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The Genesis of the GATS

(General Agreement on Trade in Services)

by

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&

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Eyal Benvenisti organized for us a great conference at Tel Aviv on May 30, 2010 where we presented this work for the first time and received precious comments by Tomer Broude and Rob Howse. Americo Beviglia-Zampetti, Theofanis Christoforou, John Croome, Dorothy Dwoskins, Murray Gibbs, David Hartridge, Doug Irwin, Felipe Jaramillo, Mario Kakabadse, Abdel-Hamid Mamdouh, David Palmeter, John Richardson, Gary Sampson, Jonathan Scheele, Dick Self, Harsha Singh, Jorge Vigano, David Walker, Bruce Wilson, and Rufus Yerxa shared their experience with us, and graciously responded to the many questions we had prepared, and to the many more that actually propped up during our meetings.

Abstract

The *Uruguay Round* services negotiations saw the light of day amidst pressures from lobbies in developed countries, unilateral retaliatory actions, and ideological struggle in the developing world. The final outcome, the GATS, certainly characterized by a complex structure and awkward drafting here and there, is not optimal but is an important first step towards liberalization of trade in services. This paper traces the GATS negotiating history, from its very beginning in the late 1970s, paying particular attention to the main forces that brought the services *dossier* to the multilateral trading system (governments, industries, and academics), and the interaction between developed and developing countries before and during the Uruguay Round. We will follow the actions, positions, and negotiating stances of four trading partners – Brazil, the European Union, India, and the United States – that were key in the development of the GATS. Finally, we will, indicatively at least, try to attribute a 'paternity' (or, rather, a 'maternity') to some key features and provisions of the agreement.

1. Why Should We Turn to the Negotiators?

In the context of the GATS, recourse to the negotiating history is, in our view, *passage obligé* for those wishing to inform themselves about the rationale for the GATS. Our interest is not purely historic. Rather, it stems from the absence of an economic theory explaining the GATS. Indeed, contrary to the GATT, whose rationale has been explained on the basis of two competing theories – *terms of trade*, and *commitment* theory – there has not been a similar development with regard to the GATS. Rather, scholars discussing the GATS have usually taken those GATT-related theoretical developments for granted, and have tried to apply them – somewhat unsuccessfully – to the services context. But there are reasons to believe that the *terms of trade* theory would sit oddly with an agreement like the GATS, which combines pure trade and trade through establishment of foreign companies. Although not referring to the GATS directly, Blanchard (2010) casts doubt on the applicability of the terms of trade theory in the presence of international ownership, arguing that the latter can mitigate incentives that lead large countries to set inefficiently high tariffs, and that have been argued as the main reason for having trade agreements such as the GATT. The GATS, on the other hand, contains too many loopholes to be considered a safe lock in-mechanism for domestic policies: for this reason, it is hard to persuasively argue that *commitment theory* explains its advent.

The remainder of the paper is structured as follows. In Section 2, we will discuss trade and trade policy in services before the advent of the *Uruguay Round (UR)*, *paying particular attention to the main actors – governments, industries, and academics – and to the process leading up to the Punta del Este Declaration in 1986..* Section 3 is dedicated to the *Uruguay Round* negotiation, while in Section 4 we examine in more detail the negotiating positions of four key players: Brazil, the European Union

(EU),¹ India, and the United States (US). In defence of our selection we will argue that these four participants were instrumental in both the course and timing of services negotiations in the Uruguay Round and in shaping each and every of the salient features of the GATS. In this section we will, indicatively at least, try to attribute a 'paternity' (or, rather, a 'maternity') to some key features and provisions of the agreement. Section 5 concludes.

The thesis that we advance could be summarized as follows:

- (a) the services negotiation and the GATS architecture are very much the product of those *Uruguay Round* participants that had elaborate (or relatively speaking, the most elaborate) domestic regulations on services, were aware of the potential of exporting services, *and* were actually interested in export markets. These are the US and the EU. The former was decisive in introducing services in the negotiating agenda, while the latter was decisive in the drafting stage;²
- (b) developing countries can be divided into two groups: those that were flexible and saw opportunities in the negotiation of the agreement, and those that kept an inflexible stance. Overall, they managed to influence only a few provisions of the agreement, notably the introduction of the fourth mode of

¹Throughout this volume we use the term EU which is the official title since December 2009. When warranted, we will use the term EC (European Communities).

²*Uruguay Round* participants of smaller size, such as Sweden (not an EU member state when the *Uruguay Round* started), and Switzerland, also made significant contributions to the elaboration of the framework. And indeed, it is very much the case that these two countries (and others in more or less the same position) influenced the shaping of GATS. We will be referring to their positions when warranted since these countries did not advance a comprehensive position in the manner that the EU and the US did. We know from the testimony of direct participants in the negotiation, that on some occasions smaller countries had submitted proposals under their own name which reflected, nonetheless, the agreement of other, more important players (who preferred to stay in the sidelines in order to advance the process, fearing outright rejections of their proposals if submitted under their own name).

- supply (that is, movement of natural persons as suppliers of services), and the incorporation of developing-country-friendly provisions;
- (c) the GATT Secretariat played an active role throughout the negotiation, always providing technical support, often helping build consensus, and occasionally steering it (also in the name of technical advice) towards conclusion.

2 Before the Negotiation (pre- 1986)

2.1 Regulation of Trade in Services

Before the advent of the GATS, trade in services was regulated through bilateral and regional schemes.³ The focus of each of these schemes was quite narrow though. A comprehensive scheme regulating trade in services was missing.

The US was used to extensive regulation of its own services market, and had concluded a number of treaties of *Friendship, Commerce and Navigation* (FCN) which regulated relations across countries with respect to *specific* services, such as, aviation, shipping and communications.⁴ Besides that, when the UR started, the US had concluded free trade agreements with Israel and Canada.⁵ While the former contained almost no discipline on trade in services, the latter, concluded in 1987, contained substantive disciplines on trade and investment in services, as well as the temporary movement of business persons.

The EU was the only supranational entity with *substantial* experience in regional liberalization of trade in services. Moreover, the dismantling of regulations

³Bhagwati (1989) mentions that in early economic analysis services were considered non-tradable. Norman and Strandenés (1987) note that the same holds for some goods. Van Holst (1988) notes however that, the merits of this theoretical disquisition notwithstanding, services have been traded for centuries.

⁴Brock (1982) at pp. 236ff. The US stopped negotiating FCNs already in the fifties.

⁵Nyahoho (1990). Krommenacker (1987) mentions an agreement between Japan and the US (implemented on April 1, 1987) concerning the possibility for lawyers to work in each other's territory.

inhibiting trade in services was identified in the 1985 White Paper on the Internal Market as essential for the achievement of the internal market in 1992.⁶

There was also some industry-specific cooperation: the *International Telecommunications Unions* (ITU) allocated radio spectrum, assigned satellite orbits, and established worldwide standards; the *Basel Committee on Banking Supervision* (under the aegis of the Bank for International Settlements) discussed and set standards on international banking regulation and supervision (e.g. the *Basel Concordat*); the *International Civil Aviation Organization* (ICAO) administered agreements on civil aviation; and the *International Maritime Organization* (IMO) was responsible for measures to improve the safety and security of international shipping. Within the OECD, the *Code of Liberalisation of Current Invisible Operations*, and the *Code of Liberalisation of Capital Movements* have contributed towards reducing restrictions on capital flows, the right of establishment, and current invisible transactions (mostly services). and transfers, as well as abolish some restrictions on cash flows.

The absence of a genuine multilateral scheme was no obstacle to the fast increase of services trade flows, which can be explained by a number of reasons:

- (a) Technology (e.g., the ICT revolution), which made it possible to perform a wide variety of services at a distant geographical location, thus paving the way to trade opportunities, and leading ultimately to the outsourcing and offshoring trends that we are witnessing today;
- (b) the increasing connection between goods and services – since many services are inputs to goods, the liberalization of trade in goods *ipso facto* amounted to liberalization of trade in services as well;⁷

⁶ The Single European Act, signed in Luxembourg on 17 February 1986 by the then nine European Member States and on 28 February 1986 by Denmark, Italy and Greece, was in fact the first major amendment of the Treaty establishing the European Economic Community (EEC). It entered into force on 1 July 1987.

- (c) The shift in employment from manufacturing to services in most OECD countries;⁸ and
- (d) The trend towards greater specialization in services and the ensuing gains in productivity.

Although already in the 1980s, observers, including the World Bank, seemed to agree on the increasing importance of trade in services, they had different quantitative estimations of its magnitude.⁹ The reason for the discrepancy in the estimation has to do with the inherent difficulties in measuring services, and with the fact that very few governments had developed at that time reliable and comprehensive data collection systems.

If trade in services was growing in the absence of a comprehensive framework *à la* GATS, so why bother negotiating one? Brock (1982, p.234), then USTR, speaks of a trend of *new protectionism*. In his own words: "If the trend of increasing barriers to trade in services continues unchecked, trade opportunities could be markedly reduced and the international trading system could be seriously harmed".¹⁰

The sequence here probably holds the key to understanding, in part at least, the long-term motivations behind the GATS negotiation: technology had opened foreign markets to some extent, by making long standing barriers in some services sectors (essentially financial and telecoms) increasingly obsolete. In other words, technology was making it possible for economic agents to circumvent existing barriers to entry. Some countries (particularly developing ones) reacted by enacting (or threatening to

⁷See Schott and Mazza (1986).

⁸Brock (1982) cites statistics to the effect that in the US in 1981, 72% of the non agricultural population was engaged in service activities (63% in 1961). This was not just a US phenomenon: in Japan the corresponding numbers were 49 and 37%.

⁹See World Bank data at the time, and Rivers, Slater and Paolini (1987).

¹⁰Eason (1984).

enact) new barriers to ensure that their control over key services sectors would not be undermined by foreign firms accessing what they considered strategic sectors of their economy. It was against this threat (or the actual imposition) of new barriers, which run counter to the renewed liberalization impetus in OECD countries in the early 1980s, that Brock (1982) wanted to rally his troops (or his troops want him to rally).

2.2 The US: Bring It On

It is commonplace among commentators that it was the US financial services sectors that first argued systematically in favour of a trade round that would include a chapter on liberalization of trade in services.¹¹ And its voice did not fall on deaf ears: the US was experiencing substantial trade deficits at that time (late seventies, early eighties), which were politically unsustainable. These deficits resulted from significant deficits in trade in goods, which were partially offset by surplus in trade in services.¹²

An agreement to liberalize trade in services would buy the US government precious political capital, indeed it would be hitting two birds with one stone. Freeman (1996) believes that the work done by the then USTR, Robert Strauss, during the *Tokyo Round*, laid the foundations for subsequent actions: the inclusion of services-related provisions in three *Tokyo Round* agreements is evidence that US was from day one clear on one issue; the GATT should be the forum to host an agreement on services.¹³

Chief among domestic lobbies was the *Coalition of Service Industries* (CSI), which was established in 1982, and which played an important role in sensitizing the US

¹¹Freeman (1996), and Feketekuty (1988).

¹² See the succinct summary of the situation made by Michael Smith, _Deputy USTR, shortly after the launch of the UR, in GATT Doc. SR.42/ST/19 of December 18, 1986 at pp. 2-3.

