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**THE CONSTITUTIONAL STRUCTURE FOR INTERNATIONAL
COOPERATION IN TRADE IN SERVICES
AND THE URUGUAY ROUND OF GATT**

by

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TRADE IN SERVICES AND THE URUGUAY ROUND OF GATT

(REVISED DRAFT)

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I. Introduction and the Basic Policy Goals¹

A. Trade In Services and the World Economy

The need for some type of international coordination and cooperation concerning services trade across borders has become apparent. While there exists an international legal framework (albeit troubled and evolving) regarding trade in goods,² there is very little such framework for services, except in certain specific sectors.³ Services make up a greater percentage of GNP of major industrial countries than production of goods⁴ and also comprise a significant percentage of world trade.⁵

Services comprise an extremely broad set of economic activities, including banking, stock brokers, lawyers, engineering, insurance, telecommunications, accounting, travel, tourism, hotels, shipping, advertising, consulting, and construction. This varied spectrum of activity is very difficult to define,⁶ much less regulate. Yet in many nations, these activities are growing more rapidly than production of goods, and also in many nations (not necessarily the same nations) governments are increasingly tempted to step in and regulate these activities,⁷ many times for legitimate reasons of protecting consumers or other national interests (such as national security), but also sometimes for pure "protectionist" reasons to protect local entrepreneurs from the rigors of competition of more efficient service providers located or controlled primarily outside a nation's borders. The time seems propitious for the development of an international regime to try to inhibit the purely protectionist impulses of governments, before these have led to national regulatory systems that will become "hardened" and difficult to dismantle in the future.

These considerations were among those which led the participants in the GATT Ministerial Meeting of September 1986, at Punta del Este, Uruguay, to include in the Declaration launching the eighth major GATT round of trade negotiations, provisions for negotiating agreements on trade in services. These provisions were certainly not without controversy, and the compromise language adopted is not entirely clear on a number of significant matters. But it is clear that the Uruguay round negotiators are charged with the responsibility of addressing the problems of world trade in services, as a counterpart to the existing world framework for trade in products.⁸

World welfare may be considerably enhanced by a system that would forestall or dismantle some of the more purely protectionist governmental regulation of service activity. However, it cannot always be assumed that the familiar and traditional economic doctrines relating to trade in goods, such as the doctrine of comparative advantage (itself under some attack), apply in an

equivalent manner to trade in services, although certainly some respected economists seem to think that this is the case.⁹

Because of the great variety of service activity, because often this activity involves no tangible property, and because it is sometimes difficult or impossible to identify when service activity "crosses a border"; the national or international regulation of such activity is very difficult. For similar reasons, it is very difficult to develop a new legal system for these activities. The GATT model, for example is often cited as a possible approach for services trade.¹⁰ However, because of the great differences between service trade and trade in goods, it is quite doubtful that the GATT model can be followed too closely. The purpose of this paper is to explore the possible legal/institutional structure which could be utilized to develop an international discipline on services trade, and to compare such structure to the GATT model.

At the outset the obvious must be recognized, that any international discipline involves some "yielding of sovereignty" by national governments. The GATT already imposes some constraints on what sovereign governments are allowed to do. A "GATT for Services" would likewise impose a number of constraints. At almost every step of considering a structure for services, policy makers must confront the trade off between, on the one hand, the needs of broader goals of world and national economic welfare, and on the other hand, the legitimate desires of national government leaders to retain as many governmental tools as possible with which to deliver appropriate solutions to the needs of their constituents. In some cases these trade offs will result in a strengthening of international discipline, yielding sovereignty. In other cases, however, it will be impossible to do this, because the forces for retaining power at national government levels will be too great. In thinking about a structure for services, sensitivity must be given to these trade offs. It is not always the case that international control is better than the less centralized decisions of governments which are closer to their constituents.¹¹

In this paper, we will explore these basic institutional questions about potential international agreements for trade in services, in the context of "Uruguay" Round trade negotiations mentioned above. This paper will not examine specific service sectors or the detailed possible rules for specific service issues. Those issues are much more ably addressed by other writers and experts, who have specific knowledge of various service sectors.¹²

The ideas and reflections expressed in this paper stem partly from considerable discussion about services trade with other scholars, government officials and policy makers. No special claim to originality for many of these ideas is made by this author, although some of his perspectives may differ from those of other experts, and indeed some of these reflect some basic policy

questions which appear as yet to be unresolved.¹³ The ideas in this paper also stem from several decades of writing, thinking, and practicing in the area of international trade and the GATT. Obviously the history of GATT is rich in analogies and potentially instructive experiences. However the GATT is a flawed instrument,¹⁴ for many reasons, and one of the objectives in a services negotiation should be to avoid the mistakes and flaws of the GATT.

Many points discussed below are put forward with "tentativeness" and no claim of absolute truth. Many of these points are "judgmental", and specific application will often depend on constraints of negotiating context and pressures, as well as the development of much additional information not currently available to this writer, or, in some cases, to policy makers. However it is hoped that this discussion below can serve as a sort of "checklist" of issues and policy considerations which should at least be taken into account during the Uruguay round of trade negotiations.

One particular policy direction implicit in the discussions throughout this paper should be made explicit. There are strong reasons why international institutions regarding economic relations should be primarily targeted for a "rule oriented" rather than "power oriented" approach. In previous writings this author has explained this as follows:¹⁵

"It seems to me that diplomatic techniques can be roughly categorized into two groups: (1) the technique we can call "power oriented"; and (2) the technique which we might call "rule oriented." Power oriented techniques suggest a diplomat asserting, subtle or otherwise, the power of the nation he represents. In general, such a diplomat prefers negotiation as a method of settling matters, because he can bring to bear the power of his nation to win advantage in particular negotiations, whether the power be manifested as promised aid, movement of an aircraft carrier, trade concessions, exchange rate changes, or the like. Needless to say, often large countries tend to favor this technique more than do small countries; the latter being more inclined to institutionalized or "rule oriented" structures of international activity. . . .

"A rule oriented approach, by way of contrast, would suggest that a rule be formulated which makes broad policy sense for the benefit of the world and the parties concerned, and then there should be an attempt to develop institutions to insure the highest possible degree of adherence to that rule. . . .

"All diplomacy, and indeed all government, involves a mixture of these techniques. To a large degree, the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented

approach. However, never is the extreme in either case reached. In modern western democracies, as we know them, power continues to play a major role, particularly political power of voter acceptance, but also to a lesser degree economic power such as labor unions or large corporations. . . .

