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## A Call for a General Agreement on Trade In Services

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# A Call for a General Agreement On Trade In Services

*"I don't subscribe to the notion that we'll become a service nation. We have to stand for something."*<sup>1</sup>

*"Are we going to be a services power? The double-cheeseburger-hold-the-mayo-kings of the whole world?"*<sup>2</sup>

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1. Address by Lee Iacocca quoted in Taylor, *Today's Leaders Look to Tomorrow*, FORTUNE, Mar. 26, 1990, at 31.

2. Address by Lee Iacocca, Japan Society of New York, *reprinted in* FORTUNE, July 7, 1986, at 14.

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## I. INTRODUCTION

Despite the historical scholarly support for Mr. Iacocca's position,<sup>3</sup> trade in services has been elevated, arguably,<sup>4</sup> to the top of the United States agenda for the Uruguay Round.<sup>5</sup> In fact, the

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3. See JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 988 (2nd ed. 1986) (stating that the service sector was considered unproductive by several noted economists including Adam Smith and Karl Marx [hereinafter JACKSON]. See also 4 Int'l Trade Rep. (BNA) 1320 (Oct. 28, 1987). U.S. Office of Technology Assessment Senior Associate John Alic said, "Services cannot . . . replace manufacturing in the U.S. economy." 4 Int'l Trade Rep. (BNA) 1074 (Aug. 26, 1987) (National Association of Manufacturers Representative claimed that the U.S. government cannot act " . . . under the assumption that America is a 'post-industrial' economy").

4. See Int'l Trade Daily (BNA) (Dec. 16, 1987) (other important issues are agriculture, strengthening of GATT's dispute settlement mechanism, intellectual property rights, non-tariff barriers and tropical products).

5. 89 Int'l Law & Trade Perspective 2143 (Feb. 1989) ("[t]he major U.S. goals in the Uruguay Round are trade liberalization extending GATT coverage to major new areas such as services"). Yu, *The New GATT Round Preliminary Developments and Future Plans: A Report from the Administration*, PLI Order No. A4-4178, 4 (1987) It has been said that at the conclusion of the Tokyo Round, "the U.S. sought comprehensive negotiations on trade in services."; and the "U.S. has been the prime proponent of negotiating in respect of trade in services at the new round." [hereinafter Yu]. JACKSON, *supra* note 3, at 988. See Wall St. J., Oct. 5, 1981, at 1, col. 1 (former United States Trade Representative William Brock called services "the frontier for the expansion of export sales"). See also 3 Int'l Trade Rep. (BNA) 451, (Apr. 2, 1986) (the U.S. renewed the Services Policy Advisory Committee to make a recommendation on policy issues related to trade in services) [hereinafter United States Trade Representative will be referred to as USTR]. See generally U.S. NATIONAL STUDY ON TRADE IN SERVICES 75-101 (1983) (the general tone and seriousness with which this study addresses the services issue strongly indicates the United States' position) [hereinafter U.S. NATIONAL STUDY].

United States threatened the very existence of the General Agreement on Tariffs and Trade<sup>6</sup> (GATT) because of the trade in services issue.<sup>7</sup> Clearly, the United States has decided "to play hard ball" on the subject.<sup>8</sup> The reasons underlying America's staunch position are summarized as follows:

The increasing economic importance of the services sector to . . . the United States, the proliferation of discriminatory non-tariff barriers, the absence of rules governing international trade in services, and the resulting declining American share of the world market for services. . . .<sup>9</sup>

Perhaps the most significant reason for the United States' position is the value of the services sector in the United States in both employment and money terms.<sup>10</sup> However, the United States did not experience an increase in net gains in trade in services during the 1980s.<sup>11</sup> Further, in an effort to indicate the seriousness of its

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6. The GENERAL AGREEMENT ON TARIFFS AND TRADE, opened for signature Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

7. Berg, *Trade in Services: Toward a 'Development Round' of GATT Negotiations Benefiting Both Developing and Industrialized States*, 28 HARV. INT'L L.J. 1, 1 (1987) [hereinafter Berg]. "So contentious was the debate in previous discussions that the U.S. had threatened to abandon the GATT process if services were not put on the table." *Id.* Former USTR Clayton Yeutter stated "GATT itself might fade into oblivion. . ." and "GATT is in a make or break situation-there is a real question of the whole organization being in jeopardy". 3 Int'l Trade Rep. (BNA) 1096 (Sept. 10, 1986); Fin. Times, Nov. 15, 1985, at 7, col. 2 (Yeutter indicated U.S. willingness to conduct a separate conference on services for interested countries).

8. See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 2041 (1974) [hereinafter TRADE ACT] (Section 301 allows the U.S. President to retaliate against countries deemed to be unfair traders, including trade in services). International Trade and Investment Act, Pub. L. No. 98-573, § 305(a)(1), 98 Stat. 3006 (1984) ("[t]he Act . . . establishes the liberalization of international trade in services as a principal U.S. objective in trade negotiations").

9. Gold, *Legal Problems in Expanding the Scope of GATT to Include Trade in Services*, 7 INT'L TRADE L.J. 281, 303 (1984) [hereinafter Gold]. Cf. JACKSON, *supra* note 3, at 992 ([i]t is suggested that the U.S. position is based on the "belief that the U.S. has a comparative advantage in many services and that it would be in the U.S. interest to liberalize trade in services").

10. 6 Int'l Trade Rep. (BNA) 1368 (Oct. 25, 1989) (USTR Carla Hills noted "that services account for two-thirds of the U.S. gross national product, 78 percent of U.S. employment, and 90 percent of all new jobs created in the U.S. alone during the past decade"). See 4 Int'l Trade Rep. (BNA) 1100 (Sept. 2, 1987) (California even claimed an important stake in the Uruguay Round as its value of services exports reached U.S. \$15 billion as compared to value of manufacturing exports of U.S. \$16.6 billion); 3 Int'l Trade Rep. (BNA) 1139 (Sept. 17, 1986) (Office of Technology Assessment stated that "up to half of the service exports may escape official statistics" indicating that the figures may be higher).

11. 4 Int'l Trade Rep. (BNA) 149 (Feb. 4, 1987) ("[t]rade in services surged in the first half of the decade, but the U.S. lost much of its service trade surplus"). See *supra* Int'l Trade Daily note 4 ("U.S. trade in services during the third quarter fell into deficit for the first time since 1958"); McMeans, *Service Trade Surplus Slows*, BUS. AM., Mar. 4, 1985, at 7 (U.S. trade surplus in services

position, the United States has specifically targeted for retaliation certain non-tariff barriers on services in various states.<sup>12</sup> At this time, neither the GATT nor any other international body purports to govern trade in services.<sup>13</sup>

Although the United States is the "prime proponent"<sup>14</sup> for negotiations on trade in services, over two-thirds of the GATT's signatories agreed to include the issue in the Uruguay Round.<sup>15</sup> This is hardly surprising in view of the relative importance of trade in services to total world trade.<sup>16</sup> In fact, some of the larger world economies head the list of exporters and importers of services.<sup>17</sup>

As the Uruguay Round nears conclusion,<sup>18</sup> negotiators strongly believe that a General Agreement on Trade in Services (GATS) will emerge.<sup>19</sup> This comment will review the history of the GATT's role in trade in services (Part II); discuss the North-South

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has fallen for three consecutive years) [hereinafter McMeans].

12. See U.S. NATIONAL STUDY, *supra* note 5, at Appendix IV (developing countries are the most frequent offenders including Brazil, South Korea, Venezuela, Mexico, Taiwan, and India). See also Gold, *supra* note 9, at 281 (the office of the USTR has compiled a list of more than 2,000 specific barriers to international trade in services); 7 Int'l Trade Rep. (BNA) 225 (Feb. 14, 1990) (USTR Hill delayed a retaliatory decision mandated under § 301 in favor of monitoring Japan's actions to open its markets).

13. Gold, *supra* note 9, at 281 ("[t]he GATT . . . does not apply to transnational trade in services"). JACKSON, *supra* note 3, at 993 ("GATT is basically concerned with goods"); 3 Int'l Trade Rep. (BNA) 1525 (Dec. 17, 1986) (Colombian ambassador to GATT, Felipe Jaramillo said that "the negotiators find themselves . . . in front of a blank page. Anything can be written on it, since there is no specific set of principles and rules in existence which serves as an agreed set of reference").

14. JACKSON, *supra* note 3, at 988.

15. Berg, *supra* note 7, at 1 (in Sept. 1986, 74 signatories of the GATT adopted a new agenda including services).

16. See 5 Int'l Trade Rep. (BNA) 1589 (Dec. 7, 1988) (trade in services accounts for nearly 30% of all world trade). See also Int'l Trade Daily (BNA) (Sept. 25, 1989) (world exports of commercial services were around U.S. \$560 billion); a rough calculation shows that transportation of goods and people accounts for about 30% of world trade, expenditure on services by travelers at their destination accounts for another 30% of world trade and other private services and income account for 40% of world trade. *Id.*

17. Exporters: U.S. = 11.23%, France = 10.6%, U.K. = 8.6%, and West Germany = 8.2%. Importers: West Germany = 12.4%, U.S. = 10.8%, Japan = 10.1% and France = 8.3%. Int'l Trade Daily (BNA) (Dec. 16, 1987).

18. See 7 Int'l Trade Rep. (BNA) 476 (Apr. 4, 1990) ([t]he Uruguay Round is scheduled to conclude in December 1990).

19. *Id.* at 477 (negotiators envision that the services talks will yield a GATS, a stand-alone pact with its own dispute settlement mechanism and other rules that would be uniquely tailored to services trade).

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Debate over the creation of a GATS (Part III); address several difficult legal issues pertaining to the creation of a GATS (Part IV); and conclude that a GATS is both feasible and necessary (Part V).

### II. AN AWKWARD DANCE: HISTORY OF THE GATT'S ROLE IN TRADE IN SERVICES

#### A. Pre-1986

As previously noted, the GATT generally has been considered inapplicable to trade in services.<sup>20</sup> Support for this position is due to the clear omission in the GATT of any comparable language to that found in Article 53 of the Havana Charter of the International Trade Organization (ITO),<sup>21</sup> GATT's long deceased<sup>22</sup> parent.<sup>23</sup> Article 53 states, "The Members recognize that certain services . . . are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects." Further, Article 54 provided for a mechanism to settle any disputes. Such language being absent from GATT leaves some doubt as to whether services are indeed covered.

In support of GATT's application to services, several factors come into play: the Contracting Parties have previously studied the

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20. But see Gold, *supra* note 9, at 291 ([o]n the other hand, however, nothing in the language of the General Agreement expressly excludes services); 5 Int'l Trade Rep. (BNA) 1600 (Dec. 7, 1989) (Former USTR Yeutter said, "there is also no reason that the principles that GATT has applied to trade in goods could not be applied to trade in services: 'All they need is slight modification for the services case'").