¹³There were voices not necessarily opposed to a negotiation of services among like-minded countries, see McCulloch (1987).

government about the importance of liberalizing trade in services for the US economy.¹⁴ The CSI originally focused on banking, insurance and the right of establishment (of banking and insurance companies) in foreign countries – it was thus, originally at least, contemplating the negotiation of an agreement that would liberalize foreign direct investment rather than direct trade in services.¹⁵ The CSI gathered data, organized conferences, engaged in extensive public lecturing, and heavily lobbied the US government to this effect. Prominent members of the services industry provided testimony to the US *Senate Finance Committee* (SFC) arguing the case for a global agreement.¹⁶ John Reed of Citibank was heading one of the advisory groups organized by the *United States Trade Representative* (USTR), the *Services Policy Advisory Committee* (SPAC), while James Robinson, the head of American Express, was heading the *Advisory Committee on Trade Negotiations*. Representatives from the financial services sector were omnipresent in the trade dialogue those days.¹⁷ Cloney (1989), the then President of the *International Insurance Council*, as well as Cohen and Morante (1981), the former being Manager of Public Affairs for the *American International Group* (AIG), provide evidence to this effect.

The role of American Express in getting the multilateral negotiation on trade in services off the ground was pivotal and needs some further explanation. In Yoffie's (1990) account, the company adopted a *Vince Lombardi* strategy, named after the

¹⁴CSI includes major international companies from the banking, insurance, telecommunications, information technology, express delivery, audiovisual energy services, and other service industries. It conducts business in all 50 US states and in over 100 countries around the world. The CSI membership is predominantly corporations engaging in trade of financial services. See Lang (1999), and the CSI website at www.uscsi.org.

¹⁵Feketekuty (1988) mentions that key members were Shelp (from AIG, and previously the US Department of Commerce), Harry Freeman and Joan Spero (American Express). See also Hansen (1989).

¹⁶See the Appendix in Feketekuty (1988).

¹⁷Preeg (1995) quotes, at p. 53, Brock stating that "our business community will be able to accuse us with some justification that we fiddled while the trading system was breaking down around us". Ostry (2007 at p. 27) suggests that for the US new issues (such as services) was crucial in sustaining support for multilateralism in general. In her view, the support for the new round in the US was originally moderate. It is the inclusion of the 'new issues', such as services, that tilted the balance in favour of supporting the new round, see also Ostry (2000) at pp. 55ff., and Ostry (1997) at pp. 175ff.

famous college football coach and described in the following terms by Joan Spero, American Express vice President for International Corporate Affairs:

The best defence was a good offense. The company did not want to be a passive observer of events. On the contrary the fundamental principle guiding American Express' actions was that 'if you don't like the environment, you should try to change it'.¹⁸

The strategy, in operational terms, consisted of:

- (a) illumination: James Robinson, Harry Freeman, and Joan Spero gave hundreds of speeches and interviews to reputed magazines of wide circulation, such as the *Economist*, *Fortune*, *Business Week*, *The Washington Post*, *The New York Times*, etc.;¹⁹
- (b) building up the domestic lobby: the CSI, mentioned above, was established in 1982 at the initiative of American Express, along with *Bechtel*, *Peat Marwick*, *Citibank* and some other firms operating in the banking sector;
- (c) building bridges between the CSI and other services lobbies around the world; and
- (d) influencing the US government through direct links: besides participation in entities like SPAC mentioned above, in 1982, James Robinson was one of the six private sector members of the US delegation to the GATT meetings (that led all the way to the Ministerial Conference which we discuss *infra*).²⁰

Why did American Express invest so much energy and resources in this discussion? At the time, the company was specializing in travellers' checks, charge cards, insurance, and investment services. This business depends on the rapid transmission

¹⁸Yoffie (1990) at p. 375.

¹⁹Their involvement continued well into the Uruguay Round, see for example, Joan Spero, *Tear Down Barriers to Export of Services*, New York Times, July 30, 1991.

²⁰Yoffie (1990) pp. 367 and 375ff.

of large amounts of data across national borders through sophisticated computer and telecommunications networks. Trans-border data flows, essential in fact to international banking and financial services, were threatened by protection, and so was data processing. Clearly, this was of utmost importance to American Express. The rationale for protection varied across countries: privacy reasons, protection of strategic sectors, infant industry, and employment.²¹ A new agreement regulating trade in services should aim at disciplining the rationale for protection, opening up trade on a worldwide basis.²²

The US, quite aware of its potential in the services sector, and having experienced itself the gains from deregulation of various services markets, saw no reason why its own experience could not be emulated worldwide.²³ Based on this conviction, the US made a negotiation on services the flagship of its national agenda for a new GATT multilateral round. In 1985, as the time for the launching of the new round was approaching, the then USTR, Clayton Yeutter, had even conditioned the participation of the US in the *Uruguay Round* upon the inclusion of a negotiation on trade in services in the agenda.²⁴

2.3 The EU: CAP, Non Negotiable, Well...Maybe

When it came to forming a negotiating position, the EU saw the issue differently. To start with, although the EU contained detailed provisions regarding its internal liberalization of trade in services, it was far from being an integrated services market

²¹Gibbs (1989a).

²²Yoffie (1990 p. 378).

²³The Airlines- (1978), Trucking- (1980), Railroads- (late 1970s, and 1980), Telecommunications- (1977 and, as mentioned, 1982), Cable Television- (late 1970s, and 1984), Brokerage- (1975), Banking (1980, and 1982), Petroleum- (1979), and Natural Gas Industry (1978) were liberalized in that period, see Winston (1993). On AT &T and its break-up, see Cowhey and Richards (2000). Some empirical work establishes a clear link between the globalization of form and capital and the restriction of state power, see Spar and Yoffie (2000) at pp. 33ff.

²⁴See Yeutter Cites Preconditions on Trade Talks, *Journal of Commerce*, December 9, 1985 at p. 3A.

in the early eighties.²⁵ However, from a bureaucratic point of view, the EU did not have competence to speak with one voice on all services. Indeed, *Opinion 1/94* (by the *European Court of Justice*, ECJ) which was issued several years later, at the end of the *Uruguay Round*, clarified that only services supplied without any physical movement of either the supplier or the customer came under the exclusive competence of the EU.²⁶

But there is another, probably more persuasive reason explaining why the EU adopted a defensive stance at the beginning of the process: according to Paemen and Bentsch (1995, pp. 32ff.), the EU wanted to avoid finger pointing against its own farm policy; being aggressive in the services context could have provoked an aggressive attitude against the EU *Common Agricultural Policy* (CAP) which the EU wanted, initially at least, to defend at any price. This would explain why the EU was not initially a *demandeur* for a round in general, never mind trade in services. The link between negotiations on farm trade and services trade is evident in the Decision adopted by the Council of Ministers on March 19, 1985, urging the European negotiators participating in the *Uruguay Round* to safeguard the CAP while encouraging meaningful negotiations in services.²⁷

Defending the CAP was therefore an overriding objective. However, as we will see later, the EU gradually shifted positions during the UR, becoming a *demandeur* of services liberalization and key participant in the actual drafting of the agreement. What explained the change in the mood in the EU? There is probably no dominant explanation. The EU must have felt that it would have been awkward to incur the political cost of blocking altogether a round in the name of the protection of its internal farm market. This line of thinking would not argue in favour of enthusiastic

²⁵The extra-EU services grew faster than its intra-EU counterpart in the period 1979-1984, GATT Doc. MTN.GNS/W/23 of October 30, 1987.

²⁶In *Opinion 1/08* (November 30, 2009) the ECJ held that services is shared competence between member states and the EU.

²⁷Paemen and Bentsch (1995) at pp. 45ff.

support, but would not favour isolation either. On the other hand, a series of national studies that saw the light of day in the GATT in the early- to mid-eighties unveiled the importance of the services economy to EU bureaucrats.²⁸

Contrary to their US counterparts, European service industries took more time to get organized. Safe for some groups at the national level (notably in Britain and Sweden), European services lobbies were not set up until 1986 (Pou Serradell, 2006).²⁹ The *European Community Services Group* (ECSG), which represented services exporters in the EU and the EFTA (the *European Free Trade Association*), was set up at the invitation of the European Commission in 1986. It was composed mainly of national chambers of commerce, employers federations, and national services coalitions such as the *Liberalisation of Trade in Services* (LOTIS) committee³⁰ of the *British Invisible Exports Council*.³¹ The *Banking and Insurance Associations*, the *Federation des Experts Comptables Europeens* also among the important lobbies.

There is evidence of co-ordination between the EU and North American interests during the Uruguay Round: For example, Arkell (1990) makes reference to the US Chamber of Commerce in Brussels (which represents US affiliates based in the EU), and the US and Canadian CSIs having been guests of the ECSG, and there is further evidence of joint missions of the US, British, Australian, Swedish, and Hong Kong CSIs to Geneva.³²

²⁸Drake and Nicolaidis (1992) at pp. 57ff.

²⁹ The Swedish Coalition of Service Industries in Sweden, and "British Invisibles" in Britain. The latter originated in the Committee on Invisible Exports, set up in April 1968 by the Bank of England, and later became the British Invisible Exports Council. Later, this Council established the Liberalisation of Trade in Services (LOTIS) Committee. "British Invisibles" is now International Financial Services London (IFSL).

³⁰LOTIS is a committee of British industries formed in order to brief the U.K. government on private sector's views on international trade issues.

³¹Confederation of trade association representing the British services industries.

³²Arkell (1990), Woll (2007). See also The Bulletin (1990).

It should come as no surprise that the EU bureaucracy was fully behind the negotiation of an agreement. For the EU Commission, trade was the only area where the EU could reaffirm its persona at the international plane, since the EU enjoyed no competence in any other field of international relations and trade was the area where it could speak with one voice. Granted, it was unclear whether the EU had competence on services. This would not however, stop the EU Commission from pushing the agenda further: adding services in the trade agenda would augment its competences and its relative position towards the Council in the inter-agency game. It was also clear however that services negotiations presented a major challenge, and even the more developed bureaucracies, such as the EU Commission, had not become prepared for this type of negotiations before – and well into – the 1980s.³³ Here again, the US seemed to have an edge over the others.

Bhagwati (1990, p. 33) mentions three other factors contributing to this change of mood in Brussels:

- (a) besides services, the EU must have been well aware of gains in other areas especially in new areas such as TRIPs (trade-related intellectual property rights). The EU TRIPs lobbies were certainly pushing for participation in the new round;
- (b) the need to put a stop to US regionalism also played a role. President Reagan was in favour of a new round, but under certain conditions. His message to his team was “if these negotiations are not initiated or if insignificant

³³ Our conversations with protagonists at the time confirm this view. Along the same lines, and in a factual manner, Pou Serradell (2006) explains that the EU general policy on the international dimension of services – in particular on the GATT negotiations – had originated within an intra-EU Commission group called ITS (International Trade in Services), chaired by DG External Relations. The group was set up in 1982. It presented periodic reports to the Commission. In June 1989, the ITS group presented a report to the Commission, where the main lines of an external policy on services are sketched. Not surprisingly, taking into account the EU comparative advantage in services, the ITS group advocated a leadership role in the GATT negotiations on services.

progress is made, I am instructing our trade negotiators to explore regional and bilateral agreements with other nations”;³⁴

- (c) the US Congress was getting into a protectionist mood: although the *Jenkins Bill* on textiles was voted down, there was fear that similar initiatives would soon see the light of the day.³⁵

Approximately at the same time, under the Single European Act, the EU was negotiating the completion of its own single market. Although the objectives of the EU single market and the new multilateral round were not the same (far from it), still the EU agent entrusted with the task to negotiate at the international plane (i.e. the Commission) benefited from cross-fertilization in light of the similarity of the instruments used in the two processes.³⁶

2.4 Other OECD Members: a Measured Yes

OECD (*Organization for Economic Cooperation and Development*) members were in favour of the negotiation. Capling's (2001, pp. 149ff.) account of the Australian participation in the *Uruguay Round* points to an attitude that resembles more that of the EU rather than that of the US:

- (a) the willingness to continue protecting Australian culture through *local content* requirements in broadcasting;
- (b) the uncertainty as to the coverage of the eventual agreement (fearing that the US could be excluding sectors of export interest to Australia);
- (c) the suspicion that the US was diverting attention from the 'real issues', that is, the opening up of farm markets; and
- (d) finally, because Australian lobbies were not *demandeurs* for such negotiation.

