

---

# The Genesis of the GATS (General Agreement on Trade in Services)

Juan A. Marchetti\* and Petros C. Mavroidis\*\*

## Abstract

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

## 1 Why Should We Turn to the Negotiators?

In the context of the GATS, recourse to the negotiating history is, in our view, *passage obligé* for those wishing to inform themselves about the rationale for the GATS. Our interest is not purely historic. Rather, it stems from the absence of an economic theory explaining the GATS. Indeed, contrary to the GATT, the rationale of which has been explained on the basis of two competing theories – *terms of trade*, and *commitment* theory – there has not been a similar development with regard to the GATS. Rather, scholars discussing the GATS have usually taken those GATT-related theoretical developments for granted, and have tried to apply them – somewhat

\* Counsellor at the WTO Trade in Services Division. Email: [juan.marchetti@wto.org](mailto:juan.marchetti@wto.org).

\*\* Edwin B. Parker Professor of Law at Columbia Law School, New York, and Professor of Law at the University of Neuchâtel, Switzerland. He is Research Fellow at the CEPR. Email: [PM2030@columbia.edu](mailto:PM2030@columbia.edu).

unsuccessfully – to the services context. But there are reasons to believe that the *terms of trade* theory would sit oddly with an agreement like the GATS, which combines pure trade and trade through establishment of foreign companies. Although not referring to the GATS directly, Blanchard<sup>1</sup> casts doubt on the applicability of the terms of trade theory in the presence of international ownership, arguing that the latter can mitigate incentives that lead large countries to set inefficiently high tariffs, and that have been argued as the main reason for having trade agreements such as the GATT. The GATS, on the other hand, contains too many loopholes to be considered a safe lock-in mechanism for domestic policies: for this reason, it is hard to argue persuasively that *commitment theory* explains its advent.

The remainder of the article is structured as follows. In section 2, we will discuss trade and trade policy in services before the advent of the Uruguay Round. Section 3 is dedicated to the Uruguay Round negotiation, while in section 4 we examine in more detail the negotiating positions of four key players: Brazil, the European Union (EU), India, and the United States (US). In defence of our selection we will argue that these four participants were instrumental in both the course and timing of services negotiations in the Uruguay Round and in shaping each and every one of the salient features of the GATS. Section 5 concludes.

## 2 Before the Negotiation (pre-1986)

### *A Regulation of Trade in Services*

Before the advent of the GATS, trade in services was regulated through bilateral and regional schemes.<sup>2</sup> The focus of each of these schemes was quite narrow though. The US had concluded a number of treaties of Friendship, Commerce, and Navigation (FCN) which regulated relations across countries with respect to *specific* services, such as aviation, shipping, and communications.<sup>3</sup> Besides that, the US had concluded free trade agreements with Israel and Canada.<sup>4</sup> While the former contained almost no discipline on trade in services, the latter, concluded in 1987, contained substantive

<sup>1</sup> Blanchard, 'Reevaluating the Role of Trade Agreements: Does Investment Globalization Make the WTO Obsolete?', 82 *J Int'l Economics* (2010) 63.

<sup>2</sup> Bhagwati, 'The Role of Services in Development', in UN Centre on Transnational Corporations, *Services and Development, The Role of Foreign Direct Investment and Trade* (1989), at 5–8. UN Doc. ST/CTC/95 mentions that in early economic analysis services were considered non-tradable. Norman and Stradenes, 'International Trade in Services: a Comment', in O. Giarini (ed.), *The Emerging Services Economy* (1987), at 44–49, note that the same holds for some goods. Van Holst notes however that, the merits of this theoretical disquisition notwithstanding, services have been traded for centuries: van Host, 'The Internationalization of Trade in Services', in D.L. Riddle (ed.), *Information, Economy and Development* (1988), at 59.

<sup>3</sup> Brock, 'A Simple Plan for Negotiating on Trade in Services', 5 *The World Economy* (1982) 229, at 236. The US stopped negotiating FCNs already in the 1950s.

<sup>4</sup> Nyahoho, 'Libéralisation multilatérale du commerce des services: enjeux et stratégie des négociations', 21 *Etudes Internationales* (1990) 55. Krommenacker, 'Multilateral Services Negotiations: From Interest-Lateralism to Reasoned Multilateralism in the Context of the Servicization of the Economy', in E.-U. Petersmann and M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations, Legal and Economic Problems* (1987), at 455–463, mentions an agreement between Japan and the US concerning supply of lawyers' services.

disciplines on trade and investment in services, as well as the temporary movement of business persons.

The EU was the only supranational entity with *substantial* experience in regional liberalization of trade in services. Moreover, the dismantling of regulations inhibiting trade in services was identified in the 1985 White Paper on the Internal Market as essential for the achievement of the internal market in 1992.

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

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

- (a) Technology (e.g., the ICT revolution), which made it possible to perform a wide variety of services at a distant geographical location, thus paving the way to trade opportunities, and leading ultimately to the outsourcing and offshoring trends that we are witnessing today;
- (b) The increasing connection between goods and services – since many services are inputs to goods, the liberalization of trade in goods *ipso facto* amounted to liberalization of trade in services as well;<sup>5</sup>
- (c) The shift in employment from manufacturing to services in most OECD countries;<sup>6</sup> and
- (d) The trend towards greater specialization in services and the ensuing gains in productivity.

Although already in the 1980s observers, including the World Bank, seemed to agree on the increasing importance of trade in services, they had different quantitative estimations of its magnitude.<sup>7</sup> The reason for the discrepancy in the estimation has to do with the inherent difficulties in measuring services, and with the fact that very few governments had developed at that time reliable and comprehensive data collection systems.

<sup>5</sup> Schott and Mazza, 'Trade in Services and Developing Countries', 20 *J World Trade* (1986) 253.

<sup>6</sup> Brock, *supra* note 4, cites statistics to the effect that in the US in 1981, 72% of the non agricultural population was engaged in service activities (63% in 1961). In Japan the corresponding numbers were 49 and 37%.

<sup>7</sup> Rivers, Slater, and Paolini, 'Putting Services on the Table: the New GATT Round', 23 *Stanford J Int'l L* (1987) 13.

If trade in services was growing in the absence of a comprehensive framework à la GATS, why bother negotiating one? Brock,<sup>8</sup> then United States Trade Representative (USTR), speaks of a trend of *new protectionism*. In his own words: ‘[i]f the trend of increasing barriers to trade in services continues unchecked, trade opportunities could be markedly reduced and the international trading system could be seriously harmed’.<sup>9</sup>

The sequence here probably holds the key to understanding, in part at least, the long-term motivations behind the GATS negotiation: technology had opened foreign markets to some extent, by making longstanding barriers in some services sectors (essentially financial and telecoms) increasingly obsolete. In other words, technology was making it possible for economic agents to circumvent existing barriers to entry. Some countries (particularly developing ones) reacted by enacting (or threatening to enact) new barriers to ensure that their control over key services sectors would not be undermined by foreign firms accessing what they considered to be strategic sectors of their economy. It was against this threat (or the actual imposition) of new barriers, which run counter to the renewed liberalization impetus in OECD countries in the early 1980s, that Brock<sup>10</sup> wanted to rally his troops (or his troops want him to rally).

### **B The US: Bring It On**

It is commonplace among commentators that it was the US financial services sectors that first argued systematically in favour of a trade round that would include a chapter on liberalization of trade in services.<sup>11</sup> And its voice did not fall on deaf ears: the US was experiencing substantial trade deficits at that time (the late 1970s, early 1980s), which were politically unsustainable. These deficits resulted from significant deficits in trade in goods, which were partially offset by surplus in trade in services.<sup>12</sup>

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

Chief among domestic lobbies was the Coalition of Service Industries (CSI), established in 1982, which played an important role in sensitizing the US government about the importance for the US economy of liberalizing trade in services.<sup>14</sup> The CSI

<sup>8</sup> Brock, *supra* note 4.

<sup>9</sup> Eason, ‘America’s “Invisible” Trade Surplus – Exporting of Services’, *Nation’s Business* (Nov. 1984), at 3.

<sup>10</sup> Brock, *supra* note 4.

<sup>11</sup> Freeman, ‘The Services Sector: Yesterday, Today, and Tomorrow’, *Economic Perspectives* (1996) 1, at 19–21 and G. Feketekuty, *International Trade in Services: an Overview and Blueprint for Negotiations* (1998).

<sup>12</sup> GATT Doc. SR.42/ST/19 of 18 Dec. 1986.

<sup>13</sup> McCulloch, ‘International Competition in Services’, Working Paper No. 2235 (1987), NBER Working Paper Series.

<sup>14</sup> The CSI (see [www.uscsi.org](http://www.uscsi.org)) includes major international companies from the banking, insurance, and other service industries: Lang, ‘The First Five Years of the WTO: General Agreement on Trade in Services’, 31 *Law and Policy in Int’l Business* (1999) 801.

originally focused on banking, insurance, and the right of establishment (of banking and insurance companies) in foreign countries – it was thus, originally at least, contemplating the negotiation of an agreement that would liberalize foreign direct investment rather than direct trade in services.<sup>15</sup> The CSI gathered data, organized conferences, engaged in extensive public lecturing, and heavily lobbied the US government to this effect. Prominent members of the services industry provided evidence to the US Senate Finance Committee (SFC) arguing the case for a global agreement.<sup>16</sup> John Reed of Citibank was heading one of the advisory groups organized by the United States Trade Representative (USTR), the Services Policy Advisory Committee (SPAC), while James Robinson, the head of American Express, was heading the Advisory Committee on Trade Negotiations. Representatives from the financial services sector were omnipresent in the trade dialogue in those days.<sup>17</sup> Cloney, the then President of the International Insurance Council, as well as Cohen and Morante,<sup>18</sup> the former being Manager of Public Affairs for the American International Group (AIG), provide evidence to this effect.

