服務貿易總協定談判的另類作法之評估

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關鍵字：服務貿易總協定、關稅暨貿易總協定、業別協商、方程式研究方法

中文摘要

服務貿易的談判是當前多哈回合的重要議題之一。就研究現階段服務貿易總協定（GATS）此一回合談判而言，服務貿易的談判多以混合雙邊和多邊模式的（request-offer approach）「要求－出價」方式進行，然而近年來世貿組織會員也開始探索其他談判模式。這包括按照服務部門和提供方式談判，以及按照某些以公式（formulae）和量化指標（quantitative benchmarks）爲基礎的談判模式。本文在總結烏拉圭回合談判中運用這些非主流談判方式的經驗的基礎上，進一步探討在今後的服務貿易談判中應如何運用這些談判方式，推動談判取得突破。

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Evaluating Alternative Approaches to GATS Negotiations: Sectoral, Formulae and other Alternatives

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Abstract:

In addition to the request-offer approach, which is the main approach in the current round of GATS negotiations, the Members have experimented with some alternative approaches over the years. These include negotiations along sectoral and modal lines, as well as those based on certain formulae or quantitative benchmarks. This article will discuss the lessons drawn from the negotiating experiences relating to these alternative approaches, and try to offer some suggestions on how the current and future GATS negotiations could benefit from the use of these approaches.

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I. Alternative Approaches in Services Negotiations: Experiences from the Uruguay Round

As noted by many commentators, the United States was instrumental in bringing services into the agenda of the multilateral trading system.[2] In early 1980, the US successfully persuaded the OECD Trade Committee to conduct a study on trade in services, which laid the groundwork for including trade in services in multilateral trade negotiations. This did not lead to automatic inclusion of services in the trade agenda, however, as the contracting parties engaged in a heated debate over the next few years on the desirability of regulating services trade under the framework of the GATT. On the one hand, the enthusiasm of the US in opening services markets stems from two basic premises: First, as services are a contributing factor in many goods, liberalization of trade in services could reduce the overall costs for the economy and is important for an "effective operation of the global economy".[3] Second, while many manufacturing sectors of the US have lost their competitive edge of the years, services have risen to be the main strength of the US, especially in sectors with high knowledge or technology contents, such as financial services, telecommunications and professional services.[4] On the other hand, many developing countries were reluctant to agree to the inclusion of services in the trade agenda for the following reasons: First, even though

2 *See* Trebilcock & Howse, at p. 356; Stewart, at pp. 2345-2358. For a general background on the services negotiations before and during the Uruguay Round, *see also* Drake & Nicolaidis, Croome.

3 Stewart, at p. 2356.

4 Trebilcock & Howse, at p. 356.

services liberalization could improve the efficiency of the whole economy, most developing countries feared that their services providers would be out-competed by firms from the US and other developed countries in both their own home markets and the markets of other countries.[5] Thus, they might well end up with a smaller slice even if the pie has grown larger. Moreover, developing countries perceived the comparative advantage enjoyed by developed countries with respect to services as a result of their overall higher level of economic and technological development, and thus they would lose their domestic market before they could even have a chance to nurture their own services providers.[6] Second, the developing countries were also taken aback by the aggressive "market access" approach taken by the US with regard to the services agreement.[7] It appeared that the US was interested not only in the extension of the National Treatment obligation to services, but also in demanding changes in the domestic regulatory regimes of the other countries in order to pry open the markets for US firms.[8] For developing countries that have yet to adopt regulatory reforms, this means that they would be forced to embark on regulatory reforms dictated by a foreign power, which certainly would not be well received by the domestic constituencies with its undertone of surrender of sovereignty. For those developing countries which have started or are about to start the reform process, this could severely limit their manoeuvring space in dealing with unexpected challenges which might arise in the

[5] *Id*.
[6] *Id.*
[7] *Id*. at p. 357.
[8] *Id*.

transition to deregulation and privatization.[9] Third, as services trade is quite complicated and notoriously difficult to measure, until the middle of 1986, several contracting parties, including the UK, regarded it premature to consider whether services should be included in multilateral action before the exchange of information process had been completed.[10] Fourth, during the early discussions on services negotiations, the US explored the idea of using the GATT as the legal instrument to regulate services trade. Some contracting parties expressed doubts as to whether the GATT has legal competence over trade in services issues or whether the GATT should be the proper venue for regulating trade in services.[11]

In order to address these concerns, the contracting parties came out with the following compromises. First, although services would be negotiated under the "Umbrella" of the Uruguay Round, the results of such negotiations would be embodied in an agreement that is legally separate from the GATT, *i.e.*, the GATS.[12] This could make sure that the sensitivities and peculiarities of services trade are fully taken into account. Second, in terms of the coverage of the agreement, the contracting parties were split on whether the "universal" or "sectoral" approach should be adopted.[13] Under the universal approach, all services sectors would be covered.[14] Under the sectoral approach, the contracting parties can choose to

9 *Id*.
10 Stewart, at pp. 2355-56.
11 *Id*. at p. 2356.
12 Trebilcock & Howse, at p. 358.
13 Stewart, at pp. 2363.
14 *Id*.

liberalize only some of the sectors, while excluding other sectors from coverage.[15] Drawing lessons from the unpleasant experiences with the effective exclusions of agricultural and textile and clothing products from the coverage of the GATT, most contracting parties embraced the former approach as one that could help maintain a balance of interests by avoiding the exclusion of sectors of primary interest to some contracting parties.[16] On the other hand, the sectoral approach is most attractive to contracting parties that wish to exclude certain sectors, as well as those that wish to single out some sectors that are particularly important to be treated in stand-alone agreements separate from a general framework agreement.[17] Even though the US initially preferred the universal approach, it decided to move towards the sectoral approach as negotiations went along in response to domestic pressures to exclude sectors such as maritime and airline transport services while giving sectors such as telecommunication and financial services special treatment in sectoral negotiations.[18]

