



UNC
SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 14 | Number 1

Article 7

Winter 1989

A Rainy Day for the GATT Umbrella: Trade Negotiations on Services

Elaine M. Whitford

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Elaine M. Whitford, *A Rainy Day for the GATT Umbrella: Trade Negotiations on Services*, 14 N.C. J. INT'L L. & COM. REG. 121 (1989).
Available at: <http://scholarship.law.unc.edu/ncilj/vol14/iss1/7>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

COMMENTS

A Rainy Day for the GATT Umbrella: Trade Negotiations on Services

Out of today's international trade volume of 2 trillion dollars, services account for about one quarter.¹ As the world's premiere exporter and producer of services,² the United States has a large stake in ensuring the minimization of barriers to trade.³ The United States offsets huge deficits in merchandise trade by its service exports.⁴ Unfortunately, the increasing number of trade restrictions has countered U.S. efforts to whittle away its trade deficit.⁵ The United States promoted its interest in service trade by urging that the General Agreement on Tariffs and Trade (GATT),⁶ which now covers only trade in goods, host negotiations for services. Unfortunately, the task of formulating a multilateral agreement on trade in services is not an easy one. Many problems confront the negotiators. This

¹ Rivers, Slater & Paolini, *Putting Services on the Table: The New GATT Round*, 23 STAN. J. INT'L L. 13, 13-14 (1987); Comment, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 INT'L TRADE L.J. 281, 284 (1983).

² CENTER FOR STRATEGIC & INT'L STUDIES, GEORGETOWN UNIVERSITY, SERVICES AND U.S. TRADE POLICY 7 (J. Yochelson & G. Cloney eds. 1982) [hereinafter THE WHITE PAPER]. In 1982 the United States controlled 20% of the services in the world. *Id.*

³ Not including government services, 55 million Americans earn their livelihood in the service industry. *Id.* Nongovernmental services contribute to over half of the U.S. gross domestic product. M. KAKABADSE, INTERNATIONAL TRADE IN SERVICES: PROSPECTS FOR LIBERALISATION IN THE 1990s 9 (Atlantic Paper No. 64, 1987).

⁴

In 1974, total U.S. service trade accounted for over 30 percent of U.S. trade in merchandise and services, and the services account produced a \$10 billion surplus. By 1978, total U.S. services trade was \$129 billion, an increase of 90 percent over the 1974 level. In 1978, it again accounted for about 30 percent of total U.S. trade in merchandise and services, and the services account produced a \$23 billion surplus in that year, to be contrasted with a U.S. deficit in the merchandise account of about \$30 billion.

S. REP. NO. 249, 96th Cong., 1st Sess. 237, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 622-23 [hereinafter SENATE REPORT]. In 1984 the United States had a 144 billion dollar deficit in merchandise trade. However, its services trade carried a surplus of \$14 billion. M. KAKABADSE, *supra* note 3, at 56.

⁵ M. KAKABADSE, *supra* note 3, at 1. Examples of trade barriers to services include the following: (1) the U.S. Copyright Act prohibits import of books authored by Americans that were printed abroad; (2) Argentina, Australia, and Canada prohibit the air of foreign-produced radio and television commercials; and (3) Japanese airports clear freight from Japanese airlines faster than they clear freight from foreign carriers. *Id.* at 1-2.

⁶ *Opened for signature* Jan. 1, 1948, 61 Stat. (5), (6), T.I.A.S. No. 1700, 55 U.N.T.S. 188 [hereinafter GATT].

Comment addresses these problems and offers a historical background of the debate which surrounds the construction of a framework for international services trade.