The role of American Express in getting the multilateral negotiation on trade in services off the ground was pivotal and needs some further explanation. In Yoffie's account,<sup>19</sup> the company adopted a Vince Lombardi strategy, named after the famous college football coach and described in the following terms by Joan Spero, American Express's Vice President for International Corporate Affairs:

The best defence was a good offense. The company did not want to be a passive observer of events. On the contrary the fundamental principle guiding American Express' actions was that 'if you don't like the environment, you should try to change it'.<sup>20</sup>

The strategy, in operational terms, consisted of:

- (a) illumination: James Robinson, Harry Freeman, and Joan Spero gave hundreds of speeches and interviews to reputed magazines of wide circulation, such as the *Economist*, *Fortune*, *Business Week*, *The Washington Post*, *The New York Times*, etc.;<sup>21</sup>

<sup>15</sup> Feketekuty, *supra* note 12, mentions that key members were Shelp (from AIG, and previously the US Department of Commerce), Harry Freeman, and Joan Spero (American Express). See also Hansen, 'Frameworks for Foreign Direct Investment', in United Nations Centre on Transnational Corporations, *Services and Development, The Role of Foreign Direct Investment and Trade*, UN Doc. ST/CTC/95 (1989), at 161–162.

<sup>16</sup> See the Appendix in Feketekuty, *supra* note 12.

<sup>17</sup> E.H. Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System* (1995), at 53. S. Ostry, *The Post-Cold War Trading System: Who's on First?* (1997); Ostry, 'Convergence and Sovereignty: Policy Scope for Compromise?', in A. Prakash and J.A. Hart (eds), *Coping with Globalization*, (2000), at 52–96; and Ostry, 'Trade, Development, and the Doha Development Agenda', in D. Lee and R. Wilkinson (eds), *The WTO After Hong Kong* (2007), at 26–33, suggests that for the US services was crucial in sustaining support for multilateralism.

<sup>18</sup> Cohen and Morante, 'Elimination of Non Tariff Barriers to Trade in Services: Recommendations for Future Negotiations', 13 *L and Policy in Int'l Business* (1981) 13.

<sup>19</sup> Yoffie, 'Trade in Services and American Express', in D.B. Yoffie, *International Trade and Competition: Cases and Notes in Strategy and Management* (1990), at 367–386.

<sup>20</sup> *Ibid.*, at 375.

<sup>21</sup> Spero, 'Tear Down Barriers to Export of Services', *New York Times*, 30 July 1991.

- (b) building up the domestic lobby: the CSI, mentioned above, was established in 1982 at the initiative of American Express, along with Bechtel, Peat Marwick, Citibank and some other firms operating in the banking sector;
- (c) building bridges between the CSI and other services lobbies around the world; and
- (d) influencing the US government through direct links: besides participation in entities like SPAC mentioned above, in 1982, James Robinson was one of the six private sector members of the US delegation to the GATT meetings (that led all the way to the Ministerial Conference which we discuss *infra*).<sup>22</sup>

Why did American Express invest so much energy and resources in this discussion? At the time, the company was specializing in travellers' cheques, charge cards, insurance, and investment services. This business depends on the rapid transmission of large amounts of data across national borders through sophisticated computer and telecommunications networks. Trans-border data flows, essential in fact to international banking and financial services, were threatened by protection, and so was data processing. Clearly, this was of utmost importance to American Express. The rationale for protection varied across countries: privacy reasons, protection of strategic sectors, infant industry, and employment.<sup>23</sup> A new agreement regulating trade in services should aim at disciplining the rationale for protection, opening up trade on a worldwide basis.<sup>24</sup>

The US, quite aware of its potential in the services sector, and having experienced itself the gains from deregulation of various services markets, saw no reason why its own experience could not be emulated worldwide.<sup>25</sup> Based on this conviction, the US made a negotiation on services the flagship of its national agenda for a new GATT multilateral round. In 1985, as the time for the launching of the new round was approaching, the then USTR, Clayton Yeutter, had even conditioned the participation of the US in the Uruguay Round upon the inclusion of a negotiation on trade in services in the agenda.<sup>26</sup>

<sup>22</sup> Yoffie, *supra* note 20, at 367 and 375ff.

<sup>23</sup> Gibbs, 'Means to Enhance the Competitive Position and Export Capacity of Service Industries of Developing Countries', in United Nations Centre on Transnational Corporations, *Services and Development, The Role of Foreign Direct Investment and Trade*, UN Doc. ST/CTC/95 (1989), at 104–107.

<sup>24</sup> Yoffie, *supra* note 20, at 378.

<sup>25</sup> The Airlines (1978), Trucking (road transport) (1980), Railroads (railways) (late 1970s and 1980), Telecommunications (1977 and, as mentioned, 1982), Cable Television (late 1970s, and 1984), Brokerage (1975), Banking (1980, and 1982), Petroleum (1979), and Natural Gas Industries (1978) were liberalized in that period: see Winston, 'Economic Deregulation: Days of Reckoning for Microeconomists', 31 *J Economic Literature* (1993) 1263. On AT & T and its break-up see Cowhey and Richards, 'Dialing for Dollars: Institutional Designs for the Globalization of the Market for Basic Telecommunications Services', in Prakash and Hart, *supra* note 18, at 148–169. See also Spar and Yoffie, 'A Race to the Bottom or Governance from the Top?', in A. Prakash and J.A. Hart (eds), *Coping with Globalization* (2000), at 31, 33ff.

<sup>26</sup> 'Yeutter Cites Preconditions on Trade Talks', *J Commerce* (9 Dec. 1985), at 3A.

### *C The EU: CAP, Non Negotiable, Well . . . Maybe*

When it came to forming a negotiating position, the EU<sup>27</sup> saw the issue differently. To start with, although the EU Treaty contained detailed provisions regarding its internal liberalization of trade in services, it was far from being an integrated services market in the early 1980s.<sup>28</sup> However, from a bureaucratic point of view, the EU did not have competence to speak with one voice on all services. Indeed, *Opinion 1/94* (by the European Court of Justice, ECJ) which was issued several years later, at the end of the Uruguay Round, clarified that only services supplied without any physical movement of either the supplier or the customer came under the exclusive competence of the EU.<sup>29</sup>

But there is another, probably more persuasive reason explaining why the EU adopted a defensive stance at the beginning of the process: according to Paemen and Bentsch,<sup>30</sup> the EU wanted to avoid finger pointing against its own farm policy; being aggressive in the services context could have provoked an aggressive attitude against the EU's Common Agricultural Policy (CAP) which it wanted, initially at least, to defend at any price. This would explain why the EU was not initially a *demandeur* for a round in general, never mind trade in services. The link between negotiations on farm trade and services trade is evident in the Decision adopted by the Council of Ministers on 19 March 1985, urging the European negotiators participating in the Uruguay Round to safeguard the CAP while encouraging meaningful negotiations in services.<sup>31</sup>

Defending the CAP was therefore an overriding objective. However, as we will see later, the EU gradually shifted positions during the Uruguay Round, becoming a *demandeur* of services liberalization and key participant in the actual drafting of the agreement. What explained the change in the mood in the EU? There is probably no dominant explanation. The EU must have felt that it would have been awkward to incur the political cost of blocking altogether a round in the name of the protection of its internal farm market. On the other hand, a series of national studies that saw the light of day in the GATT in the early to mid-1980s unveiled the importance of the services economy to EU bureaucrats.<sup>32</sup>

Contrary to their US counterparts, European service industries took more time to get organized. Save for some groups at the national level (notably in Britain and

<sup>27</sup> Throughout this article the term EU (European Union) is used as equivalent to all historical denominations (EEC, EC, etc.) of the European integration process. Numerous discussions with Jonathan Arkell, John Richardson, and Jonathan Scheele on this point are acknowledged.

<sup>28</sup> The extra-EU services grew faster than their intra-EU counterpart in the period 1979–1984: GATT Doc. MTN.GNS/W/23 of 30 Oct. 1987.

<sup>29</sup> In *Opinion 1/08* [2009] ECR I-11129, the ECJ held that services are a shared competence between Member States and the EU.

<sup>30</sup> H. Paemen and A. Bentsch. *From the GATT to the WTO, The European Community in the Uruguay Round* (1985), at 32ff.

<sup>31</sup> *Ibid.*, at 45ff.

<sup>32</sup> Drake and Nicolaidis, 'Ideas, Interests, and Institutionalization: "Trade in Services" and the Uruguay Round', 43 *Int'l Org* (1992) 46, at 57.

Sweden), European services lobbies were not set up until 1986.<sup>33</sup> The European Community Services Group (ECSG), which represented services exporters in the EU and the EFTA (European Free Trade Association), was set up at the invitation of the European Commission in 1986. It was composed mainly of national chambers of commerce, employers' federations, and national services coalitions such as the Liberalisation of Trade in Services (LOTIS) committee of the British Invisible Exports Council.<sup>34</sup> The Banking and Insurance Associations and the Fédération des Experts Comptables Européens were also among the important lobbies.

There is evidence of coordination between the EU and North American interests during the Uruguay Round: for example, Arkell<sup>35</sup> makes reference to the US Chamber of Commerce in Brussels (which represents US affiliates based in the EU), and the US and Canadian CSIs having been guests of the ECSG, and there is further evidence of joint missions of the US, British, Australian, Swedish, and Hong Kong CSIs to Geneva.<sup>36</sup>

It should come as no surprise that the EU bureaucracy was fully behind the negotiation of an agreement. For the EU Commission, trade was the only area where the EU could reaffirm its persona at the international plane, since the EU enjoyed no competence in any other field of international relations and trade was the area where it could speak with one voice. Granted, it was unclear whether the EU had competence on services. This would not, however, stop the EU Commission from pushing the agenda further: adding services in the trade agenda would augment its competences and its relative position towards the Council in the inter-agency game. It was also clear that even the more developed bureaucracies, such as the EU Commission, had not become prepared for this type of negotiation before – and well into – the 1980s.<sup>37</sup>

Bhagwati<sup>38</sup> mentions three other factors contributing to this change of mood in Brussels:

- (a) besides services, the EU must have been well aware of gains in other areas, especially in new areas such as TRIPs (trade-related intellectual property rights). The EU TRIPs lobbies were certainly pushing for participation in the new round;

<sup>33</sup> Pou Serradel, 'La Comisión y las Nuevas Políticas para el Sector Servicios', *Información Comercial Española*, No. 831, July–Aug. 2006. The two mentioned national groups were the Swedish Coalition of Service Industries in Sweden, and 'British Invisibles' in Britain. The latter originated in the Committee on Invisible Exports, set up in Apr. 1968 by the Bank of England, and later became the British Invisible Exports Council. Later, this Council established the Liberalization of Trade in Services (LOTIS) Committee. 'British Invisibles' is now International Financial Services London (IFSL).

<sup>34</sup> Confederation of trade association representing the British services industries.

