
Advancing Services Negotiations

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Negotiated during the Uruguay Round, the General Agreement on Trade in Services (GATS) forms part of the “single undertaking” of commitments accepted by all members of the World Trade Organization (WTO). The GATS is an ambitious agreement that so far has met with limited success. The extended sectoral negotiations under its auspices during the past 18 months have been disappointing. The GATS suffers from major structural weaknesses that reduce its ability to facilitate effective trade liberalization. Developments in some regional arrangements may provide some useful guidance in reviewing and strengthening it.

Framework of the GATS

Although the GATS embraces the key principles embodied in the General Agreement of Tariffs and Trade (GATT)—unconditional most-favored nation (MFN) status, transparency, reciprocity, national treatment, and negotiated (binding) concessions—there are important differences in the

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manner in which most of these principles are implemented (table 1). Unlike the GATT, the GATS permits exemptions from unconditional MFN for specified sectoral measures, so long as these were scheduled by 1 January 1995, or unless the relevant sectors were subject to ongoing negotiations.¹ Countries have insisted on, and used, MFN exemptions in the GATS to facilitate industry-specific reciprocity.

Under the GATT, national treatment is a general obligation, essentially requiring that governments treat imported and domestic “like products” equally once frontier barriers are cleared. As a general rule, an import tariff is the only form of permitted frontier barrier in GATT, though quantitative restrictions are permitted in certain limited and specified circumstances. The tariffs themselves can be at any level until bound under the negotiating processes of the GATT.

Under the GATS, on the other hand, any form of barrier to services trade can be maintained or increased in any sector until it is scheduled; only then has “national treatment” any relevance to the services traded in that sector. Although national treatment is not a general obligation, as in the GATT (arising only from specific commitments), it is defined more broadly in the GATS to embrace all measures that discriminate between domestic and foreign services—internal as well as frontier. (The distinction between internal and foreign measures is often unclear in services trade.)

Article VI essentially reinforces the national-treatment provision for sectors in which specific commitments are undertaken by requiring that measures affecting trade in services be applied in a “reasonable, objective and impartial manner,” that they be transparent, and that, if necessary, the Council for Trade in Services should establish measures to ensure that “qualification processes and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.”

In GATS, national treatment is interwoven with “market access,” a term that does not appear in the GATT. Paragraph 1 of the market-access article (Article XVI) of GATS requires foreign services and service suppliers to be treated in a manner no less favorably than that specified in a member’s schedule, for all modes of supply. This would seem to imply that all government-imposed or -supported barriers to market access should be scheduled for any scheduled service sector, even where these barriers apply equally to domestic and foreign suppliers. (There is no corresponding requirement in the GATT.) This paragraph appears to be directed to market access in general and thus relates to competition policy (when competition policy is defined broadly to encompass government as well as private actions), not foreign trade as such.

1. Such exemptions are to be reviewed after five years and in principle should not exceed ten years. They are to be subject to negotiation.

Table 1 Key features of the GATT and GATS

Key features	GATT	GATS
Most-favored nation (MFN)	Exists unconditionally for WTO members, without exceptions.	Exists for WTO members, subject to “one-off” sectoral exemptions.
National treatment	For internal measures: general obligation for all goods. Tariffs are a “legitimized” frontier measure. Tariff bindings negotiated for goods using a “positive list.” Nontariff frontier barriers generally proscribed (Article XI).	For internal and frontier measures covers only sectors scheduled by members, and subject to “bound” commitments not to violate national treatment.
Market access	Term not used in GATT.	Covers only services sectors scheduled by members. Six specified categories of quantitative restrictions are prohibited as restricting market access for scheduled sectors.
Coverage	Addresses only trade in goods and says little on foreign investment.	Addresses trade, investment, and movement of people for services through modes of delivery.
Provisions relating to developing countries	Concept of “special and differential treatment.” Relief from meeting certain obligations.	No “special and differential treatment.” But market access by developing members is to be extended progressively in line with “development needs,” allowing fewer sectors and transactions to be scheduled (Article XIX). Special treatment may be accorded least-developed countries in negotiating future specific commitments (Article IV). Developing members may also implement certain requirements more flexibly (e.g., transparency).
Regional integration	Allowable exception to MFN arrangements. Must cover “substantially all trade,” be phased in within a “reasonable time” (10 years), and involve no increase in external barriers to nonparticipants.	Allowable exception to MFN treatment. Must have “substantial sectoral coverage,” be non-discriminatory and not raise the overall level of third-country barriers within the respective sectors.
Commitments to liberalization	Major commitments in GATT 1994 to liberalize goods trade, eliminate “gray area” measures (e.g., voluntary export restraints), and control distortive agricultural policies. Standstill commitments. High level of tariff bindings. Preamble endorses progressive liberalization.	No commitments to liberalize services trade. A limited standstill commitment to not introduce new measures violating national treatment or market access in “bound” scheduled sectors. Successive negotiations to be held within five years. Preamble endorses progressive liberalization.

