for this assessment of the degree of liberalisation, not only are immaterial services under examination, but pervasively also supremely intangible perceptions on investment climate within countries: a kaleidoscope comprising political stability, public order, good governance, control over inflation and fiscal affairs, the level of macro-regulatory structure and the independence and competence of the competition authority and the sector regulators (especially in telecoms and financial services), and the courts and legal due process - and more. And then even if the framework is liberal, will more international trade in services result? This depends both on supplier entrepreneurship and market potential, and on the balance between risk taking and reward.

Decision makers are often in the dark due to the lack of studies on the impact of trade liberalisation on development economies. Econometric modelling techniques have not yet developed ways of accounting for the variegated array of services, and thus the value of the emerging methodology for sustainability impact assessment studies cannot yet be relied upon. Data on much of the services activities and products is just not collected. Where they are compiled, they are not in a form suitable for drawing conclusions through making inter-country comparisons.

4.7 Autonomous liberalisation

The negotiations have to establish “modalities for the treatment of liberalisation undertaken autonomously by Members since previous negotiations.” The challenge will be to agree on criteria. The benefits of any autonomous liberalisation will vary as between trading partners and in principle it seems difficult to value on an MFN basis, which the negotiating guidelines here mandate when it comes to the binding of specific commitments. Some think a clear solution does not seem feasible.

It will also have to be decided whether the value of unbound liberalisation - available to all WTO Members under the MFN principle - should be taken into account in some way.

Developing countries will have to be given sufficient assurances on liberalisation of interest to them that induce them to bind their positions, most likely as phased pre-

commitments in a long time frame. They will seek criteria for such recognition to ensure that each is a net beneficiary in terms of credit for these efforts.

No doubt OECD countries will maintain that transparency and legal stability for autonomous liberalisation can be secured only when such measures are bound, and only thus will contribute to further expansion of trade in services.

4.8 *The plight of the newly acceding countries*

The single file accession process for membership of the WTO demonstrates that when developing countries are not able to hang together, they have been hung separately.

In the liberalisation negotiations the cause of developing countries could be strengthened if they could form groups to create negotiating leverage. Perhaps also they could put together effective market size so as to attract investment, by approximating their autonomous liberalisation and making coordinated bindings for the essential elements.

As a start there was good liaison among the eight WTO newly acceding members during the Doha Ministerial Conference, but this has not yet been followed up.

4.9 *Blocking tactics*

What tools do developing countries have for blocking results they perceive to be undesirable, or fall short of their aims? There are a few potentially powerful methods available which will enable them to hold up closure and ensure that due attention is given to their primary interests. The set of rules for emergency safeguard measures is a major one. More amorphous, but politically resonant for gathering them around the flag in battle, are (a) the assessment of the impact of liberalisation - so developing countries can feel sure about what they are letting themselves in for - and (b) their due receipt of credit for autonomous liberalisation introduced since the Uruguay Round schedules were bound.

As we have seen, all three areas are plagued by uncertainty as to cause and effect, and a lack of useful data, whether due to its absence, or its incompatibility arising from differences of definition, classification and coverage, which nullifies inter-country comparisons.

Another strong rallying point is to be found in the provisions of GATS Article IV *Increasing Participation of Developing Countries*. The issues are of great and real importance for their social and economic development. They include the strengthening of their domestic services capacity, efficiency and competitiveness, their access to distribution channels, and information on the commercial and technical aspects of the supply of services, and on the availability of services technology.

The drawback is that the language in this Article is hortatory, and the keys lie mainly in the hands of the private sector suppliers, not the governments which signed the GATS. Perhaps governments in the richer countries might provide incentives to firms headquartered there to transfer technical and managerial know-how to SMEs in

developing countries - but this seems difficult, if not unlikely, on various fiscal and public policy grounds.