³⁴Preeg (1995) at p. 51.

³⁵Waelbroeck (1987).

³⁶Ehlermann and Campogrande (1987).

The change in attitude was due, in her view, to the fact that the government was eventually persuaded by the epistemic community that there were real advantages in the opening up of services markets (both at the national and the international level). Moreover, the *Australian Coalition of Services Industries* (ACSI), established in 1987, lobbied for an agreement.³⁷ New Zealand, following de-regulation of its national market, sided with those requesting opening up trade in services, its main (export) interest being in professional services.³⁸ Canada was aware of its export potential in some services, but quite unwilling to open up others, like audiovisuals.³⁹ Japan was a net importer of services but very much interested in negotiating a multilateral framework to liberalize trade.⁴⁰ Traditionally a free-trade minded country, and supported by an active CSI, Sweden was one of the fervent advocates of services negotiations from the start, and contributed to them throughout the process, particularly in the sectors of export interest, such as financial and maritime transport services.

2.5 Developing Countries: the S Word

Developing countries reluctantly accepted services as part of the UR agenda. At first, they adamantly refused to enter into any negotiation on this issue.⁴¹ The promoters behind this hard line were the countries forming the G-5 (or *gang of five*), that is, Argentina, Brazil, Egypt, India, and Yugoslavia. They were hostile to the negotiation altogether and would not even bow to the temptation to use liberalization of their services markets as a *quid pro quo* for the opening up of the OECD countries' textiles markets: in their eyes, the multi-fibre arrangement, was an illegal act altogether, and saw no reason to pay for its dismantlement. In addition, because of their scarce

³⁷ Already in 1990, the Australian CSI is quoted as having the intention of joining its counterparts from the US, etc. in a joint mission to Geneva to support the conclusion of the GATS (See The Bulletin, 1990).

³⁸ The comment made in note 44 *supra* also applies to the New Zealand CSI.

³⁹Hart (2002) p. 398ff.

⁴⁰GATT Doc. MTN.GNS/18 of November 29, 1988 at §8.

⁴¹GATT Docs. MDF/26 and 27, Hufbauer and Schott (1985) at pp. 69ff.

negotiating resources, they would find it difficult to simultaneously follow negotiations on the traditional GATT agenda (which comprised farm and textiles goods) and on services.⁴² Moreover, contrary to developing countries, there were not developing-country lobby pushing for services negotiations.

Developing countries also advanced that another 'S' word should guide negotiations: it should be "one fundamental principle to guide all phases in our collective endeavour", that is, "solutions ... by definition must be compatible with ... *sovereignty*".⁴³ They wanted to avoid their economies being effectively controlled by foreigners.⁴⁴ Some (at least self-proclaimed) developing countries were quite favourable to the negotiation though: Hong Kong China and Singapore, financial centres of prominence welcomed the idea.⁴⁵

2.6 The Epistemic Community

There were some voices arguing in favour of an agreement,⁴⁶ and chief among them, the London-based *Trade Policy Research Centre (TPRC)*, founded in 1968 by an Australian economist, Hugh Corbet, one of the pioneers of the study of trade and investment in services.⁴⁷ Other *fora* gradually developed. The *Services World Forum (SWF)*, set up in Geneva in 1986, was an independent forum where academics, policy-makers, and members of the *GATT Secretariat* attempted to conceptualize a negotiation on trade in services.⁴⁸ Its President, Orio Giarini, managed to persuade

⁴²There were voices to the opposite in academia, Schott and Mazza (1986).

⁴³GATT Doc. MTN.GNS/W/3 at §10, emphasis added, and Sapir (1982).

⁴⁴Gibbs and Ognitsev (2004).

⁴⁵Rivers, Slater and Paolini (1987) at p. 19. On Singapore's strategy, Mun Heng and Low (1988). As of 1990, Hong Kong would be further supported by an autochthonous CSI.

⁴⁶Deardorff (1984), Hindley and Smith (1984), Ethier and Horn (1991), Richardson (1987).

⁴⁷Feketekuty (1988), particularly the Appendix, entitled *The Story of a Campaign: How Services Became a Trade Issue*, which is an enlightening read. The *Trade Policy Research Centre* published a number of services-related studies by Robert Baldwin, and Brian Hindley.

⁴⁸Drake and Nicolaidis (1992) at pp. 61ff. See also www.ucd.ie/sirc/swfintro.html

not only people like Geza Feketekuty (USTR), Claude Barfield (Consultant, USTR, and then *American Enterprise Institute*, AEI), Albert Bréssand (who later founded *Prométhée*, another forum that was active in the discussion of trade issues), but also international bureaucrats from the GATT *Secretariat* and UNCTAD. Drake and Nicolaidis (1992, pp.97ff.) probably got it right when they conclude that the epistemic community did not substantially influence the drafting of specific GATS provisions, but provided useful comments that helped negotiators understand what was at stake.

2.7 The Road to *Punta del Este*

The main stages are the following:

- (a) in 1982 the GATT *Ministerial Decision* called for national studies on the importance of trade in services to be conducted by those willing and opened the door to their examination in the 1984 session;
- (b) following the rejection of the US proposal to establish a Working Party on Services, the so-called *Jaramillo Group* (an informal group presided by Colombian Ambassador Felipe Jaramillo with participation open to all GATT contracting parties) sees the light of day and it is in this context that the national services studies submitted in accordance with the 1982 *Ministerial Decision* were examined;
- (c) in 1984, the GATT CONTRACTING PARTIES institutionalized an information exchange mechanism (in essence, the review of national studies) and *ipso facto* the *Jaramillo Group*.⁴⁹

⁴⁹ CONTRACTING PARTIES: Expressed all in caps, this term refers to the highest organ of the GATT with the substantial authority to adopt acts by GATT organs, modify the agreement, launch trade negotiations etc.

The negative attitude of hard-line developing countries was such that the national services studies ended up being examined in a completely informal group, that never actually had a formal title, although minutes of the meetings were prepared by the GATT Secretariat. The first studies were circulated in January 1984. As of November 1985, 16 such studies had been circulated and examined.⁵⁰

In 1985, the US made its intentions clear:

Our objective in services negotiations would be the establishment of a legal framework of rules and procedures that would (1) make trade in services as open as possible through a commitment to transparency of practices and the resolution of problems through consultation, and (2) negotiate commitments of a sectoral or functional character dealing with problems unique to individual services industries.⁵¹

In September 1985, the US formally requested an extraordinary session of the GATT CONTRACTING PARTIES, which was finally held between September 30 and October 2 that year.⁵² A *Senior Officials Group* (SOG) was then established to discuss the modalities of a new round. This group did not manage to produce something concrete regarding trade in services but kept the discussion on the new round alive.⁵³ During the same time, the European services industries, through the ECSG, made their position on the services negotiation in the next round clear to the EU Commission.⁵⁴

Encouraged by a number of delegations, Arthur Dunkel, the Director General (DG) of the GATT, decided to turn to some eminent persons in an effort to provide some

⁵⁰ Australia, Belgium, Canada, Denmark, EU, Finland, Federal Republic of Germany, France, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland, UK and US. The GATT Secretariat prepared an analytical summary of information exchanged on services, contained in GATT document MDF/7/Rev. 2, dated 25 November 1985. Reyna (1993) says that a total of 18 studies were circulated.

⁵¹GATT Doc. L/5838 of July 9, 1985.

⁵²Bradley (1987) at pp. 78ff. The *GATT Council* (GATT Doc. BISD 9S at pp. 8-9) was deciding by consensus.

⁵³Bradley (1987) at p.79.

⁵⁴Quoted in Arkell (1990).

extra intellectual legitimacy to the voices calling for a new round.⁵⁵ The group was composed of seven personalities: Bill Bradley (US Senator and member of the *Senate Finance Committee*, SFC); Pehr Gyllenhammar (Chairman of Volvo); Guy Ladreit de Lacharrière (Vice President of the *International Court of Justice*, ICJ); Fritz Leutwiler (Chairman of the Swiss National Bank, and President of the Bank for International Settlements); I.G Patel (London School of Economics); Mario Henrique Simonsen (ex Minister of Finance for Brazil); and Sumito Djojohadikusumo (ex Minister of Trade and Industry of Indonesia). The group produced the *Leutwiler report*, named after the group's chairman. It did not address the merits of negotiating an agreement on trade in services in any meaningful detail, but provided those arguing in this sense with an encouragement through its advocacy of trade liberalization.⁵⁶

The next year, at the 41st session of the GATT CONTRACTING PARTIES, a *Preparatory Committee* was established with the mandate to determine the objectives, modalities, subject-matter and participation of the new round of multilateral trade negotiations.⁵⁷

3 The Negotiation of the GATS (1986-1994)

3.1 Launching the Round: *Punta del Este* (1986)

Negotiators met in *Punta del Este*, a few miles off Montevideo, the capital of Uruguay, with the intention of launching the eighth round of multilateral trade negotiations.⁵⁸ Simmonds (1988, p. 96) reports that the inclusion in the agenda of the *Uruguay Round* of a negotiating item on trade in services was still unresolved when the *Draft Ministerial Declaration* was submitted to Ministers in June 1986. Two

⁵⁵This was only the second time in GATT history that the GATT turned to outside experts. In 1958, a group of experts was established under the Chairmanship of Gottfried Haberler (Harvard), GATT Doc. L/794/Add. 1 of March 14, 1958.

⁵⁶Croome (1995) at pp. 19-20.

⁵⁷ GATT Doc. BISD 32, at p. 10, and Croome (1995) at p. 27.

⁵⁸Richardson (1988), Winham (1989).

coalitions played an important role in *Punta del Este*:⁵⁹ the G-10 (a partnership of developing countries), and the so-called *Café au Lait* group, which included both industrial and developing countries. The leading developing countries (Brazil, India, Yugoslavia) were all part of G-10 and were staunchly opposed to the inclusion of services in the round. The *Café au Lait* marked the first time that dividing lines between developed and developing countries fell.

The G-10 position was in fact jeopardizing the launch of the round. However, three events helped unblock the deadlock:

- (a) the US pressure was reaching its climax in the period leading to the *Punta del Este* meeting;
- (b) The *Café au Lait* group put together a compromise which managed to gather momentum and provided the basis for the eventual agreement; and
- (c) To a lesser extent the change of heart by Argentina.