21. See JACKSON, *supra* note 3, at 994 (U.N. Docs. EPCT/A/SR/1-43; EPCT/B/SR/1-33 (1947); U.N. Doc. EPCT/TAC/SR. 1-28 (1947)).

22. See JACKSON, *supra* note 3, at 295 (when in 1950, the Executive Branch of the U.S. announced that it would not re-submit the ITO charter to Congress, the ITO charter was "for all practical purposes" dead).

23. *Id.* at 994 ("[n]o provision comparable to Article 53 is contained in GATT"); *Id.* at 295. ("GATT was intended to be a subsidiary agreement under the ITO charter, and to depend upon the ITO charter and the ITO secretariat for servicing and enforcement").

issue,<sup>24</sup> and the GATT Secretariat has expressed an interest.<sup>25</sup> Noted scholars have indicated that "trade in services provides the same mutual economic gains made possible by trade in goods,"<sup>26</sup> during the Tokyo Round, "a number of side agreements dealt directly or indirectly with services;"<sup>27</sup> above all, it seems fairly clear that the GATT, with its reasonably successful history and diverse membership, would be an excellent forum for addressing the issue of trade in services.<sup>28</sup>

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24. Krommenacker, *Trade-Related Services and GATT*, 13 J. WORLD TRADE L. 510, 511 (1979) [hereinafter Krommenacker]. "During the 1950's the GATT Contracting Parties initiated studies concerning whether member countries had legislation providing for discrimination in transport insurance." *Id.*

25. 1 INT'L SERVICES NEWSL., Issue 4, at 3 (Jan.-June 1981).

26. BROCK, 5 THE WORLD ECONOMY 229, 233 (1982) [hereinafter BROCK]. Gray, *A Negotiating Strategy for Trade in Services*, 17 J. WORLD TRADE L. 377, 378 (1983) [hereinafter Gray]; KENEN, THE INTERNATIONAL ECONOMY 241 (2nd ed. 1989) ("[m]ost economists continue to believe that trade is the most promising engine of growth for LDCs, and they argue that the doctrine of comparative advantage applies with particular force to those countries") [hereinafter KENEN]. *But see* Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199, 217 (1985) (stating "a first step . . . would seem that of developing a clearer understanding of the contribution of the various components of the service sector to the growth and development of the national economy. It must be recognized that even in most advanced industrialized countries varying appreciations exist of this role, and . . . the shift of resources to the services sector in O.E.C.D. countries, has been viewed as a negative development by some, and positive by others") [hereinafter Gibbs].

27. JACKSON, *supra* note 3, at 994 (side agreements included Subsidies Code; Customs Valuation Agreement; Agreement on Government Procurement and Agreement on Trade in Civil Aircraft).

28. *See* Schott, *Protectionist Threat to Trade and Investment in Services*, 6 THE WORLD ECONOMY 195, 212 (1982) [hereinafter Schott]. "The GATT is . . . the only international body that seriously negotiates binding agreements. It is the only place where both developed and developing countries feel they can do business with each other." *Id.* *But see* Gibbs, *supra* note 26, at 218 (suggesting that the GATT would be incapable of handling the issue and that United Nations Conference on Trade and Development should probably play an important role); JACKSON, *supra* note 3, at 995 (suggesting that the limited membership of the Organization for Economic Cooperation and Development might assist in reaching a meaningful agreement).

B. The Turning Point: May 7, 1986

Although GATT members expressed some interest in discussing trade in services during the early 1980s,<sup>29</sup> the South<sup>30</sup> has been unusually effective in delaying any meaningful discussion.<sup>31</sup> The varying viewpoints of the developed states further complicated matters.<sup>32</sup> Indeed the United States was probably quite dismayed to present its extensive study on the subject only in response to "recommendations" of the GATT Council of Ministers.<sup>33</sup>

The United States finally achieved committed recognition for its position at the conclusion of the Tokyo Economic Summit Meeting.<sup>34</sup> With support from the larger world economies, the

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29. GATT Ministerial Meeting, COMMUNIQUE, (Nov. 29, 1982). The communique dealt with services in relevant part stating:

The Contracting Parties Decide:

1. To recommend to each contracting party with an interest in services . . . to undertake national examination of the issues. . .
3. To review the results of these examinations . . . and to consider whether any multilateral action in these matters is appropriate and desirable.

*Id.*

30. Note that throughout this comment, South or Southern shall be used when referring to developing states.

31. 3 Int'l Trade Rep. (BNA) 861 (July 2, 1986) (dispute over services being included in the Uruguay Round led to Third World countries threat not to participate). See Barshefsky, *Synopsis of Activity in Key Uruguay Round Negotiating Groups*, PLI Order No. A4-4249, 7 (1988) [hereinafter Barshefsky] (numerous developing countries continued to delay progress due to beliefs they would be adversely affected by liberalization); *Third World Slams West's Policies*, J. COM., Nov. 28, 1984, at 3A. (third world countries accused the United States of jeopardizing the chances of a new round of world trade negotiations by trying to force the pace on a single issue—the liberalization of trade in services). See also Lewis, *A Fight on Trade in Services*, N.Y. Times, Oct. 2, 1985, at D1, col. 3.

32. Wall St. J., Oct. 5, 1981, at 1, col. 1. The U.K., Germany, and Sweden showed the most support. Switzerland, Netherlands, Norway, Finland, Canada, Japan, and Australia showed qualified support. France and Italy were generally opposed. *Id.*

33. U.S. NATIONAL STUDY, *supra* note 5, at 1. The U.S. was probably seeking a commitment.

34. 3 Int'l Trade Rep. (BNA) 638 (May 7, 1986). The Communique issued at the conclusion of the Summit said in relevant part:

We, the Heads of State . . . of seven major industrialized countries and the representatives of the European Community . . . We support the strengthening . . . of the GATT, its adaptation to new developments in world trade and to the international economic environment, and the bringing of new issues under international discipline. The New Round should, *inter alia*, address the issues of *trade in services*. . .



United States confidently prepared for the Uruguay Round.<sup>35</sup> Thus, the Uruguay Round was "formally launched on September 20 as ministers from 74 contracting countries reached consensus . . . on agenda and conceptual matters. . ." including trade in services.<sup>36</sup>

### *C. Post-1986 Developments*

As might be expected, the GATT first established a Group of Negotiators on Services (GNS).<sup>37</sup> Three months later the GNS held its first "cautious" meeting, which was, at most, not disappointing.<sup>38</sup> The main point of contention centered around the desire of the United States to bypass cumbersome procedural matters so as to plunge directly into matters of substance.<sup>39</sup> However, the more moderate approach of "progressive liberalization" seemed to be the majority view.<sup>40</sup>

As the GNS entered 1987, it encountered problems with definition and coverage.<sup>41</sup> Fortunately, however, both the United

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*Id.* (emphasis added). See 3 Int'l Trade Rep. (BNA) 604 (May 7, 1986) (stating that the Communique was "an impressive show of unanimity" on the issue).

35. 3 Int'l Trade Rep. (BNA) 864 (July 2, 1986). Although the South appeared prepared not to participate in the Uruguay Round, "U.S. Ambassador to GATT Michael Samuels dismissed this implied threat as a 'smokescreen' and said, 'They'll be there . . . They can't afford not to be there.'" *Id.*

36. 3 Int'l Trade Rep. (BNA) 1150 (Sept. 24, 1986).

37. *Id.* The GNS' terms of reference were summarized as ". . . to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries." *Id.*

38. See 3 Int'l Trade Rep. (BNA) 1398 (Nov. 19, 1986) (David Woods, spokesman for GATT, said, "No decisions were taken on its (GNS) future work and none were expected").

39. *Id.* The U.S. wanted the GNS "not to get bogged down in . . . diversionary tactic(s), but to proceed directly to matters of substance." Further, one negotiator said, "Everybody agrees that liberalization is the ultimate objective, but the U.S. wants liberalization from the word go, and a lot of other people are not ready for that." *Id.*

40. 3 Int'l Trade Rep. (BNA) 1525 (Dec. 17, 1986). Felipe Jaramillo, chairman of the GNS, said "a consensus is emerging for working out a multilateral framework and then, step by step, take each service and see if we will deal with it or not." *Id.*

41. 4 Int'l Trade Rep. (BNA) 348 (Mar. 11, 1987). GNS Chairman Jaramillo at a seminar on "International Trade in Services: Issues and Challenges" said, "The depth of the agreement will depend on what definition of trade in services is adopted . . . and the scope of the agreement will depend on its vertical coverage in terms of which types of services should be covered by multilateral

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States<sup>42</sup> and the European Community<sup>43</sup> presented extensive proposals and the GNS concluded the year "with a statement of cautious optimism that it [was] is on track with its task of integrating services into the GATT framework."<sup>44</sup> Unfortunately, however, the South continued to employ delaying tactics.<sup>45</sup>

In 1988, Argentina was the first Southern state to table a proposal.<sup>46</sup> The proposal was "praised" by the United States.<sup>47</sup> Encouraged by this apparent breakthrough, Canada called upon the GNS "to reach prompt agreement on liberalizing world trade in services."<sup>48</sup> This further prompted proposals from Japan<sup>49</sup> and Australia.<sup>50</sup>

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agreement and by any sectoral disciplines, and on its horizontal coverage in terms of which concepts should be applied to trade in services generally." *Id.*

42. 4 Int'l Trade Rep. (BNA) 1380 (Nov. 11, 1987). The U.S. "broad-based plan . . . would call on GATT signatories to establish common ground rules on trade in services. GATT negotiations on services are likely to cover telecommunications, processing and communications technology, financial services, constructions engineering, accounting, architecture, legal services, and franchising, although the exact boundaries of a services agreement will depend on future negotiations." *Id.*

43. Int'l Trade Daily (BNA) (Dec. 21, 1987). "E.C. External Relations Commissioner Willy de Clercq called the proposals 'ambitious' but 'pragmatic'. What the E.C. wants is to establish exactly the same kind of system for services as was established for the exchange of goods in 1947 as GATT. According to the E.C.'s position paper, the central issue in negotiating a multilateral services agreement will be to achieve a major expansion of trade in services, boosting growth in the world economy, while at the same time respecting the policy objectives which have led to national and international regulation of services and promoted the development of developing countries." *Id.*

44. 4 Int'l Trade Rep. (BNA) 1562 (Dec. 16, 1987). GNS Chairman Jaramillo believed "there was basic agreement on the conclusions reached by the services group in the past year of discussion." Further, he "encouraged all 95 GATT members to offer more proposals early next year to provide the broadest possible base of discussion for the services group. . . ." *Id.*

45. See 5 Int'l Trade Rep. (BNA) 475 (Mar. 30, 1988). "Other developing countries such as India and Brazil previously tried to block discussion of services entirely, and when that failed, they adopted a policy of passive resistance. As a result, the GNS spent most of its first year defining what services are rather than considering how they can be included in the overall trade framework." *Id.*

46. *Id.* Argentina generally said that "Any international agreement on trade in services . . . must ensure that service industries in developing countries are fully protected" and "must be accompanied by a commitment to transfer technology." *Id.*

47. *Id.* U.S. Ambassador Michael Samuels said the proposal was "a positive initiative which moves the negotiating process forward." *Id.*

48. 5 Int'l Trade Rep. (BNA) 746 (May 25, 1988).