<sup>35</sup> J. Arkell, *The Role of Services in Socio-economic Transformation and the Integration of Western and Eastern Europe* (1990).

<sup>36</sup> *Ibid.*; Woll, 'Trade Policy Lobbying in the European Union: Who Captures Whom?' (Mimeo, 2007). See also Hong Kong General Chamber of Commerce Bulletin, *Following-up on GATS Negotiations* (Sept. 1990).

<sup>37</sup> Pou Serradel, *supra* note 33, explains that the EU policy originated within an intra-EU Commission group, set up in 1982, called ITS (International Trade in Services), chaired by DG External Relations. In June 1989, the ITS group presented a report to the Commission where the main lines of an external policy on services are sketched.

<sup>38</sup> Bhagwati, 'Aggressive Unilateralism: an Overview', in J. Bhagwati and H.T. Patrick (eds), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (1990), at 33.



- (b) the need to put a stop to US regionalism also played a role. President Reagan was in favour of a new round, but under certain conditions. His message to his team was 'if these negotiations are not initiated or if insignificant progress is made, I am instructing our trade negotiators to explore regional and bilateral agreements with other nations';<sup>39</sup>
- (c) the US Congress was getting into a protectionist mood: although the Jenkins Bill on textiles was voted down, there was fear that similar initiatives would soon see the light of day.<sup>40</sup>

Approximately at the same time, under the Single European Act, the EU was negotiating the completion of its own single market. Although the objectives of the EU single market and the new multilateral round were not the same (far from it), still the EU agent entrusted with the task of negotiating at the international plane (i.e., the Commission) benefited from cross-fertilization in light of the similarity of the instruments used in the two processes.<sup>41</sup>

#### D Other OECD Members: A Measured Yes

OECD members were in favour of the negotiation. Capling's<sup>42</sup> account of the Australian participation in the Uruguay Round points to an attitude that resembles more that of the EU than that of the US:

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

The change in attitude was due, in her view, to the fact that the government was eventually persuaded by the epistemic community that there were real advantages in the opening up of services markets (both at the national and the international levels). Moreover, the Australian Coalition of Services Industries (ACSI), established in 1987, lobbied for an agreement.<sup>43</sup> New Zealand, following de-regulation of its national market, sided with those requesting the opening-up of trade in services, its main (export) interest being in professional services.<sup>44</sup> Canada was aware of its export potential in some services, but quite unwilling to open up others, like audio-

<sup>39</sup> Preeg, *supra* note 18, at 51.

<sup>40</sup> Waelbroeck, 'International Trade in Services: a Comment', in Giarini (ed.), *supra* note 3, at 54–57.

<sup>41</sup> Ehlermann and Campogrande, 'Rules on Services in the EEC: A Model for Negotiating World-Wide Rules?', in Petersmann and Hilf (eds), *supra* note 5, at 481–498.

<sup>42</sup> A. Capling, *Australia and the Global Trade System: From Havana to Seattle* (2001), at 149.

<sup>43</sup> Already in 1990, the Australian CSI is quoted as having the intention of joining its counterparts from the US, etc., in a joint mission to Geneva to support the conclusion of the GATS (see Bulletin, *supra* note 37).

<sup>44</sup> The comment made in *supra* note 44 also applies to the New Zealand CSI.

visuals.<sup>45</sup> Japan was a net importer of services but very much interested in negotiating a multilateral framework to liberalize trade.<sup>46</sup> Traditionally a free-trade minded country, and supported by an active CSI, Sweden was one of the fervent advocates of services negotiations from the start, and contributed to them throughout the process, particularly in the sectors of export interest, such as financial and maritime transport services.

### *E Developing Countries: The S Word*

Developing countries reluctantly accepted services as part of the Uruguay Round agenda. At first, they adamantly refused to enter into any negotiation on this issue.<sup>47</sup> The promoters behind this hard line were the countries forming the G-5 (or *gang of five*), that is, Argentina, Brazil, Egypt, India, and Yugoslavia. They were hostile to the negotiations altogether and would not even bow to the temptation to use liberalization of their services markets as a *quid pro quo* for the opening up of the OECD countries' textiles markets: in their eyes, the multi-fibre arrangement was an illegal act altogether, and they saw no reason to pay for its dismantlement. In addition, because of their scarce negotiating resources, they would find it difficult simultaneously to follow negotiations on the traditional GATT agenda (which comprised farm and textiles goods) and on services.<sup>48</sup> Moreover, contrary to the position with developing countries, there was no developing-country lobby pushing for services negotiations.

Developing countries also advanced that another 'S' word should guide negotiations: it should be 'one fundamental principle to guide all phases in our collective endeavour', that is, 'solutions . . . by definition must be compatible with . . . sovereignty'.<sup>49</sup> They wanted to avoid their economies being effectively controlled by foreigners.<sup>50</sup> Some (at least self-proclaimed) developing countries were quite favourable to the negotiations though: Hong Kong China and Singapore, financial centres of prominence, welcomed the idea.<sup>51</sup>

<sup>45</sup> M. Hart, *A Trading Nation* (2002), at 398.

<sup>46</sup> GATT Doc. MTN.GNS/18 of 29 Nov. 1988, at para. 8.

<sup>47</sup> GATT Docs. MDF/26 and 27; G.C. Hufbauer and J. Schott, *Trading for Growth, The Next Round of Trade Negotiations* (1987), at 69ff.

<sup>48</sup> There were voices to the opposite in academia: see Schott and Mazza, *supra* note 6.

<sup>49</sup> GATT Doc. MTN.GNS/W/3, at para. 10, emphasis added, and Sapir, 'Trade in Services: Policy Issues for the Eighties', 17 *Columbia J World Business* (1982) 77.

<sup>50</sup> Gibbs and Ognitsev, 'International Trade', in United Nations (ed.), *Beyond Conventional Wisdom in Development Policy, An Intellectual History of UNCTAD 1964–2004* (2004), at 3–15.

<sup>51</sup> Rivers, Slater and Paolini, *supra* note 9, at 19. On Singapore's strategy see Mun Heng and Low, 'GATT Multilateral Trade Negotiations: Singapore's Perspectives', 2 *Asian Econ J* (1988) 192. As of 1990, Hong Kong would be further supported by its CSI.

## F The Epistemic Community

There were some voices arguing in favour of an agreement,<sup>52</sup> and chief among them was the London-based Trade Policy Research Centre (TPRC), founded in 1968 by an Australian economist, Hugh Corbet, one of the pioneers of the study of trade and investment in services.<sup>53</sup> Other *fora* gradually developed. The Services World Forum (SWF), set up in Geneva in 1986, was an independent forum where academics, policy-makers, and members of the GATT Secretariat attempted to conceptualize a negotiation on trade in services.<sup>54</sup> Its President, Orio Giarini, managed to persuade not only people like Geza Feketekuty (USTR), Claude Barfield (Consultant, USTR, and then a member of the American Enterprise Institute, AEI), Albert Bréssand (who later founded *Prométhée*, another forum that was active in the discussion of trade issues), but also international bureaucrats from the GATT Secretariat and UNCTAD. Drake and Nicolaidis<sup>55</sup> probably got it right when they concluded that the epistemic community did not substantially influence the drafting of specific GATS provisions, but provided useful comments that helped negotiators understand what was at stake.

## G The Road to Punta del Este

The main stages are the following:

- (a) in 1982 the GATT Ministerial Decision called for national studies on the importance of trade in services to be conducted by those willing and opened the door to their examination in the 1984 session;
- (b) following the rejection of the US proposal to establish a Working Party on Services, the so-called Jaramillo Group (an informal group presided over by Colombian Ambassador Felipe Jaramillo with participation open to all GATT contracting parties) sees the light of day, and it is in this context that the national services studies submitted in accordance with the 1982 Ministerial Decision were examined;
- (c) in 1984, the GATT CONTRACTING PARTIES institutionalized an information exchange mechanism (in essence, the review of national studies) and *ipso facto* the Jaramillo Group.<sup>56</sup>

<sup>52</sup> A.V. Deardorff, *Comparative Advantage and International Trade and Investment in Services* (1984); Hindley and Smith, 'Comparative Advantage and Trade in Services', 7 *The World Economy* (1984) 369; Ethier and Horn, 'Services in International Trade', in E. Helpman and A. Razin (eds), *International Trade and Trade Policy* (1991), at 223–244; Richardson, 'A Sub-sectorial Approach to Services' Trade Theory', in Giarini (ed.), *supra* note 3, at 59–82.

<sup>53</sup> Feketekuty, *supra* note 12. The Trade Policy Research Centre published a number of services-related studies by Robert Baldwin, and Brian Hindley.

<sup>54</sup> Drake and Nicolaidis, *supra* note 33, at 61. See also [www.ucd.ie/sirc/swfintro.html](http://www.ucd.ie/sirc/swfintro.html).

<sup>55</sup> *Ibid.*, at 97ff.

<sup>56</sup> CONTRACTING PARTIES: expressed all in caps, this term refers to the highest organ of the GATT with the substantial authority to adopt acts by GATT organs, modify the agreement, launch trade negotiations, etc.

The negative attitude of hard-line developing countries was such that the national services studies ended up being examined in an informal group. As of November 1985, 16 such studies had been circulated and examined.<sup>57</sup>

In 1985, the US made its intentions clear:

Our objective in services negotiations would be the establishment of a legal framework of rules and procedures that would (1) make trade in services as open as possible through a commitment to transparency of practices and the resolution of problems through consultation, and (2) negotiate commitments of a sectoral or functional character dealing with problems unique to individual services industries.<sup>58</sup>

In September 1985, the US formally requested an extraordinary session of the GATT CONTRACTING PARTIES, which was finally held between 30 September and 2 October that year.<sup>59</sup> A Senior Officials' Group (SOG) was then established to discuss the modalities of a new round. This group did not manage to produce something concrete regarding trade in services but kept the discussion on the new round alive.<sup>60</sup> During the same time, the ECSG, made its position on the services negotiation in the next round clear to the EU Commission.