Commentators have posited at least three reasons for the growth of traded services. First, services are more available on the international level today due to some forms of technological development. For example, the transfer of services across borders was facilitated by the communications revolution.⁷ Another reason for the growth of trade in services is the increasing connection between goods and services. Services are becoming significant inputs into the creation of goods; the increasing sophistication of goods has stimulated the need for more technical services.⁸ Finally, the reduction of trade barriers has created a stronger demand for services in interdependent markets.⁹

Early economists generally ignored services. Adam Smith distinguished goods from services by defining labor as either productive or unproductive.¹⁰ Labor was productive if material goods were created. Since services are intangible, Smith associated them with unproductive labor.¹¹ Unproductive labor was viewed as unimportant. John Stuart Mill had only a slightly different view of goods and services. Wealth was demarcated by the amount of goods accumulated. Services were discounted because they cannot be stored and accumulated.¹² Based on Marxist theory, the Soviet Union excluded almost all services from its national income accounts due to the old school of thought that services were economically stagnant.¹³

As services have overtaken manufacturing as the main contributor to gross domestic product in the United States, support for the classical economists' views has slowly eroded. Yet, because of years of dismissing services as an unnecessary bother, very little is understood about them. Data is scarce.¹⁴ Regrettably, it is the very nature of services, combined with the historic lack of interest, that led to the inadequate data base.

An explanation of the process by which services were brought into the Uruguay Round is helpful in understanding the role of serv-

⁷ Schott & Mazza, *Trade in Services and Developing Countries*, 20 J. WORLD TRADE L. 253, 255 (1986).

⁸ *Id.* Examples of services linked to sophisticated goods are computer services, management advisory services, quality control services, accounting, and tax advice. Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199, 206-07 (1985).

⁹ Schott & Mazza, *supra* note 7, at 255.

¹⁰ Shelp, *Trade in Services*, 65 FOREIGN POL'Y, Winter 1987, at 64, 64.

¹¹ *Id.*

¹² *Id.* at 64-65.

¹³ Bhagwati, *Splintering and Disembodiment of Services and Developing Nations*, 7 WORLD ECON., June 1984, at 133, 133.

¹⁴ M. KARABADSE, *supra* note 3, at 29-31.

ices in international trade. Not surprisingly, the GATT¹⁵ did not originally cover services. The only provision relating to services was Article IV¹⁶ which controlled regulations concerning the screening of motion pictures in countries other than the film's national origin. The first direct reference to services in a GATT negotiation occurred during the Tokyo Round.¹⁷ But these few references were in the specific context of the GATT Government Procurement Code.¹⁸ Trade in services was not included in the agenda for the Tokyo Round.¹⁹

The first U.S. legislative action to protect domestic interest in services trade was the Trade Act of 1974.²⁰ Section 301 of the Act²¹ gave the President the authority to retaliate against trade barriers to services when the barriers were unfair or unreasonable.²² The statute also explicitly included services in its definition of international trade.²³ The provisions pertaining to services were later expanded in the Trade Agreements Act of 1979.²⁴ Congress clarified the inclusion of services in the definition of commerce.²⁵ The President's au-

¹⁵ The GATT provides a framework for the international regulation of trade in goods, not services. The GATT sets up a system for negotiations regarding the elimination of trade barriers and regulation of international commerce. Rivers, Slater & Paolini, *supra* note 1, at 18.

¹⁶ GATT, *supra* note 6, 55 U.N.T.S. at 208.

¹⁷ The Tokyo Round is the seventh round of trade talks conducted by the GATT. The first was the Geneva Round in 1947. Then, the Annecy Round took place in 1949. Third was the Torquay Round in 1950-51. Another Geneva Round was conducted in 1955-56. In 1960-61 the Dillon Round was the fifth. The Kennedy Round was negotiated in the years of 1964-67. As the seventh, the Tokyo Round took place from 1973 until 1979. The Uruguay Round, beginning in 1986, is the eighth GATT round of negotiations. Simmonds, *The Community and the Uruguay Round*, 25 COMMON MKT. L. REV. 95, 95 (1988).

¹⁸ See Agreement on Government Procurement, Apr. 12, 1979, *entered into force* Jan. 1, 1981, art. I, ¶ 1(a), T.I.A.S. No. 10,403, 18 I.L.M. 1052.

¹⁹ Rivers, Slater & Paolini, *supra* note 1, at 16.

²⁰ Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101-2487 (1982)). The provision regarding services in the 1974 Act was pushed by several large U.S. service companies. Rivers, Slater & Paolini, *supra* note 1, at 16.

²¹ Trade Act of 1974, 88 Stat. at 2041 (codified as amended at 19 U.S.C. § 2411 (1982)).