4.10 Human capacity

Human capacity is the major challenge facing developing countries, in formulating their national plans, their negotiating stance and involving themselves in the ongoing WTO negotiations, of which the complex GATS is only part. With agricultural, textiles and minerals exports, for example, far outweighing current services exports, and often a deficit in services on the current account, it is understandable why GATS issues often take a lower priority. It is vitally important for the future of the WTO and GATS that developing countries be party to the creation of rule making, even if for a while they are not directly too constrained by its obligations. However, they must not become second class members, with lesser rights, benefits and obligations

The GATS negotiations are very information intensive, and new officials face a steep learning curve. It is therefore of key importance to maintain continuity of officials for policy and implementation so they can develop their expertise and be motivated by interest in the challenges. Technical assistance is a built-in pillar of the negotiations and donor aid for capacity building must stress the need for long-term development of officials without harming their promotional career path.²² The time that this takes forms a critical bottleneck, which conditions the rate of progress. Moreover, a further bottleneck lies in the lack of services expertise in the official organs that provide technical assistance such as the WTO Training Institute, the WTO Division on Technical Cooperation, UNCTAD, UNDP and even the World Bank and IMF. The consequent continual call on the WTO Trade in Services Division is now creating intolerable pressure on that dedicated small team.

5. Negotiating modalities for services

5.1 The negotiating guidelines: more rules or less?

The WTO represents an advance of international law as a strategic objective, with the balance still in favour of more rules rather than less. However, the GATS is going to test further the extent to which such rules should emanate from the multilateral level or be left to sovereign governments under the principle of subsidiarity. Nations have the choice to abide by the principles, and rules derived from them, and remain in the membership, or not. For each it is a question of the balance between rights and benefits acknowledged by their equals under Treaty, and the constraints which the consequent obligations impose on their room for regulatory and commercial manoeuvre.

That is the broad context within which the services negotiations under the GATS will take place: they have to promote the interests of all participants on a mutually advantageous basis and secure an overall balance of rights and obligations. That was set out in March 2001 when the Council for Trade in Services adopted "Guidelines and procedures for the negotiations on trade in services." Later in November at the Doha Ministerial Conference they were confirmed. They specified that the negotiations will be

²² Though if pay is too low, many may defect to the private sector.

conducted in ‘Special Sessions’ of the CTS and “shall take place within and shall respect the existing structure and principles of the GATS” and that “there shall be no a priori exclusion of any service sector or mode of supply.” These Sessions have to be open to all Members and acceding States.

5.2 Request-offer approach for market access

The guidelines laid down that “Liberalisation shall be advanced through bilateral, plurilateral or multilateral negotiations” and “the main method of negotiation shall be the request-offer approach.” The starting point for the negotiation of specific commitments “shall be the current schedules without prejudice to the content of requests”.²³ Credit is to be given for autonomous liberalisation undertaken since previous negotiations, and criteria developed prior to the start of negotiation of specific commitments - which if taken literally would mean by the end of March 2003, though this looks unlikely to be achieved.

Exemptions from MFN have also to be negotiated. The founding Members of GATS agreed that “In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.” They grant more favourable treatment in the situations specified, and often relate to bilateral agreements between neighbours, or for the reciprocal recognition of qualifications, standards and so on. Others however, relate to sensitive cultural and social matters, and many look as if they are intended to be of indefinite duration. The sectors with the most exemptions are transport, especially maritime, communication (mostly audio-visual), financial and business services. As required by the GATS, they were reviewed by the negotiators during 2000.

5.3 Increasing participation of developing countries

There are references to the needs of developing countries throughout the guidelines, starting with the negotiating aim “to increase the participation of developing countries in trade in services”, and that “special attention shall be given to sectors and modes of supply of export interest to developing countries.” As to the retention of MFN exemptions, “appropriate flexibility shall be accorded to individual developing country Members”, and “consideration shall also be given to the needs of small service suppliers of developing countries.”

To aid the formulation of their trade policies, the Council for Trade in Services has to “conduct an evaluation, before completion of the negotiations, of the results attained in terms of the objectives of Article IV.” Essentially this means that the economically advanced countries should make specific commitments that help to strengthen the domestic services capacity, efficiency and competitiveness of developing countries through access to technology, distribution channels and information networks, and also that the latter may stipulate conditions “when making access to their markets available to foreign service suppliers .. aimed at achieving the objectives referred to in Article IV.” To help their small delegations in Geneva, the scheduling of meetings are to be “in sequence and not in parallel.”

²³ In the case of the maritime sector, where negotiations failed, and MFN does not yet apply, the starting point will be the offers then tabled.