Encouraged by a number of delegations, Arthur Dunkel, the Director General (DG) of the GATT, decided to turn to some eminent persons in an effort to provide some extra intellectual legitimacy to the voices calling for a new round.<sup>61</sup> The group was composed of seven personalities: Bill Bradley (US Senator and member of the Senate Finance Committee, SFC); Pehr Gyllenhammar (Chairman of Volvo); Guy Ladreit de Lacharrière (Vice President of the International Court of Justice, ICJ); Fritz Leutwiler (Chairman of the Swiss National Bank, and President of the Bank for International Settlements); I.G. Patel (London School of Economics); Mario Henrique Simonsen (ex Minister of Finance for Brazil); and Sumito Djojohadikusumo (ex Minister of Trade and Industry of Indonesia). The group produced the *Leutwiler report*, named after the group's chairman. It did not address the merits of negotiating an agreement on trade in services in any meaningful detail, but provided those arguing in this sense with an encouragement through its advocacy of trade liberalization.<sup>62</sup>

At the 41st session of the GATT CONTRACTING PARTIES, a Preparatory Committee was established to determine the objectives, modalities, subject-matter, and participation of the new round.<sup>63</sup>

<sup>57</sup> Australia, Belgium, Canada, Denmark, the EU, Finland, Federal Republic of Germany, France, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland, the UK, and the US. The GATT Secretariat prepared an analytical summary of information exchanged on services, contained in GATT document MDF/7/Rev. 2, dated 25 Nov. 1985. Reyna, 'Services', in T.P. Stewart (ed.), *The GATT Uruguay Round: a Negotiating History* (1993), at 1, states that a total of 18 studies were circulated.

<sup>58</sup> GATT Doc. L/5838 of 9 July 1985.

<sup>59</sup> Bradley, 'Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations', 23 *Stanford J Int'l L* (1987) 57, at 78. The GATT Council (GATT Doc. BISS 9S, at 8–9) was deciding by consensus.

<sup>60</sup> Bradley, *supra* note 59, at 79.

<sup>61</sup> In 1958 as well, a group of experts was established under the chairmanship of Gottfried Haberler (Harvard): GATT Doc. L/794/Add. 1 of 14 Mar. 1958.

<sup>62</sup> J. Croome, *Reshaping the World Trading System* (1995), at 19–20.

<sup>63</sup> GATT Doc. BISS 32, at 10, and Croome, *supra* note 62, at 27.

### 3 The Negotiation of the GATS (1986–1994)

#### *A Launching the Round: Punta del Este (1986)*

Negotiators met in Punta del Este, a few miles off Montevideo, the capital of Uruguay, with the intention of launching the eighth round of multilateral trade negotiations.<sup>64</sup> Simmonds<sup>65</sup> reports that the inclusion in the agenda of the Uruguay Round of a negotiating item on trade in services was still unresolved when the Draft Ministerial Declaration was submitted to Ministers in June 1986. Two coalitions played an important role in Punta del Este:<sup>66</sup> the G-10 (a partnership of developing countries), and the so-called *Café au Lait* group, which included both industrial and developing countries. The leading developing countries (Brazil, India, Yugoslavia) were all part of G-10 and were staunchly opposed to the inclusion of services in the round. The *Café au Lait* marked the first time that dividing lines between developed and developing countries fell.

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

- (a) the US pressure;
- (b) the *Café au Lait* group put together a compromise which managed to gather momentum and provided the basis for the eventual agreement.

#### *1 G-10: It is No*

G-10 is the heir to G-5, its expanded version. It comprised the original G-5 (Argentina, Brazil, Egypt, India, Yugoslavia), and the following developing countries: Cuba, Nicaragua, Nigeria, Peru, and Tanzania.<sup>67</sup> Continuing with the line drawn by the G-5 (described *supra*), the G-10 refused to accept any negotiation on trade in services. On 23 June and 16 July 1986, the G-10 presented two draft Ministerial Declarations, as well as an addendum on 22 July. In all these drafts, it rejected the idea of including trade in services in the new multilateral agenda, considering that time was not yet ripe for such an inclusion.<sup>68</sup>

Srinivasan and Tendulkar<sup>69</sup> partly attribute this attitude to the fact that Brazil and India lagged behind other developing countries when it came to domestic reforms (privatization, etc.): both countries started economic reform processes in 1991, that is,

<sup>64</sup> Richardson, 'What Really Happened at Punta del Este, Understanding the Framework of the Uruguay Round', in Riddle (ed.), *supra* note 3, at 202–213; Winham, 'Pre-negotiation Phase of the Uruguay Round', 44 *Int'l J* (1989) 280. Murray Gibbs graciously shared his experience on the beginning of the negotiation with us.

<sup>65</sup> Simmonds, 'The Community and the Uruguay Round', 25 *CML Rev* (1988) 95, at 96.

<sup>66</sup> Tussie and Lengyel, 'Developing Countries: Turning Participation into Influence', in B. Hoekman, A. Mattoo, and P. English (eds), *Development, Trade, and the WTO* (2002), at 485–492; A. Narlikar, *International Trade and Developing Countries: Coalitions in GATT and the WTO* (2003).

<sup>67</sup> Rivers, Slater, and Paolini, *supra* note 8, at 20.

<sup>68</sup> GATT Doc. PREP. COM (86) W/41; W/41/Rev. 1; and W/41/Rev. 1/Add. 1.

<sup>69</sup> T.N. Srinivasan and S.D. Tendulkar, *Reintegrating India with the World Economy* (2003).

half way through the Uruguay Round. At the time of Punta del Este they were both still living within the confines of the old statist paradigm.

## 2 *US Pressure*

In June 1986, the US tabled a concrete proposal for a Ministerial Declaration which included clear terms for a negotiation on trade in services.<sup>70</sup> At the same time, the USTR Clayton Yeutter publicly announced that the US would turn to bilateral and plurilateral arrangements, instead of the GATT, if the trading nations did not agree on including the necessary subjects in the agenda of the Uruguay Round in particular services.<sup>71</sup> Moreover, one should not neglect the potential impact of unilateral action under section 301 of the US Trade Act of 1974, which allowed the US administration to take retaliatory action against countries imposing or maintaining unreasonable restrictions on US services exports.<sup>72</sup> Developing countries were facing the following dilemma: either continue to say ‘no’ to the US requests for negotiating a multilateral framework on trade in services, and retain their freedom to define unilaterally the regulation of their services markets,<sup>73</sup> but at the risk of being sanctioned by the US; or enter into services negotiations in the GATT and try to constrain as much as possible the possibility for the US to act unilaterally.<sup>74</sup> Under the circumstances, it should not come as a surprise that some developing countries chose the latter.<sup>75</sup> Almost every account of the negotiations in Punta del Este points to the fact that the US, and more precisely its USTR, Clayton Yeutter, was one of the decisive factors in pushing services into the agenda of the Uruguay Round.<sup>76</sup>

## 3 *Café au Lait: The Gordian Knot Untied*

In Narlikar’s account, the rationale for the formation of the *Café au Lait* group was provided by the need to respond to the question whether to include services within the GATT. The *Café au Lait* group owes its existence to the 1982 Ministerial Conference: since initially there was no centralized mechanism to conduct exchange

<sup>70</sup> GATT Doc. PREP. COM(86)W/4 of 11 June 1986.

<sup>71</sup> ‘Yeutter Takes Tough Line on Upcoming GATT Talks’, *Los Angeles Times*, 11 Sept. 1986; Raghavan, ‘Financial Services, the WTO, and Initiatives for Global Financial Reform’, G-24 Working Paper (2009), Washington, DC; Annual Report of the President of the United States on the Trade Agreements Programme, 1983, Washington DC: Office of the US Trade Representative (USTR, 1994).

<sup>72</sup> The US initiated 6 cases in 1985, some of which directly concerned trade in services.

<sup>73</sup> Hodge, ‘Liberalization of Trade in Services in Developing Countries’, in Hoekman, Mattoo, and English (eds), *supra* note 67, at 221–234.

<sup>74</sup> Under s. 301, the US might find other countries’ regulation of services unreasonable or unjustifiable, and might subject it to sanctions.

<sup>75</sup> Cohen and Morante, *supra* note 20, at 504.

<sup>76</sup> Paemen and Bentsch, *supra* note 31, at 39ff. and 59ff; Gibbs, and Mashayekhi, ‘Development in the Uruguay Round Negotiations’ in M. Gibbs and M. Mashayekhi, *Trade in Services, Services in Asia and Pacific: Selected Papers, Volume Two* (1991), UNCTAD/ITP/151, UNCTAD/UNDP: Geneva; Kasahara, ‘Services in Development’, 5 in *Beyond Conventional Wisdom in Development Policy, An Intellectual History of UNCTAD 1964–2004* (2004), at 119–125.

of information, some developing countries decided to join forces with industrialized nations and pursued this mandate informally. Felipe Jaramillo presided over the group's meetings.

There was no firewall between the *Café au Lait* group and the G-10: initially, the latter participated in the meetings organized by Ambassador Jaramillo, but over time stopped participating in the meetings, and proposed a draft Ministerial Declaration that made no mention of services.<sup>77</sup> In reaction to these events, the remaining participants in the Jaramillo process came together in the so-called G-20. The G-20 consisted of Bangladesh, Chile, Colombia, Côte d'Ivoire, Hong Kong China, Indonesia, Jamaica, Korea, Malaysia, Mexico, Pakistan, the Philippines, Romania, Singapore, Sri Lanka, Thailand, Turkey, Uruguay, Zambia, and Zaire. The G-20 liaised with the G-9, a group of developed countries composed of Australia, Austria, Canada, Finland, Iceland, New Zealand, Norway, Sweden, and Switzerland. Under the leadership of Colombia and Switzerland, the group prepared a draft<sup>78</sup> which became the basis for the talks during the Punta del Este Ministerial Conference.

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

Despite belonging to the G-10, Argentina proposed an alternative draft Declaration where 'services' was included in the agenda, but intellectual property and investment were not.<sup>79</sup> What made Argentina change its mind? The country was definitely not the main target of section 301 initiatives by the US, so one could hardly make the argument that it bowed down to US pressure. Hamilton and Whalley<sup>80</sup> offer the following explanation:

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

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

#### 4 End Game: Game On (on Separate Track)

The decision to initiate the negotiations on liberalization of trade in services was taken in Punta del Este in an *ad hoc* intergovernmental meeting, parallel to the session of

<sup>77</sup> Narlikar, *supra* note 66.

<sup>78</sup> GATT Doc. PREP. COM (86)W/47/Rev. 2, of 30 July 1986.

<sup>79</sup> GATT Doc. PREP. COM (86)W/49 of 30 July 1986.