3.1.1 G-10: it is No

G-10 is the heir to G-5, its expanded version. It comprised the original G-5 (Argentina, Brazil, Egypt, India, Yugoslavia), and the following developing countries: Cuba, Nicaragua, Nigeria, Peru, and Tanzania.⁶⁰ Continuing with the line drawn by the G-5 (described *supra*), the G-10 refused to accept any negotiation on trade in services. On June 23, and July 16, 1986, the G-10 presented two draft Ministerial Declarations, as well as an addendum on July 22. In all these drafts, it rejected the idea of including trade in services in the new multilateral agenda, considering that time was not yet ripe for such an inclusion.⁶¹

⁵⁹Tussie and Engyel (2002), Narlikar (2003).

⁶⁰Rivers, Slater and Paolini (1987) at p. 20.

⁶¹GATT Doc. PREP.COM(86) W/41; W/41/Rev. 1; and W/41/Rev. 1/Add. 1.

Srinivasan and Tendulkar (2003) partly attribute this attitude to the fact that Brazil and India lagged behind other developing countries when it came to domestic reforms (privatization, etc.): both countries started economic reform processes in 1991, that is, half way through the *Uruguay Round*. At the time of *Punta del Este* they were both still living within the confines of the old statist paradigm.

3.1.2 US Pressure

In June 1986, the US tabled a concrete proposal for a *Ministerial Declaration* which included clear terms for a negotiation on trade in services.⁶² At the same time, the USTR Clayton Yeutter publicly announced that the US would turn to bilateral and plurilateral arrangements, instead of the GATT, if the trading nations did not agree on including the necessary subjects in the agenda of the *Uruguay Round*, in particular services.⁶³ Moreover, one should not neglect the potential impact of unilateral action under Section 301 of the *US Trade Act of 1974*, which allowed the US administration to take retaliatory action against countries imposing or maintaining unreasonable restrictions on US services exports.⁶⁴ Developing countries were facing the following dilemma: *either* continue to say 'no' to the US requests for negotiating a multilateral framework on trade in services, and retain their freedom to define unilaterally the regulation of their services markets,⁶⁵ but at the risk of being sanctioned by the US; or or, enter into services negotiations in the GATT and try to constrain as much as possible the possibility for the US to act unilaterally.⁶⁶ Under the circumstances, it should not come as a surprise that some developing countries chose the latter.⁶⁷

⁶²GATT Doc. PREP. COM(86)W/4 of June 11, 1986.

⁶³Yeutter Takes Tough Line on Upcoming GATT Talks, Los Angeles Times, September 11, 1986; Raghavan (2009); *Annual Report of the President of the United States on the Trade Agreements Programme*, 1983, Washington D.C.: Office of the US Trade Representative (USTR, 1994).

⁶⁴The US initiated six cases in 1985, some of them (like one against India on insurance) directly concerned trade in services.

⁶⁵Hodge (2002).

⁶⁶The threat of US sanctions was indeed real: under Section 301 the US might find other countries' regulation of services unreasonable or unjustifiable, and might subject them to sanctions. Without a multilateral agreement on services, the US was basically unconstrained to do so.

⁶⁷Cohen and Morante (1981) at pp. 504ff.

Almost every account of the negotiations in *Punta del Este* points to the fact that the US, and more precisely its USTR, Clayton Yeutter, was one of the decisive factors in pushing services into the agenda of the *Uruguay Round*.⁶⁸

3.1.3 *Café au Lait*: the Gordian Knot Untied

In Narlikar's (2003) account, the rationale for the formation of the *Café au Lait* group was provided by the need to respond to the question whether to include services within the GATT. The *Café au Lait* group owes its existence to the 1982 *Ministerial Conference*: since initially there was no centralized mechanism to conduct exchange of information, some developing countries decided to join forces with industrialized nations and pursued this mandate informally. The Colombian Ambassador, Felipe Jaramillo, presided over the group's meetings.

There was no firewall between the *Café au Lait* group and the G-10: initially, the latter participated in the meetings organized by Ambassador Jaramillo, but over time stopped participating in the meetings, and proposed a draft *Ministerial Declaration* that made no mention of services.⁶⁹ In reaction to these events, the remaining participants in the Jaramillo process came together in the so-called G-20. The G-20 consisted of Bangladesh; Chile; Colombia; Côte d'Ivoire; Hong Kong China; Indonesia; Jamaica; Korea; Malaysia; Mexico; Pakistan; the Philippines; Romania; Singapore; Sri Lanka; Thailand; Turkey; Uruguay; Zambia; and Zaire. The G-20 liaised with the G-9, a group of developed countries composed of Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland. Under the leadership of Colombia and Switzerland, the group prepared a draft⁷⁰ which became the basis for the talks during the *Punta del Este Ministerial Conference*.

⁶⁸Paemen and Bentsch (1995), pp. 39ff. and 59ff. On US pressure, Gibbs and Mashayekhi (1991); Kasahara (2004).

⁶⁹Narlikar (2003).

⁷⁰GATT Doc. PREP.COM(86)W/47/Rev.2, dated 30 July 1986.

The Café au Lait group overcame the North-South divide, and in that it was unprecedented. It presented itself as a bridge-building coalition engaged in mediation-type diplomacy in the space provided by the extreme positions of the US and G-10.

3.1.4 Don't Cry for G-10, Argentina

Despite belonging to the G-10, Argentina proposed an alternative draft *Declaration* where 'services' was included in the agenda, but intellectual property and investment were not.⁷¹ What made Argentina change its mind? The country was definitely not the main target of *Section 301* initiatives by the US, so one could hardly make the argument that it bowed down to US pressure. Hamilton and Whalley (1988) offer the following explanation (p. 18):

Argentina, fearing implications for its agricultural interests in the round proposed a third draft which it hoped would bridge the gap between what had now become a solidly supported Swiss-Colombia proposal from the EFTA process and the G 10 text. The Chairman of the Preparatory Committee forwarded these three texts of a possible declaration to the Ministers at Punta del Este. However, the effort on the third text came too late and was not given serious consideration.

From a negotiating perspective, the link between services and agriculture made by Argentina was neither unique nor unreasonable (the EU had made the same link but for different reasons, as we saw *supra*).

3.1.5 End Game: Game On (on Separate Track)

The *Uruguay Round* agreements are often referred to in the literature as a *single undertaking*: this term was conceived as the antidote to the *GATT à la carte* approach that was privileged in the *Tokyo Round*, when trading nations could pick and choose the agreements that they wanted to join. The decision to initiate the negotiations on liberalization of trade in services was taken in *Punta del Este* in an *ad hoc*

⁷¹GATT Doc. PREP.COM (86)W/49 of July 30, 1986.

intergovernmental meeting, parallel to the session of the CONTRACTING PARTIES where a decision on a new round of negotiations on trade in goods in the GATT was simultaneously adopted.⁷² A separate track was the maximum Brazil and India could accept.⁷³ There were therefore two negotiating tracks: one on trade in goods, subject to the single undertaking (Part I of the Punta del Este Declaration), and another one on services, not formally subject to the single undertaking (Part II of the Punta del Este Declaration).⁷⁴

The G-10 countries unwillingly accepted the compromise, but were quick to point to the separation between the goods- and the services- negotiation, and tried to enforce this separation in the early stages of the round.⁷⁵ Paemen and Bentsch (1995, pp. 56ff.) conclude however that the attempt to separate the two negotiations (goods, services) failed the moment the *Punta del Este Declaration* was adopted.⁷⁶ This seems a reasonable conclusion: the inclusion of both issues in the same Ministerial

⁷² See Brazil's explanation of the two legally distinct negotiating processes in GATT Doc. MTN.GNS/W/3 at §4 and 5.

⁷³Randhawa (1987) at pp. 164ff.

⁷⁴ See Document GATT/1396, dated. 25 September 1986. Note that the other contentious new issues, TRIPs and TRIMs, were formally part of the single undertaking, since they had been included as part of the negotiations on trade in goods.

The TNC (*Trade Negotiations Committee*) would meet every six months and when meetings occurred in non-ministerial sessions it would be chaired by DG Dunkel. Three bodies were established and were hierarchically below the TNC: the GNS (*Group of Negotiations on Services*), the GNG (*Group of Negotiations on Goods*), and the SB (*Surveillance Body*). See Marconini (1990). The GNS held its first meeting on October 27, 1986 under the chairmanship of Ambassador F. Jaramillo (Colombia), see GATT Doc. MTN.GNS/1 of November 3, 1986.

⁷⁵ Explained by Brazil in document MTN.GNS/W/3. Shukla (2000, pp. 17ff.), the then Indian Ambassador, explains that, while Ministers were meeting in *Punta del Este*, secret negotiations were being held in Geneva between the EU, Brazil and India. The outcome of these negotiations was the *common working platform* which consisted of five elements: (i) legal separation of the two negotiating tracks; (ii) recognition of the development objective; (iii) commitment to respect national laws governing services; (iv) relationship between the outcomes of the two separate tracks should be kept open; (v) work of relevant international organizations should be taken into account.

⁷⁶McCulloch (1990, pp. 345-346) argues that the separation of the two tracks limits "the efficiency gains attainable through multilateral negotiations, and especially potential North-South agreements to make liberalization in labour-intensive manufactured goods in the North the quid pro quo for high technology and services liberalization in the South." See also Conconi and Perroni (2002).

Declaration, and the institutional link through the Trade Negotiations Committee (TNC) would remove *de facto* the pretended firewall between the two tracks.

3.2 From *Punta del Este* to Geneva: the Players

GATS services negotiators understood the mandate originating in the *Punta del Este Ministerial Declaration* as two-fold:

- (a) to establish a framework of principles and rules for trade in services;
- (b) to elaborate possible disciplines for individual sectors.⁷⁷

The US seems to be at the origin of this distinction. In its view, this issue was intimately linked to the relevance of GATT principles for trade in services: the general framework would thus encompass the GATT principles (that were judged relevant, preliminary at least), which would then be further developed to cater for sector specificities.⁷⁸

Besides the GNS, which was the main forum for negotiating on trade in services, and where all GATT contracting parties participated, the negotiators established *later on* a number of sectoral working groups which were meeting regularly and submitted periodically reports to the GNS.⁷⁹ These groups were: *labour mobility, construction and engineering services, maritime transport services, land transport services, air transport services, telecommunications services, and financial services (including insurance)*. Participation in all these groups was open to all UR participants.

3.2.1 The US

⁷⁷GATT Doc. MTN. GNS/3 of December 23, 1986.

⁷⁸Rivers, Slater and Paolini (1987) at pp. 23ff; Jackson (1988), (1993).

⁷⁹GATT Doc. MTN.GNS/36/Add. 1 of July 24, 1990.

