

# *Fordham International Law Journal*

---

*Volume 5, Issue 2*

1981

*Article 6*

---

## Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework under the GATT

Marianna Maffucci\*

\*

Copyright ©1981 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework under the GATT

Marianna Maffucci

## **Abstract**

This Comment will discuss problems inherent in creating a framework for liberalization of trade in the service sector and will propose a general plan for approaching those problems. Part One will examine the economic significance of the service sector world-wide. Part Two will consider problems in quantifying the service sector and in identifying barriers to trade in services. Part Three will look into the difficulties of building international consensus on the need for liberalization and efforts made to that end. To conclude, Part Four will explore the possibility of extending the GATT to cover services.

# LIBERALIZATION OF INTERNATIONAL TRADE IN THE SERVICE SECTOR: THRESHOLD PROBLEMS AND A PROPOSED FRAMEWORK UNDER THE GATT

## INTRODUCTION

The contracting parties to the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> will, for the first time, focus on liberalizing trade in the service sector during a ministerial meeting scheduled for November, 1982.<sup>2</sup> Trade in the service sector is hampered by a number of barriers.<sup>3</sup> The elimination or the reduction of these barriers is essential to maintaining the open trading system the

---

1. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

At the end of World War II the international community became aware of the need for closer cooperation to prevent recurrence of the economic difficulties of the 1930s caused, in part, by excessive protectionist practices. The United States took the initiative in having the United Nations draft a charter for an International Trade Organization (ITO). See J.H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 36-37 (1969) [hereinafter cited as *WORLD TRADE*]. Four conferences were held between 1946 and 1948 to draft GATT and ITO charters. See *generally id.*, at 42-46.

The GATT was intended mainly as a reciprocal tariff reduction agreement to be appended to ITO, not as an organization to deal with international trade. See *id.*, at 46-49. It was initially applied through the Protocol of Provisional Application of the General Agreement on Tariffs and Trade *opened for signature* at Geneva on October 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 188, effective January 1, 1948, while work on ITO continued. See *WORLD TRADE, supra* at 45. When ITO failed to materialize, GATT became the watchdog of international trade. See *generally id.*, at 49-53. Still applied through the Protocol of Provisional Application, the GATT now binds eighty-five contracting parties (signatory countries). GENERAL AGREEMENT ON TARIFFS AND TRADE, STATUS OF LEGAL INSTRUMENTS, GATT/LEG/1, ch. 3 Accessions.

2. See N.Y. Times, Jan. 18, 1982 § D1, col. 6. The service sector is generally said to comprise all output that does not come from the production sectors: agriculture, mining, manufacturing and construction. See Ginzberg & Vojta, *The Service Sector of the U.S. Economy*, 244 Sci. Am. 48 (Mar. 1981).

3. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. GOVERNMENT INVENTORY OF SELECTED IMPEDIMENTS TO TRADE IN SERVICES (1981) [hereinafter cited as U.S. GOVERNMENT INVENTORY]. Barriers to services are analogous to non-tariff barriers (NTBs) to trade in goods, and are generally referred to as NTBs as well. See, e.g., *Foreign Barriers to U.S. Trade: Hearings Before the Subcomm. on Int'l Finance and Monetary Policy of the Senate Banking, Housing and Urban Affairs Comm.*, 97th Cong., 1st Sess. 9 (1981) (statement of Hon. William E. Brock, U.S. Trade Representative) [hereinafter cited as *Foreign Barriers Hearings*]. NTBs have been defined as "any measure (public or private) that causes internationally traded goods and services, or resources devoted to the production of these goods and services, to be allocated in such a way as to reduce potential real world income." R. BALDWIN, *NON-TARIFF DISTORTIONS OF INTERNATIONAL TRADE* 5 (1970) (emphasis added).

GATT has strived to create.<sup>4</sup> While liberalization of trade in goods has preoccupied the international community for over thirty years,<sup>5</sup> liberalization of trade in services is a relatively new concern.

This new interest has been spurred by the increasing importance of the service sector in national economies, particularly those of developed countries,<sup>6</sup> as well as by the expansion and diversification of international trade in services.<sup>7</sup> A recent study has found that “[a]s demand for services has grown, heightened local versus international stresses have emerged, with governments increasingly intervening to shape the direction of change locally and to shield domestic business from international pressures.”<sup>8</sup>

NTBs to goods include subsidies and countervailing duties, import licensing systems, customs valuation methods, product standards and government procurement practices. See Strauss, *Symposium on the Multilateral Trade Agreements I—Foreword*, 11 *LAW & POL’Y INT’L BUS.* 1257 (1979). NTBs to services include restrictions that mandate full or partial local ownership of service firms or that exclude foreign firms from access to the local market, restriction on personnel, and discriminatory licensing regulations and fees. See CONGRESSIONAL RESEARCH SERVICE, *U.S. INTERNATIONAL SERVICE TRADE* 9 (Aug. 1980) [hereinafter cited as CRS]. See also *infra* notes 87-102 and accompanying text.

4. See *Foreign Barriers Hearings*, *supra* note 3, at 9; Farnsworth, *Toughening Attitudes on World Trade*, *N.Y. Times*, Feb. 8, 1981, § 12 (Outlook), at 11.

5. See G.J. Cloney II, *The Composition and Role of Trade in Services*, Background paper for the International Chamber of Commerce Roundtable on Liberalization of Trade in Services, Paris, June 11, 1981, at 1 (available from the Chamber of Commerce of the United States, Washington, D.C.; copy on file with the *FORDHAM INT’L L.J.*).

The liberalization of trade in goods has been achieved through seven rounds of the GATT. The first six rounds were held in: Geneva, Switzerland, 1947; Annecy, France, 1949; Torquay, England, 1951; Geneva, Switzerland, 1955-56; Geneva, Switzerland, 1960-62 (the “Dillon Round”); Geneva, Switzerland, 1964-67 (the “Kennedy Round”). See K. DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 56 (1970). The major emphasis of these rounds was on reducing tariffs. The seventh round, the Tokyo Round of Multilateral Trade Negotiations, was held in Geneva, Switzerland, 1973-79. See *AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS*, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 (1979). These agreements may also be found in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS*, 26th Supp., Sales No. GATT/1980-3 (1980) [hereinafter cited as *BISD*, 26th Supp.]. While it continued to reduce tariffs, the major contribution of the Tokyo Round was the development of codes for the reduction of NTBs to goods. See *GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS: REPORT BY THE DIRECTOR-GENERAL OF GATT* (1979) [hereinafter cited as *TOKYO ROUND REPORT*]; Comment, *GATT and the Tokyo Round: Legal Implications of the New Trade Agreement*, 11 *CAL. W. INT’L L.J.* 302 (1981); *Int’l Trade: GATT Legislation—The Trade Agreements Act of 1979*, *Pub. L. No. 96-39*, 93 Stat. 144 (1979), 20 *HARV. INT’L L.J.* 687 (1980); *GATT: A Legal Guide to the Tokyo Round*, 13 *J. WORLD TRADE L.* 436 (1979).

6. See *OECD OBSERVER*, No. 111, July 1981 at 16; Cloney, *supra* note 5, at 2.

7. See Cloney, *supra* note 5, at 3.

8. *ECONOMIC POLICY COUNCIL OF UNA-USA, TRADE POLICY ISSUES: GLOBAL STRUCTURAL CHANGES AND THE U.S. ECONOMY* 51 (1979) [hereinafter cited as *EPC STUDY*].

Government intervention may take the form of restrictions on foreign service firms' access to local markets, restrictions on personnel and discriminatory licensing regulations,<sup>9</sup> among other protective measures. These measures act as "nontariff barriers" (NTBs) to trade in the service sector.<sup>10</sup> NTBs reduce the efficiency of the service sector, distort competition among service industries of different nations, and, because of the synergistic relationship between goods and services,<sup>11</sup> introduce cost distortions in the flow of goods trade.<sup>12</sup>

It has been suggested that an attempt to reduce these barriers be made through a new round of multilateral trade negotiations.<sup>13</sup> Purportedly, liberalization of the service sector would stimulate international trade and encourage innovation in local industries.<sup>14</sup> Furthermore, it has been argued that elimination or reduction of NTBs to services would increase potential real world income.<sup>15</sup>

The GATT ministerial meeting scheduled for November, 1982<sup>16</sup> will take the first step towards multilateral trade negotiations in the service sector. Quick results are not expected.<sup>17</sup> A variety of complex problems need to be resolved before negotiations can be commenced.

At this juncture, perhaps the greatest hurdle on the path to liberalization of trade in services is the lack of broad international

9. See CRS, *supra* note 3, at 9; *infra* notes 84-98 and accompanying text.

10. See *Foreign Barriers Hearings*, *supra* note 3, at 9; EPC STUDY, *supra* note 8, at 51. See also *supra* note 3.

11. The interrelationship between trade in services and trade in goods will be discussed later. See *infra* notes 150-53 and accompanying text.

12. See INTERNATIONAL CHAMBER OF COMMERCE, COMMISSION ON INTERNATIONAL TRADE POLICY AND TRADE-RELATED MATTERS: POSITION PAPER ON LIBERALISATION OF TRADE IN SERVICES 2, Doc. No. 103/34 Rev. 4 (1981-C9-30) [hereinafter cited as ICC Doc. No. 103/34 Rev. 4]; Cloney, *supra* note 5, at 1.

13. See ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 4.

14. See *id.* at 2.

15. See R. BALDWIN, *supra* note 3, at 5. "Potential real world income is that level attainable if resources and outputs are allocated in an economically efficient manner." *Id.* at 5 (footnote omitted). For a discussion of the fundamental economic reasons for international trade see generally H. GRAY, INTERNATIONAL TRADE, INVESTMENT, AND PAYMENTS (1979) (discussing Adam Smith's concept of absolute advantage, see *id.*, at 10-15, and David Ricardo's theory of comparative cost advantage, see *id.*, at 16-25). See also M. CHACHOLIADES, INTERNATIONAL TRADE THEORY AND POLICY (1978) at 13-82 (discussing the classical theory of international trade espoused by Smith and Ricardo). The neo-classical theory is discussed at 85-201, and the modern theory at 205-306.

16. See N.Y. Times, Jan. 18, 1982, § D1, col. 6.

17. See *id.*, § D3, col. 1.

consensus on the need for liberalization.<sup>18</sup> Nevertheless, there is growing agreement that liberalization is needed.<sup>19</sup> A second major problem is ascertaining the reliability of available data on the service sector. Data currently available among the GATT countries are neither as comprehensive nor as standardized as data available on goods.<sup>20</sup> This renders international comparison arduous. A third major problem involves the identification of barriers to services trade and the determination of which barriers are impermissible. The lack of uniform treatment of the service sector<sup>21</sup> impedes the process of reaching international agreement on impermissible barriers to trade.<sup>22</sup>

In working out a framework for the inclusion of the service sector within the GATT, the heterogeneous nature of the service industries must be taken into account.<sup>23</sup> Problems relating to legit-

18. See GOVERNMENT RESEARCH CORPORATION, INTERNATIONAL ISSUES, SERVICE INDUSTRIES AND U.S. TRADE POLICY 9-10 (Oct. 1981) [hereinafter cited as GRC]. GRC surveyed a number of developed and developing countries and found various reasons for the lack of enthusiasm for the idea of liberalization to trade in the service sector. These reasons range from fatigue from previous negotiating sessions, to a belief that the United States has the most to gain and least to lose in any such liberalization, to a belief that a variety of technical problems cannot be overcome. *Id.* See also Wall St.J., Oct. 5, 1981, at 1, col. 1 (setting forth the views of various nations).

19. See *infra* notes 123-138 and accompanying text.

20. See GRC, *supra* note 18, at 4-6; A. SAPIR & E. LUTZ, TRADE IN NON-FACTOR SERVICES: PAST TRENDS AND CURRENT ISSUES, WORLD BANK STAFF WORKING PAPER NO. 410 (Aug. 1980), at 1-2.