²² 19 U.S.C. § 2411(a). Section 301 has been used in attempts to dismantle the barriers to services trade. Initiation of Investigation Under Section 301; Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (1985); Initiation of Investigation Under Section 301; Brazil's Informatics Policy, 50 Fed. Reg. 37,608-09 (1985), Section 301 Investigation; Soviet Marine Insurance Practices—Continued Suspension, 45 Fed. Reg. 49,428 (1980).

²³ 19 U.S.C. § 2112(g)(3) (1982).

²⁴ Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C.).

²⁵ 19 U.S.C. § 2411(d)(1) (1982). The statute provides: "For purposes of this section, the term 'commerce' includes, but is not limited to, services associated with international trade, whether or not such services are related to specific products."

[T]he term "commerce" in section 301 includes all services associated with international trade, not just the provision of those services with respect to international trade in merchandise. What is comprehended in the term commerce includes international trade in services, as, for example, the provision of broadcasting, banking, and insurance services across national boundaries. The service component of U.S. trade in merchandise and services has

thority to act on unfair trade practices under section 301 was broadened to encompass all trade in services, not just that service trade which aids the trade of goods.²⁶

The Trade Act of 1974 was further amended by the Trade and Tariff Act of 1984.²⁷ Congress stated the purposes for the new act in section 302.²⁸ Among those purposes, Congress expressly listed the encouragement of negotiations to reduce barriers to international trade in services and the expansion of U.S. service industries in the international sector.²⁹ The 1984 Act also gave the Secretary of Commerce the duty to establish a program which would develop policies to increase the competitiveness of U.S. service³⁰ industries in international trade. Along with this duty, the Secretary was to collect and analyze data on trade in services.³¹ The U.S. Trade Representative was given the duty of actually developing and coordinating U.S. policies on trade in services.³² The 1984 Act successfully increased regulation and guidance for services trade. The Reagan Administration supplemented the legislation by placing much emphasis on services.³³ During the Reagan Administration, both the U.S. Trade Representative and the Department of Commerce established Offices of

become far more significant than serving as an aid to merchandise transactions alone.

SENATE REPORT, *supra* note 4, at 622.

²⁶ 19 U.S.C. § 2411(d)(1) (1982).

²⁷ Pub. L. No. 98-573, 98 Stat. 2948 (codified in scattered sections of 19 U.S.C.).

²⁸ 19 U.S.C. § 2102 (Supp. IV 1986).

²⁹ 19 U.S.C. § 2102(3)(A)-(B) (Supp. IV 1986).

³⁰ The 1984 Act defined services as:

[E]conomic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism.

19 U.S.C. § 2114b(5) (Supp. IV 1986).

³¹ 19 U.S.C. § 2114b(1)(A)-(E) (Supp. IV 1986). Congress requested specific information and data concerning U.S. service trade:

(i) policies of foreign governments toward foreign and United States service industries;

(ii) Federal, State, and local regulation of both foreign and United States suppliers of services, and the effect of such regulation on trade;

(iii) the adequacy of current United States policies to strengthen the competitiveness of United States service industries in foreign commerce, including export promotion activities in the service sector;

(iv) tax treatment of services, with particular emphasis on the effect of United States taxation on the international competitiveness of United States firms and exports;

(v) treatment of services under international agreements of the United States; . . .

(vii) treatment of services in international agreements of the United States.

19 U.S.C. § 2114b(1)(C) (Supp. IV 1986).

³² Trade Act of 1984, § 306(c)(1)(A), 98 Stat. at 3010.

³³ *Shelp*, *supra* note 10, at 71.

Service Industries.³⁴ The U.S. Trade Representative also established the Services Policy Advisory Committee (SPAC). The U.S. Census Bureau, the Bureau of Labor Statistics, and the Bureau of Economic Analysis increased their efforts to collect data on services.³⁵ In addition, the Department of Commerce established the Industry Sector Advisory Committee (ISAC) for services. Through ISAC, the Department of Commerce gathers technical information on trade in services.³⁶ The 1984 Act also proposed negotiating objectives for the U.S. trade talks on services. One objective was to reduce or eliminate barriers to international trade in services.³⁷ The promotion of national treatment was another objective.³⁸

Although the United States recognized and reacted to the increased importance of services in international trade, other countries were not as progressive. Therefore, with its own well-being in mind, the United States became the chief initiator for an increased awareness of international service issues. With regard to negotiations in services, the United Nations Conference on Trade and Development (UNCTAD)³⁹ laid the groundwork for the United States, particularly in the areas of shipping and insurance.⁴⁰ The U.S. push began after the Tokyo Round. The Tokyo negotiations, however, provided a good backdrop for the move to extend the GATT umbrella to services. With new provisions on services in government procurement, the stage was set for a greater consideration of services.

