

# Constructing a Constitution for Trade in Services

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**T**HE NEED for some kind of international coordination and cooperation concerning trade in services across borders has become apparent.<sup>1</sup> While there exists an international legal framework (albeit troubled and evolving) for trade in goods, there is very little such framework for trade in services, except in certain specific industries. Services make up a greater percentage of the gross national product (GNP) of major industrialized countries than the production of goods and they also comprise a significant percentage of world trade.

These considerations were among those which led the contracting parties to the General Agreement on Tariffs and Trade (GATT) to include provisions for negotiating agreements on trade in services in the declaration issued after the special ministerial meeting, held in September 1986 at Punta del Este, that launched the Uruguay Round of multilateral trade negotiations, the eighth such round in the forty-year history of the GATT.<sup>2</sup>

Because of the great variety of service activities, because they often do not involve tangible property and because it is sometimes difficult or impossible to identify when a service 'crosses a border', the national or international regulation of service activities is very difficult. For similar reasons, it will be very difficult to develop a new legal framework for trade in services. The GATT model is often cited as a possible approach.<sup>3</sup> Because of the great differences between trade in services and trade in goods, however, it is quite doubtful whether the GATT model could be followed very closely. The purpose of this article is to explore, in the context of the Uruguay Round negotiations, the possible legal-institutional structure which could be used to develop an international discipline on trade in services and to compare such a structure with the GATT model.

The ideas and reflections expressed in the article stem partly from considerable discussion about trade in services with other scholars, government officials and policy makers. No special claim to originality for many of these ideas is made,

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although some of my perspectives may differ from those of others and, indeed, some of them reflect basic policy questions which do not appear to be resolved.

#### POLICY GOALS FOR AN AGREEMENT ON SERVICES

The complexity, defects and problems of the GATT system for trade in goods, when added to the much greater variety and complexity of trade in services, pose such potentially difficult issues in considering an international framework of rules that any person, no matter how expert, must approach the subject with a great deal of caution. It will not be possible to build, within the period of the Uruguay Round negotiations, a complete set of such rules. It seems best to recognize this and to focus, instead, on the institution and structure which could be put in place. Such a structure should allow the satisfactory evolution of substantive rules over a period of some decades, in order to achieve the broader goals of increasing global welfare, while retaining for sovereign governments enough power and decision-making authority to enable those governments to continue to administer to their constituent's reasonable needs.

For example, it seems dangerous and probably impractical to try to develop sweeping rules, such as a broad national-treatment obligation, which would apply to all 'services', regardless of industry. The details of how best to design an international discipline for the banking industry, for instance, may differ substantially from that endeavour for the insurance or engineering service industries. Different industries have different rates of technological advance and different degrees of importance to 'national security' or other sovereign goals and they rely on substantially different business structures (compare banks with airlines!). Moreover, the level of national government regulation already in place (and thus the interest-group support for the *status quo*) varies greatly from industry to industry as well as from country to country.

What is very important, however, is to think carefully about the basic 'constitutional', or institutional, structure of a system which could contribute to the beneficial evolution of more detailed rules over a period of decades. Such a structure should be relatively non-threatening in order to encourage as broad a participation as possible. It should provide a framework for gathering information and undertaking detailed analyses and studies to facilitate the development of rules. It should put in place a set of legal procedures to reinforce the evolution and predictability of rules relating to trade in services in a variety of industries. And, although encouraging broad participation, so that 'hold-outs' do not jeopardize the willingness of signatories to enter into meaningful commitments, it should allow sub-groups of like-minded countries to forge ahead with sets of obligations which not all signatories are yet prepared to accept. In other words, it should to the extent feasible avoid the 'foot dragger' problem associated with most-

favoured-nation (MFN) treatment, as experienced in the GATT and in other contexts.<sup>4</sup>

This is an ambitious agenda. Clearly some of the goals mentioned will not be fully or satisfactorily achieved, at least in the short run. A focus on long-term 'constitutional' issues does not always provide encouragement to firms or groups interested in short-term 'bottom line' results. There would always be a risk, therefore, of losing support for the endeavour from some constituent groups. Hence a compromise between the longer-term goals and more short-term results is probably inevitable. What must be preserved, though, is the goal of achieving, hopefully by the end of the Uruguay Round negotiations, a legal-institutional structure which, while providing some useful rules on trade in certain specific services, will put in place a 'constitution' for the many further decades of rule-and-discipline developments for trade in services.