49. Int'l Trade Daily (BNA) (May 23, 1988). "The main points of the Japanese proposal . . . were that restrictive measures affecting trade in services should be made public, and that most-favored nation treatment should be accorded to all signatories of a services pact." *Id.*

50. 5 Int'l Trade Rep. (BNA) 1037 (July 13, 1988) (the Australian proposal was considered to be "the most detailed" proposal submitted to the GNS).

However, the GNS only made some positive moves<sup>51</sup> after a disgusted United States' report on the negotiations.<sup>52</sup> Early in 1989, the GNS finally departed from procedural matters and moved into discussions on specific subjects.<sup>53</sup> New Zealand presented what was considered to be the most "constructive" proposal, "since it acknowledged the fears of developing countries."<sup>54</sup> In general, the developing states were still "fearful that their own emerging services sectors would go under. . ."<sup>55</sup> Perhaps the most significant step in the negotiations surfaced when "virtually all of the participants" in the GNS agreed that a separate GATS would be the best way to handle the issue.<sup>56</sup> The year concluded on an upbeat note with both the United States<sup>57</sup> and the European Community<sup>58</sup> presenting rather extensive proposals.

In 1990, the GNS quickly announced that the negotiators had agreed on a work program that "theoretically would allow them to complete the draft framework of an international agreement on the

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51. See 5 Int'l Trade Rep. (BNA) 1589 (Dec. 7, 1988) ("[t]he U.S. delegation is 'very encouraged' by the decision of the GNS . . . to scrap a working paper developed prior to this week's meeting in favor of impromptu negotiations").

52. One delegate said, "We are in fact no further advanced than we were when the Uruguay Round started in the fall of 1986." 5 Int'l Trade Rep. (BNA) 1555 (Nov. 30, 1988). Another Western ambassador said, "We have seen the developing countries making statements at the annual meeting that seemed to be going back a year or more on their negotiating positions--on services. I would like to think it is simply maneuvering, but. . . ." Int'l Trade Daily (BNA) (Nov. 15, 1988).

53. Int'l Trade Daily (BNA) (Apr. 24, 1989) (Telecommunications and construction were the first two service sectors opened for discussion). "GATT sources said the talk on construction and telecommunications was intensive." Further, it was announced that transportation and tourism would be discussed in July, with financial services following in September. Int'l Trade Daily (BNA) (June 9, 1989).

54. 6 Int'l Trade Rep. (BNA) 1227 (Sept. 27, 1989).

55. *Id.*

56. *Id.*

57. *Id.* at 1227. The U.S. presented a proposal seeking to create a body of international rules on trade in services. Of great significance was India's acceptance of the U.S. paper. India was the prime opponent to any discussions on trade in services and this acceptance along with a statement that India would be putting forward its own ideas was encouraging to the U.S. *Id.*

58. Int'l Trade Daily (July 25, 1989). The E.C. "presented a set of rules outlining a process that governments signing an eventual framework accord could follow in negotiating liberalization of trade in services." More importantly, the E.C. joined the U.S. in recognizing that developing countries would be called upon to contribute according to their development. *Id.*

subject by the end of July.”<sup>59</sup> In April, Latin American and Caribbean countries,<sup>60</sup> the United States, and the European Community<sup>61</sup> tabled joint proposals to the GNS.

In early May, Hong Kong, a British Crown Colony<sup>62</sup> with an impressive service sector,<sup>63</sup> unusually aligned itself with the developed states’ efforts at the Uruguay Round.<sup>64</sup> Although Hong Kong’s alliance was encouraging, it was shortly thereafter that a major United States services industry group announced that it would withdraw its support for a GATS in the event the agreement was unsatisfactory.<sup>65</sup> Such powerful, private distaste for developments to date caused significant concern among United States policy makers.<sup>66</sup> Despite such provocative words, the European Community ministers “confirmed their commitment to

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59. 7 Int’l Trade Rep. (BNA) 128 (Jan. 24, 1990). It should be noted that this was just a “draft” and the delegates still had a considerable amount of work to be accomplished on removing “square brackets” from the document. “Square brackets” is GATT jargon for sections where differing proposals have been presented by various delegates for reconciliation in later negotiations. *Id.*

60. *Id.* The proposal from Brazil, Chile, Colombia, Cuba, Honduras, Jamaica, Nicaragua, Mexico, Peru, Trinidad and Tobago, and Uruguay, not surprisingly, called for “extra protection to the role of developing countries in the future GATS.” *Id.* See *infra* Part III for North-South debate.

61. 7 Int’l Trade Rep. (BNA) 476 (Apr. 4, 1990). “Richard Self, the chief U.S. negotiator for services, said it is ‘a genuine effort by two of the key players in these negotiations to move things forward so that we can come up with a GATS by the end of the negotiations.’” However, “. . . the E.C.-U.S. paper was attacked by negotiators from developing countries who said it was an attempt to push them into positions that would adversely affect their own fledgling services industries. Third World delegates were particularly critical of the U.S. suggestion that individual services sectors such as tourism or construction could be treated separately.” *Id.* Several of the more important legal issues presented by this proposal will be discussed in Part IV.

62. It should be noted that in recent years Hong Kong generally has been referred to as a “territory”.

63. 7 Int’l Trade Rep. (BNA) 655 (May 9, 1990). Hong Kong’s deputy director of trade, Robert Footman said, “Hong Kong’s financial, insurance, and shipping industries could benefit from liberalization in trade in services.” *Id.*

64. *Id.* “[A]lthough Hong Kong often is aligned with other developing nations at GATT on textile-related issues, it diverges in its support for the efforts of developed nations to bring . . . certain services . . . under GATT regulation.” *Id.*

65. *Id.* at 703 (May 16, 1990). Joan Spero, chairperson of the Financial Services Trade Group said “If significant progress is not made by the end of 1990, then the service industry in the U.S. is prepared to walk away from the agreement. No agreement is better than a bad one.” *Id.*

66. *Id.* at 728 (May 23, 1990). U.S. Representative Frank Annunzio, chairman of the Financial Institutions Supervision, Regulation, and Insurance Subcommittee, said “U.S. negotiators in the Uruguay Round . . . should obtain an international agreement to prevent foreign countries from illegally capturing a major share of the U.S. financial services market.” *Id.*

keeping to the December deadline for completing the Uruguay Round negotiations and rejecting the idea of extending the talks into 1991."<sup>67</sup> However, tension remained high as some influential members of GATT indicated their displeasure with the continued United States threat of unleashing the powerful retaliatory measures outlined in Section 301.<sup>68</sup>

In June, Brazil's new leadership staged an about face in policy when displaying support for "the concept that the GATT can incorporate a framework agreement for services that can be applied to sectors in general."<sup>69</sup> While differences about the financial services sector remained divided along North-South lines during a June 11-16 GNS meeting,<sup>70</sup> "GATT officials, although unwilling to be quoted by name, said they were confident there would be some form of draft agreement on services even if it contains lots of 'square brackets'".<sup>71</sup> Unfortunately, a "square bracket" framework would be little more than an agreement on mostly

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67. *Id.* at 736 (May 23, 1990). However, it should be noted that the European Community ministers "also 'confirmed their political will to get on with the negotiations'". *Id.* This confirmation of political will indicated a certain sense of business-like confrontation increasing between developed countries. *See id.* at 735 (May 23, 1990). The Secretary General of the Organization for Economic Cooperation and Development, Jean-Claude Paye, indicated that many issues, including trade in services, were causing considerable friction between the United States and the European Community.

68. 7 Int'l Trade Rep. (BNA) 766 (May 30, 1990). "[G]eneral Agreement on Tariffs and Trade Director General Arthur Dunkel . . . criticized the U.S. Section 301 trade remedy as 'a good example of what our world could come to' if the present Uruguay Round of GATT talks is unsuccessful . . . Other GATT members . . . will show extreme interest' in the way the United States deals with its 301 law as negotiations continue . . . ." *Id.*

69. *Id.* at 805 (June 6, 1990). Moreover, an official of the Brazilian government took the position that there must be "progressive liberalization in trade in services" which is similar to that of the U.S. position. *Id.*

70. *Id.* at 908 (June 20, 1990). "[T]he United States and Canada pushed the line that any bank should be able to operate in a cross-border environment, moving capital and personnel back and forth across frontiers as need be, subject to some form of international supervision. A group of developing countries headed by India, Egypt, and Brazil reiterated its opposition to this idea on the grounds that banking services in developing countries would simply be swept aside by such multinationals as Citicorp, West Germany's Deutsche Bank, and Britain's Midland Bank." *Id.*

71. *Id.* It should be noted that the financial services sector would probably be one of the square bracket areas.

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uncontested issues while leaving the more difficult issues unsolved.<sup>72</sup>

Immediately after the GNS meeting of June 11-16, "the European Community tabled a draft agreement on trade in services . . . in what European Community delegates said was a move to speed up talks that generally have been stagnating."<sup>73</sup> Perhaps the most significant aspect of the European Community draft agreement was the attempt to address the concerns of developing states.<sup>74</sup> The European Community draft agreement further highlighted the issues of transparency<sup>75</sup> and "rules-based progressive liberalization", which has been accepted by the United States.<sup>76</sup> Despite what appeared to be a well-balanced draft agreement, rumors circulated among GATT officials that developing states would pose considerable objections upon final reading of the text.<sup>77</sup>

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72. 7 Int'l Trade Rep. (BNA) 908 (June 20, 1990). "Square brackets" is a "GATT euphemism for issues on which delegates cannot agree." *Id.* Other hotly debated issues during the June 11-16 GNS meeting included market access, cross-border financial services, increased participation of developing countries, national treatment, prudential regulation, and payments and transfers. *Id.*

73. *Id.* at 893 (June 20, 1990). "[T]he framework for a proposed General Agreement on Trade in Services (GATS) covers banking, insurance, telecommunications, construction, transport, and other professional services." *Id.*

74. *Id.* at 894 (June 20, 1990). "[E]C. sources said it is designed to meet, in part, the fear of developing countries that liberalized trade in services would mean the swamping of their own fledgling service sectors by American and European multinationals." *Id.*

75. *Id.* "[T]he E.C. proposal said transparency in government action controlling services was essential, with governments providing commercial information to less-developed countries seeking access to the services sector." *Id.*

76. *Id.* The mechanism of a rules-based progressive liberalization process requires: [w]ith the entry into force of the treaty, every party is first expected not to introduce new measures which would move in the opposite direction to the rules and principles of the framework agreement . . . Furthermore, it shall undertake specific commitments to eliminate certain restrictions on the access to its market for foreign providers of services . . . The community expects substantial and mutually advantageous commitments from all negotiating partners.

