Financial Services, the WTO and Initiatives for Global Financial Reform

Chakravarthi Raghavan

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Abstract

The ongoing global financial systemic crisis and the "Bretton Woods II" processes under way in various fora seem likely to result in reformed national and global regimes for governance, stronger regulations in public interest, and their stricter enforcement. However, these will be incomplete and may not even be successful unless there are parallel efforts in the WTO and its ongoing Doha Round, in particular on "Trade in Financial Services," where lacking data, negotiations are being conducted on faith and failed theory. A reformed global regime on finance will be incompatible with a trading system outcome of liberalised trade in financial services and capital movements. This is an area needing attention at the highest levels of developing-country governments.

Key words: GATS, Trade in Financial Services, WTO, Doha Round

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Note on author:

Chakravarthi Raghavan is Editor Emeritus[1], South-North Development Monitor SUNS.[2]

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[1] For identification only. The views expressed are those of the author, and do not necessarily reflect the views of the publications/organizations with which he is associated.

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Glossary:

AB	Appellate Body
AIG	American International Group - insurance firm
AMEX	American Express Company
BCBS	Basel Committee on Banking Standards
BOP	Balance of Payments
BW-I	Bretton Woods Agreement, 1944
BW-II	Discussions in various fora for reforms and governance of global financial system
Cariforum	Caribbean Forum of African, Caribbean and Pacific States
CTFS	Committee on Trade in Financial Services
CTS	Council on Trade in Services
Doha Round	WTO Negotiations on the Doha Work Programme, launched on 14 November 2001
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding (Annex 2 of Marrakesh Treaty)
EBOP	Extended Balance of Payments
ESM	Emergency Safeguard Measures
EU	European Union (European Economic Communities)
FDI	Foreign Direct Investment
FSA	Financial Services Agreement 1997
GATS	General Agreement on Trade in Services (Annex 1B of Marrakesh Treaty)
GATT	General Agreement on Tariffs and Trade
GATT1947	General Agreement on Tariffs and Trade, 1947 (established by the Protocol of Provisional Application)
GATT1994	General Agreement on Tariffs and Trade (Annex 1A of the Marrakesh Treaty)
GNS	Group of Negotiations on Services (in the Uruguay Round)
IMF	International Monetary Fund
MFN	Most Favoured Nation
MTNs	Multilateral Trade Negotiations
MTS	Multilateral Trading System
OECD	Organization for Economic Cooperation and Development
SCM	Subsidies and Countervailing Measures
TNC	Trade Negotiations Committee
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism (Annex 3 of Marrakesh Treaty)
TRIPS	Trade-related Intellectual Property Rights agreement (Annex 1C of Marrakesh Treaty)
UNCTAD	United Nations Conference on Trade and Development
Understanding	Understanding on Commitments in Financial Services
UNGA	United Nations General Assembly
UNSO	United Nations Statistical Office
UR	Uruguay Round of Multilateral Trade Negotiations (launched in 1986)
US	United States
USTR	United States Trade Representative
WTO	World Trade Organisation (established by the Marrakesh Treaty of 1994)

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The financial crisis that began in 2007 and that was identified consecutively as a US sub-prime mortgage crisis, credit crunch, credit crisis, and then a systemic crisis has evoked considerable discussions and led to views and proposals for rethinking and reforming national and international governance and regulation of the financial sector. For lack of a better term, all these are referred to here as Bretton Woods II.

In relation to the talk and plans for a BW-II, such as the G-20 process, the United Nations General Assembly (UNGA) process and the high-level UN summit meetings, there is now a general consensus that the reform of the financial sector, and a new global financial architecture, must include strong regulatory measures and their enforcement. In these discussions, the effects on trade have figured somewhat peripherally – in terms of the effects of the credit crunch on trade finance and the need to resist "protectionist pressures," with many frequent references to the 1930s' US Smoot-Hartley Act. Some present the act as the cause of the Great Depression, a questionable view; and others as disrupting international cooperation. There has been sparse attention and focus on the finance-trade systems and their inter-linkages.

Those who designed and agreed on BWI, in particular the US and UK (Harry Dexter White and John Maynard Keynes) had a holistic view. In the debate in the UK House of Lords before Bretton Woods, Keynes and Lord Addison referred to the statement of US Secretary of State Cordell Hull as evidence that the policy of the US Administration on various issues of political and economic preparation formed a connected whole.[3]

Trade and financial systems are not separate in an interdependent world, and this was certainly recognized in the aftermath of the Great Depression and in designing the post-war economic systems. In the British discussions, monetary policy arrangements were seen as part of other arrangements – including a stabilization policy for the cost of living through steps to mitigate the fluctuations of the international prices of primary commodities, and a trade liberalization policy to remove obstacles to British exports. But Keynes recognized, for example, that without currency agreements to prevent countries from altering the value of their currencies without agreement and at short notice, there was no firm ground to discuss tariffs.

> "Whilst other schemes are not essential as prior proposals to the monetary scheme, it may well be argued, I think, that a monetary scheme gives a firm foundation on which the others can be built. It is very difficult while you have monetary chaos to have order of any kind in other directions... if we are less successful than we hope for in other directions, monetary proposals instead of being less necessary will be all the more necessary. If there is going to be great difficulty in planning trade owing to tariff obstacles, that makes it all the more important that there should be an agreed orderly procedure for altering exchanges.... so far from monetary proposals depending on the rest of the programme, they should be the more necessary if that programme is less successful than we all hope it is going to be..."[4]

In 1944, in the preparations for and at Bretton Woods, in light of the experiences of the inter-war years and the Great Depression, both Keynes and White took for granted the necessity for controls on capital movements. In his own writings, Keynes noted that if finance capital was liberated, it would develop a life of its own and destabilize merchandise trade (Richardson, 1997).

A key element that the various BW-II discussions need to bear in mind is that, as a result of the change of course (from that envisaged at BW-I) in the overall political economy of the USA and other key nations, as well as in their variegated economic liberalization policies and measures, reforms of and regulatory measures for the financial sector have not only to deal with financial institutions such as banks and other credit and lending institutions, but a whole range of inter-

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[3] Keynes' speech in the British House of Lords, 23 May 1944 (Keynes 1980: 20).

[4] Keynes' letter to Lord Addison, May 1944 (Keynes 1980: 5-6).

connected sectors. Some of these sectors have their own intergovernmental institutions for global coordination and oversight, while others have mostly private bodies that lay down norms, standards and guidelines. All these raise important issues of coherence, not merely of the multilateral trading system and a global monetary and finance system that may take shape under the BW-II processes, but also of the UN Charter and Organization, an international system based on universality and sovereign equality of states – with overarching political and security, economic, social, cultural and humanitarian dimensions.[5] These issues of coherence are however beyond the scope of this paper.

Within this complex, one element that has received, at best, cursory attention is the World Trade Organization (WTO) Agreement on the international trade in financial services (banking, insurance, securities and other financial instruments, and many associated services), a part of the General Agreement on Trade in Services, or GATS (Annex 1B to the Marrakesh Agreement Establishing the WTO). The post-Marrakesh negotiations in GATS on trade in financial services resulted in the Financial Services Agreement (FSA) of 1997 and the Fifth Protocol to GATS that entered into force on 1 March 1999. The Fifth Protocol enabled the WTO members to annex new financial services schedules (replacing or modifying any they may have filed in 1993 and 1995) to their Uruguay Round services schedules. Since the FSA is a part of the GATS agreement, any reform of the financial services sector will have to be seen in the context of the WTO and its annexed agreements as a Single Undertaking, and the various panel and appellate body rulings in disputes at the WTO. These changes may call for changes in the GATS itself.

The Marrakesh Agreement, which entered into force on 1 January 1995, was the outcome of the Uruguay Round (UR) of Multilateral Trade Negotiations – launched in September 1986 at Punta del Este by a Declaration of Ministers at a Special Session of the GATT Contracting Parties. These negotiations (over a complex range of subjects and issues) ended in April 1994, with the signing of the Marrakesh Treaty establishing the WTO. The Treaty consists of 16 Articles providing a common institutional framework and four Annexes: Annex IA - Multilateral agreements on trade in goods; Annex IB - GATS; Annex IC - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Annex 2 - Understanding on Rules and Procedures Governing Settlement of Disputes (DSU); Annex 3 - Trade Policy Review Mechanism. Every WTO member had to sign on to all these agreements. There is also an Annex 4, consisting of plurilateral agreements – agreements among those who agree to be parties.[6]

One of the main drivers behind the UR negotiations and of bringing services within its ambit, was a coalition of financial, audio-visual and other service enterprises of the United States led from about 1982 by the American Express (Amex) Co. David Hartridge, former Director of Services at WTO, has said: "Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and CitiCorp, there would have been no services agreement and therefore perhaps, no Uruguay Round and no WTO."[7] Confirmation of this view on the origins of GATS is provided by Harry Freeman, a former executive with Amex who has given an insider's account of how the GATS and its FSA came about.[8] According to Freeman, the

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[5] Article 103 of the UN Charter makes clear that charter obligations override those under any other agreements, past or future. It says: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[6] The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts, GATT Secretariat Geneva, June 1994.

[7] David Hartridge, 'What the General Agreement on Trade in Services Can Do', speech at a conference in London, 8 January 1997, cited in Gould (2008).

[8] See Ellen Gould (2008) and Harry Freeman (2000) on the role of financial corporations (Amex, CitiCorp and AIG) in lobbying Congress and the US administration, in mobilizing powerful media support for bringing services on to the

idea for a trade agreement covering services began in 1979, when American Express became concerned that it was unable to gain access to foreign markets. Existing trade agreements were found not useful, as they covered only trade in goods. Freeman adds: "We decided that we would have to change that, which meant starting a new round of trade negotiations including services." Later, the insurance firm AIG, which had developed considerable clout with influential members of key committees of the US Senate, the Congress as well as the Clinton administration, emerged as a dominant influence in the financial services negotiations (of 1993, 1995 and 1997, and until recently, in the Doha talks). The trio of Amex, CitiCorp and AIG led the coalition of US services industries and influenced US policies[9]

The GATS, which sets out an overall framework of rules and disciplines on trade in services, has an annex on Financial Services (FS); but by the time of Marrakesh, the negotiations for market access commitments on FS were not complete. At Marrakesh, this (and a few others) was treated as unfinished business, and under a Ministerial decision, the negotiations on FS were continued after Marrakesh. These were concluded in 1997 with the Fifth Protocol to the GATS, which entered into force in 1999, 17 years from the time the subject of services was first raised as an international trade issue.

In the complex set of subjects and issues encompassed in the (UR) negotiations, the subject of services, resulting in the GATS, and within it, that of financial services was perhaps the most difficult and controversial. Part of the problem was the changing view of the US over time on how to bring services into the multilateral framework on trade, the basic principles to govern it, and later, on trade in financial services. But part of the reason for the difficulty was also the evolving views on services as something separate from goods, and how to trade them. Ironically, early in 2009, the issue has been raised that, in fact, the classification of services and goods is artificial (and entirely for the convenience of governments and statisticians), and that trade in services and goods may be treated alike (*Economist*, 2009; Lester, 2009). In the current Doha Round, the issue of classification of goods and services' trade is being considered in the context of cross-border electronic delivery.[10]

The issue of services and bringing it on the agenda of the trading system was raised by the US at the 1982 GATT Ministerial meeting and faced opposition, not only from developing countries, but also from several of the major developed nations, including the EU. Following that, there was a two-year period of interested contracting parties exchanging information among themselves on services and trade in services. This was followed by a preparatory process for a new round of negotiations, the launch at Punta del Este by Ministers as a decision of the GATT Contracting Parties of the MTNs on trade in goods (Part I of the Declaration), and then as Representatives of governments, on a separate track (Part II of the Punta del Este Declaration), the launch of Negotiations for Trade in Services with Ministers to decide at the conclusion of the negotiations on the international implementation of the results. This resulted in the signing of the Marrakesh Treaty

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trade agenda and for the UR talks culminating in the GATS accord and the FSA; Harry Freeman (2000), on the nexus of the US "coalition of services industries", the US trade representative (USTR) and Congress; for the role of and links between the European Liberalization of Trade in Services (LOTIS) group with the British government and EU Commission, see Erik Wesselius (2009).

[9] The US private sector involved in "trade in services" is perhaps the most powerful lobby influencing governments in the US and other countries in the world, according to Freeman (2000).

[10] The issue to be decided is which WTO agreement will be applicable – GATT or GATS? Since it is possible to deliver the same content through a good or a service, say a music album through a CD which is classified as a good, and through e-transfer as a soft copy, clearly a service transaction, what are the implications of the application of two different WTO agreements to essentially the same transaction in terms of the delivered content? This has other implications like the application of the domestic tax law to the two transactions, involving issues of competition, etc. There are other complex issues involved in this debate. All these are beyond the scope of this paper, but need to be kept in mind for overall understanding.

as a single undertaking (every participant having to sign on to every one of the agreements). After the entry into force of the WTO, rulings of the WTO panels and the Appellate Body purportedly "clarifying", in terms of international public law, the rights and obligations of disputants in individual disputes has resulted in a complex legal framework, and complaints of judicial activism and bias (Raghavan, 2000; Roessler, 2001; Colares, 2009). The WTO Dispute Settlement Body adopts these rulings by what is known as "negative consensus".

The paper is organized thus: the next section sets out the overall structure of the WTO and GATS; the following section outlines the GATS and its key provisions; the third section explains the GATS and the Financial Services Agreement; the fourth section deals with the 1995 interim accord on financial services and the 1997 FSA; the fifth section outlines the gaps and inadequacies of statistical data on trade in services, and its implications for the ongoing Doha Round of multilateral trade negotiations on services and in particular, on financial services. The last section has conclusions.

The WTO and GATS

The WTO FSA was concluded on 15 December 1997, resulting in the Fifth Protocol to the GATS,[11] and annexed to it were Schedules of Specific Commitments and List of Exemptions from the Most Favoured Nation (MFN) Article II of about 70 WTO members who became parties to the FSA. It is a part of the WTO GATS and entered into force on 1 March 1999. GATS itself is an integral part of the WTO agreement. Some of the issues of the WTO relevant to trade in financial services are only just flagged below but not dealt with in detail.

Relevant to any understanding of the (FS) agreement are:

1. The GATS, a framework agreement for international trade in services (with some sectoral annexes, including two on financial services), is an integral part of the 1994 Marrakesh Agreement for the establishment of the WTO (the WTO Agreement), and its annexed bundle of agreements in the area of Trade in Goods, Trade in Services, Trade-Related Intellectual Property Agreement (TRIPS), an integrated Dispute Settlement Understanding (DSU), and a Trade Policy Review Mechanism. The GATS is linked to the multilateral agreements on goods and to the TRIPS mainly through the DSU (Das, 1999: chapter VII, 1). There are also some related provisions between GATT and the GATS, such as Article V of GATS on economic integration and Article XII on balance-of-payments restrictions.

2. The Marrakesh Treaty is an umbrella agreement to provide an institutional and organizational framework for the administration of the multilateral and plurilateral agreements reached at the conclusion of the UR of multilateral trade negotiations. Among other things, the Treaty establishes the WTO, with a Ministerial Conference as the supreme governing body and, in between sessions of the Conference, the General Council.

3. The Marrakesh Treaty is a 'Single Undertaking' – with members having to sign on to all the agreements annexed to the treaty. Over the period 1986-1993, when the various agreements in the area of trade in goods, TRIPS and Trade in Services were negotiated, most participants and even key leading countries like the USA had no clear idea of their ultimate shape or the institutional arrangement. It was only at the very end, in November-December 1993, that all these were

[11] WTO document S/L/45.

integrated, along with an integrated dispute settlement understanding, and brought under a single institutional framework. After the UR Trade Negotiations Committee concluded the negotiations at the official level in December 1993, during the subsequent legal scrutiny stage, some of the variations in language used on the same issues in different agreements came to the fore; but the difficulties of changing them without upsetting the overall delicate balance resulted in things being left to later processes. Some of the current difficulties in the system can be traced to this. The texts of the agreement in the informal and formal negotiating processes were in English and during the legal scrutiny stage, French and Spanish language versions were scrutinised and cleared by the French and Spanish speaking delegations respectively.

4. Among the obligations of membership of the WTO are:

a) under Article XVI:4, "Each Member (of the WTO) shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

b) Under XVI:5, "no reservations may be made (by any member) in respect of any provisions" of the Marrakesh Treaty, and reservations to any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements.

4.1. The first part of Article III:2, stipulates that the WTO "*shall provide* (emphasis added) the forum for negotiations among the Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement." The second part says, the WTO "*may also* (emphasis added) provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference."

In effect, for matters dealt with under the WTO agreements, the article is prescriptive ("shall be") that the WTO is the forum for negotiations; on matters not dealt with such as trade in commodities, the second part suggests ("may be") the WTO as "a forum" for negotiations, meaning negotiations may be held in any forum including the WTO.

4.1A. Under Art.III:3 "The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the 'Dispute Settlement Understanding' or 'DSU') in Annex 2 to this Agreement."

4.2. Since the GATS is an integral part of the Marrakesh Treaty and the FSA is a part of the GATS,[12] any changes to GATS or its FSA, so as to be compatible with any regulatory and/or administrative changes resulting from the Bretton Woods II processes, have to be effected through negotiations at the WTO as a forum (see 5.1 below) and changes or amendments to the agreements effected through the WTO amendment process set out in Article X of the WTO agreement.

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[12] The term "financial services" is defined so widely in the Financial Services Annex to GATS that it could cover almost any activity by any enterprise that calls itself a financial service supplier. See the third section below.

5.1. Article IX of the Treaty sets out how decisions are to be made under the Marrakesh Treaty.

This provides (Article IX:1) that the WTO "shall continue the practice of decision-making by consensus followed by GATT 1947". And in footnote 1 to this, the treaty stipulates that "the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." This is generally referred to as "positive consensus" – as different from what is called "negative consensus" – when rulings of dispute panels and the AB are to be adopted automatically by the WTO membership in the DSB, unless they decide, by consensus, not to adopt a particular report.

The Article also lays down that where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. And various majority requirements are provided for various parts of the Agreement. So far, there has been no recourse to this and decisions taken by vote.

5.2. Under IX:2, the Ministerial Conference of the WTO and the General Council have the "exclusive authority" to adopt interpretations of the Marrakesh Agreement, and its Multilateral Trade Agreements.

5.3.1. Under the DSU, panels that hear and give rulings and recommendations for settling disputes among parties about the impairment of their rights and obligations, and the AB that hears appeals against panel rulings on issues of law (as different from appreciation of evidence on facts), are required to "clarify" the existing provisions of the relevant WTO agreements in accordance with "customary rules of interpretation of public international law."[13]

5.3.2. In terms of customary public international law, when states are parties to more than one agreement, they are expected to observe all of them. In interpreting conflicts among them, some well known principles are followed: a later treaty on the same subject prevails over an earlier one, a treaty on a specific issue will prevail over a general one, etc.

5.3.3. At the WTO, the panels and the AB in purporting to follow public international law, have repeatedly said they would "clarify" the provisions of various separate agreements in such a way as to avoid conflicts and thus ensure all parties carry out obligations of all the agreements.[14]

5.4. Successive rulings and recommendations of the panels and the AB, adopted by negative consensus, have resulted in blurring any difference between "clarification", that

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[13] Since the United States did not ratify the Vienna Law of Treaties codifying public international law, but has declared it abides by customary public international law, the Marrakesh Treaty only uses the words "customary rules of interpretation of public international law", even though the WTO panels and the Appellate Body frequently cite, for example, Articles 31 (1) and 31 (2) of the Vienna Law of Treaties on how treaties are to be interpreted. This has some other implications in that the US Supreme Court follows what is called a "nationalist" approach, and accepts the US State Department's enunciation of rights and obligations under public international law.