Thus, in the end, a hybrid of universal and sectoral approaches was adopted. In principle, all services sectors are included, while several sectors are subject to sector-specific negotiations. This led to the fourth issue, *i.e.*, whether services liberalization should proceed on the basis of a "negative list" or "positive list" approach.[19] Under the former approach, all services sectors are covered by default except those which are specifically excluded

15 *Id*. at p. 2364.
16 *Id*. at pp. 2363-64.
17 *Id*. at p. 2364.
18 *Id*. at p. 2364-65.
19 For a general discussion on the two different approaches, *see* Stephenson.

in negative lists. Under the latter approach, the contracting parties can pick and choose the sectors to liberalize with the result that only those sectors that are included in the schedules would be subject to market access commitments while those that are not included would not entail any liberalization obligations. The adoption of the universal approach in general seems to suggest that the negative list approach should be followed, and this is indeed what the US and EC tried to push for at first.[20] Many contracting parties, especially the developing countries, however, feared that the negative list approach could force them to make concessions in every sector and preferred the positive list approach instead.[21] Due to the strong resistance of these parties, the US backed off in the end and the positive list approach was adopted. As the positive list approach prevailed, it became natural for the contracting parties to adopt the request-offer approach as the primary method of negotiation.[22] In the Uruguay Round, however, there were no pre-existing schedules of commitments. Thus, the participants started the process with the submission of offers.[23] Then each contracting party identifies the service sectors in the markets of another party which it has interests, and decides what it would like the other party to do. This could include four types of requests, i.e.,

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[20] Stewart, at p. 2371.

[21] *Id*. As noted by Hoekman and Messerlin (1999), however, the experience of the MAI negotiations conducted under the auspice of the OECD revealed that, a "negative" list approach to scheduling commitments is not necessarily a much better way of dealing with complex barriers to competition as negotiators can simply get around the basic disciplines by tabling long exception lists.

[22] *See* Feketekuty (1988), at pp. 279-280.

[23] Technical Aspects of Requests and Offers, WTO Seminar on the GATS, 20 February 2002.

addition of sectors which were not included, removal or relaxation of existing limitations, undertaking additional commitments, or removal of MFN exemptions.[24] Such request is then presented in a letter addressed to the other party. For a variety of reasons, many contracting parties kept their requests confidential and even the Secretariat might not be aware of the content or even the existence of particular requests.[25] Even though offers typically would include the same contents as those in requests, they were normally presented in the form of draft schedules of commitments, which were in turn circulated to all parties rather than only to certain parties.[26]

A. Why the Sectoral Negotiations and Agreements?

With the request-offer approach being adopted as the main negotiating method, one might wonder why the contracting parties still had negotiations and agreements along sectoral lines. First of all, as the Uruguay Round negotiation was mainly a rule-setting exercise in services trade, it might be undesirable to have sectoral negotiations as such narrow focus could make it more difficult to bring out the broader economic reasons why a liberalization of policies would further the general public interest, which is badly needed for a negotiation which were subject to strong resistance from a majority of the contracting parties at the beginning.[27] Second, as individual services sectors are typically regulated by ministries other than the trade ministries in most countries, a negotiation carried out purely along sectoral lines

[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] Feketekuty(1988), at p. 195.

would be dominated by a sectoral regulatory agenda, which could make the negotiations more difficult as such agenda is not necessarily in line with the overall objective of trade liberalization but tends to focus on the major philosophical differences among countries with regard to the proper role of government and the optimal regime for achieving regulatory objectives.[28] Third, as the requests and offers would be made on sectoral bases anyway, there might not be much of a need for singling out particular sectors for negotiations. Indeed, the trade ministers were keenly aware of these concerns when they declared at Punta del Este that "[n]egotiations [on trade in services] shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors".[29] As noted by Feketekuty, on the one hand, the Declaration supports the traditional trade policy view that general, across-the-board rules are needed to advance the liberalization of trade barriers; on the other hand, it also recognizes that sectoral differences are more fundamental in services than in goods and that effective negotiations have to get down to a sector-by-sector level.[30]

In the view of the author, the sectoral focus could be a result of the combination of several factors. First of all, before the Uruguay Round, the contracting parties had no experience in a multilateral agreement regulating trade in services. Moreover, an analysis on the general nature of services trade and the universal rules and disciplines governing trade in services could hardly be conducted at the abstract level without "reality checks"

[28] *Id*. at p. 241.

[29] Uruguay Round Declarations.

[30] Feketekuty(1988), at p. 195.

associated with the real-world operations of one or several services sectors. Thus, it was no wonder that the contracting parties conducted sector-specific discussions (or "sector testing") at the very start of the GATS negotiations.[31] The sectoral examinations involved the following sectors: telecommunications and construction, transport and tourism, professional services, and financial services.[32] In addition to the sector-specific issues, these exercises also highlighted several issues of general nature, such as transparency, domestic regulations, and national treatment.[33] Second, as service sectors are more diverse than goods, each service sector has inherent peculiarities and problems which would deserve individual treatments. The more complicated a sector, the fewer people will be able to understand the sector to such an extent that the sector will be subject to the control of a small number of specialists. While the users affected by such service sectors might be quite large, the collective action problem means that they would not be able to get together to effectively check against the capture of the sector by the specialists. In the end, it becomes natural for the specialists to structure the negotiations along sectoral lines to maintain the exclusive club-like feel of the sector. This is particularly true with regard to the two sectors that are the subjects of sectoral agreements, *i.e.*, the telecommunication and financial services sectors, which are widely regarded as complicated sectors. Third, as it has been revealed with the experience of trade liberalizations for goods, trade negotiators, like all human beings, have a tendency of trying to leave the most difficult issues until the very end by starting with those

31 Stewart, at p. 2372

32 *Id*.