*Id.*

77. 7 Int'l Trade Rep. (BNA) 894 (June 20, 1990). "Sources said that despite the E.C.'s claim that its proposal would aid developing countries, these countries might well have some objections, if not this week, then at the next meeting of the services group in July." *Id.* A GATT official told BNA that "[a]t the moment, international trade in services is a one-way street which benefits only the developed countries . . . the developing countries are going to need a lot more convincing." *Id.*

A crucial moment during the GATS negotiations surfaced when the United States Trade Representative announced that India had triggered the "unreasonable" provision of "Super 301".<sup>78</sup> However, the United States decided not to retaliate against India so as to avoid creating any unnecessary tension in the GATS negotiations.<sup>79</sup> Considering the anger of all states, developed and developing, towards "Super 301", it appears the United States had little choice but to grant this concession or face a complete breakdown of the GATS negotiations.

At the end of what was called an "inconclusive debate" during the week of June 18, 1990, the chairman of the GNS was given a mandate to produce a draft text for a GATS, which would be presented at a mid-July meeting.<sup>80</sup> This mandate was surely a curiosity as several difficult questions remained far from resolved. The unresolved questions included a positive or negative list of restrictions, safeguards, transborder trade in services, and the United States distribution of a detailed list of barriers still in force in seventeen different service sectors.<sup>81</sup> Perhaps the mandate was pushed along by unconfirmed rumors that the United States was approaching certain states with offers of bilateral deals.<sup>82</sup>

During a GNS meeting on June 25, 1990, eight developing states<sup>83</sup> tabled an informal proposal calling for "free flow of labor for temporary service sector jobs in all countries."<sup>84</sup> Not

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78. *Id.* at 893 (June 20, 1990). "[U.S. Trade Representative Carla Hills determined June 14 that India's trade practices toward U.S. insurance providers and potential investors are 'unreasonable' as defined in the 'Super 301' provision of the 1988 trade act. . . ." *Id.*

79. *Id.* "[H]ills based her decision on the view that retaliation at this stage would be inappropriate given the fact that the United States and other members of the General Agreement on Tariffs and Trade are currently negotiating over ways to extend GATT rules to include trade in services and investment." *Id.*

80. *Id.* at 961 (June 27, 1990).

81. *Id.*

82. 7 Int'l Trade Rep. (BNA) 961 (June 27, 1990). "[S]ome delegates said that Richard Self, the U.S. negotiator on services, told delegates from other countries that he is trying to stimulate a 'request and offer' basis under which countries can put together their own bilateral deals in the services field." *Id.*

83. *Id.* The eight countries were Mexico, Argentina, Colombia, Cuba, Egypt, India, Pakistan, and Peru.

84. *Id.*

surprisingly, the foundation for this proposal<sup>85</sup> was rejected by the United States and other developed states.<sup>86</sup> Unfortunately, the North-South debate, despite what appeared to be good faith efforts, continued.

The long awaited mid-July meeting of the GNS was preceded by threatening words from the United States on the unrelated subject of agriculture.<sup>87</sup> After a week of what officials called a "make-or-break" session of the GNS, several serious problems still remained unresolved.<sup>88</sup> Of particular interest was the continued debate between the United States and the European Community over the issue of whether a GATS should include a right to exclude certain services or embrace all services.<sup>89</sup> This highly volatile debate between two of the more important developed states resulted in a large gap in the draft agreement and might lead to developing states balking until the gap is filled.<sup>90</sup> Of final concern was the European Community's "demand that GATS include a provision for effective access to foreign markets."<sup>91</sup> This demand has led

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85. *Id.* at 962 (June 27, 1990). "[T]he eight countries said their proposal was an effort to ensure that the development of service industries worldwide would not be handicapped by lack of personnel." *Id.*

86. *Id.* "[L]onger-term employment would have to be the subject of negotiations . . . noting that many countries are concerned about a flood of foreign labor as a result of a GATS agreement . . . Moreover, labor mobility is not a prerequisite for a GATS and should be considered on a sectoral basis . . . The question of what constitutes temporary personnel has yet to be resolved by the negotiators." *Id.*

87. 7 Int'l Trade Rep. (BNA) 1062 (July 11, 1990). "[H]ills maintained, failure to make headway in the farm talks would jeopardize the status of every other sector being reviewed under the round." *Id.*

88. *Id.* at 1141 (July 25, 1990).

89. *Id.* "[T]he E.C. has been insisting that any General Agreement on Trade in Services must embrace all services, while Washington has recently called for the right to exclude certain services such as civil aviation, maritime transport, financial services, and perhaps telecommunications, from the overall agreement." *Id.* See *id.* at 1180 (Aug. 1, 1990). "[M]ost nations do not favor excluding certain services sectors in a future general agreement on trade in services, as proposed by the United States." *Id.*

90. *Id.* at 1141 (July 25, 1990). "[D]omestic lobbies . . . have been blamed for this hesitation, which has led to an entire section left blank in the report to the Trade Negotiations Committee from Colombia's Felipe Jaramillo, chairman of the services group. The omission is seen by GATT officials as significant because developing countries, which were hesitant to include services in the negotiations in the first place, are unlikely to agree to continue discussions until this gap is filled in." *Id.*

91. *Id.*



to serious Japanese opposition, furthering the inability of developed states to unite on the overall objective of creating a GATS.<sup>92</sup> Clearly the "make-or-break" claim did not hold true as negotiations have continued.

#### *D. The Future*

Although much has been achieved since 1986, all GNS members realize that the areas of disagreement are numerous and difficult to resolve. However, some sort of agreement will probably be reached by the conclusion of the Uruguay Round.<sup>93</sup> This represents a significant accomplishment for the United States, and it indicates that the GATT is probably the best forum for handling such complex and divisive issues.

### III. THE NORTH-SOUTH DEBATE

#### *A. The Role Of Services In The South*<sup>94</sup>

Although the Northern<sup>95</sup> economies greatly rely on trade in services, "existing data indicate that services industries are large and growing" in the South.<sup>96</sup> Nevertheless, the Southern states remain obstinate in their belief that the GATT does not and should not cover trade in services. Most developing states "point out that the GATT was intended to cover goods exclusively and that it

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92. 7 Int'l Trade Rep. (BNA) 1141 (July 25, 1990).

93. 6 Int'l Trade Rep. (BNA) 1227 (Sept. 20, 1989). "David Woods, GATT's spokesman, said such a solution (GATS) was a 'possibility', but added that lots of work needs to be done in the next 15 months before a GATS could evolve." See 6 Int'l Trade Rep. (BNA) 1153 (Sept. 13, 1989) (an administration source commented, "It could be that we end up with a separate entity that is equal in its scope to the GATT").

94. Due to limited availability of information, the figures used for services in the South are somewhat dated.

95. Note that throughout this comment, North or Northern shall be used when referring to developed states.

96. Berg, *supra* note 7, at 19. "In 1979, services represented approximately 40% of the gross domestic product of developing countries." *Id.*

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makes no mention of services."<sup>97</sup> However, one should appreciate that the developing states are probably directed to this conclusion out of fear for their domestic service industries.

### B. The GATT and Developing Countries

Perhaps the most difficult obstacle facing the GNS is accommodating the divergent interests of the North and South.<sup>98</sup> Unfortunately, the North-South debate is not new to the GATT.<sup>99</sup> The South has taken the position that any offer made by the North lacks credibility due to the North's previously unfulfilled promises.<sup>100</sup> However, by continuing this debate through the

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97. *Id.* at 30.

98. 5 Int'l Trade Rep. (BNA) 1069 (July 27, 1988). The American Enterprise Institute issued a major series of studies on international trade in services. Counselor to the USTR, Geza Fekete-kuty said, "[T]he major difficulty will be in achieving a balance between the interests of developed and developing countries." See Berg, *supra* note 7, at 1 (stating "[t]he Contracting Parties will face staunchly opposed negotiating positions which promise to be drawn largely along North-South lines"). See also LINDERT, INTERNATIONAL ECONOMICS 272 (1986). "[I]t is the belief that trade prescriptions must be different for developing countries than for the most developed countries." Declaration of Establishment of a New International Economic Order [hereinafter Declaration], U.N. Doc. A/9559 (1974). "Thus, the political, economic and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality. . . ."

99. JACKSON, *supra* note 3, at 1138. "One of the more difficult problems that has faced the international trading system as embodied in GATT is how developing countries should be integrated into that system." *Id.*

100. Berg, *supra* note 7, at 5. "The experience of LDCs with liberalization of trade in goods makes them wary of including services in the GATT." *Id.* "In particular, developing countries share a profound sense of frustration with the international trade order developed after World War II. This frustration stems from a number of substantive trade practices and institutional characteristics of GATT that, in their view, combine to inhibit the development of their economies and relegate them to a secondary status in the global economy." BLAKE, THE POLITICS OF GLOBAL ECONOMIC RELATIONS 34 (1987) [hereinafter BLAKE].

GATT mechanism, the South, at least in words,<sup>101</sup> has obtained considerable concessions.<sup>102</sup>

*C. Current Problems*<sup>103</sup>

An unfortunate obstacle to the creation of a GATS is the accusatory nature of the North-South relationship.<sup>104</sup> This

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101. See JACKSON, *supra* note 3, at 1148 (citing Report By The Secretary-General of UNCTAD: Assessment of the Results of Multilateral Trade Negotiations, TD/B/778/Rev. 1, at 5-9). "In sum, these findings indicate that in respect of developing countries the tariff-cutting exercise has fallen short of fulfilling the objectives of the Tokyo Declaration. There has been in varying degrees an across-the-board erosion of GSP margins . . . It also appears that certain special measures regarding tariffs on behalf of the least developed countries will have only a marginal impact on the trade of those countries . . . It is estimated that the losses in potential trade expansion resulting from the erosion of the GSP amount to U.S. \$1.7 billion and are offset by only U.S. \$0.6 billion through potential trade expansion . . ." *Id.*

102. See GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 6. *Id.* at art. XXXVI states in relevant part:

1. The contracting parties,  
(c) noting, that there is a wide gap between the standards of living in less developed countries . . . agree as follows.
2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.
3. There is need for positive efforts designed to ensure that less-developing contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.
8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.
9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

*Id.* at art. XXXVI.