[14] See WTO Analytical Index, Vol. 2, 1089-1094, on GATT/GATS relationship: Banana III ruling (DS27, DS27/AB/R), the Canadian Auto ruling (DS139, DS142, DS139/AB/R, DS142/AB/R) and the Canadian periodicals ruling (DS31, DS31/AB/R); also GATT/GATS relationship, "WTO Appellate Body Repertory of Reports (1995-2004)" AB Secretariat, G.2.2, 161-162.

dispute panels and the AB are mandated to do, and "interpretation", solely reserved for the Ministerial Conference and the General Council. And since panel and AB rulings are automatically adopted by negative consensus, whilst actions by the Ministerial Conference and the General Council need a positive consensus, and/or forcing issues to a vote (but never done so far), the panels and the AB have, in practice, become more powerful than the supreme governing body of the WTO! However, when the Ministerial Conference or General Council provide an authoritative interpretation, it can only be changed by amending the agreement concerned; the *stare decisis*[15] principle of law does not apply in international public law, and thus not to rulings of the panels and AB; in theory, they could thus be changed by another decision in another dispute.

5.5 Rulings of panels and the AB, adopted by negative consensus at the DSB resulting in a "GATT-acqui" status, and panels and the AB making legal determinations that a political body of the WTO is empowered to make, have resulted in the creation – by the dispute settlement processes – of new or additional rights and obligations (see Das, 2003: 96-97; Rossler, 2001; Raghavan, 2000; Colares, 2009).

Overall, the culture of the WTO -- a member-driven and rules-based system in theory but largely driven by the secretariat -- and its working -- mostly in informal negotiations and processes -- has made it difficult to distinguish and separate process from substance of the accords or any changes to them. This will have a bearing on how current processes for BW-II will be reflected in changes that will be needed in the WTO trading system, in particular the GATS and its FSA.

GATS

The GATS is a framework agreement of rules and disciplines[16] governing the relationships of members in the area of trade in services, and providing for periodic negotiations for liberalizing trade in services. The Agreement has 29 Articles and 8 sectoral annexes which are integral parts of the GATS (under Article XXIX). Two of the annexes relate to financial services (Annex on FS and Second Annex on FS); and six others are: 1. on Article II (MFN) Exemptions; 2. on Movement of Natural Persons Supplying Services; 3. on Air Transport Services; 4. on Negotiations in Maritime Transport Services; 5. on Telecommunications; and, 6. on Negotiations on Basic Telecommunications.

The GATS was the outcome of very difficult negotiations and for most members, including those who initiated it, uncharted territory. Initially, the US, as the "demandeur" in 1982, sought to put services along with investment and "counterfeit goods" -- a term that conjured up something inherently illegal and undesirable, but in reality, was a euphemism to bring in intellectual property issues-- on to the framework of the GATT multilateral trading system.

The GATT 1947, a part of the Havana Charter, had been put into force among signatories through the protocol of provisional application (pending entry into force of the Havana Charter and its International Trade Organization). With the US not willing to ratify the Havana Charter, the

[15] Literally, stand by things decided, a principle of law, mainly Anglo-Saxon, which entails reliance on precedents, and thus, previous opinions or rulings – as opposed to deciding cases afresh on the basis of first principles.
[16] The rules and disciplines on what governments in countries can and cannot do are so wide-ranging that several civil society groups and policy think tanks see GATS more as a framework for "governance" in developing countries, than as a trade agreement. See Gould (2008).

GATT 1947 had remained a provisional treaty for 48 years (until the Marrakesh Treaty). This resulted in the initial grandfathering of existing legislation, and it became a privilege, in particular for the original signatories. As it became clear that the Havana Charter would never be ratified by the US, the "grandfathering" privilege was gradually eroded over a period of years, through panel rulings that only changes towards compliance with GATT in pre-GATT mandatory law would be GATT-legal, but not retrogressive changes.

During the negotiations on GATS, the US sought to bring the grandfathering concept into GATS. The issue was discussed and rejected, except as reflected through GATS provisions on the MFN exemptions in one dimension, and limitations on market access and national treatment as reflected in the schedules in the other dimension.[17]

In its schedule of commitments on Financial Services under the 1997 Fifth Protocol to GATS, the US filed "an additional commitment"[18] to work with Congress for Glass-Steagall reform, and with states on other banking service reforms, as well as in the insurance sector. The repeal of Glass-Steagall -- firewalls between banking activities and trading activities -- was achieved in December 1999. In the context of the current financial and related economic crisis, there are moves in the US and elsewhere for financial sector reforms and for re-imposing the Glass-Steagall type of restrictions as part of the regulatory structures in the financial sector[19]. If this happens, and a dispute is raised by another Member, it is unclear what view would be taken in the WTO dispute settlement system. It is difficult to predict whether the US additional commitment would be viewed as a firm or best endeavour commitment (precluding a reversal once the "reforms" are achieved) or something else?

There has been no WTO jurisprudence on the FS Annex, the FSA (the Second and Fifth protocols to GATS) or the Understanding on Commitments in Financial Services, which is not even a part of the legal texts of the Marrakesh Agreement and Ministerial Decisions and Understanding, but may have a bearing in disputes involving those WTO members who expressly or indirectly made it a part of their schedule of commitments under the Fifth Protocol. (According to a communication from Switzerland in the Doha round of negotiations in services,[20] the Understanding was accepted by only some 30 WTO members in scheduling their FSA commitments.) But panels, in case of ambiguity in matters requiring clarification, have relied on past practices.

The GATT encompassed the area of international trade in goods – physical products, primary and industrial/manufactured, produced and exported from one country and crossing the borders and entering the markets of another. That framework related to conditions for entry of such goods at the border, subject to the levying of tariffs and/or quantitative limitations, etc, and once the goods cross the border for equal (national) treatment with domestically produced goods, and various rules and disciplines dealing with these. Most of the concepts and principles underlying the rules and disciplines of the GATT had evolved over more than a century or two of trade between and among nations, at least ever since the Westphalia treaty: the MFN or non-discrimination principle, the national treatment principle, border controls (tariffs and quantitative and other measures), etc. When the post-war system – the Havana Charter and, as its subset, the provisional GATT was negotiated, it was only a case of translating these principles and concepts into a treaty.

In the case of services, it was completely uncharted territory. The initial US proposal – by USTR William Brock at the 1982 Davos symposium of the European Management Forum, which subsequently renamed itself as the World Economic Forum – was for a Ministerial meeting to

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[17] Communication to author from B. K. Zutshi, Indian ambassador to GATT (1989-1994).
[18] GATS/SC/90/Suppl.3 - "Attachment to the United States Schedule."
[19] See "Financial Reform: A Framework for Financial Stability," report of the Group of Thirty, <www.group30.org>
[20] S/CSS/W/71 of 4 May 2001.

launch a new trade round to deal with investment and all attendant problems of liberalizing the movement of capital, liberalizing trade in services, including issues of capital investment and the free movement of capital, banking, insurance, shipping, consultancy, data systems, etc, and problems of technology (Raghavan, 1990: 70).

At the 1982 GATT Ministerial, and the subsequent processes of "interested countries undertaking national studies" and subsequently, "interested countries exchanging information on such national studies inter alia through international organizations such as GATT", the list of services put forward by the US ranged, at one end, from religious missionary activities and the work of philanthropic and charitable organizations to, at the other end, many tangible and intangible services provided for profit.

In all these discussions and exercises around the GATT – but also at the UN Conference on Trade and Development (UNCTAD) where there was already ongoing work on "invisibles related to trade," and in a few other UN fora and specialized agencies – it became clear that the term "services" covers a wide range of very disparate activities. Their only common element seemed to be that they are not "agriculture" or "manufacturing", and that the outcome of their activities is "invisible." Some of the activities sought to be included under this term were: accounting; advertising; banking; building construction, and engineering; franchising, hotels and motels; insurance; leasing; legal services; motion pictures; telecommunications; data processing and information; tourism; air transport; and maritime transport. In many countries, both in the industrial world and the Third World, several of the services are in the public sector, or are monopolies subject to heavy state regulation on grounds of national security, development objectives, consumer protection, or other public policy considerations.

In the preparatory processes for the UR at the GATT (1982-86), and during the process of exchanging experiences among interested contracting parties, it was brought out that services are:

> "heterogeneous; pose difficulties in 'defining precisely' the range of activities in the term; that in many cases the services are consumed where produced (because they are intangible, and are neither storable nor transportable); that there are difficulties in defining the 'traded' or 'tradable' services, or in identifying the 'obstacles' to the trade and distinguishing them from obstacles to 'investment' or 'establishment'; and that there is no international understanding on problems faced in data collection, classification, data needed for analysis, and problems of confidentiality."[21]

Despite these acknowledged deficiencies, the US and its supporters pushed for negotiations for an international framework on services, and restricting the right of countries to undertake regulatory actions in such areas as: currency and foreign exchange controls; state authorization for purchase of real estate and property; right of foreign firms to establish themselves on the territory of a country; conditions under which foreigners may enter, leave, reside and be employed; business competition; protection of intellectual property. And since most of the services had to be provided to customers on the spot, the US proposal involved "establishment of commercial presence" by its nationals -- natural or corporate, through capital investments, as branches or locally incorporated subsidiaries -- to generate and provide the services to consumers.

After considerable, lengthy, protracted and difficult negotiations, which at one stage threatened to split apart the GATT trading system itself, it was agreed in 1986 at Punta del Este,

[21] Report of the Chairman of the CPs to the 41st session, GATT Secretariat document L/5911, cited in Raghavan (1986); Raghavan (1990: chapter 5).

Uruguay, by Ministers of member-countries of the GATT Contracting Parties, to launch negotiations on trade in services (Part II of the Punta del Este Declaration). This provided:

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

Before the Punta del Este meeting, and even initially in the presentations on services, the US, without committing itself to its ultimate goals, took the position that there should be an overall framework on services in GATT, applying some of the rules and principles of GATT, with separate codes for various service sectors. It also made clear that it did not want the GATT's fundamental provision for MFN treatment to apply to services, but wanted the application of the GATT provision for national treatment to foreign services enterprises established in a country and their products. To begin with, under the overall framework, the US wanted countries to notify all their regulations on services, and make them "transparent",[22] so that countries could be asked to justify the "reasonableness" of their regulations, namely, "the balance between their regulatory requirements and their restrictive effects on 'trade' in services." At the same time the US wanted to exclude laws that came within the purview of consular affairs, so that while the rights of countries to regulate the use of foreign managerial and highly technical personnel working in 'service establishments' in their country would be subject to the international framework on services, the rights of countries to control "immigration and prevent entry of labour" and "labour services" would not be affected (Raghavan, 1986).

From the outset of the preparatory processes and the negotiations on GATS, the US position was that services had to be provided on the spot to the consumers, and the only effective way to provide the service was through establishment or investment. Based on this view, and on the view that its own services market was fully liberalized and thus had commercial value, in its initial proposals the US sought: (a) rights for its service providers to invest or establish in WTO member countries, and (b) national treatment in the WTO member countries for US foreign investor/service providers on the analogy of the GATT's "national treatment provisions" on treatment of imported goods after it fulfils the conditions of entry and is put on the domestic market abroad.

On the other hand, the US did not agree to the fundamental principle of the trading system, evolved even before the GATT, from at least the late 19th century, namely, the principle of MFN and non-discriminatory treatment. Most of the bilateral trade treaties of those days had such a provision, and in the post-war systems, this was part of the Havana charter and the GATT, which came into being under a protocol of provisional application in 1948. In the UR GATS negotiations, however, the US wanted to only provide a reciprocally negotiated conditional MFN commitment for individual countries.

When it initially pushed for inclusion of services into the trade agenda – the 1982 GATT ministerial, and the subsequent exchange of experience on services among interested countries, and almost till the launch of the Uruguay Round at Punta del Este – the US position was that it could be

[22] According to Ellen Gould, the push for transparency has been a key US strategy; it is a way for US corporations to become intimately involved with governments in foreign countries at the very earliest stage of regulatory processes.

achieved by amending the GATT, which dealt with international trade across borders in "products" and include, wherever product or products are mentioned, services. And since services could only be provided on the spot, this required providing for the right of a service producer or supplier to invest or "establish" on the territory of any other member, produce and supply for that market and get national treatment.

After Punta del Este, and the launch of the UR negotiations, with services in a separate track and under a Group of Negotiations on Services (GNS), the US kept repeatedly going back to some of its initial stances, in particular automatic right for investment and establishment, national treatment, and negotiated MFN only. After a considerable amount of hard bargaining, the concept of trade in services by four modes of delivery was evolved and agreed to. Also, the initial US position was that a country should commit to allowing all services to be traded, subject only to specified exceptions that each country should list. Developing countries, not fully aware of the ramifications of all the services and what such a commitment would mean in terms of their domestic economic policies and development strategies, did not agree to the US proposal. Finally, a compromise was reached on the basis of the GATS framework to provide for periodic rounds of negotiations on liberalizing services, and the adoption of what is called a "positive listing" approach – countries agreeing to open their markets in specified service sectors or sub-sectors, and subject to limitations they would inscribe in their schedules – under national treatment, market access limitations, and MFN treatment exceptions. The removal or reduction of these limitations could be the subject of future rounds of GATS negotiations. In the current Doha round, there are both bilateral and plurilateral requests for removal or reduction of these limitations.

In the final stages, in the last quarter of 1993, the newly elected Clinton administration, after concluding the North American Free Trade Agreement and getting it approved by Congress, turned its attention to the UR negotiations. On the issue of FS and negotiating market access, as part of the framework accord in GATS, the US went back to its original stance, upsetting a very delicate balance that had been reached over six years of negotiations. At that time, the negotiators in Geneva had reached a tentative agreement in the UR package, including on the framework of the services accord, with bilateral market access negotiations in services set to begin on 26 November and working towards a final overall agreement by 15 December. But in the latter half of 1993, under pressure of its powerful banking and insurance lobbies on both the administration and Congress, the US Treasury changed its stance, and argued that given its very large and open market for financial services, the US could not agree to commit itself to provide access in its markets to financial services providers of other Members on the basis of the MFN provision – namely, extending to all members the outcome of its bilateral market access accords with anyone. The US conceded that many developing countries did not have the regulatory structures and prudential regulations and systems in place, and this would take time to set up. On this view, the US sought and insisted upon "reciprocal commitments" with developing countries having to agree with the US to fully liberalize their markets for financial services over an agreed phased period of six to seven years, to be able to get a right for their own financial service institutions to set themselves up in the US and offer financial services. The US stance was in contrast to the long period over which OECD countries liberalized their banking and financial sectors, some over a period as long as 18 years (Cornford and Brandon, 1998). Meanwhile, in order to conclude the UR negotiations, the US proposed a two tier-approach to financial services and an attempt at a "tax carve-out" in the framework text for the GATS.

These US positions were so fundamentally at variance with compromises that had been so painfully negotiated and tentatively agreed to –positive listing in the four modes, and provisions enabling parties to the GATS to have taxation measures that would differentiate between domestic suppliers and foreign suppliers, provided such differing treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes on services or service suppliers of other

members – that other participants said that the US position would require a complete renegotiation of the GATS and, since there was no time, the services talks would have to be abandoned. Alternatively, the US was told, it would force every other participant to withdraw their own offers on the table, and enter similar reservations to that of the US, in effect nullifying GATS.

On financial services in particular, a number of participants made clear that they too would withdraw all their financial services offers, limiting their MFN commitment in this sector to assuring existing market access, and reserving all future liberalizations to non-MFN basis. Some, like Egypt, actually withdrew their financial services offers, while others, like India, Brazil and some ASEAN countries stipulated that their own offers were conditional on the US changing its position. This would have resulted in a UR accord with a GATS component that would have virtually excluded a major sector whose liberalization much of the ostensible benefits of the Round seemed to depend on namely financial services. The non-MFN provisions in this, as in several other areas, would have made the Uruguay Round a multilateral negotiation to get for the industrial world the right to derogate from the MFN principle.[23]

The consensus accord on GATS in the UR negotiations only became possible on the basis of a definition of trade in services and for its supply via four modes: (1) cross-border supply, (2) supply through a movement of consumers to the location of the suppliers, (3) supply through establishment in a country, by way of commercial presence, of legal entities of another country; and (4) supply through movement of natural persons of one country in the territory of another. It also involved commitment to a work programme of collection of data on "trade in services" (see the fifth section below).

Article XXVIII of GATS provides definitions for a number of terms used such as "supply of a service", "measures", "measures on trade in services", etc. However, GATS does not provide a definition of services as such. Article 3 (b) stipulates that "services" include any service in any sector "except services supplied in the exercise of government authority". Article 3(c) provides that a "service supplied in the exercise of government authority" means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.

The GATS is a framework agreement within which periodic rounds of negotiations for progressive liberalization are to be undertaken, and market access commitments on trade in services are to be negotiated and implemented. Key articles are Article II, a general obligation for MFN or non-discriminatory treatment as between members (subject to some qualifications and initial exemptions), Article III on transparency, Article XVI on market access, Article XVII on national treatment, and Article XIX on progressive liberalization through specific commitments in periodic rounds of negotiations for liberalization.

The GATS adopts what is called a positive list or bottom-up approach to Members making commitments in sectors and sub-sectors that they specify in a schedule. This means that members agree to accept commitments to liberalize and provide market access for trade in services in specified sectors and sub-sectors. The initial US, Canadian, European and Japanese positions favoured what is called negative list, or top-down approach; that is all tradable services are to be allowed, excepting those specified in a list as excluded and scheduled. This was unacceptable to developing countries for whom the whole area of trade in services was completely new.

The negative list approach is being used by both the US and the EU in current and ongoing negotiations for free trade agreements (FTA) with developing countries – e.g., the EU-Cariforum

[23] Reports in *SUNS*, Nos. 3190, 3192 and 3195 (November-December 1993).

agreement.[24] The FTA approach and issues in the area of services are not dealt with in detail in this paper, but can be found on civil society websites monitoring these issues.[25]

Any limitations on MFN treatment were to be listed in a country's schedule of initial UR commitments and could be the subject of negotiations in subsequent rounds with a view to removal or dilution. Any limitation would be in terms of providing more favourable treatment to service suppliers of another country or countries or regional groupings under specific agreements.

Market access as such is not defined by GATS. However, six categories of measures are prohibited (Article XVI: 2) unless they are specified in a country's schedule for each of the four modes of supply. These prohibited categories are: a) limitations on the number of service suppliers – whether numerical quotas, monopolies, exclusive service-suppliers or requirements of an economic needs test; b) limitations on the total value of service transactions or assets in the form of quotas or the requirements of an economic needs test; c) limitations on the number of service operations or quantity of service output; d) limitations on the number of natural persons that may be employed; e) limitations on the type of legal entities through which a service is supplied; and f) limitations on the permissible size of foreign capital in terms of maximum percentage limits on foreign share-holding or total value of individual or aggregate foreign investment.

National treatment under GATS Article XVII is defined as treatment no less favourable than that accorded to a domestic service supplier. Deviations from national treatment are to be listed and included in a country's schedule of commitments.

There are two provisions, in paragraphs (d) and (e) of Article XIV, "General Exceptions", that enable derogations from national treatment in tax matters. Under Article XIV (d), parties to the GATS can have taxation measures that would differentiate between domestic suppliers and foreign suppliers provided such differing treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes on services or service suppliers of other members.

A footnote, No. 6 for (d), has expanded on these provisions, and elaborates on the permissible kinds of measures discriminating between domestic and foreign service suppliers if the measures are aimed at ensuring equitable or effective imposition or collection of direct taxes including measures taken by a Member under its taxation system which: (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or (iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base. Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

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[24] http://ec.europa.eu/trade/issues/bilateral/regional/acp/pr220208_en.htm

[25] http://www.ftamalaysia.org/article.php?aid=214; http://somo.nl; http://www.ftamalaysia.org; http://somo.nl/dossiers-en/trade-investment

Under Article XVI (e), there can be measures, inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Other key provisions include: Article III: on transparency of relevant policy measures; Article IV: facilitation of increased participation of developing countries in services trade; Article X: emergency safeguard measures in certain circumstances, prescribing further multilateral negotiations on this subject in the future; Article XII: restrictions that may be imposed in the event of serious balance-of-payments difficulties of a country; and Article XIV exceptions dictated by requirements of public order, health, securing compliance with laws and regulations (not inconsistent with GATS) to prevent deceptive or fraudulent practices or default on a service contract and protection of privacy of individuals in processing and dissemination of personal data and confidentiality of individual records or accounts, and safety; and Article XIV: security exceptions. Article XV on subsidies recognizes that, in certain circumstances, subsidies may have distortive effects on trade in services and calls for "shall enter into" negotiations to develop multilateral disciplines and appropriateness of countervailing (CV) measures, explicitly recognize the role of subsidies in the development programmes of developing countries. For purposes of the negotiations on disciplines for subsidies, the article also requires members to exchange information on all subsidies related to trade in services provided to domestic service suppliers. No rules or disciplines have been set so far.[26] Some of the areas envisaged for further GATS negotiations are discussed below.