5.4 Deadlines, stocktaking and implementation

The deadlines set at Doha for the GATS negotiations were that the initial requests be issued by the end of June 2002, and initial offers by the end of March 2003, whilst conclusion would be with the whole Doha Development Round at the end of 2004. The Ministers at their next Conference in Cancun, Mexico, on 10-14 September 2003 (in the words of the ‘Ministerial Declaration’ of 14 November 2001), “will take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary.” Finally “when the results of the negotiations in all areas have been established, a Special Session of the Ministerial Conference will be held to take decisions regarding the adoption and implementation of those results.”

5.5 Negotiating proposals

During the years 2000 and 2001 55 countries tabled proposals, totalling over 140, on their aims for the liberalisation of particular sectors, for the further framework disciplines, and ways to enhance the efficiency of the negotiating process.

5.5.1 Fresh liberalisation: how much?

Unlike industrial products, where it is possible to see clearly when a tariff rate is zero, it is less clear whether regulatory measures form barriers to trade or not. Therefore there have been no proposals urging ‘zero for zero’ in any service sector. Indeed some critics of the request-offer procedure see it as inappropriate in the context of negotiating rules of common application. It does not make sense to trade-off regulatory measures which have aims superior to trade such as social development, the protection of consumers, contestable markets and so on, surely advantageous for everyone. My own phrase, coined to describe it is “meaningless mechanistic mercantilism”! Even with the GATT it has been less effective since the late 70s when non-tariff barriers became more significant and tariff levels for many products fell.

5.5.2 Tactics for requests and offers

Clearly the content of requests is easier to decide upon than setting the level of initial offers. Requests can be formulated mechanically if a developing country is not clear about its current services exports and the barriers they face abroad. The initial offer may only signal the intent to negotiate, and negotiators may hold back the content of their final offer as negotiating coin, perhaps for linkages with other sector aims, such as in agriculture, textiles and so on. It appears so far that developing countries may not be making requests to each other out deference to group solidarity, yet in commercial reality their SME services exporters face problems in South/South trade just as elsewhere.

Perhaps there should be an amnesty for the developing countries which failed in the Uruguay Round, due to administrative errors and manpower deficiencies, to inscribe Article II exemptions for existing bilateral and other agreements, or to indicate horizontal limitations in their schedules of specific commitments the conditions in their investment laws specifying that investors must train local staff and transfer technology.

Uganda tabled a proposal in March 2002 on behalf of the 30 or so LDC Members of the WTO that they should not be faced with requests to make specific commitments in more than four sectors. The proposal called for the governments of the developed economies to encourage their suppliers to declare their interest in investing in these sectors, and to commit to transfer technology and know-how by suitable training. These governments should also open up their own sectors of specific export interest to LDCs, and report regularly on the evolution of trade in them, and assist the LDCs in assessing its impact and that of any associated regulatory reforms.

Speculating on why the negotiating agenda of developing countries differs from that of the OECD group, an OECD booklet²⁴ points to “tactical bargaining considerations in the WTO as well as the power of vested interests in government and in import-competing sectors. However, it also reflects the legitimate concerns of many developing countries regarding their lack of appropriate regulatory regimes and institutions, weak technical capacities, poor market information, difficulties in meeting product standards in export markets, and the need for significant upgrading of human resources.”

The challenges for developing countries include assessing and measuring the current economic realities, formulating national plans and sectoral policies to take account of the growing importance of services, the negotiation of national interests in Geneva, the coordination of them with like minded nations, and competently implementing obligations bound in GATS schedules. Many will probably both cede liberalised positions in practice, and largely bind them, in the hope of attracting inward investment for badly needed facilities, and to benefit from the transfer of technology, sector know-how and business management skills. There is a fine balance to be struck between laying down requirements for the latter transfers and frightening investors away altogether: that is between the benefits retained in the country, as opposed to those for investors.

Developing countries may only want to make requests if they discover that their export interests are being thwarted by specific laws in particular countries. They will have to carry out surveys of their exporters to obtain this information. There is anyhow the possibility that these problems will have been detected by other countries and appropriate requests made, and the developing countries will benefit under the MFN principle from offers finally bound as a result.