See KENNEN, *supra* note 26, at 243 (stating that "[LDCs] won what seemed to be a major victory in 1968 . . . when the developed countries agreed to introduce a Generalized System of Preferences . . .").

103. This list is not exhaustive. Other problem areas to a successful GATS include technology transfer, control over investment and access to financial resources. See JACKSON, *supra* note 3, at 1000-001 (citing KROMMENACKER, WORLD TRADED SERVICES: THE CHALLENGE FOR THE EIGHTIES 41-42 (1984)). Several problem areas include employment, monetary and balance of payments, protection of domestic consumers and cultural sensitivity.

104. See 7 Int'l Trade Rep. (BNA) 476 (Apr. 4, 1990). The U.S. and the E.C. have accused the South of "expecting a free ride in the GATS." *Id.* Cf. Int'l Trade Daily (BNA) (Aug. 2, 1988) (Mexico, indicating its distaste for Western trade policies, said "[w]e have big problems already in getting our exports into developed countries, especially the U.S." Mexico's point that increased competition in the services field would exacerbate their position is well-taken); Ewing, *Why Freer Trade in Services is in the Interest of Developing Countries*, 19 J. WORLD TRADE L. 147, at 159

continuous tension appears to stem from the relative economic success enjoyed by the North as opposed to the South. However, the South probably views the means by which the North achieved economic superiority to be highly suspect. In any event, this historical distrust will most certainly result in loss of valuable time.<sup>105</sup>

Another obstacle to a GATS is that service industries in Southern states are often publicly owned monopolies.<sup>106</sup> These monopolies usually represent the state's interest in achieving purely domestic socio-economic goals.<sup>107</sup> The South does not wish to subject their service industries to the comparative advantage theories which support the GATT.<sup>108</sup>

This leads to yet another problem: the South's general desire "to preserve autonomy over development of their service economies."<sup>109</sup> The South's desire to preserve such autonomy reflects a fear of potential loss of sovereignty that "pervades almost all of the articulated reasons for opposing free trade . . . in

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(1985). In fact most Southern states consider the GATT to be a "rich man's club"; BLAKE, *supra* note 100, at 41 ("[P]rebisch . . . summons the rich states unilaterally to extend preferential treatment to LDCs for their exports of manufactures . . ."); Declaration, *supra* note 98 ("the new international economic order should be founded on full respect for the following principles: (c) . . . bearing in mind the necessity to ensure the accelerated development of all the developing countries . . .").

105. See 3 Int'l Trade Rep. (BNA) 348 (Mar. 11, 1987) (stating that John Richardson of the Commission of the European Communities "warned that negotiators in the Uruguay Round 'must understand each other's interest' and not seek to achieve short-term gains for their own country which will sour the overall negotiating pattern").

106. Berg, *supra* note 7, at 20-21 (citing INDIAN INVESTMENT CENTER, INVESTING IN INDIA: A GUIDE FOR ENTREPRENEURS 3 (1981)). India reserves air and rail transport, communications, power, banking and insurance for development by the state).

107. See C. DIAZ-ALEJANDRO & G. HELLEINER, HANDMAIDEN IN DISTRESS: WORLD TRADE IN THE 1980s 19 (1982) ([m]any Southern states have nationalized the banking system and banks are used as instruments for achieving state policy).

108. See Berg, *supra* note 7, at 21 (such controls indicate the degree to which the development of domestic service industries is a function of government policy rather than comparative advantage). This position reflects the infant industry argument. Cf. Gray, *supra* note 26, at 379 (arguing that temporary protection is justified when an industry has "decreasing long-run costs generally due to the presence of scale economies." This is not the case in most Southern states).

109. Berg, *supra* note 7, at 22.

services.”<sup>110</sup> In fact, the Southern states are so concerned with sovereignty that the probable gains in efficiency by freeing their domestic service market are of little interest.<sup>111</sup>

Additionally, “third world governments fear that free trade in services will exacerbate existing disparities in development.”<sup>112</sup> This fear is based on the reasonable position that the sheer financial strength, technological superiority, and managerial expertise of transnational corporations will cause developing states to lose potential income from trade in services. Thus, it is argued that increased dependence<sup>113</sup> on Northern states for services would cause both financial<sup>114</sup> and national security problems.<sup>115</sup>

Finally, Southern states fear “creeping inclusion” of services.<sup>116</sup> This reflects the South’s continued distrust of the North.<sup>117</sup>

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110. *Id.* at 24. *See* 5 Int’l Trade Rep. (BNA) 1069 (July 27, 1988) (former USTR Yeutter “observed that services trade is bound up in countries’ notions of their sovereign right to regulate services”).

111. *See* Berg, *supra* note 7, at 24.

112. *Id.* at 27 (they reason that the immense technological advantage of transnational corporations would usher in a whole new set of imbalances). *See* Barshefsky, *supra* note 31 at 7 (progress (in the Uruguay Round) has been hindered by opposition from numerous developing countries, which believe they would be adversely affected by liberalization of trade in services.); Yu, *supra* note 5 at 6 (opening up trade in services, an industry in which the U.S. has a distinct head start, would be to their (Southern states) own disadvantage); 7 Int’l Trade Rep. (BNA) 225 (Feb. 14, 1990) (Yves Berthelot, Deputy Secretary-General of United Nations Conference on Trade and Development, said, “Many developing countries fear that possible short-term gains to be had from liberalization in services trade would be accompanied by constraints limiting their development and growth”).

113. *See* N. Kofele-Kale, *The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System*, 18 CAL. W. INT’L L.J. 291, 294 (1988) (stating trade in services “remains an area in which the [Developing Countries] feel very acutely their economic inequality and dependency vis-a-vis the [Industrialized Countries]”).

114. *See* 7 Int’l Trade Rep. (BNA) 476 (Apr. 4, 1990) (claiming Southern states are “afraid their fledgling service sectors will be completely displaced by more advanced Western industries”).

115. Berg, *supra* note 7, at 26 (“[s]trong domestic service industries function as insurance against complete dependence on foreign sources that might be cut off during a dispute”).

116. *Id.* at 29. “[T]hese states worried that merely discussing services in a GATT context would create a presumption that GATT principles should apply and put third world states in the defensive position of having to justify the legitimacy of departures from principles that they never accepted.” *Id.*

117. “Creeping inclusion” depicts a feeling that the North would manipulate various GATT articles to the North’s advantage.

D. Is There A Reasonable Solution?

Although Southern states proffer many reasonable arguments for avoiding the creation of a GATS,<sup>118</sup> many scholars believe these states are only hurting themselves.<sup>119</sup> Further, if the South can unite,<sup>120</sup> it can use trade in services "as a strong bargaining chip in achieving their broader objective of improved access in the industrialized countries for their manufacturing exports."<sup>121</sup> Such bargaining strength is due to the fact that the North heavily relies on trade in services to ensure domestic economic growth. Thus, the North will come to the negotiating table willing to compromise in order to achieve important domestic objectives. However, the ability of the South to stand together in an united front has been

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118. See Part III, Sections B and C. See also Berg, *supra* note 7, at 4 (indicating that "[t]he primary reason for the North-South division over trade in services is that developing countries perceive all potential gains in services trade to be on the side of developed countries. Such a perception is not unrealistic, for most international service trade flows from North to South"); BLAKE, *supra* note 100, at 35 (stating "[LDCs] argue that reciprocity [i.e. MFN] is equitable when applied to negotiations among states at approximately the same stage of economic development, but in negotiations between industrialized and LDCs, reciprocity is a call for equal competition among fundamental unequal economic units").

119. See Int'l Trade Daily (Aug. 2, 1988) ("[C]harles Heeter, director of federal services with Arthur Anderson and Co., and Henry Parker, vice president and administrative director of Chubb and Son, Inc., said that . . . proposals to reduce barriers to services trade . . . would generate employment in and promote technologies transfers to developing countries"). See also Berg, *supra* note 7, at 1 (concluding that "a liberalized world services market could also act as an economic stimulus in the third world."); Gray, *supra* note 26, at 379 (commenting that "[t]rade in services may well generate more important gains by virtue of the effect on the quality of service supplied" and "in the absence of international trade and competition in services, domestic industries may fail to innovate at the rate achieved in foreign countries"); KENNEN, *supra* note 26, at 241, 244.

120. See Berg, *supra* note 7, at 5-6. (indicating that the South's success "hinges upon the ability of third world governments to articulate common interests and promote them by negotiating as a bloc. . ."). "The ability of the third world to negotiate as a bloc will determine whether the LDCs gain genuine benefits from the next GATT round (Uruguay)." *Id.* at 30.

121. See *id.* at 33 ("one strategy would be to seek preferences such as those available for trade in goods under the Generalized System of Preferences"). But see Int'l Trade Daily (BNA) (Dec. 28, 1988) (noting that many developing countries "are reluctant to make that linkage, fearing that the existing GATT obligations of the developed countries might be at risk if new agreements are linked to them"). Further, "those countries are right in believing that they should not have to make concessions to induce the developed countries to respect the existing rules and to refrain from imposing measures that contravene the spirit and letter of existing agreements". *Id.*

less than impressive.<sup>122</sup> The Southern states should take advantage of the GATT forum since liberalization appears to be inevitable.<sup>123</sup> The United States has indicated its desire to include the Southern states in this discussion<sup>124</sup> and the South could avoid potentially devastating United States' domestic laws (i.e. Super 301) by cooperating in the creation of a GATS.<sup>125</sup> The Southern states should, however, bear in mind that the Northern states are similarly interested in gaining an advantage through the negotiations.<sup>126</sup> This should somewhat balance the scales in the negotiating process.

Nevertheless, the North-South debate will continue.<sup>127</sup> Hopefully, negotiations will lead to a compromise.<sup>128</sup> Even if a

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122. See LINDERT, *supra* note 98, at 274-75. See generally BLAKE, *supra* note 100 (witness the failure of The South Bank; the inability of LDC oil producers to curtail cheating and truly create an ongoing and successful cartel; and the inability of LDC debtors to undermine the North's banking control via unified bargaining. In short, when it is of unilateral advantage to accept an offer from the North, Southern states have shown a penchant for breaking ranks).

123. See Int'l Trade Daily (BNA) (July 27, 1988) (counselor to the USTR, Geza Feketekuty said, "that services trade would be liberalized one way or another. If the GATT route fails, then economic forces themselves will bring about the liberalization").

124. See Berg, *supra* note 7, at 17 (claiming the rhetoric also demonstrates that U.S. values the participation of the developing countries in negotiations to bring service trade within the GATT).