"[A] particularly strong argument exists for pursuing even-handedly and with a fixed direction the progress of international economic affairs towards a rule oriented approach. Apart from the advantages which accrue generally to international affairs through a rule oriented approach -- less reliance on raw power and the temptation to exercise it or flex one's muscles which can get out of hand; a fairer break for the smaller countries, or at least a perception of greater fairness; the development of agreed procedures to achieve the necessary compromises; in ECONOMIC affairs there are additional reasons. . . .

"Economic affairs tend (at least in peace time) to affect more citizens directly than may be the case for political and military affairs. Particularly as the world becomes more economically interdependent, more and more private citizens find their jobs, their businesses, and their quality of life affected if not controlled by forces from outside their country's boundaries. Thus they are more affected by the economic policy pursued by their own country on their behalf. In addition, the relationships become increasingly complex -- to the point of being incomprehensible to even the brilliant human mind. As a result, citizens assert themselves, at least within a democracy, and require their representatives and government officials to respond to their needs and their perceived complaints. The result of this is increasing citizen participation, and more parliamentary or congressional participation in the processes of international economic policy, thus restricting the degree of power and discretion which the Executive possesses. This makes international negotiations and bargaining increasingly difficult.

"However, if citizens are going to make their demands be heard and have their influence, a "power oriented" negotiating process (often requiring secrecy, and executive discretion so as to be able to formulate and implement the necessary compromises) becomes more difficult if not impossible. Consequently, the only appropriate way to turn seems to be toward a rule oriented system, whereby the various layers of citizens, parliaments, executives and international organizations will all have their inputs, arriving tortuously to a rule, which however, when established will enable business and other decentralized decision makers to rely upon the stability and predictability of governmental activity in relation to the rule."

Since the GATT is often cited as a model for international discipline in economic relations, it is worthwhile to briefly review the nature and outlines of that institution. The most important fact about GATT, or more broadly what we can term the "GATT System" so as to embrace the many separate treaty instruments and practices which together form the legal structure of GATT, is that the GATT as such was never intended to be what it has become. The original idea, in the period just after World War II, was to create an organizational counterpart to the World Bank and the IMF (International Monetary Fund), which would be called the ITO - International Trade Organization. The GATT was to be merely an agreement on tariffs, sort of appended to and serviced by the ITO. In theory, the GATT was not an organization. By such theory, the GATT does not have "members", but instead accepting governments are "contracting parties", or "CP's."¹⁶

In due course, however, the ITO idea failed. The final draft ITO charter completed at Havana, Cuba in 1948, was not accepted by the U.S. Congress, and no other country was willing to bind itself to that charter without its application to the then pre-eminent economic power, the U.S. The GATT, however, was accepted by the U.S. (through the "Protocol of Provisional Application") under authority granted the U.S. President in the 1945 extension of the Reciprocal Trade Agreements Act. Thus, the Congress did not need to approve the GATT.¹⁷

The GATT was thus thrust into the position of the principal international institution for controlling trade, despite the fact that agreement had inadequate institutional provisions (rule making, voting, dispute settlement, new members, secretariat, etc.) These constitutional infirmities are the source even today of some of the significant problems of the GATT system. Some of these problems have been extensively commented upon, and are part of the agenda for the new GATT trade round of negotiation.¹⁸

Substantively the core of GATT can be described as including obligations which relate to trade in goods (but only trade in goods), and which apply to constrain government regulatory actions. Only a minute few of GATT obligations could be said to even impliedly apply to business firms or individuals.¹⁹ The GATT was designed to limit what governments could do to place hurdles on trade across borders. These obligations include:

1) Negotiated tariff "binding", item by item, contained in a schedule for each GATT contracting party, with the obligation on such party to avoid applying a tariff in excess of the "bound rate" contained in its schedule.²⁰

2) MFN - Most Favored Nation obligation, to require each GATT CP to treat goods originating in any other GATT CP on an equal (or

"at least as favorable") basis as that treatment afforded to the most favored GATT CP.²¹

3) National Treatment obligation to require each GATT CP to treat imported goods, once they have crossed the border (cleared the border "customs" process), no less favorably than it treats goods produced domestically.²²

4) A broad prohibition on the use of quotas (quantitative restrictions), with a few exceptions (e.g. for Balance of Payments reasons).²³

5) A series of "due process" type obligations constraining the manner by which governments applied their tariffs and customs regulations, requiring due notice, realistic (not arbitrary) valuation methods, opportunity to appeal, etc.²⁴

6) Obligations permitting but channeling the use of anti-dumping and countervailing duties (to offset dumping margins and subsidies).²⁵

7) Obligations constraining the type of subsidies which can be used to benefit goods which are exported or compete with imports.²⁶

The GATT agreement also contains a series of exceptions, some of which arguably make serious inroads in the obligations mentioned above. Most prominent among the exceptions are those for: national security, governmental health and welfare and intellectual property measures, customs unions and free trade areas, certain agricultural programs, certain measures by developing countries to aid economic development, and escape clause measures to slow imports to allow domestic industries to better adjust to competition.²⁷

In addition, because the GATT agreement as such has never come into force, instead being applied through the Protocol of Provisional Application, there exist "grandfather rights", exempting some countries from parts of the GATT obligations when these obligations conflict with "existing legislation."²⁸ Also, for certain historical reasons, the GATT provides an "opt out" clause (in Article 35), allowing any country to "opt out" of a GATT relationship with any other GATT country, exercisable (in theory) at one time only, namely the time when one or the other country enters GATT.²⁹ These two exceptions in particular have caused a number of troublesome problems in the GATT and its ability to effectively discipline international economic relations. When added to the longer list of other exceptions, the pattern of "escapes" provides sufficient opportunity for governments to evade their GATT responsibilities as to evoke the criticism that GATT is meaningless (which it is not).