Table 1 Key features of the GATT and GATS (continued)

Key features	GATT	GATS
Emergency safeguard measures	Possible when increased imports have caused, or threatened to cause, serious domestic injury.	No measures currently exist. To be implemented within three years.
Dumping and countervailing action	Antidumping action permissible against "dumped" imports if causing, or threatening to cause, material domestic injury. Countervailing duties can offset for certain bounties or subsidies.	No antidumping provisions. Negotiations to be held on the appropriateness of countervailing procedures.

Source: Adapted from the Australian Industry Commission (1995).

Competition policy is also addressed in Articles VIII and IX. Article VIII requires members to ensure that all monopolies (whether legislated or not) do not act in a manner inconsistent with MFN or specific commitment obligations, while Article IX relates to other restrictive practices, mainly to the supply of information on request. It is fair to ask whether an international agreement in services trade is the best way to address problems arising from domestic competition policy (broadly defined) that affect goods as well as services trade.

National treatment in GATS requires that foreign services and service suppliers in the sectors scheduled be treated no less favorably than domestic services and service suppliers, except as provided in the schedule. It can be seen there is an uncomfortable and somewhat confusing relationship between the national-treatment article (XVII) and paragraph 1 of the market-access article: national treatment applies to trade as such; market access applies to all government-supported restrictions on access.²

Commitments to market access and national treatment are both country- and sector-specific. Members can maintain trade-restricting (nonconforming) measures pertaining to each mode of supply listed in the schedules. However, unless MFN reservations were explicitly specified when GATS came into existence (or under the provisions for extended negotiations for specific sectors), all measures must be applied in a manner that does not discriminate among other members.³

GATS implements a "hybrid" approach to scheduling commitments, combining positive and negative lists (Hoekman 1995). A positive list determines sectoral coverage, while a negative list specifies, for each sector

2. Paragraph 2 of the market-access article (Article XVI) prohibits specified quantitative restrictions in those sectors for which market-access commitments are undertaken.

3. Preferential access may be provided within the context of the provisions relating to economic integration, which are the GATS equivalent of the GATT provisions for free trade areas and customs unions.

and for each of the four modes of service supply, measures that limit market access and national treatment. A negative list specifying sectors exempt from specific commitments, as was adopted for MFN exemptions, would have been far more transparent and more capable of facilitating future liberalization, even though the list of exemptions would have been very long.⁴

While the GATT covers only cross-border trade as a means of supply, the GATS includes all modes by which supply may be undertaken: cross-border trade itself and the movement of both people and capital across frontiers for the supply or consumption of services. Thus, commitments under the GATS cover not only the more conventional cross-border trade, but also the much more sensitive areas of movements of suppliers and consumers (temporary movement of people) and commercial presence (foreign investment, particularly direct investment). This breadth of coverage could be a strength if there were a general commitment to reduce all barriers; experience so far raises the question of whether it would be better for the GATS to focus on cross-border trade per se, even though this is quite limited in some services as compared with goods trade, and to leave investment in services and goods (as well as competition policy and movement of people) to separate negotiations.

While GATS is very broad in principle, in practice the liberalization that has been achieved is heavily restricted by the sectoral coverage of core commitments on national treatment and market access, as well as those measures exempted from MFN treatment.⁵

Sectoral Commitments

Although most developed countries recorded what initially appear to be substantial sectoral commitments in more than 70 sectors (with a handful leading the way with more than 100 sectors covered), as compared with a maximum of around 150 total sectors, this is likely to be a poor indicator of coverage when one examines these countries' actual service production. For example, while Australia made commitments in over 80 sectors, only one-fifth of its total production of services is estimated to be covered by liberalizing obligations—bound commitments not to maintain nonconforming measures—and these commitments were skewed heavily toward

4. Many countries were concerned that a negative-list approach could require them to make concessions in every sector (Stewart 1995, 2371), thereby implying that positive and negative listings could not be constructed as duals, even in the short run.

