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The Gatt and Services: Quill and Ink in an Age of Word Processors

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Abstract

This Note argues that because a significant portion of services are traded electronically, for example, via cable and satellite, any new agreement must encompass electronically-delivered services. Part I of this Note discusses the dispute in the international community over extending the GATT to cover services. Part II examines the problems posed by modern technology related to the inclusion of services in any multi-lateral agreement. Part III analyzes the inadequacy of existing and proposed GATT frameworks for dealing with the problems posed by electronically-delivered services. This Note concludes that while the existing and proposed GATT frameworks may provide a structure for an agreement liberalizing trade in services, they do not adequately respond to technological advances in the delivery of services.

THE GATT AND SERVICES: QUILL AND INK IN AN AGE OF WORD PROCESSORS?

INTRODUCTION

The General Agreement on Tariffs and Trade¹(GATT), as it now exists, does not encompass trade in services. Despite the controversy between the developed nations and some developing nations over the proposed incorporation of trade in services into the GATT, commentators now generally concur that some agreement will be reached by which such trade is liberalized.² Indeed, the discussion now seems to be concerned mainly with the problems relating to trade in services that must be addressed by the new Round of GATT negotiations begun in September 1986 in Punta del Este, Uruguay.

This Note argues that because a significant portion of services are traded electronically, for example, via cable and satellite, any new agreement must encompass electronically-delivered services. Part I of this Note discusses the dispute in the international community over extending the GATT to cover services. Part II examines the problems posed by modern technology related to the inclusion of services in any multilateral agreement. Part III analyzes the inadequacy of existing and proposed GATT frameworks for dealing with the problems posed by electronically-delivered services. This Note concludes that while the existing and proposed GATT frameworks may provide a structure for an agreement liberalizing trade in services, they do not adequately respond to technological advances in the delivery of services.

I. GATT AND THE DISPUTE OVER SERVICES

A. GATT

GATT was founded at the end of World War II, envi-

1. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, Sales No. GATT/1969-1 [hereinafter *BISD VOL. 4*], *reprinted in* 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187. Throughout this Note, "GATT" refers to the organization; "the GATT" refers to the treaty itself.

2. *See, e.g.*, Farnsworth, *GATT Talks Facing Tough Obstacles*, N.Y. Times, Sept. 22, 1986, at D7, col. 1; Lewis, *GATT, Backing U.S., Votes to Prepare New Trade Round*, N.Y. Times, Nov. 29, 1985, at D6, col. 4.

sioned by the industrialized world as a reciprocal trade reduction agreement and a part of the International Trade Organization (ITO), a United Nations body which was chartered but never materialized.³ After the ITO failed as an organization, GATT became the overseer of international trade.⁴

3. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 49-53 (1969). At the close of World War II, the international community saw the need to avoid the economic calamities of the 1930's, which were due in part to trade protectionism. The United States was successful in prompting the United Nations to draft a charter for an International Trade Organization (ITO). See *id.* at 36-37.

The GATT was originally designed as a reciprocal tariff agreement appended to the ITO. When the ITO failed to come into existence, the GATT became the main instrument of international trade. See generally *id.* at 49-53. It now binds ninety-two Contracting Parties (signatories). Farnsworth, *GATT Talks Facing Tough Obstacles*, N.Y. Times, Sept. 22, 1986, at D7, col. 2.

4. See generally J. JACKSON, *supra* note 3, at 50-51. GATT is composed of 92 signatories, known as Contracting Parties, who negotiate at rounds initiated at their vote. See generally *id.* at 126-32. A Secretariat in Geneva performs administrative tasks, and a number of committees have been appointed to administer specific provisions of the agreement, but the Contracting Parties have the controlling authority. See generally *id.* at 145-151.

The GATT has a number of basic principles, embodied both in the basic Agreement and in the MTN codes, *infra* note 5, negotiated during the Tokyo Round to reduce non-tariff barriers. Greatly simplified, these principles are: a) Most-Favored-Nation treatment, b) National treatment, c) transparency, d) dispute resolution, e) least-restrictive regulations.

The Most-Favored Nation principle requires that treatment of one Contracting Party by another Contracting Party must be the same as to any third Contracting Party. The GATT, *supra* note 1, art. I; see J. JACKSON, *supra* note 3, at 249-72.

National treatment requires that, with reasonable variations, foreign suppliers be treated on the same basis as domestic suppliers. *Id.* at 273-303.

Transparency requires that regulations that impede or distort trade be transparent, that is, open, unambiguous and regularly-administered; this is accomplished by the notifications procedures under the GATT, by which Contracting Parties are to notify the GATT of matters affecting GATT rights. See Agreement on Technical Barriers to Trade, Apr. 12, 1979, in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26TH SUPP., Sales No. GATT/1980-83, Art. X, at 17-18 (1980), reprinted in 31 U.S.T. 405, T.I.A.S. No. 9616, — U.N.T.S. —, negotiated during the Tokyo Round; E. MCGOVERN, *INTERNATIONAL TRADE REGULATION*, 44-45, 232-33 (2d ed. 1986).

Dispute resolution provisions, allowing adequate opportunity for consultations in the settlement of disputes, are provided for in articles XXII and XXIII of the GATT, parts of the General Agreement dealing with specific subject areas, and in the Non-Tariff Barrier (NTB) agreements made during the Tokyo Round. *Id.* at 32.

The Contracting Parties are required to promulgate regulations that are the least restrictive possible. This principle is contained in the Agreement on Technical Barriers to Trade, *supra*, Art. II, sec. 2.1, at 9-10. See E. MCGOVERN, *supra*, at 230-34. See generally UNITED STATES TRADE REPRESENTATIVE (USTR), U.S. NATIONAL STUDY ON TRADE IN SERVICES: A SUBMISSION BY THE UNITED STATES GOVERNMENT TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE 104-05 (1983) [hereinafter USTR STUDY]

B. *Dispute Over Including Services Under The GATT*

For nearly 40 years, the international community has attempted to achieve liberalization of trade in goods.⁵ The international trade of services, on the other hand, is a relatively new concern.⁶ The GATT currently applies only to the trade in goods.⁷ The United States and other developed nations⁸ argue that, due to a decline in world trade, slow growth in the developed nations, and an increasing dependence of these nations on income from services trade, the barriers to trade in services must be reduced so that the developed nations can regain the income they have lost by the transfer of the manufacture of many goods to the developing nations.⁹ The devel-

(available from the USTR office; copy on file at the *Fordham International Law Journal* office).