The US wanted a meaningful comprehensive agreement in services: meaningful in terms of liberalization, and comprehensive in terms of sector coverage and participation.⁸⁰ Although the possibility for *variable geometry* was not totally excluded *ab initio*, the US wished to include all *Uruguay Round* participants in the negotiation and was to this effect, prepared to make concessions to *least developed countries* (LDCs) in order to facilitate their participation. It was opposed however to widespread *free riding* and was not prepared to extend this courtesy to developing countries that did not qualify as LDCs.⁸¹ The (eventual) GATS should, in the US view, be a multilateral agreement where everybody, except for the LDCs, would be requested to make a substantial liberalization effort.⁸²

3.2.2 The EU

The distribution of competences across the EU and its Member states was, as we alluded to *supra*, uncertain at the moment the *Uruguay Round* was launched. It was clarified at the end of the round, when the EU jointly requested an opinion from the *European Court of Justice* (ECJ) on this matter. Although sitting on the driver's seat, and acting *as if* it was fully competent, throughout the round the EU agent, the Commission, should be on a tight leash: its negotiating positions were not only *ex ante* decided but also *ex post* scrutinized by the EU Member states. *De facto* however, this does not seem to have been a major impediment.⁸³ Moreover, a positive external effect stemmed from the intra-EU distribution of competences: the common agent, the Commission, had to report back to 12 Member states with divergent interests. The EU delegates kept very comprehensive and detailed records of each and every

⁸⁰Self (1989). Hindley (1987) mentions that originally the US government toyed with the idea of concessions only in *non-factor services*, that is, services that can be supplied from a supplier in country A to a buyer in country B without relocation of either seller or buyer.

⁸¹Paemen and Bentsch (1995, pp. 132ff).

⁸²Berg (1987) at pp. 14ff.

⁸³ See Pou Serradell (2006) for an account of how the Commission was preparing *internally* for these negotiations.

discussion, participated in practically all meetings, and emerged as a key player in the negotiation.

The EU was in favour of a comprehensive agreement as well.⁸⁴ Its overall negotiating objective was to a considerable extent function of its willingness to preserve the CAP.

3.2.3 Other OECD

Apart from the US and the EU, the most active OECD countries were Australia, Canada, Japan, New Zealand, Sweden and Switzerland.⁸⁵ Other OECD countries with high stakes, notably the UK, would channel their interests through the EU Commission. They had more or less similar strategies: they were all in favour of including some specific sectors, while being adamant on excluding others. Unfortunately, their 'ins' and 'outs' were not identical and this was one of the factors that made the negotiation on MFN quite hard: if only the few sectors where everybody could agree to be part of the 'ins' had been included in the agreement, then the bite of (an eventual) MFN-discipline would have been severely curtailed.⁸⁶

3.2.4 Developing Countries

Developing countries were divided into two camps. On one side, the reluctant players, that is, those that believed that there was not much in these negotiations for them, and that saw no reason why the negotiation should take place in the first place.⁸⁷ Which services could they export to the rest of the world? They held that their competitive advantage was in goods, not in services.⁸⁸ And those services of

⁸⁴ von Dewitz (1987) at p. 479.

⁸⁵ See discussions at the Preparatory Committee, e.g. GATT document PREP.COM(86)3, dated 7 March 1986. Eventually all those that submitted "national service studies" can be considered as demandeurs.

⁸⁶ Canada, the EU, Japan, and the US were already meeting as 'Quadrilateral' and had already endorsed services negotiations in the GATT; while the OECD members had endorsed the inclusion of services in the coming round at a meeting held in April 1985. See Reyna (1993)..

⁸⁷ Gill (1988).

⁸⁸ Kierzkowski (1987), and Sapir (1987).

interest to them (like tourism) were liberalized anyway. They adopted a passive – if not obstructive – attitude towards the negotiation, at least early on.⁸⁹ Nobody better than the then Indian Ambassador Shukla to sum up the way they felt following the *Punta del Este Ministerial Declaration*:

In the negotiations that led to Punta del Este, developing countries were able to ensure that their concerns were taken into account in the following manner. First, the respect of the policy objectives behind national regulations was explicitly recognized in the Punta del Este mandate, which to a great extent alleviated the fears of developing countries. Second, development was stated as the ultimate goal of the negotiations, in other words whatever rules and disciplines were to emerge should promote the development of developing countries. Thus, the recognition of the development objective was to meet the concern that the element of equity could be ignored or inequity increased, as a result of the negotiations. Finally, the subject matter of the negotiations was defined as ‘trade in services’, which meant some kind of narrowing down of the scope of negotiations. If a broad coverage had been intended, the mandate would have been framed in terms of negotiations on services or negotiations on transactions of services. Instead, the Ministerial Declaration refers to trade, which is natural for a forum that basically deals with trade matters and not with the whole body of transactions that are associated with any economic activity. Those are the basic principles of the Punta del Este Declaration, which were designed to take care of the concerns of developing countries. It is interesting that the mandate does not speak of liberalization per se as the goal of negotiations. It aims at expansion of trade, not liberalization, of expansion of trade as an instrument for the growth of all trading partners and for the development of developing countries. That is the central goal of the multinational framework that must evolve.⁹⁰

On the other side there were the *Café au Lait* participants who, from the early stages, participated actively in the negotiating process. This group included such GATT members as Hong Kong China, who became over time an active participant in the services negotiations, vigorously supported by an organized CSI as of 1990.

3.2.5 The Various Coalitions

We have already made reference to the *Café au Lait* group and the crucial role it played in successfully unblocking the deadlock back in *Punta del Este*. The group

⁸⁹Randhawa (1988) noted that probably some developing countries feared a GATT-like approach to services which, in the eyes of developing countries, was not about equitable growth.

⁹⁰Shukla (1989) at p. 171.

survived in various versions –sometimes referred to as the *Friends of Services Group*– but had minimal visibility and minimal successes to its credit. It seems thus fair to conclude that the *Café au Lait* group was instrumental in launching the round but did not have much influence on the shaping of the GATS.

Besides this group, there were informal gatherings of delegations:

- (a) The *Rolle Group*, under the initiative of Meg McDonald (Australian delegate to the GATT), and composed of Australia, Canada, Hong Kong China, Hungary, Korea, New Zealand, Philippines, Singapore, Sweden, and Switzerland, with additional countries included at a later stage;
- (b) The *Hôtel de la Paix Group*, named after the famous lakeside hotel in Geneva, which was a gathering of services experts, and eventually of experts in financial services. Ambassadors Jaramillo and Pierre-Louis Girard (Switzerland) co-chaired this group.

3.2.6 The GATT Secretariat

The *GATT Secretariat* is a bureaucracy. Before the *Uruguay Round*, the GATT had developed a practice whereby working groups, like negotiating groups, would be chaired by a national delegate to the GATT. The *GATT Secretariat* would assist the chair and the groups in various ways, by preparing documents clarifying conceptual issues or ‘taking stock’ of the various opinions expressed, by reviewing the state of statistics regarding trade in services, and even by developing ideas about the shape of the agreement and providing definitions and drafting alternatives. In short: it was an active participant throughout the process.

It is worth recalling nevertheless, that, with few exceptions, there was hardly any embedded expertise, neither within national governments and delegations nor within international bureaucracies regarding trade in services in 1986. Unavoidably,

the participants in the process would enjoy more discretion than if they were negotiating disciplines on trade in goods, an area where embedded expertise was already substantial. This is not to say that political economy-type of considerations were un-important. It is lack of expertise in many national capitals that led to (more) reliance on the GATT Secretariat, and its staff. Moreover, for many countries, particularly developing ones, ideas presented by the GATT Secretariat were more palatable than the same ideas – no matter how reasonable – when presented by the EU, or the US, or the OECD. It was still members nonetheless that had the last word.

3.3 On the Way to Montreal (1986 – 1988): Houston, We Have a Problem

Negotiations went through many ups and downs. Schematically, this is where countries stood at *Punta del Este*:

	Developed countries	Café au Lait	G-10
Framework	GATT	GATT	Non-GATT
Agreement's sectoral coverage	Full	Full	Partial
Liberalization level	Substantial	Substantial	Limited

By the end of the round, the compromise reached by *Uruguay Round* participants, which also reflects the more complex dimensions that characterized the negotiations, could be summarized as follows:

	Developed countries	Developing countries
Framework	WTO (new)	WTO (new)
Agreement's sectoral coverage	Full	Full

Liberalization obligations	Progressive	Progressive
Liberalization level (bindings)	Substantial	Limited

Trading partners struggled during the initial phase of the negotiation, roughly between *Punta del Este* and mid-1988. The early phase aimed at providing negotiators with information necessary to help them understand the intricacies of trade in services and what was really at stake. They had an imperfect compass to help them navigate through uncharted territory:

- (a) it was clear that the development of the framework, and the ensuing negotiations, could not be supported by reliable and systematic data on trade in services, which was missing;
- (b) very little could be learned from other international agreements in the area of services that, due to their specific nature, were not concerned with trade liberalization;
- (c) GATT principles and concepts, such as transparency of regulations, National Treatment (NT), Most-favoured-nation (MFN), safeguards, exceptions, were considered useful and potentially applicable to a future agreement on trade in services, although it was not clear how and to what extent;
- (d) In discussing the definition and classification of services, as well as the possible sectoral coverage of the agreement, *Uruguay Round* participants came to realize that the future agreement should acknowledge, one way or another, the specific nature of services, either by including a definition of services, or by identifying different ways of delivering services (including through the movement of consumers, or through commercial presence of suppliers abroad).

Under the circumstances, it is only normal that the negotiators spent the first couple of years of the negotiation educating themselves rather than doing anything else. By September 1988, the discussion on the issues (particularly on definitions) was at best abstract or academic.⁹¹ Still, Jaramillo (1989) noted that the first two years were not lost years at all: indeed, substantial progress had been made in two respects: delegations submitted proposals evidencing their interests, and some issues were clarified.⁹²

During this phase we can observe the negotiating patterns of the two groups:

- (a) developed countries wished to bring in place an elaborate framework whereby all, *in principle*, services sectors will be included;
- (b) developing countries adopted a more defensive strategy: they wished to negotiate on few services, preferably those of their own export interest, and to keep under national control the regulation of whatever sector they consider of national interest. They feared that some sectors, such as financial services, education, etc. could escape their control if they became part of the liberalization game and the voices in favour of a negative integration-type of contract did not persuade them of the opposite.

A rather unfortunate initiative of the developed countries did not help narrow down the gap between them and developing countries. A 1987 study prepared by the OECD, entitled *Elements of a Conceptual Framework for Trade in Services*, was submitted for consideration to the GATT. It was thwarted immediately by developing countries, only because it had been prepared by the OECD and, consequently, they had had no opportunity to debate it and negotiate it.

⁹¹GATT Doc. MTN.GNS/17 at §§40, and 44.

⁹²Jaramillo (1989, p. 164).

Negotiations should start from a clean slate, not from an OECD dictum, in their view.⁹³

It is worth noting that the GATT Secretariat, through DG Dunkel, argued quite explicitly in favour of the involvement of business in the negotiations from early on. DG Dunkel understood that business was a natural ally since its interests lay in the fast resolution of the round and the liberalization of trade. This was particularly the case in the context of services.⁹⁴

3.4 The Montreal Ministerial Conference (1988): Mid Term Review

As became the GATT practice, half way through the round (or around that time) negotiators would meet to take stock of the progress made and agree on whatever needed to be done in order to complete the negotiations. The text that was submitted to the meeting was heavily bracketed⁹⁵ to the point that Yeutter, the USTR, was quoted stating that it was "the worst I've ever seen coming to a ministerial meeting".⁹⁶

Montreal was more the phase of the negotiation where the negotiation itself had to be maintained. Unfortunately, the US adopted a hard, uncompromising line, and developing countries refused to give in. The EU essentially saw itself as mediator between the US on the one hand and developing countries on the other. Paemen⁹⁷ and Bentsch (1995) refer to a 'secret' meeting where delegates from the EU, Sweden and a host of developing countries (Argentina, Brazil, Egypt, India, and Jamaica)

⁹³Those arguing for the transposition of the OECD MAI (*Multilateral Agreement on Investment*) to the WTO some years later would have done themselves and the negotiations on trade and investment a favour had they studied this episode and drawn the appropriate conclusions.