The United States came to the November 1982 ministerial level meeting of the Contracting Parties⁴¹ ready to push for the inclusion of services negotiations in the GATT framework.⁴² The U.S. position met strong resistance.⁴³ The only product of the 1982 ministerial meeting was "a vague commitment that 'interested nations' would examine their own national interests in services and report

³⁴ Rivers, Slater & Paolini, *supra* note 1, at 17-18.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 19 U.S.C. § 2112 (Supp. IV 1986).

³⁸ *See supra* p. .

³⁹ UNCTAD was established as an organ of the United Nations General Assembly in 1964. It is an "autonomous body responsible to the General Assembly of the UN and is a participating and executive agency of the UN Development Program (UNDP)." All members of the UN or its agencies are members of UNCTAD. *Introduction*, in LAW AND PRACTICE UNDER THE GATT 3-4 (K. Simmonds & B. Hill eds. 1988).

⁴⁰ Gibbs, *supra* note 8, at 199-200. The work of UNCTAD encouraged negotiation of three multilateral shipping agreements: (1) The UN Convention on the Code of Conduct for Liner Conferences, (2) the UN Convention on the Carriage of Goods by Sea, and (3) the UN Convention on International Multimodal Transport of Goods. The UNCTAD Special Programme on Insurance guides developing countries with respect to insurance matters. *Id.*

⁴¹ 22 I.L.M. 445 (1983).

⁴² Shelp, *supra* note 10, at 72.

⁴³ The developing countries, France, and the Western European countries opposed the U.S. initiative. *Id.* at 73.

back to GATT."⁴⁴ The results of the studies were to be examined at the 1984 session.⁴⁵ The United States promptly commissioned a study of international services. The study stressed that deregulation of service industries would benefit the world economy. The United States presented its study to the GATT secretariat in March 1984. By the time of the 1984 meeting of the GATT Contracting Parties, resistance against the U.S. contention had dissipated, but had not disappeared.⁴⁶ The U.S. position was again compromised at the March 1984 meeting. A group was formed, consisting of both industrial and developing GATT members, to report to the Contracting Parties in November 1985.⁴⁷ In its report, the group noted the inadequate data base for services, the importance of distinguishing service trade from service investment, and the variety of trade rules for services among different countries.⁴⁸

Erosion of international trade policy along with the recession of the early 1980s spawned the Uruguay Round.⁴⁹ The November 1985 meeting launched the new round. A Preparatory Committee was formed in November 1985 for the purpose of specifying issues for negotiation. In January 1986, proposals were solicited for the Uruguay Round agenda. The expansion of GATT to include services was debated, but its inclusion on the agenda was unresolved when the draft Ministerial Declaration was submitted in June 1986.⁵⁰ It was not until the Contracting Parties met in Punta del Este, Uruguay in September 1986 that a decision to include services on the agenda was reached. This conclusion was the result of a compromise between the industrialized and developing countries.⁵¹ One of the main disputes over services between the United States and developing countries was the efficiency of adding services to GATT. The Ministers resolved the dispute by placing service negotiations under the Group of Negotiations on Services (GNS). The GNS must report to the Trade Negotiations Committee, the GATT's main negotiating committee.⁵² Although responsible for updating the Trade Negotiations Committee, the GNS "maintains complete autonomy from the

⁴⁴ *Id.* at 72-73.

⁴⁵ Gibbs, *supra* note 8, at 201. See also Ministerial Declaration of November 1982, reprinted in *LAW AND PRACTICE UNDER THE GATT*, Booklet No. III.A, at 1, 16-17 (K. Simmonds & B. Hill eds. 1988).

⁴⁶ Shelp, *supra* note 10, at 73. Opposition by the developing countries persisted.