21. A study conducted by the International Trade Administration of the U.S. Department of Commerce found that service industries are generally covered by Friendship, Commerce and Navigation (FCN) treaties. The right to establish and operate firms differs from treaty to treaty, depending on the time the treaty was signed and the stage of industrialization of the treaty partner. Many service industries are excluded from national treatment because of national security reasons, variations in laws, and public safety. See Int'l Trade Admin., U.S. Dep't of Commerce, Memorandum on Treaties of Friendship, Commerce and Navigation and their Treatment of Service Industries 7 (Feb. 2, 1981) (available from the U.S. Dep't of Commerce; copy on file with the FORDHAM INT'L L.J.) [hereinafter cited as FCN Memorandum]. Some treaties restrict practice of a number of professions because of public health and safety considerations. *Id.* at 12. Furthermore, all FCNs are drafted in very broad language which dilutes any guarantee of nondiscriminatory treatment. *Id.* at 13.

22. ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 2.

23. Service industries encompass a broad universe of diverse activities and may be differently defined and listed. See INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, CURRENT DEVELOPMENTS IN U.S. INTERNATIONAL SERVICE INDUSTRIES 2 (1980) [hereinafter cited as CURRENT DEVELOPMENTS].

The service industries which are significant internationally number some 14 to 18, the number depending upon varying delineations. The following are generally

imate national regulations<sup>24</sup> and to a general system of preference<sup>25</sup> call for flexible solutions. In addition, an effective method of dispute resolution needs to be established.<sup>26</sup>

This Comment will discuss problems inherent in creating a framework for liberalization of trade in the service sector and will propose a general plan for approaching those problems. Part One will examine the economic significance of the service sector worldwide. Part Two will consider problems in quantifying the service sector and in identifying barriers to trade in services. Part Three will look into the difficulties of building international consensus on the need for liberalization and efforts made to that end. To conclude, Part Four will explore the possibility of extending the GATT to cover services.

### I. THE ECONOMIC SIGNIFICANCE OF THE SERVICE SECTOR

The service sector has been traditionally viewed as a lagging sector,<sup>27</sup> a drag on the economy. Recently, however, it has become the leading sector of the economy, at least in the United States.<sup>28</sup> In

included: accounting, advertising, banking, communications, computer services, construction and engineering, consulting and management services, educational services, franchising, health services, insurance, leasing, legal services, motion pictures, shipping and air transport, and tourism (including the overseas development of hotels and motels). There may well be others for the U.S. service economy is infinitely resourceful and sophisticated, with wares that are often eminently saleable abroad.

*Id.*

24. See *infra* notes 77-80 and accompanying text.

25. See *infra* notes 176-77 and accompanying text.

26. See *infra* notes 220-38 and accompanying text.

27. See I. LEVESON, *PRODUCTIVITY IN SERVICES*, HUDSON INSTITUTE 1 (Hudson Inst. Paper No. H1-3169-P. 1980). Leveson criticizes the continuing belief that the service sector is unproductive. He observes that little attention had been given to the service sector and that quantitative studies in productivity shunned service industries. See *id.* at 6. (For the types of studies conducted before 1980 and their results see *id.* at 7-11.) As a result, the increasing productivity of services has not been adequately comprehended.

Economic thinkers from the time of Adam Smith to the 1930's noted services in a disparaging way. In the 1930's, the Australian economist, Allan G. B. Fisher, began to recognize services and later suggested an economic progression from agriculture to manufacturing and then to services. See Cloney, *supra* note 5 at 27. For a discussion of economic theory and services, see *id.* at 27-32.

28. See S. 1233, 97th Cong., 1st Sess., 127 CONG. REC. S5371 (daily ed. May 20, 1981). S. 1233 is the "Service Industries Development Act." In introducing this bill, Sen. Inouye stated that

1980, the United States service account trade totaled about 26% of all United States private sector trade producing a \$38 billion net surplus.<sup>29</sup> In the same year, the United States' balance of payments position showed an overall surplus because of favorable trade balance in services.<sup>30</sup> "According to the latest figures of the Committee on Invisible Exports in London the U.S. accounted for 20 percent of total world trade in services."<sup>31</sup>

Economic growth in the service sector has not been limited to the United States. Virtually all developed countries have seen a sharp increase in the service sector as a percentage of the gross national product.<sup>32</sup> The same is true for a number of developing countries.<sup>33</sup> In fact, "global trade in services has grown at two and

[t]he output of the service sector now far exceeds the manufacturing sector. According to Department of Commerce statistics, 7 out of 10 working Americans are employed in service industries, and about 65 percent of the gross national product is service derived.

. . . .  
In addition to its crucial significance to our domestic economy, services are a significant component in our international trade. In 1979, while we suffered a merchandise trade deficit of more than \$29 billion, services—including investment receipts—provided us with a surplus of more than \$34 billion, for a surplus of \$5 billion. In 1980, we likewise ran up a deficit of more than \$27 billion, while accumulating a surplus exceeding \$7 billion . . . .

. . . .  
Services are, however, for the majority of Americans, including policymakers, still not thought of in terms of advance technology-intensive industries, which many of them are, rather in terms of labor-intensive and often menial tasks . . . .

*Id.*

The role of the service sector in the United States has been recapitulated as follows: "In sum, the U.S.: (1) has the largest domestic service economy, (2) has the largest service labor force, (3) is the largest importer and exporter of services, and (4) is the largest foreign investor in services." Robinson, *America's "Invisible" Trade—Hampered by Invisible Barriers*, 1979 NAT'L J. 1547, 1548.

For a brief discussion of the reasons for the emergence of the service sector see I. LEVESON, *THE MODERN SERVICE SECTOR* 39-42 (Hudson Inst. Research Memorandum No. 83, HI-3112-P, 1980).

29. *Service Industries Development Act: Hearings on S. 1233 Before the Subcomm. on Business, Trade and Tourism of the Senate Comm. on Commerce, Science, and Transportation*. 97 Cong. 1st Sess. 62 (1981) (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States) [hereinafter cited as *S. 1233 Hearings*].

30. *Id.* at 89 (statement of Harry L. Freeman, Senior Vice President - Office of the Chairman, American Express Company).

31. *Id.*

32. See *Foreign Barriers Hearings*, *supra* note 3, at 7; OECD OBSERVER, *supra* note 6, at 16.

33. See *Foreign Barriers Hearings*, *supra* note 3, at 7.

Country ranking based upon service account balance and upon service dependency factor, utilizing data from the Committee on Invisible Exports, does not correlate with size of



a half times the pace of world merchandise trade over the past decade . . . ."<sup>34</sup>

## II. PROBLEMS IN QUANTIFYING THE SERVICE SECTOR AND IDENTIFYING BARRIERS TO TRADE

The figures described above demonstrate at least two reasons for attempting to reduce barriers to trade in the service sector through multilateral negotiations under the GATT: the magnitude of the service sector in domestic economies, and the increase of global trade in services. Before meaningful negotiations can take place, however, two preliminary problems must be resolved. First, it must be ascertained whether data gathered primarily for balance of payment purposes<sup>35</sup> may also be used to measure the global significance of the service sector.<sup>36</sup> Second, the various barriers to trade in services must be identified and distinguished from legitimate government regulations and policies.<sup>37</sup>

### A. The Quantitative Problem

Before determining whether available data accurately measure the service sector, the service sector must be defined. It is no easy task to define a sector which embraces numerous industries of striking heterogeneity. The potential breadth of this sector is displayed by the national accounting definition of services as all output not derived from the goods-producing sectors.<sup>38</sup> Under this

the national economy. See Cloney, *supra* note 5, at 5. "This suggests that the importance of service trade is not an exclusive concern of industrial countries, that successful service trade is hardly a monopoly of large economies and that some developing countries are successfully emerging as exporters of services." *Id.*

34. GRC, *supra* note 18, at 3.

35. See CURRENT DEVELOPMENTS, *supra* note 23, at 4-5.

Balance of payments "refers to international financial transactions reflected in the current account resulting from trade in goods and services, as well as unrequited transfers. The last two items—trade in services and requited transfers—are sometimes designated as the invisible component of the current account." A. SAPIR & E. LUTZ, *supra* note 20, at 73.

36. See GRC, *supra* note 18, at 4-6.

37. See *infra* notes 63-103 and accompanying text.

38. See Ginzberg & Vojta, *supra* note 2, at 48; S. 1233 *supra* note 28, § 4(4). S. 1233 defines services as follows:

services means economic outputs which are tangible goods or structures, including, but not limited to, transportation, communications, retail and wholesale trade, advertising, construction, design and engineering, utilities, finance, insurance, real estate, professional services, entertainment, and tourism, and overseas investments which are necessary for the export and sale of such services.

definition, the service sector would include distributive services,<sup>39</sup> producer services,<sup>40</sup> consumer services<sup>41</sup> and nonprofit and governmental services.<sup>42</sup>

The magnitude of the service sector in domestic economies is one of the justifications for including services in multilateral trade negotiations. The above definition of services, however, comprises two types of services, nonprofit and governmental, which because of their inherently domestic nature, are not likely to be affected by any change in international trade policy. In the United States, these two components account for a large part of the growth in the service sector. It has been estimated that "[w]hen the contribution of the private nonprofit sector is added to that of government, the not-for-profit sector accounts for more than a third of the total employment and nearly a third of the gross national product."<sup>43</sup>

There is, therefore, insufficient data on what percentage of the service sector would benefit from liberalization of international trade.<sup>44</sup> In addition, data on the service are imprecise,<sup>45</sup> in part because unreported economic activity is growing faster than reported economic activity.<sup>46</sup>

Quantifying the service sector at the international level is even more difficult. Service sector data have been developed in a domestic context and are not necessarily adaptable to international use.<sup>47</sup>

*Id.* § 4(4). See also Cloney, *supra* note 5, at 7. See generally Cohen & Morante, *Elimination of Nontariff Barriers to Trade in Services: Recommendations for Future Negotiations*, 13 LAW & POL'Y INT'L BUS. 495, 497 (1981) (discussing the difficulty in developing a definition of services).

39. Distributive services include wholesale and retail trade, communications, transportation and public utilities. See Ginzberg & Vojta, *supra* note 2, at 48.

40. Producer services include accounting, legal counsel, marketing, banking, architecture, engineering and management consulting. *Id.* at 48.

41. Consumer services include restaurants, hotels, laundry and dry-cleaning establishments. *Id.* at 48.

42. They include education, health, the administration of justice and national defense. *Id.* at 48.

43. *Id.* at 51.

44. See GRC, *supra* note 18, at 5.

45. See *id.* at 5.

46. See Ginzberg & Vojta, *supra* note 2, at 55. Ginzberg and Vojta estimate unreported income from transactions kept off the books, barter, illicit arrangements, etc. at about ten percent of the GNP. But see I. LEVESON, *supra* note 28, at 14 (estimating unreported economic activity at five percent of the GNP).

47. See ECONOMIC CONSULTING SERVICES, INC., THE INTERNATIONAL OPERATIONS OF U.S. SERVICE INDUSTRIES: CURRENT DATA COLLECTION AND ANALYSIS xxi (1981) [hereinafter cited as ECS Study], see also *infra* notes 55-59 and accompanying text.

The current data indicating growth are reported in terms of the services account.<sup>48</sup> "The services account provides [only] a means to aggregate and value different categories of international services transactions for balance of payments purposes."<sup>49</sup> It was not created for gathering service sector data.<sup>50</sup>

Moreover, services accounts are not directly comparable. The term "services" taken from a balance of payments context can present different meanings, depending upon national accounting practices used in aggregating different current account components into a single service account.<sup>51</sup> Varying aggregation practices create data discrepancies.<sup>52</sup> In addition, there is evidence that balance of payments data on services may be inaccurate because many service exports are unrecorded, reported as merchandise trade, or lumped with the investment category.<sup>53</sup> Using the services account of a particular nation to reflect the service sector could be misleading, even though most service transactions are included in the services account.<sup>54</sup>

48. See CURRENT DEVELOPMENTS, *supra* note 23, at 4.

49. Cloney, *supra* note 5, at 12.

50. See CURRENT DEVELOPMENTS, *supra* note 23, at 4.

51. See Cloney, *supra* note 5, at 35. The services account is a component of the current account. "The current account classifies and record [sic] the two-way flow of international transaction [sic] in goods and services for national balance of payments accounting purposes." *Id.* Although the current account format varies from nation to nation, it is composed of the following accounts: merchandise, travel, transportation, investment, other services and government transactions. *Id.* Travel, transportation, investment and other services are referred to as private service transactions. *Id.*

National accounts may or may not aggregate these into a single service account total depending on accounting practices. For example, U.S. balance of payments lists the items individually—there is no service or private service aggregate. The U.K. balance of payments aggregates travel, transportation and other services into a 'services' subcategory and then combines this aggregate with interest, profits, dividends and private transfers into what is called 'private invisibles'. Japan aggregates all five items under 'services'.