⁹⁴GATT Doc. GATT/1407 of February 11, 1987.

⁹⁵ By GATT custom, a bracketed text signals disagreements among participants.

⁹⁶Capling (2001) at p. 156.

⁹⁷Hugo Paemen, a high EU Commission official, was one of the leading EU negotiators during the *Uruguay Round*.

participated and produced what came to be known as the *weekend text*.⁹⁸ This text formed the basis of the *Montreal Declaration*.⁹⁹

The language of this document is hortatory, calling for extra efforts, agreements to continue studying particular questions, and identifying a list of principles (such as transparency, progressive liberalization, etc.) that were considered relevant and, consequently, would constitute the focus of the upcoming negotiation. And yet – politically – something had been achieved: the number of paragraphs dedicated to trade in services (compared to the *en passant* references in the *Punta del Este* Declaration) was evidence that the negotiation was there to stay and that there should be no doubt as to the resolve of the trading nations to go ahead with it; then, there was the resolve not to leave, in principle at least, any sector outside the realm of the negotiation; and finally, the idea emerged to first negotiate in adequate detail the general framework (which started to take shape) before moving to discussing the *initial liberalization commitments*, i.e. the GATS concessions.

3.5 Montreal-July Text: a Glimpse of Sunshine

The main issues confronting negotiators were the following:

- (a) should the negotiation be limited to the provisions that would form an integral part of the general framework, or, should *initial liberalization commitments* be negotiated?;
- (b) whether the *negative list*- or the *positive list* approach would ultimately carry the day;
- (c) the manner in which the *initial liberalization commitments* would be entered (following the quick decision to reject a proposal by developing countries to limit the pre-Round negotiations to the shaping of the general framework). In

⁹⁸Marconini (1990).

⁹⁹GATT Doc. MTN/TNC/7(MIN) of December 9, 1988; Reyna (1993 pp. 49ff.).

this context, two questions emerged as the basic issues: *first*, the manner in which the *initial liberalization commitments* would be entered, that is, the subject-matter of what was eventually termed *specific commitments*; second, the manner in which services would be traded under the (eventual) GATS, that is, the *modes of supply*;

- (d) the applicability of GATT principles (such as NT, MFN, etc.) to trade in specific sectors (telecoms, construction, transport, tourism, professional, and financial services), for which the GATT Secretariat had been asked to prepare background papers to facilitate such assessment.¹⁰⁰

The TNC met in April 1990, that is, four months after the Montreal meeting. Between April and July 1990, the so-called *July Text* was prepared and circulated.¹⁰¹ The *July Text* is very interesting in several respects:

- (a) it is made clear that the general obligations will bind the discretion of signatories with respect to all services covered, irrespective whether a specific commitment has been entered;
- (b) specific commitments could be made not only with regard to market access and national treatment, but also with regard to "any other provisions to be decided upon";
- (c) the text hints at the existence of four "modes of delivery", as they used to be identified at the time, instead of "modes of supply" that was privileged later;
- (d) the provision on Domestic Regulation imposes a necessity requirement with respect to requirements such as standards and qualifications;
- (e) a framework is put into place with respect to *restrictive business practices* (RBPs), which requires parties to provide information (upon request) about their own domestic economic operators whenever warranted;

¹⁰⁰GATT Doc. MTN.TNC/13 of January 23, 1990.

¹⁰¹GATT Doc. MTN.GNS/35 of July 23, 1990.

Although the *July Text* was presented as a "clean" text, it was clear, as indicated by Ambassador Jaramillo in his introductory note, that several key issues remained unresolved. Chief among them were the coverage (which was presented as universal in the text but where some delegations favoured the possibility of excluding sectors from the agreement's coverage); MFN and market access (where there were still proposals related to conditional MFN, relative reciprocity, or reciprocal market access); and the negotiation and application of specific commitments (where some delegations have taken the position that there should be a baseline for the future liberalization process).

3.6 From the *July Text* to the Brussels Meeting (December 1990): Early Winter

Based essentially on the *July Text*, another text was prepared and formally submitted to all trading partners when they met in Brussels (*Brussels Ministerial Conference*).¹⁰² The text was substantially *bracketed* but still, even within brackets, it provided a meaningful basis for the GATS general framework. The *Brussels text* contained 35 provisions (just like the *July Text*). Basically all the GATS provisions as we now know them, albeit not *verbatim* identical, are *thematically* there:

- (a) the four modes of supply were already mentioned in Art. I of the text;¹⁰³
- (b) the exclusion of *services supplied in the exercise of governmental functions* (now "governmental authority") appeared for the first time;
- (c) the provisions on increasing participation of developing countries were beefed up;
- (d) a provision on recognition and harmonization of regulations made its way to the text for the first time;

¹⁰²GATT Doc. MTN.TNC/W/35/Rev.1, Annex II of December 3, 1990.

¹⁰³Self and Zutshi (2003) at p.33.

- (e) specific negotiating mandates were drafted for safeguards and government procurement; and
- (f) provisions on the modification of schedules and dispute settlement were included.

The issues however that remained open in the *July Text* were not resolved in Brussels either; chief among them, MFN. It was in Brussels that the US backed definitively away from unconditional MFN, probably following pressure to this effect by Jack Valenti, the most important US lobbyist in the audiovisual sector, who was representing the Hollywood based *Motion Picture Industry Association* (MPIA).

The Brussels meeting failed over disagreements regarding the transformation of the EU CAP. Failure to agree on farm issues *ipso facto* led to general failure. The doom and gloom was back in Geneva.

3.7 From Brussels to Geneva: *the Dunkel Draft*

At the same time,¹⁰⁴ negotiations in the GNS-context continued: the so-called *Room B* meetings¹⁰⁵ multiplied and it is there that delegations attempted once again to iron out their differences and hammer out the GATS general framework. The meetings were of course open to all GATT contracting parties. Only some of them were physically present almost every time (Australia; Bangladesh; Brazil; Canada; Chile; Colombia; Egypt; the EU; Hong Kong; India; Japan; Korea; Malaysia; Mexico; New Zealand; Singapore; Sweden; Switzerland; Tanzania; Uruguay; and the US).¹⁰⁶

¹⁰⁴GATT Doc. MTN.TNC/19 of March 1, 1991.

¹⁰⁵Room B is one of the meeting rooms in Geneva.

¹⁰⁶ While Room B would normally host delegates with technical expertise on the issue, so-called 'Green Room' meetings (named after the GATT DG's meeting room) would be convened and chaired by DG Dunkel (as chair of the TNC), and only selected Ambassadors would participate. 'Green room' meetings were essentially of political nature.

As in any negotiation, but particularly in services where new ground had to be broken, personalities played a key role. At the risk of being unfair to others, it is clear that three delegates almost monopolized the negotiations between the Brussels Ministerial Conference and the preparation of the *Dunkel Draft*: Jonathan Scheele (EU, stationed in Brussels), Richard Self (US, originally stationed in Washington and later on in Geneva), and B.K. Zutshi (Indian Ambassador to the GATT). They frequently met among them and with the Secretariat, and together managed to produce a number of drafts for various key provisions that would ultimately be included in the *Dunkel Draft*.¹⁰⁷

Based on input from the *confessionals*, as well as (some) progress made in the *Room B* meetings, DG Dunkel, put together a text which, its limited legal value notwithstanding, provided – content-wise – the basis for the eventual agreement. This text, which was part of a larger draft encompassing all issues under negotiation, came to be known as the *Dunkel Draft*.¹⁰⁸

It should be underscored that DG Dunkel did not think of services as a ground-breaker. From a moment onwards during the negotiations, he decided to chair himself the negotiating groups on Agriculture and on Textiles, obviously holding the view that these two groups held the key to the successful conclusion of the *Uruguay Round*. The *Dunkel Draft* came amidst disagreements across the trading nations and following the Brussels failure. Interestingly, the text contained no brackets. Nevertheless, the negotiation on services still had to go through some rough passages. Two important reasons help explain why:

¹⁰⁷Brazil was concentrating in the goods negotiations, and India became the leading developing country in the services-negotiation.

¹⁰⁸GATT Doc. MTN.TNC/W/FA of December 20, 1991, (hereinafter ‘the *Dunkel Draft*’); Hart (2002, p. 414).

- (a) *first*, the absence of brackets was not tantamount to agreement between the players. This is how DG Dunkel conceived the process: based on the confessionals and the ongoing negotiations in Rooms B and F, he requested the various Chairs of negotiating groups to put together a text without brackets.¹⁰⁹ Absence of brackets could be either the outcome of negotiations (and therefore the reflection of a consensus among the parties), or simply, in the absence of consensus, upon Dunkel's request, the personal view of the Chair regarding a particular provision. In the case of services, it would be in fact the view of two chairs, because, since April 1991, Ambassador Jaramillo had been assisted in his tasks by Ambassador David Hawes (Australia), who became a sort of co-chair of the GNS, and succeeding Jaramillo when the latter left Geneva¹¹⁰;
- (b) *second*, the change in US attitude, and its decision to exclude maritime transport from the purview of the agreement and to take MFN exemptions in some key sectors (financial services; basic telecoms; air transport), also pushed negotiations into a bumpy road.¹¹¹ And of course, the big brother (farm negotiations) was not that far behind: more than ever before, services was not a self-contained negotiation: the failure in the *Dunkel Draft* to bridge the gap in farm negotiations led to additional negotiating time. Still, the services part of the *Dunkel Draft* looks very much like the eventual GATS.

DG Dunkel did the multilateral system a service by sticking out his neck and signing a text which was approved by him (and his close staff) but not necessarily by all delegates participating in the negotiations. The text represented a compromise that, in Dunkel's view, could carry the day. It should be noted here that little substance was added to the *Dunkel Draft* in subsequent negotiations. The GATS as we now know it largely reproduces this text. At the TNC meeting when the document was

¹⁰⁹ F is a meeting similar to B, where small-sized meetings are usually held.

¹¹⁰ See GATT document MTN.GNS/41, dated 6 May 1991.

¹¹¹ Reyna (1993) at pp. 79ff.

presented, it became clear that his text would not be the final word of the negotiators on the Uruguay Round.¹¹²

3.8 The Gavel Goes Down (the Train Has Now Left the Station)

Eventually, and after some self-imposed (unrealistic) deadlines had been passed, following a trade-off between EU concessions in the farm sector and US additional opening of its services market,¹¹³ together with new offers from developing countries in some sectors, the agreement on services was concluded. The new DG, Peter D. Sutherland, played an important role in bringing the overall UR package to a successful conclusion.¹¹⁴

The successful conclusion was not without some late friction though: the EU, surprisingly for many, changed its attitude on maritime transport days before the final agreement, requesting now exclusion of this sector from the package. The rationale for this change of heart had to do with the EU disagreements with the US regarding the extent of *cabotage*: according to the EU, the US opted for a very expansive understanding of the term, making it impossible to successfully negotiate a compromise. This led services negotiators back to the room where the *Annex on Negotiations on Maritime Transport Services* was finally concluded. For all practical purposes, negotiations on maritime transport were postponed for a later day, that is, after the entry into force of the *Uruguay Round* package. It was thanks to this final compromise that was reportedly achieved one hour before the gavel in the hands of Peter D. Sutherland marking the end of the round went down, that the GATS had been finally agreed.¹¹⁵

¹¹²GATT Doc. MTN.TNC/25 of February 5, 1992 at pp. 31-33.