125. See TRADE ACT, *supra* note 8, at 2364-66.

126. See Berg, *supra* note 7, at 39 ("postwar growth in LDC economies has spawned third world economic interests that are often at odds with those of industrialized states. These interests, in the aggregate, are powerful enough that they cannot easily be ignored. Consequently, officials from industrialized states recognize increasingly that the success of the next round (Uruguay Round) will turn on whether or not it provides real benefits for the third world").

127. See generally LINDERT, *supra* note 98, at 275; ROBOCK & SIMMONDS, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES (1983) (it has been asserted that the differing cultural and social objectives of the North and South will lead to a never-ending debate) [hereinafter ROBOCK & SIMMONDS].

128. See Int'l Trade Daily (Nov. 15, 1988) (David Woods, spokesman for GATT, when discussing the continued problems between the North and South, said "I don't want to minimize the problems in Montreal—we are going to need a lot of political will. Positions are hardening, but this is necessary if we are going to have a successful outcome of the talks"). See also 7 Int'l Trade Rep. (BNA) 225 (Feb. 14, 1990) (the United Nations Conference on Trade and Development cited the following principles necessary for a balanced agreement: "trading of concessions on goods with those on services must be expressly prohibited; rights of developing countries to develop their own intermediate and basic service networks must be recognized; solutions proposed should help developing countries to overcome obstacles which limit their integration in world service markets; and for certain specific sectors, the dismantling of obstacles to trade should be accompanied by new governmental regulations aimed at facilitating the growth of export receipts in developing countries").

compromise is reached, many legal problems remain that will ensure a continued debate on the creation of a GATS through the 1990s.

#### IV. FURTHER PROBLEMS

##### A. Definition<sup>129</sup>

Perhaps the most difficult<sup>130</sup> and fundamental issue<sup>131</sup> to be resolved is how to define "services." Unfortunately, traditional trade definitions seem wholly inadequate for services.<sup>132</sup> Not surprisingly, the North and South have constantly bickered over this issue.<sup>133</sup>

The proposals for defining services vary considerably. The European Community's proposal is probably the most comprehensive because, in principle, no sector would be

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129. Measuring trade in services is a function of definition. Thus, discussion on measuring trade in services has been excluded. For more information see Gold, *supra* note 9; Berg, *supra* note 7; U.S. NATIONAL STUDY, *supra* note 5; 4 Int'l Trade Rep. (BNA) 910 (July 15, 1987).

130. See Gold, *supra* note 9, at 297 (the great diversity and heterogeneity of the types of services and the ways in which they may be provided makes the classification of services trade according to these characteristics a complex problem). See also *A GATT for Services*, ECONOMIST, Oct. 12, 1985, at 20 (defining services is not easy. Things which can be bought and sold but which you cannot drop on your foot will do for most purposes); 3 Int'l Trade Rep. 1525 (BNA) (Dec. 17, 1986) (Pol Provost, chairman of the ICC's Belgian National Committee, said "[t]here is a tremendous problem of defining 'services' where they begin, and where they end").

131. See Gold, *supra* note 9, at 298 (the fundamental issue to be resolved is the determination of what is meant by international trade in services). See also Berg, *supra* note 7, at 3 ("a threshold issue in the negotiations is the difficulty of arriving at a commonly accepted definition of the term services"); D. NAYYAR, *Towards A Possible Multilateral Framework For Trade In Services: Some Issues And Concepts* in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, PROCEEDINGS OF THE ROUND TABLE ON TECHNOLOGY AND TRADE POLICY 113 (1990) ("[t]he question of definition is fundamental in so far as the negotiations will remain at cross purposes unless there is a common understanding of what is meant by trade in services") [hereinafter NAYYAR].

132. See Gold, *supra* note 9, at 298 (stating "Much of what has traditionally been considered by the services sector and the U.S. government to be within the scope of international trade in services does not appear to conform to the basic export/import model").

133. See Int'l Trade Daily (BNA) (May 20, 1988) ("Third World countries have continued to resist the American approach, insisting that the GATT negotiating group first define what services mean to different countries"). Cf. Berg, *supra* note 7, at 3 ("[a]n all-encompassing definition is not attractive to states with service industries that they seek to protect").



excluded."<sup>134</sup> The European Community's use of cross-border concepts has received some scholarly support.<sup>135</sup> However, both the Southern states<sup>136</sup> and at least one publicist<sup>137</sup> have criticized the inclusion of establishment trade in a definition of services.<sup>138</sup>

The United States appears to have sidestepped the issue<sup>139</sup> of defining services in order to move directly into selecting which service industries are to be covered.<sup>140</sup> Of considerable debate is the United States' proposal, surprisingly supported by the European

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134. Int'l Trade Daily (BNA) (Oct. 25, 1989). The E.C. proposes to define trade in services as providing a service through one or more of the following types of transactions:

1. involving cross-border supply of the service;
2. involving cross-border movement of consumers;
3. involving a commercial presence, whether temporary or permanent; and
4. involving the movement of personnel essential to the supply of the service . . . i.e. key personnel and other skilled personnel, and provided such movement is limited to the specific purpose for which the access is granted and is of limited duration or is a discrete transaction.

It should be noted that by saying that "no sector would be excluded", the European Community has indicated its preference that all service industries be included in a GATS.

135. See Gold, *supra* note 9, at 298. "Although across-the-border services might present administrative problems relating to valuation and record-keeping, no conceptual problem arises as to whether they are within the scope of international trade in services."

136. See 6 Int'l Trade Rep. (BNA) 1368 (Oct. 25, 1989) ("[it] could bring stiff opposition from the developing countries that are seeking broad access for workers in order to export their building and tourism trades").

137. See Gold, *supra* note 9, at 300 ("[r]egardless of why foreign establishment occurs . . . a serious question is raised as to whether such trade should be considered within the scope of the meaning of international trade in services"). However, Gold notes, "the American service industries apparently hold very strong views that establishment trade is properly includable within the meaning of international trade in services." *Id.* at 302.

138. *Id.* at 298 ("The concept of establishment trade is that the transaction requires physical proximity between the seller/producer and the buyer/consumer because the service is not or cannot be transported or otherwise provided across the border. It is the currency exchange transaction affecting the balance of payments between the countries which provides the basis for characterizing the transaction between the buyer and the seller as international trade").

139. See 5 Int'l Trade Rep. (BNA) 475 (Mar. 30, 1988) (the U.S. has probably taken this position due to frustration over the fact that the GNS "spent most of its first year defining what services are rather than considering how they can be included in the overall trade framework").

140. Int'l Trade Daily (BNA) (Nov. 5, 1987) (industries include telecommunications, processing and communications technology, financial services (banking and insurance), construction engineering, accounting, architecture, legal services, and franchising).

Community,<sup>141</sup> to employ an "opt out"<sup>142</sup> or "negative list" approach.<sup>143</sup> The "opt out" or "negative list" approach requires the listing of service industries that will not be included in a GATS. As expected this approach has been criticized by the South<sup>144</sup> and appears to have all the markings of causing debate between several significant states.<sup>145</sup>

The South has virtually unified under an "opt-in" or "positive list" approach.<sup>146</sup> The South also wants to include labor-intensive services while the North favors limiting services to white-collar

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141. See 7 Int'l Trade Rep. (BNA) 476 (Apr. 4, 1990). The U.S. and E.C. "informally" presented a joint new proposal. It should be noted that it was not a "formal" proposal and it was full of "square brackets". The surprise takes form in the E.C.'s willingness to move away from a comprehensive discussion in favor of the opt out plan.

142. See 6 Int'l Trade Rep. (BNA) 1368 (Oct. 25, 1989) ("Hills confirmed that the U.S. proposal calls for a . . . opt out approach . . . meaning that all services would be covered . . . unless a specific exception was made").

143. See 7 Int'l Trade Rep. (BNA) 477 (Apr. 4, 1990) (negative lists are "lists of service areas that will not be covered in the proposed GATS").

144. *Id.* at 478.

145. Cf. D'Alessandro, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 GEO. L.J. 417, (1987) (discussing the Newly Industrialized Countries cavalier attitude towards prohibiting misuse of American films); Kigawa, *Foreign Lawyers in Japan: The Dynamics Behind Law No. 66*, 62 S. CAL. L. REV. 1489, (1989) (discussing Japanese trade barriers to legal services); Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country. Bridging the Cultural Gap*, 63 TUL. L. REV. 443, (1989) (discussing the E.C.'s extensive rules and regulations regarding foreign lawyers); Kyer, *Marketing Computers and Software in Canada*, PLI Order No. G4-3820, (1988) (discussing the areas of liberalization and restriction in services trade as a result of the U.S.-Canada Free Trade Agreement); Duane, *Sectoral Reciprocity in Telecommunications: The Telecommunications Trade Act of 1988*, 22 GEO. WASH. J. INT'L L. & ECON. 175 (1988) (discussing "pervasive" barriers to U.S. telecommunications industry); 7 Int'l Trade Rep. (BNA) 225 (Feb. 14, 1990) (discussing Japanese barriers to construction related industries which involve U.S. \$300 billion of business in Japan); 3 Int'l Trade Rep. (BNA) 771 (June 11, 1986) ("U.S. companies have been effectively barred from bidding on major construction projects in Japan, including the enormous Kansai International Airport planned for Osaka . . . with an expected price tag of U.S. \$6 billion").

146. See 7 Int'l Trade Rep. (BNA) 477 (Apr. 4, 1990) ("the developing countries are unhappy with the proposed 'negative lists'. They would like to see a reverse procedure adopted in which lists would be established of areas where developing countries can keep out foreign competition if they believe domestic industry is threatened").

services.<sup>147</sup> Not surprisingly, the United States and the European Community oppose these proposals.<sup>148</sup>

Although the exact framework has yet to be formalized, one would imagine that a middle-of-the road proposal, similar to the one presented by New Zealand,<sup>149</sup> would be preferred. When acknowledging the fears of the developing countries, New Zealand said, "there should be a schedule of reservations in which each country that signs an eventual GATS would list those areas which it felt could not immediately be incorporated into it."<sup>150</sup> This would speed up negotiations, provide Northern states with their desired framework, and force Northern states to truly recognize their claimed commitment of not forcing Southern states to contribute beyond their means in trade areas.<sup>151</sup>

### *B. Transparency*

The principle of transparency is considered by the United States an essential ingredient of a GATS.<sup>152</sup> Transparency requires that states fully inform each other of national legislation and regulations designed to protect domestic industries.<sup>153</sup> The United States' concern in this area stems from the fact that "barriers to trade in services often take the form of domestic regulations and practices that act as non-tariff barriers."<sup>154</sup> That is, a developing country could meet the requirement of transparency by simply informing other countries of new legislation

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147. See 7 Int'l Trade Rep. (BNA) 83 (Jan. 17, 1990). See also Berg, *supra* note 7, at 38 ("since labor is plentiful in third world countries, the sale of labor services across international borders in the course of service transactions is potentially a strong export of developing states").