Emergency Safeguard Measures (ESM) under Article X

In several developing countries, and particular in Asia,[27] domestic constituencies and stakeholders opposed liberalization measures in the financial sector, especially after their experiences during and after the 1997-98 Asian financial crisis. Here governments and their policy-makers sought to reduce opposition by holding out reassurances to their domestic constituencies that they would arm themselves with powers to invoke ESM in the services trade, and in financial services in particular, before making any more concessions in the Doha Round.

Judging merely by the list of papers and documents on the issue before the negotiators, this is an area of GATS rules negotiations where there has been the most intensive engagement, and considerable work has been done at technical levels; yet until now, there is no clarity about "who is to be protected against what and how". The ESM notion, embodied in the goods agreement,[28] is difficult to operate in the structure of the GATS trade flows in four modes; and it will be even more difficult to prove or defend an ESM in the services area in a dispute, absent clear data for each of the modes. This exercise involves complicated methodological issues and problems, and makes it almost impossible to devise an across-the-board set of disciplines applicable to all modes. The other trade-remedy instrument used in goods trade – anti-dumping and countervailing measures – is not foreseen in GATS.

[26] See section below on the current Doha negotiations.

[27] In the Latin American region, where in the 1980s and early 1990s, the governments went farthest in adopting policies in line with the Washington Consensus, domestic policy space has been reduced – making it an issue of reversing course, rather than of using safeguards to prevent the erosion of space.

[28] The safeguards provision in GATT 1947, in Article XIX, was so used and abused against developing countries that the latter insisted on an elaboration of this instrument, which was done in the UR Safeguards Agreement. There is a view now among some trade law academics (e.g. Aparicio Caicado) that the AB's technical and overly legalistic interpretations of these provisions may have turned the escape clause into an impossible-to-use clause.

Subsidies (Article XV of the GATS)

GATS envisages future negotiations for multilateral disciplines in services to avoid the trade-distortive effects of subsidization on trade in services, the appropriateness of CV measures, and to provide for such CV measures. GATS has no provisions analogous to GATT Article XVI (subsidies) and Article VI (CV measures) – concepts taken and expanded in the disciplines of the Subsidies and Countervailing Measures (SCM) Agreement. Framing the subsidies disciplines for GATS, especially for banking and financial services, would pose several methodological issues as complicated as for ESM. Article XV uses the mandatory "shall", both for entering into the negotiations and for recognizing the role of subsidies in the development programs of developing countries and the need for flexibility.

And, unlike in GATT, GATS has no analogous provisions on dumping and unfair trade. GATS has also no analogous provisions to GATT Article III: 8 (excluding national treatment for purchases by government or government agencies of products for government consumption, and excluding from subsidy disciplines government subsidies in such purchases).[29]

Some of the requests in the Doha round, for example, include removal of the requirement for capital adequacy ratios of a foreign bank's operation as a "branch" in a country and the deposits, etc., in it, preferring instead to use the capital available to the principal that is presumably cheaper.

And when, as now, the US, UK and other major developed countries have gone to the rescue of their banks and have provided them with subsidized credit from the governments and the central banks concerned, the subsidizing effects have aroused concerns, even among some global players. On the face of it, absent GATS disciplines on subsidies, nothing much can be done. However, such subsidies may be open to WTO challenge, where governments have made commitments on the basis of the Understanding, and without inscribing national treatment exceptions. The US and the EU, in Part 1 of their services schedules, Horizontal Commitments, have entered some reservations on national treatment in respect of the provision of subsidies, limiting it generally to nationals, incorporated enterprises with national majority shareholding, etc. In the case of the US, on the face of it, the reservations do not appear to cover the current TARP and other funding for banks and other financial enterprises, including the latest moves of providing government guarantees and subsidies to private investors to buy the "toxic assets" of banks. Complicating the problems of interpretation, the US headnote to its Financial Services Schedule[30] under the Fifth Protocol says: "Commitments in these sub-sectors are undertaken in accordance with the Understanding on Commitments in Financial Services (the "Understanding"), subject to the limitations and conditions set forth in these headnotes and the schedule below." This makes it a happy hunting ground for trade lawyers to argue whether the headnotes to the 1997 US FSA schedule in effect overrides the 1993 reservations in market access under Horizontal Commitments. But it may introduce another uncertainty for policy-makers, regulators and administrators.

There are equally difficult problems in the insurance area, in particular, in some non-life insurance and reinsurance sectors. All these may need revisiting, in the light of likely and forthcoming regulatory reforms: some of the GATS provisions and existing commitments by

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[29] Article XIII of GATS has effected a de facto carve-out by exempting government procurement of services from the MFN and national treatment requirements. But this is only until mandated multilateral negotiations on government procurement in services take place. As such it is not the equivalent provision to that of GATT Article III (8), which keeps government procurement of goods out of the purview of the GATT's requirements on national treatment or subsidy. There is no requirement to negotiate any multilateral agreement on government procurement in goods.

[30] GATS/SC/90/Suppl. 3.

Members on subsidization, national treatment and admission of commercial presence in the form of branches as opposed to locally incorporated subsidiaries

GATS Negotiating Rounds for Progressive Liberalization

Article XIX on progressive liberalization provides for periodic rounds of negotiations for liberalization, and for the WTO Council for Trade in Services (CTS), the WTO body mandated to facilitate the operation of GATS to establish, for each round, negotiating guidelines on the basis of an assessment of trade in services, in overall terms and on a sectoral basis, with reference to the objectives of the agreement, including increased participation of developing countries in the services trade.

Absent adequate and relevant data on overall and sectoral trades in services and of participation by developing countries (see the fifth section below), this important requirement has not been carried out in any measurable quantitative terms for the current Doha Round and cannot be undertaken for future rounds either. With the major developed countries the overwhelming exporters of services, particularly financial services, it has been part of the strategy of the leading US and European service coalitions, and of the WTO/GATS secretariat, to "sell" liberalization in the services sector as essential for growth and development, lack of data notwithstanding (Freeman, 2000; see also Annexes 3A and 3B of this paper, and Raghavan, 2002). Qualitative judgements may turn out to be theoretical and theological on liberalization and its benefits. At a minimum for achieving the mandatory requirement under GATS Article XIX, and even for BW-II itself, the UN General Assembly must mandate UN statisticians in a time-bound process, and hold them accountable, to revisit the issue of a manual for collection of data on trade in services. They must recommend a methodology for adoption by the UNGA to be followed by UN members for collecting and reporting national and international data on trade in services according to the GATS definitions, and not in the manner it has been dealt with so far as explained in paragraphs 2.72, 2.73 and 2.74 of the 2001 manual. In effect, the manual suggests that the statisticians disregarded the mandate given to them to draw up guidelines to collect data on trade in services as defined in GATS. (see the fifth section below on statistical data on trade in services).

Also important to keep in mind, particularly in terms of the ongoing processes for BW-II and any regulatory, governance or other changes, would be Article XXI for the modification of schedules or withdrawal of concessions, and provisions of the Marrakesh Treaty if any changes are to be made in the GATS. Modification or withdrawal of concessions in a schedule would require renegotiation with interested members and provision of compensation; if any changes need to be made to the provisions of the GATS itself, it may involve the processes envisaged in the Marrakesh Treaty for amendments. The difficulties and challenges the US has been facing in withdrawing its initial commitments in GATS to provide access for gambling services -- both in terms of compensating Antigua and Barbuda who won a dispute against the US over restrictions on internet gambling, and in getting the agreement of other interested parties -- bear this out![31]

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[31] In scheduling its commitments under GATS in December 1993, the US had a Market Access entry in its schedule, under item 10D, "Recreational, Cultural and Sporting Services" (a term mentioned in the Secretariat 1993 Agreed Guidelines for Scheduling Commitments and a secretariat background document on the agreed classification list of various services that followed and referenced the UN Central Product Classification list). The entry 10D, "Other Recreational Services (except Sporting)", specified it had no limitations under Modes 1, 2, and 3 – neither market access limitations nor national treatment exceptions. In a dispute raised by Antigua and Barbuda, the panel interpreted, in accordance with customary rules of interpretation, and with reference to the various background documents, the US entry to include internet gambling services (WT/DS285/R, pp140-168 and WT/DS285/AB/R, pp51-73). Since Congress could not be persuaded to change the law to allow internet gambling, the US has had to renegotiate, to

GATS and the Financial Services Agreement

The actual UR negotiations on services, held in the GNS, proved to be tough at almost every stage, with all sides making compromises and departing considerably from their initial positions. However, the negotiations on financial services proved even more difficult, and, towards the end of the UR (Oct-Nov 1993), almost wrecked the accord on GATS, if not the UR agreement itself. The negotiations finally resulted in the GATS as an integral part of the WTO.[32] The FS Annex supplements and interprets some parts of the GATS in relation to financial services – definitions, prudential carve-outs, and some requirements in disputes.

Paragraph 1 of the GATS Annex on financial services sets out the scope and definition of the annex; para 2 provides for a "prudential carve-out" for the sector from the disciplines on domestic regulation; in para 3, there is provision for recognizing the prudential measures of another Member; para 4 has a provision on dispute settlement, requiring panels in disputes on financial services and prudential issues to have the necessary expertise relevant to the specific financial service, and para 5 has the definition of financial services (Legal Texts, 1994: 355-358).

Para 5(a) of the Annex provides a definition of financial services that is both vague and all encompassing, and has an illustrative list of some 16 items that are declared to be "included" in the definition (Legal Texts, 1994: 355-358). However, the definition in 5(a) is much wider than the illustrative list: "A financial service is any service of a financial nature offered by a financial service supplier of a Member" (Gould, 2008; Cornford, 2004). Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance).

In explaining the term "financial services", Freeman says: "The first thing we did in 1979 was to coin the phrase. You will not see the term 'financial services' before 1979. We did it by asking everybody in the (American Express) company to talk about financial services, particularly with the media, and in about two years the term financial services was part of the lexicon" (Freeman, 2000: 457). He adds:

> It is always difficult to determine the meaning of financial services company. What does that mean? Everybody talks about banks, insurance companies and securities companies, and they are part of it. But what about H&R Block, which is one of the largest, accounting firms in the United States and operates in about twenty countries? That is a financial services company. I think, EDS, which does back-office work for American Express Bank, Citibank, and others around the world, also is a financial services company. Credit card processors, such as MBNA,[33] Reuters Information,[34] Standard & Poor's, which operates in 100 countries or something like that, and asset management companies are all financial services

withdraw or modify this particular entry in its commitment, which has involved arbitration on the value of the concession to Antigua and Barbuda, as well as several other members, including the EU, who staked a claim for compensation.

[32] *SUNS* Nos. 3190, 3192, 3195, Nov-Dec 1993.

[33] Initially founded as Maryland Bank NA, and originally the world's largest independent card issuer, MBNA became, after many mergers and acquisitions (and as a subsidiary of Bank of America), the US FIA Card Services National Association, but remained MBNA in Canada and Europe.

[34] See also, Erik Wesselius (2009); in its appendices, the paper has minutes, membership of key committees of LOTIS and other documents of the committee over the period 1999-2001, and shows that Reuters, among others, is a member of this committee, and considers itself as a financial services company. The papers of the LOTIS group were uncovered and published by the civil society group GATSWatch.

> companies. This is a partial text. We were quite successful in the UR in defining financial services as 'any service of a financial nature'. This allowed us to have more allies, and you have to take care of your allies.[35]

On "Domestic Regulations," the annex provides for a prudential carve-out. Para 2 of the Annex says:

> "Notwithstanding any other provisions of this agreement, a Member shall not be prevented from taking measures for prudential reasons, including for protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system".

This, however, is qualified by a second sentence in the same paragraph: "Where such measures do not conform to the provisions of this Agreement, they shall not be used as a means of avoiding the Members' commitments or obligations under the Agreement."

On the one hand, this is a wide-ranging and sweeping carve-out from any disciplines that may be fashioned under the GATS provisions for disciplines on regulations. The prudential carve-out, on the face of it, appears wide enough to cover any reforms out of the BW-II processes for closer oversight of the financial institutions from a fiduciary or systemic viewpoint.

> "... it can mean anything. There is no remedy. You cannot go to the courts under the U.S. Administrative Procedures Act and file a lawsuit, and say, no, you are wrong. You could go to the WTO, and they will study it for a couple of years and say that they do not know. It is a wide-open concept. The problem is to adjudicate a controversy over a prudential carve-out. That is a very serious problem" (Freeman, 2000: 459).

However, the measures and character of measures permitted under the heading "prudential measures" are not spelt out. The second sentence of para 2 (a) of the Annex leaves open the possibility of a challenge through a dispute process at the WTO, where three panellists (selected by the secretariat, and serviced and guided by the secretariat in the panel process) will decide on "facts", and the AB on WTO law, on whether the measures taken properly fall within the prudential carve-out provisions (see Stichele, 2005; 2006).[36] In disputes, panels and the AB have adopted a case-by-case approach. This might inject a situation of uncertainty in as important a sector as a financial system, national and global. According to Andrew Cornford,

> One set of questions under this heading is likely to be measures taken as part of the restructuring of banking sectors in the aftermath of financial crises such as that which broke out in Asia in 1997. Such restructurings can take place over an extended period of time, thus posing the question whether all the actions involved can be classified as being covered by the reference to system integrity and stability. Moreover, the restructuring may also be accompanied by substantial injections of

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[35] http://www.gatswatch.org/LOTIS/LOTISapp1.html

[36] Arguably, the second sentence of para 2(a), prudential carve-out in the financial services annex, can be invoked on measures banning or restricting, for example, short-selling, and more so where the commitments have been made on the basis, or explicitly in terms of the Understanding, which requires a standstill on regulations.

government money in forms which some may consider as distorting competition and discriminating against foreign suppliers of financial services (Cornford, 2004: 15).

This question, posed in the aftermath of the Asian financial crisis and the restructuring of financial institutions with considerable injections of government funds in South Korea, has now acquired much greater topicality in light of actions in the US, UK, France, etc. So far, there is no WTO/GATS jurisprudence (or panel rulings) on such an issue. In the South Korean case,[37] the provision of government funds to recapitalize the banks and loans to industry were challenged under the SCM Agreement of the GATT/WTO. However, in the case of the US, and others who signed on to the Understanding and the negative list approach, and without a national treatment exception, some of the current measures may be open to challenge as de facto discrimination.[38] The guidelines for scheduling commitments approved by the Council on Trade in Services say:

> "Article XVII [national treatment] applies to subsidies in the same way that it applies to all other measures. ... any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article. Subsidies are also not excluded from the scope of Article II (MFN)".

In line with this, the guideline adds: "a binding under Article XVII with respect to the granting of a subsidy does not require a Member to offer such a subsidy to a services supplier located in the territory of another Member."[39]

Though the negotiations on the GATS framework ended in December 1993, the final compromise – agreement on GATS as an integral part of the WTO – also involved continuation of the negotiations on trade in financial services beyond Marrakesh, as part of the unfinished business of the Uruguay Round. With the US having taken an MFN exemption for its two-tier approach, the decision to continue the financial services negotiations for a further six months after entry into force of the WTO, also provided that other Members who had some offers on the table could keep them and negotiate to persuade the US to change. Failing that, six months after entry into force of the WTO, they would have the right to change their own commitments. Even this continuance became possible only when – at the insistence of Egypt, India and the Philippines – it was decided to continue negotiations on Mode 4 in services (temporary movement of natural persons for supply of a service).

The negotiations on market access in financial services continued beyond Marrakesh, first up to July 1995 with an interim accord, and then up to the end of 1997, concluding on 17 December 1997 with the adoption of the Fifth Protocol to the GATS, that entered into force on 1 March 1999 (see the fourth section below). The horizontal negotiations covering all sectors of GATS on Mode 4 that were continued at Marrakesh ended in 1995, but with minimal gains for the developing countries.

During the negotiations on financial services in the UR, there was an Understanding on Commitments in Financial Services (in short, "the Understanding"). This, as in other areas of negotiations on trade in goods, like agriculture, was merely a modality or guideline for participants to undertake and schedule commitments. In terms of the GATS and its FS, the Understanding was an

[37] WT/DS273/R - EC complaint against Korea on subsidies provided by Korean banks and financial institutions to the Korean ship-building industry for building and exporting commercial vessels
[38] See subsection 2 on "Subsidies" in the second section of this paper.
[39] WTO document S/L/92.

alternative or supplementary approach that may be followed by members, to that set out in Part III of GATS (Articles XVI, XVII and XVIII). This is made clear in the opening paragraph of the Understanding which says: "Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (hereafter referred to as the "Agreement") *on the basis of an alternative approach to that covered by Part III of the Agreement* (emphasis added). It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;

(ii) *it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement* (italics added);…" (Legal Texts, 1994: 478).

The Understanding, as an alternative approach or modality for scheduling commitments, did not form part of the agreement and had no legal value, except perhaps for those who explicitly or implicitly referenced the Understanding in scheduling their financial services commitments. In accordance with past practice, as in other areas of trade, once a schedule of commitment of a member (GATS and FSA) had been filed, scrutinized and accepted, it could not be challenged later on the basis of its variance with any modality.

While not part of the legal texts, the Understanding was annexed to the Final Act signed by representatives of governments that met at Marrakesh. In accord with the Vienna conventions on international conferences of governments at plenipotentiary level, the signing of the Final Act by a plenipotentiary only carries with it an obligation on the part of that plenipotentiary to take back the documents stipulated in the Final Act, and to present it to the plenipotentiary's government for its consideration in good faith. It has no other legal or other effect. It is a common practice at international plenipotentiary conferences that the Chair or Secretary, reads out such a statement into the record before adoption and signing of a Final Act by participants.

> Paragraph 1 of the Final Act Embodying the Results of the UR of MTNs says:
> "Having met in order to conclude the Uruguay Round of Multilateral Trade Negotiations, representatives of the governments and of the European Communities agree that the Agreement Establishing the World Trade Organization (referred to in this Final Act as the 'WTO Agreement'), the Ministerial Declaration and Decisions, and the Understanding on Commitments in Financial Services, as annexed hereto, embody the results of their negotiations, and form an integral part of this Final Act".
>
> Paragraph 2 says:
> "By signing the present Final Act, the representatives agree:
>
> (a) to submit, as appropriate, the WTO Agreement for the Consideration of their respective competent authorities with a view to seeking approval of the Agreement in accordance with their procedures; and
>
> (b) to adopt the Ministerial Declarations and Decisions (GATT, 1994: 2-3)".
>
> Paragraph 2 does not mention the Understanding at all.

After the Marrakesh agreement was signed, the GATT secretariat published "The Results of the Uruguay Round of Multilateral Negotiations: Legal Texts"; this publication (June 1994) contains the texts of each of the agreements reached at the conclusion of the UR in December 1993, the related decisions and understandings taken at the same time and those taken later at the Ministerial Meeting in Marrakesh in April 1994. These are the only legal texts of the Marrakesh Agreement.

The GATT secretariat publication also includes, in separate pages, the Understanding on Commitments in Financial Services (pp. 477-482) and the text of GATT 1947. The third paragraph of the preface to the GATT Secretariat publication says:

"The WTO Agreement includes the 'General Agreement on Tariffs and Trade 1994.' This instrument, known as 'GATT 1994,' is based on the original GATT referred to as 'GATT 1947'. The text of GATT 1947, as subsequently amended by decisions of the GATT CONTRACTING PARTIES, is included for reference at the end of this volume".

There is no self-contained complete text of GATT 1994, though the publication (pp. 21-38) sets out what GATT 1994 consists of: the provisions of GATT 1947, legal instruments that entered into force under GATT 1947 before the WTO entered into force, and the Understandings reached on the interpretation of some of the Articles during the UR (that have been set out), explanatory notes and what is known as the US maritime clause that prohibits use of foreign-built or foreign reconstructed vessels in national waters or exclusive economic zones (a grandfathered provision of GATT 1947, carried over into GATT 1994).