5. Services not covered by the GATS are air landing rights and those supplied in the exercise of governmental functions, such as the provision of basic infrastructural services. Also excluded is government procurement of services, on which negotiations are to be held under the GATS by 1997.

services that were already relatively open (Industry Commission 1995, 189-214).⁶ Major sectors—at least some of which are known to have highly restrictive trade measures—were excluded from Australia’s schedule or were subject to unbound commitments. Other countries’ schedules have similar characteristics.

Not surprisingly, the number of measures specified in the GATS as violating national treatment and market access and as constituting “unbound” offers was substantial. Most countries currently maintain extensive trade restrictions on services. For example, an analysis of GATS schedules for member economies of the Asia Pacific Economic Cooperation forum (APEC) indicates that well over two-thirds of possible service markets—defined as each mode of supply in each service market in each APEC economy—may be impeded (APEC 1995, 72). Cross-border supply is the least-restricted mode of supply within APEC economies as a group, while the movement of natural persons is easily the most constrained.

Structural Problems of the GATS

The trade liberalization achieved within the context of GATS is very modest; there are little more than limited standstill commitments within sectors already open, even by those countries making significant commitments. The inability to secure more substantial results may be attributable to structural weaknesses of GATS as well as to negotiating attitudes. Of course, the structure of the GATS reflects what was achievable at the time.

Unlike the GATT, the GATS is largely a framework agreement, with sectoral commitments left for negotiation. There was always a question of how much in the form of general obligations should be in the framework and how much left to negotiations. Compared with the GATT, the balance in the GATS is strongly away from the general framework, and this sectoral focus is a fundamental problem. In GATT, national treatment is a general obligation, with tariffs as the sole generally sanctioned form of discrimination against foreign supplies. But within GATS, national treatment and market access are specific obligations to be negotiated with respect to all scheduled services and all forms of barriers. MFN exceptions were also taken across major sectors so members could later negotiate sector-specific and country-specific reciprocity.

The sectoral trade-offs that could help remove major stumbling blocks are particularly difficult to secure when negotiations are sector-specific.

6. A quarter of Australia’s services production, including coastal shipping, was excluded outright from its specific GATS commitments, while those sectors scheduled for which no obligations were made to provide market access or national treatment—thereby maintaining existing restrictions and enabling new ones to be introduced—represented a further 55 percent of Australian services production.

Such negotiations are highly susceptible to blocking by vested domestic interests who are able to mount effective campaigns designed to focus attention on the costs to the particular sector of trade liberalization, rather than on the gains to other sectors, and to the economy in general, of such reforms.

The chances of success of sectoral-specific negotiations are diminished further by the nature of the barriers to services trade, as well as by the attitudes of key *demandeurs* (Hoekman 1995). First, tariffs on goods provide a continuum for negotiation—a 60 percent tariff is negotiable to all levels between 60 and zero. But barriers to trade in services, which are seldom in a price-based form comparable to tariffs on goods, are less quantifiable. And with their incidence not as divisible, they are often subject to substantial bureaucratic interpretation and are less transparent. All these characteristics make them more difficult to trade in negotiations.⁷ A second, related point is that some *demandeurs* are addressing negotiated reciprocity not in terms of the extent of market-opening commitments, as has been the tradition in GATT negotiations, but in terms of the degree to which markets are open. This interpretation of reciprocity places a particularly heavy political-economy burden on countries traditionally having closed service markets.

Scheduling commitments by combining a positive list of sectors with a negative listing of trade-restricting measures within these sectors also inhibits liberalization. This structure facilitates and even encourages a “made-to-measure” approach that limits liberalization to areas that, and to the extent that, it does not hurt. Moreover, members have severely compromised the transparency of barriers by refraining from scheduling sensitive sectors in which trade-restricting measures abound. Negative listing is transparent; positive listing can be, and is, used to obscure.

Extended Sectoral Negotiations

While the WTO and hence the GATS became operational on 1 January 1995, negotiations were largely incomplete at that time in the key areas of telecommunications, financial services, maritime transport, and the movement of natural persons.⁸ A timetable was established for extending

7. Negotiating away impediments to services trade is also difficult because barriers are frequently embedded in domestic regulations. Unlike the GATT and for goods, the main measures restricting services trade do not operate at the border but are applied internally and are directed at restricting all access, not just foreign access. They are often also justified on other grounds, including consumer protection.

8. The European Union, largely at the insistence of the French government, excluded the audiovisual sector from MFN treatment. It (along with some other members) thus made no sectoral commitments in this sector and may impose discriminatory or nondiscriminatory measures on the entire audiovisual sector. However, it will be the subject of future negotiations.

these negotiations. This effectively suspended initial commitments in these areas—they could be amended, along with MFN exemptions, until the negotiations concluded. Major MFN reservations were lodged (or threatened) by key players to lever other countries to improve their offers under GATS. At the same time, it was agreed to carve out certain segments of financial services from the GATS for prudential reasons.