*Id.* For current account components of Japan, United States and United Kingdom see *id.* at 35-37.

52. See CRC, *supra* note 18, at 6. In fact, a report by the Japan Economic Institute found discrepancies between American and Japanese statistics. "From the mid-1960s to the mid-1970s, both the United States and Japan recorded services trade deficits with each other." *Id.* There remains a discrepancy of \$1 billion to \$3 billion on the net balance in bilateral services trade. *Id.*

53. *Id.* at 5.

54. CURRENT DEVELOPMENTS, *supra* note 23, at 4.

The gross figure of balance of payment hides a more complicated story. The "invisible" surplus is composed of investment surplus and of service surplus. Investments do not refer to services only. "Even though investment is a key component of services trade because of the

One study undertaken by the Economic Consulting Services Inc. (ECS Study),<sup>55</sup> highlighted the unreliability of using services account data to quantify the service sector. The ECS Study, conducted for the purpose of examining the current system of international data collection and evaluating the data gathered, determined that the currently "available data are in most cases incomplete and in some cases seriously inadequate for the potential needs of policy-makers."<sup>56</sup> It found that the "estimates for all 16 [services] industries yield an 'order of magnitude' for the international commercial stake of the United States in the services sector of about \$60 billion in 1980 . . . . [T]his estimate is nearly double the amount shown by the conventional [services account] statistics for the U.S. exports of services in 1980."<sup>57</sup> The study also found that generally the United States government is gathering some data on what the study considered to be "key variables" for the service industries under observation.<sup>58</sup> It concluded, however, that it will be some time before sufficient data can be gathered for negotiations.<sup>59</sup>

Steps towards improving data on the service sector have been taken both at the national and international level. In the United States, recognition of data inadequacies for domestic services and international trade in services has led to the introduction of a bill<sup>60</sup> before Congress which, among other things, aims at improving data collection in this area.<sup>61</sup> At the international level, some of the statistical problems are being addressed in several studies conducted under the aegis of the Organization of Economic Cooperation and Development (OECD).<sup>62</sup>

---

nature of the sector's products, there remains a question as to whether investment issues should be handled in a services context or as a separate issue altogether." GRC, *supra* note 18, at 5.

55. ECS Study, *supra* note 47.

56. *Id.* at xvii.

57. *Id.* at xviii. That the "conventional statistics" criticized in the ECS Study are services account data for balance of payments computations is implied by *id.* at xxi.

58. *Id.*

59. *Id.* at xxii.

60. S. 1233, *supra* note 28.

61. One of the purposes of the bill is to develop a data base for policymaking pertaining to services. *Id.* at § 5(b)(3).

62. Convention on the Organisation for Economic Co-Operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891. The Organization of Economic Cooperation and Development (OECD) is composed of developed nations. They are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States and Yugoslavia (special sta-

## B. Identifying Barriers to Trade in the Service Sector

Lack of comprehensive statistical data on services is not the only impediment to services negotiations; identification of barriers to free trade presents a problem as well. The heterogeneity of the service industries and their diverse modes of performance complicate efforts to identify barriers to trade.<sup>63</sup> Difficulties in identification are increased by the complexity of government regulations with discriminatory effect and by the lack of transparency in government administration.<sup>64</sup>

### 1. Heterogeneity

Service industries differ greatly in size, method of organization, and characteristics of operations. International business problems vary from industry to industry.<sup>65</sup> Services encompass a wide variety of industries, including advertising, education, banking, insurance, transportation and tourism. Traditionally, their problems were considered to be industry specific with different characteristics, problems and solutions.<sup>66</sup> Efforts of a variety of organizations have begun to overcome this problem of dissimilarity.<sup>67</sup>

tus). OECD OBSERVER, *back cover*. The OECD is compiling an inventory of regulatory restrictions to trade in services. See Comments by W. Witherell, OECD, to the Council of Foreign Relations Conference on International Trade and Investment in Services (June 2, 1981) at 3-4 (copy on file with the FORDHAM INT'L L.J.) [hereinafter cited as International Trade and Investment in Services]; Noble, *Services are the New Trade Frontier*, N.Y. Times, Feb. 7, 1982, § E20, col. 3.

63. See ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 2.

64. See *id.*, annex.

65. See *Current Developments*, *supra* note 23, at 2. Generally service industries deal in intangibles and operate on a contractual basis. Many depend heavily on overseas affiliates. Although generally regarded as highly labor intensive, there is wide variation among service industries and some are capital intensive. See *id.* at 2-3.

66. See GRC, *supra* note 18, at 6-8. See generally Cohen & Morante, *supra* note 38, at 500-03 (discussing problems encountered in the areas of insurance, air transportation, marine transportation, motion pictures, construction, and engineering).

67. See S. 1233 Hearings, *supra* note 29, at 62 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States). These organizations include the United States Chamber of Commerce, the National Foreign Trade Council, the Business Roundtable, the Council on Foreign Relations, the United States Council of the International Chamber of Commerce, the Committee for Economic Development, the German Marshall Fund, and the Rockefeller Foundation. *Id.*

Among the most active organizations is the International Service Industry Committee (ISIC) which was "organized in 1978 to bring together representatives of American service industry firms and service industry trade associations to act jointly to foster the freer flow of U.S. services into world markets." INTERNATIONAL SERVICE INDUSTRY COMMITTEE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, REPORT 1978-1980 15 (1980) [hereinafter

Recently, individual service industries have started to see themselves as being part of a sector.<sup>68</sup>

## 2. Diverse Modes of Performance

Identification of impermissible barriers is further complicated by the lack of extensive studies of the functional role of services in trade.<sup>69</sup> While the process of supplying goods in a foreign market is straightforward and easily understood, the process of supplying services is much more complex, because of the variety of forms it can take.<sup>70</sup>

These forms are, nonetheless, reducible to two basic trading techniques: "across-the border trade" and "establishment trade."<sup>71</sup> Across-the-border trade refers to those services which can be provided by a supplier who remains in the exporting country to a

cited as ISIC REPORT]. In 1981 it was merged with its International Investment Subcommittee to form the International Services and Investment Subcommittee of the International Policy Committee. See INT'L DIVISION, CHAMBER OF COMMERCE OF THE U.S., INTERNATIONAL SERVICES AND INVESTMENT SUBCOMMITTEE 1 (Dec. 1981).

68. See S. 1233 Hearings, *supra* note 29, at 90 (statement of Harry L. Freeman, Senior Vice President—Office of the Chairman, American Express Company).

69. See Cloney, *supra* note 5, at 12.

70. See *id.* There are a number of ways in which services may be provided.

Some services involve the provision of information which can be embodied in physical mediums (e.g. films, tapes, blueprints, publications, formulas, etc.). Some services are provided through electronic means of communication (e.g. data, commercial information and some entertainment services). Some are only embodied in contracts (e.g. banking, insurance, etc [sic]). Certain services may be provided through individuals (e.g. engineering, management, other consulting services, technical assistance, etc.). Some services involve making available capital facilities (e.g. marine transport, air transport, warehousing, telecommunications, etc.). Many services require physical proximity between supplier and consumer (e.g. certain business services, retailing, lodging, food services and most services consumed by individuals).

*Id.*

71. *Id.* Across-the-border trade includes (1) trade of logistic services necessary to international transport and supply of goods, people and information such as cargo insurance, port services, passenger transport, telecommunications, and brokering; (2) producer services necessary to foreign production of goods and services such as investment, management services, technological services, provision of intangible assets to final producers, and franchising; (3) other directly traded services such as engineering, commercial lines insurance, merchant banking, film services, and information services. *Id.* at 13.

Establishment trade is composed of (1) services provided in an importing country by foreign-controlled producers such as advertising, accounting, personal lines insurance, equipment rental, retail trade, and legal, repair, maintenance and lodging services; and (2) services provided in an exporting country to visitors such as tourism, lodging, food services, education, and health services. *Id.* at 13.

consumer in the importing country.<sup>72</sup> Establishment trade refers to those services which require physical proximity between the supplier and the consumer.<sup>73</sup> This requirement can be met either by having the consumer travel to the supplier country or by having the providing enterprise "establish" itself in the foreign market.<sup>74</sup> While the first method, typically represented by tourism, is conventionally accepted as part of trade, the second is not understood as well.<sup>75</sup> In addition, it is unclear whether establishment by a service industry is part of international trade.<sup>76</sup> Experts believe that:

[f]rom a functional perspective which sees international trade as the means to relate supply and demand in different countries, establishment is clearly within the parameters of trade in services. Without establishment there can be no international trade in many services and inefficient, distorted trade in others. To the extent that international trade in services involves establishment, to speak of service trade barriers and liberalized trade in services is to imply an incursion of international trade discipline into areas of regulatory jurisdiction heretofore largely seen as the domain of national sovereignty.<sup>77</sup>

### 3. Distinguishing Legitimate National Regulations from Barriers to Trade in Services

A major source of barriers to trade is found in regulatory and administrative government action. Government regulations with discriminatory effect increase the sheer bulk of barriers to be identified. Identification is further hampered by the lack of transparency of certain discriminatory practices.<sup>78</sup> These regulations affect both across-the-border and establishment trade.

72. *Id.* at 14.

73. *Id.* at 15.

74. *See id.*

75. *See id.* There are several reasons why a service enterprise will "establish" itself in the importing country. First, some services may not otherwise be provided. Second, the enterprise may feel that it would be able to better relate to its foreign customers if it is established. Third, establishment may be required by the importing country. *See id.* at 16.

76. *See id.*

77. *Id.*

78. Transparency in government administrative practices refers to identifiable, visible, and regularly administrated procedures. *See generally* Note, *United States-Japan Trade Developments Under the MTN Agreement on Government Procurement*, 5 *FORDHAM INT'L L.J.* 139, 163 (1981-82) (discussing steps taken during the Tokyo Round to insure transparency in government procurement procedures).

Although government regulations hamper the free flow of trade, they are often supported by legitimate national interests. Service industries like banking, insurance, transportation and communication are considered critical to economic, social and national security goals.<sup>79</sup> To protect these objectives, governments have traditionally felt the need to regulate these industries.<sup>80</sup> A number of service occupations such as accountants, physicians and attorneys are generally regulated by governments to ensure a high degree of reliability.<sup>81</sup> It is only to the extent that legitimate national regulations are discriminatorily administered as a shield for protectionist practices,<sup>82</sup> that they demand censure.

#### 4. A Current Catalogue of Barriers to Trade in the Service Sector

The complexities of government regulations,<sup>83</sup> the diversity of the service sector,<sup>84</sup> and the absence of uniform treatment of services,<sup>85</sup> make identification of barriers to trade and protectionist practices difficult. Although data on barriers are not extensive, preliminary research and analysis have identified a number of practices which affect nearly every service industry.<sup>86</sup>

79. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, OBJECTIVES FOR TRADE NEGOTIATIONS IN SERVICES (FOR USE IN OECD DISCUSSIONS) 2 (1981) [hereinafter cited as OBJECTIVES FOR TRADE NEGOTIATIONS IN SERVICES].

80. See *id.* According to a survey conducted by the Department of Commerce, the United States generally has adopted a liberal policy toward foreign providers of services. The existing restrictions are justified on national security grounds and reflect a belief that foreigners should not control industries vital to national interest. See INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, SURVEY OF PRINCIPAL U.S. IMPEDIMENTS TO ALIEN SERVICE INDUSTRIES 2 (1980).