5. Liberalization of trade in goods has been achieved through seven rounds of the GATT. The first six rounds were held in: Geneva, Switzerland, 1947; Ancey, 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 main subject of these rounds was reduction in tariffs. The seventh round, the Tokyo Round of Multilateral Trade Negotiations ("MTN"), was held in Geneva, Switzerland, 1973-79. See *MULTILATERAL TRADE NEGOTIATIONS, INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND, H. WAYS & MEANS COMM. PUB. NO. 96-18, 96th Cong., 1st Sess. (1979)*. The agreements may also be found in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 26TH SUPP., Sales No. GATT/1980-83 (1980)* [hereinafter *BISD 26TH SUPP.*]. While reduction in tariffs was still pursued, the major contribution of the Tokyo Round to international trade was the development of codes for the reduction of non-tariff barriers (NTB's) to goods. See *GENERAL AGREEMENT ON TARIFFS AND TRADE, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, REPORT BY THE DIRECTOR GENERAL OF GATT 49-87 (1979)*; E. MCGOVERN, *supra* note 4, at 8-9; Comment, *GATT and the Tokyo Round: Legal Implications of the New Trade Agreement*, 11 *CAL. W. INT'L L.J.* 302 (1981); Note, *GATT: A Legal Guide to the Tokyo Round*, 13 *J. WORLD TRADE L.* 436 (1979); Recent Development, *International 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 (1979).

6. See Comment, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 *FORDHAM INT'L L.J.* 371, 372 (1982).

7. J. JACKSON, *supra* note 3, at 529.

8. While there is currently no unified international consensus, Sweden, Great Britain and Germany have been the most interested. Switzerland, the Netherlands, Norway, Finland, Canada, Japan and Australia support liberalization in varying degrees. See Note, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 *INT'L TRADE L.J.* 281, 286 n.32 (1982-83).

9. Brock, *A Simple Plan for Negotiating on Trade in Services*, 5 *WORLD ECON.* 229, 230-33 (1982); see also Lewis, *A Fight on Trade in Services*, *N.Y. Times*, Oct. 2, 1985, at D1, col. 4.

oped nations allege that the GATT, by not covering trade in services, unfairly discriminates against them because their trading activity is predominantly in services.¹⁰ They are thus denied their comparative advantage.¹¹

In contrast, some developing nations, led by Brazil and India, argue that the GATT has no authority to regulate services.¹² They fear that they will become permanent importers of services and high technology goods¹³ and thus may never be able to develop their own domestic services industries if services trade is liberalized.¹⁴ Further, these nations argue that a host of problems will be created by free services trade because it would force them to ease restrictions on establishing and acquiring businesses, and foreign investment within their territories.¹⁵ Finally, these nations are also concerned that the focus on services will be at the expense of problems important to

10. Lewis, *supra* note 9, at D19, col. 3.

11. H. GRAY, *INTERNATIONAL TRADE, INVESTMENT, AND PAYMENTS* 16-25 (1979) (David Ricardo's theory of comparative advantage). Comparative advantage is the economic concept that some countries, due to inherent superiority in endowments or cost of labor, capital, or natural resources, will be able to produce some commodities more competitively than others. For a discussion of the basic reasons for international trade, see *id.* at 10-25.

12. Lewis, *supra* note 9, at D19, col. 3. France and Italy also support this position. Note, *supra* note 8, at 286 n.32. However, "[t]his is not to say that all developing countries are resistant; on the contrary, there is a wide range of opinion. . . . [S]ervice centres like Hong Kong . . . [have a] keen interest in the future of internationally-traded services." Malmgren, *Negotiating International Rules For Trade in Services*, 8 *WORLD ECON.* 11, 12 (1985).

These countries, also known as the Third World or the lesser-developed countries (LDCs), are not homogeneous. As one commentator has written, the nations grouped under that rubric reflect varying levels of development as well as divergent goals and resources. Significant differences in political philosophy, economic advancement, and cultural heritage exist among the various LDCs. At the same time, the LDCs are unified by a shared desire to steadily improve their standard of living, to build stable national economies, and to compete in the international marketplace while preserving their unique cultural identities.

Bortnick, *International Information Flow: The Developing World Perspective*, 14 *CORNELL INT'L L.J.* 333, 333 n.1 (1981).

13. Lewis, *supra* note 9, at D19, col. 3 (statement of the Brazilian Ambassador, Paulo Nogueira Batista).

14. *Id.* This is known as the "infant industry" argument. See generally Hindley & Smith, *Comparative Advantage and Trade in Services*, 7 *WORLD ECON.* 369, 383 (1984). It is recognized as a legitimate ground for protectionism under Article XVIII of the GATT, E. MCGOVERN, *supra* note 4, at 273, 392, as well as under the Generalized System of Preferences for developing countries, *id.* at 276-280.