The poor progress to date in the extended negotiations covering key sectors is disappointing but hardly surprising. These sectors have also proved difficult in regional attempts to liberalize services trade, where sectoral trade-offs should likely be more successful than at the multilateral level. Sector-specific negotiations provide separated focuses for sectoral lobbies and thus ensure that “whole of government” considerations are likely to be overwhelmed in national negotiating stances and that trade-offs across sectors receive scant attention within capitals and none at the negotiating tables. If the structure of negotiations had not kept sectors apart, for example, there may have been some possibility within the United States of setting the telecommunications industry’s more global view against the fortress stance of the maritime interests.

The results of the financial services agreement—concluded on 28 July 1995 with an interim agreement and then only after a one-month extension—were unsatisfactory. The United States insisted that offers from other countries were inadequate, invoked an MFN exemption for the entire financial services sector, and refused to join the interim agreement, though it left its offer on the table. While adopting a conditional MFN stance—opening its financial market to trading partners only on a reciprocal basis—the United States nevertheless agreed to give Japan and the European Union MFN status in its financial services market.⁹ While the stated US objective was to secure improved offers from other countries, in the eyes of some, the United States appeared to be free riding on other countries’ unconditional MFN commitments.

Only 29 countries (counting the European Union as one) of the 76 WTO members that made commitments in the financial services sector improved their offers during the extended negotiations and became members of the interim agreement.¹⁰ Although some concessions were made to relax foreign equity participation and operational restrictions, these remain far short of what is needed to open financial markets significantly. Most developing countries still have not scheduled all their financial services sectors, and thus many elements of financial services remain completely unbound.

9. In return, the European Union is required to maintain its current commitments in the WTO, and Japan must implement the measures agreed to bilaterally in financial services.

10. These offers are to be implemented until 1 November 1997, after which members will have 60 days to negotiate further amendments to specific offers on financial services or to take MFN exemptions.

Negotiations were held concurrently on the movement of natural persons, aimed at achieving better temporary entry of senior executives and professionals supplying services. These, too, concluded unsatisfactorily on 28 July 1995. Only a few countries made improved offers during negotiations. There are no plans to resume them.

Negotiations on basic telecommunications, initially due to conclude on 30 April 1996, were then suspended and were scheduled to recommence in January 1997 for completion by mid-February 1997. To the surprise of many participating countries, late in April 1996 the United States claimed that only 10 of the 34 country offers were acceptable and emphasized its concern with “one-way bypass”—the ability of a monopoly supplier in another country to exploit the competitive conditions in the US market to secure monopoly returns on the traffic between the United States and its own country (Hoekman, Low, and Mavroidis 1996). Consequently, the United States was very reluctant to commit to unconditional MFN, which would oblige it to relinquish its press for reciprocity. The scheduled date for the telecommunications accord to come into force, 1 January 1998, is still feasible. Standstill commitments apply in the interim.

However, if negotiations are concluded successfully so that best offers are retained, the telecommunications accord will significantly improve market access. Most offers included reduced limitations on foreign investment in telecommunications companies, although many governments retained restrictions on investment in domestic monopoly carriers. Modest offers were made on satellite communications. Proposed commitments varied considerably—for example, while the United States offered to remove foreign ownership restrictions in its mobile phone market to a significant degree, Thailand and the Philippines offered only standstill commitments.

No agreement on maritime transport services was achieved by the 30 June 1996 deadline. Members agreed to suspend negotiations until 2000, when a further round of comprehensive negotiations on trade in services is scheduled. Of the 42 governments participating in the negotiations, only 24 (including the European Union as a single entity) made offers. The United States refused to make an offer in the negotiations, and progress from that quarter would appear unlikely until some countervailing forces can be brought to bear against the powerful domestic maritime lobby. Governments did agree not to introduce new measures affecting trade in maritime transport services, except in response to measures applied by other countries.

Services in Regional Trade Agreements

It is useful to review the provisions regarding services in major regional arrangements—the European Union, the North American Free Trade Agreement (NAFTA), the Australia-New Zealand Closer Economic Rela-

tions (CER) pact, APEC, and the ASEAN Free Trade Agreement (AFTA)—to see what lessons, if any, emerge. Key features of these regional agreements relating to services are summarized in table 2.