The preface, however, makes no mention of the Understanding at all, though the manner in which it is included as part of the volume on *Legal Texts* (1994), the unwary may be led to think it is a part of the UR legal texts and agreements.

According to the WTO analytical index, there has, so far, been no jurisprudence or decision of a competent WTO body on any interpretation and application of the Annex on FS (1), or Protocol II on FS, or on the "Interpretation and Application of the Understanding on Commitments in Financial Services."[40] This ambiguously worded factual statement in the analytical index, however provides a misleading picture about the Understanding and its status.

According to a communication to the author from Mr. B.K. Zutshi, India's ambassador and representative to the GATT (1989-94), and a key negotiator of the GATS at the time of the conclusion of the negotiations at Geneva in December 1993 and at Marrakesh, all the GATS negotiators understood the Understanding to be an alternate modality for the inscription of commitments on financial services in the GATS schedule for acceptance by participants on a voluntary basis, conditional on its application on an MFN basis to all Members. This modality was, in fact, based on what came to be known, during the negotiations, as the "top-down" or the "negative list" approach – in contrast to the "bottom-up" or the "positive list" approach, reflected in Part III of the GATS.

This, he said, is also clear from the fact that, both in the interim accord of 1995 and the 1997 agreement incorporated in the Fifth Protocol to GATS, only about 30 countries made commitments in financial services under the Understanding.[41] Thus, an overwhelming majority of the WTO members did not accept the Understanding as the modality for a financial services accord. The Understanding thus has a bearing only in respect of the obligations of Members who have specifically undertaken their commitments in full, or in part, under it, as reflected in their schedules by direct reference or in head notes, as in the case of the USA schedule. Members that have not explicitly scheduled their commitments in the financial services sector under the provisions of the Understanding have no legal obligations arising from it.

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[40] WTO Analytical Index, Vol. 2, General Agreement on Trade in Services, pp. 1139-1140.

[41] S/CSS/W/71, "Communication from Switzerland - GATS 2000, 4 May 2001", asking all Members to adopt the Understanding for scheduling, notes that the Understanding, with its standstill provision, was only accepted by some 30 WTO members in scheduling their financial services commitments in 1997.

Financial Services: The "Interim" Accord of July 1995 and the 1997 FSA

As mentioned earlier, at the end of the UR negotiations in 1993, negotiations on financial services, along with those on basic telecommunications and maritime transport, remained unfinished. The negotiations on movement of natural persons was a cross-cutting issue, covering all services sectors, and not a sectoral one like financial services, basic telecommunications and maritime transport. Specific commitments to provide market access and national treatment were made in the financial sector in 1993, but they were not considered enough to conclude the negotiations. Broad MFN exemptions based on reciprocity remained. The Second Annex to the GATS on FS and the Decision on FS adopted at the end of the round provided for extended negotiations on this sector. The negotiations were to be held during a six-month period following the entry into force of the GATS, i.e., until the end of June 1995. At the conclusion of this period, Members of the WTO had the possibility to improve, modify or withdraw all or part of their commitments. They were also to be able to introduce additional MFN exemptions. Until the end of this period, existing broad MFN exemptions based on reciprocity were not applied.

The post-Marrakesh negotiations on FS began in earnest after the entry into force of the Marrakesh Treaty and the coming into being of the WTO on 1 January 1995. The US, the EU and a few others, as also the then Director-General of the WTO Renato Ruggiero, tried to treat the talks as a stand-alone event. However, some of the countries with interest in the supply of services in Mode 4 (India, the Philippines, etc.) did not view it so, and saw some linkages and parallels in them. Policy-makers in the capitals made it clear that any concessions in the form of market access in financial services, where the beneficiaries would be the US, EU and Japan, would be linked to any benefits they would get in the Mode 4 negotiations. Singapore tied any further concessions in its financial services to concessions on maritime transport services.

The US, on the other hand, continued to insist on reciprocal market access in financial services, and full liberalization by key major developing countries. Statements in Washington identified the US targets as Brazil, Chile, India, Indonesia, South Korea, Malaysia, Pakistan, the Philippines, Singapore, Thailand and Venezuela.[42] In regard to its target countries, the US was only agreeable to their completely liberalizing trade in financial services via Mode 3 (commercial presence) over an agreed time schedule – a six-year period was mentioned in some media reports – during which the target developing countries would put in place the necessary regulatory and supervisory mechanisms. Very few developing countries were prepared to do this – and even fewer saw any prospect, even in the medium to long term, of their financial enterprises entering and competing successfully in the US market. Hence, they did not see any need to make concessions to the US in their own markets, and in addition, benefit the EU, Japan, etc., to get unconditional MFN treatment.

The 1995 negotiations were actually concluded on 28 July 1995, instead of 30 June as initially planned. The agreement was called the interim agreement (TWE, 1995a; 1995b) since negotiators again decided that the results of the negotiations were not satisfactory and envisaged further negotiations in two years' time; i.e., in 1997. The 1995 interim accord resulted in some "improved specific commitments, and/or removal, suspension or reduction of MFN exemptions" from 29 WTO Members (counting the EU as one) who improved their schedules of specific commitments and/or removed, suspended or reduced the scope of their MFN exemption in financial services. Those improved commitments were annexed to the Second Protocol to the GATS. The Second Protocol and the commitments annexed to it entered into force on 1 September 1996 except for a small number of countries, who were unable to complete their internal ratification procedures and

[42] SUNS, No. 3533, "Trade: US, WTO head pressing South on financial services", 22 May 1995.

formally accept the protocol before 1 July 1996. For these remaining countries, the commitments entered into force 30 days after acceptance.

The negotiations were reopened in April 1997 and went through an equally difficult process, being concluded along with market access commitments on 17 December 1997 (TWE, 1997a, 1997b). US banks, securities trading firms and insurance firms seeking full market access through commercial presence lobbied the US Congress and the administration towards this end. The insurance firm AIG – with considerable lobbying clout in Congress and with the Clinton administration – was the principal driving force to open up Asian markets and/or to attempt to get the developing countries concerned to provide for and commit 100 per cent ownership rights in the insurance area for AIG. The negotiations took place in the aftermath of the 1997-98 Asian financial crisis, and the US-orchestrated conditional IMF lending to afflicted countries. In the wake of the crisis, the IMF did not press ahead with its own 1994 moves to change its Articles of Agreement to bring about capital account convertibility in all developing countries. However, it used the Asian crisis and its lending programs to pressure South Korea and the ASEAN countries to which it was providing loans to, in effect, hand over their own troubled banking and insurance enterprises to foreign ownership, and to schedule them at the WTO (so as to prevent any change in the future). Only Malaysia resisted US and WTO pressures to change its policies of "encouraging" fully-owned foreign enterprises (including in the banking and insurance sectors) to dilute foreign ownership and offer shares to Malaysians. Malaysia declined to grandfather the 100 per cent ownership of AIG in its schedule of commitments.

The US Treasury negotiating team in Geneva was led by Tim Geithner, then Treasury Assistant Secretary, and orchestrated from Washington, DC, by Treasury Secretary Robert Rubin and Deputy Secretary, Larry Summers. At a White House media briefing on 18 Dec. 1997, then USTR Charlene Barshevsky and Deputy Treasury Secretary Summers confirmed that: (a) liberalization of financial services globally had been a priority in the UR for both Republican and Democratic administrations (and the US financial services industry) as well as the US Congress; (b) under the deal, 61 countries had agreed to allow foreign, including US, majority ownership of insurance firms – most at 100 per cent, the rest at 51 per cent or more; (c) the MFN carve-out was aimed against Malaysia, if in future, it forced divestiture of foreign-owned insurance enterprises (AIG had a 100 per cent owned subsidiary, but the Malaysian government was trying to persuade foreign-owned enterprises to reduce ownership and offer shares to nationals). In Summer's view, the FSA had not only made substantial progress for American industry, but also "important progress for the global economy" at a time of financial uncertainty, with a recognition by more than 100 countries, "of the important benefits that global financial markets can bring; of the reality that participation of foreign financial institutions can bring know-how, can bring the capital base that a global institution can provide and can provide important services to local businesses and local entrepreneurs" and a recognition that "financial openness is essential to economic growth in today's global economy."[43] It is ironic that AIG, whose 100 per cent ownership and "establishment" rights abroad were promoted so arduously, is now near insolvent; and the vision of the benefits of financial globalization are now in shambles – with the same personalities having to deal in the present US administration with fallout from the financial and economic crisis and breakdown of the global financial system, caused by policies of liberalization and globalization of the finance sectors that they had promoted in the Clinton administration.

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[43] Press briefing by Ambassador Charlene Barshevsky, Assistant to the President for International Economic Policy Dan Tarullo, and Deputy Secretary of the Treasury Larry Summers, Office of the Press Secretary, The White House, M2 Presswire, 18 December 1997.

Overall, the 1997 FSA (the Fifth Protocol of the WTO that entered into force on 1 March 1999) "is generally regarded as having contributed to more transparent policy regimes in the organization's member countries. But its contribution to the opening of markets to foreign suppliers varied greatly among the different parties to the agreement" (Cornford, 2004: 2).

As a result of the 1997 Agreement and the Fifth Protocol, a total of 104 members had commitments of varying degrees in financial services. Three of them, the United States, India and Thailand withdrew their broad MFN exemptions based on reciprocity; a small number of countries submitted limited MFN exemptions or maintained existing broad MFN exemptions; several others reduced the scope of their MFN exemptions. The US submitted a limited MFN exemption in insurance, applicable in a circumstance of forced divestiture of US ownership in insurance service providers operating in WTO Member countries; this was principally aimed at Malaysia, but as a contingent, future conditional withdrawal of MFN, based on a US unilateral determination of another member's future measures, it is of doubtful WTO-GATS legality.

In scheduling their GATS commitments under the Fifth Protocol, various members (the vast majority) did so according to the provisions of Part III of the GATS (Articles XVI, XVII and XVIII), viewing the "alternative approach" promoted – in the Understanding – as only a voluntary guideline that could not be invoked against them, once their schedule of market access commitments (subject to limitations entered in their schedules) had been scrutinized, accepted and multilateralized. Some, like Japan, not trusting future jurisprudence on "prudential regulations and scope" under the Annex, entered them as limitations on market access and/or horizontal commitments.

The US took a different approach in scheduling its commitments: the headnotes to its schedule of commitments under the Fifth Protocol (GATS/SC/90/Suppl.3) has by reference incorporated the Understanding as part of its commitments – subject only to the limitations it has set out in the schedules. The US headnotes on 'all insurance and insurance-related services' and 'banking and other financial services (excluding insurance)' are set out in Annex 2.

Thus, the headnote on insurance says:

> 1. Commitments in this subsector are undertaken in accordance with the Understanding on Commitments in Financial Services (the 'Understanding'), subject to the limitations and conditions set forth in these headnotes and the schedule below.

Similarly, on "Banking and other Financial Services and excluding Insurance", the headnote says:

> 1. Commitments in these subsectors are undertaken in accordance with the Understanding on Commitments in Financial Services (the 'Understanding'), subject to the limitations and conditions set forth in these headnotes and the schedule below.

In terms of market access under insurance – where the US has made commitments in respect of: direct insurance: a) life, accident and health insurance services, except workers compensation insurance, and, b) non life insurance services – the US schedule says:

> "*Government owned or government controlled insurance companies, whether US or foreign* (emphasis added), are not authorized to conduct business in: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New Jersey (only with respect to surplus lines), New York (non life insurance companies are authorized; life

> and health insurance companies are not authorized), North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, Wyoming."

There is a similar entry in the US schedule on market access limitations in respect of reinsurance and retrocession (the reinsurance of another reinsurance business). This again sets out that government owned or government controlled insurance companies, *whether US or foreign* are not authorized to conduct business in the specified states.

The US has made no national treatment exception in its financial services schedule though it has a horizontal national limitation on its services schedule as a whole. It is not clear whether the subsidies now being received as a result of the various rescue measures taken by the Treasury and the US Fed (TARP loans and others) in respect of the AIG conglomerate -- resulting in the US government currently owning 80 per cent of the company and de facto controlling it -- fall within the national treatment exceptions in the US commitments. If the subsidies, de jure or de facto, are not available to all insurers, the US may be open to a WTO challenge by any other Member whose government-owned or government-controlled insurance enterprise is refused market access in any of the states enumerated in the US schedule, on the ground that it is "government-owned or government-controlled".

The US schedule also has an attachment titled: "Additional Commitments Paper II" (Paper I is in respect of insurance). This attachment (Paper II) says, in part:

> "(1) The Administration has expressed its support for Glass-Steagall reform on a national treatment basis and *will work with Congress to achieve an appropriate framework to accomplish this objective*" (emphasis added).

The US attachment itself is in the nature of a "best endeavour" commitment by the US administration implemented later. Subsequent to the entry into force of the Fifth Protocol, in 1999, the US repealed the Banking Act of 1933, more popularly known as the Glass-Steagall Act or the Second Glass Steagall Act; the first, in 1932, expanded the Federal Reserve's ability to offer rediscounts on more types of assets and issue government bonds as well as commercial paper. The 1933 Act had erected barriers between enterprises engaged in normal commercial banking operations and so-called investment bank enterprises engaged in securities and other trading operations. The repealing legislation, US Public Law 106-102, known as the "Gramm-Leach-Bliley Act", was signed into law by President Clinton on 12 November 1999. Title 1 of this law, "Facilitating affiliations among banks, securities firms and insurance companies", became effective 120 days after the date of enactment -- except for Section 104, which deals with the operation of state law and contains the insurance safe harbour provisions-- according to a press release by then Chairman of the Senate Banking Committee, Sen. Phil Gramm.[44]

An issue that arises in the context of the current discussions on course reversal, and putting in place strong regulatory measures and firewalls between normal banking activities and trading activities[45] is whether the US can reverse course, by changing or amending the Gramm-Leach-Bliley Act? The jurisprudence on GATS in general, and in particular on financial services is rather sparse. Under the old GATT, in terms of the protocol of provisional application and the grandfathering of existing legal provisions in individual contracting parties, the jurisprudence developed after the mid-1950s seems to indicate that a contracting party can take steps fully or partially to change the grandfathered provisions of its laws to comply with GATT obligations, but may not reverse course. It is somewhat unclear whether any WTO member would raise a dispute and challenge the US in

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[44] http://banking.senate.gov/prel99/1117glb.htm

[45] See Report of the Group of 30, *Financial Reform: A Framework for Financial Stability*, 2009, chaired by Paul Volcker. www.groupof30.org/pubs/pub_1460.htm

terms of the FSA commitments set out above, if and when (as seems likely) the US enacts domestic legislation to put some firewalls between purely banking operations, and trading operations – of investment banks, brokerage or security trading operations of banking enterprises.

Also, the European Commission (EC) and others who signed on to the Understanding and scheduled financial services commitments under the Fifth Protocol to the GATS, have thus committed themselves to a standstill on regulations. As such, some of their recent measures, purportedly claimed to fall under "prudential carve-out measures" such as bans on short-selling of shares in banks, etc., may be contrary to their WTO/GATS obligations, and thus subject to a dispute process (see SOMO 2009).

Gaps in Statistical Data on "Trade in Services"[46]

In the preparatory process and in discussions at the GATT prior to the launching of the UR at Punta del Este in 1986, and during the negotiations themselves in the GNS, a constant and recurring issue on the agenda of every meeting was the non-availability of statistical data on trade in services. It was widely recognized that without such data, the objectives of a framework agreement on trade in services could not be achieved.

The objectives set out, in the UR Punta del Este Ministerial declaration in launching the Negotiations on Trade in Services, says:

> "Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries..." [47]

The preamble of the GATS (paragraphs 2 and 3) sets out the objective as:

> "*Wishing* to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;
> *Desiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives" (*Legal Texts*, 1994: 327).

It is obvious that the availability of statistical data is a minimum for negotiators and for policy- and decision-makers in capitals to assess observance of the requirements of "transparency" in the trade in services, the contribution of such trade to "promoting the economic growth of all trading partners and the development of developing countries", securing "an overall balance of rights and obligations", and balancing all these within a multilateral framework "giving due respect to national policy objectives".

This was recognized in the run-up to and at Punta del Este, and subsequently in meetings of

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[46]This section draws on Raghavan (2002), Cornford (2004) and, with permission of the author, from Cornford (forthcoming).

[47] Para two of Part II of the Ministerial Declaration Basic Instruments and Selected Documents (BISD) 33rd Suppl. pp. 19-28; also quoted in Raghavan (1990: 310-319).

the UR GNS. When the GNS set out its plan of work, every participant recognized that data and statistics constituted the pre-requisite for informed and meaningful discussions (see Shukla, 2002; Raghavan, 2002: 12-14; Raghavan, 2002: 13). The issue was a recurrent agenda item at the GNS, which consulted with statistical experts of UNCTAD and the UN system, as well as the IMF, World Bank and the OECD. At the instance of the then Director of the UNCTAD Division on Statistics, statisticians within the UN system discussed the issue and how to meet the needs of negotiators in their periodic meetings. At a very early stage, the statisticians pointed to the difficulties in providing the statistical data in the absence of a clear definition or understanding of trade in services, and the lack of adequate resources (budgetary and human) to address the problems (see Annexes 3A and 3B of this paper).

The lack of statistical data was so widely recognized that in 1986, at the instance of the statistical office in Canada and the UN Statistical Office (UNSO), a small group was set up, which became known as the Voorburg group, after the place in the Netherlands where it first met. The group initially had statistical experts from selected developed countries and the statistical office of the EC. There were observers from major international organizations like GATT, UNCTAD, OECD, IMF and World Bank at the initial meeting. Later, representatives from some selected developing countries were brought in -- some contributed to its work, but not too much, judging by the outcome -- and many others were able to be present during discussions, in what the Voorburg group saw as an educational process.

In February 1990, the UNSO told the GNS that "much of the Third World is *terra incognita* as far as statistics about trade in services are concerned" (Raghavan, 2002; and Annexes 3A and 3B of this paper).

Despite the lack of statistical data to make informed judgements, the GATS framework was settled after lengthy negotiations: principles and rules for the framework agreement on trade in services (to some extent drawing on concepts in the trade in goods) including the definition of the trade in services in four modes of delivery, and the positive list approach for scheduling market access commitments.

In the area of trade in goods, the IMF's balance of payments data for countries and its directions of trade data, can enable a country (its trade ministry in the capital and its negotiators at the WTO) to make a rough assessment of the value of concessions given by them and those offered in exchange by trading partners in negotiations in the goods sector. However, in the services sectors and trade in those sectors in the four modes of delivery, the available data provide no basis for a country to estimate, in rough quantitative terms, the value of the concession it would make via the four modes of delivery, the value of the benefits of the concessions it would receive, and the overall balancing of the costs, including necessary administrative and regulatory costs and benefits.

Handicapped by the absence of data to enable informed judgements, but propelled by economic theories on the "role of services", UR negotiators formulated and agreed on the framework of principles and rules in GATS, and individual country schedules of market access commitments in various service sectors and sub-sectors. There was considerable media hype and the lobbying clout of the US Services Coalition, led by the US financial services groups Amex, CitiCorp and AIG, was on display. The three US financial groups not only lobbied the USTR and Congress to promote their viewpoint and use the trade negotiations to open up and capture markets in the developing world, but also engaged in high-level lobbying (with a generous budget and staff provided by Amex) to "sell" to decision-makers in developing countries the concept that the provision of services is to be encouraged and facilitated by host governments liberalising their markets through commercial presence and national treatment (see Gould, 2008; Freeman, 2000).

In the absence of data on their services trade account (exports and imports), and even more importantly, lacking data on the direction of such trade, the market access or liberalization

commitments that countries undertook and scheduled at the WTO were based on "guesstimates." Exercising some caution, most developing country participants made commitments much below the degree of liberalization of their then existing regimes in different sectors (typically undertaken autonomously from domestic economic and development policy considerations). There were significant liberalization and market access commitments by developing countries in the basic telecoms services sector, and to a limited extent in financial services, both through the post-Marrakesh UR negotiating process. In both cases, the developing countries did so autonomously for reasons of development, particularly in the case of basic telecoms; and even then, they did not make GATS commitments to the full extent of their autonomous levels of liberalization. They were more cautious in banking, insurance and other financial services – with lack of data a major factor behind their caution. The limitations on market access and national treatment by developing countries are variegated and depend on their particular circumstances and local judgements. In the absence of data, it is difficult to evaluate and rank the degree of liberalization undertaken and the value of commitments undertaken.