⁴⁷ *Id.* at 74.

⁴⁸ *Id.*

⁴⁹ Note, *Intellectual Property Rights and the GATT: United States Goals in the Uruguay Round*, 21 *VAND. J. TRANSNAT'L L.* 367, 390 (1988).

⁵⁰ Simmonds, *supra* note 17, at 96.

⁵¹ *Id.*

⁵² Rivers, Slater & Paolini, *supra* note 1, at 19-20.

The [M]inisters compromised by placing services negotiations on a separate "track" from negotiations on goods. Adoption of this negotiation structure allowed the industrialized nations to claim a victory because services trade will be addressed (perhaps even more quickly), while developing na-

rest of the negotiations."⁵³ In line with this separation, the final draft of the Ministerial Declaration of Punta del Este was divided into two parts. Part I⁵⁴ dealt with Negotiations on the Trade in Goods; Part II⁵⁵ was directed specifically at Negotiations on Trade in Services.⁵⁶

Inclusion of services on the GATT agenda does not guarantee resolution of all the problems associated with trade in services. Up to this point, services were a hotly debated topic among GATT members. A number of stumbling blocks which arise from the nature of services will create difficulties in arriving at a negotiated agreement.

Consensus on a definition of services is the most fundamental problem facing the proponents of bringing services under the GATT umbrella. There is no universal definition of services. Without a definition, determination of the point at which services are traded is difficult, if not impossible.⁵⁷ Definition is not an easy task because services pervade many industries and sectors of society.⁵⁸ Various organizations have put forth differing proposals.⁵⁹ A common alter-

tions were satisfied because services remain technically outside the GATT talks.

Id. at 20.

⁵³ Randhawa, *Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round*, 21 J. WORLD TRADE L. 163, 165 (1987).

⁵⁴ Ministerial Declaration of Punta del Este of Sept. 20, 1986, reprinted in LAW AND PRACTICE UNDER THE GATT, Booklet No. III.A, at 25, 25 (K. Simmonds & B. Hill eds. 1988).

⁵⁵ *Id.* at 33.

⁵⁶ The goals and objectives of the service negotiations as stated in Part II of the Punta del Este Ministerial Declaration are in part:

Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.

... A Group on Negotiations on Services is established to deal with these matters.

Id. at 34.

⁵⁷ Shelp, *supra* note 10, at 65-66.

⁵⁸ Livingston, *Observations on the Role of Services in International Trade*, 6 FLETCHER F. 91, 92 (1982).

⁵⁹ See Comment, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework Under the GATT*, 5 FORDHAM INT'L L.J. 371, 374 n.23 (1982). The U.S. Standard Industrial Classification defines services as: "hotels and other lodging places; establishments providing personal, business, repair and amusement services; health, legal, engineering and other professional services; educational institutions; membership organizations and other miscellaneous services." Livingston, *supra* note 58, at 92 (citing U.S. DEP'T OF COMMERCE, U.S. SERVICE INDUSTRIES IN WORLD MARKETS 8 (1976)). The U.S. national income accounts adds the following to the above definition: finance, insurance and real estate, wholesale and retail trade, general government, transportation, communication and public utilities. *Id.* at 94. A pragmatic definition is that "services are something you can buy and sell but cannot drop on your foot." M. KARABADSE, *supra* note 3, at 5-9. Another economist defines services as "a change in the

nate approach skirts the definitional problem by classifying services via lists. Lists provide clarity and precision.⁶⁰ Avoiding a strict definition in this manner, however, has its drawbacks. First, a list of services may not be flexible enough to include new services created by technological development. In addition, a subjective listing of services cannot account for differing opinions among nations about the identification of services.⁶¹

In order for a multilateral agreement on trade in services to be compiled, services must be distinguished from goods and identified.⁶² In the abstract, goods are tangible objects which can be transferred from one person, or entity, to another.⁶³ Services are intangible and cannot be stored.⁶⁴ They must be consumed at the same time as they are produced.⁶⁵ Though instructive, this simple dichotomy does not always provide a label for the economic unit being traded.