15. Sapir, *North-South Issues in Trade in Services*, 8 *WORLD ECON.* 27, 39 (1985).

them, primarily restrictions by developed nations on imports of their manufactured products.¹⁶

Since the new Round of GATT talks has services on its official negotiating agenda, it is possible that some progress will be made towards liberalizing trade in services. The GATT appears to be the most appropriate mechanism for this. Although other organizations are concerned with trade in services,¹⁷ GATT remains the primary "watchdog" of international trade. It is the most likely forum for agreement liberalizing trade in services, and for recognizing and eliminating the obstacles created by the technological "informatics"¹⁸ revolution.¹⁹ It is the most established of major international trade organizations, and has dispute resolution and consultative features already in place.²⁰ Moreover, it has legitimacy among at least the ninety-two Contracting Parties.²¹

16. Schott, *Protectionist Threat to Trade and Investment in Services*, 6 WORLD ECON. 195, 211 (1983).

17. The Organization for Economic Co-operation and Development (OECD), consisting of 24 industrialized nations of western and southern Europe, the United States, Canada, Australia, New Zealand and Japan, has been involved in building consensus on this issue. Comment, *supra* note 6, at 391-92. In 1980 the OECD adopted non-binding Guidelines on the Protection of Privacy and Transborder Flows of Personal Data to attempt to standardize regulations of this sort. Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 14 CORNELL INT'L L.J. 203, 213-17 (1981). The United Nations Conference on Trade and Development (UNCTAD), composed of developing countries, has successfully lobbied for exceptions to the GATT for developing countries in the form of lower tariffs for their goods, called the Generalized System of Preference (GSP). Comment, *supra* note 6, at 394-95 n.160.

Other organizations are more specifically involved with transborder data flow, but are either too politicized for effective action, such as UNESCO and the International Telecommunications Union, or like the Intergovernmental Bureau for Informatics, have too few members to be effective. Bortnick, *supra* note 12, at 344-51. See generally Note, *Freedom of Information Versus National Sovereignty: The Need for a New Global Forum for the Resolution of Transborder Data Flow Problems*, 10 FORDHAM INT'L L.J. 262 (1986-1987).

18. Informatics has been defined as the "rational and systematic application of information to economic, social and political development." Bortnick, *supra* note 12, at 334 (citing INTERGOVERNMENTAL BUREAU FOR INFORMATICS, *INFORMATICS: ITS POLITICAL IMPACT* 2 (Jan. 1978)).

19. Cf. Comment, *supra* note 6, at 408 (the GATT is the foremost established international treaty governing international trade, and therefore the most likely to be able to address this issue).

20. See, e.g., *id.* at 405-08 (discussion of the various dispute resolution and consultative provisions of the GATT).

21. This would have to be the case, or the Contracting Parties involved last summer in acrimonious debate, over the inclusion of services in the new Round, would have, logically, withdrawn from GATT. See generally *GATT Launches Uruguay Round as*

II. SERVICES: THEIR IMPORTANCE IN THE WORLD
ECONOMY AND THE DIFFICULTIES THEY
PRESENT TO MULTILATERAL
LIBERALIZATION
NEGOTIATIONS

In recent years, many nations and supranational bodies have focussed their attention on trade in the service sector.²² This is partly attributable to the shifting of production in industrialized economies from manufactured goods to services, and the increasing importance of the export of services to the economic well-being of these nations.²³

Trade in services, particularly since the 1970's, has become an increasingly important sector in the economies of the industrialized world.²⁴ During the 1970's, trade in services grew at an annual rate of approximately nineteen percent, and presently comprises approximately one-fifth of world trade.²⁵

Consensus Reached on Services, Agricultural Trade, 3 Int'l Trade Rep. (BNA) No. 38, at 1150 (Sept. 24, 1986); *Preparatory Committee Fails to Agree on MTN Agenda, GATT Ministers Meeting Will Tackle*, 3 Int'l Trade Rep. (BNA) No. 32, at 1002-03 (Aug. 6, 1986); *Attempts to Remove Services from September GATT Agenda are Again Blocked by U.S., EC*, 3 Int'l Trade Rep. (BNA) No. 29, at 914-15 (July 16, 1986); *Dispute Over Services in MTN Round Heats Up as Third World Threatens Not to Participate*, 3 Int'l Trade Rep. (BNA) No. 27, at 864-65 (July 2, 1986).

22. The service sector is said to include all output that does not come from production sectors, that is, mining, agriculture, manufacturing and construction. See Ginzberg & Votja, *The Service Sector of the U.S. Economy*, 244 SCI. AM. 48 (Mar. 1981).

23. Sapir, *supra* note 15, at 27.

24. See USTR STUDY, *supra* note 4, at 13-14. Until the 1930's, economists regarded the services in a disparaging way. Comment, *supra* note 6, at 375 n.27. Recently, however, it has become the leading sector of the United States' economy and is important in the economies of other industrialized nations as well. *Id.* at 375-77. In introducing S. 1233, the "Service Industries Development Act," Sen. Inouye remarked that "[t]he output of the service sector now far exceeds the manufacturing sector. According to Department of Commerce statistics, seven out of ten working Americans are employed in service industries, and about 65 percent of the gross national product is service derived." S. 1233, 97th Cong., 1st Sess., 127 CONG. REC. S5371 (daily ed. May 20, 1981).

For example, in 1948 the United States goods-producing sector accounted for 46% of United States gross national product (GNP). Since that time the sector's share of GNP has dropped to only 33%, while services' has risen from slightly more than half to two-thirds today. USTR STUDY, *supra* note 4, at 20.

25. USTR STUDY, *supra* note 4, at 13; Schott, *supra* note 16, at 198. That the service sector is larger is not entirely undisputed. A recent study by the Bank of England finds that in the United States economy the percentage of services produced out of total output rose only 4.2 percent during the years 1953 to 1983, from 50.4 percent to 54.6 percent. In West Germany and Britain, the study said, increases were

These statistics attest to the growing importance of services in the world economy, and certainly to the trading position of the United States, and emphasize the need to reduce barriers to trade in services.²⁶ However, difficulties exist in identifying and distinguishing protectionist barriers to trade, such as restrictions to protect mature domestic industries from competition,²⁷ from reasonable law and policies designed to further legitimate ends, such as restrictions to prevent dissemination of private information of citizens.²⁸

A. *Problems in Distinguishing Goods from Services*

As world trade grows in complexity, distinguishing between services and goods becomes increasingly difficult. This is particularly evident with respect to those services delivered electronically, that is, by transborder data flow (TDF), which can be defined as the sending from one nation to another of units of information by some mode of electronic transmission, such as radio waves, cable, or microwaves.²⁹ A service delivered by one of these methods to a terminal in the form of a finished product, such as a legal case summary, may be viewed as a good or service.³⁰

One way to separate goods and services in the TDF con-

similarly small, and in Japan the percentage fell. Lewis, *supra* note 9, at col. 4. This study contradicts the assumptions of many commentators. See, e.g., Brock, *supra* note 9, at 232. If the amount of services actually tradeable is questioned, and services in general are difficult to quantify because they are "invisible," the entire proposition of stretching the GATT to cover services would seem questionable. Cf. *Dispute Over Services in MTN Round Heats Up as Third World Threatens Not to Participate*, 3 Int'l Trade Rep. (BNA) No. 27, at 864-65 (July 2, 1986) (statement of Brazilian Ambassador Batista) ("Nobody has yet defined clearly for me exactly what services are. We can't make GATT hostage to something nobody can define."). However, the importance and size of services trade is likely to have been *understated* rather than overstated, due to difficulties in collecting data. USTR STUDY, *supra* note 4, at 13.