5.5.3 Formulae

Ways to facilitate the negotiations, and to save the time of hard pressed officials, have been suggested. These include model schedules - such as that for maritime and port services which gained much credence towards the end of the Uruguay Round; lists of related services that need to be liberalised in tandem - the so-called core and cluster approach; and a matrix of agreed categories and skill levels of workers to be permitted temporary entry in relation to GATS commitments.

Proposals include developing further sectoral reference papers - such as that signed on to by about 60 countries for basic telecommunications, which introduced elements of competition-related disciplines for the first time. Even more liberal would be sectoral

²⁴ “GATS: The Case for Open Services Markets”, OECD, Paris, 2002.

papers modelled on the Understanding on Commitments in Financial Services, with its much higher level of commitment, including national treatment. Both of these are optional, either as a whole, or in part, and a number of developing countries have adopted them, so they might be open to adopt further such papers.

The developing countries have an aversion to any 'blanket' moves smacking of the top down, or negative listing structure being imposed on them. This is particularly acute where proposals link a range of services together in 'clusters', listing one or two core services and a penumbra of others for essential joint outputs and necessary inputs. The extreme of this approach was seen in proposals by the proponents of electronic commerce, since so many different services are involved in the supply chain.

The mutual recognition of professional qualifications is a particularly tough nut to crack, as decades of EU experience demonstrates, and more recently the lack of progress under NAFTA. The few examples that do exist were only achieved after great expenditure of the time of highly experienced practitioners and academics who minutely inspected each others' educational establishments and professional institutes, their structures, courses, exams, procedures and practice. Such concentrated and lengthy use of scarce resources may lie beyond developing country capabilities for some time to come, whether in their regional trade agreements or at GATS. Perhaps capacity building aid could help here.

6. Regional Free Trade Agreements

6.1 WTO Committee on Regional Trade Agreements

Much work has been done over the past few years in the WTO Committee on Regional Trade Agreements examining numerous regional trade agreements (RTAs) that have been notified, though not all have been. Their number is thought to be about 250 and rising perhaps to 300 by the end of 2005.²⁵ The flexibility and 'creative ambiguities' in the WTO agreements have made it difficult conceptually to draw the line between what is WTO compatible and what not. In fact disagreements on such matters have impeded progress, and so far there is no consensus on any important issue. Yet it is important to know whether any particular RTA is trade-creating and cost-reducing or trade-diverting and distorting, and endeavour to bring all into compliance with the over-arching multilateral WTO disciplines and rules.

6.2 Regionalism as Plan B?

Some governments see that the multilateral process at the WTO is lengthy and not very ambitious, and they can gain more from deeper integration with their neighbours and main trading countries. They may also fear that the Doha Round has such a wide scope, is so complex in parts, and that consensus among the many nations is so difficult, that they need a Plan B in case of deadlock. The danger is that the effort and time of trade officials being spent on the RTAs is actually so detracting from their input into the

²⁵ WTO document WT/IPR/OV/8, 15 December 2002.

Geneva process, that the WTO process will be fatally undermined. The insurance premium for Plan B may be too high.

6.3 National treatment in place of MFN

At the core of GATS Article V *Economic Integration* lies the highest liberalisation standard of all ie **full national treatment** - in all sectors and modes. This is what is required if an exception to MFN is to be granted. Many developing countries have opposed the top down, or negative listing approach in the GATS, so perhaps this penny may not have dropped? Or do they feel that the GATS aim of flexibility for them will permit swathes of derogations for an indefinite future?

6.4 Asian FTAs and services

It appears that in Asia, in both the ASEAN and APEC contexts, there has only been slow progress. Perhaps the addition of new members in ASEAN has pushed the goals for services liberalisation back. Despite this ASEAN is talking to some third countries about FTA relationships. Perhaps a trade bloc including China will emerge to match those centred on the US and EU. However, the Asian region is highly dependent for trade and investment on the latter two blocs: so FTAs cannot yield the whole answer. All three blocs must support the multilateral WTO to deliver freer trade worldwide.

6.5 Bilateral FTAs

Singapore has pioneered initiatives in Asia to form bilateral FTAs, starting with the US. Such pacts grant preferential access to markets of the major economies, and hopefully will defuse future trade disagreements by locking in strong partnership links.

7. Two 'Singapore issues': investment and competition

7.1 The Havana Charter

The linkage between trade, investment and competition is not a very new subject for discussion at the multilateral level.