Both for the UR and the current Doha Round, the only available data to judge the value of a market access concession or commitment a country will make via Mode 3 or commercial presence -- a GATS euphemism for capital investment – fully or partially foreign owned service enterprise, operated as a branch or locally incorporated subsidiary – are those derived from the IMF balance of payments data. By definition the BOP data and the EBOP data for a country measure the value of international transactions between a resident and a non-resident; but they do not record or measure the transactions within a country, between a foreign and a local resident. And services transactions in Mode 3 are between a resident foreign producer and a local resident consumer (and thus not reported in BOP or EBOP data).

Moreover, the IMF's BOP and EBOP data are at highly aggregated levels, and not at the levels of dis-aggregation needed by GATS negotiators in general, and negotiators on the financial services trade in particular. In any trade negotiations and exchange of concessions between country 'A' in product 'y' and country 'B' in product 'x' in the goods sector, there are benefits and costs. The benefits (in trade theory) come for consumers of product 'y' in A, and to exporters of product 'x' in A from improved access to the markets of B as a result of the concessions that B gives in exchange; the costs come for A's producers of 'x'. Country A can judge the value of its market in 'x', and thus the value to B of access to this market, and balance it with the value of the concession by B that benefits exporters of 'y' in B's market.

In negotiations on the trade in services, both as a whole and on various sub-sectors, as well as modes of supply, the IMF's BOP and EBOP data, based on resident-non-resident transactions, can give no equivalent information.

As a result, the data on trade in services used or cited by the WTO, UNCTAD, UN and IMF-World Bank to promote liberalization of the services trade and its benefits are misleading and distort policy- and decision-making processes, particularly in developing countries.

As pointed out earlier, the issue of lack of data came up several times in the UR negotiations, and UNCTAD and the UN statistical system began attempting to address these questions and trying to figure out how to collect meaningful data. This was difficult enough given the budgetary constraints imposed on the UN system, but even the modest effort that the UNSD and UNCTAD (that was providing technical assistance to developing countries) could have made on conceptual issues, was discouraged and sidetracked. The data issue and the preparation of a manual for collection of data at the national level, and their collation by the UNSD, was taken over by a small group of experts from the OECD, Eurostats (the statistical office of the EU's Executive Commission), IMF, World Bank and a few others in the so-called Voorburg Group, and more recently, the UN and UNCTAD, resulting in a draft manual.

The UN Statistical Commission — in a process involving a task force comprising the EC, IMF, OECD, UNSO, UNCTAD and the WTO, but no developing country group — has adopted a manual on Statistics of International Trade in Services and, with the imprimatur of the UN General Assembly, has recommended that national statistical offices adopt the manual and begin to collate data on this basis. Nineteen years after the services trade issue came on the international agenda (in 1982), a manual has been devised for collection of data that will not serve trade negotiators at all.

Although supposedly intended to come up with recommendations for collection of data on trade in services on the basis of the definition of such trade (through the four modes of supply) as agreed in GATS, the report of the task force to the Statistical Commission, and its own draft manual, make very clear that the manual would not reflect or comply with the GATS definition for collecting statistical data, since in its view, "such an approach [to statistical collection] would fail to ensure compatibility with international statistical systems ... and would demand excessive resources for implementation."

This is what the manual says:

> 2.72. Modes of supply are *central* (emphasis added) to the GATS. They are defined in its very first Article and are the basis on which WTO member countries' commitments are scheduled. The Manual introduces, for the first time, modes of supply in the statistical context.
>
> 2.73. However, a comprehensive statistical treatment of modes of supply that would fully mirror the GATS legal definition and other GATS Articles would be out of the scope of this Manual. Such an approach would fail to ensure compatibility with international statistical systems such as BPM [the IMF's Balance of Payments Manual, Fifth Edition] and the 1993 SNA [the System of National Accounts, 1993], and would demand excessive resources for implementation.
>
> 2.74 Drawing on the GATS legal provisions, the Manual proposes, as a first approximation, a simplified approach to the statistical allocation of trade in services to modes of supply that is operational in the statistical context and consistent with international statistical standards.[48]

There is no explanation why "a comprehensive statistical treatment that would fully mirror the GATS legal definition and other GATS Articles would be out of the scope of this Manual." Who decided this issue, how and where is not made known?

Rather, as in the Greek mythological tale of the robber and his Procrustean bed, in effect WTO/GATS negotiators are asked to adjust their definitions, rules and data needs "to ensure compatibility with international statistical systems such as BPM [the IMF's Balance of Payments Manual, Fifth Edition] and the 1993 SNA [the System of National Accounts, 1993]".[49]

Statistical data are an important ingredient in terms of both trade negotiations, and subjects covered in the trade agreements, including those in GATS. Given that the Marrakesh Treaty and the rights, obligations and market access commitments in various areas such as agriculture, non-agricultural goods and services, is a Single Undertaking, as is the current Doha Round, the

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[48] *Manual on Statistics of International Trade in Services*, (ST/ESA/STAT/SER.M/86), United Nations, p. 20.

[49] Cited in Raghavan (2002: 28); *Manual on Statistics of International Trade in Services* (ST/ESA/STAT/SER.M/86), United Nations, pp. 12-25.

importance of international statistical data cannot be overemphasized.

The valuation of offers and commitments is needed for negotiating governments to judge the value of market access concessions they will make, and the value of concessions they will get in return, and the balancing of one against the other in trade in goods and services that is part of the bargaining processes at the WTO. Such valuation of offers and commitments in banking, insurance and other financial services as well in various other services sectors, is needed by negotiators to judge and balance offers and commitments that will balance costs and benefits in services and other areas of trade. This is particularly important in banking and other financial services, as well as insurance and related services (at present, there is some overlap too).

Under Article XIX.3 of GATS, for each round of services negotiations, negotiating guidelines and procedures are to be established. For the purposes of establishing such guidelines, the Council for Trade in Services "shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV (increasing participation of developing countries in the services trade)" (*Legal Texts*, 1994: 343-344).

Absent such data, the assessment for the Doha round has been limited to descriptive presentations of developments in the financial sectors of countries, and the liberalization undertaken as a result of the GATS commitments, and autonomous measures since then. These are not adequately or closely linked to the concepts and categories of services sectors and classifications of the GATS, and its FS Annex. As a result, there have been few, if any, quantitative assessments covering the expansion of banking and other financial services trade, and its contribution to economic growth and development.

There are several areas of ongoing negotiations in the Doha Round on GATS rules -- these will apply to all trade in services, including banking, insurance and other financial services -- and in the administration of GATS and any disputes where data will be needed:

Emergency Safeguard Measures under Article X

As noted earlier in the second section, in several developing countries, and particularly in Asia, where domestic constituencies and stakeholders are opposing liberalization measures in the financial sector, particularly after their experiences during and after the 1997-98 Asian financial crisis, where IMF conditional lending policies were quite the opposite of what is now being practised in the US and Europe. Governments and their policy-makers have held out reassurances to their domestic constituencies that they would arm themselves with powers to invoke ESM in the services trade, and in financial services in particular, before making any more concessions in the Doha Round. Failure of governments to carry out their promises would further erode public support for the WTO.

Apart from the conceptual problems set out in the second section, in fashioning rules setting out disciplines in this area (to prevent misuse) without clear statistical data, governments can neither judge the need to use ESM temporarily nor justify it multilaterally if challenged in a WTO dispute process. Absent other instruments used in the GATT (under trade in goods), such as anti-dumping and countervailing measures, the only alternative to lack of ESM is for developing countries not to make any market-opening concessions.

Subsidies (Article XV of the GATS)

GATS envisages future negotiations for multilateral disciplines in services to avoid trade-distortive effects of subsidization on the trade in services, to determine the appropriateness of CV measures, and to provide for such CV measures. GATS has no provisions analogous to GATT Article XVI

(subsidies) and Article VI (CV measures) – concepts taken and expanded in the disciplines of the SCM Agreement. Framing subsidies disciplines for GATS, and more so, for banking and financial services would pose several methodological issues as complicated as those for ESM. Article XV uses the mandatory "shall" both for entering into the negotiations and for recognizing the role of subsidies in the development programs of developing countries and the need for flexibility.

And, unlike in GATT, GATS has no analogous provisions on dumping and unfair trade. GATS also has no analogous provisions to GATT Article III: 8: excluding national treatment for purchases by government or government agencies of products for government consumption, and excluding government subsidies in such purchases from subsidy disciplines.

Again, absent reliable statistics on trade in financial services in different modes, both framing rules, and later, using rules to challenge unfair, trade-distortive subsidies, are impossible. And without disciplines trade becomes a "free-for-all" that will further erode the credibility of the WTO system.

WTO Dispute Settlement Understanding (DSU)

The DSU, an integrated one for all the agreements of the Marrakesh treaty, envisages that a member, who has suffered a "nullification or impairment" on account of the failure of another member to carry out its obligations, is entitled to compensation and suspension of concessions.

There is a hierarchy of sorts set out in Article 22.3 of the DSU for a complaining party to choose a sector for suspension of compensation – within the sector where it has suffered impairment, and if that is not feasible, any other sector of trade. The DSU envisages an arbitrator to rule on the level of impairment, and thus, on the level of compensation, and also on whether, in cases of cross-sectoral retaliation, the relevant WTO agreement restricts or prohibits "suspension of concessions".

Both in judging "nullification or impairment" in any services sector – more so in financial services – and in deciding the level of compensation or suspension to re-balance nullification or impairment, adequate data would be needed in each of the four modes of service deliveries. In the Banana III case[50], the finding was that US rights were impaired in the EU's wholesale and retail distribution service markets, which affected the exports of US owned Chiquita banana company from central and South America to Europe. The value of this impairment was assessed, enabling the US to "retaliate" by suspending an equivalent value of concessions in goods. All these require data, and it becomes almost crucial when it involves banking and other financial services operations involving Mode 3.

The current services trade data are not reliable at all, since they are primarily based on the resident-non-resident distinction.

Cornford has identified various sources of data (other than the BOP and EBOP) in the four modes of supply that may be available for banking, financial and auxiliary services, excluding insurance and pension funds, and how they could be used for national policy-makers to make judgements in terms of the trade negotiations (see Cornford, forthcoming). Much more work needs to be done in following this up. However, there is no uniformity among countries in reporting requirements, etc; and it is not clear whether they can provide a consolidated and transparent database, with comparability across countries and regimes. This is even more problematic in cases of disputes over impairment and nullification, or subsidization, etc.

Also, the definition of financial service is so ambiguous and wide-ranging, covering even activities such as rating agencies, news services, etc., that a more comprehensive approach is needed

[50]DS27 and DS27/AB/R; DS158 and DS158/AB/R.

on statistics – collection and collation, nationally and internationally.

Current Negotiations: The Doha Round

A new round of negotiations on trade in services (as mandated by Article XIX:1 of GATS) technically began on 1 January 2000 and was formally set in motion by the General Council decision at its meeting on 7 February 2000 with the negotiations conducted at Special Sessions of the Committee on Trade in Services (CTS). In March 2001, the CTS adopted Guidelines and the Procedures for the Negotiations on Trade in Services.

Prior to the setting of guidelines and procedures by the CTS, the WTO Secretariat (Services Division) produced a report for the CTS, which acknowledged that data on trade in services continue to suffer from a variety of shortcomings. Further, the report added, while improvements in data collection and processing as a long-term process are in sight, it will never be possible to attain a level of reporting in services that is comparable – in breadth, depth and accuracy – to current statistics in merchandise trade.

The report "Review of Statistics on Trade Flows in Services",[51] admitted that the "gaps in data" made assessments difficult, but nevertheless advocated negotiations and commitments on the basis of efficiency of resource allocation. It said:

> "Trade negotiations are not essentially about analysing and, possibly, balancing trade flows in individual sectors, but achieving a – progressively more liberal and mutually beneficial – balance of rights and obligations under relevant agreements.... From an economic perspective, it does not really matter whether the results translate into import and/or export expansion in specified areas, but whether they contribute to removing distortions to the allocation of resources between and within countries and, thus, to promoting sustainable development" (see Annex 3B; Raghavan, 2002: 70).

This proposition of the WTO secretariat, that trade negotiations are not about analysing and balancing trade flows in individual sectors, is a clear contradiction of the practices in negotiating commitments in the 50-year history of the GATT multilateral trading system. No country over this 50-year period has ever negotiated market access concessions or made commitments without a careful analysis of the costs and benefits to the country, and its exporters and importers. And, implicit in the view that trade negotiations are about "removing distortions to the allocation of resources between and within countries and thus promoting sustainable development", is a perspective that sees the world economy as a single, seamless global economy, for the purposes of policy-making – blissfully unaware that there is no decision-making mechanism to deal with the world as a whole and perform even some rudimentary role of government (see Annex 3B; Raghavan, 2002).

The services negotiations were rolled over and made part of the single undertaking of the Work Programme and Negotiations launched at Doha in November 2001. The Doha Ministerial Declaration confirmed the CTS guidelines set in March. Current negotiations for further liberalization of the trade in financial services are part of this exercise; some of the issues covered in the general negotiations on services have implications for the trade in financial services too. Other timelines in these negotiations include: March 2003: deadline for receiving "initial offers"; July 2004: "July Package" resuscitated negotiations and established the deadline of May 2005 for submission of revised offers; December 2005: Hong Kong Ministerial Conference reaffirms key principles of the services negotiations; July 2006: Doha negotiations suspended; January 2007: resumed Doha

[51] S/C/W/27/Add 1. W/27 is a note on services trade data circulated in November 1997, and Addendum 1 has updated it. Circulated initially as a restricted document to members, it is now downloadable from the WTO website.

negotiations; May 2008: Report on services issued; and July 2008: Services Signalling Conference held as part of the "July 2008" package. This last event provided non-binding indications by individual participating countries on the kind of offers they would make in financial services – depending on satisfactory outcomes for the signalling member in other parts of the Doha Round, including services.

As set out in the proposals and presentations of key members of the CTS[52], and in its subordinate bodies, including the Committee on Trade in Financial Services (CTFS), there are attempts at clarifications (limitations) on regulatory powers (domestic regulations provisions of GATS). Also on the agenda are proposals for adoption by developing countries, and their enforcement through the WTO dispute settlement process, of so-called financial, accounting, insurance and other standards and practices set by "international" supervisory organizations, coupled with pressures for expanded market access through commercial presence (investment) for transnational corporate service providers. Some of these international supervisory organizations have "opened" up their membership to national supervisory organizations of developing countries, others have them as associates; some are official, others private. Whether membership is open or "associated", public or private, these institutions are controlled and run by the national institutions of the major industrialized countries, and developing country participation is pro forma or nominal, with no real power in governance and decision-making.

Parallel to these efforts at the WTO – of some international supervisory organizations, part public and part private, attempting to impose their own standards on the world through the "harmonization" processes of the WTO – are the moves to use the IMF and its assistance packages or its Article IV surveillance to force "emerging markets" to adopt standards set by the Basel-based Bank for International Settlements (BIS), associated institutions such as the Basel Committee on Banking Standards (BCBS), the Financial Stability Forum (FSF), international security market supervisors and others, as a price for the IMF's positive assessment of their financial sectors.

There are also fitful attempts at formulating disciplines envisaged in the GATS on subsidies, safeguards, etc., that will have a bearing not only on various sectors and sub-sectors of the services trade, but also on the trade in financial services.

The main objectives, set out by the demandeurs in outside fora, leave little doubt that the aim is to bring about transnational corporate globalization of the services trade, through a wholly-owned commercial presence.

When GATS was concluded in 1993, and with the subsequent 1995 interim accord on financial services, and the 1997 FSA (Fifth Protocol), commercial presence was the main mode of delivery on which market access commitments were made, and are being sought in the current Doha Round. Mode 1, cross-border delivery of financial and some other services, was not very significant, and there have been very few bindings of market access commitments by participants.

But since then, the explosive growth of internet and e-commerce, and the opportunities opened by outsourcing have shown the potential of services delivery through Mode 1, particularly for developing countries. However, reports of various requests and offers suggest little movement on this front. In fact the current crisis – the financial crisis that has spawned a major economic crisis, with increasing talk of another "Great Depression" – has already seen a retreat on outsourcing, with US President Obama making clear that his administration wants to end or restrict it, having already taken some steps in this regard. Requests from several developed countries have asked developing countries to remove all restrictions on cross-border trade via modes 1 and 2, but this might well leave consumers in developing countries exposed to activities of enterprises outside

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[52] Job (05)/93, Council for Trade in Services, "Financial Services: Information note by the Secretariat". 19 September 2005.

their country's jurisdiction, and without remedy against abuse. With service consumers situated in one national jurisdiction, and their service suppliers in another (via modes 1 and 2, or as branch activities in mode 3, subject to national regulations and supervision in the home country) difficult questions of legal responsibilities arise. In the WTO system, a member-country has to raise a dispute on behalf of its enterprise about nullification and impairment of rights and obligations in another WTO member country. But there is no corresponding provision for a host country to raise a dispute on behalf of its consumers against the service provider's home country, or over failure of regulatory and supervisory measures (e.g. against various financial sector Ponzi schemes) in the home country, affecting service consumers in another. It is even difficult to think, of a methodology to deal with and respond to such situations within the WTO and its dispute settlement system.

Besides the proposals and demands for expansion and liberalization of financial services, through pressure on developing countries to commit themselves to increased commercial presence without limitations and in any form the supplier deems appropriate, there are also demands for liberalization of accounting, auditing and other professional services. Each and every one of these will have an effect on the trade in financial services.

Speaking at the World Economic Forum in New York in early 2002, Mr. Stuart Eizenstat, an Under-Secretary of State in the Clinton Administration, is reported to have described the GATS talks as a "move to allow [Arthur] Andersen to export its accounting services to the world" (Nichols, 2002). The later collapse of the global audit firm, Arthur Andersen over its consultancy and auditing of the Enron group, has not abated the push for expansion of these transnational firms into the developing world. Even the ongoing financial and economic crisis has not. In fact, US and European services coalitions are pressuring their governments to get more market access in the developing world in the services sectors and, in view of the increasing difficulties and road-blocks in agriculture and non-agricultural market access, to separate the services negotiations from the Doha single undertaking!

The single undertaking of the Doha Work Programme embraces several sectors and areas of international trade covered by the WTO, and others yet to be brought in under its remit. It is a further effort at creating level playing fields, for liberalization to promote economic globalization by expanding the space of corporations and reducing the domestic space and authority of governments of developing countries to pursue domestic economic policies and goals to further their development strategies.

While negotiations in the Doha round on agricultural and non-agricultural market access have attracted headline attention, and have aroused concerns among various domestic stakeholders (and for negotiators, a not-so-welcome awareness and mobilization of civil society actors), the services talks have been promoted as "more promising" and less controversial. This is partly due to the management of information about the talks, and partly because of the myth – prevalent among many developing countries, as well as several international organizations – about the GATS being a "development friendly" agreement. The fact that liberalization need not be done at one stroke, but gradually over several rounds of negotiations – in effect allowing domestic reforms and external openings to be in step – does not make it any more development-friendly. Nor is the view that "liberalising commercial presence and binding them in GATS" will result in greater inflows of capital for investment, seem to be borne out by empirical evidence" (see Felix, 2003; Mody and Murshid, 2002; Prasad and others, 2004).

One study determined that concessions given by developing countries in new areas "could very likely bring economic costs - real costs" (Finger and Nogues, 2001). The study found that following the liberalization of its trade and capital accounts by Argentina in 1991, foreign direct investment grew rapidly, a considerable part of it in the services sector, with inflows trebling to $13 billion over 1992-98. This was all under the umbrella of bilateral treaties that imposed no restrictions

on sectors, ownership, capital or profit remittances or employment conditions. However, it found that locking in such openness through commitments under GATS was not the key to attracting FDI. The growth of FDI was higher in service sectors where commercial presence was not bound in the UR than in sectors where it was.