European Union

The EC-92 internal market program extended the three main liberalizing principles affecting services contained in the EEC Treaty: the freedoms to engage in internal cross-border services trade, the rights of establishment, and the movement of people. Despite the liberalizing provisions for internal services trade in the EEC Treaty, major blockages remained for more than 30 years, due primarily to differences in national regulations and standards among member states.

It was not until the Single European Act of 1987 that a legal and institutional framework was provided for ensuring the free internal movement of goods, persons, services, and capital. This process introduced (and extended) concepts of minimum standards and mutual recognition, as well as the development of common minimum quality standards.¹¹ These were mainly applied through commonly agreed EC directives or regulations. Significant liberalizing directives were implemented in financial services, road and air transport, telecommunications, and professional services.¹² Greater internal harmonization of technical standards was also applied, and disciplines on state aids, public procurement, and competition were introduced.¹³

The EC-92 program demonstrated that achieving full market access in services required that national treatment be complemented by other measures, such as the harmonization and mutual recognition of standards, and the application and enforcement of competition rules within the common market (Hoekman and Sauv e 1994). EC-92 policies on trade expansion within a common market were retained in the 1992 Treaty on European Union (the Maastricht treaty).

North American Free Trade Agreement

Many of the features in NAFTA, which came into effect in January 1994, emerged from the Canada-US Free Trade Agreement. However, in ser-

11. Mutual recognition requires member states to allow goods and services to be traded that are lawfully traded in other member states.

12. Mutual recognition was introduced for diplomas related to pharmacy and professional qualifications in accounting, legal, and medical services.

13. However, the emphasis shifted from harmonization of national regulatory differences in order to form communitywide regulation and standards toward mutual recognition of national standards, a form of conditional national treatment; all community suppliers that meet their government's standards receive national treatment.

VICES there were some significant changes in approach, particularly in relation to coverage. In the Canada-US FTA, a positive list was adopted, while in NAFTA there was a negative list: all services are covered unless specifically exempted. Most air and maritime services are so exempted.

While the GATS embraces all modes of service delivery, the services chapter of NAFTA covers only cross-border trade, including access to transportation and distribution systems, and the presence of the service providers of other parties, excluding financial services. Investment (in the provision of both goods and services), temporary entry for businesspeople, financial services, telecommunications, and competition policy are covered in separate chapters, as are services associated with basic petrochemicals.

MFN treatment for parties and (unlike GATS) national treatment are general obligations in NAFTA.¹⁴ Like GATS, NAFTA provides for exemptions of existing measures from MFN as well as from national treatment for both cross-border trade and investment. Exceptions to MFN or national treatment at the federal or state (province) level must be scheduled, though not those at the local government level.¹⁵ NAFTA provides a right of nonestablishment, whereby service providers are not required to have local residence to provide services.

The term “market access” is generally avoided in NAFTA. Its (general) absence in NAFTA, combined with the broad definition of national treatment, is one of the features of NAFTA that makes it easier to understand and apply than GATS.

Australia-New Zealand Closer Economic Relations Trade Agreement

Services were brought within the CER in 1989. The Protocol on Trade in Services provided a framework of transparent rules aimed at liberalizing services trade. All sectors are covered, subject to a negative list of exclusions, to which MFN treatment must still apply. (Thus, unlike GATS and NAFTA, there are no exemptions to MFN.) Included sectors of each member are subject to standard national-treatment provisions (and market access, which is expressed in terms that do not confuse the issue as the GATS does), ensuring that domestic and imported services are treated equally.

Persons, defined to include business entities and citizens or residents, are covered by these same commitments, as well as having the right to

14. NAFTA also has as a general commitment nondiscriminatory treatment, but this is defined as providing parties the best of national treatment and MFN.

15. Federal measures had to be scheduled when NAFTA came into force, while those maintained by state (provincial) governments had to be listed within two years (i.e., by 1 January 1996).