The record of the United Nations Conference on Trade and Employment which took place in Havana, Cuba from November 1947 to March 1948, set out the 'Havana Charter for an International Trade Organisation'. Its Chapter V Restrictive Business Practices, in Article 46 'General policy towards restrictive business practices' stated that "Each Member shall take appropriate measures and shall cooperate with the Organisation to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade ..". Under its Article 12 'International investment for economic development and reconstruction' Members would have undertaken "to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investment, and to give due regard to the desirability of avoiding discrimination as between foreign investments."

7.2 Trade and Investment

On its entry into force, the GATS was hailed by the then WTO Director General as the first global multilateral investment agreement because it covers the setting up of ‘commercial presence’, and every possible means of supplying a service within the market. However it does not contain a number of key features of bilateral investment treaties (BITs). They usually cover a wider range of investments,²⁶ they establish the right to take invested and built-up capital out again - with a choice of convertible currencies, the right for payment in case of confiscation, privatisation and war damage, and entry for third country personnel as employees. Importantly they include investor-state dispute settlement provisions.

The EC has for a long time maintained that the case for the correlation between trade and investment is proven, and that the WTO is the appropriate forum to cover the issue. It points out that BITs are not transparent, and UNCTAD is not the suitable forum as it lacks a binding system for arbitration, and dispute settlement, and its focus is on issues for developing countries. The inefficient and non-transparent array of BITs and Friendship Commerce and Navigation agreements should be superseded, by involving a far wider group of countries than OECD Members. This is desirable to avoid unfair practices and defuse trade frictions in many quarters, and preclude further market distortion, misunderstanding and confusion. The newly industrialised economies and developing countries are attracting a growing share of world outward investment, and the most dynamic ones are themselves emerging as increasingly important sources of foreign direct investment.

The Doha Ministerial Declaration in the section on the ‘Relationship between Trade and Investment’ recognised “the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity building. This is to include policy analysis “so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development.” It went on to say that the Working Group on the Relationship between Trade and Investment should “focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members.” After listing other aims, some related to developing countries, it added that “account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.”

It does seem possible that negotiations could be launched after Cancun to form a free-standing agreement on investment for adoption by all Members under the WTO framework. This would not change the GATS in any way. It would probably include a broad assets-based definition of investment (though excluding portfolio holdings), and feature the basic principles of MFN and national treatment to apply post-establishment.

²⁶ Tangible and intangible assets relating to: trade in tangible products and services, foreign tangible goods producers, and trading services suppliers, including direct and portfolio investment, but excluding assets not related to such trade or production (eg for individual use).

Higher standards of investment protection would be permitted in domestic law, and under regional and bilateral agreements. Transparency of laws and procedures relating to investment would be covered, and the need for transparent and equitable appeal procedures. The standard WTO dispute settlement mechanism would apply, being available only to Members.

This will no doubt disappoint the ICC which called also for a high standard of investment protection (against nationalisation and expropriation), a comprehensive transfer of funds provision, the inclusion of ‘shares, stocks, bonds and debentures’, and an investor-to-state dispute settlement procedure.

7.3 Trade and Competition

The Doha Ministerial Conference set up the Working Group on the Interaction between Trade and Competition Policy. It is to “focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions of hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.”

The combined impact of deregulation, privatisation and globalisation, have brought these issues to the fore in industrialised and developing countries alike. There are no multilateral rules governing the terms on which firms may compete, and that provide a secure market structure for fair competition.

Trade liberalisation alone for services is not achieving its aim in many areas due to the presence of monopolists and the anti-competitive practices of dominant suppliers. In many cases they are exempt from competition laws, the regulators are not independent, or there are no regulations at all. Many forms of state aid fall outside the limits of competition policy. Due to the need for commercial presence in their markets abroad, services suppliers are especially impacted by such problems.

Many state-owned monopolies are allowed to compete directly with private firms, for example the postal and telecoms services, national airlines and shipping companies. Since the bulk of their markets are protected by the state, there is room for cross-subsidisation. Such exclusive franchises clearly prejudice the private sector, in that they exclude competition, wholly or in part. This is especially gratuitous in situations where no ‘natural’ monopoly arises from physical infrastructure limits such as constrain some utilities, airports and docks, and wireless frequencies. These state entities are also often protected politically by powerful ministers and their families.