The right to liberalize progressively has to be weighed against the facts of the real economy, namely, that once an undertaking to liberalize has been entered into a country's schedule of commitments, there is no retreat or scope for rethinking if the policy fails to achieve the expected objective, an outcome not unlikely when there is no data on services trade (via commercial presence according to the GATS definition) to make such an assessment in terms of exports and imports.

Apart from the lack of data and inability to make an assessment, there are several serious policy issues raised in the efforts to set uniform global policies and standards – and to enforce them via the WTO dispute settlement processes – for professional, accountancy, consultancy, rating and other services (see Annex VI in Raghavan, 2002).

The current crisis has brought out that recourse to "creative accounting"-- with the help of accountants, auditors and legal advisors and attempts to talk up markets in order to keep up the value of stock options, a tax-free way of paying managements -- appears to have been a common practice among a large number of enterprises, banks and their security analysts, and Wall Street firms. Even if the difficult to believe claims that US regulators were unaware of these practices until the Enron crisis are to be accepted, the most recent ones, including several Ponzi schemes, and the failures of regulators, do not inspire much confidence in the future.

In terms of the current GATS negotiations, particularly over financial services, a whole range of new regulatory issues – at both national and international levels, such as the functioning of the US-sanctioned oligopoly of global rating agencies – have come up, with calls for regulating them. These agencies routinely issue ratings, solicited or unsolicited, and these move the markets; US courts have even held that the unsolicited ratings issued by these firms, despite the severe financial and economic damage they may do, are immune from legal action on the ground they are protected by the US Constitution's First Amendment.

During the services negotiations in the UR before the GATS was concluded, the formulations and positions set by the US and EC in terms of financial services and their liberalization, left little doubt that their end game was to bring about capital convertibility and make it irreversible through the GATS. For, once an obligation has been entered into a member country's schedule of commitments, changing course or reversing or modifying a scheduled commitment would require re-negotiating and compensating the trading partners, and this would be so costly that no country could easily contemplate it. At best, the GATS route is one for progressively moving to capital account convertibility, but with every step in that process becoming irreversible.

In the mid-1990s, the IMF management mooted the idea of making capital accounts convertible by changing the Fund's Articles of Agreement. The financial crisis that subsequently erupted in east and south-east Asia, and then spread to Russia and Latin America, further reinforced by the Argentine crisis, forced the IMF to make a tactical retreat, though it has not abandoned the idea. However, whether the IMF acts or not, the same objective would be achieved through the process of financial services liberalization under GATS. Already, under Article XI of the GATS, no restrictions are to be applied by a member on international transfers and payments for current transactions relating to specific commitments. The same article also precludes WTO members imposing restrictions on capital transactions inconsistent with their specific commitments. The only exception to this is for safeguarding the balance of payments or if the restriction is undertaken at the request of the IMF.

Most recently, in the context of the collapse of the banking and financial sectors in Iceland, and the approach employed by the Iceland government for loans, the emergency package introduced under the auspices of the IMF was controls on capital outflows, implemented through rigorous foreign exchange controls (Buiter, 2009). Whether this presages a permanent change of course by the IMF, or is an example of the IMF's double standards, remains to be seen. But some of the IMF loans to developing economies and to Eastern Europe continue to be pro-cyclical and contractionary (Weisbrot and others, 2009; Muchhala, 2009).

Besides the issue of specific commitments, under various sectors and sub-sectors, the current round of GATS talks cover a range of issues and areas of rule-making – including issues relating to safeguards, subsidies, regulatory issues, and balance of payments questions.

The proposals for negotiations tabled so far, under the heading of financial services, have come, among others, from the US, EC, Japan, Canada, Norway, Australia and Switzerland. As a general objective, all want further liberalization.

The US proposal clearly sets out as an objective in the current round, or what it calls "benchmarks" for financial services liberalization: common commitments constituting fundamental liberalization, and transparency and other principles for regulation of this liberalization. It further explains that this includes removal of restrictions on the form of commercial presence, and at the level of equity participation preferred by the services supplier, and removing restrictions on the supply of certain financial services on a cross-border basis. All these are also specifically proposed as barriers to market access to be removed.

The EC, too, wants liberalization to promote trade in a 'sufficient range' of financial instruments. Among the others, Japan hopes that restrictions still maintained by a number of members will be reduced. Canada seeks expanding and strengthening market access and national treatment commitments, and further reducing barriers to trade in financial services. Switzerland too seeks relaxation of restrictions on commercial presence, particularly in insurance services and in the banking sector for more commitments for brokerage, asset management, settlement and clearing services and transfer of information. Switzerland also wants to qualify the right of countries to take prudential measures by reference to international standards.

The right to regulate under Article VI of GATS is itself qualified by terms like "use of objective and transparent criteria" or "not more burdensome than necessary" or "licensing procedures, not in themselves a restriction on supply of services". All these terms, in effect, make the regulatory measures that a country might put in place subject to interpretation – when disputes are raised, by a panel and the AB and at any time in the future – though some former GATS negotiators suggest that these are speculative. However, in the case of the financial sector, this is an invitation to inject the uncertainty principle into a country's macroeconomic policy (Cornford, 2008).

Another element involves the extent to which the developing country can, in effect, institute prudential regulations, and have the machinery as well as the qualified personnel to enforce such regulations. Prudential standards are also matters of national preference – some countries are more cautious than others. Whether the WTO should be empowered to rule out all differences in national preferences is a question that raises fundamental issues with implications beyond trade, and needs, within every country, full disclosure of intentions and the widest debate, involving not merely trade ministries and service providers, but the general polity. This issue is all the more important if commitments are undertaken that may enable foreign financial institutions to engage in the use of a variety of complex instruments (derivatives, swaps, etc.) that even sophisticated counter-parties find difficult to understand. These instruments have now brought the US and global financial system into jeopardy, if not on the verge

of breakdown.

As for rule-making under GATS, talks have also been taking place over the framing of rules and disciplines for invoking emergency safeguards, on subsidies and balance-of-payments. But these have not made any progress.

However, given the tendency of trade officials, negotiators, dispute settlement panels and the AB to invoke GATT practice and precedents, developing countries invoking these escape clauses in GATS (or trying to quiet their domestic critics by pointing to the right to use the escape clause) will face an insurmountable problem of presenting objective data backing their assessments and the measures taken. As pointed out in the last section above, there are no services data that can be used by them; the manual drawn up by the task force, and adopted by the statistical commission with the imprimateur of the ECOSOC,[53], leaves little doubt that it is not tailored to meet the GATS definitions of trade in services. In fact, the statisticians involved in the preparation of the manual have declined to change the accounting systems to take care of the needs of GATS. If and when data according to the manual is collected nationally, and collated internationally, it will be on the basis of the IMF's BOP statistics and EBOP statistics. Whatever the merits of these data, they cover only transactions between residents and non-residents – and will not capture the data and value of the trade in services provided through commercial presence by a foreign service provider to a consumer (individual or enterprise) in that country.[54]

The GATS negotiations involve request and offer procedures – where individual countries address (often similar) requests to various other individual countries. These are confidential, but requests from the EU, Australia, Japan, Norway, Switzerland and the US, and plurilateral requests have leaked to civil society groups, several of whom have posted them on their non-public websites and list servers. According to this information, the US does not appear to have specifically requested any country to make offers or schedule commitments according to the Understanding, but more or less in the same language (as in parts of the Understanding). In their negotiating proposals in 2000-01, Australia, EC, Japan and Norway appear to have asked members to make commitments in line with the Understanding. Some major developing countries also appear to have received bilateral requests from the EC, Japan and Switzerland to make commitments in financial services in line with the Understanding.

Another major issue in the current negotiations covering trade in services as a whole, but that will also have effects on trade in financial services too, is liberalization via Modes 1 and 2. The issue is inter se between developed countries as well as between developed and developing counties. The issue in the cross border supply of services under Mode 1 is application of the regulatory regime of the service-originating or service-receiving country, particularly consumer protection in the case of direct delivery to consumers. One reason for countries making Mode 3 (commercial presence) a mandatory requirement for delivery is to ensure application of the regulatory regime of the host country. In this context, India and a group of other developing countries are seeking across the board full liberalization under Mode 1, but restricted to business to business transactions (B to B in current GATS jargon), i.e., excluding business-to-consumer transactions for all sectors other than financial and transport services. The logic here is that in B to B transactions, there can be agreement about which regime will be applicable to the transaction and the safeguard that the domestic supplier will be responsible to the consumer under domestic regulations.

In terms of objectives, several of the proposals and requests under financial services in the current

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[53] Statistical Commission 2001 report - E/2001/24, E/CN.3/2001/25, and taken note of and budget and further work authorized by ECOSOC in 2001 – E/2001/24/Suppl.4

[54] Cornford (forthcoming) proposes a second-best basis for national determinations of services trade data to enable countries to judge the value of their offers and concessions, but this is specific to the banking sector only, and not for all financial services as such, nor even only for other services and services transactions.

round have sought to set out what are called benchmarks for financial services liberalization: common commitments constituting Fundamental Liberalization, and transparency and other principles for regulation of this liberalization. Also sought are removal of restrictions on the form of commercial presence and at the level of equity participation preferred by the services supplier, and removal of restrictions on the supply of certain financial services on a cross-border basis. Some of the requests also seek liberalization "to promote trade in a sufficient range of financial instruments", reduction of restrictions maintained by a number of developing countries, expansion and strengthening of market access and national treatment commitments, and achieving further reductions in barriers to trade in financial services. As mentioned earlier (section B: 25), under the heading of requirements for local incorporation, issues under this heading as well as current commitments of some countries under the GATS may need re-examination in the light of recent events and regulatory responses.

Several requests from the US, EU and other developed countries to major developing countries call for commitments to enable foreign service suppliers to acquire existing enterprises in countries, and for recipients of the requests to undertake "full market access commitments (in banking and other financial services)" in sub-sectors where there are now no commitments, "including trading for own account of derivative products and of exchange rate and interest rate instruments", trading for account of customers of all "negotiable instruments, money broking, collective investment management, pension fund management, depository services, etc. ", and removal of restrictions on the trade in derivatives. The leaked information on requests to major developing countries by some of the developed country demandeurs (oftentimes, acting in concert with the US and the EU) suggests that the major developing countries have been "requested" to undertake commitments "in accordance with the Understanding".[55]

Para B.5 of the Understanding requires that each Member "shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence". And Para B.7 of the Understanding stipulates that "A Member shall permit financial services suppliers of any other Member established in its territory to offer in its territory any new financial service".

Joe Nocera (2008), the business columnist of the *New York Times*, writing about his visit to Mumbai, India, said that the main reason India's banks managed to avoid the mistakes that nearly brought down the Western financial system, was that India had a far-sighted regulator in the central bank (Reserve Bank of India), who saw the Indian real estate market entering bubble territory two years ago and banned the use of bank loans for purchase of raw land; and "as securitisations and derivatives gained increasing prominence in the world's financial system, the Reserve Bank of India sharply curtailed their use in the country".[56]

Several of the demands, couched as requests for the removal of restrictions on foreign banking and insurance suppliers via mode 3 (commercial presence, meaning capital investments and acquisitions of local firms), would result in irreversible liberalization and capital account convertibility of developing countries with fragile financial sectors.

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[55] A WTO secretariat information note on Financial Services to the CTS Special Sessions, Job(05)/190, which perhaps inadvertently got posted on some member-government websites, also provides a summary and assessment of various negotiating proposals, and a footnote 15 confirms that the EU, Japan, Norway and Switzerland have advocated adoption of the Understanding for scheduling.

[56] If India had made commitments in 1997, (as it was being pressured to do by the US and others) in terms of making commitments and scheduling them on the basis of the Understanding, or does so in the current Doha Round, the government of India, and the Reserve Bank of India would have been powerless to curtail the use of securitization and derivatives that has landed the financial systems of the US and UK in this crisis.

At least in hindsight, the source of the current financial crisis – whose contours and extent are still not clear, but which is overall estimated to involve a few trillion dollars of "assets" -- appears to be in many cases, "the alphabet soup" of credit swaps, collateralised debt obligations, "insurance contracts" guaranteeing their values and payments, and several trades in derivatives, whose markets are unregulated and non-transparent.

One confidential request on trade in financial services in the current Doha Round complains that in a particular developing country, "foreign banks' branches are not fully allowed to use parents' capital to meet prudential requirements, even if their home country's regulation and supervision has implemented Basel or equivalent standards." Financial sector developments since last year have brought out that some major global players in banking and other services have got into trouble and face near insolvency conditions, though having purportedly followed Basel standards, and are being bailed out by governments. Also, the BIS, in its quarterly report of December 2008 following the collapse of Lehman Brothers, has brought out the inadequacies of current arrangements, including the absence of international bankruptcy laws and norms for treatment of creditors.

Developing country negotiators and their governments acted in good faith in concluding the GATS framework in 1993, and undertaking related market access agreements, including the FSA in 1997. In the current Doha Round, but before the outbreak of the current financial and economic crisis that calls into question the drive for financial services liberalization and globalization, many developing countries who participated in the July 2008 Signalling Conference on Services provided indications of what they would offer as market access commitments in financial services, depending on a satisfactory outcome for them in other areas of the Doha Round such as agriculture, non-agricultural market access and services, including on Mode 4).[57]

A question that needs to be seriously weighed in country capitals now, and more so in capitals of developing countries, is the real implications of GATS as an "agreement" of the WTO system. Within it, the wisdom of further market access openings and concessions – more so in mode 3, and to some extent, in modes 1 and 2, in a wide range of financial services, without reaching a clearer understanding, and arriving at prior agreements to strengthen and enforce regulations rather than reducing them – is also a question. Even the wisdom of financial globalization and its benefits would need to be re-assessed in capitals.

Conclusions

The Marrakesh Treaty and its agreements, including those on FS, did not result in an overall balance of benefits for developing countries in the areas of trade in goods, services and TRIPS. There is a widely shared perception in the developing world that developing country-governments have given away too many concessions without effectively getting any in return.

Within this overall situation, one outcome of the 1997 FSA was increased transparency in the sector. Many developing countries merely specified the rules already in place, binding – via the GATS – various limitations on market access and national treatment listed in schedules. Most developed countries bound a considerable amount of liberalization already undertaken by them over the past two or three decades. The US, the EU and Japan made commitments on the basis of the Understanding on

[57] The outcome of the Signalling Conference on Services Negotiations held on 26 July 2008, including on financial services, can be found in WTO document Job (08)/93 of 30 July 2008 – Report by WTO Director-General Pascal Lamy to the Doha Round Trade Negotiations Committee.

Commitments in Financial Services (a top down, negative list approach). All of them have left "unbound" (with limited or no commitments) Mode 1 cross-border supply, and unrestricted Mode 2 supply – consumers buying financial services in another Member. In Mode 3, there are considerable reductions listed in the application of reciprocity tests, though in several US states, there is such a test, and these are excepted in US commitments. In Mode 4, there are liberal rules for temporary entry of top professional and management personnel. The Understanding also provides for a standstill on restrictions in specified areas, liberal rules with regard to market access by commercial presence, and for the supply of new financial services and various over-the-counter derivatives under the beguiling term "innovation".

In the Doha Round, a major push from the US, EU, Japan, Switzerland and Canada on developing countries has been to explicitly or implicitly, seek scheduling of commitments on the basis of the Understanding and for the national treatment and removal of restrictions on the introduction of new financial services – including various kinds of credit derivatives now seen as mainly responsible for the crisis and the meltdown of the system. Until the current financial crisis, the US coalition of service industries was boasting of the innovations that US banks had been able to introduce to benefit US consumers (enabling and encouraging them to go on spending), and of similar benefits that the developing world would get by opening their markets through commercial presence for foreign banks (see Gould, 2008: 5, fn 26). Much less is heard of these now, but they have not been taken off the table. But in the wake of the current financial-cum-economic crisis in the US and other major developed countries, it may be difficult to contend that liberalised international trade in financial services, and locking developing countries into such a model, via WTO/GATS trade rules and highly legalistic dispute settlement and enforcement processes, would promote or further the development of developing countries. There is simply no empirical evidence, and the data cited are dubious.

The current financial crisis and the felt need for stronger regulatory structures and governance for enforcement, make some of these questions even more crucial. In today's world, it is difficult, if not impossible, to practice Keynes at home, and to preach, promote and enforce Hayek abroad via the WTO.[58]

And, given the scale of government interventions and public funding and ownership of financial institutions in the US, UK and some other major centres, and given the proposals and moves for course reversal and stricter regulatory regimes on banking and financial sector activities, there may be need for developing countries to pause and weigh their own options in the Doha Round, particularly in the GATS-FS negotiations. The GATS FS negotiations are difficult to separate from overall trade negotiations, and this may not even be desirable.

Developing countries should not, in any event, sign on to the Understanding to schedule commitments, and may even need to be wary of adopting the broad headings of classifications, while scheduling commitments.[59] Equally important, they should resist attempts in any FTA negotiations to agree to liberalised financial services trade commitments, whether in the trade or investment dossiers of these FTAs. At a minimum, developing countries need to await the outcome of the planned reforms in international governance regimes in money and finance that are still in their preliminary stages, some of which may need complementary changes in the GATS-FSA regimes, and then, to judge the wisdom of liberalization.

The Doha Round of negotiations are at an impasse (Raghavan, 2009), with major public attention

[58] Statement of Indian ambassador, U. S. Bhatia, at the WTO's Trade Policy Review Body discussion on the financial crisis on 10 February 2009. Published in *SUNS*, No. 6637, 11 February, 2009, pp. 5-6.

[59] A market access commitment under a broad heading would result in a commitment for all the sub-sectors and variations under that heading. This was what happened to the USA, when it made a commitment under recreational service and was found in panel proceedings to have committed itself to providing market access for gambling services.

focussed on agriculture and non-agricultural market access issues. Notwithstanding the efforts to shift the focus away from financial sector reforms to the trade front, it is probable that the trade negotiations may not reach a conclusion for a year or two. This gives developing countries time and opportunity to examine their own particular situations, think through their particular needs, and, if needed, revisit proposals and partial tentative accords in the trade negotiations, including on financial services and GATS rules.

Also, it is time to revisit the issue of a methodology for collection, at national and international levels, of statistics on trade in services in four modes, as provided in the GATS. This is a tool needed by policy-makers and negotiators to make informed judgements – and there should be no more commitments till a satisfactory statistical database can be evolved. The non-transparency -- even to the membership of the WTO -- of the negotiating processes, and secretariat biases, are such that at the last minute, proposals for changes have been presented and sought to be hustled through, without much time for careful consideration by governments of developing countries that involve not merely trade ministries, but also other parts of governments and stakeholders. This is an important consideration for the financial sector. The changes in the structures, governance and international regulatory regimes of money and finance need to be properly coordinated with the ongoing talks, technicalities and decision-making at the WTO.

In theory, WTO governance structures and consensus decision-making, with every member having the theoretical right to object, enables developing countries to have an equal voice. However, in practice, while developing countries and their groups have been able to prevent certain actions and policy courses, they have not been so successful in prevailing in a positive way. Preserving the status quo will not be beneficial to the developing world.

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ANNEXES

Annex 1:

ANNEX ON FINANCIAL SERVICES (Legal Texts pp 355-358)

1. Scope and Definition

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement[60].

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I[61] of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3 (c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. Domestic Regulation

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. Recognition

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[60]Article 1 para 2 (of GATS):

For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member from the territory of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

[61]Art. 1. Para 3 (b):

"Services" includes any service in any sector except services supplied in the exercise of governmental authority.

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. Dispute Settlement

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. Definitions

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

(i) Direct insurance (including co-insurance):

(A) life

(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of

deposits);

(B) foreign exchange;

(C) derivative products including, but not limited to, futures and options;

(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(E) transferable securities;

(F) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

(c) "Public entity" means:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

SECOND ANNEX ON FINANCIAL SERVICES

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.

2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve,

modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.