Table 2 Comparing GATS with services provisions of regional trade agreements

Characteristics	GATS	EU	NAFTA	APEC	CER
Sectoral coverage	Most air services excluded. Negative list for MFN exceptions. Positive list of sectors covered by national treatment and market access by supply mode.	All services covered. Sector-specific directives and regulations.	Universal coverage, except for air services, subject to bilateral air agreements. Negative list of exemptions.	General (Bogor) commitment to free trade in services by 2020 at the latest. Implementation rules yet to be resolved.	Negative list of exemptions.
Most-favored nation	Exists for WTO members, but with sectoral exemptions (to be reviewed after 5 years and eliminated within 10 years).	Extends to all members with no exemptions.	Exists for members.	Will extend to members and (probably) nonmembers.	Exists for members.
National treatment	Covers only scheduled sectors subject to bound commitments.	Not specifically addressed. General nondiscriminatory requirements.	General obligation, subject to listed exemptions.	Action agenda aims to apply to services and investment progressively.	General obligation, exemptions listed. Exemptions allowed for prudential or consumer protection reasons.
Market access	Covers all modes of supply for bound commitments. Prohibits six types of quantitative restrictions within scheduled sectors.	Not specifically addressed. Competition policy relevant.	Not specifically addressed; covered under national treatment and competition policy.	Action agenda aims to apply to services progressively.	General obligation, exemptions listed. Suppliers can select form of commercial presence. Competition policy relevant.
Sectors subject to special provisions	Financial services, basic telecommunications, maritime transport, movement of natural persons, and audiovisual.	Transportation services (air, road, and rail).	Maritime transport, financial services, basic telecommunications, and movement of natural persons.	General (Bogor) commitment applies to all sectors. Separate negotiations to continue on trade facilitation and harmonization, for energy, transportation, telecommunications, and tourism.	Air transport, telecommunications, and postal services.

Movement of natural persons	Included in schedule of specific commitments as a mode of supply; limited commitments. Provisions for mutual recognition of qualifications, etc.	Common labor market. Directives on mutual recognition for certain professional qualifications.	Disciplines on temporary entry of businesspeople and provision of professional services.	Not covered by general (Bogor) commitment. Action agenda aims to facilitate improved mobility of businesspeople engaging in trade and investment.	Common labor market. Discussions on mutual recognition for certain professional qualifications.
Treatment of investment	Commercial presence covered by specific sectoral commitments, as a mode of supply.	Free capital movement.	Separate investment disciplines, covering goods and services.	Covered by general (Bogor) commitment. Action agenda aims to provide MFN and national treatment progressively and to adopt APEC Nonbinding Investment Principles.	Not included.
Government procurement of services	Not included, to be addressed in future negotiations.	Disciplines adopted to ensure open public procurement.	Disciplines for a range of entities covered by a positive list.	Action Agenda aims to liberalize government procurement markets, including developing non-binding principles by 2000.	Disciplines for services covered by the Pro-tocol.
Regulatory standards	Regulatory measures must be nondiscriminatory.	Disciplines adopted on mutual recognition of standards and common minimum quality standards.	Detailed information on regulatory impediments required in negative list of exemptions.	Efforts at trade facilitation, including standards, covered in general (Bogor) commitment. Action Agenda to achieve mutual recognition of conformity assessment.	Regulatory measures must be nondiscriminatory.
Competition policy	Limited provisions in the articles on monopolies and exclusive services and business practices. Market access provisions relevant.	Disciplines adopted on competition.	Disciplines adopted regarding competition policy, monopolies and state enterprises.	Not included in general (Bogor) commitment. Action Agenda aims to promote more effective and transparent competition policies.	Monopolies are not to subsidize services in competition with other suppliers.

Source: Regional agreements and the GATS.

commercial presence, subject to foreign investment policies maintained by each country. Although the CER does not cover investment, a standstill commitment covers measures that would violate the right of nonestablishment.

Australia and New Zealand form a common labor market in a separate agreement predating CER: the Trans-Tasman Travel Arrangement. Non-discriminatory licensing and certification measures are encouraged, as is mutual recognition of qualifications.¹⁶

Sectors excluded cover basic telecommunications, broadcasting, air transport, coastal shipping, and postal services. Australia has removed reservations on banking, while New Zealand has done so for radio and television broadcasting, shortwave and satellite broadcasting, and stevedoring. Although a memorandum of understanding was signed in 1992 to form a single aviation market across the Tasman, including the right to operate in each other's market, Australia decided in October 1994 not to proceed.¹⁷

In the latest review in 1995, Australia liberalized its inscriptions on postal services and telecommunications, while New Zealand did so on aviation and coastal shipping.

Asia Pacific Economic Cooperation

APEC economies agreed in the Bogor Declaration of 1994 to achieve free trade in the region, including for goods, services, and capital, by no later than 2020 (2010 for developed countries). The 1995 APEC meeting in Osaka endorsed this commitment and developed an "action agenda" to pursue liberalization and facilitation measures consistent with WTO principles and objectives. In the agenda, APEC economies adopted a rather weak standstill commitment to endeavor to introduce no new protective measures, including on services.