Although competition policy as such falls outside the GATS remit, under its Article VIII on Monopolies and Exclusive Service Providers governments have to ensure that where a “monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights .. [it] does not abuse its monopoly position” and this injunction also applies where “exclusive services suppliers” are authorised or the law “substantially prevents competition.” This feature has attracted little discussion.

The GATS Article IX covers Business Practices, but it holds no disciplines. The developing countries are concerned by many private anti-competitive practices, such as exclusion from networks, predatory pricing, abuse of dominance by various means and the misleading use of information.

The aim of competition policy should be to control anti-competitive practices and to remove statutory and privately erected barriers to entry into a market. Healthy competition should be assured so that state and private firms are prevented from gaining dominant positions at the expense of others. There should be minimal, or no, exemptions for regulated industries, or other exclusive arrangements sanctioned by governments. State aids including incentives and internal cross-subsidisation, should not be allowed to affect trade adversely. Measures should discipline domestic policies that favour selected industries, including for government procurement. There will have to be co-operation between national competition authorities to deal with any adverse anti-trust practices of internationally dominant firms.

Judging by the work done at the WTO since the Singapore Ministerial in 1996, there seems to be a possibility of consensus on negotiating a binding multilateral agreement on competition policy and enforcement. Members would have to put in place suitable laws, during appropriate transition periods where necessary, which would include a ban on hardcore cartels: but generally laws would not be harmonised. Foreign affiliates would be accorded full national treatment. There would be transparency for the laws and their enforcement, and notification to the WTO. Voluntary cooperation would extend to information exchange both in general and on specific cases for enforcement. There might be best endeavours to provide long-term help on capacity building. Perhaps a regulatory toolkit could be devised to aid developing countries.

8. Annex 1: Business advocacy groups

In the UK as long ago as 1968, the Committee on Invisible Exports was set up, with some official support, to lobby for a greater awareness of the importance of service exports, and the improvement of official statistics on services production and trade. Later this became British Invisibles which created its Liberalisation of Trade in Services (LOTIS) Committee in late 1981 to ensure the private sector voice was heard by the UK government.²⁷ International Financial Services, London is the successor to British Invisibles, and LOTIS continues its activities.

The US Coalition of Service Industries (US CSI) was formed in 1982, the members of which are corporations and trade associations.

The European Services Forum (ESF) was formed in 1998. It also comprises both corporations and trade associations.

The Japan Services Network (JSN) was formed in 2000, as an outgrowth of the Keidanren (Japanese Federation of Economic Organisations) which was founded in 1946 as a federation of companies and associations from all sectors. Contacts have been made

²⁷ The author was a founder member of LOTIS speaking for consultancy.

by the JSN with the Confederation of Indian Industry in the hope it may become involved on international services issues.

The Hong Kong CSI was formed in 1990, and is a “highly autonomous body within the Hong Kong General Chamber of Commerce”.

On a few occasions these organisations can be signatories to a joint statement, though usually on issues at a rather generalised level, such as to support the launch of a new round aimed at extending and deepening specific commitments.

The Financial Services Leaders Group (FLSG) is able to project a unified view on a range of issues related to financial services. It is supported by organisations and coalitions in Canada, the EU, Hong Kong, Japan, Switzerland, and the US.

The CSIs created the ‘World Services Congress’ to debate key issues and project their message to a wider public. The first conference was organised by the US CSI in Atlanta, USA, in November 1999 to precede the WTO Ministerial in Seattle, and the second by the Hong Kong CSI, in Hong Kong in September 2001²⁸ to precede the Doha Ministerial. The Chinese authorities are actively looking at the possibility of hosting the third conference later this year.

The Global Services Network (GSN) is an informal private sector led forum which gathers the global services community of business people, government officials, academics, and others, who are supportive of the rules-based multilateral trading system, and of further liberalisation of international trade in services under the GATS.²⁹

9. Annex 2: Mutual recognition of professional qualifications

In the case of professional qualifications, the path towards mutual recognition agreements (MRAs) is a difficult one conceptually and in practice, and the costs in operation are not foreseeable. In only a few cases have neighbouring countries worked up MRAs so that licensed professionals are admitted to practise in each others’ jurisdictions. This process has proved to be very time and cost intensive, and has only been achieved over a long period. Examples include the system within the EU, which is the most ambitious and extensive, that between Australia and New Zealand, and a modest start within NAFTA.