In pursuing these policy objectives, past experience, especially that of the GATT, will be extremely useful. Accordingly, in the discussion below, frequent reference is made to that experience. In particular, it would seem desirable to avoid some of the institutional defects of the GATT, as well as the problems posed by the 'grandfather' clause, providing for existing laws to stay in place even though they are in conflict with the new articles of agreement. Likewise, there seem many good arguments for trying to achieve as broad and varied a membership in the overall system as possible and to avoid the characterization of a 'rich man's club' by drawing developing countries as deeply into the process as possible.

#### STRUCTURE OF A CONSTITUTION FOR SERVICES TRADE

Trade in services should not, and cannot realistically, be 'incorporated' into the GATT. The notion that the General Agreement could be simply amended, so that the GATT would apply not only to goods but also to services, is not feasible for a number of reasons.

First, amending the GATT is very difficult, for it requires the consent of two thirds of the contracting parties (currently 96 in number) or, in some cases, unanimity. Thus countries which oppose an international discipline on trade in services would be in a position to exact concessions and compromises which could considerably water down the endeavour. This explains why, in the Tokyo Round negotiations of 1973-79, countries opted to rely primarily on the adoption of codes of conduct — extending, elaborating or interpreting certain GATT articles — rather than amending the General Agreement *per se*. In addition, the Contracting Parties adopted by consensus the Agreements Relating to the Framework for the Conduct of International Trade.<sup>5</sup>

Second, the GATT has inadequate institutional provisions. These would simply carry over to services some of the most serious problems of the GATT

already felt in the field of goods. This would be particularly true on 'core' questions such as dispute-settlement procedures, voting, acceptance of new members and their status and methods of developing new rules and keeping them up to date.<sup>6</sup>

Third, it would be very 'threatening' and probably politically unacceptable to apply many of the GATT obligations in an indefinite and ambiguous way to all service industries, known and unknown. Countries would find a compelling political need to examine in detail how particular GATT obligations, such as national treatment, or rules on subsidies, would apply to each area of service activity. For many services, however, information and data are not readily available. No country is likely to be willing to accept broad 'blank cheque' obligations applying even to unknown activities of the future as well as existing but poorly understood activities. In addition, it is not entirely clear that global welfare would be enhanced by the application of typical GATT rules of liberal trade to all service industries. Intellectual property issues, for example, may require restrictions on trade in order to enhance global welfare in the longer run.<sup>7</sup>

Fourth, there are advantages in experimenting with rules for a few selected service industries before extending similar rules to other, less well-known industries.

The most difficult and threatening GATT obligation is that of national treatment — which requires countries to treat imports in a non-discriminatory manner relative to domestically-produced products. When applied to services, it would require countries to apply their regulations in a manner that was no less favourable to foreign service providers than to domestic service providers. It is easy to understand why many countries would be hesitant to agree to a strong national-treatment obligation in many service industries, at least without some evolutionary experience as to how it might affect their instruments for governing. Countries with nationalized banks, for example, would encounter a number of problems with an obligation requiring foreign banks to be treated no less favourably than domestic banks. In certain industries (for example, banking and telecommunications), secrecy issues would be raised to reinforce national fears of international rules. Moreover, for some service activities effective access to a foreign market requires a 'right of establishment', which raises issues of long-standing controversy.<sup>8</sup>

Likewise, GATT rules on subsidies could be very troublesome as applied to services. Subsidies are a central policy instrument of governments, albeit often misused. Subsidy issues perplex policy makers and trade negotiators in connection with goods.<sup>9</sup> The difficulties would be compounded in relation to services, many of which are less well understood and involve intangibles which are more difficult to administer or to evaluate.

In addition, for some kinds of services, traditional rules for goods are not applicable. In some cases, services can be easily provided by entities located outside the consuming country. For other services, some kind of 'establishment' within the consuming country is necessary for the effective delivery of services;

and this raises a host of traditional and non-traditional questions of international law, such as the right of establishment, protection of foreign investment and rules on employment. Many of the concerns expressed by developing countries in recent decades about the activities of multinational enterprises would manifest themselves in opposition to rules such as a national-treatment obligation regarding services. Even developed countries are worried about the relative ease with which multinational enterprises seem to be able to evade government regulation.