¹¹³EC *Hints at Agriculture Compromise Linked to US Action on Services*, Daily Report for Executives (BNA), May 5, 1992 at A-1.

¹¹⁴GATT Doc. NUR 077 of November 26, 1993.

¹¹⁵Roger Cohen, *The World Trade Agreement: The Turning Point; A Call from Clinton, and Then a Deal*, The New York Times, December 16, 1993.

4 Property Rights on the GATS

4.1 No Gang of Four, Yet All Four Have Been Quite Influential

In what follows, we trace the impact that four trading partners (Brazil, the EU, India, and the US) had on the negotiations and on particular features of the GATS. The four made 42 out of a total of 95 proposals submitted to GNS during the Uruguay Round, that is, more than 44% of all proposals. These numbers need some explanation:

- (a) these numbers correspond to *all* proposals submitted by UR participants, irrespective of whether they concerned the general framework (including, for example, communications on statistics), or sectoral negotiations;
- (b) it is further irrelevant whether the proposals were made by individual nations, or whether they were joint proposals. In the latter case we will credit all co-sponsors;
- (c) we do not count revisions, addenda and corrigenda to original proposals, since they did not anything substantive in our view.

It is probably inaccurate to state that all proposals were equally influential. It could be the case that the 42 proposals we chose to review in detail proved to be non-influential. This is why we entered a second criterion, that is, the parallelism in subject-matter between the proposal and the final provision of the GATS: participation (measured by the number of proposals) is a necessary but not a sufficient condition for influence; parallelism of subject-matter moves us closer to our objective.

We should note that the four cannot be credited with influencing decisively each and every provision of the GATS. This was not the case. On the one hand, other participants also submitted several communications at various stages of the negotiating process (e.g. the Nordic countries, Japan, Australia, Canada, Mexico,

Switzerland) and some of the ideas put forward may have found their way to the final text (it is not easy to identify 'who' was the first one to throw up an idea). On the other hand, some other proposals, even if they ended up in the final text, were, in our view at least, of marginal interest: for example, it is the Nordic countries that should be credited with the paternity (or maternity) of Art. *Vbis* of the GATS, which however, is not central to the GATS framework.

The alliance forged by Brazil and India before the UR, and reflected primarily in the G-10, was mainly political. It continued once the negotiation was launched, but it was clear that their approaches and commercial interests diverged. Interestingly, once the UR was launched, Brazil and India never submitted a joint proposal. For example, in 1989, with only three weeks of difference, both of them submitted communications outlining the main elements for a services agreement: while the Brazilian one was more rhetoric, the Indian one was more pragmatic and reflected a more elaborate idea of the main elements to be included in the framework.¹¹⁶

4.2 Brazil

It is probably fair to state that Brazil “frontloaded” most of its negotiating effort: it spent a lot of negotiating capital in, first, trying to stop any discussion on services, then (when the first strategy did not work out) trying to impose a ‘firewall’ between the negotiations on goods and services, then, insisting on focusing on definitions, concepts, and statistics, and, finally, trying to limit the negotiating agenda to few items and trying to get as much flexibility as possible as a developing country. Wahrendorff (1998) discusses the Brazilian participation in the *Uruguay Round* focusing on services negotiations. He notes a clear opposition initially to negotiate services, followed by a change in attitude after 1988 (Montreal) which allowed Brazil

¹¹⁶ See GATT document MTN.GNS/W/86, Communication from Brazil, dated 21 November 1989, and document MTN.GNS/W/87, Communication from India, 13 December 1989.

to become more cooperative, and thus enabled the conclusion of the agreement, without however notably influencing the shaping of the agreement. In other words, it was very important politically, due to its influence on other developing countries, but not a mastermind of the agreement.

Wahrendorff (1998) attributes the change in attitude to three factors:

- (a) *First*, some anti-globalization hardliners lost their privileges;
- (b) *second*, the threat of unilateral action by the US, which, as we noted *supra*, was quite serious, and made it increasingly necessary to have a multilateral deal covering services; and
- (c) *third*, a change in key personnel. Ambassador *Paulo Batista* headed the Brazilian delegation early on, and was sceptical of the GATT –he called it, like many others, ‘a rich men’s club’. *Batista* was a friend of G-10, indeed the mentor of this group, in Wahrendorff’s view.¹¹⁷ He was replaced in 1989 by Ambassador *Rubens Ricupero*, a multilateralist who believed in trade cooperation.¹¹⁸

Brazil probably understood, after some point in time, that its position regarding a firewall between the negotiation on goods and that on services was water under the bridge. Hence, the potential for trade-offs was there and Brazil could profit along with all the other trading nations that engaged in this practice: it could, for example, offer opening up of its services market in return for the opening up of the farm markets of the OECD countries. It tried however to ensure that the negotiation on services kept a very narrow focus, limited only to the development of a framework

¹¹⁷ The G-10 was, as discussed earlier in this paper, a group of developing countries, quite influential in the Uruguay Round, which focused on opening up OECD markets on textiles and farm goods while being hostile to a services negotiation.

¹¹⁸Preeg (1995) at pp. 44ff.

of rules and principles, and leaving actual liberalization to be achieved very progressively in future rounds of negotiations.¹¹⁹

Hoekman (1995) suggests that there are anyway only a few provisions in the GATS of particular interest to developing countries: transparency (Art. III GATS); increasing participation of developing countries (Art. IV GATS); subsidies (Art. XV GATS); and progressive liberalization (Art. XIX GATS). Brazil tried its hand with respect to each one of them and specifically supported provisions regarding *increasing participation of developing countries*, MFN, NT, exceptions from the main obligations, safeguards, and transparency; and stressed the importance of progressive liberalization as an overarching principle.¹²⁰ It was also clear from its perspective, that the new agreement should be a negative integration-scheme, that is, policies should be unilaterally defined and to the extent that they exhibited (negative) international external effects, the agreement's disciplines should come into play.¹²¹

4.3 EU

Taking a rather long term perspective starting in the 1970s, it is probably fair to conclude that the EU was not as instrumental in preparing the ground for the services negotiations as the US. However, the EU was indeed instrumental in shaping the final agreement, probably benefiting from an extremely effective international bureaucracy, namely the EU Commission.

¹¹⁹GATT Doc. MTN.GNS/W/86, and MTN.GNS/27 at §12.

¹²⁰GATT Doc. MTN.GNS/W/48 of October 19, 1988, and MTN.GNS/W/86.

¹²¹Developing countries insisted a lot on a provision that would discipline RBPs, because they feared that most services suppliers were multinational corporations with substantial bargaining power, GATT Doc. MTN.GNS/W/99 of April 25, 1990.

The EU's hand can be traced in all key provisions of the GATS, such as the four modes of supply, the exception for services supplied in the exercise of governmental authority, domestic regulation, NT, the modification of schedules, transparency, and even sectoral disciplines, such as the Annex on Financial Services.¹²² Moreover, throughout the process, the EU appeared as more forthcoming about developing countries' positions, willing to work through the drafting to accommodate their concerns. This eventually translated, for example, in the GATS distinction between general obligations (applicable to all service sectors) and specific commitments on market access and national treatment (applicable only to sectors specifically chosen and identified by the country concerned), which was in the interest of both developing countries (who wished to open service sectors and make commitments gradually) and the EU itself, who faces conflicts of competence between the Commission and the Member States regarding services.¹²³ The EU was quite vocal on institutional issues as well, such as dispute settlement.¹²⁴

Being one of the most prominent service exporters, the EU was in favour of a comprehensive agreement. The only sector that the EU wanted to exclude from liberalization commitments was the audiovisual sector.¹²⁵ The dispute between the EU and the US over audiovisual services, which was resolved only a couple of days before the conclusion of the UR, proved to be the Round's deal-breaker or deal-maker, even more than agriculture, where difficulties had been resolved a few days earlier in December 1993. The stakes were so high that probably the fate of maritime transport services in the UR (and later on in the WTO) owes a great deal to the dispute regarding audiovisual services.¹²⁶

¹²²GATT Doc. MTN.GNS/W/65 of July 20, 1989.

¹²³ The situation persists today, and has decisively influenced the model followed by the EU for its preferential trade agreements covering services trade, which in all cases follow the GATS model.

¹²⁴GATT Doc. MTN.GNS/34 of July 16, 1990 at §§21ff.

¹²⁵ The French (Balladur) government was the main force behind this EU stance.

¹²⁶ Although there is very little formal documentation, it seems that both sectors were actually traded-off by the EU and the US. According to media reports at the time (Chol, 1993), both parties had envisaged an agreement early in 1993: the US, who feared opening up the heavily protected maritime transport sector seemed to have

4.4 India

India's original position was symmetric to Brazil's.¹²⁷ Its strategy evolved along the following lines: it would concede *right to establishment* (within bounds) if it could extract a promise on movement of labour force. This is what Indian delegates termed symmetric treatment of labour and capital under the GATS. As the Indian negotiator, Ambassador Zutshi, stated in a publication some years after the end of the negotiation, India, through negotiation of meaningful commitments on the movement of physical persons, wanted thus, to establish "the principle of parity/symmetry in the treatment of capital and labor".¹²⁸

India pushed hard during the negotiations for the inclusion of an Annex on the movement of physical persons. Along with other developing countries (Argentina, Colombia, Cuba, Egypt, Mexico, Pakistan, and Peru) India submitted a very elaborate framework to facilitate movement of natural persons.¹²⁹ Although the final compromise (the current *Annex on Movement of Natural Persons Supplying Services under the Agreement*) falls short in comparison to the Indian proposal, there should be no doubt that it was agreed largely because of the Indian push. India was one of the leaders in the request to avoid a *special and differential (S&D) treatment* -type of provision (*à la* GATT) into the GATS text. India (like many developing countries) thought that the GATT *S&D treatment* provisions (the 1980 Decision)¹³⁰ was an after-thought. As such, it did not influence the functionality and the understanding of the

accepted that the EU escaped commitments on audiovisual services. A kind of pact of non-aggression. However, the American audiovisual lobbies and the European maritime ones profited from the delay in concluding the Round to put up pressure on their respective governments, calling this deal into question. In a very detailed account, Véron (1999) explains how negotiations between USTR Kantor and EU Commissioner Brittan evolved in December 1993, concluding that "[o]n December 13, Brittan signalled that the EC was ready to trade a standstill on audio-visual legislation against the same commitment by the US on maritime transport".

¹²⁷GATT Doc. MTN.GNS/W/4 of March 11, 1987.

¹²⁸Self and Zutshi (2003) at p. 31.

¹²⁹GATT Doc. MTN.GNS/W/106 of June 18, 1990.

¹³⁰Mavroidis (2007).

basic GATT institutions. In the case of the GATS then, India and other developing countries (including Brazil) wanted to see the concerns of developing countries embedded in as many provisions as possible – these concerns should permeate the GATS text. From that perspective, not only Art.IV of the GATS is owed to that position championed by India, but also Art.XIX on Progressive Liberalization, and more generally, the gradual – positive list – approach to making liberalization commitments.