33 *Id*. at pp. 2372-73.

products that have lower tariffs to begin with. In the years leading to the conclusion of the negotiations on financial services and telecommunication, both sectors have been marked by rapid and significant trade-liberalizing changes, which include the global integration of markets, increased competition, deregulations and mergers and acquisitions activities which lead to the consolidation among the services providers.[34] As noted by Hoekman and Messerlin, "[transparency] *alone* is not sufficient to move a liberalization agenda forward. It needs to be supported by domestic political forces that favor moving forward in the pursuit of liberalization. The existence of such a domestic consensus was a major factor behind the successful conclusion of the GATS basic telecom talks".[35] (emphasis original) Thus, it was no wonder that these two sectors, rather than other sectors, were picked for sectoral initiatives as the contracting parties wanted to use the GATS negotiation as a way to lock in the achievements of the trade liberalization efforts. As most of the GATT commitments are binding of "*status quo*", it is no surprise that the commitments in financial services and telecommunication are among the most popular among WTO Members.[36] Fourth, both financial services and telecommunication are important infrastructural services. They are crucial in maintaining the overall wellbeing of the economy, as well as attracting the inflow of FDI.[37] In the case of financial services, for example, as the WTO Secretariat noted in one study,

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[34] *See e.g.*, statements made by many contracting parties on their telecom reform programs at the ninth meeting of the Negotiating Group on Basic Telecommunications held on 6 October 1995, S/NGBT/9.

[35] Hoekman and Messerlin (1999).

[36] *See e.g.*, Hoekman, Mattoo, and English, at pp. 263-264.

[37] *See e.g.*, Eschenbach & Hoekman. *See also*, WTO 1997, 17-22.

"the financial services sector is far more important than its direct share in the economy implies. Financial services are the backbone of modern economies. It is difficult to think of any economic activity, except perhaps those that remain largely outside the money economy in less well-off countries, that does not depend in a significant way (either directly or indirectly) upon services provided by the financial sector".[38] Thus, both the developed and developing countries perceived a need to start with liberalizations in these sectors first in order to capture the full benefit of trade liberalization.[39]

B. Issues arising from sectoral negotiations.

The experiences of the sectoral negotiations on telecommunications, financial services, and maritime services illustrated several issues that any future sectoral negotiations would have to deal with in order to facilitate the proper functioning of the negotiations. These include the following:

i. Observer Status

The Decision establishing the Negotiating Group on Basic Telecommunications (NGBT) and the Decision establishing the Negotiating Group on Maritime Transport Services (NGMTS) stated that these two groups shall be open to all contracting parties that announce their intention to participate in the negotiations on basic telecommunications. Presumably, this

[38] WTO, 1997, 7.

[39] *See e.g.*, statements made by many contracting parties on the benefits of liberalizations in the telecom sector at the ninth meeting of the Negotiating Group on Basic Telecommunications held on 6 October 1995, S/NGBT/9.

means that participation in the first meeting would be open to all, but it was unclear as to whether those which have not indicated their intention to participate fully in the negotiations, or observers, should also be allowed to participate in future meetings. The NGBT and NGMTS discussed this issue over the first few meetings and agreed on the following[40]:

First, there shall be an open door policy on observers, which means that observer status in the two Negotiating Groups will be granted upon request to members of the Sub-Committee on Services which have not yet notified their intention to participate in the negotiations. There are two reasons for this decision: first, as a matter of principle, because these negotiations represented an extension of the Uruguay Round and would lead eventually to multilateral commitments, there was a need to avoid being overly rigid with respect to observer status so long as observers did not obstruct the negotiations. Second, from a practical point of view, as the markets for these services are becoming increasingly globalized, the participants should encourage the widest possible participation in these negotiations in order to capture most benefits arising from such negotiations. Indeed, at least at the beginning of the telecom negotiations, some important countries did not participate in the negotiations due to various concerns. In order to ensure a commercially meaningful outcome, many participants viewed the granting of observer status as a good way to allow such countries to get a taste of the negotiations first by participating initially as observers until a decision to participate could be taken. Indeed, during the course

40 TS/NGBT/1. PC/SCS/1.

of the negotiations, nineteen observers have decided to become full participants after observing the negotiations for some time.

Second, observers will be entitled to attend formal meetings of the Negotiating Groups and to receive documents prepared for the groups by the Secretariat. Presumably, the discussions at the formal meetings would focus on issues of a general nature and the participation in the formal meetings by the observers could keep them updated of the progress of the negotiations. As an example, it has been suggested that the telecom negotiations could lead to major changes in régimes, i.e., the provision of basic telecommunications on a competitive basis. As this represented for many a radical departure from current regimes it was inevitable that there would be a finite number of participants. Nevertheless, it would be beneficial for countries that could not make radical changes to participate as observers in order to understand what this would entail. As to the informal meetings and bilateral negotiations, they are generally kept confidential by those involved and the observers would not be able to attend those meetings.

Third, the observers will not take part in decisions taken by the groups and will be entitled to speak only upon invitation by the Chairman, normally at the conclusion of interventions by participants. One concern raised was that the commitments being exchanged could have implications for the framework and the Annex on Telecommunications, which are applicable to all Members. Thus, the observers should be given the right to speak with respect to such issues. This suggestion was dismissed on the basis that, first, it was not the intention of the negotiations to alter the framework or the annex, second, even if either were to

be amended at any time this would have to be done according to the correct procedures, and third, issues related to competition in basic telecommunication were different from the issues addressed by the Annex anyway.