26. See generally Comment, *supra* note 6, at 373.

27. See *id.* at 384-87.

28. Schott, *supra* note 16, at 203.

29. See Feldman & Garcia, *National Regulation of Transborder Data Flows*, 7 N.C. J. INT'L L. & COM. REG. 1, 1 n.1 (1982) (defining transborder data flow as "the transmission from one nation to another of units of information coded electronically for processing or storage by one or more digital computers"). For the purposes of this Note, the definition is broader, including news broadcasts, voice-to-voice telephone calls, television programming, cablegrams and telex services, that these authors excluded for the purposes of their article. *Id.*

30. See Hardy, *Transborder Data Flow: An Overview and Critique of Recent Concerns*, 9 RUTGERS COMPUTER & TECH. L.J. 247, 262-63 (1983).

text is to separate "ideational,"³¹ or pure information services, such as television, news services and electronic bulletin boards, from "commodity,"³² or finished product services, such as the LEXIS computerized legal research system.³³ Another way electronic services can be roughly divided is between "producer" or raw services used to make a finished product, and "consumer" services that are a finished product.³⁴ Defining the distinction between goods and services will become more important as services are increasingly delivered by sophisticated information technology, because those services classifiable as commodities should already be the subject of current GATT provisions and need not be taken up in the proceedings on extending the GATT to services.³⁵

B. Problems in Quantifying Services

How much of the service sector would benefit from liberalization of international trade cannot be accurately determined because the data on trade in services are insufficient.³⁶ The size and breadth of services trade is not certain. It is difficult to value services because of their lack of physical presence, and it is easy to under-report them. In addition, contracts for goods often include the value of component services as part of

31. *Id.* at 262.

32. *Id.* at 262-63.

33. *Id.* "Another proposed classification divides information into three sets: 'final consumption,' like news dispatches; 'semi-finished goods,' like raw sales figures that will be 'refined' into computerized summaries and graphs; and 'capital goods,' like computer programs being transmitted elsewhere for resale or use." *Id.* at 263.

34. UNITED NATIONS CONFERENCE ON TRADE & DEVELOPMENT, TRADE AND DEVELOPMENT REPORT 99-100, U.N. Doc. UNCTAD/TDR/2/Rev.1, U.N. Sales No. E.82.II.D.12 (1982) [hereinafter UNCTAD REPORT].

35. See Hardy, *supra* note 30, at 263-64. The question has arisen in a number of taxation cases in the United States, with courts reaching different conclusions. *Id.* at 263; see, e.g., *Spencer Gifts, Inc. v. Taxation Div. Director*, 182 N.J. Super. 179, 204-05, 440 A.2d 104, 118 (1981) (magnetic tape encoded with a mailing list like paper in attorney's writing of a will, part of a service); *Commerce Union Bank v. Tidwell*, 538 S.W.2d 405, 408 (Sup. Ct. Tenn. 1976) (sale of computer programs is a service). It is beyond the scope of this Note to find the definitive guide for a distinction between goods and services in the TDF context.

36. Comment, *supra* note 6, at 378, 381. The scope of the service sector is broad and heterogeneous. Some examples include: accounting, banking, computer and related services, construction and engineering, management and consulting services, legal services, insurance, various forms of transportation, and tourism. Schott, *supra* note 16, at 197. This list is not meant to be exhaustive, but to show the breadth of the service sector.

the cost of the goods.³⁷ Some services data are overinclusive, including non-tradeable services, such as those that are consumer services, such as domestic housekeeping.³⁸

C. *Barriers to Trade*

The wide array of industries encompassed by services trade creates difficulty not only in quantifying their respective sizes but also in identifying what may be barriers to trade.³⁹ Furthermore, the complexity of laws regulating the sector makes it difficult to identify and separate legitimate regulations from those that are protectionist.⁴⁰ These regulations are often ambiguous, and inconsistently or unfairly enforced.⁴¹ And, of particular importance for electronically-delivered services, there is also no contractually binding multinational agreement currently governing TDF.⁴²

Many of the barriers to international trade in services are deeply rooted in the distinct cultures, ideologies and political philosophies of each nation. Nations do not agree as to what role governments should play in the various service markets. Profound differences also exist as to the legitimacy of government monopolies and the desirability of commercial competition. Finally, many nations are concerned about the threat of control by existing multinational enterprises based in the developed economies, as well as the potential loss of sovereignty and freedom of action to regulate services domestically according to their own goals.⁴³

37. Schott, *supra* note 16, at 197.

38. UNCTAD REPORT, *supra* note 34, at 102 n.208; Comment, *supra* note 6, at 378.

39. Comment, *supra* note 6, at 381-82.

40. *Id.* at 383-87.

41. See Feketekuty & Aronson, *Restrictions on Trade in Communication and Information Services*, 1984 MICH. Y.B. INT'L LEGAL STUD. 145, 148-50 n.16. Some examples of the numerous governmental barriers to services trade are: 1) interference with access to markets or the establishment of businesses; 2) interference and cumbersome control of transactions; 3) interference with access to economic inputs, such as natural resources, personnel, or services to be used in production; 4) interference with sales; and 5) government action that distorts trade, such as governmental monopolies that are also actors in the market. See OFFICE OF U.S. TRADE REP., *SELECTED PROBLEMS ENCOUNTERED BY U.S. SERVICE INDUSTRIES IN TRADE IN SERVICES (1985)* [hereinafter USTR LIST] (available from the USTR; copy on file at the *Fordham International Law Journal* office).