148. See 7 Int'l Trade Rep. (BNA) 477 (Apr. 4, 1990) ("E.C. and U.S. officials said that allowing such exemptions would amount to giving the developing countries a veto on what can be included in a GATS . . . they are expecting a free ride in the GATS").

149. See *supra* note 54.

150. *Id.*

151. See *supra* note 74.

152. See Berg, *supra* note 7, at 11.

153. See *id.*

154. See U.S. NATIONAL STUDY, *supra* note 5, at 57. The U.S. also believes that regulations for safeguarding sovereignty should be specifically noted; a dispute settlement mechanism should be established, and a due process agreement wherein foreigners could take part in the actual drafting of proposed laws. *Id.*

while continuing to impose significant barriers to trade in services. In short, the text of transparency would be fulfilled while the spirit of liberalizing trade in services would be flouted.

It also seems inevitable that the South will oppose the due process aspect of the United States proposal.<sup>155</sup> The reason for opposition to the due process requirement is "that it allows foreign service providers to participate in rule making."<sup>156</sup> It seems fair to say that every country probably will treat this provision with skepticism as it significantly intrudes upon an area considered purely domestic, i.e. lawmaking. Moreover, the United States desire "to bind local level governments" will be highly problematic.<sup>157</sup>

The European Community, in agreeing with the United States on the importance of transparency,<sup>158</sup> has outlined how transparency should be applied.<sup>159</sup> The E.C. argues that transparency can be applied in the following ways: "through the notification by governments of perceived obstacles to services trade, as well as the notification of regulations perceived as appropriate; as an obligation for governments concerning all national regulations affecting the supply of services by foreign suppliers; the provision and publication of 'inquiry points' through which governments could exchange information for the benefit of firms likely to be affected by existing or new regulations; and through the continuous assessment of the results of any agreement reached."<sup>160</sup>

As a general principle, the inclusion of transparency in a GATS would have to be considered a fantastic achievement. It

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155. See Berg, *supra* note 7, at 18.

156. *Id.*

157. See 6 Int'l Trade Rep. (BNA) 1153 (Sept. 13, 1989) (Linda Powers, deputy assistant secretary of commerce for services, noted, "that areas such as construction and insurance services are largely regulated at the state and municipal level . . . we need to figure out how far these disciplines should go").

158. See 4 Int'l Trade Rep. (BNA) 1592 (Dec. 23, 1987) ("the E.C. also says that transparency can be seen as an important instrument for promoting trade, and its absence as a major obstacle to it").

159. *Id.*

160. *Id.*

imposes a high level of responsibility for notification, and it requires sincere co-operation among states. Further, at least one publicist considers the incorporation of transparency into a GATS to be improbable.<sup>161</sup> Although there appears to be no opposition to the principle of transparency,<sup>162</sup> one must seriously question whether the principle will ever reach the level proposed by the United States and European Community.<sup>163</sup>

### *C. Market Access*

Market access involves the development of a market equally open to foreign as well as domestic suppliers, except in cases of national security or exceptional balance of payment problems.<sup>164</sup> Unfortunately, governmental imposition of restrictions to market access are incredibly pervasive.<sup>165</sup> Market access also involves discussion of the highly sensitive areas of foreign ownership and investment<sup>166</sup> and requires new rules to provide equal footing with domestic publicly held monopolies.<sup>167</sup>

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161. See NAYYAR, *supra* note 131, at 137 ("given the characteristics of services, as distinct from goods, it is most unlikely that the concept of transparency can be written into a legal regime, let alone put into practice"). *Id.*

162. See 7 Int'l Trade Rep. (BNA) 337 (Mar. 7, 1990) (in fact, the Latin American and Caribbean countries "called for total transparency in all services dealings and said that national information centers should be established to enable countries wishing to do business in services industries in other countries to obtain details of relevant legislation and regulations").

163. See *supra* notes 152-54. Cf. 7 Int'l Trade Rep. (BNA) 16 (Jan. 3, 1990) ("the question of transparency involves negotiations on how much information governments must make available on laws governing services and how much weight national laws will have in relation to the proposed international agreement").

164. 3 Int'l Trade Rep. (BNA) 1525 (Dec. 17, 1986).

165. See JACKSON, *supra* note 3, at 999 (summarizing Michael Samuels, Chamber of Commerce of U.S., 1982, Statement on the Trade in Services Act of 1982). Samuels points out governments engage in prohibition of across-the-border importation; denial of the right of establishment; discriminatory licensing and registry of foreign firms; interference with financial structures; denial of access to production inputs; prohibiting use of certain marketing techniques; and discretionary regulatory power. *Id.*

166. See BERG, *supra* note 7, at 12-13. See also U.S. NATIONAL STUDY, *supra* note 5, at 38 (although noting that this is a "sensitive issue", the U.S. argues that "parallel efforts need to be pursued in other fora to reduce foreign investment barriers").

167. See BERG, *supra* note 7, at 11 ("U.S. seeks rules to prevent domestic public monopolies from competing unfairly with foreign firms").

The most sensible approach to improved market access has been offered by the European Community.<sup>168</sup> The European Community's approach takes a logical and pragmatic position in that it requires "periodic agreement on similar levels of market opportunity in a particular sector."<sup>169</sup> In similar fashion, the European Community has sought to deal with public monopolies in an orderly manner.<sup>170</sup> However, there is little doubt that this problem, due to its ties with ownership and investment, will cause extensive debate.<sup>171</sup>

#### D. National Treatment

The United States adamantly supports the extension of GATT principles on national treatment<sup>172</sup> to trade in services.<sup>173</sup> For the most part, this seems to parallel the position of the GNS.<sup>174</sup> Perhaps the most problematic aspect in this regard is the existence of public monopolies.<sup>175</sup> Through use of public funds, the monopoly is not only capable of controlling the domestic market but it achieves an unfair advantage in the international market.<sup>176</sup>

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168. See 4 Int'l Trade Rep. (BNA) 1592 (Dec. 23, 1987).

169. *Id.* at 1593.

170. *Id.* "[The E.C.] therefore proposes that a set of principles of behavior be drawn up, which would be suitable for national monopolies and for firms or groups of firms with dominant positions in the marketplace." *Id.*

171. See BERG, *supra* note 7, at 27 (suggesting that the South "should advance a regime of standards that would clarify the confusion over the differences between trade in services and investment in services"). See also U.S. NATIONAL STUDY, *supra* note 5, at 37 (the U.S. apparently would support such a regime).

172. See GATT, *supra* note 6, art. III. Article III, § 1, states in relevant part:

1. The contracting parties recognize that internal . . . laws . . . affecting the internal sale . . . or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production.

173. See U.S. NATIONAL STUDY, *supra* note 5, at 55. "A fundamental principle governing services trade . . . is that foreign services and their suppliers should be treated on the same basis as domestic firms supplying these services." *Id.*

174. See *supra* note 37 and accompanying text (citing GNS terms of reference, which indicates an interest in extending many of the principles found in GATT).

175. See *supra* notes 106-08 and accompanying text (discussing conflict between free trade in services and the objective sought in the use of public monopolies).

176. See BERG, *supra* note 7, at 11-12. "Public monopolies . . . can achieve a competitive advantage by dealing with the home market on terms that allow the public sector to absorb costs. In effect, the public sector subsidizes the monopoly's operations in the less regulated markets of other

In an effort to offset this potentially large problem, the "USTR proposes a rule that would ban the practice by requiring an arm's length relationship between the monopolistic service industry's . . . activities and its activities as an international competitor. . . ." <sup>177</sup> There is little doubt that Southern states, <sup>178</sup> and quite possibly the European Community, <sup>179</sup> will oppose this approach.

Unfortunately, absolute national treatment is as undesirable for trade in services <sup>180</sup> as it is for trade in goods. <sup>181</sup> This is primarily due to the desire of every nation to reserve considerable

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states. This is typically done by selling at a high enough price in the home market to enable the monopoly to offer a competitive price abroad." *Id.*

177. *Id.* at 12 (citing the USTR in the ANNUAL REPORT TO THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM, 1984-85, app. M, at 154).

178. *Id.* at 18 (stating "governments of developing countries often own and operate such service industries as banking, insurance, . . . Authorities use these industries as instruments of national economic and social policy. For many developing countries, these represent the height of their economies, the control of which they do not wish to leave to foreigners").

179. See 5 Int'l Trade Rep. (BNA) 1589 (Dec. 7, 1988) (The E.C. doesn't want a complete national treatment package now . . . indicating that the Community would rather phase in such an arrangement").

180. See NAYYAR, *supra* note 131, at 137. "The concept of national treatment, developed in the context of trade in goods in the GATT, may not be appropriate for trade in services." *Id.*

181. See GATT, *supra* note 6. Art. III, §8, provides in relevant part:

- (a) The provisions of this Article shall not apply to laws . . . governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale[.]

See also *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962). The California District Court of Appeal, applying Section 8(a), held it inoperative as applied to San Francisco's acceptance of bids for a generation station since the equipment is for "use in the generation of electric power for resale." Article XX states in relevant part, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human . . . health . . . .

See also *Territory of Hawaii v. Ho*, 41 Haw. 565 (1957). The Supreme Court of Hawaii, found a Hawaii statute requiring a vendor to display a placard indicating the sale of "FOREIGN EGGS" undeserving of the public moral or human health protection of Article XX; Article XXI says, in relevant part, "Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests. . . .

See also JACKSON, *supra* note 3, at 911. "The issue of national security being so important, it has always seemed inevitable that a national security exception would apply to international trade rules." *Id.*

discretion in the formation and implementation of national policies. Although this viewpoint is probably shared by all GATT members,<sup>182</sup> it achieves even greater significance with the South.<sup>183</sup> The Southern states' concern simply reflects their fear that large transnational corporations from Northern states will extinguish their domestic service industry. However, it has proven to be a somewhat workable<sup>184</sup> aspect of GATT, thus ensuring some form of a national treatment clause in a GATS.<sup>185</sup>

#### E. Most-Favored Nation and Non-Discrimination Clause

It should come as no surprise that the United States<sup>186</sup> and the European Community<sup>187</sup> strongly support the inclusion in a GATS

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182. See U.S. NATIONAL STUDY, *supra* note 5, at 48. The U.S. rhetoric citing national treatment as a "primary objective in efforts to establish disciplines governing services trade" seems almost entertaining in light of *Schieffelin & Co. v. United States*, 424 F.2d. 1396 (1970), where the U.S. successfully argued against application of Article III to questionable customs tax provisions. See also JACKSON, *supra* note 3, at 508 (citing The Fair Practices in Automotive Products Act, which is still pending approval in Congress). This Act borders on violation of Article III due to its restrictive domestic-content requirements.