The above considerations have led a number of people to suggest an approach to a constitution for trade in services which would involve at least two 'layers' of agreement. The objective would be to provide a legal-institutional structure for international trade in services which would make it very easy and 'non-threatening' for countries to participate, at least in the 'first' or 'top' layer of the agreement. This top layer would contain the overall institutional measures (including the supervisory body, the secretariat, decision-making rules and dispute-settlement procedures) together with some relatively modest obligations. Some substantive provisions in this layer might be called 'principles', 'objectives' or 'goals'. The purpose of this layer would be to put in place a legal-institutional structure which would facilitate the longer-term evolution of agreements or codes on particular service industries.

The top layer, often referred to as an 'umbrella agreement', would be complemented by a series of industry-specific agreements — for example, on banking and on insurance. In addition, however, the umbrella agreement might contain an 'intermediate' layer of more significant obligations regarding a specified list of service industries. This intermediate layer could be constructed as an 'optional title' or an 'optional protocol' (similar to the legal structure of a number of international agreements, especially in the area of human rights). The 'general services protocol', as it might be called, could contain a few key obligations, such as an MFN obligation and some form of national treatment, but it could be so designed as to apply only to a specified list of service industries (to avoid the 'blank cheque' problem). It could also be so worded that when a more detailed agreement was ultimately adopted for one of the industries, that agreement would prevail over the general services protocol as between signatories of that agreement.

The final layer of obligations would be contained in the industry-specific agreements or codes. Since each agreement would be devoted to one service industry, it could be tailored to the particular needs and complexities of that industry. It would be understood that not all members of the umbrella agreement would need to join any particular industry agreement, but normally there would be additional advantages to be gained from so doing.

At the outset, it might only be feasible to negotiate four or five industry-specific agreements. Time and negotiating resources, as well as political acceptability, would constrain the number of industries which could be covered. The umbrella agreement could include a framework for negotiating industry-specific

agreements as well as rules on their relationship with the umbrella agreement. But to prevent an umbrella agreement from being too 'hollow', some countries — for example, those belonging to the Organisation for Economic Cooperation and Development (OECD) — could decide among themselves, as a negotiating strategy, that the umbrella agreement would not come into force unless a minimum number of industry-specific agreements came into force, which in turn could require a minimum number of acceptances.

The possible details of these three layers of agreement are explored below.

#### POSSIBLE CONTENTS OF AN UMBRELLA AGREEMENT ON TRADE IN SERVICES

For an umbrella, or first layer, agreement on trade in services, the principal objective should be the broadest possible participation, consistent with a viable institutional structure that would promote a beneficial evolution of rules in the long run. The subjects listed below should be among those considered for inclusion. In the next section I briefly discuss a possible general services protocol, or second layer of obligations, which might well be included in the overall umbrella agreement, but for which acceptance would be optional. This second layer, however, should be so constructed as to confer some benefits on those countries which do accept it. One possibility would be to reserve MFN treatment to adherents to the optional protocol. Some of the other obligations mentioned below could well fall back into the optional protocol if it turned out that their inclusion in the umbrella agreement would cause too many countries to refrain from joining it.

##### *Statement of Objectives*

Carefully phrased objectives in an agreement can have a considerable effect in subsequent interpretation and implementation of the agreement and in resolving disputes over its provisions.

##### *Institutional Measures*

Provisions would be needed to set up a general highest-authority supervisory body, to be called an 'Assembly', 'Contracting Parties' or similar. These provisions should address the usual international-organization questions such as the location of the headquarters, the frequency of meetings, the institution's powers and competence and, especially, voting. Clearly consideration of these provisions should include their relationship with the GATT. Presumably it would not be advisable simply to allow the Contracting Parties to the GATT to be the supervisory body for the new agreement on services. But the relationship between

the GATT and a new supervisory body for services would need to be worked out. Does this imply an even broader overall body for both agreements, along the lines of the ill-fated Organization for Trade Cooperation of the mid-1950s? Or could the GATT and a new set of contracting parties for services share premises, a secretariat and other institutions?

The question of voting would be particularly sensitive. In order for decisions to be effective, they would have to be accepted by a reasonably large part of the real power which exists among member countries. A 'one-nation one-vote' procedure for at least certain decisions would not be conducive to such effectiveness since powerful countries could sometimes be out-voted and would then refuse effectively to carry out the decisions. On the other hand, the system would not need to cater exclusively to power; rather it should impose a sense of fairness and a perception of justice on even the powerful countries. Various combinations of voting structure should be examined for possible use in an umbrella agreement on trade in services.