In an attempt to examine services closer, some commentators have broken services down into four classes.⁶⁶ The first three classes depend on the physical proximity of the user and the provider. Physical proximity is not essential for the fourth class. First, *Mobile Provider/Immobile User* requires that the provider of the service travel to the user because the user cannot move.⁶⁷ Second, *Mobile User/Immobile Provider* requires that the user move to the locale of the provider.⁶⁸ Third, *Mobile User/Mobile Provider* requires that either provider or user move to the locale of the other. Here, the ability to move is mutual.⁶⁹ The fourth class of services is *Long Distance* services. The physical presence of the user and the provider are not es-

condition of a person, or of a good belonging to some economic unit, which is brought about as the result of the activity of some other economic unit, with the prior agreement of the former person or economic unit." Hill, *On Goods and Services*, 23 REV. INCOME & WEALTH, Dec. 1977, at 315, 318.

⁶⁰ M. KAKABADSE, *supra* note 3, at 9.

⁶¹ *Id.*

⁶² Hill, *supra* note 59, at 316. "The objective is always to identify exactly what one economic unit hands over to, or provides for, the other." *Id.*

⁶³ *Id.* at 317.

⁶⁴ *Id.* at 318-19.

⁶⁵ *Id.* at 321.

⁶⁶ Bhagwati, *International Trade in Services and Its Relevance for Economic Development*, in THE EMERGING SERVICE ECONOMY 3, 6-7 (O. Giarini ed. 1987); Sampson & Snape, *Identifying the Issues in Trade in Services*, 8 WORLD ECON., June 1985, at 171, 172-73; see also Riddle, *The Role of the Service Sector in Economic Development: Similarities and Differences by Development Category*, in THE EMERGING SERVICE ECONOMY 83, 93 (O. Giarini ed. 1987).

⁶⁷ Bhagwati, *supra* note 66, at 7. For example, when the English motorway was built, Indian and South Korean construction firms had to go to England to provide the service of construction. *Id.*

⁶⁸ For example, complex surgery cannot be performed unless the surgeon is based in his hospital where he has support staff and necessary instruments available to him. Likewise, shoppers cannot browse in Macy's unless they travel to New York City. *Id.*

⁶⁹ For example, haircuts may be given and received in either the provider or the user's home. *Id.* at 8.

sential to the performance of these services.⁷⁰ In terms of trade, the cost of mobility affects the ability to trade the service. Where costs are high, the service may become internationally nontraded. Moreover, country regulations on the transfer of labor across borders also restrict trade. Technological advancement, on the other hand, is responsible for the increased emergence of Long Distance services in international trade.⁷¹

All services affect one of two subjects: Persons or goods.⁷² The possible interaction between goods and services adds to the complexity of distinguishing the two. One example is the production of a car. A car is a good. Part of the production process of a car is a paint job. Painting is a service. If the car is painted on the premises of the plant, the service becomes value added to the car. The service is one of many inputs into the creation of the good. If, on the other hand, a painter is hired from outside the plant, then the paint job itself is classified as a service.⁷³ Reversing the analysis, goods can come out of services. Singing or playing a musical instrument is a musical service. But a record or cassette tape is a good. Through technology, the service became embodied in the good.⁷⁴ Although services and goods can be distinguished, their underlying relationship makes identification difficult at times. Since some services are integrated with goods,⁷⁵ one commentator has suggested that it is "unrealistic to deal with services and goods in watertight compartments."⁷⁶ This view casts doubt on the decision to negotiate services in a different group from goods. It may be impossible to adequately address the problems of goods or services if the approach fails to consider their interrelatedness.

Building on the definitional and identification difficulties, calculation of services in physical quantities is impossible. Quantities of services can be measured by the duration and intensity of the service provided to the user.⁷⁷ Unfortunately, this measurement is wholly dependent upon the subjective interpretation of the user.⁷⁸ Services cannot merely be counted, as can be goods. The ambiguous classification of services, their unquantifiable nature, and the classical economists' dismissal of services as insignificant have all led to the

⁷⁰ Examples of Long Distance services are banking and insurance. *Id.*

⁷¹ *Id.*

⁷² *Id.* at 319.

⁷³ Bhagwati, *supra* note 13, at 136-37. Mr. Bhagwati called this the splintering process because services splinter from the goods as they are taken out of the firm and become inter-firm transactions. *Id.*

⁷⁴ *Id.* at 137-38.