183. See 5 Int'l Trade Rep. (BNA) 475 (Mar. 30, 1988) (Argentina's proposal indicated that developing countries "should have the option of establishing specific national policy objectives in individual service areas"). See also 7 Int'l Trade Rep. (BNA) 337 (Mar. 7, 1990) (discussing the Latin American and Caribbean proposal).

184. *Contra* JACKSON, *supra* note 3, at 486 and 491 (citing *Italian Discrimination Against Imported Agricultural Machinery*, Report by the Panel for Conciliation 15 July 1958, GATT, 7th Supp. BISD 60 (1959) and *E.E.C.- Measures on Animal Feed Proteins*, Report of the Panel adopted on 14 March 1978, GATT, 25th Supp. BISD 49 (1979), respectively). In short, the somewhat strained reasoning of these cases calls into question the efficacy of a national treatment clause.

185. See *supra* note 103 (cited in JACKSON at 1005) In arguing for a GATS, Krommenacker states, "If each signatory nation were to eliminate all distinctions between foreign services and domestic services, world-traded services would be liberalized and each country would retain control over those service industries that it feels should be regulated." Krommenacker at 167-70.

186. See U.S. NATIONAL STUDY, *supra* note 5, at 48 ("the MFN principle has had major advantages in the establishment of a multilateral trading system for goods and it is likely that it could have similar advantages for trade in services"). See also JACKSON, *supra* note 3, at 428 (citing Executive Branch GATT Studies, No. 9, 1974). "The basic rationale for MFN is that if every country observes the principle, all countries will benefit in the long run through the resulting more efficient use of resources. Furthermore, if the principle is observed, there is less likelihood of trade disputes." *Id.*

187. See 6 Int'l Trade Rep. (BNA) 1368 (Oct. 25, 1989) ("the Community's document on non-discrimination calls for the application of the MFN clause across the board for all signatories. . ."). Cf. 3 Int'l Trade Rep. (BNA) 348 (Mar. 11, 1987) (quoting John Richardson of the Commission of the European Communities said, "some countries -- France is one, though he did not name it -- pursue an active cultural policy designed to reinforce and safeguard their cultural identity, and in



of a most-favored nation (MFN) clause similar to that found in the GATT.<sup>188</sup> The MFN principle, simply stated, requires that "any advantage . . . granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."<sup>189</sup> However, the Latin American and Caribbean agreement to endorse non-discrimination in services trade was probably a bit shocking.<sup>190</sup> This assertion draws support from the fact that such tactics are usually reserved by governments in order to facilitate the implementation of some underlying national policy objective. At least two noted publicists<sup>191</sup> believe that a GATS should include a MFN clause.<sup>192</sup>

Although a MFN clause is virtually ensured a position in a GATS, the clause has been the subject of some confusing GATT panel decisions,<sup>193</sup> and some questionable reports issued by the

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doing so they may discriminate against foreign suppliers of cultural services, such as films. . .").

188. See GATT, *supra* note 6, at art. I. Art. I states in relevant part:

1. With respect to customs duties . . . and with respect to the method of levying such duties . . . and with respect to all rules . . . in connection with importation and exportation . . . any advantage . . . granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

189. *Id.* See also NAYYAR, *supra* note 131, at 136 (pointing out the two principal advantages of MFN as "first, the strong cannot discriminate against the weak and, second, trade liberalization or concessions negotiated among two or a few powerful developed countries are multilateralized for the benefit of all others in the system").

190. See 7 Int'l Trade Rep. (BNA) 337 (Mar. 7, 1990). Cf. New International Economic Order Programme of Action, U.N. Doc. A/RES/3202 at 7 (1974) ("In the field of general trade . . . the principles of non-reciprocity and preferential treatment for developing countries in multilateral trade negotiations should be the guidelines").

191. See KROMMENACKER, *supra* note 24, at 167. See also NAYYAR, *supra* note 131, at 136 ("the MFN principle, therefore, appears both relevant and appropriate for trade in services").

192. *Id.*

193. See JACKSON, *supra* note 3, at 445-50 (citing *Treatment by Germany of Imports of Sardines*, Report adopted by the Contracting Parties on 31 October 1952, GATT, 1st Supp. BISD 53-59 (1953) and *Belgian Family Allocations Allowances*, Report adopted by the Contracting Parties on 7 November 1952, GATT, 1st Supp. BISD 59-62 (1953), neither of which are persuasive).

United States.<sup>194</sup> Both the Executive Branch GATT Studies, No. 9 and the Senate Report No. 93-1298 are seemingly contradictory to the United States' official support for a MFN clause in a GATS. In any event, MFN's importance to GATT<sup>195</sup> will probably justify its reproduction in a GATS.<sup>196</sup>

Perhaps one of the greatest points of contention is the inclusion in a GATS of a "Customs Unions and Free Trade Areas" exception similar to that found in the GATT's MFN clause.<sup>197</sup> This is primarily due to the perceived misuse of the exception by developed states. The United States is probably the main target of this criticism as it has entered into two free trade agreements<sup>198</sup> and has indicated an interest in a third.<sup>199</sup> Considering the usual economic benefits that accrue to members of such Customs Unions or Free Trade Areas, developing states think the United States is not a needy applicant.

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194. See JACKSON, *supra* note 3, at 464 and 476 (citing, first, the Executive Branch GATT Studies, No. 9, The Most-Favoured-Nation Provision, 136-37, 93d Cong., 2d Sess. (1974), which offers reasons as to why MFN is "a goal which cannot in all cases be achieved." Second, in Senate Report No. 93-1298, Reciprocal Nondiscrimination, 93d Cong., 2d Sess. 94-95 (1974), the U.S. arguing against "free rider" problems seemed to support conditional MFN principles).

195. See Hufbauer, *The GATT Codes and The Unconditional Most-Favored-Nation Principle*, 12 L. & POLY. INT'L. BUS. 59, 91 (1980) ("without unconditional MFN, bilateral trading arrangements that divert trade from third countries and undermine the efficiency of the world economic system could become widespread").

196. See 7 Int'l Trade Rep. (BNA) 16 (Jan. 3, 1990) ("concepts . . . to be embodied in a future framework on trade in services were identified (by the GNS) as: most-favored-nation treatment and non-discrimination").

197. See GATT, *supra* note 6, at art. XXIV. Article XXIV provides in relevant part:

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

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198. See *U.S.-Israel Free Trade Agreement*, Pub.L. No. 99-47, 99 Stat. 82 (1985). See also *U.S.-Canada Free Trade Agreement* (entered into force Jan. 1, 1990. No T.I.A.S. number assigned yet).

199. See 5 Int'l Trade Rep. (BNA) 993 (July 6, 1988) (indicating "a probe of the feasibility of a U.S.-Japan free trade pact has officially begun . . .").

Further, the exception has caused inconclusive Working Party reports<sup>200</sup> and the approval of somewhat overlapping regional agreements.<sup>201</sup> Although the European Community generally agrees that this exception should be included in a GATS,<sup>202</sup> the European Community has expressly opposed a United States-Japan agreement.<sup>203</sup> The European Community has not put forth a clear reason to support its opposition. However, it seems reasonable to hypothesize that the European Community views exclusion from such a powerful free trade agreement to threaten its economic well-being. That is, the European Community's major international competitors (i.e. the United States and Japan) will derive extensive benefits from such an agreement and at the cost of lost opportunities for the European Community. Thus, the issue remains unsettled.

## V. CONCLUSION

Considering the relative importance of trade in services to world trade, it seems almost nonsensical for one to have to argue for the creation of a General Agreement on Trade in Services. However, the world trading system is far from being a rational creature, responding solely to its own economic advantage. In fact,

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200. See JACKSON, *supra* note 3, at 458-62 (citing *Examination of Stockholm Convention*, Report adopted on June 4, 1960, GATT, 9th Supp. BISD 70, 83-87 (1961), *Association of Greece with the European Economic Community*, Report adopted on 15 November 1962, GATT, 11th Supp. BISD 149-54 (1963) and *E.E.C.-Association Agreements with African and Malagasy States and Overseas Countries and Territories*, Report of Working Party adopted on 4 April 1966, GATT, 14th Supp. BISD 100-06 (1966)).

201. *Id.* at 463. "Those agreements approved by GATT in the last decade were the ASEAN agreement (Indonesia, Malaysia, Philippines, Singapore and Thailand) and the Bangkok Agreement (Bangladesh, India, Korea, Laos, Philippines, Sri Lanka, and Thailand)." *Id.*

202. See 6 Int'l Trade Rep. (BNA) 1368 (Oct. 25, 1989) ("to benefit from the derogations, however, the regional agreements would have to respect the following conditions: agreements should liberalize trade in services between the parties in a broad range of sectors; agreements should be linked to customs unions or free trade agreements for goods; and agreements should not prejudice the level of liberalization commitments undertaken by the signatories concerned in the context of the general framework").

203. *Id.* "The second derogation from the MFN status should be available for traditional regional formations, such as the existing U.S.-Canada free trade agreement or the E.C.-EFTA agreement . . . but not for new developments, such as a U.S.-Japan agreement. . . ."

considering the historical maneuvering preceding the anticipated completion of a GATS, one can only stare in amazement at the arguably needless bickering associated with what appears to be in the best economic interests of all concerned. The unfortunate division of states along North-South lines almost ensures that this "World Civil Trade War" will continue to dominate the 1990s. Additionally, the actual drafting of a final and formal GATS, inclusive of all the refined clauses of the GATT, is far from complete. It seems reasonable to expect, however, that the drafters of these rules will do a much better job the second time around. Therefore, a GATS seems inevitable so long as the negotiators remain true to the following principle:

[T]he central issue in negotiating a multilateral services agreement will be to achieve major expansion of trade in services, boosting growth in the world economy, while at the same time respecting the policy objectives which have led to national and international regulation of services and promoted the development of developing countries.<sup>204</sup>

With some of the most brilliant and responsible minds of our times diligently working on a GATS, it seems rather reasonable to expect their devotion to this simple principle.

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204. 4 Int'l Trade Rep. (BNA) 1592 (Dec. 23, 1987). This quote was taken from the E.C.'s position paper, A Possible Conceptual Structure for a Services Agreement. It can be found in 4 Int'l Trade Rep. (BNA) 1592 (Dec. 23, 1987). See NAYYAR, *supra* note 131, at 111 ("the stated fundamental objective of such a framework is the economic growth of all trading partners and the development of developing countries").