In addition to the observer status of WTO Members, the negotiating groups also discussed the possibility of international organizations to participate as observers. As the negotiations aim to promote trade liberalizations in the telecom sector at a global level, it would be of great benefit to have those international organizations with an interest in telecommunications to participate as observers so that first, the negotiations could benefit from the expertise of these organizations on technical issues; second, the WTO could better coordinate its liberalization efforts with the agendas of these international organizations. On this basis, international organizations with universal memberships, such as the ITU, the UNCTAD and World Bank were readily admitted as observers. Difficult issues arose, however, when international organizations with limited or regional membership, such as the Asia Pacific Telecommunity (APT) and the OECD, sought observer status in the groups. Some representatives expressed reservations regarding the admissibility of such organizations by referring to a precedent established during the Uruguay Round in the Group of Negotiations on Services whereby organizations with limited or regional membership, rather than universal membership, were not normally granted observer status. In the end, it was decided that the Group should not tie its hands up with precedents and the primary consideration in making the decision in this regard shall be the relevance of their work to the subject matter being

addressed by the Group. On this basis, both the APT and OECD were granted observer status.

A related issue surfaced in the negotiations on maritime services was whether private-sector organizations, such as the Council of European and Japanese National Shipowners' Associations (CENSA) and the American Institute of Merchant Shipping (AIMS), could be granted observer status. Several delegations felt uncomfortable with such decision and preferred to limit observership to inter-governmental organizations instead. One potential risk of granting observership to such private-sector organizations was that the WTO negotiations could be perceived to cater to private interests. In view of this, the group decided not to grant observer status to these organizations.

Exchange of information

As noted by many scholars, barriers to trade in services are rather heterogeneous and difficult to quantify.[41] Thus, an information-collecting exercise aimed at identifying the relevant barriers in that sector is the necessary first step before any sectoral negotiations can take place. To facilitate the information exchange, the negotiating groups issued questionnaires for the participants to provide details of their regulatory regimes in the particular sectors. The one for telecommunication covered definitions and market structure, competition, and regulatory issues, while the one for maritime services addressed market structure and regulatory issues. Both the full participants and observers were encouraged to submit responses to the

41 Trebilcock & Howse, at p. 352.

questionnaire. In response to the concerns expressed by some delegations, the Chairman stressed that the questionnaire should in no way be intended to prejudice the position of any participant regarding the final outcome of negotiations on commitments. After the participants submitted their responses, the groups undertook reviews of such responses. In such reviews, participants were invited to briefly introduce their documents first and to entertain questions seeking further detail or clarification of the responses. Many governments participated actively in this exercise. In the telecommunications group, for example, 37 of the 53 full participants and 2 of the 24 observer governments submitted questionnaire responses. Similarly, in the maritime services group, 35 of the 56 full participants and 2 of the 16 observer governments submitted questionnaire responses.

Examination of outstanding technical and conceptual issues

As the sectoral negotiations involved highly technical issues which have never been subject to the regulatory framework of the GATT/WTO multilateral trading system before, it is important for the participants to undertake discussions on technical and conceptual issues first so that they could reach a common understanding on these issues and would not be comparing apples with oranges when making specific commitments. In the telecom group, the issues discussed include technical matters relating to the scheduling of commitments and regulatory issues such as licensing, interconnection, competition safeguards, transparency, independent regulatory bodies, frequency and numbering, standards and type approval, tariffs and accounting rates, termination services, rights of way and planning and universal service. In the maritime services group, the issues

discussed were technical matters relating to the scheduling of commitments on international shipping, auxiliary services, access to and use of port facilities and multimodal transport services. In the telecom negotiations, one achievement of these discussions was an informal Reference Paper on regulatory disciplines. Originally described as a tool to help participants arrive at an understanding of the kinds of commitments they might undertake on regulatory matters, it was later encouraged to be used by the participants as a guideline for the scheduling of additional commitments. Formally speaking, there is no binding commitment arising from the paper "*per se*"; it is only when a Member explicitly incorporates the reference paper in its schedule of commitments that a legally binding commitment be undertaken.

The bilateral request-offer negotiations

Even though the sectoral negotiations started out as an exception to the general bilateral request-offer approach and as a plurilateral or multilateral initiative, in the real world, such negotiations could not be conducted without being supplemented by a bilateral request-offer process. As the countries are at different stages of liberalization, the adoption of a minimum regulatory standard such as the reference paper would simply mean that some countries have to give more than they would receive and this would not be very conducive for trade negotiations which are generally based on the "*quid pro quo*" mentality. Even though during the discussions on the reference paper, there had been calls to adopt a flexible and gradual approach to take into account of the varied nature of the regulatory systems and structures of each country, such an

approach was against the very nature of a benchmark instrument like the reference paper and thus could not be adopted. The only way to make sure that the general principles in the reference paper are acceptable would be to allow some countries to be able to request more concessions in the bilateral request-offer process in order to "compensate" them for the "losses" they have incurred by subscribing to the reference paper. Moreover, while participants would need to have an idea of the rules that would apply once commitments were in place by continuing discussions on the general disciplines, some of the specific problems and the proper rules to address them could only be identified and formulated as a result of bilateral negotiations. Thus, the discussions on general technical and conceptual issues were held along with the bilateral negotiations and drafting of schedules. As with the bilateral negotiations which were conducted under the auspices of the GATS, these offers were explicitly made conditional upon the quality and extent of the commitments made by others. Moreover, as the negotiations on the general regulatory disciplines such as the reference paper continued until the very end of the telecom negotiations, some offers were also implicitly conditional upon the acceptance of these regulatory principles by a sufficient number of participants.

ii. The roles of the formal meetings

While informal negotiations and meetings have been instrumental in hammering out the details of the individual schedules and regulatory principles, the formal meetings, which are generally held on a monthly basis throughout the negotiations, also played an important role. First, the formal meetings provide an opportunity for the Members to get together and take stock on the

progress of the negotiations. During the two-year period from April 1994 to April 1996, both Negotiating Groups held 16 meetings each. At almost every meeting, especially the later meetings, the groups would conduct reviews on the number of full participants, new or revised offers made, progress of bilateral negotiations, as well as the results of the discussions on outstanding technical and conceptual issues. During such reviews, appeals were frequently made to observers to become full participants, to participants which had not submitted draft offers to do so, to participants which had submitted initial offers to revise their offers, to participants which had second-thoughts over their offers to refrain from withdrawing or diluting their offers.