⁷⁵ The service may form a package with the good. For example, the sale of a computer is normally accompanied by computer programming. See M. KAKABADSE, *supra* note 3, at 16.

⁷⁶ Comment, *supra* note 59, at 393-94.

⁷⁷ J. NUSBAUMER, *THE SERVICES ECONOMY: LEVER TO GROWTH* 11-12 (1987).

⁷⁸ *Id.* at 12.

inadequate data base of information on services. An illustrative example given by one author is noteworthy:

If a British tourist visits Paris the amount of money he spends there shows up as a service export in the "travel" category of French invisibles trade data. If the same British tourist flies to New York on a Pan Am flight, his ticket payment to the foreign airline is counted as a British service import in the "passenger fares" category. If a Japanese company ships goods from Okinawa to the United States and pays for ship-handling services at the American port, this counts as an American service export under "transportation." Thus, the export of services by a country can be a mixture of domestic services provided to touring foreigners and other services supplied across borders; few such transactions involve imports or exports in the traditional sense.⁷⁹

Especially pertinent to the GATT negotiations is the identification of barriers to services trade. Not only must services be identified, but the barriers used by countries to regulate the import and export of services must be discovered. Trade barriers to services are difficult to identify. Since services cover a broad range of industries, many of the barriers are unique to a particular service industry. In addition, some barriers to services also restrict trade in goods.⁸⁰ Some of the nontariff restrictions now encumbering services trade are the denial of access to markets, restrictions on the inputs of services, limits on the exporting country's ability to market and sell its service, and government regulatory practices.⁸¹ The intangible nature of services also makes the barriers hard to pinpoint because services do not always visibly cross the border of one country to another.⁸²

Services are traded in two ways. "Across the border" trade occurs when a company in the exporting country provides services to a client or consumer located in the importing country.⁸³ The other method, "establishment trade," occurs when a company from the exporting country establishes a local branch or subsidiary inside the importing country to produce services.⁸⁴ Trade barriers affect both types of trade in services.

Where physical proximity is required for trade, a foreign corporation may need to be established in the importing country. Even though the firm performing the service is within the borders of the country, the transaction is international trade because the exchange of international currency affects the balance of payments of the countries involved.⁸⁵ One issue facing the GATT negotiators is whether

⁷⁹ M. KAKABADSE, *supra* note 3, at 29.

⁸⁰ Livingston, *supra* note 58, at 104.

⁸¹ Comment, *supra* note 1, at 296-97.

⁸² Riddle, *supra* note 66, at 98.

⁸³ THE WHITE PAPER, *supra* note 2, at 13.

⁸⁴ *Id.*

⁸⁵ Comment, *supra* note 1, at 299. For example, a tourist outside his home country

establishment trade should be included in the services agreement. When the provider of the service must be in the importing country, governmental administrative and regulatory control affects the service provided.

Regulating establishment trade raises the sticky issue of impinging on a government's right to control businesses within its borders. Recall that Part II of the Ministerial Declaration expressly states that the policy objectives of national laws will be respected.⁸⁶ Nevertheless, disputes will surely arise regarding the policy objectives of national regulations. Developing countries jealously exercise domestic control over industries which are critical to their economic development.⁸⁷ Almost all countries are protective of their banking systems since banks are tied into a country's monetary policy. A recent example was Britain's denial of a takeover bid made by the Hong Kong and Shanghai Bank for Britain's fifth largest bank, the Royal Bank of Scotland.⁸⁸ Other reasons for a country's regulation of certain industries are consumer protection, the promotion of social and cultural goals, and support for domestic labor.⁸⁹ Even though the regulations affect international trade in services, most can be justified in the national objectives sense. The line between nontariff protectionist measures and domestic policies is hazy.

Currently, GATT applies only to tariffs and nontariff barriers that distort transborder trade in goods.⁹⁰ If this pattern is extended to regulating trade in services, and establishment trade is not included in any GATT agreement on international services trade, then a large portion of services trade would be left virtually untouched.⁹¹ Most services require a close proximity between the user and the provider. While GATT coverage of only across the border trade in goods has been relatively effective, exclusion of establishment trade in services from the GATT umbrella will be detrimental to a multilateral services agreement.⁹²

Immigration policy will also be affected by the service negotiations. Until now, a country could regulate labor within its boundaries by imposing restrictions on immigration. With the latest technological advances, the services of foreigners can be bought in

uses the currency of the host country which he obtained by exchanging the currency of his home country. *Id.* at 300.