Voting on certain issues should probably be limited to sub-groups of countries which have signed the umbrella agreement. For example, strong arguments (and precedent practice) can be demonstrated to support a rule that, regarding issues of legal treaty interpretation or application of a subordinate industry-specific agreement, only those countries which have accepted the industry-specific agreement should vote. Yet there could be much value in allowing all signatories to the umbrella agreement to participate in discussions on the subject, so that countries which had not signed a particular industry-specific agreement could have their 'day in court' concerning the side-effects of rules for, and actions in, specific industries. Thus it might be efficient and beneficial to allow the umbrella agreement's supervisory body to oversee the industry-specific agreements (rather than have a separate 'committee of signatories' for each, as in the GATT codes), provided that voting on any measure was restricted to countries which had accepted the industry-specific agreement in question.

Other institutional measures to consider include a smaller steering and policy body, the secretariat, the accession of new members and the various 'final clauses'.

#### *Dispute-settlement Procedures*

It would be important to provide a carefully conceived set of procedures and institutions for the resolution of disputes relating to trade in services, including issues arising under industry-specific agreements or other related or subordinate treaties. The GATT approach of multiple procedures is not beneficial since (i) it allows 'forum shopping', (ii) it adds to the uncertainty of procedures, (iii) it imposes greater needs of expertise and staffing, (iv) it is more difficult for the public at large to understand and (v) it tends to be more easily abused and

manipulated.<sup>10</sup> A single overall procedure offers the best chance for the prestige of a dispute-settlement process to develop, which is the real basis in international relations of the potential effectiveness of a treaty or an agreement.

#### *Transparency Obligations*

A very important obligation, which could be a prime candidate for inclusion in the umbrella agreement, would be an obligation to report many kinds of information about governmental practices relating to trade in services. This would assist countries and the secretariat to study the problems of trade in services, perhaps preparatory to the development of new industry-specific agreements or bringing up to date existing ones. A general obligation granting the supervisory body the authority to require (as a legal treaty obligation) information on any matter relating to trade in services (probably with exceptions for national security, intellectual property measures and proprietary business reasons), given the availability of reasonable resources, would be extremely useful as part of the umbrella agreement. The supervisory body could be empowered to establish a 'transparency committee', or other sub-body, which could act on its behalf and generally supervise the gathering and examination of data. It could also make rulings on disputes over what the transparency provisions require of member countries.

#### *Regulatory Due Process*

Closely related to transparency, but going beyond it, is the concept of 'regulatory due process'. Articles VII, VIII and IX of the GATT contain analogous measures for customs procedures. It would be very useful to include general obligations in the umbrella agreement, applicable to all trade in services, requiring member countries to afford a certain fair standard of procedures in government dealings with foreign service providers. They could include measures requiring fair notice, access to information on regulations and procedures, right of appeal to an impartial tribunal and similar matters. Such measures could be linked to the consultation and dispute-settlement procedures of the umbrella agreement. At the least, national governments should be able to raise matters on behalf of their service providers who feel aggrieved by the actions of another country.

#### *Relation to Industry-specific Agreements*

The umbrella agreement should provide for the negotiation of agreements on individual service industries and specify the relationship of those agreements to the umbrella agreement. There are several aspects of this topic.

First, there should be provisions covering the procedures by which industry-specific agreements are to be negotiated. For example, it could be made explicit that if negotiations on individual industries fulfil certain criteria, then the umbrella

agreement's secretariat would provide services to assist the negotiations and the implementation of the resulting agreement.

Secondly, certain criteria should be established in the umbrella agreement as prerequisites for an industry-specific agreement to be an 'agreement under the services umbrella'. The criteria should include the following:

(a) Negotiations on an industry-specific agreement should be open to all member countries of the umbrella agreement. Provision must be made for all members to at least have an opportunity to be heard in any negotiation, in order to point out potential problems in a possible agreement which would affect their interests, even if a country knew it would not accept the obligations of the new agreement when the draft was finalized.

(b) The subject matter must be 'trade in services'.

(c) The supervisory body, or its sub-body such as a council, must approve (or at least not disapprove) the negotiations, probably by means of a specially qualified vote, which must give leeway to the desires of a relatively small group of like-minded countries to launch such negotiations. (Otherwise countries would take their affairs elsewhere, outside the umbrella agreement for services.)

(d) The dispute-settlement procedures of the umbrella agreement must apply to the industry-specific agreement's rules and members.

(e) The rules of an industry-specific agreement (even though negotiated later in time) are subordinate to the rules of the umbrella agreement, unless the umbrella-agreement provision expressly allows industry-specific agreements to deviate.