In a certain way, the formal meetings are a way for the more active participants to apply peer pressure on their less active trade partners. In this sense, the formal meetings are very much like breaks during football matches to revive the spirits of the players. Second, the formal meetings were the forum of choice to deal with issues of a general nature. As noted above, this includes for example, the discussions on the grant of observer status and the technical and conceptual issues. Third, especially during the earlier meetings, the formal meetings were used to lay out the road map for the organization of future work and made sure that the negotiations were conducted pursuant to the original timetable.

Choice of Instruments

Both the financial services negotiations and the telecom negotiations resulted in a number of different instruments. Rather than reflecting the deliberate choices made by WTO

Members, the true reasons behind these complex webs of instruments were the incompleteness of these negotiations at the closure of the Uruguay Round in December 1993 and the compromises between different views as to how the negotiations should be completed.[42]

In the financial services sector, for example, there are two Annexes on financial services, an Understanding on Commitments in Financial Services and one Decision on Financial Services. The Annex on Financial Services was included as an integral part of the original GATS to spell out the application of several GATS provisions to the financial services sector. As such it does not contain any specific liberalization commitments relating to the sector. When the Uruguay Round drew to a close in 1993, negotiations on financial services remained unfinished.[43] Even though Members made specific commitments on both market access and national treatment, some Members, especially the US, did not consider them to be sufficient to conclude the negotiations.[44] The US threatened to schedule broad MFN exemptions based on reciprocity and proceed with bilateral and regional negotiations in the sector instead. As any agreement on financial services would be rendered useless without the participation of the US, home to some of the biggest financial services providers and the largest financial services market in the world, the Members came up with a compromise to extend the negotiations for a six-month period following the entry into force of the GATS in 1995 while the US would suspend its MFN exemptions for the same period

[42] Trebilcock & Howse, at p. 379.
[43] Hoekman, Mattoo, and English, at p. 265.
[44] *Id*. *See also*, Trebilcock & Howse, at p. 379.

pending the result of such negotiations. This compromise was recorded in the Second Annex on Financial Services and the Decision on Financial Services, both of which were adopted at the end of the Uruguay Round. The Second Annex provides that, a Member may, during a period of 60 days beginning four months (or roughly six months) after the date of entry into force of the WTO Agreement, schedule new MFN exemptions, or "improve, modify or withdraw" all or part of the specific commitments on financial services inscribed in its Schedule. The Decision on Financial Services includes similar languages, while also providing that Article II Exemptions which are conditional upon the level of commitments undertaken by other participants or upon exemptions by other participants will not be applied during this period. As a result of the 1995 negotiations, 29 WTO Members (counting the EU as one) improved their schedules of specific commitments and/or removed, suspended or reduced the scope of their MFN exemption in financial services. This outcome, however, was still deemed insufficient by the US, which went on with very broad MFN exemptions. In view of this, the Members decided to temporally lock-in the liberalization results in an "interim agreement" while agreeing to commence further negotiations within two years to improve the commitments. The new negotiations resulted in significant improvements in commitments and considerable expansion of the Membership. Satisfied with the results, the US, along with India and Thailand, withdrew their broad MFN exemptions based on reciprocity.

Similarly, the telecom sector negotiation was also a leftover from the Uruguay Round negotiations. Pursuant to the Decision on Negotiations on Basic Telecommunications, the Members

continued the negotiations, which were originally scheduled to conclude by April 30 1996. At the eleventh hour, however, the US walked out of the talks in dissatisfaction over the liberalization offers made by other Members. The WTO Secretariat intervened and successfully proposed that the negotiations be extended until early 1997.[45] At the conclusion of the extended negotiation, the Members made substantial commitments and all but two countries subscribed to the Reference Paper. Finally satisfied with the results, the US agreed to make MFN commitments in most areas.

At one point of the negotiations on telecommunications, suggestions were made that instead of having the Reference Paper, the GATS could be amended to incorporate the regulatory principles contained in the proposed Reference Paper.[46] In the end, the Members decided to proceed with the Reference Paper. In the view of the author, this is a sensible decision as the matters dealt with under the Reference Paper were probably too sector-specific to be included in a framework agreement like the GATS. Moreover, as the GATS obligations are to be assumed universally by all the Members, or at least those Members which have undertaken specific or additional commitments, a GATS amendment would have to face an uphill battle with those Members which were reluctant to participate in the NGBT negotiations in the first place and might even endanger the successful conclusion of the whole negotiations. In this regard, the Members are well advised to follow the wisdom embodied in the old saying “if it ain’t broke, don’t fix it”.

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45 Trebilcock & Howse, at p. 392.
46 S/NGBT/12.

Issues in the Current Round

Article XIX of the GATS establishes a built-in agenda for new negotiations on trade in services by requiring Members to "enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter". In order to assist the Members in this effort, the Special Session of the Council for Trade in Services adopted on 28 March 2001 the Guidelines and Procedures for the Negotiations on Trade in Services. According to Paragraph 11 of the Guidelines, "[t]he *main* method of negotiation shall be the request-offer approach" (emphasis added). This does not necessarily mean, however, that the bilateral request-offer approach should be the *sole* method of negotiation. Indeed, the very same paragraph also envisages the possibility of advancing the liberalizations through other approaches, such as bilateral, plurilateral or multilateral negotiations. In addition to the plurilateral negotiations, this could include sectoral and formula approaches. In this part, the author will try to discuss some of the pros and cons of each of these two approaches.