42. See Note, *supra* note 17, at 265-66 nn.13-14 and accompanying text.

43. Malmgren, *supra* note 12, at 21.

Developing nations particularly are very cautious about allowing non-nationals to establish businesses within their territories. They see the right to establish a business as an issue of foreign investment, rather than of trade, which distinction is recognized by most nations.⁴⁴

The magnitude of these barriers is shown in the list, compiled by the United States Trade Representative, of more than 2,000 specific barriers to international trade in services.⁴⁵ These barriers include specific barriers to the electronic delivery of services.⁴⁶

Thus, while services are vital to the world economy, regulation of trade in services is impeded because services are difficult to quantify and distinguish from goods, and their trade is restricted by a wide array of complex regulations.

III. EXISTING GATT PROVISIONS AS A FOUNDATION FOR PROPOSED FRAMEWORKS FOR SERVICE AGREEMENTS

A. Existing GATT Provisions Potentially Applicable to Services

There are at least three provisions of the GATT that could be used as starting points for a services agreement, and may be the foundation on which the work in the new round is based.⁴⁷ These provisions are: the Agreement on Government Procurement, or Procurement Code;⁴⁸ the Agreement on Technical Barriers to Trade, or Standards Code;⁴⁹ and Article XVII of the GATT.⁵⁰

44. See, e.g., I. WALTER, BARRIERS TO TRADE IN BANKING AND FINANCIAL SERVICES 54-60, 77-80 (Thames Essay Series No. 41, 1985) (restrictions on entry and operation affecting American banks).

45. USTR LIST, *supra* note 41.

46. *Id.* at 33-35.

47. USTR STUDY, *supra* note 4, at 75-100; Feketekuty & Aronson, *supra* note 41, at 159; Comment, *supra* note 6, at 403-405.

48. Agreement on Government Procurement, Apr. 12, 1979, in BIRD 26TH SUPP., *supra* note 5, at 33; *reprinted in* — U.S.T. —, T.I.A.S. No. 10403, — U.N.T.S. — [hereinafter *Procurement Code*].

49. Agreement on Technical Barriers to Trade, Apr. 12, 1979, in BIRD 26TH SUPP., *supra* note 5, at 8; *reprinted in* 31 U.S.T. 405, T.I.A.S. No. 9616, — U.N.T.S. — [hereinafter *Standards Code*].

50. Article XVII of the GATT, BIRD VOL. 4, *supra* note 1, at 27 [hereinafter *Article XVII*].

1. Agreement on Government Procurement

The Procurement Code was designed to promote greater international competition in the process by which governments purchase goods, while expanding world trade.⁵¹ This Code applies to any law, regulation, procedure and practice regarding the procurement of products by the governmental 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* . . ." ⁵² In spite of the specific exclusion of service contracts, the Procurement Code explicitly states 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."⁵³

Because the basic rationale of the negotiations of this code, most-favored nation and national treatment,⁵⁴ is applicable equally to services and goods, negotiations in the procurement area should not be too difficult, aside from the political problems discussed above.⁵⁵ For example, in a government procurement data flow context, a Postal, Telephone and Telegraph (PTT) monopoly would be required to adhere to basic GATT principles⁵⁶ in its dealings with foreign providers.

Unfortunately, for progress toward trade liberalization, the Procurement Code is flawed in that European Contracting Parties specifically excluded their telecommunications monopolies from its purview during the original negotiations.⁵⁷ The

51. GENERAL AGREEMENT ON TARIFFS AND TRADE, GATT ACTIVITIES IN 1978, Sales No. GATT/1979/2, at 33-34 (1979).

52. *Procurement Code*, *supra* note 48, art. I, para. 1(a), at 34. The meaning of "services incidental to the supply of products" has yet to be defined. Comment, *supra* note 6, at 403 n.209. Construction contracts and other service contracts are expressly excluded from application. Anthony & Hagerty, *Cautious Optimism as a Guide to Foreign Government Procurement*, 11 LAW & POL'Y INT'L BUS. 1301, 1319 (1979). If the phrase "but not service contracts per se" had not been added, *see* Presidential memorandum of Jan. 4, 1979, 44 FED. REG. 1933, 1940 (Jan. 8, 1979), at least an argument could have been made that many service contracts, and in particular construction contracts, which did not exceed the value of the materials, would be covered by the *Procurement Code*. *See* Anthony & Hagerty, *supra*, at 1320.

53. *Procurement Code*, *supra* note 48, art. IX, para. 6(b), at 54.

54. For an explanation of these GATT concepts, *see supra* note 4.

55. *See supra* notes 8-16 and accompanying text.

56. *See supra* note 4.

57. Feketekuty & Aronson, *supra* note 41, at 167 n.50. In most nations telecom-

latter monopolies are notoriously not fair in their dealings with foreign firms,⁵⁸ and their exclusion from the Code prevents it from being used to alleviate this problem.⁵⁹

2. Agreement on Technical Barriers to Trade

The Standards Code⁶⁰ is designed to reduce trade barriers by requiring governments to adhere to internationally recognized regulatory standards, in order to discourage standards that discriminate against non-national businesses.⁶¹ Many nations have regulations to ensure that imports possess certain characteristics, with the stated or unstated intent being the protection of health, safety, the environment, the convenience of consumers, the conservation of national resources, and the facilitation of communication. The substantive rules are often accompanied by procedures of enormous complexity to ensure that they are observed. The Standards Code is designed to ameliorate the negative effect these complexities have on international trade.⁶²