(f) An industry-specific agreement must be open to membership by any member country of the umbrella agreement, the only condition being that the country must accept the rules and disciplines of the industry-specific agreement.

Thirdly, as an agreement under the umbrella, an industry-specific agreement would benefit from several advantages:

(a) the services of the umbrella agreement's secretariat;

(b) the dispute-settlement procedures of the umbrella agreement;

(c) possible deviation from certain specified obligations of the umbrella agreement which are subject to approved industry-specific agreements;

(d) the transparency provisions of the umbrella agreement;

(e) an opportunity to deviate from a general MFN requirement contained in the umbrella agreement (as explained in the next sub-section); and,

(f) in the absence of contrary provisions in the industry-specific agreement, technical 'final clauses' and institutional measures furnished by the umbrella agreement, such as provisions for new members, amendments, ratification, the funding of secretariat services and other measures, rules on observers and state succession.

*MFN Provisions*

A key question is to what extent an umbrella agreement should contain an MFN obligation. There are some persuasive arguments that suggest it might not be in the best interests of some of the major developed countries to enter into MFN obligations, especially if those countries were already significantly more receptive to foreign business than most other signatories of the umbrella agreement. An attractive alternative might be to omit the MFN obligation from the umbrella agreement, but to include it in the optional protocol in such a way that only those countries accepting the protocol would be entitled to receive MFN treatment in services. One problem is that there already exist a number of treaties (for example, treaties of friendship, commerce and navigation) which contain MFN obligations that apply in various forms to trade in services or to particular aspects of trade in services (such as right of establishment). Clarification of these legal interrelationships would be needed.

A commitment to MFN treatment has many advantages. It reduces distortions in trade and thus maximizes welfare; and it lessens rancour and tension among countries, sometimes accelerating the process of liberalization by generalizing to all member countries any particular liberalizing action. But MFN treatment also creates the 'foot dragger' or 'free rider' problems. Attempts by smaller groups of countries to develop more advanced rules could be thwarted if these countries knew that they must offer all benefits of better rules to all member countries, regardless of whether the beneficiaries would reciprocate or would undertake the discipline of the rules. Attempts to get every country 'signed up' would make the process vulnerable to one or two hold-out countries, while going ahead without the hold-outs would give, under the MFN clause, a free ride to the hold-outs.

It seems clear that a general MFN requirement, whether contained in the optional protocol or in the umbrella agreement, should make an exception for industry-specific agreements. Countries which accept the discipline of an industry-specific agreement should also receive the benefits. This is a form of 'code conditional MFN', similar to some (disputed) views of the approach taken in several of the codes concluded during the Tokyo Round negotiations.<sup>11</sup> The controversy of the GATT on this issue should be avoided and the umbrella agreement should make it clear that 'code conditionality' is a standard exception to an MFN requirement in either the umbrella agreement itself or an optional protocol. Industry-specific agreements could (and should) have a special MFN requirement for national government activities in the industry concerned.

It may be that other exceptions to a general MFN clause would also be appropriate. At least they could be considered. There would also probably be a political need for some 'grandfather' type exceptions, particularly during a transition period. It would be wise to provide explicitly for these, but to impose a strict time limit, with a sensible decision-making process for renewal. There

should also be a reporting or 'registration' requirement for every exception in order to reduce conflicts over the existence and extent of exceptions. In addition, there should be a general prohibition against treaty reservations. These provisions and limits on exceptions might apply more broadly than just in the context of MFN treatment. They would also be relevant to a general 'waiver' authority, as described below.

### *National Treatment and Right of Market Access*

A key policy decision which would need to be made is whether to try to include anything in an umbrella agreement concerning the national-treatment obligation. This obligation — requiring a country to treat foreign service providers at least as favourably as its domestic service providers — is the basis of meaningful international discipline on national regulation concerning trade in services. For some types of trade it also raises questions of the right of establishment or other measures necessary to make effective the business operations of foreign providers of services.

It would probably not be feasible to impose a national-treatment obligation on trade in services generally, including unnamed or unknown service industries. Understandably, national leaders would be hesitant to enter into such 'blank cheque' obligations, which would cut deeply into a wide variety of existing and future government regulations and, too, could tread on sovereign toes in a very uncomfortable way. The inclusion of a national-treatment requirement in an umbrella agreement could greatly inhibit the broad participation in that agreement which could allow the meaningful evolution of sound rules for many service industries. It might be best to leave the national-treatment obligation to particular definition and implementation in an optional protocol and the various industry-specific agreements. Each industry will have a number of specific problems and features which could be dealt with in the course of negotiating industry-specific agreements. The amount of information currently available on many service industries is probably not adequate to permit a good understanding of the effect that the inclusion of a general national-treatment clause in an umbrella agreement would have on national regulatory systems.