Sectoral approach

As noted by the former WTO Deputy Director-General Andrew Stoler in a recent article, the Doha Round is very different from the Uruguay Round in the sense that the current Round "is a market access round, not a round involving the introduction and elaboration of complex new rules like the last round".[47] This is especially true for trade in services, which was only brought under the regulation of the multilateral trading system in the Uruguay Round. Thus, during the last Round, "a considerable percentage of the effort went into writing the rules to govern services trade", while most of the specific commitments in WTO Members' post Uruguay Round schedules only reflected the *status quo* of market access in the mid-1990's rather than offering any real opportunities. Even though there are still some unfinished rules issues, such as those on safeguards, subsidies, government procurement and domestic regulation,[48] it is most likely that the current Round will focus on market access negotiations. Generally, it is much easier to negotiate general rules or principles, as people have yet to fully grasp the real implications of such rules, while a much harder battle would have to be fought when people try to bring the trade policies in individual sectors into conformity with these principles as it is only then that the real interests of service suppliers will be affected and political costs be entailed. This also explains the general paucity of substantial offers so far.

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[47] Stoler, at p. 1.

[48] For a discussion on these issues, see Sauvé (2002).

With its focus on market access and the heterogeneous nature of service sectors, the current Round will have a much greater focus on sectoral negotiations. Moreover, as many developing Members were reluctant to join the services negotiations in the Uruguay Round, the priority then has been to persuade them to accept the framework agreement of the GATS rather than undertaking substantial market access commitments. Now that the general rules in the GATS has been firmly established as a cornerstone of the multilateral trading system, the major services exporters will shift their priority toward addressing what they perceive as imbalances in the level of commitments. In this regard, the observation made by Sauvé on the difference between the financial services negotiations in the Uruguay Round and the Doha Round is equally applicable to most services sectors: there will be challenges arising from differences between countries at different levels of development; between different modes of supply and competing business models; or between different market segments.[49]

Obviously, the beauty of the sectoral approach is that it could take into account the institutional and market realities among individual services sectors, which include many differences such as "differences in market structure and the scope for competition, differences in regulatory objectives and the nature of government regulation, and differences in the historical development of domestic and international institutions".[50] As each sector involves highly-technical issues, a sectoral approach could ensure that the discussions will be mainly held among the

[49] Sauvé, at p. 133.
[50] Feketekuty, at p. 241.

technical experts in the field, who would be presumed to have a better appreciation of the issues and challenges facing the particular sector and thus would be more able to formulate the policy reactions to address these problems to achieve better market liberalization.

A sectoral approach is also more manageable, as it is much easier to compare the values of concessions given in one sector rather than compare the gains that would arise from the liberalizations of sectors which are totally independent of each other, say, education and health sectors. In some circumstances, for example when the technological and regulatory landscapes in a particular sector have undergone fundamental shifts, it might be useful to push for negotiations in such sector without waiting for movements in other sectors in order to guarantee an "early harvest" by locking in the gains from unilateral liberalization. In this regard, the experience from the telecommunication negotiations is especially enlightening. As noted by Adlung, telecommunication is an example of a services liberalization that is "virtually irresistible", as driven by several factors: First, technical progress has created new alternatives to long entrenched regimes and/or rendered them unenforceable. Second, when the users learned about the liberalization policies abroad, they became impatient with the slow reform process (or nothing at all) at the domestic level and held the telecom ministries accountable for performance deficits (higher charges, lower penetration, non-availability of advanced services, *etc.*).[51] It was

[51] Adlung (2004), at p. 21.

against this background that many governments simply recognized and adjusted to what was happening in reality.[52]

To some extent, the flourishing of the so-called "Friends Groups" in the current services negotiations attests to the popularity of the sectoral approach. Currently there are about twenty such groups, covering sectors ranging from those that had been the subjects of sectoral negotiations in the Uruguay Round, i.e., financial services, telecommunication, maritime services and Mode 4, to sectors with newly-discovered interests, such as audiovisuals, computer services, environmental services, distribution services, postal services, construction services, tourism services, logistics services, energy services and legal services. These groups are largely driven by export interests. They have done a lot of work to advance the negotiations by taking stock of the main barriers to trade in the particular sectors, identifying the major traders of these services, and some even drafted model schedules for the Members to inscribe their market access commitments.

On the other hand, the sectoral approach is not without its pitfalls. First of all, as sectoral approaches are normally driven by export interests or the interests of the service providers, they can easily subject to the capture by such private interest groups and would be biased towards reflecting and protecting the interests of the service suppliers. While most service suppliers are on constant look for ever-expanded markets for their services, this is not always the case. Indeed, in markets that are subject to the control of monopolistic or obligopolistic firms, there might

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52 *Id*.

be no incentive to push for liberalization at all as the firms are presumably comfortable with their positions. This seemed to be confirmed by a recent study by Fink *et all* on the possible causes for the high prices in international maritime services, which shows that private anticompetitive practices seem to have a greater effect on prices than public trade restrictive practices. In the author's view, this is probably one of the reasons why the post-Uruguay Round sectoral negotiations on maritime services did not succeed. There have been calls to adopt a user-oriented approach to some sectoral negotiations[53], but such initiatives are unlikely to work for most sectors due to collective action problems. Second, it has been widely held that the success of the Uruguay Round owes a lot to the fact that negotiations on industrial products were held along with those on agricultural products, services and TRIPS in a "single undertaking". It would have been almost impossible to conclude negotiations on each of these different sectors had they had been negotiated separately. Similarly, a purely sectoral approach in services could deprive the invaluable policy space that trade negotiators would need to find trade-off across sectors in order to justify making concessions in one sector. To make it even worse, almost every services sector would be subject to the regulation of at least one and sometimes several government ministries or bureaux within one country. With each side-payment or issue linkage there will be invariably a bureaucratic loser within each government.[54] This might not be a big problem in a cross-sectoral undertaking, while it would be much harder to justify if a strict sectoral approach is institutionalized. Indeed, as observed by Feketekuty,

[53] Feketekuty, for example suggested such approach in the sectoral negotiations on transportation services. See Feketekuty (1998), at 11.