81. OBJECTIVES FOR TRADE NEGOTIATIONS IN SERVICES, *supra* note 79, at 2-3.

82. See S. 1233 Hearings, *supra* note 29, at 63 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States); OBJECTIVES FOR TRADE NEGOTIATIONS IN SERVICES, *supra* note 79, at 3.

83. See S. 1233 Hearings, *supra* note 29, at 63 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States). See also *supra* notes 79-82 and accompanying text.

84. See CURRENT DEVELOPMENTS, *supra* note 23, at 2. See also *supra* notes 65-68 and accompanying text.

85. FCN Memorandum, *supra* note 21, at 5-7. See also *supra* note 21.

86. See CRS, *supra* note 3, at 9.

NTBs to trade in the service sector are many and diverse. They depend largely on the nature of the particular industry they affect. Nonetheless, the following common barriers can be enumerated:

1. Restrictions on remittance and repatriation of profits, fees, and royalties
2. Restrictions that mandate full or partial local ownership or service firms or that exclude foreign firms from access to the local market



Barriers to trade in the service sector have been divided into five major categories: interference with access to market (denial of establishment/across-the-border trade);<sup>87</sup> interference with transac-

- 
3. Restrictions on personnel, including visas, work permits, professional licensing, and the employment of local labor
  4. Discriminatory taxes placed exclusively or inequitably on foreign business income, profits, or royalties
  5. Inadequate protection of intellectual property, trademarks, copyrights, and technology
  6. Government subsidies that favor the competitive position of locally owned firms in the home market or in third-country markets
  7. Government-owned or government-controlled enterprises in the service industries
  8. Discriminatory licensing regulations, fees, and taxes
  9. Excessive duties on or outright prohibition of necessary imports
  10. Absence of international standards and procedures for services
  11. Discriminatory restrictions on government procurement

*Id.* at 9.

The ISIC has divided possible foreign market impediments, barriers and discriminatory practices to industry abroad under the headings of legal establishment, investment/finance, foreign exchange restrictions, local purchasing requirements, industrial/intellectual property, marketing and selling, access to public sector markets, personnel, taxation and foreign government regulatory procedures. *See* ISIC REPORT, *supra* note 66, at 33-36.

It is also possible to classify NTBs according to the intent of the restriction. *See* Walter, *Non-tariff Barriers and the Free-Trade Area Option*, BANCA NAZIONALE DEL LAVORO Q. REV. No. 88, March 1969 at 16, 19. Walter is concerned primarily with NTBs to trade in goods. Nevertheless, the same analysis would apply to NTBs to trade in the service sector. He subdivides NTBs into three major types.

Type I is composed of all measures designed principally to protect domestic industries from import competition, to restrict exports, or to strengthen domestic industry in competing with imports or for export markets. *See id.* at 20. These NTBs are subclassified into import-directed measures such as discriminatory government purchasing, *see id.* at 22, and export directed measures such as export credit insurance subsidization—"[a]ctuarially unsound export credit insurance schemes which have historically operated with deficits covered by the government." *Id.* at 23.

Type II consists of trade distorting policies and practices "which are imposed primarily with the intent of dealing with non-trade-related problems, but which are periodically and intentionally employed for trade-restrictive purposes." *Id.* at 20. Border tax adjustments, marketing standards, safety requirements, health requirements, exchange restrictions and government financing would fall under the Type II category. *See id.* at 24-27.

Type III NTBs are "[p]olicies and practices applied exclusively for non-trade-related reasons, but which unavoidably serve to distort international competitive conditions and hence affect trade." *Id.* at 20. Examples of such NTBs are variations in depreciation methods, variations in social securities and health-insurance systems, variations in monetary and fiscal policies, and government sponsored research and development. *See id.* at 27-30.

87. *See* S. 1233 Hearings, *supra* note 29, at 63 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States). *See also infra* notes 93-98 and accompanying text.

tions and financial structure;<sup>88</sup> interference with access to production inputs;<sup>89</sup> interference with marketing;<sup>90</sup> and trade-distorting government behavior.<sup>91</sup> The first and the last categories are particularly important because they are the most common.<sup>92</sup>

Restrictions on access to market affect both across-the-border and establishment trade.<sup>93</sup> In establishment trade the access problem presents itself in two situations. First, there may be restrictions prohibiting establishment per se. Second, even if an industry is allowed to set up a local office, its operations may be curtailed by a number of restrictions which effectively limit its access to the local market.<sup>94</sup> Thus, to achieve meaningful establishment, the service industry must be able not only to establish a local office, but also to have free access to the local market.<sup>95</sup> Impediments to market access take the form of prohibitions on importation or establishment of the service,<sup>96</sup> operation of a system of licenses which acts as

88. NTBs in the area of transactions and financial structure include regulatory practices applied to slow or block international transactions by foreign firms through discriminatory taxation, denial of foreign exchange issuance, and/or imposition of onerous capital structure, ownership and financial management requirements. *See S. 1233 Hearings, supra* note 29, at 63 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States).

89. Production input NTBs may take the form of denial of or restrictions on access to imported equipment, foreign personnel or producer services coming from outside the importing country. *See id.*

90. Restrictions on marketing may take the form of quotas, technical standards or denial of government procurement arrangements by local private sector companies. *See id.*

91. *See id.*

Protectionist regulatory behavior may be formal, based upon law or written regulation or it may be achieved indirectly through pettifoggery, delay or other arbitrary practices by officials. Also, government-controlled services or facilities that are available to local competitors may be denied to foreign firms. Subsidization of national service firms can skew competition in domestic and in third country markets. Government competition policies may favor government-owned service enterprises.

*Id.*

92. *See ICC Doc. No. 103/34 Rev. 4, supra* note 12, annex.

93. *See S. 1233 Hearings, supra* note 29, at 63 (statement of Ronald K. Shelp on behalf of the Chamber of Commerce of the United States).

94. *See ICC Doc. No. 103/34 Rev. 4, supra* note 12, annex at 1.

95. *See id.*

96. *See id.* annex at 1-2. Examples of prohibition upon the establishment of local operations or upon the importation of a service by a foreign firm include legal prohibition of establishment; prohibition of foreign investment in an existing domestic industry; cabotage; limitations on freedom to pick up or put down passengers/freight in the country concerned, or to proceed through national territory; and prohibition of or limitation on activities of services' brokers to conduct their business on international markets. *See id.* annex at 2.

a quota upon the number or type of firms granted access,<sup>97</sup> and other legislation which discriminates against foreign firms and in favor of domestic firms.<sup>98</sup>

In addition to access restrictions, other government behavior distorts the competitive position of foreign service providers. Frequently, governments directly intervene in the functioning of the market mechanism. They attempt to improve the competitive position of certain firms through government grants and loan facilities not available to foreign firms,<sup>99</sup> or hamper the competitive conditions of foreign firms by imposing restrictions on contractual freedom,<sup>100</sup> importation of equipment or employment of expatriate staff.<sup>101</sup> Governments are also able to impose barriers in the free flow of trade in services by discriminating between domestic and foreign suppliers in the area of government procurement.<sup>102</sup>

To obtain a more complete list of trade barriers to services, the GATT Secretariat should request that each country submit an inventory of government regulations and administrative practices adversely affecting its service industries' trade in other countries. This procedure was successfully utilized during the Tokyo Round negotiations of NTBs to goods.<sup>103</sup>

### III. *BUILDING INTERNATIONAL CONSENSUS ON LIBERALIZATION*

The barriers confronting the service sector are very similar to tariffs and nontariff barriers to trade in goods.<sup>104</sup> "It seems therefore reasonable to seek formulation of principles for open, free

97. Quota-related barriers include procedural impediments to granting licenses; requirements that foreign firms offer a service materially different from those offered by domestic firms before licenses are granted; licenses which cover only limited activities; and non-recognition of professional licenses to practices awarded in other countries. *See id.*

98. Types of discriminatory legislation include imposition of cargo-sharing or cargo-allocating agreements, limitations on foreign equity holdings or on the amount of capital required for initial investment, and restrictions on level of sales and/or advertising by a foreign firm. *See id.* annex at 2-3.

99. *See id.* annex at 5.

100. *See id.*

101. *See id.* annex at 5-6.

102. *See id.* annex at 6.

103. *See TOKYO ROUND REPORT*, *supra* note 5, at 50. The United States has already compiled an inventory of barriers to United States service industries listing an ever increasing number of barriers. *See U.S. GOVERNMENT INVENTORY*, *supra* note 3. *See also* Wall St. J., Oct. 5, 1981, at 1, col. 1.

104. *See* Cloney, *supra* note 5, at 18.

trade in services that are similar to those for goods trade and which might orient similar procedures to reduce barriers to trade in services.”<sup>105</sup>

#### A. *Difficulties in Reaching Consensus*

Nations' interest in liberalization of trade in the service sector varies a great deal.<sup>106</sup> As the leading exporter of services, the United States has been the major proponent of liberalization.<sup>107</sup> The response of other developed nations, with the exception of the United Kingdom, has been tepid.<sup>108</sup> A probable reason for this lack of enthusiasm is the belief that the United States has the most to gain and the least to lose from services' liberalization.<sup>109</sup> France, Italy and several smaller European nations have expressed concern that the lack of appropriate data makes it impossible for them to ascertain whether it would be to their advantage to liberalize trade in services.<sup>110</sup> Other nations, particularly developing countries, believe that their service industries are unable to compete internationally. These nations argue that their service industries are at the “infant-industry”<sup>111</sup> stage and, therefore, should be allowed to en-

105. *Id.*

106. *See* GRC, *supra* note 18, at 9-10. *See also* Wall St. J., Oct. 5, 1981, at 1, col. 1.

107. *See* GRC, *supra* note 18, at 9. The United States government has established a work program for the cultivation of foreign markets by the United States service industries. The work program consists of (1) making full utilization of existing bilateral channels for resolving current trade problems in services; (2) including services in the review of United States policies that burden United States exports; (3) making domestic and international preparation for future multilateral negotiations and trade in services; (4) reviewing domestic legislative provisions relating to the achievement of reciprocity for United States services exports, and (5) reviewing the adequacy of United States statistics on trade in services. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, U.S. GOVERNMENT WORK PROGRAM ON TRADE IN SERVICES (1981).

108. *See* GRC, *supra* note 18, at 9.

109. *See id.* Wall St. J., Oct. 5, 1981, at 1, col. 1 cont'd at 20, col. 1.

110. *See* Wall St. J., Oct. 5, 1981, at 1, col. 1 cont'd at 20, col. 1.

111. The basic argument for infant industry protection is that “the nation considering protection does *not* have a comparative *disadvantage* in the production of the good in question in long-run equilibrium. But, in the immediate short run, no firm can start up.” H. GRAY, *supra* note 15, at 162-63. This inability exists because “[t]he industry must start up on a relatively small scale and grow by increasing its capacity.” *Id.* at 163. The “small or infant firm would not be able to survive to grow to maturity because its costs would be too high and foreign firms would undersell it in its domestic market.” *Id.* It is thought that temporary protection, generally in the form of a tariff, is needed to allow the industry to survive. *See id.*

Another reason for the inability of the infant industry to achieve economies of scale that are technologically available is the relatively small size of the domestic market. *See id.* It is assumed that demand will grow with economic development and ultimately economies of scale would be achieved. *See id.*

courage the development of domestic service industries through discriminatory treatment.<sup>112</sup>

Within the last decade, the United States' share of international trade in the service sector has declined in relative terms although it has grown in absolute terms.<sup>113</sup> According to the United States, this decline is attributable to the growing imposition of foreign barriers to trade<sup>114</sup> and to the open United States economy, which has few administrative and legal weapons to retaliate against foreign discrimination.<sup>115</sup> The United States is considering the imposition of access restrictions and other barriers in response to offensive foreign restraints if efforts to achieve liberalization fail.<sup>116</sup> It is hoped that the United States need not resort to these penalties. Recent efforts towards liberalization of services made by the United States and the OECD lend support to this hope.