The equivalence of many aspects has to be ascertained, the scope of the matters carefully defined, the degree of automaticity settled upon, and the extent of ex-post guarantees and conditions agreed, the latter including mutual monitoring, positive collaboration (or comity), choice of competent laws, dispute settlement and a reversibility route as a safety valve, since no third party can enforce such a voluntary undertaking.

In the case of highly regulated professions various aspects are tightly linked and have to form an integral part of the overall package. They concern the individual practitioner (his education, training, qualifications, licences, integrity, insurance and so on), the

²⁸ The author was a member of its International Business Advisory Committee.

²⁹ To find out more about the GSN, and to join it at no cost, go to www.globalservicesnetwork.com. Note, however, that this site has not been updated since 19 July 2000. The author was a founding adherent in April 1998, and is on its Contact Group.

nature and scope of the activities involved, the competent registration and licensing bodies and their codes, administrative and disciplinary procedures, and public laws and procedures such as Ombudsmen and appeals against decisions of the regulators and courts.

In 1989, six organisations of engineers participated in forming an agreement on the 'Recognition of equivalency of engineering education' - the so-called 'Washington Agreement'. This provided for the "recognition of engineering education courses/programs leading to the accredited engineering degree". They came from Australia, Canada, Ireland, New Zealand, the UK and the US. Having exchanged "information on their individual processes, policies, criteria and requirements for granting accreditation to university/college level courses/programs observe that these are substantially equivalent. The participating organisations agree, subject to satisfactory verification of the accreditation systems, to recognise each other's accredited courses / programs leading to a degree in engineering as being substantially equivalent and satisfying the academic requirements for the practice of engineering at professional level."

Later they entered into discussions regarding a proposed international register for engineers, and formed 'The Engineers' Mobility Forum', comprising organisations from Australia, Canada, Hong Kong, Ireland, New Zealand, South Africa, the UK and the USA, and both China and Mexico showed interest in its deliberations. The Forum considers that the work which has been done on harmonisation would clearly be useful in forming a basis for potential agreement. It became clear that the common accepted denominator is not merely a professional qualification, but an accredited qualification that is gained following a university degree course and appropriate professional experience, the combined period for which should be seven years. This is considered to act as a safeguard against possible discrepancies in levels of training in different countries.

The "Accord on Recommended International Standards of Professionalism in Architectural Practice" (the 'Barcelona Accord'³⁰) will serve as the framework for the mutual recognition agreements between associations of architects. It provides not only for the recognition of an academic diploma, but also the waiving of examinations, adaptation periods or tests, the issue and registration of a practising certificate for cross-border and establishment practice, and membership of the local order and use of their title. This is the only example among the professions at the global level.

The former GATS Working Party on Professional Services deliberated for three years on the case of the accountants, as an example of a highly regulated profession. In May 1997 it produced a set of "Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector" that were adopted by the Council for Trade in Services on a non-binding basis for voluntary use. They are intended to simplify the negotiation of MRAs concerning professional qualifications, and to help third parties negotiate accession to them or comparable agreements.

³⁰ Approved by the International Union of Architects at their plenary meeting in Beijing in the summer of 1999.

Any extra-territorial reach of one nation's laws is not popular with other sovereign jurisdictions. Co-operation between regulators is the necessary alternative in situations where suppliers act internationally. Only in this way can regulators discipline errant professionals and can consumers obtain redress when making claims to professional associations through their complaints procedures or the civil courts.

Perhaps developing countries, which are showing impatience over the lack of recognition of their professions' qualifications, have not appreciated the high cost to be expended to create mutual recognition agreements, and the necessity of persuading their counterparts to commit to such use of funds.

10. Annex 3: Completing the GATS framework

There are three elements for which disciplines have yet to be devised.