Furthermore, partly because of the weakness of the GATT institutional provisions, particularly the dispute settlement procedures and the procedures for keeping rules up to date with rapidly changing international patterns of economic activities (such as evolving ideas of "industrial policy"), even those rules of GATT which technically apply are sometimes avoided.³⁰

Despite all this, the GATT has been remarkably successful in holding its own as an effective international system to keep pressure on governments to avoid at least the most damaging of protectionist measures. Certainly it has been far more successful than could have been predicted in the early period after the failure of the ITO. A key question, however, is how much longer can the GATT system cope with a world which is economically very different from that for which it was designed. The GATT membership, for example, has increased more than fourfold and now includes a much greater variety of economic systems and stages of development.³¹ The GATT was essentially designed for market economies, and has great difficulty coping successfully with state trading, non-market economies, and even some activities of modern market economy governments such as industrial policies based on targeting strategies. Even modest differences in economic structure, such as customary differences in debt-equity structures of firms, can have significant impacts on trade flows and entrepreneurial behavior, some of which is perceived as "unfair" in the eyes of domestic industries competing with goods from some other systems.³²

C. Policy Goals for a Services Agreement

The complexity, defects, and problems of the GATT system for trade in goods, when added to the much greater variety and complexity of services trade, results in a mosaic or web of crosscurrents which is so potentially difficult to organize by international rules, that any person, no matter how expert, must approach the subject with a great deal of caution. Indeed, in this writer's view, it will not be possible to build, within a few years or the time span of one GATT negotiating round, a complete structure of such rules. Instead, to this writer it seems better to recognize this, and to focus 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, so that these would enhance the broader goals of increasing world 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 appears dangerous and probably impractical, to try to design sweeping rules, such as a broad national treatment

obligation, which apply to all "services", regardless of sector. The details of how best to design an international discipline for the banking sector, for example, may differ substantially from that endeavor for the insurance, or engineering services sectors.³³ Different sectors have different rates of technological advance, different degrees of importance to "national security" or other sovereign goals, and rely on substantially different business structures (compare banks with airlines!). In addition, the level of national government regulation already in place (and thus the interest group support for the status quo) varies greatly from sector to sector, 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 can constructively contribute to the beneficial evolution of sets of more detailed rules over a period of time. Such a structure should be relatively non-threatening so as to encourage as broad participation as possible. It should provide the framework for gathering information and developing detailed analyses and studies to facilitate future rule development. It should put in place a legal structure to reinforce the evolution and predictability of rules relating to service trade in a variety of sectors. And, although encouraging broad participation, so that "hold-outs" don't jeopardize the willingness of participants to enter into meaningful commitments, it should allow sub-groupings of like-minded nations to forge ahead with sets of obligations which not all "members" are yet prepared to accept. In other words it should to the extent feasible avoid the MFN foot dragger problem experienced in GATT and in other contexts.³⁴

This is an ambitious agenda. Clearly some goals mentioned will not be fully or satisfactorily achieved, at least in the short run. A priority focus on those long term "constitutional" issues does not always provide encouragement to firms or groups interested in short term "bottom line" oriented results. There is therefore always some risk of losing support for the services negotiation endeavors from some constituent groups. Thus some compromises between the longer-term goals, and more short term results are probably inevitable. What must be preserved, however, is the goal of achieving, hopefully by the end of the Uruguay Round, a legal-institutional structure which, while providing some useful rules for specific service sector trading activity, will have in place a "constitution" for the many further decades of rule and discipline developments for service trade.

In carrying out these policy objectives, past experience, especially that of GATT, will be extremely useful. Thus in the discussion below, frequent reference has been made to that experience. In particular, it would seem desirable to avoid some of the institutional defects, as well as the problems posed by "grandfather" type exceptions which have troubled the GATT.

Likewise, there seem many good arguments to try to achieve as broad and varied a membership in the overall system as possible, and to avoid the characterization of "rich-man's club" for the institution for services by drawing developing countries as deeply into the process as possible.

II. Structure of a Constitution for Services Trade

A. Relation to GATT

Services trade should not and cannot realistically be "incorporated" into the GATT agreement. For example, the notion that the GATT would be amended briefly, so that the GATT agreement as we know it now would apply not only to products, but also to services, would not be wise for a number of reasons.

First, amending the GATT is very difficult, requiring two-thirds (and for some purposes unanimous) consent of existing contracting parties (currently exceeding 94 in number). Thus, countries which oppose an international services discipline would be in a position to exact concessions and compromises which could considerably water down the endeavor. This reasoning is why, in the Tokyo Round, nations opted to rely primarily on side "codes" or separate agreements rather than amending the GATT.³⁵

Second, the GATT has inadequate institutional provisions. These would simply carry over to services issues some of the most serious problems of the GATT already felt for product trade. (Some of these problems have been mentioned above.) This would be particularly true on core questions such as dispute settlement procedures, voting, new members and their status, methods of developing new rules and keeping them up-to-date.³⁶

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 sectors, known and unknown. Nations 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 sector of service activity (banking, insurance, engineering, lawyers, doctors, economists, education, films, TV programs, theatre, consulting for government agencies, advertising, investment and securities, etc.) In many of these sectors, information and data are not readily available. No nation is likely to be willing to accept broad "blank check" type obligations applying even to future unknown activities as well as current little understood activities. In addition, it is not entirely clear that world welfare would be enhanced by typical GATT rules of liberal trade in all service

sectors. Intellectual property issues, for example may require restricting trade in order to enhance longer run world welfare.³⁷

Fourth, there is advantage in experimenting with rules for a few selected service sectors before extending similar rules to other, less well known sectors.

The most difficult and "threatening" GATT obligation is, of course, that of national treatment. This obligation requires nations to treat imports in a non-discriminatory manner relative to domestic products. When applied to services, it would require nations to apply their regulations in a manner that was not less favorable to service providers from other nations, compared to those from within the nation itself. It is easy to understand why many nations would be hesitant to agree to a strong national treatment obligation in many service sectors, at least without some evolutionary experience as to how these may affect its tools for governing, (countries with nationalized banks), for example, would find a number of problems with an obligation requiring treatment of foreign banks no less favorably than its treatment of domestic banks. In a number of other sectors, secrecy issues will come into play to reinforce some national fears of international rules.³⁸ In addition, for some service activities effective access to a foreign market requires a "right of establishment" which raises issues of long-standing controversy.³⁹

Likewise the GATT subsidy rules could be very troublesome. Subsidies are a central tool of governments, albeit often misused. Subsidy issues perplex the policy makers and negotiators in connection with trade in products.⁴⁰ Such perplexity would be compounded in relation to service sectors, many of which are less well understood, and would involve intangibles which are more difficult to administer or to evaluate.⁴¹

In addition, for some types of services, traditional rules for products do not fit. In some cases services can be easily provided by establishments located outside the consuming nation. For other services, some sort of "establishment" within the consuming nation is necessary for effective delivery of services, and this raises a host of traditional and non-traditional international law questions such as right of establishment, protection of foreign investment, employment rules, etc.⁴² Many of the developing country worries of recent decades about the activities of multinational corporations will manifest themselves in opposition to rules such as national treatment, regarding services. Even developed nations worry about the relative ease by which multi-national corporations seem to be able to evade government regulation.⁴³

B. The Overall Structure of a Constitution for Services Trade

The various considerations mentioned have led a number of

persons to suggest an approach to a services constitution which would involve at least two "layers" of agreement. The objective would be to provide a legal and 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 obligations. This top layer would contain the overall institutional measures (including the supervisory body, secretariat, decision making rules, and dispute settlement procedures) along with some relatively modest obligations (as outlined below). Some substantive provisions in this layer might be phrased as "principles", "objectives" or "goals." The basic purpose of this "layer" would be to put in place a legal-institutional structure which would facilitate the longer term evolution of specific sector agreements with detailed rules regarding those sectors.