## B. Efforts Toward Liberalization

### 1. The United States Effort

Efforts by the United States to reduce barriers to trade in the service sector began with the passage of the 1974 Trade Act.<sup>117</sup> The 1974 Trade Act authorized United States' participation in the Tokyo Round, developed a procedure for consultation between the President and Congress during the negotiating period,<sup>118</sup> and autho-

"This argument is valid for certain industries in certain countries in certain stages of development. However, there are real, and possibly important, short-run cost to this kind of protection as well as a potential long-run cost." *Id.*

112. See A. SAPIR & E. LUTZ, *supra* note 20, at 62.

113. See S. 1233, *supra* note 28, at S5371.

114. *Foreign Barriers Hearings*, *supra* note 3, at 8.

115. See S. 1233, *supra* note 28, at S5371. Growing competition from other developed and advanced developing countries is another factor causing the relative decline of the United States' share of global trade in services. See, GRC, *supra* note 18, at 3.

116. See N.Y. Times, Jan. 18, 1982, § D1, col. 6. The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101-2487 (1976)) authorized the President of the United States to retaliate against unjustifiable, unreasonable or discriminatory practices which have been brought to the attention of the Office of the United States Trade Representative and for which a solution could not be reached through bilateral negotiations. See Trade Act of 1974, 19 U.S.C. § 2411 (1976) *amended by* 19 U.S.C. § 2501 (Supp. III 1979).

117. 19 U.S.C. §§ 2101-2487 (1976).

118. See 19 U.S.C. § 2112(c) (1976); S. REP. NO. 93-1298, 93rd Cong., 2d Sess. *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7186-87.

A salient feature of United States trade policy is the constitutionally induced tension between the Legislative and Executive Branches of government. See Jackson, *The Birth of the*

rized the President to enter into trade agreements for the purpose of eliminating tariffs, nontariff barriers and other distortions to international trade.<sup>119</sup> International trade was, for the first time, defined as including both goods and *services*.<sup>120</sup>

As a result, the extent of the problems faced by the United States' service sector were analyzed.<sup>121</sup> Based on a Department of Commerce study,<sup>122</sup> the United States introduced service trade matters during the late stages of the Tokyo Round negotiations.<sup>123</sup> Although largely unsuccessful,<sup>124</sup> this attempt resulted in the specific mention of services in the Agreement on Government Procurement.<sup>125</sup> Since the completion of the Tokyo Round, the United States Chamber of Commerce,<sup>126</sup> the Commerce Department<sup>127</sup>

*GATT-MTN System: A Constitutional Appraisal*, 12 *LAW & POL'Y INT'L BUS.* 21, 53 (1980) [hereinafter cited as *GATT-MTN System*]. Although the United States Constitution specifically grants Congress the power to regulate interstate and foreign commerce, see U.S. CONST. art. I, § 8, cl. 3, Congress cannot effectively negotiate foreign agreements and has traditionally delegated its power to the President. See *GATT-MTN System*, *supra*, at 53. At the same time, the Executive Branch may have the power to negotiate international agreements, but it may not have the power to have them enforced. See Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 *LAW & POL'Y INT'L BUS.* 327, 333-34 (1975). The need for cooperation between the two branches became apparent during the Kennedy Round negotiations of 1967 when Congress attempted to block the implementation of the Antidumping Code. See *id.* at 332-35.

119. See S. REP. NO. 93-1298, *supra* note 118, at 7186.

120. See 19 U.S.C. § 2112(g)(3) (1976). The legislative history of the 1974 Trade Act also indicates a concern with services. "The Committee . . . felt strongly that barriers affecting services as well as goods should be eliminated. These would include, but not be limited to, barriers involving transportation of goods and persons, insurance, and other important commercial services associated with international trade." S. REP. NO. 93-1298, *supra* note 118, at 7224.

121. See *CURRENT DEVELOPMENTS*, *supra* note 23, at 9.

122. DEP'T OF COMMERCE, *U.S. SERVICE INDUSTRIES IN WORLD MARKETS* (1976).

123. See *ISIC REPORT*, *supra* note 67, at 17. See also *supra* note 5. The United States' aims in introducing service trade matters were to explore where services might be introduced into NTB groups working on NTB codes, and to table a number of issues affecting different service industries for bilateral discussions with trading partners under the MTN umbrella. See *id.* at 17-18.

124. See *id.* at 18; *CURRENT DEVELOPMENTS*, *supra* note 23, at 9.

125. Agreement on Government Procurement, BISD, 26th Supp., *supra* note 5, art. I, para. 1(a) at 34.

126. Most of the work of the United States Chamber of Commerce in the trade in services area is done through the International Service Industry Committee. See *supra* note 67.

127. The Commerce Department established the International Services Division in 1978 to focus on issues affecting the international operations of service industries. See *CURRENT DEVELOPMENTS*, *supra* note 23, at vii.

and the Office of the United States Trade Representative<sup>128</sup> have worked to bring service issues to the international forefront.

## 2. The OECD Effort

International consensus building in the area of service sector trade liberalization is also being done through the OECD. The United States was instrumental in the OECD's adoption of a Ministerial Resolution which endorsed increasing attention to services.<sup>129</sup> From its inception, the OECD has been concerned with services.<sup>130</sup> The importance of the service sector was recognized in 1961 in the "Code of Liberalisation of Capital Movement and Current Invisible Operations"<sup>131</sup> in which members undertook to eliminate restrictions on current invisible transactions.<sup>132</sup> Services were also covered in the OECD Declaration and Decisions on International Investment and Multilateral Enterprises of 1976,<sup>133</sup> in which the member countries agreed to the principle of granting "national treatment"<sup>134</sup> to established foreign-controlled enterprises including service industries.<sup>135</sup>

In 1979, the OECD Council requested the Committee for Capital Movements and Invisible Transactions to revise and update the Code to make it a more effective instrument for the liberalization of international service operations. The OECD Code does not cover many services and the treatment of services it does cover is

128. The Office of the United States Trade Representative (USTR) is placing great emphasis on trade issues relating to services. See *S. 1233 Hearings*, *supra* note 29, at 89 (statement of Harry L. Freeman, Senior Vice President — Office of the Chairman, American Express Company). The USTR publishes a quarterly newsletter to inform service industries and interested individuals about current issues and activities in the service sector. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1 INTERNATIONAL SERVICE NEWSLETTER 1 (Mar. 1980).

129. See GRC, *supra* note 18, at 9.

130. See International Trade and Investment in Services, *supra* note 62, at 1-2.

131. See OECD OBSERVER, *supra* note 6, at 16.

132. See International Trade and Investment in Services, *supra* note 62, at 2.

133. O.E.C.D. Press Release A(76)20 of June 20, 1976 reprinted in 15 I.L.M. 967 (1976).

134. See *id.* at 968. Providing "that Member countries should . . . accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country . . . treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises." *Id.* at 968.

135. See International Trade and Investment in Services, *supra* note 62, at 4.

outdated.<sup>136</sup> The OECD commitment to liberalization of services was re-emphasized in the 1980 Trade Pledge<sup>137</sup> in which member countries expressed their determination to "avoid restrictive measures in the trade field and on other current transactions."<sup>138</sup>

Service sector questions are handled largely by the Trade Committee.<sup>139</sup> Its work is still in the exploratory phase, identifying and cataloguing the most important obstacles.<sup>140</sup> Speaking of the Committee's work, one OECD representative was hopeful that the "comprehensive inventory of problem areas which is expected to result from this work will be an essential first step to any more action-oriented search for possible solutions."<sup>141</sup>

#### IV. *EXTENDING THE GATT TO COVER TRADE IN THE SERVICE SECTOR*

While helpful in building international consensus, OECD pronouncements on liberalization of the service sector are merely political statements of intent and not legally binding.<sup>142</sup> A legal instrument which could be expanded to deal with the service sector is the GATT.<sup>143</sup> Currently, the GATT deals only with trade in goods.<sup>144</sup> The intent of the drafters to exclude service sector issues is shown in the preparatory work for the International Trade Organization (ITO) Charter and for the GATT.<sup>145</sup> Nonetheless, it was recognized from the beginning that discriminatory practices in services could affect trade in goods.<sup>146</sup>

Interest in exploring the service sector has been shown in the upper levels of the GATT organization.<sup>147</sup> Recently, the GATT

136. *See id.* at 3.

137. *See* OECD OBSERVER, *supra* note 6, at 16-17.

138. International Trade and Investment in Services, *supra* note 62, at 4 (emphasis omitted).

139. *See id.* at 3.

140. *See id.* at 3; Noble, *supra* note 62, at E20, col. 3.

141. *See* International Trade and Investment in Services, *supra* note 62, at 3-4.

142. *See id.* at 5; *Foreign Barriers Hearings*, *supra* note 3, at 10.

143. For a discussion of legal obligations in international affairs, see generally WORLD TRADE, *supra* note 1, at 12-17.

144. *See id.* at 528; for a discussion of the GATT, *see supra* note 1.

145. *See* WORLD TRADE, *supra* note 1, at 528-29.

146. *See id.* at 529.

147. Arthur Dunkel, Director-General of the GATT, has stated that trade in services is as important a sector of international economic relations as trade in goods. *See* Wall St. J., Mar. 3, 1981, at 12, col. 2.



Secretariat prepared a paper which reviewed the historical role of the GATT in services, discussed some barriers to trade in services and considered whether some existing GATT commitments could be extended to services.<sup>148</sup> The paper was then reviewed by the GATT Consultative Group of 18 (CG-18).<sup>149</sup> Moreover, a ministerial meeting of the GATT's signatory countries scheduled for November, 1982 is expected to focus on service sector problems.<sup>150</sup>

### A. *Inter-relationship Between Goods and Services*

There is a synergistic relationship between trade in goods and trade in services.<sup>151</sup> Trade in goods cannot exist without support services such as transportation, banking, insurance, retailing and advertising. Conversely, service activities create a demand for goods.<sup>152</sup> Furthermore, trade in goods and services is becoming increasingly interrelated.<sup>153</sup> Many services, such as computer programming, are integrated with goods. This has prompted one commentator to state that "[t]hese two issues are so closely related that

148. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1 INTERNATIONAL SERVICES NEWSLETTER 3 (Jan.-June 1981). The text of the GATT paper is reprinted in *Hearings on S. 1233*, *supra* note 29, at 21-33.

149. This group, composed of officials responsible for their countries' trade policies, was provisionally established in 1975 to help the contracting parties to the GATT carry out their responsibilities more effectively. In 1979 it became a permanent body. "The task of the Group is to facilitate the carrying out by the CONTRACTING PARTIES, of their responsibilities particularly with respect to:

- (a) following international trade developments with a view to the pursuit and maintenance of trade policies consistent with the objectives and principles of the General Agreement;
- (b) the forestalling, whenever possible, of sudden disturbances that could represent a threat to multilateral trading systems and to international trade regulations generally; and action to deal with such disturbances if they in fact occur;
- (c) the international adjustment process and the co-ordination, in this context, between the GATT and the IMF.

BISD, 26th Supp., *supra* note 5, at 289. In carrying out this mandate, the Group, in 1980, agreed "that the problems of trade in services, export restrictions and charges, restrictive business practices, rules of origin and dispute settlement would be taken up at later meetings." GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1980, Sales No. GATT/1981-1 (Apr. 1981).

150. See N.Y. Times, Jan. 18, 1982 § D, at 1, col. 6.

151. See Krommenacker, *Trade-Related Services and GATT*, 13 J. WORLD TRADE L. 510, 510 (1979).

152. See S. 1233 *Hearings*, *supra* note 29, at 88 (statement of Harry L. Freeman, Senior Vice President—Office of the Chairman, American Express Company).

153. See Krommenacker, *supra* note 151, at 510. See generally Robinson, *A New Economic Alliance—Services and Manufacturing*, FINANCIER, March 1981, at 43.

it could be unrealistic to deal with services and goods in watertight compartments. Efforts to liberalize trade in services should go hand in hand with action to liberalize trade in goods."<sup>154</sup>

Multilateral negotiations in the service sector must overcome technical negotiating difficulties and conceptual difficulties. The GATT's discussion of transport insurance in the 1950's<sup>155</sup> and the Tokyo Round discussion of services<sup>156</sup> illustrate the difficulty of dealing with services in multilateral trade negotiations. The basic GATT concepts of reciprocity,<sup>157</sup> National Treatment<sup>158</sup> and Most-Favored Nation (MFN)<sup>159</sup> and their corrective administrative measure, the General System of Preference (GSP),<sup>160</sup> must be tailored to the peculiarities of the service sector.