<sup>80</sup> Hamilton and Whalley, 'Coalitions in the Uruguay Round: The Extent, Pros and Cons for Developing Country Participation', Working Paper No. 2751, NBER Working Paper Series (1988) (2 vols), ii, at 18.

the CONTRACTING PARTIES.<sup>81</sup> A separate track was the maximum Brazil and India could accept:<sup>82</sup> one track on trade in goods, and another one on services.<sup>83</sup> The G-10 countries were quick to point to the separation between the goods and the services negotiations.<sup>84</sup> The inclusion, however, of both issues in the same Ministerial Declaration and the institutional link through the Trade Negotiations Committee (TNC) would remove *de facto* the pretended firewall between the two tracks.<sup>85</sup>

### ***B From Punta del Este to Geneva: The Players***

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

- (a) to establish a framework of principles and rules for trade in services;
- (b) to elaborate possible disciplines for individual sectors.<sup>86</sup>

The US seems to be at the origin of this distinction. In its view, this issue was intimately linked to the relevance of GATT principles for trade in services: the general framework would thus encompass the GATT principles (that were judged relevant, preliminarily at least), which would then be further developed to cater for sector specificities.<sup>87</sup>

<sup>81</sup> GATT Doc. MTN.GNS/W/3, at paras 4 and 5.

<sup>82</sup> Randhawa, 'Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round', 21 *J World Trade L* (1987) 63, at 164ff.

<sup>83</sup> GATT/1396, 25 Sept. 1986. The TNC (Trade Negotiations Committee) would meet every 6 months, and when meetings occurred in non-ministerial sessions it would be chaired by DG Dunkel. Three bodies were established and were hierarchically below the TNC: the GNS (Group of Negotiations on Services), the GNG (Group of Negotiations on Goods), and the SB (Surveillance Body). See Marconini, 'The Uruguay Round Negotiations on Services: an Overview', in B.M. Hoekman, P. Messerlin, and K. Sauvart (eds), *The Uruguay Round: Services in the World Economy* (1990), at 19–41. The GNS held its first meeting on 27 Oct. 1986 under the chairmanship of Ambassador F. Jaramillo (Colombia): see GATT Doc. MTN.GNS/1 of 3 Nov. 1986.

<sup>84</sup> MTN.GNS/W/3. Shukla, 'From GATT to WTO and Beyond', The UN University, World Institute for Development Economics Research (WIDER), Working Paper No. 195 (2000), at 17ff, the then Indian Ambassador, explains that while Ministers were meeting in Punta del Este, secret negotiations were being held in Geneva between the EU, Brazil, and India. The outcome of these negotiations was the common working platform which consisted of five elements: (i) legal separation of the two negotiating tracks; (ii) recognition of the development objective; (iii) commitment to respect national laws governing services; (iv) that the relationship between the outcomes of the two separate tracks should be kept open; (v) that the work of relevant international organizations should be taken into account.

<sup>85</sup> McCulloch, 'Services and the Uruguay Round', 13 *The World Economy* (1990) 329, at 345–346, argues that the separation of the two tracks limits 'the efficiency gains attainable through multilateral negotiations, and especially potential North–South agreements to make liberalization in labour-intensive manufactured goods in the North the quid pro quo for high technology and services liberalization in the South'. See Conconi and Perroni, 'Issue Linkage and Issue Tie-in in International Negotiations', 57 *J Int'l Economics* (2002) 423.

<sup>86</sup> GATT Doc. MTN. GNS/3 of 23 Dec. 1986.

<sup>87</sup> Rivers, Slater, and Paolini, *supra* note 8, at 23ff; Jackson, 'Constructing a Constitution for Trade in Services', 11 *The World Economy* (1988) 187; Jackson, 'The Constitutional Structure for International Cooperation in Trade in Services and the Uruguay Round of the GATT', in R.M. Stern (ed.), *The Multilateral Trading System* (1993), at 351–389.



Besides the GNS, which was the main forum for negotiating on trade in services, and where all GATT contracting parties participated, the negotiators established later on a number of sectoral working groups which were meeting regularly and submitted periodically reports to the GNS.<sup>88</sup> These groups were: labour mobility, construction and engineering services, maritime transport services, land transport services, air transport services, telecommunications services, and financial services (including insurance). Participation in all these groups was open to all Uruguay Round participants.

### 1 The US

The US wanted a meaningful comprehensive agreement in services: meaningful in terms of liberalization, and comprehensive in terms of sector coverage and participation.<sup>89</sup> Although the possibility for variable geometry was not totally excluded *ab initio*, the US wished to include all Uruguay Round participants in the negotiation and was to this effect, prepared to make concessions to least developed countries (LDCs) in order to facilitate their participation. It was opposed, however, to widespread free riding and was not prepared to extend this courtesy to developing countries that did not qualify as LDCs.<sup>90</sup> The (eventual) GATS should, in the US view, be a multilateral agreement where everybody, except for the LDCs, would be requested to make a substantial liberalization effort.<sup>91</sup>

### 2 The EU

The distribution of competences across the EU and its Member States was, as we alluded to *supra*, uncertain at the moment the Uruguay Round was launched. It was clarified at the end of the round, when the EU jointly requested an opinion from the European Court of Justice (ECJ) on this matter. Although sitting in the driver's seat, and acting as if it was fully competent, throughout the round the EU agent, the Commission, was on a tight leash: its negotiating positions were not only *ex ante* decided but also *ex post* scrutinized by the EU Member States. *De facto*, however, this does not seem to have been a major impediment.<sup>92</sup> Moreover, a positive external effect stemmed from the intra-EU distribution of competences: the common agent, the Commission, had to report back to 12 Member States with divergent interests. The EU kept very comprehensive and detailed records of each and every discussion, participated in practically all meetings, and emerged as a key player in the negotiations.

<sup>88</sup> GATT Doc. MTN.GNS/36/Add. 1 of 24 July 1990.

<sup>89</sup> Self, 'International Discussions on Trade in Services: The Perspective of Developed Countries', in UN Centre on Transnational Corporations, *supra* note 3, at 167–169; Hindley, 'International Trade in Services: a Comment', in Giarini (ed.), *supra* note 3, at 35–39, mentions that originally the US government toyed with the idea of concessions only in non-factor services, that is, services that can be supplied from a supplier in country A to a buyer in country B without relocation of either seller or buyer.

<sup>90</sup> Paemen and Bentsch, *supra* note 31, at 132ff.

<sup>91</sup> Berg, 'Trade in Services: Toward a "Development Round" of GATT Negotiations Benefiting Both Developing and Industrialized States', 28 *Harvard J Int'l L* (1987) 1, at 14ff.

<sup>92</sup> Pou Serradell, *supra* note 34.

The EU was in favour of a comprehensive agreement as well.<sup>93</sup> Its overall negotiating objective was to a considerable extent a function of its willingness to preserve the CAP.

### 3 *Other OECD Countries*

Apart from the US and the EU, the most active OECD countries were Australia, Canada, Japan, New Zealand, Sweden, and Switzerland.<sup>94</sup> Other OECD countries with high stakes, notably the UK, would channel their interests through the EU Commission. They had more or less similar strategies: they were all in favour of including some specific sectors, while being adamant on excluding others. Unfortunately, their 'ins' and 'outs' were not identical, and this was one of the factors that made the negotiation on MFN quite hard: if only the few sectors where everybody could agree to be part of the 'ins' had been included in the agreement, then the bite of (an eventual) MFN discipline would have been severely curtailed.<sup>95</sup>

### 4 *Developing Countries*

Developing countries were divided into two camps. On one side, the reluctant players, that is, those that believed that there was not much in these negotiations for them and that saw no reason why the negotiation should take place in the first place.<sup>96</sup> Which services could they export to the rest of the world? They held that their competitive advantage was in goods, not in services.<sup>97</sup> And those services of interest to them (like tourism) were liberalized anyway. They adopted a passive – if not obstructive – attitude towards the negotiations, at least early on.<sup>98</sup> Nobody better than the then Indian Ambassador Shukla to sum up the way they felt following the Punta del Este Ministerial Declaration:

In the negotiations that led to Punta del Este, developing countries were able to ensure that their concerns were taken into account in the following manner. First, the respect of the policy objectives behind national regulations was explicitly recognized in the Punta del Este mandate, which to a great extent alleviated the fears of developing countries. Second, development was stated as the ultimate goal of the negotiations, in other words whatever rules and disciplines were to emerge should promote the development of developing countries. Thus, the recognition of the development objective was to meet the concern that the element of equity could be ignored or inequity increased, as a result of the negotiations. Finally, the subject matter of the

<sup>93</sup> von Dewitz, 'Services and the Uruguay Round: Issues Raised in Connection with Multilateral Action on Services: a Comment', in Petersmann and Hilf (eds), *supra* note 6, at 475, 479.

<sup>94</sup> GATT document PREP.COM(86)3, 7 Mar. 1986.

<sup>95</sup> Canada, the EU, Japan, and the US were meeting as 'Quadrilateral' and had already endorsed services negotiations in the GATT; the OECD members endorsed the inclusion of services in the coming round at a meeting in Apr. 1985.

<sup>96</sup> Gill, 'The Uruguay Round: Perspectives from Latin America', in Riddle (ed.), *supra* note 3, at 184–188.

<sup>97</sup> Kierzkowski, 'International Trade in Services: a Comment', in Giarini (ed.), *supra* note 3, at 39–43; Sapir, 'International Trade in Services: a Comment', in *ibid.*, at 49–54.

<sup>98</sup> Randhawa, *supra* note 82, noted that probably some developing countries feared a GATT-like approach to services which, in the eyes of developing countries, was not about equitable growth.

negotiations was defined as 'trade in services', which meant some kind of narrowing down of the scope of negotiations. If a broad coverage had been intended, the mandate would have been framed in terms of negotiations on services or negotiations on transactions of services. Instead, the Ministerial Declaration refers to trade, which is natural for a forum that basically deals with trade matters and not with the whole body of transactions that are associated with any economic activity. Those are the basic principles of the Punta del Este Declaration, which were designed to take care of the concerns of developing countries. It is interesting that the mandate does not speak of liberalization per se as the goal of negotiations. It aims at expansion of trade, not liberalization, of expansion of trade as an instrument for the growth of all trading partners and for the development of developing countries. That is the central goal of the multinational framework that must evolve.<sup>99</sup>

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

### 5 *The various coalitions*

We have already made reference to the *Café au Lait* group and the crucial role it played in successfully unblocking the deadlock back in Punta del Este. The group survived in various versions – sometimes referred to as the Friends of Services Group – but had minimal visibility and minimal successes to its credit. It seems thus fair to conclude that the *Café au Lait* group was instrumental in launching the round but did not have much influence on the shaping of the GATS.