Many have termed this top "layer" the "umbrella agreement". It would be complemented by a series of specific "service sector agreements" (SSA's) or "codes", such as a code for banking, one for insurance, etc. However, the Umbrella agreement might also contain a sort of "intermediate" layer, of more significant concrete obligations regarding a specified list of service sectors. This intermediate layer could be constructed as an "optional title", or "optional protocol" (similar to the legal structure of a number of international agreements, especially in the human rights area). This optional title, which we can call the "general services protocol" or GS Protocol, could also be legally designed as simply another "SSA", but one which applied to a number of different service sectors in the absence of a specific service sector agreement. This "GS Protocol", could contain a few key obligations such as a MFN (most favored nation) obligation and some form of national treatment, but could be fashioned to apply only to a specified list of service sectors (to avoid the "bank check" problem). It could also be worded so that whenever a more detailed service sector agreement (SSA) were ultimately adopted for a specific sector, this SSA would prevail over the GS Protocol.

The final layer of obligations would be contained in a series of specific service sector agreements (SSA's) or codes. Each sector agreement would be devoted to one service sector, and could then be tailored to the particular needs and complexities of that sector. It would be understood that not all members of the umbrella agreement would need to join any particular sector agreement, but normally there would be some advantages of sector agreement membership which would not accrue automatically to countries which did not accept the sector agreement.

At the outset, it may only be feasible to negotiate four or five sector agreements. Time and negotiating resources, as well as political acceptability, will constrain the number of sectors which can be covered. The umbrella code could include a framework for

negotiating sector "codes" as well as rules as to how the sector agreements relate to the umbrella agreement. However, so that an umbrella agreement would not be too "hollow", some countries, e.g. the industrialized OECD group, could decide among themselves, as a negotiating strategy, that the umbrella agreement would not come into force unless at least two specified number of sector agreements came into force, which in turn could depend on a minimum number of acceptances of the sector agreements.

In the next several parts of this paper we will explore further the possible details of these various "layers" of agreement.

C. United States Law and Other National Laws Related to the "Constitution"

While considering the international structure for an institution and obligations about trade in services, some thought should also be given to the law of the United States (and certain other key countries, such as the EEC), which would be appropriate in relation to a new international institutional/legal structure for such trade. The U.S. law in relation to GATT has always been troubled, leading to occasional (incorrect) statements that the GATT is not a binding legal instrument or that the GATT has never been correctly approved under United States Constitutional law.⁴⁴ This can be contrasted with the situation for the World Bank and the International Monetary Fund, for which the U.S. statute called the "Bretton-Woods Agreements Act" exists.⁴⁵

In the 1945 Bretton-Woods Agreements Act, the Congress authorized U.S. participation in the IMF and World Bank, and laid down rules governing how the U.S. would organize its representation in those organizations, and specifying that for some subjects (such as amendment or changing the par value of the dollar) the permission of Congress would be required. Even if approval of a set of services agreements were to occur in the U.S. through "fast track" type legislative procedures⁴⁶ it is likely that the Congress would want some constraints on the Executive and its relation to the new institution, analogous to those in the Bretton-Woods Agreement Act. Thus some thought should be given to the appropriate framing of such constraints. For example, it might be appropriate to spell out the method by which Congress would approve future sector agreements negotiated under the umbrella agreement, and the Congress might be willing to apply a fast track procedure for such approvals.

III. Possible Contents of An Umbrella Agreement on Services Trade

For an umbrella or first "layer" agreement for services trade, the principal objective should be the broadest possible participation, consistent with a viable institutional structure which would promote a beneficial long-run evolution of rules for services trade. The subjects listed below should be among those

considered for inclusion in this "first layer." In Part IV of this paper, we will turn briefly to a possible "general service protocol" or second layer of obligations which might well be included in the overall umbrella agreement, but for which acceptance would be optional. Such second layer, however, should be constructed so as to have some benefits for those who do accept. One possibility is to reserve "MFN" treatment to apply only for the optional protocol adherents. A number of the other obligations mentioned below, could well fall back into the "optional protocol", if in the negotiation it turned out that inclusion in the overall universal "umbrella" would cause too many nations to refrain from joining.

A. Statement of Objectives

Carefully phrased objectives in an agreement can have a considerable effect in later interpretation and implementation of the agreement, and in resolving disputes about the agreement.⁴⁷

GATT Agreement objectives are worded as follows. (These can be modified for services.)

"Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

"Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, . . .

In addition, a general objective of minimizing world tensions stemming from economic relations might be added.

Other stated objectives might relate to:
Need to recognize the advantages of rules, predictability. Need for further study and gathering of information. Need to develop a framework for pragmatic evolution of rules regarding a wide variety of service sectors. Need to assist economic development in those countries with lower standards of living. Need to balance the advantages of national sovereignty with the advantages of international cooperation and disciplines.

B. Institutional Measures: Supervisory Body, Voting, Rule making, Secretariat, Dispute Settlement, Membership

1. Supervisory Body: Provisions to set up a general highest authority supervisory body, called "Assembly", or "Contracting Parties", or similar. These provisions should address the typical international organization questions such as seat of headquarters, frequency of meetings, powers and competence, and especially voting.⁴⁸ Clearly consideration about these provisions must include their relationship with the existing GATT. Presumably it would not be advisable to simply allow the existing GATT Contracting Parties to be the supervising body for the new services area. But the relationship between the GATT and a new services supervising group would need to be worked out. Does this imply an even broader over-all group for both endeavors such as a modified and institutional structure along the lines of the ill-fated OTC (Organization for Trade Cooperation) of the mid-1950's? Or can the GATT and a new set of contracting parties for services share premises, staff, secretariat, and other institutions?