154. Krommenacker, *supra* note 151, at 510.

155. In 1953 the Contracting Parties asked the Secretary to prepare a report on the issues involved in the question of discrimination in transport insurance. These negotiations resulted in a 1959 recommendation on the freedom of contract in transport insurance. See Krommenacker, *supra* note 151, at 515. It recognized the right of countries which did not have sufficiently developed national insurance industries to take protective measures and recommended that

in the formulation of national policies in the field of transport insurance, governments should endeavor to avoid measures that would have restrictive effect on international trade . . . that this matter be regarded as a subject of interest to the CONTRACTING PARTIES . . . .

GATT, 8th Supp. BISD 27 (1960), *reprinted in* WORLD TRADE, *supra* note 1, at 530. The contracting parties were thus asked to avoid creating more obstacles in that particular field and were requested to report to the GATT Secretariat relevant information on the subject which had not been previously reported. Even to this rudimentary agreement, however, there was never adherence. See Krommenacker, *supra* note 151, at 530.

156. During the Tokyo Round service sector problems were introduced by the United States for the purpose of exploring where services might be introduced in the NTB groups and for presenting a number of issues affecting specific service industries. See ISIC REPORT, *supra* note 67, at 17-18. Only very modest progress was made during the Tokyo Round. Conceivably, in addition to the Agreement on Government Procurement, services could have been specifically covered in the Agreement on Interpretation and Application of Articles VI, XVI and XXVII (Subsidies and Countervailing Measures), BISD, 26th Supp., *supra* note 5, at 56, and the Agreement on Trade in Civil Aircraft, *id.* at 162. It is not clear whether services were not included because of theoretical opposition to negotiating in the services area, technical problems or, simply, fatigue. In fact, services problems were introduced by the United States in the late stages of the negotiating process. See ISIC REPORT, *supra* note 67, at 18.

157. See GATT, *supra* note 1, Preamble *amended by* Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade *done at* Geneva on March 10, 1955, 278 U.N.T.S. 168.

158. See *id.*, pt. II, art. III.

159. See *id.*, pt. I, art. I.

160. The generalized system of preference (GSP), was developed by the United Nations Conference on Trade and Development (UNCTAD), FINAL ACT U.N. Doc. e/Conf. 46/141, vols. 1-8 (1964) (Sales No. 64 II B.12). The UNCTAD is composed of developing countries. Through political and moral pressure on developed countries, the UNCTAD

### B. Applying the Basic GATT Concepts

The major premise of negotiation for the reductions of tariffs under the GATT is that resulting reductions will be reciprocal, mutually advantageous and generalized through the MFN status.<sup>161</sup> While the concept of reciprocity has proved to be politically marketable,<sup>162</sup> it is "almost impossible to measure the value of a concession so that another concession offered in exchange can be accurately compared with it,"<sup>163</sup> even when dealing with trade in goods.

For trade in goods this problem has been overcome by using a rough measure of the concession value.<sup>164</sup> The same approach could be used for trade in services. An exchange between two countries of concessions judged to be equivalent in value would satisfy the reciprocity requirement.<sup>165</sup>

The literal meaning of reciprocity—"equal treatment applied to given products and services at home and abroad"<sup>166</sup>—clashes with legitimate national interests and policies expressed through legislated regulations of many service sector industries. Carried to its extreme, literal application of reciprocity would subordinate all laws bearing on the service sector of all signatory countries to the

succeeded in having the developed countries impose a lower tariff on goods imported from developing countries than those imposed on goods from developed countries. See *WORLD TRADE*, *supra* note 1, at 661-63; *infra* notes 179-81 and accompanying text.

161. See *id.*, pt. II, art. XXVIII *bis*. See also *WORLD TRADE*, *supra* note 1, at 240-41. The GATT provides that "any advantage, favour, privilege or immunity granted by any contracting party shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 1, pt. I, art. I.

The essence of the MFN principle is thus nondiscrimination. For a discussion of the perspectives, preparatory history, obligations and exceptions to the MFN principle under the GATT, see generally *WORLD TRADE*, *supra* note 12, at 249-72.

162. See *WORLD TRADE*, *supra* note 1, at 245.

163. *Id.* at 241.

164. See *WORLD TRADE*, *supra* note 1, at 241. A concession is the amount by which the tariff is reduced. *Id.*

It is very difficult to quantify NTBs. "Administrative and technical regulations on customs, valuation, health, and safety measures are especially difficult to assess, yet their misuse can be as significant a barrier to trade as very high tariffs. Thus the judgment of trade experts may be relied upon for qualitative assessments of the trade effects of these barriers." R. BALDWIN, *supra* note 3, at 14.

165. *Foreign Barriers Hearings*, *supra* note 3, at 13-14.

166. *Id.*

rules established under the GATT. It seems unlikely that any nation would be willing to sacrifice national sovereignty in these areas.<sup>167</sup>

Perhaps, the concept of reciprocity would have to be limited to the granting of national treatment.<sup>168</sup> National treatment under the GATT "means that imported goods will be accorded the same treatment as goods of local origin with respect to matters under government control, such as taxation and regulation."<sup>169</sup> If each signatory nation were to eliminate all distinctions between foreign services and domestic services, trade in services would be liberalized and each country would retain control over those service industries which it feels should be regulated. Reciprocity would thus amount to each government's treating foreign services on a basis no less favorable than that given to domestic firms.<sup>170</sup>

Developing countries will probably express disfavor with this standard of reciprocity. They are likely to claim competitive disadvantage and to point to Article XVIII of the GATT which recognizes that "it may be necessary for . . . [developing] contracting parties, in order to implement programmes and policies of economic development . . . to take protective . . . measures affecting imports . . . ."<sup>171</sup> Developing countries can find further support for their position in the "Framework for Conduct of International Trade"<sup>172</sup> [Framework] reached during the Tokyo Round. In the

167. *See id.*

168. *See* GATT, *supra* note 1, pt. II, art. III, *amended by* the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, *signed at* Geneva on September 14, 1948, 62 U.N.T.S. 113.

It provides:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

*Id.*, pt. II, art. III, para. 1.

169. WORLD TRADE, *supra* note 1, at 273.

170. *Foreign Barriers Hearings*, *supra* note 3, at 13.

171. GATT, *supra* note 1, pt. II, art. XVIII, para. 2 *amended by* Protocol Amending the Preamble and Parts II and III of the General Agreements on Tariffs and Trade *done at* Geneva on March 10, 1955, 278 U.N.T.S. 168.

172. BISD, 26th Supp., *supra* note 5, at 203. *See also* TOKYO ROUND REPORT, *supra* note 5, at 148.

The aim of the negotiations in the Framework area was to reinforce certain GATT provisions in their application and to adopt trade relations between developed and developing countries. *See* Note, *Technical Analysis of the Group "Framework,"* 12 LAW & POL'Y INT'L BUS. 299 (1980).

Framework the contracting parties agreed to give more favorable treatment to developing nations with respect to the GATT provisions.<sup>173</sup>

It appears, thus, that reciprocity consisting of national treatment could not be achieved, at least for developing countries. There remain questions, however, whether the infant industry argument<sup>174</sup> applies to service industries and whether the developing countries would in fact be disadvantaged by liberalization of trade in the service sector.<sup>175</sup>

In any event, developing countries could limit themselves to the MFN principle.<sup>176</sup> This principle applied to the service sector would serve to put all foreign service sector industries in a particular country on the same competitive footing. In the GATT parlance, the MFN principle would require any internationally traded services originating in any other country to be subject to equal treatment by the recipient nation.<sup>177</sup> The host country could, however, continue to favor its own service sector.<sup>178</sup>

Moreover, because of their competitive disadvantage, the developing countries are likely to insist upon a system of preference similar to the GSP.<sup>179</sup> The GSP allows developed nations to levy a lower tariff on products imported from developing countries than the tariff applied to the same product imported from a developed country.<sup>180</sup> This system of preferential treatment was incorporated in the Framework.<sup>181</sup>

173. See Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, BISD, 26th Supp., *supra* note 5, at 203.

174. See *supra* note 111 and accompanying text.

175. See A. SAPIR & E. LUTZ, *supra* note 20, at 66.

176. See *supra* note 161.

177. See ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 2.

178. See WORLD TRADE, *supra* note 1, at 273.

179. See *supra* note 160.

180. See WORLD TRADE, *supra* note 1, at 661. See also *supra* note 160. The GSP was created to increase the export earnings of developing countries, and to enable developing countries to establish infant industries by giving them preferential access to mass markets so that economies of scale can be realized. WORLD TRADE, *supra* note 1, at 663. See Note, *The Generalized System of Preferences: Nations More Favored Than Most*, 8 LAW & POL'Y INT'L BUS. 783 (1976).

The President of the United States is authorized to extend duty free treatment to eligible articles from beneficiary developing countries. See 19 U.S.C. §§ 2461-65 (1976).

181. BISD, 26th Supp., *supra* note 5, at 203. The enabling clause of the Framework provides a legal basis by which differential and more favorable treatment may be extended to developing countries on a preferential basis. The types of special arrangements covered by the

C. *Proposed Framework for Liberalizing Trade in the Service Sector Under the GATT*

Liberalization of the service sector within the GATT's framework requires analysis from both the conceptual and the mechanical perspective. The application of the MFN principle to services necessitates a system which treats equally all foreign service industries while conceding a degree of national preference.<sup>182</sup> The limits of this preference would have to be negotiated.<sup>183</sup> Furthermore, a service code is needed to provide for the mechanics of achieving these goals.

1. A System for Allowing a Degree of National Preference

For trade in goods, the method of preference used under the GATT is the tariff.<sup>184</sup> "Tariffs have two major advantages over other forms of discriminatory treatment imposed to afford a preference to a domestically produced good. First, they are of a transparent nature, and secondly, they minimise market distortion in that they act directly and proportionally on the price, thus avoiding distortions between foreign competitors."<sup>185</sup>

Given the intangible nature of the service sector and the fact that many service industries do not involve across-the-border trade, it is apparent that an import tax at the border, i.e. a tariff, on services is impracticable. The International Chamber of Commerce has suggested that, in the service sector, the preferential role of the tariff be played by a discriminatory sales tax imposed upon transactions with foreign providers of the service or a corporate tax on total sales.<sup>186</sup>

enabling clause include the GSP and differential treatment with respect to the GATT provisions concerning NTBs governed by the Tokyo Round agreements. See TOKYO ROUND REPORT, *supra* note 5, at 149.

182. See INTERNATIONAL CHAMBER OF COMMERCE, JOINT WORKING PARTY ON OBSTACLES TO INTERNATIONAL TRADE IN SERVICES LIBERALISATION OF TRADE IN SERVICES: FURTHER POINTS FOR DISCUSSION Doc. No. 103-22/INT. 12 *Bis* at 3 (1981-08-31) [hereinafter cited as ICC Doc. No. 103-22/INT. 12 *Bis*].

183. *Id.*

184. See *id.* See generally WORLD TRADE, *supra* note 1, at 205-11. A tariff is an import tax. See M. CHACHOLIADES, *supra* note 15, at 442. For a discussion of the economic consequences of tariffs on income levels and distribution, see H. GRAY, *supra* note 15, at 145-75. Reasons for impositions of tariffs include protecting certain industries in time of war, protecting infant industries, expanding employment, protecting domestic labor's income, making adjustments more gradual and protecting the jobs of the unskilled. See *id.* at 160-74.

185. ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 3.

186. *Id.*

The role of this tax would be as follows. Theoretically, all barriers not intrinsically necessary to legitimate domestic economic policies should be eliminated through a negotiating process similar to the one in the Tokyo Round for discussions of NTBs to goods.<sup>187</sup> International economic policy, however, is nearly always subservient to international political policy.<sup>188</sup> It is very likely, therefore, that political considerations will play a major role in reaching agreement on the reduction of barriers to services.