Besides this group, there were informal gatherings of delegations:

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

### 6 *The GATT Secretariat*

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

<sup>99</sup> Shukla, *supra* note 84, at 171.

active participant throughout the process. It is worth recalling that, with few exceptions, there was hardly any embedded expertise, either within national governments and delegations or within international bureaucracies regarding trade in services in 1986. It is lack of expertise in many national capitals that led to reliance on the GATT Secretariat.

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

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

|                                      | <b>Developed countries</b> | <b><i>Café au Lait</i></b> | <b>G-10</b> |
|--------------------------------------|----------------------------|----------------------------|-------------|
| <b>Framework</b>                     | GATT                       | GATT                       | Non-GATT    |
| <b>Agreement's sectoral coverage</b> | Full                       | Full                       | Partial     |
| <b>Liberalization level</b>          | Substantial                | Substantial                | Limited     |

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

|  | <b>Developed countries</b> | <b>Developing countries</b> |
|--|----------------------------|-----------------------------|
| <b>Framework</b>                       | WTO (new)                  | WTO (new)                   |
| <b>Agreement's sectoral coverage</b>   | Full                       | Full                        |
| <b>Liberalization obligations</b>      | Progressive                | Progressive                 |
| <b>Liberalization level (bindings)</b> | Substantial                | Limited                     |

Trading partners struggled during the initial phase of the negotiation, roughly between Punta del Este and mid-1988:

- (a) it was clear that the development of the framework could not be supported by reliable and systematic data on trade in services, which were missing;
- (b) very little could be learned from other international agreements in the area of services that
- (c) GATT principles and concepts, such as transparency of regulations, National Treatment (NT), Most-favoured-nation (MFN), safeguards, exceptions, were considered useful and potentially applicable to a future agreement on trade in services, although it was not clear how and to what extent.

By September 1988, the discussion on the issues (particularly on definitions) was at best abstract or academic.<sup>100</sup> Still, Jaramillo noted that substantial progress had been made in two respects: delegations submitted proposals evidencing their interests, and

<sup>100</sup> GATT Doc. MTN.GNS/17, at paras 40 and 44.

some issues were clarified.<sup>101</sup> During this phase we can observe the negotiating patterns of the two groups:

- (a) developed countries wished to put in place an elaborate framework whereby all, in principle, services sectors would be included;
- (b) developing countries adopted a more defensive strategy: they wished to negotiate on few services, preferably those of their own export interest, and to keep under national control the regulation of whatever sector they consider of national interest.

A rather unfortunate initiative of the developed countries did not help to narrow down the gap between them and developing countries. A 1987 study prepared by the OECD, entitled *Elements of a Conceptual Framework for Trade in Services*, was submitted for consideration to the GATT. It was thwarted immediately by developing countries, only because it had been prepared by the OECD and, consequently, they had had no opportunity to debate it and negotiate it. Negotiations should start from a clean slate, not from an OECD dictum, in their view.<sup>102</sup>

It is worth noting that the GATT Secretariat, through DG Dunkel, argued quite explicitly in favour of the involvement of business in the negotiations from early on. DG Dunkel understood that business was a natural ally since its interests lay in the fast resolution of the round and the liberalization of trade.<sup>103</sup>

### **D The Montreal Ministerial Conference (1988): Mid Term Review**

As became the GATT practice, half way through the round (or around that time) negotiators would meet to take stock of the progress made and agree on whatever needed to be done in order to complete the negotiations. The text that was submitted to the meeting was heavily bracketed<sup>104</sup> to the point that Yeutter, the USTR, was quoted stating that it was 'the worst I've ever seen coming to a ministerial meeting'.<sup>105</sup>

Montreal was more the phase of the negotiation where the negotiation itself had to be maintained. Unfortunately, the US adopted a hard, uncompromising line, and developing countries refused to give in. The EU essentially saw itself as mediator between the US on the one hand and developing countries on the other. Paemen<sup>106</sup> and Bentsch refer to a 'secret' meeting at which delegates from the EU, Sweden, and a host of developing countries (Argentina, Brazil, Egypt, India, and Jamaica) participated

<sup>101</sup> Jaramillo, 'Multilateral Negotiations on Trade in Services: Perspectives for the Future', UN Centre on Transnational Corporations, *supra* note 3, 163, at 164.

<sup>102</sup> Those arguing for the transposition of the OECD MAI (Multilateral Agreement on Investment) to the WTO some years later would have done themselves and the negotiations on trade and investment a favour had they studied this episode and drawn the appropriate conclusions.

<sup>103</sup> GATT Doc. GATT/1407 of 11 Feb. 1987.

<sup>104</sup> By GATT custom, a bracketed text signals disagreements among participants.

<sup>105</sup> Capling, *supra* note 43, at 156.

<sup>106</sup> Hugo Paemen was one of the leading EU negotiators during the Uruguay Round.

and produced what came to be known as the weekend text.<sup>107</sup> This text formed the basis of the Montreal Declaration.<sup>108</sup>

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

### *E From Montreal to the July Text: A Glimpse of Sunshine*

The main issues confronting negotiators were the following:

- (a) should the negotiations be limited to the provisions that would form an integral part of the general framework, or should initial liberalization commitments be negotiated?;
- (b) whether the negative list or the positive list approach would ultimately carry the day;
- (c) the manner in which the initial liberalization commitments would be entered (following the quick decision to reject a proposal by developing countries to limit the pre-Round negotiations to the shaping of the general framework). In this context, two questions emerged as the basic issues: first, the manner in which the initial liberalization commitments would be entered, that is, the subject-matter of what was eventually termed specific commitments; secondly, the manner in which services would be traded under the (eventual) GATS, that is, the modes of supply;
- (d) the applicability of GATT principles (such as NT, MFN, etc.) to trade in specific sectors (telecoms, construction, transport, tourism, professional, and financial services), for which the GATT Secretariat had been asked to prepare background papers to facilitate such assessment.<sup>109</sup>

The TNC met in April 1990, that is, four months after the Montreal meeting. Between April and July 1990, the so-called July Text was prepared and circulated.<sup>110</sup> The July Text is very interesting in several respects:

<sup>107</sup> Marconini, *supra* note 83.

<sup>108</sup> GATT Doc. MTN/TNC/7(MIN) of 9 Dec. 1988; Reyna, *supra* note 57, at 49ff.

<sup>109</sup> GATT Doc. MTN.TNC/13 of 23 Jan. 1990. We are grateful to Hammid Mamdouh, Gary Sampson, Jorge Vigano, and Rufus Yerxa for sharing their views on the negotiation with us.

<sup>110</sup> GATT Doc. MTN.GNS/35 of 23 July 1990.

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

Although the July Text was presented as a 'clean' text, several key issues remained unresolved. Chief among them were the coverage; MFN and market access; and the negotiation and application of specific commitments.

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

Based essentially on the July Text, another text was prepared and formally submitted to all trading partners when they met in Brussels (Brussels Ministerial Conference).<sup>111</sup> The text was substantially bracketed but still, even within brackets, it provided a meaningful basis for the GATS general framework. The Brussels text contained 35 provisions (just like the July Text). Basically all the GATS provisions as we now know them, albeit not *verbatim*, are thematically there:

- (a) the four modes of supply were already mentioned in Article I of the text;<sup>112</sup>
- (b) the exclusion of services supplied in the exercise of governmental functions (now 'governmental authority') appeared for the first time;
- (c) the provisions on increasing the participation of developing countries were beefed up;
- (d) a provision on recognition and harmonization of regulations made its way to the text for the first time;
- (e) specific negotiating mandates were drafted for safeguards and government procurement; and
- (f) provisions on the modification of schedules and dispute settlement were included.

<sup>111</sup> GATT Doc. MTN.TNC/W/35/Rev.1, Annex II of 3 Dec. 1990.

<sup>112</sup> Self and Zutschi, 'Mode 4: Negotiating Challenges and Opportunities', in A. Mattoo and A. Carzaniga (eds), *Moving People to Deliver Services* (2003), at 27, 33.

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

### G From Brussels to Geneva: The Dunkel Draft

Negotiations in the GNS context continued: the so-called Room B meetings<sup>113</sup> multiplied and it is there that delegations attempted once again to iron out their differences and hammer out the GATS general framework. The meetings were of course open to all GATT contracting parties. Only some of them were physically present almost every time (Australia, Bangladesh, Brazil, Canada, Chile, Colombia, Egypt, the EU, Hong Kong, India, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Singapore, Sweden, Switzerland, Tanzania, Uruguay, and the US).<sup>114</sup>

As in any negotiations, but particularly in services where new ground had to be broken, personalities played a key role. At the risk of being unfair to others, it is clear that three delegates almost monopolized the negotiations between the Brussels Ministerial Conference and the preparation of the Dunkel Draft: Jonathan Scheele (EU, stationed in Brussels), Richard Self (US, originally stationed in Washington and later on in Geneva), and B.K. Zutshi (Indian Ambassador to the GATT). They frequently met together and with the Secretariat, and together managed to produce a number of drafts for various key provisions that would ultimately be included in the Dunkel Draft.<sup>115</sup>

DG Dunkel put together a text, the Dunkel Draft, which, its limited legal value notwithstanding, provided – content-wise – the basis for the eventual agreement.<sup>116</sup> Dunkel did not think of services as a ground-breaker. Dunkel decided himself to chair the negotiating groups on Agriculture and on Textiles, obviously holding the view that these two groups held the key to the successful conclusion of the Uruguay Round. The text contained no brackets. Nevertheless, the negotiations still had some way to go:

- (a) first, the absence of brackets was not tantamount to agreement between the players. This is how DG Dunkel conceived the process: based on the confessionals and the ongoing negotiations in Rooms B and F, he requested the various Chairs of negotiating groups to put together a text without brackets.<sup>117</sup> The absence of brackets could be either the outcome of negotiations (and therefore the reflection of a consensus among the parties) or simply, in the absence of consensus, upon Dunkel's request the personal view of the Chair regarding a particular provision. In the

<sup>113</sup> Room B is one of the meeting rooms in GATT; see also GATT Doc. MTN.TNC/19 of 1 Mar. 1991.