The voting question will be particularly sensitive.⁴⁹ In order for decisions to be effective, they must be accepted by a reasonably large part of the real power which exists among members. A one-nation one-vote procedure for at least certain decisions is not conducive to such effectiveness, since the powerful nations can sometimes be outvoted, and will then refuse to effectively carry out the decisions. On the other hand the system does not need to cater exclusively to power, but should impose a sense of fairness and a perception of justice on even the powerful nations. Various combinations of voting structure should be examined for possible use in a services umbrella agreement. Obviously the weighted voting structure of the IMF or World Bank, is a model which must be considered. Perhaps voting can be weighted by percentage of the total international service trade of participant countries. Combinations of weighted and one-nation one-vote systems can be used, to protect the less powerful from the more powerful. A "Council" or other sub-body, with selected representative membership, can sometimes substitute for weighted voting. For example, in a 100 nation organization, a 20 nation "council", with membership guaranteed to the five largest trading nations and to representatives of each of several geographic regions and types of economic systems, can be joined with a two-thirds or three-fourths council voting requirement as a condition of adoption of certain types of decisions.

The voting question relates intimately to the types of decisions to be made. Perhaps a "qualified" voting pattern could be required for new rules, for budgets, and for certain waivers.

Voting on certain questions should probably only be allowed to sub-sets of the umbrella membership. For example, powerful arguments (and precedent practice) can be demonstrated to

support a rule that, regarding issues of legal treaty interpretation or application of a subordinate specific sector agreement (not the umbrella agreement), only those nations which have accepted the specific agreement should vote.⁵⁰ Yet there could be much value in allowing all umbrella nations to participate in the debate on the subject, (so that non-sector parties have their "day in court" concerning by-product effects of specific sector rules and actions). Thus it might be efficient and beneficial to allow the umbrella supervisory body to play a supervisory role for the specific sector agreements, (rather than a separate "committee of signatories" for each, as practiced in the GATT context), provided that the voting on a measure be limited to nations which have accepted the specific sector agreement.

2. Smaller Steering and Policy Body: Since the overall supervisory body is not likely to meet too frequently, a smaller body such as a "council", (as the GATT practice has developed, or comparable to the Executive Board of the IMF) will be necessary. Again voting and power distribution need to be considered.

3. Secretariat: Provision must be made for a secretariat, and for the position of the chief officer of the secretariat. Funding and budget obligations and decisions must be determined. One of the important questions in this regard will be whether to use the GATT secretariat, or more appropriately, whether to use a combined secretariat which will service both the GATT and the services agreement. Obviously many arguments exist to favor that approach.

4. Membership: The process for accepting new members (two-thirds vote? or open enrollment?), expulsion of members (gross defiance of obligations, as ruled by a dispute settlement panel and approved by two thirds of the supervisory body?), must be set forth.

5. Final clauses: Provisions must be made for the traditional final clauses for a treaty, when it is to open for signature, ratification, come into force (when 20 countries, comprising at least 25% of the international services trade total of all preparatory countries?), etc.

C. Dispute Settlement

It would be most wise to provide a carefully thought out set of procedures and institutions for dispute resolution of all issues concerning services trade, including issues arising under specific sector agreements or other related or subordinate treaties. The GATT approach of multiple procedures is not beneficial⁵¹ since it allows "forum shopping", adds to the uncertainty of procedures, imposes greater needs of expertise and

staffing, is harder for the world's public to understand, and tends to be more easily abused and manipulated. A single overall procedure allows 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 such a procedure.

Such a procedure should involve an impartial "panel" as the central feature, which panel would be charged with making impartial, third-party, well reasoned (and published) "findings" or "determinations", focused on whether certain actions by a nation are inconsistent with treaty obligations. The procedure should provide for secretariat services, and a roster of potential "panelists", and should embrace the following obligations and steps in the procedure:

- 1) A general obligation to consult with any other nation or nations who are members of the Services Umbrella agreement, on any matter related to trade in services, (regardless of whether the matter is covered by a sector agreement or any other service rules under the system). The obligation should spell out the duty to provide reasonable information about actions or processes concerning service trade in any member nation. This step can be confidential, and bilateral.
- 2) An obligation to cooperate in a process of mediation or conciliation supervised by a secretariat service, if the consultation step above does not result in a settlement of differences. The secretariat will assist the parties in achieving some sort of resolution of their differences, (a process which in GATT is often unfortunately confused with other parts of the dispute settlement procedure.)
- 3) A panel procedure is needed, invocable as of right by any member of the services umbrella agreement, which will focus on developing "findings" about the consistency of practices with legal treaty obligations, (including those in specific sector agreements.) (The unfortunately ambiguous language of GATT dispute settlement procedures, the "nullification or impairment" phrase, should be avoided.) The first two steps above should be a prerequisite for this step. Measures for selecting panel members must guard against delaying tactics, and ensure impartiality of the panel as well as its expertise. More detail than exists in GATT is needed for procedures for fact and information gathering, for representation of interested parties other than the original disputants, for time limits, and for avoiding delay in publication of the panel's report. The panel need not be given power to "recommend", and should avoid conciliation efforts which sometimes confuse panelists as to their role of coming to an objective finding. Provision could be made for disputants to opt in favor of: a) being bound by the panel report, and b) giving the panel

power to make recommendations or rule "ex aequo et bono" (on equitable rather than legal grounds), as is the case now for the world court. Absent such agreement, however, the panel's competence should exclude these results or activities.

4) A political body of the organization, such as a council or the overall supervisory body, or similar sector body, should have the power to approve, disapprove, send back a report for redoing, or invoking a new panel process to redo a case. This provides a sort of "political" or "policy" filter for the otherwise more strictly legal results of a panel process. The panelists can then focus on the legal questions, and be impartial. The political filter can invoke broader policy considerations, but only after the world knows the results of able thinking about the legal issues, so that those results become part of the broader considerations. This political filter process can make it more palatable for nations to commit themselves to a meaningful dispute settlement process, and yet as time and experience operates to (hopefully) increase the prestige of the panel process, it is more likely that a panel report will have great weight in the political considerations.

5) The final step in a process is consideration of a potential "sanction" or responding actions by either a complaining country, or in cases severe enough, all nation members of the organization. However, it must not be assumed that sanctions or retaliation type responses are essential for a dispute settlement process to be successful. In fact, the prime reason for effectiveness of such a process is the willingness of nations, especially powerful nations, to "voluntarily" implement the results of a panel report. This is more likely if a panel process gains prestige and respect through experience and carefully crafted impartial and reasoned reports. Sanctions are often not that important. Nations realize that to ignore or flout a dispute settlement result will, reciprocally, make it harder for them to utilize that procedure when they need it, and will generally reduce the utility of the treaty commitments made in the general legal system designed for services.