It seems, thus, that some barriers will remain to accommodate legitimate national economic and political concerns. Because of the amorphous nature of barriers to trade in services,<sup>189</sup> it is proposed that these remaining barriers be lumped together, evaluated in terms of the protection they afford to the national economy of the country in which they are found, and translated into a tax which would be applied pursuant to the MFN principle.

Assuming that the present variety of service trade distortions acts as a barrier in and of itself, the crystallization of such barriers into a tax should encourage global<sup>190</sup> economic activity. Empirical studies have shown that trade liberalization leads to economic benefit to the nations that gain access to a previously restricted market, as well as to the nation that is reducing its barriers.<sup>191</sup> The preferential tax should, therefore, be slightly less protective than the aggregate nontax barriers it replaces to adjust for increased eco-

187. See *id.* at 1. Negotiations of NTBs during the Tokyo Round proceeded as follows. First, after a comprehensive inventory of nontariff barriers was compiled, NTBs were classified into broad categories. See TOKYO ROUND REPORT, *supra* note 5, at 50-51. The Trade Negotiations Committee set up a group to oversee negotiations of NTBs. This group then established subgroups to deal with each of the broad NTBs categories. See *id.* at 51. See generally *Fourth Annual Judicial Conference of the U.S. Court of Customs and Patent Appeals—Multi-Lateral Trade Negotiations — a Two-Year Review* 77 F.R.D. 63 (1977) (discussing the activities of various subgroups dealing with NTBs during the Tokyo Round).

188. See H. GRAY, *supra* note 15, at 196-97.

189. See *supra*, notes 63-103 and accompanying text.

190. Trade-distorting measures should be evaluated at the world level. R. BALDWIN, *supra* note 3, at 7.

Just as individual countries can improve their income positions by appropriate import duties if they possess some monopoly power, so too can they raise their income levels by using such nontariff measures as selective internal taxes. However, if each country considers only its own selfish interests in trade, most (but not necessarily all) countries will end up poorer than they initially were and world income as a whole will decline.

*Id.* at 7. It would seem that the effect of removing trade distorting measures should also be evaluated from a global perspective.

191. See SUBCOMM. ON INT'L TRADE OF THE U.S. SENATE COMM. ON FINANCE, 96TH CONG. 1ST SESS., MTN STUDIES 5: AN ECONOMIC ANALYSIS OF THE EFFECTS OF THE TOKYO

conomic activity. It is likely, however, that each country will insist on a preferential tax which is the exact equivalent of the nontax barriers since it has already negotiated a level of preference.

The advantages of replacing the existing barriers to trade in services with a preferential tax would be that the distortion could be easily identified and its effects easily calculated. A tax would be a transparent obstacle. In addition, market distortions among foreign competitors in a particular country would be minimized since all would be subject to the same level of taxation through the MFN principle.

The obvious problem in substituting a preferential tax for nontax barriers is measuring the distorting effects of existing barriers to trade in the service sector.<sup>192</sup> That the same barrier may have very different effects in different countries adds to the complexity of the measuring problem.<sup>193</sup>

Assuming that the impact of these barriers can be measured, a number of factors must be considered in establishing a preferential tax. Effects of the tax could vary depending on whether it is imposed directly on the exporter, the importer or the ultimate consumer. The acceptability of each imposition would vary depending on whether the tax is intended to protect the domestic industry, to further a specific monetary policy or to promote balance of payments. If the objectives of the preference include the creation of

ROUND MULTILATERAL TRADE NEGOTIATIONS ON THE U.S. AND THE OTHER MAJOR INDUSTRIALIZED COUNTRIES (Comm. Print 1979) [hereinafter cited as MTN STUDIES]; W. CLINE, N. KAWANABE, T. KRONSJÖ, T. WILLIAMS, TRADE NEGOTIATIONS IN THE TOKYO ROUND (1978). The latter work is a comprehensive assessment of trade protection and economic effects of future trade liberalization for the industrial and for the developing countries. *Id.* at 1.

The empirical results show that major economic benefits would be derived from further trade liberalization.

[T]here would be economic benefits from increased exploitation of economies of scale associated with output expansion for increased exports, as well as from increased investment stimulated by the new export opportunities . . . . [F]reer trade should provide a competitive stimulus to technological advances as well as a moderating influence on import prices and, therefore, on domestic inflation . . . . These . . . economic benefits may be achieved at very little cost in terms of labor adjustment or disturbances in trade balance.

*Id.* at 6-7.

192. See R. BALDWIN, *supra* note 3, at 13-14. "Ideally, the actual and potential real income effects of a measure, including any adjustment effects and the income-distribution effects within and among countries, should be measured. Such an analysis would require interpersonal welfare judgments as well as detailed information on demand and supply conditions." *Id.* at 14 n. 18.

193. See A. SCAPERLANDA, PROSPECTS FOR ELIMINATING NON-TARIFF DISTORTIONS 285 (1973).



employment for certain types of workers, revenues generated by the preferential tax could be channeled into programs which would achieve these goals.

## 2. Limiting the System of National Preference

The preferential tax system described above would closely parallel the existing GATT structure. There would be a negotiated code regulating nontax barriers to the service sector with provisions monitoring the implementation of the code<sup>194</sup> and provisions mandating periodic reviews of the code's continuing fitness to the sector's needs.<sup>195</sup> Each signatory country would be obligated to levy no more than a stated tax on a particular service. As international trade in services increases there should be less need for protection of the domestic service sector and the level of taxation could be gradually reduced in the same fashion as tariffs on goods are reduced.<sup>196</sup> A tax concession, like a tariff concession, involves two obligations. Pursuant to Article II of the GATT, it creates a specific obligation to limit the tax on a service, and a general obligation to apply the tax in a nondiscriminatory fashion.<sup>197</sup> Gradually, the tax preference would be eliminated. This gradual liberalization would have the added advantage of preventing possible dislocation in labor markets.<sup>198</sup>

194. A monitoring scheme was developed for the NTBs codes negotiated during the Tokyo Round. See, e.g., Government Procurement Agreement, BISD, 26th Supp., *supra* note 5, art. VII, at 48.

195. One of the major criticisms lodged against the GATT is non-compliance by countries to its rules. See Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1299 (1971). Procedural obstacles in the GATT have prevented it from being amended to reflect changing needs. As a result, discrepancies between written law and GATT practice have developed. See Roschke, *The GATT: Problems and Prospects*, 12 J. INT'L L. & ECON. 85, 86-87 (1977).

196. See ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 3.

197. See WORLD TRADE, *supra* note 1, at 204.

198. The effect of liberalization in trade resulting from the Tokyo Round on labor markets is discussed in MTN STUDIES, *supra* note 191, at 59 (concluding that adjustment problems should be relatively minor).

The Trade Act of 1974, *supra* note 117, at §§ 2271-2322 provides for worker adjustment assistance. This assistance was provided to "safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm [sic], workers, and communities to adjust to changes in international trade flows . . ." *Id.* § 2102(4) (footnote omitted).

In *Fortin v. Marshall*, 608 F.2d 525 (1st Cir. 1979), however, it was decided that Pan American World Airways employees who lost their jobs when that airline stopped its operations in Boston because of foreign competition were not entitled to adjustment assistance. Before there can be compensation, the Secretary of Labor must determine

### 3. Formation of a Proposed Service Code

The heterogeneous nature of the service sector poses the problem of whether a single code should be developed to cover all industries in the service sector or whether each industry should negotiate its own code.<sup>199</sup> As previously discussed,<sup>200</sup> barriers to trade in services fall into definable categories and affect nearly all service industries. It would appear then that a "global approach," i.e. a code applicable to all industries, should be favored.<sup>201</sup>

This approach would be similar to the one used during the Tokyo Round.<sup>202</sup> Nontax barriers would be grouped into broad categories and, through multilateral negotiations, agreements would be reached on rules regulating such barriers. The agreements would be incorporated into a code which would then be submitted by the GATT to member governments for their acceptance.<sup>203</sup> The code would not mandate the blanket imposition of broad based rules upon all service industries.<sup>204</sup> Rather, it would recognize the obstacles to trade in services, outlaw them, and create measures "adapted to the specific operation of the different service industries . . . ." <sup>205</sup>

The global approach would have the advantage of avoiding repetitive, time consuming and costly negotiations of substantially

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272 (1976).

While the airline workers met the first two requirements, they did not meet the third because, it was held, airline services are not "articles" within the meaning of the worker assistance eligibility requirements. *Fortin v. Marshall*, *supra*, at 528.

In view of the large number of employees in the service sector, *see supra* note 28, the implications of this case should be considered in any legislative act implementing any future international agreement on liberalization of trade in services.

199. *See* ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 4.

200. *See supra* notes 63-103 and accompanying text.

201. *See* ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 4.

202. *Id.*

203. *See* TOKYO ROUND REPORT, *supra* note 5, at 52.

204. ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 4.

205. *Id.* *See also* ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 5.

the same issues in each industry while, at the same time, providing for the idiosyncratic needs of very diverse industries. Furthermore, this approach "results in a more organised, less complicated, body of legislation than does the individual industry or selective approach."<sup>206</sup>

Any definite solution to whether a global or selective approach would better serve the objective of liberalization of trade in services must await further studies concerning the nature of barriers to trade in the service sector.

#### D. *Extending the Agreement on Government Procurement to Services*

While overall multilateral agreement in the service sector will require a lengthy period of preparation,<sup>207</sup> liberalization in limited areas may be more readily achieved. For example, the Agreement on Government Procurement<sup>208</sup> [the Agreement], negotiated during the Tokyo Round, applies to

any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts *per se* . . . .<sup>209</sup>

206. ICC Doc. No. 103-22/INT. 12 *Bis*, *supra* note 182, at 4.

207. See *Foreign Barriers Hearings*, *supra* note 3, at 17; GRC, *supra* note 18, at 16; ICC Doc. No. 103/34 Rev. 4, *supra* note 12, at 5.

208. BISD, 26th Supp., *supra* note 5, at 33.

209. *Id.* art. I, para. 1(a), at 34. The meaning of "services incidental to the supply of products" has not been defined. The Senate Report states that "[t]o the extent that there is ambiguity in the scope and meaning of the term 'services incidental to the supply of products', the committee is of the opinion that, where feasible, services which are related to the end use of a product (e.g. insurance, financing, etc.) should be covered by the agreement." S. REP. No. 6-249, 96th Cong. 1st. Sess. 130, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 516.

Construction contracts and other service contracts are expressly excluded from coverage. Anthony & Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1301, 1319 (1979). Had the phrase "but not service contracts *per se*" not been added, see Presidential Memorandum of Jan. 4, 1979, 44 Fed. Reg. 1933, 1940 (Jan. 8, 1979), an argument could have been made that service contracts, particularly construction contracts, which did not exceed the value of the materials would be covered by the Government Procurement Agreement. See Anthony & Hagerty, *supra*, at 1320.

For a fuller discussion of the Government Procurement Agreement see generally Note, *United States-Japan Trade Developments Under the MTN Agreement on Government Pro-*

The Agreement specifically states, however, that "the Committee [on Government Procurement] shall, at an early stage, explore the possibilities of expanding the coverage of this Agreement to include service contracts."<sup>210</sup>

Since the rationale behind the negotiations of the Agreement on Government Procurement<sup>211</sup> applies equally to services and goods, negotiation in this area should not create major problems. Furthermore, the procedures set out in the Agreement governing technical specifications,<sup>212</sup> tendering procedures,<sup>213</sup> information and review,<sup>214</sup> and enforcement of obligations<sup>215</sup> could be extended to cover services without renegotiating the fundamental principles.<sup>216</sup> The contracting parties would only have to negotiate a threshold level<sup>217</sup> and agree on a list of entities to be bound by the agreement on services.<sup>218</sup>

curement, 5 FORDHAM INT'L L.J. 139 (1981-82); Note, *The Trade Agreements Act I 1979: The Agreement on Government Procurement*, 14 J. INT'L L. & ECON. 321 (1979); Note, *Eliminating Nontariff Barriers To International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. INT'L L. & POL. 315 (1979).