<sup>114</sup> While Room B would normally host delegates with technical expertise on the issue, so-called 'Green Room' meetings would be convened and chaired by DG Dunkel (as chair of the TNC), and only selected Ambassadors would participate. 'Green room' meetings were essentially of a political nature.

<sup>115</sup> Brazil was concentrating on the goods negotiations, and India became the leading developing country in the services negotiations.

<sup>116</sup> GATT Doc. MTN.TNC/W/FA of 20 Dec. 1991 (hereinafter 'the Dunkel Draft'); Hart, *supra* note 46, at 414.

<sup>117</sup> F is a meeting room similar to B, where small-sized meetings are held.



case of services, it would be in fact the view of two chairs, because, since April 1991, Ambassador Jaramillo had been assisted in his tasks by Ambassador David Hawes (Australia), who became a sort of co-chair of the GNS, and succeeding Jaramillo when the latter left Geneva;<sup>118</sup>

- (b) secondly, the change in US attitude, and its decision to exclude maritime transport from the purview of the agreement and to take MFN exemptions in some key sectors (financial services, basic telecoms, air transport), also pushed negotiations into a bumpy road.<sup>119</sup> And, of course, the big brother (farm negotiations) was not that far behind: more than ever before, services was not a self-contained negotiation: the failure in the Dunkel Draft to bridge the gap in farm negotiations led to additional negotiating time. Still, the services part of the Dunkel Draft looks very much like the eventual GATS.

DG Dunkel did the multilateral system a service by sticking out his neck and signing a text which was approved by him (and his close staff) but not necessarily by all delegates participating in the negotiations. The text represented a compromise that, in Dunkel's view, could carry the day. It should be noted here that little of substance was added to the Dunkel Draft in subsequent negotiations.<sup>120</sup>

### **H *The Gavel Goes Down (the Train Has Now Left the Station)***

Eventually, and after some self-imposed (unrealistic) deadlines had been passed, following a trade-off between EU concessions in the farm sector and US additional opening of its services market,<sup>121</sup> together with new offers from developing countries in some sectors, the agreement on services was concluded. The new DG, Peter D. Sutherland, played an important role in bringing the overall Uruguay Round package to a successful conclusion.<sup>122</sup>

The successful conclusion was not without some late friction though: the EU, surprisingly for many, changed its attitude on maritime transport days before the final agreement, now requesting the exclusion of this sector from the package. This led services negotiators back to the room where the Annex on Negotiations on Maritime Transport Services was finally concluded. For all practical purposes, negotiations on maritime transport were postponed for a later day, that is, after the entry into force of the Uruguay Round package. It was thanks to this final compromise, which was reportedly achieved one hour before the gavel in the hands of Peter D. Sutherland marking the end of the round went down, that the GATS had been finally agreed.<sup>123</sup>

<sup>118</sup> See GATT document MTN.GNS/41, dated 6 May 1991.

<sup>119</sup> Reyna, *supra* note 57, at 79ff.

<sup>120</sup> GATT Doc. MTN.TNC/25 of 5 Feb. 1992, at 31–33.

<sup>121</sup> 'EC Hints at Agriculture Compromise Linked to US Action on Services', *Daily Report for Executives (BNA)*, 5 May 1992, at A-1.

<sup>122</sup> GATT Doc. NUR 077 of 26 Nov. 1993.

<sup>123</sup> Cohen, 'The World Trade Agreement: The Turning Point; A Call from Clinton, and Then a Deal', *New York Times*, 16 Dec. 1993.

## 4 Property Rights on the GATS

### *A All Four Have Been Quite Influential*

In what follows, we trace the impact which four trading partners (Brazil, the EU, India, and the US) had on the negotiations and on particular features of the GATS. The four made 42 out of 95 proposals to the GNS (more than 44 per cent of the total):

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

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

We should note that the four cannot be credited with influencing decisively each and every provision of the GATS. This was not the case. On the one hand, other participants (e.g., the Nordic countries, Japan, Australia, Canada, Mexico, Switzerland) also submitted several communications at various stages of the negotiating process, and some of the ideas put forward may have found their way to the final text (it is not easy to identify who was the first one to throw up an idea). On the other hand, some other proposals, even if they ended up in the final text, were, in our view at least, of marginal interest: for example, it is the Nordic countries that should be credited with the paternity (or maternity) of Article *Vbis* GATS which, however, is not central to the GATS framework.

The alliance forged by Brazil and India was mainly political. Brazil and India never submitted a joint proposal. For example, in 1989, only three weeks apart, both of them submitted communications outlining the main elements for a services agreement: while the Brazilian one was more rhetorical, the Indian one was more pragmatic and reflected a more elaborate idea of the main elements to be included in the framework.<sup>124</sup>

### **B Brazil**

It is probably fair to state that Brazil ‘frontloaded’ most of its negotiating effort. It spent a lot of negotiating capital in, first, trying to stop any discussion on services; then (when

<sup>124</sup> GATT docs. MTN.GNS/W/86, 21 Nov. 1989; MTN.GNS/W/87, 13 Dec. 1989.

the first strategy did not work out) trying to impose a ‘firewall’ between the negotiations on goods and services; then insisting on focusing on definitions, concepts, and statistics; and, finally, trying to limit the negotiating agenda to few items and trying to get as much flexibility as possible as a developing country. Wahrendorff<sup>125</sup> discusses the Brazilian participation in the Uruguay Round, focusing on services negotiations. He notes a clear opposition initially to negotiating services, followed by a change in attitude after 1988 (Montreal) which allowed Brazil to become more cooperative, and thus enabled the conclusion of the agreement, without however notably influencing the shaping of the agreement. In other words, it was very important politically, due to its influence on other developing countries, but not a mastermind of the agreement.

Wahrendorff attributes the change in attitude to three factors:

- (a) first, some anti-globalization hardliners lost their privileges;
- (b) secondly, the threat of unilateral action by the US, which, as we noted *supra*, was quite serious, and made it increasingly necessary to have a multilateral deal covering services; and
- (c) thirdly, a change in key personnel. Ambassador Paulo Batista headed the Brazilian delegation early on, and was sceptical of the GATT – he called it, like many others, ‘a rich men’s club’. Batista was a friend of G-10, and indeed the mentor of this group, in Wahrendorff’s view. He was replaced in 1989 by Ambassador Rubens Ricupero, a multilateralist who believed in trade cooperation.<sup>126</sup>

Brazil probably understood, after some point in time, that its position regarding a firewall between the negotiation on goods and that on services was water under the bridge. Hence, the potential for trade-offs was there and Brazil could profit, along with all the other trading nations that engaged in this practice; it could, for example, offer the opening-up of its services market in return for the opening-up of the farm markets of the OECD countries. It tried, however, to ensure that the negotiation on services kept a very narrow focus, limited only to the development of a framework of rules and principles, and leaving actual liberalization to be achieved very progressively in future rounds of negotiations.<sup>127</sup>

Hoekman<sup>128</sup> suggests that there are anyway only a few provisions in the GATS of particular interest to developing countries: transparency (Article III GATS), increasing participation of developing countries (Article IV GATS), subsidies (Article XV GATS), and progressive liberalization (Article XIX GATS). Brazil tried its hand with respect to each one of them and specifically supported provisions regarding increasing participation of developing countries, exceptions to the main obligations, safeguards, and transparency, and stressed the importance of progressive liberalization as an

<sup>125</sup> R. Wahrendorff Caldas, *Brazil in the Uruguay Round of the GATT* (1998).

<sup>126</sup> Preeg, *supra* note 18, at 44ff.

<sup>127</sup> GATT Docs MTN.GNS/W/86, and MTN.GNS/27, at para. 12.

<sup>128</sup> Hoekman, ‘Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services’, in W. Martin and L.A. Winters (eds), *The Uruguay Round and the Developing Economies*, World Bank Discussion Paper Series No. 307 (1995), at 125.

overarching principle.<sup>129</sup> It was also clear from its perspective that the new agreement should be a negative integration-scheme, that is, policies should be unilaterally defined, and to the extent that they exhibited (negative) international external effects, the agreement's disciplines should come into play.<sup>130</sup>

## C EU

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

The EU's hand can be traced in all key provisions of the GATS, such as the four modes of supply, the exception for services supplied in the exercise of governmental authority, domestic regulation, NT, the modification of schedules, transparency, and even sectoral disciplines, such as the Annex on Financial Services.<sup>131</sup> Moreover, throughout the process, the EU appeared more forthcoming about developing countries' positions, willing to work through the drafting to accommodate their concerns. This eventually translated, for example, in the GATS distinction between general obligations (applicable to all service sectors) and specific commitments on market access and national treatment (applicable only to sectors specifically chosen and identified by the country concerned). The EU was quite vocal on institutional issues as well, such as dispute settlement.<sup>132</sup>

Being one of the most prominent service exporters, the EU was in favour of a comprehensive agreement. The only sector that the EU wanted to exclude from liberalization commitments was the audiovisual sector.<sup>133</sup> The dispute between the EU and the US over audiovisual services, which was resolved only a couple of days before the conclusion of the Uruguay Round, proved to be the Round's deal-breaker or deal-maker, even more than agriculture, where difficulties had been resolved a few days earlier in December 1993. The stakes were so high that probably the fate of maritime transport services in the Uruguay Round (and later on in the WTO) owes a great deal to the dispute regarding audiovisual services.<sup>134</sup>

<sup>129</sup> GATT Doc. MTN.GNS/W/48 of 19 Oct. 1988, and MTN.GNS/W/86.

<sup>130</sup> Developing countries insisted a lot on a provision that would discipline RBPs, because they feared that most services suppliers were multinational corporations with substantial bargaining power: GATT Doc. MTN.GNS/W/99 of 25 Apr. 1990.

<sup>131</sup> GATT Doc. MTN.GNS/W/65 of 20 July 1989.

<sup>132</sup> GATT Doc. MTN.GNS/34 of 16 July 1990, at paras 21ff.

<sup>133</sup> France was the main force behind this EU stance.

<sup>134</sup> According to media reports at the time (Chol, 'GATT: Dans les coulisses du grand marchandage', *L'Expansion*, 7 October 1993), both parties had envisaged an agreement early in 1993: the US feared opening up the heavily protected maritime transport sector and seemed to have accepted that the EU escaped commitments on audiovisual services. In a very detailed account, Véron, 'Hollywood and Europe: A Case of Trade in Cultural Industries, the 1993 GATT Dispute', Working Paper, Center for International Studies, University of Southern California (Mar. 1999), explains how negotiations between USTR Kantor and EU Commissioner Brittan evolved in Dec. 1993, concluding that '[o]n December 13, Brittan signalled that the EC was ready to trade a standstill on audio-visual legislation against the same commitment by the US on maritime transport'.