There are two qualifications to these points which could be made.

First, an umbrella agreement might contain a statement of a national-treatment 'objective' or 'principle', perhaps requiring countries to pursue (in the longer run) a general goal of national treatment 'to the fullest extent possible'. This provision could be combined with transparency requirements, such as a requirement to report any situation where foreign service providers are not treated as favourably as domestic service providers and a requirement to respond meaningfully to requests for information along the same lines. It could also include a statement of the goals of providing meaningful market access when national treatment might

not in itself ensure such access. In addition, some consideration should be given to the problem of *de facto* discrimination, in cases where measures appear to be non-discriminatory, but in reality operate to the detriment of foreign service providers.

Second, as outlined in the next section, a special sub-group of the umbrella membership might be prepared to go further in accepting a national-treatment obligation in an optional protocol. Such a 'second tier' membership could be designed either as part of the umbrella agreement or as a separate agreement analogous to an industry-specific agreement — for example, an 'agreement on general national-treatment obligations for trade in services'. The agreement could be governed by the same disciplines under the umbrella agreement as an industry-specific agreement, except that it would apply to several service industries rather than just one. Indeed, a set of country 'schedules' of industries could be negotiated as part of a national-treatment agreement for services.

In any event, the preparatory negotiators for the umbrella agreement could make it a prerequisite of the implementation of an umbrella agreement that at least a certain number of industry-specific agreements (with appropriate national-treatment obligations) come into effect at the same time.

The apparently successful provisions on services in the free trade area agreement negotiated by the United States and Canada might suggest that a multilateral umbrella agreement on services could be more ambitious. It must be remembered, however, that the cultures, economies and legal structures of the United States and Canada are much more similar than those of probably any other GATT member countries. The enormous diversity among GATT members makes it dangerous to conclude that the American-Canadian relationship will always be an effective model in a context of much greater diversity.

### *General Exceptions*

It would probably be wise to specify in the umbrella agreement general exceptions which would apply not only to obligations of the umbrella agreement but also to any industry-specific agreement, unless the latter provided explicit measures to the contrary (negating the general exception). Articles XX and XXI of the GATT contain a series of exceptions which should be considered, such as those covering health and welfare measures, monopoly policies and laws, intellectual property measures and national security.

### *Waiver Provisions*

Since the future is so hard to foresee, it would be useful (as GATT experience demonstrates) to include in the umbrella agreement a provision allowing obligations to be waived.

*Measures for Developing Countries*

Both for general policy reasons and as a recognition of realistic political constraints, special provisions for developing countries would undoubtedly be necessary.<sup>12</sup> The umbrella agreement could contain at least some general 'aspirational' provisions and perhaps some clauses, similar to various articles in the Tokyo Round codes, providing special assistance to developing countries. Details and specifics might better be placed in industry-specific agreements. The question of 'graduation' or time limits on special treatment for developing countries would need to be addressed.

It is likely that developing countries would desire some recognition of infant-industry arguments for protection in service industries such as banking, insurance and stock and securities broking. In some cases these desires would merit special consideration. It is less clear, however, whether a legal exception for such desires should be placed in the umbrella agreement. Disciplined supervisory mechanisms, perhaps linked to a time limit, might be considered.

## THE MIDDLE LAYER OR OPTIONAL PROTOCOL

There would, of course, be advantages in obtaining somewhat more significant obligations from a core group of like-minded countries which would apply to several service industries. Some of these advantages would stem from the difficulty of negotiating a significant number of industry-specific agreements and the time it would take to do so. Likewise there might be opportunities for cross-industry swaps (if you agree to include banking we will agree to include insurance). Consequently there might be room for a somewhat general set of obligations which would apply to many service industries. In all likelihood, these obligations should specify a list of industries to which they apply (to avoid the 'blank cheque' problem). The list of industries could even become negotiated 'lists', similar to schedules of tariff concessions in the GATT or the 'entities' in the GATT Agreement on Government Procurement.

The key argument of this article, however, is that if this objective is desirable, it should be accomplished in such a way as not to undermine the establishment of a broadly subscribed legal-institutional structure which will serve the long-term process of developing an increasingly significant international discipline for trade in a range of service industries, with a larger and larger number of countries. This process should extend over several decades.