210. BISD, 26th Supp., *supra* note 5, art. IX, para. 6(b), at 54.

211. The rationale for the Government Procurement Agreement is to provide greater international competition and to apply commercial considerations while expanding world trade, making more efficient use of tax revenues allocated to government procurement, and providing for an extra weapon in the battle against inflation by buying at the most favorable price resulting from international competition. See TOKYO ROUND REPORT, *supra* note 5, at 77; ICC Doc. No. 103-22/INT. 12 Bis, *supra* note 182, at 5; *Int'l Trade: GATT Tokyo Round — GATT & Trade MTN*, reprinted in *House Comm. on Ways and Means Senate Comm. on Finance 96th Congress, 1st Session, MTN*, 20 HARV. INT'L L.J. 695, 699 (1979).

212. See BISD, 26th Supp., *supra* note 5, art. IV, at 38.

213. See *id.*, art. V, at 39.

214. See *id.* art. VI, at 46.

215. See *id.* art. VII, at 48. For a discussion of how the Government Procurement Agreement operates see Note, *Technical Analysis of the Government Procurement Agreement*, 11 LAW & POL'Y INT'L BUS. 1345 (1979).

216. See ICC Doc. No. 103-22/INT. 12 Bis, *supra* note 182, at 6.

217. The Agreement on Government Procurement applies to procurement contracts of a value of 150,000 Special Drawing Rights (SDRs) or more. BISD, 26th Supp., *supra* note 5, at art. I, para. 1(b), at 34. SDRs 150,000 are worth approximately \$190,000. See S. REP. No. 96-249, *supra* note 209, at 516.

218. See BISD, 26th Supp., *supra* note 5, at 34 art. I, para. 1(c), at 34. The list of entities covered by the Agreement on Government Procurement should be as wide as possible to better carry out the objectives of the Agreement.

The current Agreement does not apply to states and local government even when local procurement is financed through federal funds. See S. REP. No. 96-249, *supra* note 209, at 516. This has resulted in litigation. See, e.g., *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (upholding New Jersey buy-American statute). The case was discussed in Note, *State Buy-American Laws — Invalidity of State Attempts to Favor American Producers*, 64

The first review of the implementation of the Government Procurement Agreement is set for "[n]ot later than the end of the third year from the entry into force of this Agreement . . . ." <sup>219</sup> Since the Agreement entered into effect in 1981, the first review will take place in 1984. Unlike the GATT voting requirements <sup>220</sup> which make amendment almost impossible, <sup>221</sup> the Agreement on Government Procurement may be easily amended to include a service provision. <sup>222</sup> The Agreement provides that "[t]he Parties may amend this Agreement having regard, *inter alia*, to the experience gained in its implementation." <sup>223</sup> Provided that a consensus is reached among the contracting parties on the advisability of including services, there seems to be no technical reason why the Agreement should not cover services as early as 1984.

### E. Enforcement Procedures

Along with developing an acceptable framework for dealing with service sector problems, the contracting parties to the GATT should be concerned with developing rules and procedures for resolving disputes under the proposed service code. The GATT has a number of provisions which govern dispute settlement between member countries. <sup>224</sup> Two articles <sup>225</sup> are particularly important in this respect. Article XXII creates an obligation of the contracting

MINN. L. REV. 389 (1980) (arguing that buy-American laws are invalid under the GATT). See also Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967) (concluding that the GATT supersedes state law).

219. BISD, 26th Supp., *supra* note 5, art. IX, para. 6(b), at 53-54.

220. Article XXX of the GATT provides:

Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or to the provisions of Article XXIX of this Article shall become effective upon acceptance by all contracting parties, and other amendments to this Agreement shall become effective, in respect to those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

GATT, *supra* note 1, art. XXX, para. 1.

221. See WORLD TRADE, *supra* note 1, at 73-82; GATT-MTN System, *supra* note 118, at 32.

222. See BISD, 26th Supp., *supra* note 5, art. IX, para. 7, at 54.

223. *Id.*

224. See generally WORLD TRADE, *supra* note 1, at 163-89.

225. See GATT, *supra* note 1, art. XXII (Consultation) and art. XXIII (Nullification or Impairment).

parties to consult on GATT matters,<sup>226</sup> and Article XXIII provides a framework for GATT dispute settlement procedures.<sup>227</sup>

From the GATT's inception, interpretative problems and lack of set procedures have created uncertainty.<sup>228</sup> A tradition of selecting a panel to investigate points of dispute developed shortly after the GATT's formation.<sup>229</sup> This method worked well at first but later became inadequate.<sup>230</sup> Frequent delays and recognition that panel members were moved by political considerations led to a loss of confidence in the system.<sup>231</sup> During the Tokyo Round the dispute settlement procedure was somewhat improved. The procedure still relies heavily on the *deus ex machina* of political solutions, but the legal basis upon which settlement is to be reached was laid

226. Article XXII provides:

THE CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has been possible to find a satisfactory solution through consultation . . . .

*Id.*, art. XXII, para. 2, amended by Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade, done at Geneva, March 10, 1955. 278 U.N.T.S. 168, 200.

227. See GATT, *supra* note 1, art. XXIII. "The outlines of Article XXIII can be summarized as follows: If any contracting party believes a benefit it should get under GATT has been 'nullified or impaired' as a result of another contracting party's breach or other measure, then it may seek consultation and if that fails, the complainant may ask the plenary GATT body to authorize (by majority vote) suspension of GATT obligations (a sort of 'retaliation') as a response." Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 754 (1978) [hereinafter cited as *Jurisprudence of Int'l Trade*].

228. See *Jurisprudence of Int'l Trade*, *supra* note 227, at 754.

229. See *GATT-MTN System*, *supra* note 118, at 42.

230. See *Multilateral Trade Negotiations Dispute Settlement*, 1980 AM. SOC'Y INT'L L. PROC. 129, 130 (Apr. 1980) (remarks by Robert E. Hudec).

231. See *GATT-MTN System*, *supra* note 118, at 42-43.

There are various reasons for this loss of confidence in the panel system. Some difficulties result from the tradition of selecting panel members from officials who represent governments to the GATT. Each person on the panel, while ostensibly acting in an individual capacity, is nonetheless the representative of his country. It is therefore hard to insulate the panel member from the influence of his government. See *id.* at 42.

Other difficulties arise from panel members having tried to play the role of conciliators. In assuming this role, the panels often assist negotiations between the parties instead of interpreting existing rules. Moreover, the panels have been burdened by the ambiguous concept of "nullification or impairment." See *id.* at 42-43.

According to Professor Jackson, the major shortcomings of the GATT's dispute resolution mechanism are (1) delay in establishing a procedure which tends to result in a *fait accompli* approach to trade policy; (2) meager resources and personnel which may contribute to inadequate consideration of the cases and faulty reasoning; (3) inadequacy of the fact finding resources and procedures; (4) the indefinite role of the panel; (5) the ambiguity of Article XXIII; and (6) loose implementation. See *Jurisprudence of Int'l Trade*, *supra* note 227, at 780-81.

out.<sup>232</sup> The Framework<sup>233</sup> aimed at codifying past practices and clarifying the operation of the dispute settlement provisions in the GATT.<sup>234</sup> Improvements were made in the area of time limits and panel selection.<sup>235</sup> In addition, each code negotiated during the Tokyo Round contains a separate dispute settlement mechanism. Each follows the basic GATT rules for dispute settlement, but generally sets out more specific requirements.<sup>236</sup> This "balkanization" of the dispute settlement mechanisms has been criticized as being unnecessarily complex and resulting in increased costs.<sup>237</sup>

Moreover, dispute settlement procedures remain loosely worded.<sup>238</sup> The question of "one country, one vote" was not addressed. Professor John H. Jackson finds this to be a major shortcoming.<sup>239</sup> "As long as [the dispute settlement mechanism] is subject to the disparity between real economic power and actual voting power of a one-nation, one-vote system, it seems unlikely that powerful nations will trust that system with any meaningful authority."<sup>240</sup>

The success of any international agreement depends, to a large degree, on the ability of the system to resolve disputes.<sup>241</sup> Serious thought should be given to developing effective dispute resolution

232. See *The Sixth Annual Judicial Conference of the U.S. Court of Customs and Patent Appeals—Reform of the International Trading System (Especially Dispute Settlement)* 84 F.R.D. 590, 592 (May 9, 1979) [hereinafter cited as *Reform of Int'l Trading System*].

233. See *supra* notes 172-73.

234. See TOKYO ROUND REPORT, *supra* note 5, at 107. The need for review of the dispute settlement procedure under the GATT during the Tokyo Round was prompted by changes in international trading relationships, diversity and extent of the GATT membership, frequent and often flagrant departures from the GATT's rules, and the framework's inadequacy for developing countries. See *id.* at 104.

235. See *Reform of Int'l Trading System*, *supra* note 232, at 593-94.

236. See *id.* at 593. The NTB codes negotiated during the Tokyo Round tend to set tighter standards than other GATT proceedings. They set time limits and require that there be a standing roster of panelists, that the opinion of the panelists be in writing, that the rationale be given, and that panels concentrate on questions of facts and questions of law (not broker political deals). See *id.*

237. See *GATT-MTN System*, *supra* note 118, at 44.

238. See *id.* at 46-47. For example, article 18 of the Subsidies and Countervailing Measures Agreement which governs the review of a panel's report by the Committee on Subsidies and Countervailing Measures provides that the Committee "may make recommendations to the parties . . . [and] may authorize appropriate countermeasures . . ." BISD, 26th Supp., *supra* note 5, at 77.

239. See *GATT-MTN System*, *supra* note 118, at 48.

240. *Id.* at 49.

241. See *id.* at 25-28.

procedures in any code that might eventually be adopted to cover the service sector. The contracting parties should evaluate the merits of creating new settlement procedures for dealing with services *vis à vis* delineating standard procedures for all disputes dealing with GATT related matters. In making this evaluation, the parties should address the many criticisms which have been made against the present method.<sup>242</sup>

### CONCLUSION

Although there has been a growth of competing trade organizations,<sup>243</sup> the GATT remains the foremost multilateral treaty dealing with international trade. Every effort should thus be made to bring major areas of international trade under its system. The service sector is one of these areas. Efforts by the OECD and the United States are beginning to arouse international interest.<sup>244</sup> Given the complex and varied nature of the service sector, negotiators seeking to bring services under the GATT will face a number of technical and policy related problems.

From a technical standpoint, two problems must be overcome: currently available data must be checked for accuracy, and barriers to trade in the service sector must be identified. Concerning the first problem, efforts to gather and catalogue more comprehensive data are already under way. Concerning the second problem, work already done in the area tends to show that each service industry is faced with a variety of obstacles, but that barriers may be grouped into general categories which lend themselves to policy analysis.<sup>245</sup>

The GATT policy should be gingerly applied to the service sector. It must be remembered that governments have traditionally exercised more control over services than goods because many serv-

242. For specific suggestions on the aim and content of a dispute settlement system under the GATT see Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 8-9 (1979).

243. Examples are the OECD, *supra* note 62 (composed mostly of industrialized countries), and the UNCTAD, *supra* note 160 (composed mostly of developing countries). There is an overlap among the GATT, OECD and UNCTAD. See generally WORLD TRADE, *supra* note 1, at 11-12.

244. See *supra* notes 104-41 and accompanying text.

245. See Appendix to U.S. GOVERNMENT INVENTORY, *supra* note 3, at 1.



ices are vital to the achievement of national goals.<sup>246</sup> Provided the international community becomes more aware of the benefits of liberalizing trade in the service sector, there should be no reason for not reaching a solution which takes into account both the global welfare to be derived from freer trade in services and the domestic interests of particular nations.

It is believed that this could best be achieved through an integrated code on services which, where appropriate, recognizes the special needs of specific industries.<sup>247</sup> Simultaneously, efforts should be made to expand existing codes, particularly the Tokyo Round codes dealing with NTBs, to cover services. Effective dispute settlement procedures should be developed contemporaneously with the negotiating of a code on services.<sup>248</sup>

It is hoped that the GATT ministerial meeting set for November, 1982 will be a determinative step towards bringing the service sector under the rules of international free trade embodied in the GATT.

*Marianna Maffucci*

---

246. See *supra* notes 79-81 and accompanying text.

247. See *supra* notes 199-205 and accompanying text.

248. See *supra* notes 224-42 and accompanying text.