In the services area, these same regulations affect non-nationals who are service providers just as adversely as those who trade in goods. For example, Euronet, an innovative data and telecommunications network designed to connect the European capital cities, excludes the participation of foreign firms

munications are one of the largest areas of government expenditure. National networks are primarily or exclusively owned by the state, and governments use this position to further the interests of domestic industries. The cost of developing new telecommunications systems is so large that only the largest corporations could enter the field without an expectation of sales at least in their home market, and one of the truisms of the industry is that no new system will sell abroad unless it can show that it has already been acquired by its national service. It is therefore not surprising that many nations have excluded telecommunications purchases from the *Procurement Code*. This is especially annoying to the United States, where, in contrast to the vast majority of the world, private corporations provide telecommunications services, and they are free to buy from any producer. Resentment especially has been directed at Japan, which in 1980 was persuaded to enter into a bilateral agreement, Agreement Relating to Government Procurement in the Field of Telecommunications, Dec. 19, 1980, — U.S.T. —, T.I.A.S. No. 9961, under which it gave foreign suppliers access to procurement by the national service, the Nippon Telegraph and Telephone Public Corporation (NTT). E. McGOVERN, *supra* note 4, at 215.

58. See generally *id.* at 155-56.

59. *Id.* at 167 n.50.

60. *Standards Code*, *supra* note 49.

61. *Id.*, preamble.

62. E. McGOVERN, *supra* note 4, at 228-34.

as hosts to the network unless their mainframe computers are based in Europe.⁶³

The Standards Code explicitly requires that regulations governing services trade be the least restrictive possible, open and unambiguous, and regularly administered, or transparent.⁶⁴ Additionally, the Code provides an international dispute mechanism through the Committee on Technical Barriers to Trade, which is composed of representatives of parties to this agreement.⁶⁵ The Code could be the basis for a similar code, to be drafted in the new round, to require the Contracting Parties to follow these principles in enforcing existing data flow regulation.⁶⁶

However, the Standards Code now in force has a number of flaws that will make it difficult to use as a guide for a similar agreement applicable to services. Of the ninety-two GATT Contracting Parties, only approximately twenty are parties to this code.⁶⁷ It would seem therefore not to be a very popular provision, one to which it is difficult to gain adherents just for application to trade in goods, and given the controversy over services it would probably have even fewer contracting parties were it applied to services. This reticence would seem to add to the consensus problem discussed earlier with regard to services trade in general.⁶⁸

Another inadequacy of the Standards Code is that it is

63. USTR LIST, *supra* note 36, at 34.

64. For a discussion of these principles, see *supra* note 4 and accompanying text.

65. E. MCGOVERN, *supra* note 4, at 233. McGovern describes the dispute resolution procedures:

The common pattern [for dispute resolution] commences with an obligation upon parties to afford sympathetic consideration to representations made by other parties, and to provide an adequate opportunity for consultation. If a party considers a benefit under the particular agreement nullified or impaired or the achievement of an objective impeded as a result of the actions of another it may request consultations with that party. If no settlement is achieved through consultation the committee supervising the particular agreement is given the role of conciliator, and must meet for this purpose within thirty days of a request. In the Customs Valuation Code and . . . [Standards Code] there is a provision for assistance to be given by special technical bodies.

Id. at 44.

66. E. MCGOVERN, *supra* note 4, at 44.

67. E. MCGOVERN, *supra* note 4, at 231.

68. For a discussion of the international debate of the issue, see *supra* notes 8-16.

prospective in effect. There is no obligation to change standards already in existence.⁶⁹ This fact, making the Code rather toothless, would therefore seem to forbode little success for a similar provision applicable to technical barriers to services trade. If current barriers to trade are not changed, it is arguable that little liberalization could be accomplished with only the prohibition of future barriers.⁷⁰

3. Article XVII of the GATT

Article XVII⁷¹ provides for nondiscrimination, or national treatment, in trade in goods having a state-run monopoly as a partner to the transaction.⁷² This provision could be applied by analogy to trade in services, and PTTs could agree to follow this provision, give up their "monopoly bargaining position" and begin to compete on an "arm's-length, commercial basis" with foreign suppliers.⁷³ Extension of this Article to actions by such government entities as PTTs in the service area, concurrent with the Procurement Code, would clarify the proper means by which they could operate as market actors and in their dealings with foreign suppliers.

Nevertheless, as with the other GATT provisions previously examined, Article XVII also has a number of characteristic fundamental weaknesses as a basis for a similar provision applicable to services. The first is that it has not been complied with in full. Every state enterprise governed by the Article is required to notify GATT of its activities as a market actor.⁷⁴ According to one commentator, these notifications have not been complete.⁷⁵

Another major problem is that it will be nearly impossible to force the Contracting Parties to make their PTTs evenhanded as market actors. This is due to the philosophy and intentions behind the anti-competitive structure of telecommunications regulation in countries other than the United States.

The United States is the only nation in the world to allow

69. E. MCGOVERN, *supra* note 4, at 231.

70. For examples of current barriers, see USTR STUDY, *supra* note 4, at 184-86.

71. *Article XVII*, *supra* note 50.

72. *Id.*

73. Feketekuty & Aronson, *supra* note 41, at 160.

74. See E. MCGOVERN, *supra* note 4, at 209-11.

75. Baban, *State Trading and the GATT*, 11 J. WORLD TRADE L. 334, 343 (1977).

market forces to dominate provision of information and information technologies.⁷⁶ In all other countries, the supply of services is determined by a central government body with little or no reliance on the unpredictable competitive market, and the entry of new competitive carriers is blocked substantially. Services are designed to meet general, rather than specific needs, and rates are set without reference to costs; cross-subsidies are built into the system for the provision of universal service. Also, private networks are small or non-existent, almost all user equipment is provided by the government monopoly and the uses of the network are sharply restricted by tariff.⁷⁷ Thus the PTTs' desire to restrict competition and obtain the revenues generated by future changes in technology will likely prevent this provision in the GATT from having any successful counterpart applied to services trade.⁷⁸

At least two proposals for agreements to liberalize trade in the service sector have been made in the past four years. Neither of the two completely addresses the problems of electronically-delivered services, or transborder data flow in general.⁷⁹