D. Transparency Obligations:

A very important obligation which can be a prime candidate for the umbrella agreement, is an obligation to report many kinds of information about governmental practices relating to services trade. This will assist nations and the secretariat to study the problems of services trade, perhaps preparatory to the development of new sector agreements, or up-dating existing agreements. The consultation obligation mentioned above is related to this, but in that context information can remain confidential. A general obligation which would give the supervisory body the authority to require (as a legal treaty obligation) information on any matter relating to services trade (probably with national security,

intellectual property and proprietary business exceptions) within reasonable resources available, 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 rule on disputes about what is required from members nations by the transparency obligations.

E. Regulatory Due Process

Closely related to transparency, but going beyond it, is the concept of "regulatory due process." GATT Articles VII through IX contain some analogous measures for customs procedures.⁵² It would be very useful to have general obligations in the umbrella agreement, applicable to all services trade, which would require all members to afford a certain fair standard of procedures in government dealing with foreign service providers. This could include measures requiring fair notice, available information about regulations and procedures, right of appeal to an impartial tribunal, and similar matters. These could be linked to the consultation and dispute settlement procedures of the umbrella agreement. At least national governments could raise matters on behalf of their service providers who feel aggrieved by the actions of another nation.

F. Relation to Sector Specific Agreements

The umbrella agreement should include provisions which contemplate specific service sector agreements, and spell out the relationship of those agreements to the umbrella agreement. Several dimensions of this topic exist:

1) Some provision should be made in the procedures by which specific sector agreements are to be negotiated. For example, it could be made explicit that if sector negotiations fulfill specified criteria, then the umbrella secretariat would provide services to assist the negotiation and implementation. (A list of possible subjects to be considered for any sector agreement is discussed in Part IV below. The umbrella agreement might contain a similar list, perhaps as an Annex, as sort of a checklist for negotiators.)

2) Certain criteria should be established in the umbrella agreement as prerequisites for a service sector agreement to be an "agreement under the services umbrella". These should include:

a) Participation in negotiating the sector agreement should be open to all nation members of the umbrella. Provision must be made for all members to at least have an opportunity to be heard in any negotiation, so as 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 is completed.

b) The subject matter must be "services trade"

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

d) The umbrella dispute settlement procedures must apply to the sector agreement rules and members.

e) Sector agreement rules (even though later in time) are subordinate to umbrella agreement rules, unless the umbrella agreement provision expressly allows sector agreements to deviate.⁵³

f) The Sector agreement must be open to membership for any nation member of the umbrella agreement, with the only condition that the nation must accept the rules and discipline of the sector agreement in order to be a part of it.

3) As an agreement under the umbrella, the sector agreement would benefit from various advantages:

a) Secretariat services of the umbrella

b) dispute settlement procedure of the umbrella

c) Possible deviation from certain specified umbrella obligations which are made subject to approved SSA's.

d) transparency provided in the umbrella agreement

e) An opportunity to deviate from a general umbrella agreement MFN requirement, (as explained below in G.)

f) the umbrella agreement, absent contrary provisions in the sector agreement, could furnish some of the technical "final clauses" and institutional measures, such as provision for new members, amending, ratification, funding secretariat services and other measures, rules on observers and state succession, etc.

G. MFN Non-Discrimination Provisions

A key question is to what extent an umbrella agreement should set forth an MFN (Most-Favored-Nation) obligation. There are a number of aspects which need consideration. There are some

persuasive arguments that suggest it may not be in the best interests of some major industrial countries to enter into MFN obligations, especially if those countries are already significantly more receptive to foreign business than most other umbrella agreement countries would be. A possibly attractive alternative, therefore, would be to omit the MFN obligation from the basic mandatory umbrella agreement, but include it as part of the "optional protocol", on a basis by which only those nations accepting the protocol would be entitled to receive "services MFN." One problem is that there already exist a number of treaties (e.g. FCN, or Friendship, Commerce and Navigation treaties), which contain MFN obligations which apply in various forms to services trade or aspects (such as right of establishment) of services trade. Clarification of these legal interrelationships would be needed. In addition to those considerations, however, some other important questions would need to be addressed in the context of the MFN clause, where ever it is placed: First, it might be desirable to include a general MFN obligation in the umbrella agreement, applicable to all possible services trade questions, and binding all members of the umbrella agreement. This obligation is not a national treatment obligation, that is, it does not require nations to treat "imports" or foreign service trade as well as it treats its domestic service producers. (National treatment is discussed below). Instead, MFN requires each nation to treat the service trade of any other nation member of the umbrella agreement, at least as favorably as it treats the service trade of any nation (other than itself).

The MFN commitment has many merits - reducing distortions in trade and thus maximizing welfare, reducing rancor and tension among nations, sometimes accelerating liberalization by generalizing to all member nations any particular liberalizing activities.⁵⁴ However, MFN also creates the "footdragger" or "free-rider" problems. Attempts by smaller groups of nations to develop more advanced beneficial rules can be thwarted if these nations know they must offer all benefits of better rules to all member nations, regardless of whether the beneficiaries will reciprocate or will undertake the discipline of the rules. Attempts to get every nation "signed up" make the process vulnerable to one or two hold-out nations. While going ahead without the holdout gives, under MFN, a free ride to the hold outs.

Thus it seems clear that any general MFN requirement, whether located in the optional protocol, or in the main umbrella agreement, should make an exception for specific sector agreements. Nations who accept the discipline of a sector agreement, should also receive the benefits. Nations who refuse the discipline can be denied the benefits. This is a form of "code conditional MFN", similar to some (controverted) views of the approach of several of the Tokyo Round GATT Codes.⁵⁵ The controversy of the GATT on this should be avoided, and the umbrella agreement should make it clear

that "code conditionality" is a standard exception to the general umbrella or optional MFN requirement. Of course, specific sector agreements can (and should) have a specific type of MFN requirement for national government activities in the sector concerned.

It may be that other exceptions of a general MFN clause would be wise also. At least this can be considered. There will also probably be a political need for some "grandfather" type exceptions, at least during a transition period. It would be wise to explicitly provide for these, but to provide a strict time limit (with a sensible decision making process for renewal). There should also be a reporting or "registration" requirement for every exception (to reduce controversy over the existence and extent of the exception). In addition, there should be a general prohibition against treaty reservations. These provisions and limits on exceptions may apply more broadly than just to the MFN context. They also relate to a general "waiver" authority, described below.