The action agenda is very broad, and implementation details have not yet been resolved. However, the concept of open regionalism, as enunciated in Osaka, embraces MFN treatment to non-APEC economies, with no sectors being excluded from the Bogor commitment. At this stage, all services are covered by commitments to reduce restrictions progressively on market access and to provide progressively for MFN

16. Mutual recognition principles have been extended by the signing on 14 June 1996 of the Trans-Tasman Mutual Recognition Arrangement, which is to become operative as early as possible in 1997 following enactment of the necessary legislation. Subject to specified exemptions, Australia and New Zealand have agreed to recognize each other's standards and testing assessments. For example, a person able to practice in one country will be able to do so in the other without the need for further testing or examination.

17. Discussions between the two governments resumed in July 1996, with the intention of sealing an agreement on a single aviation market by November 1996.

and national treatment. Moreover, members are to contribute positively to the GATS negotiations by expanding their sectoral commitments on market access and national treatment and by eliminating MFN exemptions. The agenda treats foreign investment both generically and separately and calls for the progressive provision of MFN, national treatment, and transparency.¹⁸

The agenda singles out four service sectors where negotiations on trade facilitation measures have existed for some time: telecommunications, energy, transportation, and tourism. These sectoral negotiations are looking mainly at harmonizing regulations and administrative procedures and at improving transparency. The Committee on Trade and Investment is examining the possibility of extending this work to other service sectors.

ASEAN Free Trade Agreement (AFTA)

The scope of AFTA does not currently extend to services. However, some preliminary moves were taken at the December 1995 summit of the Association of Southeast Asian Nations (ASEAN) toward including services and investment, with the first services to be included in 1998. In the meantime, a three-year negotiating process was set with the aim of extending free trade in several services sectors, including finance, air transport, maritime transport, telecommunications, tourism, construction, and business services. However, while predicting the likely outcome of these negotiations would be premature at this stage, it appears that any gains in these sectors will be largely exploratory. ASEAN members (except Vietnam) are, of course, also APEC economies.

Lessons from Regional Agreements

There is a broad similarity between the GATS and the main regional agreements in terms of specific rules and disciplines, as well as liberalized and excluded sectors (Hoekman and Sauv e 1994). Generally, agreements have excluded or have special provisions for the same particularly sensitive sectors: basic telecommunications, broadcasting, air and maritime transport, and government services.

However, there are important structural differences between the agreements. Of the regional agreements, NAFTA and CER probably provide the best models from which to draw lessons for the GATS. The following are some of these lessons, together with lessons that emerge from a more

18. The APEC nonbinding investment principles reflect these commitments. Countries are expected to submit individual action plans for meeting the Bogor Declaration—under the process of concerted unilateralism—in November 1996 in the Philippines.

general consideration of GATT, GATS, and the regional agreements. Many of the points are also considered in Hoekman (1995), Hoekman and Sauvé (1994), Sauvé (1995a, 1995b, and 1996), Low (1995), and Snape (1994).

Sector Specificity

The structure of GATS encourages sector-specific negotiations and arrangements, as liberalizing commitments apply only to scheduled sectors or subsectors. This structure likely will continue to limit the usefulness of GATS in promoting future liberalization. Experience in multilateral negotiations shows that more market opening has been achieved when negotiations were extended beyond individual sectors. Focusing on trade-restricting measures rather than sectors in such negotiations facilitates trade-offs between losses to certain sectors and the broader gains from such reforms to other sectors and the economy generally. The GATT is a general agreement—general with respect to products and countries. GATS is being implemented not so much as a general agreement, but as a basis for negotiating product-specific agreements. The focus needs to be shifted.

Exemptions from MFN

The possibility of exempting sectors from MFN has further encouraged sectoral negotiations and product-specific bilateral reciprocity: indeed, this was the objective of the countries that demanded these exemptions. The CER agreement (as well as the arrangements within the European Union) and the GATT (with the exception of waivers and the Article XXXV provision for nonapplication between particular parties) do not specifically provide for sectoral exemptions from MFN among the parties. When such exemptions have been allowed under the GATT—the Multi-Fiber Arrangement being the prime example—the results have been trade-restricting rather than trade-liberalizing.

Negative Listing

A negative-list approach to sectoral exemptions from national treatment (and market access), as found in CER and NAFTA, would greatly improve the transparency of the GATS. Under negative listing, all exempted sectors and all restrictions maintained within sectors need to be clearly, consistently outlined to avoid ambiguities (as they are in NAFTA and CER).