B. *Proposals for Liberalization of Trade in Services*

1. United States Trade Representative Proposals

The United States National Study on Trade in Services, submitted to GATT by the United States Trade Representative (USTR) in December 1983 (USTR Study) relies on basic GATT principles and the Procurement Code, Standards Code, and Article XVII as potential conceptual foundations for a services agreement.⁸⁰ The flaws of the latter having been ex-

76. USTR STUDY, *supra* note 4, at 188.

77. R. EWARD, *THE DEREGULATION OF INTERNATIONAL COMMUNICATION* 226 (1985).

78. See, e.g., Eger, *supra* note 17, at 217-38 (anti-competitive behavior by PTTs); Feketekuty & Aronson, *Meeting the Challenges of the World Information Economy*, 7 *WORLD ECON.* 63, 72 (1984) (German and Italian PTTs want to limit leased cable lines to preserve their earnings base); Markoski, *Telecommunications Regulations as Barriers to the Transborder Flow of Information*, 14 *CORNELL INT'L L.J.* 287, 298 (1981) (specific examples of PTTs' exclusionary history). See generally Feketekuty & Aronson, *supra*.

79. One other framework is outlined in Comment, *supra* note 6, essentially paralleling the structure of the United States Trade Representative proposal, examined *infra* notes 80-99.

80. See USTR STUDY, *supra* note 4, at 89-100.

amined above, the USTR did nevertheless recognize several of the major problems confronting a multilateral effort at liberalizing trade in electronically-delivered services.⁸¹

The first of these problems — that some of these services are actually classified as products and thus currently governed by the GATT⁸² — is, however, not even mentioned by the USTR Study. Presumably this is due to the very broad nature of the Study, which attempts to address all the various service industries.⁸³ The USTR also probably did not want to be accused by the developing countries opposing liberalization of trying to extend GATT to govern services by the “back door.”⁸⁴

The USTR Study acknowledges the paucity of international services data and proposes that each Contracting Party develop methodology and collections systems to improve the data base.⁸⁵ The USTR also pledges that the United States will seek to refine its data, specifically by developing its own methodology, strategy, and questionnaires.⁸⁶ This seems rather vague, and the Study urges little other than “cooperation” concerning how the primary source, data gathered by the International Monetary Fund, could be improved and standardized for each country reporting.⁸⁷

The USTR has identified many of the barriers to trade in electronically-delivered services.⁸⁸ But the Study imprudently relies on the problematic GATT provisions examined earlier as its basis for reducing those barriers.⁸⁹

The specific problem of barriers to investment as barriers to electronic services trade is, however, addressed in a somewhat creative fashion. The Study states that if the service or a component part is produced abroad, the activity should be considered trade; if it can only be made locally, and local facilities must be used, the activity should be considered invest-

81. See *supra* notes 27-46 and accompanying text.

82. See *supra* note 35 and accompanying text.

83. For examples of the breadth of the sector, see *supra* note 36.

84. Cf. Lewis, *supra* note 9, at D19, col. 3 (statement of Brazilian Ambassador that services are not legally covered by the GATT).

85. USTR STUDY, *supra* note 4, at 181-82.

86. *Id.*

87. *Id.* at 181-82.

88. See USTR LIST, *supra* note 41.

89. See USTR STUDY, *supra* note 4, at 94-98, 192-93.

ment.⁹⁰ For example, the processing of data by a foreign computer through transborder data flow communication is trade, while the same services provided locally by a foreign-owned business involves investment.⁹¹

Another problem posed by liberalization of services trade that is discussed but not adequately resolved by the Study is that of customs valuation. Because such services do not pass through customs, as one commentator has noted, governments want to tax them, and this poses questions of fair valuation.⁹² Thus, there would seem to be the need to establish objective international standards, and to create some governing code and body to control this within the GATT. Yet the Study only identifies the problem, states that the GATT's Agreement on Customs Valuation⁹³ and Article VII⁹⁴ will be very difficult to apply because transborder data flow bypasses customs, and merely proposes that the problem be "explored."⁹⁵

The Study acknowledges that it is too early to know how negotiations might be organized.⁹⁶ The submission tentatively envisions the above framework of general principles as "most workable,"⁹⁷ but that "sector-specific issues must blend into

90. *Id.* at 71.

91. *Id.*

92. Malmgren, *supra* note 12, at 22.

93. *Agreement on Implementation of Article VII of the GATT*, Apr. 12, 1979, in *BISD 26TH SUPP.*, *supra* note 4, at 116.

94. Article VII of the GATT, *BISD VOL. 4*, *supra* note 1, at 12.

95. *USTR STUDY*, *supra* note 4, at 92, 99-100.

96. *See USTR STUDY*, *supra* note 4, at 8. The framework might replace, supplement or operate alongside current international agreements. It could be connected with GATT or it might be established as a separate and independent code applicable only to signatory nations. These details were not delineated. *USTR STUDY*, *supra* note 4, at 101-07; Malmgren, *supra* note 12, at 20-21. However, the Study suggests three possible but not mutually exclusive approaches to negotiations in this specific area of services trade: 1) the Standards Code should be used as a model for an agreement ensuring transparency and fair administration of regulations, *Standards Code*, *supra* note 49, at 8; 2) a multilateral agreement should be negotiated establishing a "right to plug in" to a national communication system, which in most countries is controlled by government monopoly, for equipment meeting minimum standards, and the right to sell services through such qualified equipment; 3) an agreement should be negotiated limiting telephone rates, taxes, and the power of these monopolies to deny the use of communication lines, to the extent these constitute barriers to trade. *USTR STUDY*, *supra* note 4, at 192-93.

While acknowledging that different approaches may be necessary to accomplish liberalization, *id.* at 101-07, the Study argues that GATT is in a strong position to manage a general framework of principles. *Id.* at 103-04.