⁸⁶ For a portion of the text of the Punta del Este Ministerial Declaration, see *supra* note 56.

⁸⁷ M. KAKABADSE, *supra* note 3, at 63.

⁸⁸ *Id.* at 64.

⁸⁹ *Id.* at 65-66.

⁹⁰ Comment, *supra* note 1, at 301.

⁹¹ Recognizing the difficult distinction between trade and investment, U.S. officials have suggested that the services talks be limited to those services exchanged in across the border trade. Randhawa, *supra* note 53, at 167.

⁹² Comment, *supra* note 1, at 302.

the home country without the actual presence of the foreigner in the country. Advanced communications have made this possible. If GATT addresses those services related to communications, then, in effect, it is merging into the realm of immigration law. With liberalization in services trade, foreign labor can enter a country without a foreigner ever setting foot within that country's borders.⁹³

Aside from the unavoidable problems of negotiations in services trade, the negotiating stage is not set. Although a one time dissenter to the U.S. initiative, the European Community now supports services trade negotiations in the GATT.⁹⁴ The strongest opponents to bringing services under the GATT umbrella are the developing countries. Wary of the United States, the developing countries are unwilling to compromise their quest for special treatment.⁹⁵ In light of the vast array of various services, the difficult issues inherent in the nature of services, and the inadequate data base,⁹⁶ as well as differing interests of the negotiating countries, a successful negotiation is unlikely. But it should be remembered that it took seven rounds of negotiations over the course of about forty years to negotiate trade in goods.⁹⁷

The United States has illustrated that bilateral agreements are feasible. The United States has recently participated in bilateral agreements on trade in services. In the United States-Israel Free Trade Area Agreement,⁹⁸ the two countries signed a nonbinding declaration to liberalize trade in services in the areas of transportation, travel, tourism, communications, banking, insurance, construction, engineering, accounting, education, law, management consulting, computer services, and advertising. Both nations are receptive to further negotiations which could lead to solidifying the declaration in a legally binding agreement.⁹⁹ On January 1, 1989, the United States-Canada Free Trade Agreement became effective. Accomplishing what the United States-Israel Agreement did not, the United States-Canada Agreement is the first international agreement to contain legally binding rules applicable to trade in services.¹⁰⁰ Due to the newness of the U.S. bilateral agreements in services, the

⁹³ Bhagwati, *supra* note 13, at 141.

⁹⁴ M. KAKABADSE, *supra* note 3, at 57.

⁹⁵ Ewing, *Why Freer Trade in Services is in the Interest of Developing Countries*, 19 J. WORLD TRADE L. 147, 156 (1985).

⁹⁶ It could be years before statistics on trade in services are developed to the point of equality with statistics covering the trade in goods. News of the Uruguay Round of Multilateral Trade Negotiations, Apr. 16, 1987, at 5 (issued by Information Service of the General Agreement on Tariffs and Trade).

⁹⁷ Randhawa, *supra* note 53, at 164-65.

⁹⁸ United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified at 19 U.S.C. § 2112 (Supp. IV 1986)).

⁹⁹ *Id.*, art. 9.

¹⁰⁰ United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, 27 I.L.M. 281.

success rate is unavailable. Given the complexity of services, it may be overly idealistic to hope for coverage of services trade by the GATT. The bilateral arena may be the best option available for those countries seeking freer trade in services.

Agreement on a multilateral compact on trade in services is not impossible, but it will not happen overnight. The newness of services as an international topic of debate, as well as the scarcity of information on services trade, will contribute to a slow negotiation process. In all likelihood, disputes regarding services under the GATT framework will not be resolved during the Uruguay Round. In the event of the GNS's failure to draft an agreement during the Uruguay Round, all is not lost. Services are an important part of the world economy today. Recognition of this and steps toward liberalizing services are accomplishments in themselves.

ELAINE M. WHITFORD