Apart from other virtues, a negative list is more conducive to comprehensive, cross-country comparison of restriction levels. This facilitates liberalization by providing trade negotiators with a clear inventory of what remains to be done (and, importantly, facilitates domestic analysis of

the economic costs of such restrictions). Although arguably more tedious, forming a negative list encourages countries to reevaluate the desirability of existing restrictions. This approach also facilitates a standstill on restrictions. Unlike a positive list, a negative list prevents countries from introducing further restrictions to unbound sectors. A negative list also facilitates liberalization by automatically including any new service areas that emerge.

Market Access/National Treatment

Given that national treatment is defined in the GATS as covering all measures that discriminate between domestic and foreign supplies (both internally and at the border), there would be much to be gained from integrating national-treatment and market-access provisions, preferably dispensing with the latter term. As a specified obligation, market access plays almost no part in the CER or NAFTA, and none at all in GATT. Within the GATS, the provisions of the first paragraph of the market-access article seem to overlap with those of national treatment. Furthermore, they add nothing, with respect to discrimination against foreign suppliers, to an interpretation of national treatment (supported by Article VI on domestic regulation) embracing frontier as well as internal measures that discriminate against foreign suppliers of services.

National Treatment as a General Obligation

With a negative-list approach to coverage, national treatment (and market access, whether or not it is merged with national treatment, as suggested above) can easily become a general obligation, with exceptions scheduled. This has proved successful in NAFTA and the CER.

Sanctioned Forms of Discrimination against Foreign Services?

The question arises as to whether a restricted category of frontier measures could be allowed as legitimate discrimination (and thus subject to negotiation) against foreign suppliers of services, with all other trade barriers proscribed—paralleling tariffs as the only generally sanctioned exception to the equal treatment of domestic and foreign products under the GATT.

Tariff-like measures are one obvious form: the precedent of the Uruguay Round agriculture tariffications could give some hope here, and there are many barriers to services where tariff-type levies could replace other forms of discrimination against foreign suppliers of services (Deardorff 1994). However, if this proves too much to digest, there could be a small set of other permitted measures that could be generally sanctioned exceptions to equal treatment of domestic and foreign services (Snape 1994).

Restricting the allowed forms of discrimination in this way would greatly facilitate negotiation and liberalization of an incremental, trade-opening form (which has been so successful in the GATT), rather than the openness focus, which appears to have dominated the stance of some *demandeurs*.

Separate Treatment of Investment, Movement of Persons, and Competition Policy

Compared with goods trade, arm's-length cross-border trade is a minor component of the total trade in services. Nevertheless, there do appear to be advantages in focusing a services agreement on this component of trade and leaving to separate negotiations and agreements investment (in goods and services), movement of people, and most aspects of competition policy, including government-supported or legislated restrictions on competition or access in general. Many of the recommendations made above would be more easily implemented if these areas were negotiated separately.

The classification of forms of barriers to services trade according to modes of delivery does not imply that all modes need be covered in the same agreement, as was pointed out around the time that the classification was introduced (e.g., Snape 1988). There could be more scope for cross-sectoral bargaining if the focus in the GATS was solely on cross-border trade, while similar considerations would apply in a separate investment agreement. (Such an agreement probably would have to be plurilateral under WTO auspices rather than multilateral, in view of the technical difficulties of negotiating new multilateral agreements under the WTO, as well as the differences in attitudes across countries.)

Frustration of market access by existing internal restrictions that apply to both domestic and foreign suppliers are best dealt with by competition policy on a broad front—including legislated monopolies, competitive neutrality, trade practices, and access to essential facilities—rather than in a services-specific trade agreement that is best focused on measures discriminating between “us” and “them.”¹⁹ But for the same reasons as in an investment agreement, the best way forward may be plurilaterally. A model for separate treatment is NAFTA, with its separate chapters on cross-border services trade, investment (in goods and services), competition policy (for goods and services), and movement of people. This is also the manner of the CER agreement, except that this agreement effectively does not cover investment.

Do Some Sectors Need Special Provisions?

Some sectors do need special treatment: the prudential requirements in financial services and perhaps some aspects of telecommunications are

19. New barriers to competition that are applied after barriers against foreign services are reduced can be dealt with under nullification and impairment provisions.

prime examples. But much of the latter appears to be associated with competition policy broadly defined (monopolies and access to essential facilities), which has as much to do with domestic competition as it does with international trade.

To the extent that such special treatment is required, including reasons associated with political muscle, the lessons of regional agreements and of the GATT appear to be that negotiations in these sectors should not be separated from negotiations for others and certainly should not be left to the representatives of the sectors themselves, including the bureaucracies responsible for them. Countervailing pressures and economywide perspectives need to be brought to bear. They seldom are when sectors are negotiated on their own.

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