H. National Treatment and Right of Market Access Obligations

A key policy decision to be made is whether to try to have anything in an umbrella agreement concerning the national treatment obligation. This obligation would require a nation to treat foreign service providers at least as favorably as it treats its domestic service providers. This obligation is probably the core or "guts" of meaningful international discipline of national regulation concerning service trade. For some types of trade it also raises questions of the right of establishment or other meaningful measures necessary for effective business operations by foreign service-providers.⁵⁶

This writer tends to think that it is politically unlikely and probably unwise for nations to impose a national treatment obligation on service trade generally, including unnamed or unknown service sectors. National leaders would be understandably hesitant to enter into such "blank check" type obligation which could cut deeply into a wide variety of existing and future government regulations, and tread on sovereign toes in a very uncomfortable way. To include such a requirement in an umbrella agreement could greatly inhibit the broad participation in that agreement which could build toward meaningful future evolution of sound rules in many service sectors. It seems wiser to leave the national treatment obligation to particular definition and implementation in an optional protocol and to each specific sector agreement. Each sector will have a number of special problems and features which can be dealt with in negotiating the specific sector agreements. Currently, the amount of information available for many sectors is probably not adequate for a good understanding as to how a general umbrella national treatment clause would impact national systems.

There are two qualifications on these thoughts which could be made. First, an umbrella agreement might contain some sort of statement of a national treatment "objective", or "principle" perhaps requiring nations to pursue (in the longer run) a general goal of national treatment "to the fullest extent possible". This provision could be coupled with transparency requirements, such as a requirement to report any situation where foreign service providers are not treated as well as domestic providers, and a requirement to respond meaningfully to requests for information along the same lines. It could also include text which states goals of providing meaningful market access, when mere national treatment might not be enough to assure such access. In addition, some consideration should be given to the problem of "de facto" discrimination, in cases where measures appear on their face to be non-discriminatory, but in fact operate to the detriment of foreign providers.

Second, as outlined in Part IV below, it may be that a special subgroup of the umbrella membership is prepared to go further in accepting a national treatment obligation in an optional protocol. If so, such a "second tier" membership could be designed as part of the umbrella agreement, or as a separate agreement analogous to a specific sector agreement, e.g. an "Agreement on General National Treatment Obligations for Service Trade". Such an agreement could be governed by the same disciplines under the umbrella agreement as a special sector agreement, except that it might apply to a number of service sectors rather than just one. Indeed a negotiated set of national country "schedules" of sectors could be envisaged as part of such "national treatment service agreement."

In any event, the preparatory negotiators for the umbrella agreement could make a prerequisite of the implementation of an umbrella agreement, that at least several specific sector agreements (with appropriate national treatment obligations) come into effect also.

The apparently successful agreements on services in the U.S. - Canada Free Trade Area notifications, ⁵⁷ might suggest that a multilateral services umbrella can be more ambitious. It must be remembered, however, that the U.S. and Canada have cultures, economies and legal structure that are much more similar than those of probably any other members of GATT. The enormous diversity among GATT members makes it unwise to conclude that the U.S.-Canada relation will always be an effective model in a context of much greater diversity.

I. General Exceptions

It would probably be wise to specify in the umbrella

agreement, a series of general exceptions which would apply not only to obligations of the umbrella agreement, but also to any specific sector agreement unless that specific agreement provided explicit measures to the contrary (negating the general exception.)

GATT Article XX and XXI contains a series of exceptions⁵⁸ which should be considered, such as health and welfare measures, monopoly policies and laws, intellectual property measures, and national security. All of these, particularly national security, are troublesome and can lead to considerable dispute. Nevertheless they are necessary. Thus it is wise to think through language and procedures which give national sovereigns some leeway, but imposes some constraints (such as the modified or "soft" MFN and national treatment commitments of GATT Article XX.) Reporting and transparency requirements should be linked to these (and any other) exceptions.

GATT has several particularly troublesome exceptions which must be considered by analogy for a services agreement. One is for free trade areas and customs unions.⁵⁹ Another is the GATT Article 35 "opt out" provision,⁶⁰ under which any GATT contracting party or newly entering party can announce that it will not have a GATT treaty relationship with any other GATT party. This option in GATT is only exercisable at one time -- the time that one of the parties enters GATT. However, countries have in fact severed trading relations (or imposed embargoes) with other GATT parties at various other times in their GATT relations.⁶¹ While such measures have uncertain legal status, these severences of trading relations have nevertheless been implemented and tolerated. It might simply be best to make explicit provision for such actions in the umbrella agreement, recognizing reality of international relations and providing for a "total opt out" for national sovereign or security reasons, if certain due notice and transparency provisions are fulfilled.

Another GATT "exception" is the escape clause of Article XIX. By analogy again, some thought should be given to the question whether a general escape clause should be included in a services umbrella agreement, applying also to specific sector agreements (unless the specific agreement negated it.)⁶²

Other exceptions to consider include waiver authority, and measures for developing countries, discussed below.

J. Waiver Provisions

Since the future is so hard to foresee, it is useful (as GATT experience demonstrates) to include a provision allowing obligations to be waived. In GATT, a two-thirds vote is required for a waiver, and there has been some interpretative problems about other requirements for waivers.⁶³ A waiver provision in a services umbrella agreement could include the following features:

- 1) Applies to all umbrella and specific sector obligations, unless a sector agreement explicitly negates a waiver possibility for named obligation
- 2) Requires a special qualified vote, and for waiving a specific sector agreement obligation, requires a special vote of only the nations which have accepted that agreement.
- 3) Waivers should always be limited in time, and the umbrella could specify that unless a shorter period is otherwise stated, a waiver expires after five years. They would be, however, renewable under the same procedure as originally granted.
- 4) Reporting, annual review, and transparency requirements should be part of every waiver, and the umbrella agreement can contain details about this to apply to every waiver not otherwise making provision for these details.

K. Measures for Developing Countries

Both for general policy reasons, and as a recognition of realistic political constraints, special provisions for developing countries will undoubtedly be necessary.⁶⁴ The umbrella agreement could contain at least some general "aspirational" provisions, and perhaps some clauses similar to various articles in the Tokyo Round GATT codes which provide special assistance to developing countries. Details and specifics might better be placed in specific sector agreements. The question of "graduation" or time limitations on special favors for developing countries must be faced.