[54] Levy, at pp. 5-6.

as bureaucrats rush to defend their own turf, "[a]ny purely sectoral discussion is likely to turn into an effort to justify and reinforce sectoral regulations that tend to be restrictive and interventionist". Third, as not all Members are interested in the same sectors, any sectoral approach would have to be a plurilateral rather than multilateral initiative. Thus, the sectoral approach could further eviscerate the imbalance of the commitments by Members across sectors. Moreover, for sectors which are the subjects of international rule-making, the sectoral approach would create the risk of subjecting the Members to different sets of rules, which could lead to the "Balkanisation" of the multilateral trading system as had happened on the basis of the Tokyo Rounds Codes.

Formula approach

In addition to the sectoral approach, various formulae approaches have been proposed in recent years. There is no uniform definition on the formulae approaches. In terms of coverage, they could encompass both sectoral and cross-sectoral initiatives. In terms of content, they could include rule-making exercises as well as ways to drive up the number of commitments. One general observation about formulae approaches is that they provide a much more efficient means of negotiation than the traditional request-offer process by reducing transaction costs[55], and that largely explains the popularity of such approaches. Other than that, however, each formula approach has to be dealt with on its own merits. Adlung (2004)

[55] Mattoo (2005), at p. 16.

provides a good summary of the formulae approaches[56], and the author will use his summary as a starting point for discussion.

The first formula approach relates to common definitions of frequently used terms in schedules. This includes, for example, the definition on what constitutes "temporary" presence of natural persons, a clear definition of the categories of skilled workers such as managers, executives and specialists. As noted by Low and Mattoo, such approach is also useful in delineating the boundaries of different sub-sectors, as well as defining areas where differing degrees of liberalization were feasible.[57] For example, in the post-Uruguay Round maritime negotiations, the Members agreed to exclude cabotage from the scope of the negotiations. They also reached consensus to separate bulk and liner shipping services, which enabled them to offer more in the former area than they would have been willing to do without such separation. Similarly, in telecom negotiations, the differentiation between international, domestic long-distance and local loop telephony services also was instrumental in ensuring the success of the telecom negotiations.

The second formula approach is standard policy instruments or concepts for adoption. The best known example in this regard is the telecom Reference Paper, while the latest proposals along this line include creation of "GATS visa" for movements under Mode 4; one-stop information or contact points for interested groups and proposed Reference Paper for Economic Needs Tests. This approach usually involves a high degree of international

56 Adlung (2004) at p. 16.
57 Mattoo (1999), at p. 19.

rule-making and is most useful in addressing problems in heavily regulated sectors on issues such as the allowable forms and extent of competition and the minimum performance standards that should be met.[58]

The third approach is framework undertakings, whereby Members refrain from operating and/or scheduling measures considered to be particularly restrictive or distortive. Examples include the moratorium on duties on electronic-transmissions, as embodied in the Ministerial Declaration on Global Electronic Commerce of 25 May 1998, and the proposals to exclude specified transactions from economic needs tests.

The fourth approach is model schedule, which gives Members options to undertake standardized commitments in individual sectors, technology areas or modes. Examples from the last round include the Understanding on Commitments in Financial Services[59]; the Model Schedule for Basic Telecommunications; and Draft Schedule for Maritime Transport Services, while the current Round also witnesses proposals relating to model schedules of mode 4 and information technology and business process outsourcing. Of them, the Understanding on Commitments in Financial Services is particularly interesting. It essentially provides an alternative method of scheduling by specifying the content of market-access commitments.

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58 Feketekuty (1998), at p. 4.

59 Low and Mattoo (1999) deem the Understanding on Commitments in Financial Services as a formula rather than model schedule. As this paper use the word “formula” as a broad reference to all cross-cutting approaches, the Understanding is classified as a model schedule here.

All four approaches analysed above involve some degree of international rule-making. This is a source of concern among developing countries, which fear that such regulatory obligations would "put liberalisation and 'pro-competitive' objectives and the rights of foreign firms ahead of national objectives such as universal provision".[60] In their view, such international regulatory frameworks are usually drafted by the developed countries and fail to address the particular needs of most developing countries, such as the need to allow for strong local service industries to develop. This is partly illustrated by the recent Panel ruling in the *TelMex* case, where the Panel refused to allow Mexico to include in its interconnection charges the costs incurred for the development of the telecom infrastructure of Mexico, which is allegedly essential for Mexico to achieve its aim of providing universal telecom services in its domestic market.[61]

Another concern for the developing countries is that their lack of experience, or the non-existence of adequate national regulation, would put them at a huge disadvantage when negotiating with their developed partners over the international regulatory framework.[62] One way to solve this problem would be to adopt, along the lines suggested by Mattoo, a credible international assistance mechanism to help the developing countries diagnose and remedy regulatory inadequacies so that they could be better prepared for making liberalization commitments.[63] Another way

60 Kwa.

61 Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004.

62 Kwa.

63 Mattoo (2005).

would be to accord more flexibility to developing countries in implementing their commitments, possibly through policy instruments such as emergency safeguard mechanisms.

The developing countries also worried about the potential loss of flexibility when the international rulemaking exercises would effectively pressurize them into making commitments that they otherwise would be unwilling to make.[64] Such worry is probably more conjured than real, however, as developing countries usually do not have sufficient bargaining power in the bilateral request-offer process to take advantage of any flexibility they might have in paper. Instead, as Mattoo has suggested, in a world of unequal bargaining power, multilaterally agreed approaches that must be seen to be equitable and efficient are more likely to produce a desirable outcome than bilateral negotiations.[65]

The fifth approach is scheduling "standstill" obligations, whereby Members agree to bind currently applied regime in scheduled sectors. This is a useful way for the Members to lock in their existing liberalization efforts and guard against backsliding that might be brought about with the changes in regulatory philosophy or administration as international obligations, once signed, generally cannot be backtracked. The Understanding on Commitments in Financial Services, for example, contains a standstill provision, and this is probably why most developing countries have not accepted the

64 Kwa.
65 Mattoo (2005), at p. 16.

Understanding, as financial matters, if handled impurely, could bring serious consequences to the economy.