3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

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Understanding on Commitments in Financial Services (Legal Texts pp 478-482)

Participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services (here in after referred to as the "Agreement") on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement. It was agreed that this approach could be applied subject to the following understanding:

(i) it does not conflict with the provisions of the Agreement;
(ii) it does not prejudice the right of any Member to schedule its specific commitments in accordance with the approach under Part III of the Agreement;
(iii) resulting specific commitments shall apply on a most-favoured-nation basis;
(iv) no presumption has been created as to the degree of liberalization to which a Member is committing itself under the Agreement.

Interested Members, on the basis of negotiations, and subject to conditions and qualifications where specified, have inscribed in their schedule specific commitments conforming to the approach set out below.

A. Standstill

Any conditions, limitations and qualifications to the commitments noted below shall be limited to existing non-conforming measures.

B. Market Access

Monopoly Rights

1. In addition to Article VIII of the Agreement, the following shall apply:

Each Member shall list in its schedule pertaining to financial services existing monopoly rights and shall endeavour to eliminate them or reduce their scope. Notwithstanding subparagraph 1(b) of the Annex on Financial Services, this paragraph applies to the activities referred to in subparagraph 1(b)(iii) of the Annex.

Financial Services purchased by Public Entities

2. Notwithstanding Article XIII of the Agreement, each Member shall ensure that financial service suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory.

Cross-border Trade

3. Each Member shall permit non-resident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment, the following services:

(a) insurance of risks relating to:

(I) maritime shipping and commercial aviation and space launching and freight (including satellites), with such insurance to cover any or all of the following: the goods being transported, the vehicle transporting the goods and any liability arising therefrom; and

(ii) goods in international transit;

(b) reinsurance and retrocession and the services auxiliary to insurance as referred to in subparagraph 5(a)(iv) of the Annex;

(c) provision and transfer of financial information and financial data processing as referred to in subparagraph 5(a)(xv) of the Annex and advisory and other auxiliary services, excluding intermediation, relating to banking and other financial services as referred to in subparagraph 5(a)(xvi) of the Annex.

4. Each Member shall permit its residents to purchase in the territory of any other Member the financial services indicated in:

(a) subparagraph 3(a);
(b) subparagraph 3(b); and
(c) subparagraphs 5(a)(v) to (xvi) of the Annex.

Commercial Presence

5. Each Member shall grant financial service suppliers of any other Member the right to establish or expand within its territory, including through the acquisition of existing enterprises, a commercial presence.

6. A Member may impose terms, conditions and procedures for authorization of the establishment and expansion of a commercial presence in so far as they do not circumvent the Member's obligation under paragraph 5 and they are consistent with the other obligations of the Agreement.

New Financial Services

7. A Member shall permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service.

Transfers of Information and Processing of Information

8. No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where

such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier. Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement.

Temporary Entry of Personnel

9. (a) Each Member shall permit temporary entry into its territory of the following personnel of a financial service supplier of any other Member that is establishing or has established a commercial presence in the territory of the Member:

(i) senior managerial personnel possessing proprietary information essential to the establishment, control and operation of the services of the financial service supplier; and

(ii) specialists in the operation of the financial service supplier.

(b) Each Member shall permit, subject to the availability of qualified personnel in its territory, temporary entry into its territory of the following personnel associated with a commercial presence of a financial service supplier of any other Member:

(i) specialists in computer services, telecommunication services and accounts of the financial service supplier; and

(ii) actuarial and legal specialists.

Non-discriminatory Measures

10. Each Member shall endeavour to remove or to limit any significant adverse effects on financial service suppliers of any other Member of:

(a) non-discriminatory measures that prevent financial service suppliers from offering in the Member's territory, in the form determined by the Member, all the financial services permitted by the Member;

(b) non-discriminatory measures that limit the expansion of the activities of financial service suppliers into the entire territory of the Member;

(c) measures of a Member, when such a Member applies the same measures to the supply of both banking and securities services, and a financial service supplier of any other Member concentrates its activities in the provision of securities services; and

(d) other measures that, although respecting the provisions of the Agreement, affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market; provided that any action taken under this paragraph would not unfairly discriminate against financial service suppliers of the Member taking such action.

11. With respect to the non-discriminatory measures referred to in subparagraphs 10(a) and (b), a Member shall endeavour not to limit or restrict the present degree of market opportunities nor the benefits already enjoyed by financial service suppliers of all other Members as a class in the territory of the Member, provided that this commitment does not result in unfair discrimination against financial service suppliers of the Member applying such measures.

C. National Treatment

1. Under terms and conditions that accord national treatment, each Member shall grant to financial service suppliers of any other Member established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business. This paragraph is not intended to confer access to the Member's lender of last resort facilities.

2. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organization or association, is required by a Member in order for financial service suppliers of any other Member to supply financial services on an equal basis with financial service suppliers of the Member, or when the Member provides directly or indirectly such entities, privileges or advantages in supplying financial services, the Member shall ensure that such entities accord national treatment to financial service suppliers of any other Member resident in the territory of the Member.

D. Definitions

For the purposes of this approach:
1. A non-resident supplier of financial services is a financial service supplier of a Member which supplies a financial service into the territory of another Member from an establishment located in the territory of another Member, regardless of whether such a financial service supplier has or has not a commercial presence in the territory of the Member in which the financial service is supplied.
2. "Commercial presence" means an enterprise within a Member's territory for the supply of financial services and includes wholly- or partly-owned subsidiaries, joint ventures, partnerships, sole proprietorships, franchising operations, branches, agencies, representative offices or other organizations.
3. A new financial service is a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member.

[According to a communication from Switzerland in the negotiations in Services - S/CSS/W/71 of 4 May 2001 - the Understanding (with its standstill provision) was accepted by some 30 WTO members in scheduling their financial services commitments.].

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Financial Services WTO classification and Corresponding CPC
(pages 5 and 6 of WTO document **MTN.GNS/W/120, dated 10 July 1991)**

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
7.	FINANCIAL SERVICES	
A.	All insurance and insurance-related services	812**
a.	Life, accident and health insurance services	8121
b.	Non-life insurance services	8129
c.	Reinsurance and retrocession	81299*
d.	Services auxiliary to insurance (including broking and agency services)	8140
B.	Banking and other financial services (excl. insurance)	
a.	Acceptance of deposits and other repayable funds from the public	81115-81119
b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	8113
c.	Financial leasing	8112
d.	All payment and money transmission services	81339**
e.	Guarantees and commitments	81199**
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
	- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
	- foreign exchange	81333
	- derivative products incl., but not limited to, futures and options	81339**
	- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
	- transferable securities	81321*
	- other negotiable instruments and financial assets, incl. bullion	81339**
g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h.	Money broking	81339**
i.	Asset management, such as cash or portfolio management, all forms of collective	8119+** 81323*

	investment management, pension fund management, custodial depository and trust services		
j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	or	81339** 81319**
k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	or	8131 8133
l.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services		8131

Annex 2

US Financial Services commitments (GATS/SC/90/Suppl.3)

Headnotes:

7.FINANCIAL SERVICES

A. INSURANCE:

1.Commitments in this subsector are undertaken in accordance with the Understanding on Commitments in Financial Services (the "Understanding"), subject to the limitations and conditions set forth in these headnotes and the schedule below.

2.The market access commitments in this subsector in respect of mode (1), as described in paragraph 2(a) of Article I of the Agreement, are limited to the services indicated in paragraphs B.3(a) and B.3(b) of the market access section of the Understanding. The market access commitments in this subsector in respect of mode (2), as described in paragraph 2(b) of Article I of the Agreement, are limited to the services indicated in paragraphs B.4(a) and B.4(b) of the market access section of the Understanding. It is understood that paragraph B.4 of the Understanding does not require that non resident financial service suppliers be permitted to solicit business, and no commitment to such solicitation is undertaken.

3.National treatment commitments in this subsector are subject to the following limitation: national treatment with respect to services and service suppliers will be provided according to a non U.S. service supplier's state of domicile, where applicable, in the United States. State of domicile is defined by individual states, and is generally the state in which an insurer either is incorporated, is organized or maintains its principal office in the United States.

4.Commitments in this sector do not cover measures set out in the entry applicable to "Insurance" in the United States list of exemptions from Article II.

Under Insurance, the US commitment (col 1 of schedule) is in respect of: Direct Insurance - a)Life, Accident, and Health Insurance Services (except workers compensation insurance), b)Non Life Insurance Services.

Under market access limitations (Col 2) the US schedule says:

"Government owned or government controlled insurance companies, whether US or foreign, are not authorized to conduct business in: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New Jersey (only with respect to surplus lines), New York (non life companies are authorized; life and health companies are not authorized), North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, Wyoming".

In respect of Reinsurance and Retrocession, the US schedule on market access limitations says:

1)Government owned or government controlled insurance companies, whether US or foreign, are not authorized to conduct business in: Alabama, Alaska, Arkansas, Colorado, Connecticut,

Delaware, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New York (non life companies are authorized; life and health companies are not), North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, Wyoming.

B. FINANCIAL SERVICES (LIMITED TO BANKING AND OTHER FINANCIAL SERVICES AND EXCLUDING INSURANCE):

1.Commitments in these subsectors are undertaken in accordance with the Understanding on Commitments in Financial Services (the Understanding), subject to the limitations and conditions set forth in these headnotes and the schedule below.
2.The market access commitments in these subsectors in respect of modes (1) and (2), as described in paragraphs 2(a) and (b) of Article I of the Agreement, are limited to the services indicated in paragraphs B.3(c) and B.4(c) of the market access section of the Understanding, respectively. It is understood that paragraph B.4 of the Understanding does not require that non resident financial service suppliers be permitted to solicit business, and no commitment to such solicitation is undertaken.
3.National treatment commitments in these subsectors are subject to the following limitation: National treatment will be provided based upon the foreign bank's "home state" in the United States, as that term is defined under the International Banking Act, where that Act is applicable. A domestic bank subsidiary of a foreign firm will have its own "home state" and national treatment will be provided based upon the subsidiary's home state, as determined under applicable law (fn2).
4.Service suppliers choosing to supply a service through a juridical person constituted under the laws of the United States are subject to non discriminatory limitations on juridical form (fn3).

5. The offer of new financial services or products is subject, on a non discriminatory basis, to relevant institutional and juridical form requirements.

Fn2. Foreign banking organizations are generally subject to geographic and other limitations in the United States on a national treatment basis. Where such limitations do not conform to national treatment, they have been reserved as market access restrictions. For purposes of illustration, under this approach, the following situation does not accord national treatment and would therefore be scheduled as a limitation: a foreign bank from a particular home state is accorded less favourable treatment than that accorded to a domestic bank from that state with respect to expansion by branching.
Fn3. For example, partnerships and sole proprietorships are generally not acceptable juridical forms for depository financial institutions in the United States.

The US schedule has also an attachment titled:
ADDITIONAL COMMITMENTS PAPER II (Paper I is in respect of Insurance)

(1)The Administration has expressed its support for Glass-Steagall reform on a national treatment basis and will work with Congress to achieve an appropriate framework to accomplish this objective.
(2)The Administration, noting that even before the adoption of the Riegle-Neal banking legislation, many states had taken action to liberalize interstate acquisitions of banks on a basis that provided national treatment to foreign banks, welcomes further initiatives by states to provide additional access on a non-discriminatory basis.

(3)The Government of the United States has taken action to remove impediments to the offering of securities in the United States by foreign and domestic issuers. The National Securities Markets Improvement Act of 1996 preempts state regulation of offerings of certain securities, including those listed on the New York Stock Exchange, the National Association of Securities Dealers Automated Quotation/National Market System, and securities issued by registered investment companies. This legislation eliminates duplicative state and federal securities legislation in the area of securities registration.
(4)Section 7(d) of the Investment Company Act authorizes the SEC to permit a foreign investment company to register and publicly offer its shares in the United States if the SEC makes the following prudential findings:
1. that it is both legally and practically feasible for the SEC and U.S. investors effectively to enforce the provisions of the Investment Company Act against the investment company, and
2. that it is consistent with the requirements set forth in the Investment Company Act.
(5)The Government of the United States notes that the Federal Reserve, working in cooperation with other domestic supervisory authorities, has established an enhanced framework for the regulation and supervision of U.S. operations of foreign banks, which endeavours to coordinate annual examinations of foreign banks and provide uniform guidance with respect to examination policies.

Annex 3A

Trade: Third World markets '*terra incognito*' on services trade data
by Chakravarthi Raghavan

Geneva, 28 Feb (1990) -- If statistics are seen as providing a map to guide policy-makers in their deliberations, much of the Third World is terra incognito or unknown territory as far as statistics about international trade in services are concerned, according to the United Nations statistical office.

Making this comment this week at the meeting of the Uruguay Round Group of Negotiations on Services, William Seltzer, Director of the UN's Statistical Office, warned that unless concerted actions are taken soon 'neither the Uruguay Round of negotiations nor even the next round of negotiations will have the data they need to reach sound and equitable conclusions."

In the three years of negotiations on the issue of trade in services, the ICs have been trying to brush aside the issue and problem of services and lack of data about production, 'trade', 'transactions' etc, arguing that it was a long-term project and negotiations could not be held up for that-

The attempts of the UN, UNCTAD etc to develop a methodology for collection of national data to reflect the 'services' and their contributions, as well as international 'trade' and 'transactions' have run into problems of 'definition', as well as funds needed both at the international level and to provide technical help to Third World countries.

The ICs have discouraged such efforts being undertaken ahead of an agreement on the Framework, lest it come in the way of their attempts to use this to get rights of establishment for their TNCs, or provide support to the Third World fears about liberalisation of the trade in services.

At the same time a group of Ics, the socalled Voorburg group, have been trying to develop their own methodology, which would then be presented to the US and the Third World to adopt, that would best subserve their common interests.

Seltzer's remarks to the GNS came at the formal meeting of the group which later moved into informal consultations on the structure and market access issues.

The informal consultations, participants said, showed a major division between the Industrial Countries on the one hand and the Third World countries, particularly the Latin American countries who have presented a comprehensive proposal on the framework, on the other, over the question of timing of negotiations for initial level of commitments for liberalisation, to be taken up only after the shape of the Multilateral Framework and the nature of the rights and obligations are known, and after entry into force.

The US, EEC and others want negotiations on the Framework and the first round of negotiations for liberalisation to go on in parallel and for Parties to the framework to agree on an initial level of commitments, including freeze on new restrictions.

In addressing the statistical issue, Seltzer reminded the GNS that the UN statistical office had overall responsibility for collection and compilation of statistics on many of the major components of

international trade in services, including international trade statistics, national accounts statistics, industrial statistics, as well as related methodological work.

These responsibilities were carried out in close cooperation with, and in some cases on behalf of a broad range of UN organs and international organizations such as UNCTAD, UN Regional Commissions, GATT and IMF among others, and they were guided in this work by UN Statistical Commission comprising chief statisticians from 24 member-states, Seltzer told the GNS.

Various participants in the GNS, at each stage, had recognized the critical role of 'sound and comprehensive' statistics in reaching equitable solutions to the complex problems before the GNS.

That the issue was once again before the GNS was a demonstration of the important role that statistics should play in these negotiations and of the continuing inadequacies of statistics on services, including trade in services, Seltzer said.

There were serious shortcoming in the available data, and in terms of the statistical methodology i.e. internationally agreed definitions, classifications and reporting practices, and shortcomings in terms of the application of existing methodology.

"Finally, and the most important shortcomings for the GNS," Seltzer added, "is a marked unevenness in the availability and quality of data from different groups of countries.

"If statistics are seen as providing a map to guide policy-makers in their deliberations, available statistics on international trade in services leave much of the developing world marked as a terra incognito, an unknown territory."

The UN official recalled that three years ago the UN Statistical Office, in cooperation with UNCTAD, GATT and the IMF, had developed a proposal for a concerted and integrated approach to the problem involving conceptual development, technical cooperation and data collection.

A four-year programme had been suggested addressing primarily, but not exclusively, the needs of Third World countries including preparation of appropriate technical manuals and training activities. Although some preliminary interest was expressed in this proposal by prospective individual donors, "no tangible support has been received to date."

"Unfortunately," he added, "the description of the state of statistics is that proposal remains largely uncharged and the needs outlined in that proposal remain unaddressed."

Referring to the efforts of some of the OECD countries to tackle these issues among themselves and evolve a methodology, Seltzer said that, as the UN Statistical Commission had noted at its last year, despite the valuable contribution of the Voorburg Group on services statistics that group could not replace the traditional methods for developing statistical methodology.

The Commission had also asked the UN Secretary-General to seek extra-budgetary financing for a comprehensive programme involving development of methodology, data compilation and technical cooperation in this field of statistics.

If this or some modified proposal had been supported in 1987, Seltzer said, "we would today be further advanced in statistics than we are... Unless concerted action is initiated soon, neither the Uruguay Round of negotiations nor even the next round of negotiations will have the data they need to reach sound and equitable conclusions."

Seltzer in effect reminded the GNS Monday (26 Feb) that the lack of statistics and efforts to fill the gap have not progressed because of the failure of the Ics to agree to find extra-budgetary resources needed for this work by the UN.

GNS participants said in the informal discussions on the framework, and the draft paper put forward on behalf of a group of Latin American and Caribbean countries, the US and the EEC would appear to have objected to the approach in the paper envisaging first negotiations on a framework and its entry into force before starting negotiations on an initial level of commitments.

The US and EEC said they want a schedule of market access concessions of each country to be negotiated and incorporated into the framework, in the same way as the General Agreement and the schedule of each signatory's tariff concessions.

The Latin American countries, as well as several other Third World participants, said that without knowing the details and shape of the framework and its obligations, they could not negotiate or bind themselves to any initial level of commitments.

Another division between the ICs and the Third World revolved round the view of the US that the Framework would cover all traded services save those sectors and subsectors that each country, in its schedule, excepts - the socalled negative list concept of coverage.

Third World countries on the other hand favoured a positive list approach - agreeing on the list of traded services to be included and listing them in an annex.

In discussing the relationship and role of the Framework and its institutional setup with other international organisations, a number of Third World participants underscored the role of organisations like the ITU, ICAO, UNCTAD etc in the services area, while the US also brought in the role of the IMF and the GATT.

However, some Third World countries underlined that GATT was not an institution or organization but only a contract.

The proposals of the US, Switzerland and some others envisage not only close coordination between the GATT and their proposals for a General Agreement on Trade in Services (GATS), but a common secretariat and other such services.

Third World countries however underscore that the negotiations for the proposed multilateral framework on services is totally outside of and independent of the GATT or the GATT negotiations, and that they could not accept any linkage between the two.

The US and the Swiss also reportedly suggested that since a number of services were embedded in goods that were traded internationally, there should be close links between the future services organisation and the GATT.

However, some Third World participants said that if some services were embedded in goods which were traded, these were already covered by the GATT, and the proposed framework for services should exclude the services embedded in the goods.

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Annex 3B

Despite GATS data gaps, Negotiate Commitments says WTO

Geneva, 18 Dec 2000 (Chakravarthi Raghavan) - Data on trade in services continue to suffer from a variety of shortcomings, and while improvements in data collection and processing as a long-term process are in sight, it will never be possible to attain a level of reporting in services comparable, in breadth, depth and accuracy to current statistics in merchandise trade, a WTO secretariat report says.

Nevertheless, the WTO secretariat in effect advises trade negotiators (of developing countries who have been raising this issue repeatedly) not to pay too much attention to this problem, but go ahead and negotiate more commitments in a new round of services negotiations, in order to remove distortions in allocation of resources between and within countries and thus promote 'sustainable development.'

The document does not say whose 'sustainable development' it advocates - of the world as a whole, of the individual nations who are members of the WTO or the hidden actors behind the services agenda, the transnational corporations.

But in a recent speech (to the European Services Forum in Brussels on 27 November to which the WTO drew the attention of the media), the Director of the WTO division on services, Mr. David Hartridge presented the GATS and the ongoing services negotiations in terms of "the implications of trade liberalization for equity and welfare," and the value of the Mode 3 (commercial presence) of the GATS commitments as "an inducement to foreign direct investment."

However, the secretariat note on 'Review of Statistics on Trade Flows in Services,'(S/C/W/27/Add 1, circulated as a restricted document for the Committee on Trade in Services), admits the gaps in data (making assessments difficult), but advocates negotiations and commitments on basis of efficiency of resource allocation. It says in the note:

"Trade negotiations are not essentially about analysing and, possibly, balancing trade flows in individual sectors, but achieving a - progressively more liberal and mutually beneficial - balance of rights and obligations under relevant agreements."