Thus if more significant obligations are contemplated, and such obligations might seriously inhibit the adherence of a large number of countries to the overall structure, it would seem wise to put such added obligations into a form which could be optionally accepted. Their acceptance should not be a prerequisite to

membership of the umbrella agreement. (Obligations might include both some of those discussed above, in the section on the umbrella agreement, and those listed below, in the section on industry-specific agreements.) For a core group of countries, it might become a negotiating requirement that acceptance of the optional protocol is a prerequisite to the coming into force of the whole package of agreements — that is, the umbrella agreement itself and several industry-specific agreements.

There are various ways in which this might be done, but one which seems efficient is to provide in the umbrella agreement an optional protocol, which would specify a series of significant obligations, certainly including MFN treatment and more impressive 'regulatory due process' and transparency requirements but also perhaps a reasonably binding national-treatment obligation. (I continue to think that service industries are sufficiently diverse that details of national-treatment and market-access obligations would need to be worked out separately for each industry.)

The basic thrust of the optional protocol would be to provide a few obligations, including a code conditional MFN obligation, to a specified list of industries. But it would also provide that, in the event that adherents to the optional protocol had also accepted an industry-specific agreement, as between those countries the rules of the industry-specific agreement would prevail over the rules of the optional protocol. Accordingly, an industry-specific agreement might have an altered or more stringent MFN and/or national-treatment clause; and these clauses would prevail as between countries which belonged to the industry-specific agreement even if such countries had accepted the optional protocol. Since the MFN clause in the industry-specific agreement would probably also be code conditional, it would be important for the MFN clause in the optional protocol to allow an exception for this type of clause in an industry-specific agreement.

#### OBLIGATIONS IN INDUSTRY-SPECIFIC AGREEMENTS

Most of the substantive international obligations on trade in services would probably be contained in the industry-specific agreements which could be negotiated over a period of several decades. If the umbrella agreement was thoughtfully constructed it could furnish both the institutional structure for negotiating and effectively implementing industry-specific agreements and an incentive or facilitation for negotiating such agreements. Each industry-specific agreement could then be tailored to the complex specific needs of a particular industry.

Some of the principles and rules regarding industry-specific agreements have been discussed above. For example, to be approved as an agreement under the umbrella — so as to obtain the benefits of that agreement, including services

provided by the secretariat, dispute-settlement procedures and certain exemptions from particular general obligations such as MFN treatment — an industry-specific agreement would have to conform to various requirements, including being open for acceptance to all member countries of the umbrella agreement.

In addition, an industry-specific agreement could embrace provisions concerning a long list of topics including: (i) the extent of the national-treatment obligation; (ii) effective market access and its meaning; (iii) subsidies; (iv) dumping; (v) 'commercial presence' or questions of investment (cf. right of establishment) which is essential for the effective delivery of many services; (vi) monopoly-competition policies and actions by private firms which restrict competition; (vii) the extent to which rules apply to political sub-divisions of a federal state; (viii) quantitative versus tariff-type barriers at the government 'border', monopolies, state trading *et cetera*; (ix) government procurement; (x) entities covered by the agreement; (xi) standards and technical barriers; (xii) transition periods and standstills; (xiii) special measures for intellectual property; (xiv) safeguard measures; (xv) 'grandfather' clauses for existing legislation and practices, with provision for the phasing out of such exceptions over a period of time; (xvi) a committee of signatories and the form of voting (although a better approach might be to use, instead, the umbrella agreement's supervisory body with voting restricted to countries which had accepted the industry-specific agreement); (xvii) formation and negotiation of new rules and amending the agreement; (xviii) supervision of rules and possible provision for complaints or information to be provided by injured private parties, as a preliminary or technical procedure leading up to the dispute-settlement procedures of the umbrella agreement; and (xix) final provisions on ratification, implementation, amendment *et cetera* or reliance on the relevant provisions in the umbrella agreement.

Obviously each of these topics could be discussed at some length. How obligations on 'subsidies' or 'dumping', for example, should be applied in specific service industries is very complex and beyond my expertise.

#### CONCLUDING REMARKS

The need to develop an international institutional and rule-oriented framework for discipline on national government measures relating to trade in services is very clear. The time is ripe, because needs are obvious, while positions on many issues have not yet 'hardened' into government practices shored up by powerful special interest groups. Delay could be very damaging because temptations are growing for national governments to cater to domestic service providers at the expense of opportunities for international trade in providing services. The subject, however, is extremely complex. Consequently, an approach that stresses the establishment of a legal-institutional framework which would facilitate a pragmatic step-by-step

evolution of specific rules for various service industries seems best. This article has suggested a number of ways to achieve such a framework.