The sixth approach is the cluster approach, whereby complementary commitments are assumed for clusters of interlinking sectors. Currently, proposals exist on the following clusters: courier and related transport services (e.g. road freight transport); various environmentally important services; health care and health insurance services; and multimodal transport services (maritime transport and related road and waterways transport).

The last approach is numerical targets, or minimum sector coverage. This again includes two slightly-different sub-approaches. The first is a "Qualitative" approach, while the second is the pure "Quantitative" approach. The first sub-approach aims at improving the quality of the commitments and would require Members to include certain core sectors in all schedules. There are proposals, for example, on achieving more comprehensive coverage of strategically/economically important services (e.g. business process outsourcing, telecommunications, financial services) and/or to liberalize services that are transmitted electronically. The second sub-approach focuses on improving the quantity of the commitments and would require Members to include a minimum number of sectors in all schedules. The major developed countries are main proponents for such an approach, with the EU as the chief advocate. According to the EU proposal, there are mandatory numerical target for each individual country, with developed countries being required to make commitments in 139 of the 163 services subsectors and developing countries being required to make

commitments in 93 subsectors. Developing countries are generally against the introduction of mandatory numerical targets. They argued that, since developing countries have different abilities to make commitments, such an approach would effectively require the larger ones to "take up the slack" for smaller developing countries unable to make the commitments necessary to achieve the average target.[66] For example, if developing countries were required to have commitments in an average of 80 sub-sectors, and smaller developing countries could only make commitments in 30 sub-sectors, larger developing countries would have to make commitments in more than 140 sub-sectors in order to hit the average target.[67] The US tried to bridge the difference by offering an alternative proposal to allow Members the flexibility in choosing the sectors to make commitments.[68] While the developing countries did acknowledge that the U.S. proposal give Members more flexibility, they pointed out that this could also mean that developed countries could choose only to open their markets in sectors that are not of particular interest to developing countries, which is against the mandate in the Doha Declaration to promote "the development of developing and least-developed countries" and the requirement in the Negotiating Guidelines to give special consideration to "sectors and modes of supply of export interest to developing countries". Another concern of the developing countries is that, when developing country markets are pried open, the services markets

66 Inside US Trade, *U.S. Fights For Numerical Targets In Services Talks*, November 11, 2005.
67 *Id*.
68 *Id*.

will be even more highly concentrated.[69] As most developing countries do not have significant export capacities in services, it would be extremely difficult for them to nurture their local service industries.[70] This, however, is not necessarily always the case. Indeed, in recent years, the service providers from several developing countries in sectors such as financial services, telecom services and engineering services have become very competitive. In this regard, the development of the internet holds special promise for developing countries to close the gap in their service sectors by catching up in a technological leap.

Putting aside the question of the desirability of the quantitative approach, the author also has reservations with regard to the effectiveness of this approach as a negotiating mechanism. Indeed, as several studies analysing the patterns of commitments across sectors have illustrated, some of the sectors, such as tourism, financial services, business services, communications services, have already attracted large number of commitments.[71] Thus, even without the explicit requirement of a mandatory numerical target, most Members have already made commitments in several sectors. Adding such a requirement probably could only achieve the same results as would be the case without such a requirement: the Members will just pick those which they would schedule anyway. It is probably more meaningful to talk about the quality of the commitments.

II. Concluding observations

[69] Kwa.
[70] *Id*.
[71] Hokeman, Mattoo, English, at pp. 263-64. Adlung, at pp. 8-9.

In conclusion, the author would like to make the following observations with regard to the choice of negotiating approaches:

First, during the GATT era, the tariff negotiations gradually shifted from bilateral to sectoral and formulae approaches. Even though the nature of services is quite different from that of goods, we would probably observe a similar shift in negotiating approaches as with the increased membership and the complexity of the multilateral trading system, sectoral and formulae approaches are probably the most efficient (or feasible) ways to negotiate. With goods, as the rules framework for services is getting finalized, there is probably more need to negotiate along sectoral and formulae lines.

Second, even though sectoral negotiations (and formulae negotiations along sectoral lines) are inherently of a plurilateral nature, it is still important that they include a critical mass of countries in that particular sector to ensure the success of such negotiations. As the experiences during the negotiations on telecom, financial services and maritime services have illustrated, unless countries representing 90% of the markets in a particular sector sign on to a sectoral agreement, there is no hope of achieving real results. Thus, when the US, home to the largest financial services market, threatened to walk out the financial services negotiations in 1993, the negotiations almost collapsed. It was only when the US returned to the negotiating table later that a deal could be struck. Thus, contrary to the statement made by Hong Kong when the maritime services negotiations were about to fall apart due to the lack of offers from the US, “absence of one or two participants” would actually “spell doom

for the negotiations or the GATS"[72] and "a multilateral agreement" could well "depend on … one country"[73].

Third, even though the experiences on dispute settlement cases related to services have been scarce, these cases have revealed very much the "inherent incomprehensibility and unpredictability" of the GATS rules and commitments: even the WTO Members with the largest resources of trade experts and negotiators have claimed to have been surprised by the full implications of the GATS as spelt out in Panel rulings in cases in which they were named respondents.[74] Thus, whatever the negotiating approach taken, the Members should always keep in mind the interpretive difficulties that might arise in future dispute settlement cases. Otherwise, even equipped with the best possible negotiating approach, the Members might still be quite reluctant in making commitments as they could never be fully aware of exactly what they are getting themselves into.[75]

[72] S/NGMTS/13.
[73] S/NGMTS/14.
[74] Mattoo (2005), at p. 10.
[75] Henry Gao.

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