## D India

India's original position was symmetrical to Brazil's.<sup>135</sup> Its strategy evolved along the following lines: it would concede right to establishment (within bounds) if it could extract a promise on movement of labour force. This is what Indian delegates termed symmetrical treatment of labour and capital under the GATS. As the Indian negotiator, Ambassador Zutshi, stated in a publication some years after the end of the negotiations, India, through negotiation of meaningful commitments on the movement of physical persons, wanted thus to establish 'the principle of parity/symmetry in the treatment of capital and labor'.<sup>136</sup>

India pushed hard during the negotiations for the inclusion of an Annex on the movement of physical persons. Along with other developing countries (Argentina, Colombia, Cuba, Egypt, Mexico, Pakistan, and Peru) India submitted a very elaborate framework to facilitate movement of natural persons.<sup>137</sup> Although the final compromise (the current Annex on Movement of Natural Persons Supplying Services under the Agreement) falls short in comparison to the Indian proposal, there should be no doubt that it was agreed largely because of the Indian push. India was one of the leaders in the request to avoid a special and differential (S&D) treatment-type of provision (*à la* GATT) into the GATS text. India (like many developing countries) thought that the GATT S&D treatment provisions (the 1980 Decision)<sup>138</sup> was an after-thought. As such, it did not influence the functionality and the understanding of the basic GATT institutions. In the case of the GATS then, India and other developing countries (including Brazil) wanted to see the concerns of developing countries embedded in as many provisions as possible – these concerns should permeate the GATS text. From that perspective, not only is Article IV of the GATS owed to that position championed by India, but also Article XIX on Progressive Liberalization, and more generally, the gradual – positive list – approach to making liberalization commitments.

## E US

It is probably fair to state that the US influenced each and every GATS provision. The US had in mind an investment type of agreement.<sup>139</sup> Besides, it wanted a comprehensive and meaningful negotiation: no sectors should *ab initio* be excluded, and liberalization should be generated through the negotiation. The US was the first GATT contracting party that tabled a comprehensive draft intended to serve as the basis for concluding an agreement.<sup>140</sup> Following heavy lobbying by specific groups, the US decisively influenced the timing and outcome of negotiations for key sectors such as

<sup>135</sup> GATT Doc. MTN.GNS/W/4 of 11 Mar. 1987.

<sup>136</sup> Self and Zutshi, *supra* note 112, at 31.

<sup>137</sup> GATT Doc. MTN.GNS/W/106 of 18 June 1990.

<sup>138</sup> P.C. Mavroidis, *Trade in Goods* (2007).

<sup>139</sup> Sauv , 'Regional Versus Multilateral Approaches to Services and Investment Liberalization: Anything to Worry About?', in P. D maret, J.-F. Bellis, and G. Garcia-Jimenez (eds), *Regionalism and Multilateralism after the Uruguay Round* (1997), at 429–456.

<sup>140</sup> GATT Doc. NUR032 of 21 Nov. 1989.

maritime transport, financial services, and basic telecoms.<sup>141</sup> It was very much the US position that led to the extension of negotiations on these three sectors. In the case of financial services, the main reason was the US's dissatisfaction with the level of liberalization offered by developing country partners, and the consequent fear that the latter would free ride on the already open US financial market. Likewise, the US's position on basic telecoms was not motivated by unwillingness to change domestic laws, but rather by the genuine dissatisfaction with the offers made by its trading nations.<sup>142</sup> The US had to fight a battle on taxation; the consistency of its sub-federal taxes with the principle of non-discrimination was questionable, and, as with maritime transport, the US was unwilling to amend domestic laws.<sup>143</sup> And, finally, recall that the initial US model (an investment treaty, that is, a top down approach where everything in principle should be covered and liberalized unless subsequently excluded through negotiations) was dismissed by the rest of the GATT membership.

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

In the case of financial services, the US had a *de facto* MFN policy at work when it came to admitting foreign financial institutions. For the banking industry – but also securities – it was all about not getting enough market access (in foreign markets) out of the negotiations, particularly after the so-called 'hybrid' approach to scheduling was finally resolved late in 1989. The US had held strongly to the negative list approach for sector coverage and commitments throughout the period preceding that

<sup>141</sup> It is quite ironic to see in retrospect that the services sector that gave a *raison d'être* to negotiations towards a services agreement – financial services – could have eventually ended up outside the GATS coverage. The most persuasive explanation of the US stance in this context has to do with intra-agency distribution of competences (turf wars between the US Treasury and the USTR).

<sup>142</sup> 'Global Telecommunications Talks at Critical Stage, an Interview with Ambassador Jeffery Lang, Deputy USTR', *Economic Perspectives*, Apr. 1996, at 5–7; M. Naftel and L.J. Spiwak, *The Telecoms Trade War* (2000), at 102.

<sup>143</sup> GATT Doc. MTN.GNS/W/227 of 8 Dec. 1993. Deputy Secretary Larry Summers visited Geneva during this period and pressed for the exclusion of discussion on taxation from the Uruguay Round package. Art. XIV(d)–(e) GATS is tailor-made for the US.

decision, largely because of financial services. 'Progressive liberalization' meant only one thing to the US: continued protection in other markets. And the framework of rules and principles meant little, absent commitments to market access. This is the best example of some early enthusiasts turning sour on including services in the trade rules. This changed after the extended negotiations, which were successfully concluded in December 1997, but it stuck during the life of the Uruguay Round.

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

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

## 5 Concluding Remarks

There is no point in repeating how difficult it was to negotiate the GATS, a point that has been time and again made in literature.<sup>144</sup> Suffice it to underscore two elements here:

- (a) this was no group of like-minded countries (like, more or less, the group of countries that originally negotiated the GATT). The participants had diametrically opposite views even with respect to basic issues, such as the usefulness of a multilateral regulatory framework;
- (b) the issue as such is quite complicated. Over 60 years' worth of GATT case law shows that even nowadays it is sometimes a quixotic test to disentangle non-discrimination from deregulation. This is very much the heart of the issue in the services context, and it was not at all an enviable task for negotiators to come up with a workable definition of a barrier to trade.

<sup>144</sup> Feketekuty, 'Assessing and Improving the Architecture of GATS', in P. Sauvé and R.M. Stern (eds), *GATS 2000, New Directions in Services Trade Liberalization* (2000), at 85–111.

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

With this in mind, we present the main findings of our work:

First, the negotiation narrative: once the opposition by developing countries was overcome and talks were launched in 1986, negotiators spent the first three years essentially educating themselves by asking questions about the size of trade involved, the barriers encountered, etc. The future of the negotiations was very much in doubt even in Montreal where the trading nations met for an early harvest; no harvest could be reported by those negotiating services, but the commitment to continue negotiating was solidified; from Montreal to the July Text substantial progress was made in less than two years with respect to the general framework of the GATS. Although the July Text was subsequently modified, it is fair to state that the basic architecture of the GATS was negotiated there and then. The Brussels Text is based on the July Text, contains many brackets, but leads nowhere because of the failure to conclude on CAP. The Dunkel Draft does not put into question the essentials of the Brussels Text but is a welcome signal to the effect that this issue is on the table and conclusion should follow. The period following the Dunkel Draft (1991–1994) is dedicated to the negotiation of specific commitments, the result on the general framework having been judged (implicitly at least) satisfactory.

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

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

Fourthly, India initially and Brazil throughout the round shaped their negotiating position in the light of the prevailing ideology regarding trade in services in these two countries. Developed countries are driven essentially by political economy-type considerations, powerful lobbies making specific requests that often find their way into the final compromise. It is difficult to measure the resistance of ideology- and political economy-based positions.

Fifthly, this is no time for exemplary statesmen like during the post World War II period that saw the establishment of institutions such as the UN, the World Bank, the



IMF, and closer to our discussion, the GATT. The study by Irwin *et al.*<sup>145</sup> shows that individuals who marked the post-World War II construction of international cooperation were behind a trade agreement as well. The (subsequent) Economics Nobel Prize winner James Meade was an active member of the UK delegation, as were the reputed economics professors John Maynard Keynes and Lionel Robbins, and the French philosopher Alexandre Kojève. The 1980s is a different world. It is now modern bureaucracies that drive negotiations forward, and domestic inter-agency battles (like that between USTR and US Treasury on financial services) have had important repercussions on the shaping of the negotiating agenda and the eventual compromise.<sup>146</sup>

Sixthly, the architecture of the agreement, as well as the majority of the provisions are the brainchild of proposals by developed nations, to a large extent the US and the EU. This is probably due to the fact that developing countries took a long time before they became interested and involved in the issue; still, they were quite influential on some issues (India, *Mode IV*<sup>147</sup>).

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

Eighthly, the GATT Secretariat was instrumental in getting the final text out. It is not only the Dunkel Draft that came at a moment when a push was very much needed not just for the negotiations on trade in services, but for the future of the round altogether. Throughout the period of the negotiations, the GATT Secretariat serviced the trading nations, prepared useful papers on conceptual and practical issues, and emerged as an honest broker.

Finally, the agreement as such is no monument of clarity. Indeed, it is very much the outcome of an elaborate political compromise. The language chosen is often awkward, and it should come as no surprise that many of the disputes revolve round misunderstandings regarding the ambit of specific provisions. It is hard to imagine the GATS standing the test of time the way the GATT has done, still going strong more than 60 years after its original drafting. Yet, it is the negotiating history that we have discussed so far that explains why this has been the case: absent complex compromises, we would probably not have seen GATS in the first place. Now, the first decisive step has been taken. Future experience can make it a better, more workable document.

<sup>145</sup> A. Irwin Douglas, P.C. Mavroidis, and A.O. Sykes, *The Genesis of the GATT* (2008).

<sup>146</sup> Although national delegations change over time and especially so in an 8-year period (that is, the time it took to complete the round), the reader can get a flavour of the individuals involved in the negotiation of the Uruguay Round by looking at GATT Doc. MTN.TNC/INF/1 of 27 Oct. 1986.

<sup>147</sup> *Mode IV* refers to the temporary movement of physical persons.