97. *Id.* at 8-9.

such an approach"⁹⁸ and flexibility must be maintained until further exchange of studies and views has occurred.⁹⁹

2. Statement of the United States Council for International Business

This submission to the USTR by the United States Council for International Business (Council), a part of the International Chamber of Commerce,¹⁰⁰ resembles the proposals of the USTR; but is much shorter, and devotes only a small portion to services and an even smaller portion to electronically-delivered services.¹⁰¹ However, it recognizes the importance of telecommunications in current and future services trade.¹⁰² According to the Statement, telecommunications is now an impetus to world competition and, therefore, regulations that create barriers to the flow of information or to the use of telecommunications services should be singled out for negotiation and elimination.¹⁰³

The Statement does not address the goods versus services conceptual problem, nor does it mention the lack of data on services. However, it does treat the problem of barriers to services trade, and, like the USTR Study, relies on the GATT provisions criticized above.¹⁰⁴

On the issue of investment, the Statement contains a questionable and controversial expectation that when a "domestic regulatory system required a local corporate presence as a condition of doing business, the right of establishment would be-

98. *Id.* at 9.

99. *Id.*

100. UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, STATEMENT OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS ON A NEW ROUND OF MULTILATERAL TRADE NEGOTIATIONS: RECOMMENDED U.S. BUSINESS OBJECTIVES, app. 1 (Apr. 18, 1985) (submitted to William E. Brock, then-United States Trade Representative, Office of the United States Trade Representative, and Edmund T. Pratt, Jr., Chairman, Advisory Committee on Trade Negotiations) [hereinafter COUNCIL STATEMENT] (available from the Council; copy on file at the *Fordham International Law Journal* office). There have been more recent publications of this type by the Council, but these are notable more for their similarities than differences with the USTR STUDY. See, e.g., UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, A CONCEPTUAL FRAMEWORK FOR TRADE IN SERVICES (1986) (a draft statement submitted by the Council to the International Chamber of Commerce Trade Commission).

101. *Id.* app. 1.

102. *Id.* app. 1, at 6-8.

103. *Id.* at 7.

104. *Id.* at 2.

come a negotiable trade issue rather than an investment issue"¹⁰⁵ This is especially controversial among developing nations.¹⁰⁶

The Statement, like the USTR Study, essentially reflects the current structure of the GATT and does not sufficiently address the enormous structural changes that are occurring in the service industries. Of the two, only the USTR framework comes close to completely acknowledging the difficulties inherent in adapting the GATT to services.

Thus the proposed frameworks above do not adequately address the problems of extending the GATT to services, because they rely upon existing GATT provisions that have weaknesses due to exceptions, few adhering Contracting Parties, or a lack of force with regard to the existing barriers to services trade. The USTR states that it is not intended to reach "hard and fast" conclusions.¹⁰⁷ Since the Uruguay Round has only begun, however, neither proposal should probably be judged too harshly.

CONCLUSION

No actual international agreement currently governs transborder data flow.¹⁰⁸ What now exists is a bewildering array of national regulations that restrict transborder data flow and hence electronic delivery of services.¹⁰⁹ Although the proposals above as to government monopolies and harmonization of regulations are conceivable in the near future, it would be naive to suggest an agreement creating completely free flow of information, as envisioned by commentators,¹¹⁰ will come

105. *Id.* app. 1, at 4.

106. *See supra* note 15 and accompanying text. Developing countries, much more than developed countries, are inclined to want to control investment in their economies because, seemingly, of a fear of losing control and sovereignty to foreign multi-national corporations. *See generally* Note, *Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations*, 7 *FORDHAM INT'L L.J.* 467, 477, 484-86 (1984) (LDCs want to ensure that the activities of multi-national corporations are compatible with their development plans and objectives, and their position is supported by various international agreements, e.g., the U.N. Charter of Economic Rights and Duties of States).

107. USTR STUDY, *supra* note 4, at 1.

108. *See supra* note 42 and accompanying text.

109. *See, e.g.*, USTR LIST, *supra* note 41, at 33-35.

110. *See, e.g.*, Feldman & Garcia, *supra* note 29, at 24-25.

about quickly or easily in the Uruguay Round.¹¹¹ Progress will be slow and difficult.

This Note has demonstrated that the existing and proposed GATT frameworks will be insufficient to deal with the enormous changes occurring in the delivery of services. It should be recognized, however, that no alternative forum for establishing a consensus on these issues currently exists that can encompass their breadth. Therefore, GATT must be the organization through which liberalization is sought.¹¹²

The Uruguay Round begun in September 1986 must surmount a number of difficult obstacles for meaningful progress to be made in the services area. The Contracting Parties must establish consensus for liberalization, increase effort and precision in the data gathering process, and address definitional problems. Finally, the negotiations must result in a conceptual framework that acknowledges 1) the rapidly evolving environment of services industries throughout the world, 2) the role of governments and *legitimate*, not protectionist, regulation, and 3) the technological developments that are rapidly surpassing the efforts of governments to understand what is at stake and are the cause of labyrinthine regulation in most nations.¹¹³

It is therefore imperative that the Contracting Parties in the Uruguay Round look forward to the conditions of the 1990s as they attempt to address the vexing problems of extending the GATT to services.

*Robert N. H. Christmas**

111. One unnamed delegate stated, speaking of the GATT negotiations generally at the opening of the Round in September, that it will be "like watching paint dry." Farnsworth, *supra* note 2, at col. 4. It has taken five to six years for the United States to get services trade liberalization in general merely on the *agenda* of the GATT round; in 1982 it was on the agenda of a meeting of the highest ministers and the result was only an invitation to exchange national studies. *Compromise GATT Accord Adopted, Though Differences Remain on Agriculture Trade*, 7 Int'l Trade Rep. (BNA) No. 9, at 281-82 (Dec. 1, 1982). See also *Communique, GATT Ministerial*, Nov. 29, 1982, in *GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 29TH SUPP.*, Sales No. GATT/1983-1, at 9, 21-22 (1983), reprinted in 22 I.L.M. 445 (1983) (the text that came of the 1982 meeting). The developing nations would be very resistant to any broad free data flow agreement. Note, *supra* note 17, at 278-82.

112. Commentators such as Professor Malmgren, *supra* note 12, and Feketekuty and Aronson, *supra* note 41, do not appear to recognize this reality.

113. Malmgren, *supra* note 12, at 25.

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