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1. This article is based on a study prepared for the American Enterprise Institute in Washington.
  2. See 'Ministerial Declaration on the Uruguay Round', *GATT Press Release*, GATT Secretariat, Geneva, No. 1396, 25 September 1986.
  3. See *ibid.* Also see Mario A. Kakabadse, *International Trade in Services: Prospects for Liberalisation in the 1990s*, Atlantic Paper No. 64 (London: Croom Helm, 1987); Richard Rivers, Valerie Slater and Angela Paolini, 'Putting Services on the Table: the New GATT Round', *Stanford Journal of International Law*, Vol. XXIII, No. 13, 1987, pp. 18-21; and M.G. Clark, *Services and the General Agreement on Tariffs and Trade*, Discussion Paper No. 8603 (Montreal: Institute for Research on Public Policy, 1986).
  4. John H. Jackson, 'Equality and Discrimination in International Economic Law (XI): the General Agreement on Tariffs and Trade', in *Yearbook of World Affairs* (London: Sweet & Maxwell, for the Institute of World Affairs, 1983) p. 224; and Jackson, 'Multilateral and Bilateral Negotiating Approaches for the Conduct of United States Trade Policies', in Robert M. Stern (ed.), *US Trade Policies in a Changing World Economy* (Cambridge, Massachusetts: MIT Press, 1987). See also Jan Tumlir, *Protectionism: Trade Policy in Democratic Societies*, AEI Study No. 436 (Washington: American Enterprise Institute, 1985) ch. 2.
  5. Jackson, Jean-Victor Louis and Mitsuo Matsushita, *Implementing the Tokyo Round: National Constitutions and International Economic Rules* (Ann Arbor: University of Michigan Press, 1984) ch. 4.
  6. Jackson, 'The Birth of the GATT-MTN System: a Constitutional Appraisal', *Law and Policy in International Business*, Washington, Spring 1980, p. 21; and Jackson, 'Anticipating Trade Policy in 1987', *Looking Ahead*, National Planning Association, Washington, Vol. IX, No. 1, 1987, pp. 1-7.
  7. Gene M. Grossman and Carl Shapiro, 'Normative Issues Raised by International Trade and Technology Services', in Stern (ed.), *Trade and Investment in Services: Canada/US Perspectives* (Toronto: University of Toronto Press, for the Ontario Economic Council, 1985).
  8. See Kakabadse, *op. cit.*, and Jonathan D. Aronson and Peter F. Cowhey, *Trade in Services: a Case for Open Markets* (Washington: American Enterprise Institute, 1984) pp. 25-26.
  9. Gary Clyde Hufbauer and Joanna Shelton Erb, *Subsidies in International Trade* (Washington: Institute for International Economics, 1984); Hufbauer, 'Subsidy Issues after the Tokyo Round', in William B. Cline (ed.), *Trade Policy in the 1980s* (Washington: Institute for International Economics, 1983); and Daniel K. Tarullo, 'The MTN Subsidies Code: Agreement without Consensus', in Seymour J. Rubin and Hufbauer (eds), *Emerging Standards of International Trade and Investment* (Totowa, New Jersey: Rowman & Allanheld, for the American Society of International Law, 1984).
  10. Jackson, 'The Birth of the GATT-MTN System: a Constitutional Appraisal', *loc. cit.*
  11. See Jackson, Louis and Matsushita, *op. cit.*, ch. 4, pp. 160-61; and Jackson and William J. Davey, *Legal Problems of International Economic Relations*, 2nd edition (St Paul, Minneapolis: West Publishing Company, 1986).
  12. A group of developing countries, including Brazil and India, was vehemently opposed to including services in the Uruguay Round negotiations, preferring to keep trade in services out of the liberal trade rules. See the testimony of Clayton Yeutter, the United States Trade Representative, before the Sub-committee on Trade of the Committee on Ways and Means, United States House of Representatives, 25 September 1986.
- Part IV of the GATT (added in 1965), as well as Article XVIII, contain special provisions for developing countries. Both the ministerial declaration of 1973, launching the Tokyo Round negotiations, and the ministerial declaration of 1986, launching the Uruguay Round negotiations, refer to the necessity for special measures for developing countries.