4.5 US

It is probably fair to state that the US influenced each and every GATS provision. The US had in mind an investment-type of agreement.¹³¹ Besides, it wanted a comprehensive and meaningful negotiation: no sectors should *ab initio* be excluded, and liberalization should be generated through the negotiation. The US was the first GATT contracting party that tabled a comprehensive draft intended to serve as the basis for concluding an agreement.¹³² Following heavy lobbying by specific groups, the US decisively influenced the timing and outcome of negotiations for key sectors such as maritime transport, financial services, and basic telecoms.¹³³ It was very much the US position that led to the extension of negotiations on these three sectors. In the case of financial services, the main reason was the US dissatisfaction with the level of liberalization offered by developing country partners, and the consequent

¹³¹Sauvé (1997).

¹³²GATT Doc. NUR032 of November 21, 1989.

¹³³ It is quite ironic to see in retrospect that the services sector that gave a *raison d'être* to negotiations towards a services agreement – financial services – could have eventually ended up outside the GATS coverage. The 'driver' behind each of those positions were different though: the industry was the one pushing for a trade agreement to include financial services in the late 1970s-early 1980s, but it was the US Treasury towards 1990 (and even until 1992) who toyed with the idea of excluding the sector from the GATS coverage, with a view to concluding a separate agreement on financial services. The most persuasive explanation of the US stance in this context has to do with intra-agency distribution of competences: the US Treasury, who was responsible in the US Administration for negotiations on banking and securities, did not want to give up the sector to trade negotiators and trade fora (the USTR traditionally being responsible for negotiations on trade in insurance services). However, the U.S. was not alone: many other Finance ministries (particularly in developed countries) were of the same mind, and had no more interest in trading off financial services commitments for other things than did the US Treasury.

fear that the latter would free ride on the already open US financial market. Likewise, the US position on basic telecoms was not motivated by unwillingness to change domestic laws but rather by the genuine dissatisfaction with the offers made by its trading nations.¹³⁴ The US had to fight a battle on taxation: the consistency of its sub-federal taxes with the principle of non-discrimination was questionable, and, as with maritime transport, the US was unwilling to amend domestic laws.¹³⁵ And finally, recall that the initial US model (an investment treaty, that is, a top down approach where everything in principle should be covered and liberalized unless subsequently excluded through negotiations) was dismissed by the rest of the GATT membership.

MFN was a key hurdle for the US, who did not give up on it until it obtained the possibility of filing MFN exemptions, of which it made wide use. It is unwarranted however to treat the US stance on MFN in the same way irrespective of the sector involved. It had been largely the financial services and telecommunications industries who opposed MFN as an automatic right. The telecommunication companies had a strategic concern: the US was the only country at the time that permitted competition in long-distance telephone services. An MFN obligation in telecom by the US would have permitted other countries' monopolies to compete with the US private operators in the US market with no corresponding opportunities for the US companies to operate in monopoly markets. Here the American argument was simply that there could not be MFN for this sector without market access. The US requested then the exclusion of basic services, not value added telecom services, where there was more global openness. The extended negotiations were made possible by policy shifts that had been brewing for several years in the EU and a

¹³⁴*Global Telecommunications Talks at Critical Stage, an Interview with Ambassador Jeffery Lang, Deputy USTR, Economic Perspectives, April 1996, pp. 5-7. See also Naftel and Spiwak (2000) at pp. 102ff.*

¹³⁵GATT Doc. MTN.GNS/W/227 of December 8, 1993. Deputy Secretary Larry Summers visited Geneva during this period and press for the exclusion of discussion on taxation from the *Uruguay Round* package. Art. XIV(d)-(e) GATS is tailor-made for the US.

number of other countries. This formed the basis for the extended negotiations on basic telecommunications, which have unquestionably been the most successful so far.

In the case of financial services, the US had a *de facto* MFN policy at work when it came to admitting foreign financial institutions. For the banking industry--but also securities--it was all about not getting enough market access (in foreign markets) out of the negotiations, particularly after the so-called "hybrid" approach to scheduling was finally resolved late in 1989. The US had held strongly to the negative list approach for sector coverage and commitments throughout the period preceding that decision, largely because of financial services. "Progressive liberalization" meant only one thing to them: continued protection in other markets. And the framework of rules and principles meant little, absent commitments to market access. This is the best example of some early enthusiasts turning sour on including services in the trade rules. This changed after the extended negotiations, which were successfully concluded in December 1997, but it stuck during the life of the *Uruguay Round*.

The US position on maritime transport services, certainly defensive, was not only dictated by the Jones Act and *cabotage* rights, something that could probably have been reserved, but also by the wish to avail itself of the right to use unilateral action provided by US statutes to address unfair trade practices abroad. Indeed, not long after the conclusion of the round, the US took action against Japan's unfair port practices that made shipping to that country unprofitable. While the US shipping industry carried its brief out in a particularly belligerent way (with lots of pressure from the US Congress on the US negotiators), the fact is that the only delegation willing to put anything on the table was the EU.¹³⁶

¹³⁶ For the USTR, maritime was simply a write-off, and its very public position in this regard was later to be exploited by the EU in the end game of the Uruguay Round, even after, as we saw earlier, USTR Kantor submitted an offer in maritime in exchange for commitments from the EU in audiovisual services.

In the case of air transport services, the notion of MFN as an applicable principle to the principal aspects of operation (i.e. landing rights and "soft" rights) was a non-starter for just about every delegation. Market access for this sector had been negotiated on the basis of *reciprocity* since 1947 under the rules of the *Chicago Convention*. The only delegation that was willing to forego these rules was New Zealand. Although the Americans took the initiative to exclude most of this sector from the GATS coverage (and therefore from MFN), virtually everyone was on the same page here. The absence of any meaningful debate over this issue is the best proof of this conclusion.

5 Concluding Remarks

There is no point in repeating the formidable task that the negotiation of the GATS represented, a point that has been time and again made in literature.¹³⁷ Suffice to underscore two elements here:

- (a) this was no group of like minded countries (like, more or less, the group of countries that originally negotiated the GATT). The participants had diametrically opposite views even with respect to basic issues, such as the usefulness of a multilateral regulatory framework (particularly in the early stages of the process); and
- (b) the issue as such is quite complicated. Over sixty years of GATT case-law show that even nowadays it is sometimes a quixotic test to disentangle non-discrimination from deregulation. This is very much the heart of the matter in the services context and it was not at all an enviable task for negotiators to come up with a workable notion of a barrier to trade in services, and moreover, a workable framework of rules and disciplines.

¹³⁷Feketekuty (2000) is but one example.

With this in mind, let us add one caveat before we discuss our main findings: we are not pronouncing on the reasons that led to the successful conclusion of the GATS. Indeed, this could be for reasons exogenous to our subject-matter. What we care about is how the GATS unfolded and what lessons can be drawn from this negotiation.

With this in mind, we present the main findings of our work, which are as follows:

First, the issue of the forum should not be taken for granted. It is quite clear that in the mind of the US at least, and the EU later, it should be the GATT.¹³⁸ There is not one single developed country that argued otherwise. Developing countries however, eventually wanted to find a new home for the services agreement. It is probably the realization that trade-offs between (offers in) services and (requests in) goods that persuaded them to change course.

Second, although dividing lines across developed and developing nations were quite clear in the pre-negotiation phase (when every attempt by the US to move the ball ahead was being consistently blocked), they became less of an issue already at *Punta del Este*. It was largely thanks to the efforts of the *Café au Lait* group, a heterogeneous group of countries that the deadlock was overcome. Although this group did not manage to keep its momentum in the subsequent phases of the negotiation, it should be credited with substantially contributing to launch the first multilateral round on services.

Third, for some developing countries, it was ideology that dictated the negotiated attitude (initially at least for some, e.g. India, and for much of the duration of the round for others, e.g. Brazil). Developed countries were driven

¹³⁸ The GATT as an 'institution'.

essentially by political economy-type of considerations, with powerful lobbies making specific requests that often found their way into the final compromise. It is difficult to measure the resistance of ideology- and political economy-based positions. We would tend to believe though that, other things equal, it is easier to curb the former than the latter.

Fourth, this was no time for exemplary statesmen like the post World War II period that saw the establishment of institutions such as the UN, the World Bank, the IMF, and closer to our discussion, the GATT. The study by Irwin *et al.* (2008) shows that individuals that marked the post World War II construction of international cooperation were behind a trade agreement as well. The (would-be) Economics Nobel Prize winner James Meade was an active member of the UK delegation, as was the reputed economics professor Lionel Robbins, and the French philosopher Alexandre Kojève. The eighties was a different world. It was modern bureaucracies that drove the negotiation forward, and domestic inter-agency battles (like the one between USTR and US Treasury on financial services) had important repercussions on the shaping of the negotiating agenda and the eventual compromise.¹³⁹

Fifth, the architecture of the agreement, as well as the majority of the principles and rules contained there-in (e.g. market access, domestic regulation), were the brainchild of proposals by developed nations, notably the US and to a lesser extent the EU. This was probably due to two facts: developing countries took a long time before they became interested and involved in the issue. When they did, they were quite influential (e.g. India on Mode 4, and India and others on flexibility), but by that time they had to concentrate on specific issues and it was too late to put into question everything. On the other hand, developed countries had much more

¹³⁹GATT Doc. MTN.TNC/INF/1 of October 27, 1986.

experience in regulating their domestic services markets, and some of them (essentially, the EU and the US) were also more experienced in negotiating international agreements in this area.

Sixth, the US provided the impetus to sign the agreement, and the EU in fine-tuning it. In a way, the *Uruguay Round* in this respect was not exceptional when compared to previous rounds: it is another version of US idealism against (or complemented by) EU pragmatism/realism. The US started with a very ambitious agenda, and the EU tailored it down to what could realistically be achieved within a heterogeneous multilateral context.

Seventh, the *GATT Secretariat* was instrumental in getting the final text out, not only with the *Dunkel Draft*, that came at a moment when a push was very much needed not just for the services negotiation but for the whole round, but throughout the period of the negotiation. Indeed, throughout the process, the *GATT Secretariat* serviced the trading nations, prepared useful papers on conceptual and practical issues, provided technical advice, and emerged as an essential facilitator, almost an honest broker. If one were to take into account that in the mid-eighties there was no expertise in the house, then one can better appreciate the size of the contribution.

Eighth, the next negotiation which has already started (*Doha Round*) does not look much like the one we discuss here. Although we have not addressed this negotiation here, there is ample evidence that developing countries are now well aware of the opportunities presented by an agreement on trade in services and have become active participants submitting various proposals on a wide range of issues, including on the liberalization of trade in services on a cross-border basis and through the movement of natural persons, and on some sectors. Current services

negotiations, in terms of participation, look more and more like goods negotiations nowadays.

Finally, the agreement as such is no monument of clarity. Indeed, it is very much the outcome of an elaborate political compromise. One may reasonably have a hard time trying to understand what purpose a rather empty general framework serves; or why several obligations (e.g. some in Art. VI GATS) are placed among the general obligations when their subject matter actually relates to specific commitments. The language chosen is often awkward, some key expressions are not clearly defined, and it should come as no surprise that many of the disputes have evolved around misunderstandings regarding the meaning of specific provisions. It is hard to imagine that the GATS stand the test of time the way the GATT did, showing its strength more than 60 years after its original drafting. Yet, it is the negotiating history that we have discussed so far that explains why the services agreement looks the way it does: absent complex compromises, we would probably not have seen a GATS in the first place. Now, the first decisive step has been taken. Future experience can make it a better, more workable document. Only time will tell.

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