Clearly developing countries will desire some recognition of infant industry arguments applied to some service sectors, such as banking, or insurance, or stock and securities brokers. In some cases these desires will merit special consideration. Whether a legal exception for such desires should be placed in the umbrella agreement, however, is less clear. Disciplined supervisory mechanisms, perhaps linked to a time limit, might be considered.

Some text on which countries would be recognized as developing countries for these purposes, should be included (perhaps with a list of countries.)⁶⁵

L. Reciprocity

Some thought should be given to the question whether it makes sense to articulate in any formal manner, some sort of notion of "reciprocity" in the development of rules for services.⁶⁶ The umbrella agreement might include at least some general

considerations on this question, perhaps only as part of the statement of objectives, or more significantly as a general clause expressing some obligation to be motivated (or not) by ideas of reciprocity.

M. Final Clauses

A series of typical treaty "final clauses" will be needed, to cover questions of signature, ratification, implementation, and the like. In all probability a prohibition on treaty reservations (similar to the Law of the Sea treaty draft) would be advisable.

N. Existing International Service Agreements

Consideration will be needed to the relationship to the umbrella agreements and certain sector agreements of some existing international agreements covering services (such as the agreements for the Intergovernmental Maritime Organization, the International Telecommunication Union, and the International Civil Aviation Organization).⁶⁷

For example, while understanding the formidable political, interest group, and bureaucratic opposition possible, it might be considered wise to bring an existing agreement or organization into some type of formal relationship to the umbrella agreement, comparable to a sector agreement.

IV. The Middle Layer or Optional Protocol

There are, of course, some advantages of trying to obtain somewhat more significant obligations from a core group of like-minded nations, to apply to a number of service sectors. Some of these advantages are based on the difficulty of negotiating a significant number of sector agreements and the time it will take to do so. Likewise there may be opportunities for cross-sector swaps (if you agree to include banking we will agree to include insurance, etc.). Consequently there may be room for a somewhat general set of obligations which would apply to many service sectors. In all likelihood, these obligations should specify a list of sectors to which they apply (to avoid the "blank-check" worries). It can even be imagined that the list of sectors could become negotiated "lists", similar to scheduled tariff concessions in GATT or the entities in the GATT Government Procurement Code.

The key argument of this paper, however, is that if this objective is desirable, it should be accomplished in such a way so as not to undermine the establishment of an appropriate broadly subscribed legal-institutional structure which will best serve the long range process of developing an evolutionary for increasingly significant international discipline for trade in a number of service sectors, with a larger and larger number of countries.

This should be a decades long process.

Thus if more significant obligations are contemplated, and such obligations might seriously inhibit the adherence of large number of nations to the overall structure, it would seem wise to put such added obligations into a form which could be optionally accepted, not as a prerequisite to membership in the overall umbrella. (Obligations might include both some of those listed above, under the "first layer", and others listed below, under the discussion of the specific sector 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 (the umbrella, and several sector agreements.)

There are several ways to do this, but one which seems efficient is providing in the umbrella agreement an "optional protocol", which would specify a series of significant obligations, certainly including MFN and more impressive "regulatory due process" and transparency requirements, but might also include a reasonably binding national treatment obligation or principle. (I continue to think that the specific sectors are sufficiently diverse that details of national treatment and market access obligations will need to be worked out for each sector.)

The basic thrust of this optional protocol would be to provide a few obligations, including a code conditional MFN obligation, to a specified list of sectors, but to also provide that in the event that adherents to the optional protocol also have accepted a specific sector agreement, as between them the rules of the specific sector agreement would prevail over those of the umbrella optional protocol. Thus a specific sector agreement might have an altered or more stringent MFN and/or national treatment clause, and these would prevail as between nations which belong to the specific sector agreement even if such nations had accepted the optional protocol. The MFN clause in the SSA would likely be "code conditional", so it would be important that the MFN of the optional protocol allow an exception for this type of SSA clause.

V. The Nature and Obligations of Specific Sector Agreements

Most of the substantive international obligations on service trade are likely to be contained in a series of specific sector agreements, "SSA's", which can be negotiated over a period of decades. If the umbrella agreement is thoughtfully constructed it can furnish both the institutional structure for negotiating and effectively implementing such SSA's, and an incentive or facilitation for negotiating such agreements. Each SSA can then be tailored to the complex specific needs of a particular sector.

Some of the rules and principles regarding SSA's have been

discussed above. For example, the SSA, to be approved as an agreement under the umbrella so as to obtain the benefits of such agreement including secretariat services, dispute settlement procedures, and certain exemptions from particular general obligations such as MFN, must conform to various umbrella agreement requirements, including being open for acceptance to all umbrella agreement member countries. In addition, an SSA could embrace provisions concerning a long list of topics including:⁶⁸

- Extent of National Treatment obligation
- Effective Market Access and its meaning
- Subsidies
- "Dumping"
- "Presence", or questions of investment (cf. right of establishment) which is essential for effective delivery of services
- Monopoly/competition policies; actions by private firms which damages competition
- Extent to which rules apply to political subdivisions of a federal state
- Quantitative versus tariff type barriers at the government "border" monopolies, state trading, etc
- Government purchases
- Entities covered
- Standards/technical barriers
- Transition periods and standstill
- Special measures for intellectual property in this sector
- Safeguards
- Grandfather clauses for existing legislation/practices, with provision for phase out of these exceptions over a period of time
- Committee of signatories, voting (and whether weighted) (although a better approach might be to use instead the umbrella agreement supervisory body with voting restricting to nations which have accepted the SSA.)
- New rule formation/negotiation over time; amending the agreement
- Supervision of rules, and possible provision for complaints or information to be provided from injured private parties, as a procedure preliminary or technical leading up to the umbrella agreement dispute settlement procedure.
- Final provisions on ratification, implementation, amending etc. or reliance on umbrella agreement provisions which provide these.

Obviously each of these topics could be discussed at some length. How obligations on "subsidies" or "dumping", for example should be applied in specific sectors, is very complex and beyond the expertise of this writer. Various other study projects, such

as that of the services project of the American Enterprise Institute, have explored some of these issues in depth.

V. Conclusions

The necessity for developing 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 interests. Delay could be very damaging as temptations are growing for national governments to cater to domestic service providers at the expense of opportunities for international trade in providing service. The subject is extremely complex, however. Consequently, an approach which stresses establishing a legal and institutional framework which will facilitate a pragmatic step by step evolution of specific rules for various service sectors is best. This paper has suggested a number of ways to do that.