10.1 *Emergency safeguard measures (Article X)*

Most interest has been shown on emergency safeguard measures (ESMs) and much effort put into proposals. But this has resulted in a stand-off, broadly between the OECD group and the rest. Private sector business organisations argue strongly against the need for further flexibility than already subsists in the GATS framework. Some point to subsidies as a more practical way to deal with excessive imports, but of course few developing countries would have the resources for this.

ESMs would form a 'safety valve' whereby governments could take emergency corrective action should their liberalisation moves produce unforeseen and damaging effects on locally owned services firms. The issues have proved to be intensely difficult to handle and the final form of any disciplines is not yet clear. The safety valve must not form a loophole for protectionism, and should be carefully restricted, in view of the great flexibility built into the design of the GATS framework itself - particularly for developing countries to liberalise progressively and at their own pace.

10.2 *Government Procurement (Article XIII)*

The market for government purchases is extremely large - estimated at over 10 % of GDP in the EU, for example, yet Government procurement remains outside the scope of the specific commitments and MFN does not apply.³¹

Government Procurement has yet to be addressed by the GATS negotiators in earnest, despite the great potential impact of any disciplines, due to the scale of official purchases

³¹ Some Members may have extended MFN and national treatment to the government purchases of certain financial services due to their adoption of the 'Understanding on Commitments in Financial Services.'

in most economies. The debate is presumably waiting for progress in other fora under the WTO roof, where presumably the thrust will be for improved transparency, and there will be no forced obligations on where, or from whom, to purchase goods and services. Obviously governments of whatever persuasion ultimately want the biggest and best bang for their scarce bucks in terms of price and quality.

The WTO Committee on Government Procurement has been discussing ways of improving the language of the plurilateral Agreement on Government Procurement, deepening its coverage (both more countries, and sub-federal entities), and extending its membership.³²

In addition, the WTO Working Group on Transparency in Government Procurement is discussing ways to improve transparency disciplines - partly a euphemism for preventing corruption - and of procedural value rather than of substance.

Clearly the disciplines should ban discrimination and improve transparency. Some modifications might be necessary for major service sectors. The removal of barriers to establishment and improving the enforcement of competition policy are crucially necessary in addition.

10.3 Subsidies (Article XV)

This Article recognises that “in certain circumstances, subsidies may have distortive effects on trade in services”, but does not define ‘subsidy’. Negotiations have begun with the aim of developing “the necessary multilateral disciplines to avoid such trade-distortive effects.” In the meantime if any Member “considers that it is adversely affected by a subsidy” it can request consultations which “shall be accorded sympathetic consideration.”

The MFN obligation applies to subsidies because they are covered by the definition of ‘measure’. National treatment commitments also apply, unless a schedule specifically excludes subsidies.

In the Working Party on GATS Rules, there does not seem to be much heat in the conceptual discussions, perhaps because egregious subsidies are not very prevalent. A few examples have been tabled of potentially trade distortive subsidies, some in sensitive areas such as cultural, educational and health services, but also in transport, telecoms, postal and financial services, construction, software and information services, advertising, tourism, export credits and R&D. Investment incentives are likely to raise problems.

The way in which disciplines would apply across the Modes of supply for ‘like services’ has not yet been fathomed. One instance being considered arises when services are supplied to consumers abroad (Mode 2). Here a domestic subsidy for tourist hotels near an international border might be distortive, as it could disadvantage those just across the border where no subsidy is available.

³² There are 12 members (counting the EU as one), 18 WTO Member observers, and 4 non-WTO observers. Eight of the WTO Member observers have applied for accession. (See WTO document GPA/44 of 2 November 2000).

This GATS Article seems to be mainly a North-South problem at present, unless subsidies in the audio-visual sector become an issue. The need for subsidies to promote development will have to be taken into account.

Although consideration has to be given to the ‘the appropriateness of countervailing procedures’, any rules on distortive subsidies would inherently have to be very complex, and would present severe practical enforcement difficulties.³³ Returns here do not look likely to be commensurate with the negotiating effort.

Subsidies for services deemed necessary on objective grounds could be permitted in listed cases (as in the GATT Green Box), and be notifiable, but should be devised to be least trade distortive and subject to transparency provisions. Others might be banned, including export subsidies and import substitution subsidies.

³³ Subsidies relating to the supply of service ‘in the exercise of governmental authority’ could not be disciplined (Article I.3 (b)).