"From an economic perspective," the secretariat note adds, "it does not really matter whether the results translate into import and/or export expansion in specified areas, but whether they contribute to removing distortions to the allocation of resources between and within countries and, thus, to promoting sustainable development."

But there are a number of elements in these two sentences, to put it at its mildest, that are problematic.

Firstly, the proposition that trade negotiations are not about analysing and balancing trade flows in individual sectors is a clear contradiction of the practices in negotiating commitments in the 50-year history of the GATT multilateral trading system.

No country or major trading entity in the old GATT or the new WTO has ever negotiated market access concessions and commitments, or rules to accompany them, without a careful analysis of the costs and benefits of the concessions to its exporters and importers.

In fact at the end of each such negotiation, they present to their parliaments and other authorities, facts and data about how much the country would gain (and in an undertone expect to lose) by the outcome.

Very few countries accept the view propounded by the WTO economists in this document as a proposition in their trade policy negotiations, and no one has practised it.

Secondly, implicit in the view that trade negotiations are about "removing distortions to the allocation of resources between and within countries and thus promoting sustainable development" is a point of view which views the world economy as a single, seamless global economy for the purpose of policy-making.

The problem with such an assumption is that there is no decision-making mechanism to deal with the world as a whole, and perform even some rudimentary role of a government.

And the view that in trade measures and trade, the entire policy is only about 'efficient allocation of resources', is one that most orthodox economists in terms of a national economy would not accept. That economic policy needs to promote equity as well as efficiency is so basic that mainstream economists and the economics profession takes it for granted and does not lay stress on.

Economists of various hues and schools may differ in their views on 'equity' and income distribution and rewards, but all assume that this is something brought about by governmental policies.

Classical welfare economics in fact is all about balancing equity and efficiency.

If the WTO economists view in the document is to be accepted, it means they believe that the current distribution of income worldwide is reasonably just and nothing special is needed to ensure equity.

They may of course be assuming that trade liberalization will itself address egregious global inequality, but that assumption would not command widespread support even within the profession's mainstream.

Indeed, this proposition flies so much in the face of facts and empirical evidence that even institutions like the IMF, the World Bank or the OECD, exponents of the interests of the major rich industrialized nations, do not make it.

If the statement is about efficiency at the level of a national economy, it is difficult to understand the meaning of a proposition about efficiency in the absence of any reference to a system of prices for an economy linked to equilibrium in its markets. Such prices would include exchange rates.

The world is a collection of national economies, which are far from integration into a single global economy, but consist of individual disparate economies at different levels of development and integration into world markets, having national currencies and interacting with others on the basis of 'trade' (in goods, services, capital and factor movements) and capital flows (that are expressed in value even when transfers are non-monetary goods and services).

The sustainability of the exchange rate of a currency is dependent on its current and prospective balance of payments, and this in turn depends on its 'trade' flows - exports and imports.

And trade (export and import) flows and their sustainability cannot be judged by any government of a country without some facts to judge the effect of any concessions it makes or gets in terms of its imports and exports (in this case of trade in services).

This is so elementary that the breath-taking proposition quoted above could perhaps only be put forward by the secretariat in a note to trade diplomats at the WTO and in a restricted document at that.

As a proposition in a term paper on neo-classical economics in a university under-graduate course, it would not have earned the barest pass marks.

In explaining the continued data problems (seven years after the structure of the GATS was settled in negotiations), the secretariat note says that the sectoral and modal structures of commitments under GATS does not coincide with the existing structure of trade statistics.

The activities of foreign-owned companies in their host country markets (covered by commercial presence) are not reflected in conventional statistics. Also, the IMF Balance of Payments Manual classification, on which the only global trade statistics in services are based, is far less detailed than the UN Central Product Classification (CPC) which has provided building stones for the Classification list widely used by Members for scheduling purposes."

[This problem was among those identified by UN system statisticians as early as 1987].

But work is in progress "to gradually ease these problems," says the WTO secretariat in this latest note.

The report says that while international efforts are under way to improve the data on trade in services which suffer from a variety of shortcomings, even in the best of circumstances it will never be possible to attain a level of reporting in services comparable in breadth, depth and accuracy to current statistics on merchandise trade and in any event it may not be an appropriate objective to aim at in services, says the WTO secretariat.

In making a presentation, "essentially descriptive in nature", the secretariat says that the recent trade developments in individual countries, regions or sectors, does not allow for any inferences on the causes. For e.g. changes in a country's share in world trade in a given sector may be attributable to

autonomous demand trends, valuation effects in the wake of currency movements, sudden market upheavals (associated, for example, with the Asian financial crises), development in merchandise trade having an impact on related producer services (transport, insurance etc) or longer term changes in an industry's international competitiveness. Such changes in turn may be industry-generated (reflecting company decisions) or attributable to government interventions in markets or longer-term structural reforms.

"However," says the WTO secretariat, "one conceivable factor has not possibly played a leading role to date - liberalization measures associated with the entry into force of GATS in January 1995."

The secretariat, it adds, is not aware of any significant policy changes induced by the entry into force of the Uruguay Round schedules. Available evidence suggests that the bindings negotiated in 1993, remained essentially confined to locking in the status quo.

The extended negotiations on basic telecommunications and financial services reportedly left deeper imprints, in terms of actual liberalization measures, on trade regimes of several countries. But given the implementation dates of the relevant protocols for most participants - February 1998 and March 1999 - that it is doubtful whether they could have affected trade flows.

In an overview, the secretariat says that the share of commercial services measured on a balance-of-payments basis, in total world exports of goods and services has remained virtually unchanged since the mid-1990s. At 19.6% in 1999 it is no more than a 0.1 percentage point from the share reported in 1995.

There are however some regional variations.

On the export side, North America and Western Europe continued to record above-average share of services in their total exports, while Latin America and Asia remained below the world average. Africa changed its position - but this is not necessarily indicative of a particular dynamic services sector, but may be attributed as well to weak world markets for major merchandise exports including oil.

North America's share in total world services exports increased by over 2 percentage points from 1985 to exceed 21% in 1999. More than half of world trade in commercial services is made up of travel and transportation services, though over the last couple of years, other commercial services (insurance, banking, telecommunications and so forth) have tended to expand faster.

But depending on travel and transportation services may pose a structural problem for producer countries, including not least many developing economies. Supplies in these sectors are closely related to physical movements of persons and goods, and thus to merchandise trade.

And in financial services, given the strong dollar appreciations, the US has significantly expanded its share.

(This was originally published in #SUNS 4808, 20 Dec 2000, and Raghavan 2002; it is reproduced with permission)

Annex 4:

The WTO Negotiations on Financial Services: Current Issues and Future Directions
by Andrew Cornford
Extracts
....
Section D. The 1997 agreement in brief

As already mentioned, the 1997 agreement on financial services was probably notable more for its airing of issues and the consequent increased transparency concerning the sector than for its concrete achievements in terms of market opening. Many countries' commitments simply specified rules already in place ("the status quo"), and in some cases less than this – the latter a procedure analogous to binding tariffs in GATT or WTO agreements at levels higher than those actually prevailing.

Among developed countries commitments typically bound the considerable amount of liberalisation already undertaken during the previous two to three decades. Japan, the United States and the European Union made their commitments on the basis of the Understanding on Commitments on Financial Services, an initiative of like-minded countries in the negotiations to furnish a relatively uniform and liberal formula for undertaking commitments. While the Understanding provides for commitments as to unrestricted market opening under Mode 2 (the purchase by residents of one member country of financial services in the territory of any other), commitments specified under Mode 1 (cross-border supply) by countries taking this route are limited.[62]Some common features of countries' regimes for financial services which were targeted by developed countries during the negotiations have largely disappeared from the limitations in their commitments regarding market access and national treatment. For example, there has been a reduction during recent years in the number of countries applying reciprocity tests to market access for foreign banks (that is to say rules enabling a country to withhold market access from banks of another country if their own banks do not enjoy similar conditions for market access in that country)[63] and the frequency of economic needs tests in bank licensing rules has also been reduced.[64]But their remain exceptions. For example, among the limitations on market access under Mode 3 specified by Portugal are that "the establishment has to increase the national banking system's efficiency", and "convenience and needs" are amongst the criteria considered in the licensing process in the United States, although

[62] Other important features of the Understanding are a standstill on restrictions in areas specified, liberal rules regarding market access through Mode 3 (commercial presence), permission for suppliers of financial services to supply new financial services in the territory of any other member country (a particularly interesting provision for a sector which continues to be subject to rapid innovation), liberal rules concerning the granting of temporary entry of managerial and specialist personnel of foreign suppliers, and rules designed to ensure that non-discriminatory measures do not in practice adversely affect the ability of foreign suppliers to establish and expand their operations in a member country (a provision intended to promote "equality of competitive opportunity", a concept often raised during negotiations on the GATS which may go beyond formal non-discriminatory treatment).

[63] Reciprocity was a feature of the offers of several developed countries during the early part of the negotiations, some countries specifying that its eventual removal would depend on the quality of other Members' offers.

[64] Economic needs tests do not always go by this name but the rules for licensing foreign banks in the banking regimes of several countries have traditionally included features with the same effect such as "an economic interest test", the ability of the applicant to demonstrate its potential to contribute to bank competition, satisfying the authorities that an additional corporation would be a source of public benefits or advantages, etc. For countries not setting such conditions a new bank's profitability is implicitly assumed to indicate whether or not it meets an economic need.

this is not mentioned among the limitations in its schedule of commitments.[65]In the United States market access for banking entities licensed at state level is subject to reciprocity tests in several states. This is one of several limitations on both market access and national treatment in the United States schedule which apply at state level and reflect the diversity of the regimes for foreign banks associated with the country's multi-level licensing system.

One feature of Japan's schedule is of particular interest in view of the uncertainty as to the scope of actions permissible under the prudential carve-out of the Annex on Financial Services. Amongst its horizontal limitations is the statement that "For prudential reasons within the context of ... the Annex on Financial Services, Japan shall not be prevented from taking measures such as non-discriminatory limitations on juridical forms of a commercial presence ... and from applying non-discriminatory limitations concerning admission to the market of new financial services which shall be consistent with {a} regulatory framework aimed at achieving such prudential objectives". These limitations qualify commitments specified in the Understanding and point to Japan's intention to place off limits certain features of its prudential regime regardless of any more precise interpretation of the prudential carve-out which may be forthcoming in future.

Limitations on market access and national treatment in developing countries' schedules (like the associated legal regimes for the financial sector) were more heterogeneous than in those of developed countries. The absence of estimates of the effects of these restrictions or of alternative methods of evaluating commitments renders the task of ranking or otherwise evaluating developing countries' schedules by their degree of liberalisation is difficult, though attempts have been made.[66]One survey of developing countries' schedules indicates that the most extensive commitments to liberalisation were to be found among small economies in Africa, the Pacific, and Latin and Central America (Ghana, Kenya, Malawi, Mozambique, Sierra Leone, Papua New Guinea, Solomon Islands, Guyana, Haiti, and Panama).[67] Willingness to include commitments in a country's schedule was greater for Mode 3 (commercial presence) than for Mode 1 (cross-border supply). Indeed, for Mode 1 among countries of Latin and Central America only Ecuador, Guyana, Haiti and Panama included commitments in their schedules – in other words none of the region's countries usually classified as among the larger "emerging financial markets" -, and among countries in Asia and the Pacific the situation was similar, only Indonesia and Malaysia of the larger "emerging financial markets" scheduling commitments. Another interesting feature of comparison of schedules by region is the much greater number of countries in Asia and the Pacific (India, Indonesia, South Korea, Kuwait, Malaysia, Pakistan, Philippines, Singapore, Sri Lanka and Thailand) than in Latin and

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[65] Concerning the history of the "convenience and needs" test in legislation for United States banks since the second half of the nineteenth century see H.E.Jackson and E.L.Symons, **Regulation of Financial Institutions** (St. Paul, Minn.: West Group, 1999), pp. 59 and 90.

[66] The Financial Leaders Group (FLG), set up by European and American financial-service firms in 1996 to seek common ground in the negotiations on financial services and thus achieve more effective and balanced lobbying, conducted an evaluation of the commitments of 20 key emerging financial markets. See Dobson and Jacquet, **op.cit.** (at footnote 2), p.89. An attempt at ranking developing countries' commitments numerically is made in A.Mattoo, "Financial services and the WTO: liberalisation commitments of the developing and transition economies", **The World Economy**, 23 (3), March 2000, pp. 380-385. This ranking uses weights for Modes 1, 2, and 3 for two distinguished activities of banks, deposit-taking and lending – weights heavily influenced by figures for United States, the only country for which suitable data are available on a regular basis. In the case of all three modes of delivery commitments specifying "unbound" were assigned a value of zero and those specifying "no limitations" were assigned a value of one. Cases where restrictions were specified were assigned a value 0.5 for Modes 1 and 2, and a value for Mode 3 between 0.1 and 0.75 corresponding to the measure specified in the schedule which was identified as having the most restrictive effects ("no new entry", for example, being assigned a value of 0.1 and "ceiling on foreign equity of more than 50 per cent" one of 0.75).

[67] Mattoo, **ibid.**, pp. 364-368.

Central America (Brazil and Dominican Republic) scheduling limitations on both the number of foreign suppliers and on their equity participation.

As already mentioned, the commitments of some developing countries fell short of the degree of market opening already present in their policy regimes. Moreover commitments as to liberalisation under other agreements were not always included in WTO schedules. For example, commitments undertaken by Indonesia, South Korea and Thailand as part of IMF programmes in response to the Asian financial crisis of 1997 were not included in their WTO schedules. In view of the widespread concern as to the exact scope for prudential measures provided by the carve-out of the Annex on Financial Services it is interesting that South Korea (like Japan) included an explicit and broad reference to its prudential regime among the horizontal limitations of its schedule ("As described in ... the Annex on Financial Services, Korea shall not be prevented from taking prudential measures including requirements related to parent companies, the minimum capital requirement, or minimum operating funds requirement").

....

Section F. Issues in the new negotiations

1. Market opening, financial stability, and international capital movements

As will be evident from the introduction, two pervasive concerns have dominated discussions in the new negotiations so far. On the one hand, developed countries have been pressing the case for increased market opening and tighter rules for policy measures with restrictive effects on market access and national treatment and, on the other, developing countries wish to ensure the compatibility of further liberalisation with financial stability. The latter concern has been reflected in interventions during the negotiations which raise the issue of connections between WTO commitments regarding financial services and the potentially destabilising effects of international capital movements.

On the face of it this is a little surprising since, as explained in section C, Article XI of the GATS is intended to guarantee the primacy of IMF rules in this area.[68]Obligations as to the liberalisation of cross-border transactions in the WTO are linked to the commitments to market access included in a country's schedule and are designed to prevent their frustration in practice through restrictions on the capital transactions necessary for their fulfilment. However, the decoupling in the GATS of market opening for financial services from liberalisation of capital-account transactions generally leaves substantial scope for connections in practice. This is most easily seen for the hypothetical example of a country which enters into commitments to no limitations regarding Modes 1, 2 and 3 for all the activities mentioned in the Annex on Financial Services. To ensure effective implementation of such commitments the country would be obliged to undertake comprehensive liberalisation of capital-account transactions. Moreover a country - not that in the hypothetical example just described - whose commitments were made through the Understanding (see footnote 4) would also be making an open-ended commitment to the liberalisation of such transactions required by its obligation to "permit financial service suppliers of any other Member established in its territory to offer in its territory any new financial service". Although commitments as to market

[68] Article XI also prescribes restrictions on payments and transfers for current transactions related to commitments under the GATS (except as part of actions to safeguard the balance of payments as provided for in Article XII). As of the time of writing only 5 of the signatories of the GATS agreement (Albania, Angola, Colombia, Egypt, and Nigeria) have yet to accept the obligations of IMF Article VIII under which member countries do not restrict payments and transfers for current international transactions without the Fund's approval.

opening for financial services often carry associated obligations as to the liberalisation of capital transactions, the country making them will have to depend on guess work for the estimation of the size of the capital movements which are likely to ensue.[69]The difficulty of reaching estimates here is increased by the pace of change in the financial sector which, as described in section F.2, is adding to the range of transaction possible transactions under the different modes of delivery of the GATS.

That the discretion left to countries under the GATS regarding the liberalisation of capital-account transactions has failed to alleviate many developing countries' concerns would appear to be linked to the pressures to undertake substantial further market opening during the new round of negotiations and to uncertainties as to what its effects would be. Whereas this discretion should give countries scope to avoid entering into commitments whose consequences they judge to be potentially risky or unfavourable, there may well be apprehension that such a negotiating stance will prove untenable as momentum builds for substantial concessions as to market access dictated by the interest of achieving a successful outcome of the negotiations.
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3. Prudential measures

The financial crises of recent years have led to greatly increased attention to prudential regulation of the financial sector. Strengthening such regulation has been attributed a key role among initiatives for international financial reform. As noted in section C, the GATS recognises governments' need for considerable freedom of action for prudential measures to protect investors, depositors, policy holders and other persons covered by a financial-services supplier's fiduciary responsibilities, or to ensure the financial system's integrity and stability. However, the scope and character of measures permitted under this heading are not specified. Indeed, the allowance of recourse to dispute settlement concerning a country's prudential measures is probably, *inter alia*, an indication of the difficulty which negotiators of the GATS faced when it came to spelling out the measures which are or are not permissible under the prudential carve-out of the Annex on Financial Services.

One set of questions under this heading is likely to be measures taken as part of the restructuring of banking sectors in the aftermath of financial crises such as that which broke out in Asia in 1997. Such restructurings can take place over extended periods of time, thus posing the question of whether all the actions involved can be classified as being covered by the reference to system integrity and stability. Moreover the restructurings may also be accompanied by substantial injections of government money in forms which some may consider as distorting competition and discriminating against foreign suppliers of financial services. To date there is no WTO case law to provide guidance here (though this may be about to change).[70]Thus it is unsurprising that a request

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[69] On the basis of his personal assessment for the activities in the Annex on Financial Services an IMF observer attributes "major importance " to "capital flows for virtually all financial services delivered through mode 3 (commercial presence), as such presence by its nature implies some form of cross-border investment". Indeed, the only activities under the heading of banking and financial services (excluding insurance) to which he does not attribute such importance are financial leasing, provision and transfer of financial information, and advisory, intermediation and other auxiliary services. See A.Kireyev, "Liberalization of trade in financial services and financial sector (analytical approach)", **IMF Working Paper WP/02/138**, August 2002, pp. 10-14.

[70] South Korea's restructuring of its financial sector in the aftermath of the 1997 Asian financial crisis – a restructuring which involved substantial injections of government money to deal with non-performing loans and to replenish banks' capital but which was also the subject of discussions between the country and the IMF in the context of the latter's programme of financial support – has recently been challenged in the WTO as involving actionable subsidies under the Agreement on Subsidies and Countervailing Measures (rather than under the dispute settlement procedure available for prudential measures under the Annex). In addition to its bearing on what are permissible prudential measures this

for clarification as to the scope of the prudential carve-out has been made during the new negotiations.

Switzerland, for example, whilst acknowledging the need for ample room for manoeuvre with respect to prudential measures, has none the less drawn attention to the way in which in its view prudential regulation can be disproportionate to the problems at which it is directed and can involve limitations on the participation of foreign institutions in a country's financial sector. It recommends greater recourse to financial standards developed by organisations such as the BCBS, the International Association of Insurance Supervisors (IAIS), IOSCO, and the Joint Forum on Financial Conglomerates. These standards, Switzerland argues, could serve as the basis for a definition of the exceptional measures which may be taken for prudential reasons regardless of other provisions of the GATS.

It is unclear as yet what the practical implications of the Swiss recommendation might be. One possibility would be simply some kind of use of the work of the bodies mentioned in an exercise which attempted to define non-actionable prudential measures. Another possibility, which would probably have more far-reaching implications, might involve some kind of vetting of countries' regimes of prudential regulation and supervision as a precondition for according broad latitude with respect to prudential measures. Since the standard-setting bodies mentioned above are not responsible for vetting implementation, in this case the Swiss recommendation might point to the establishment of a link between such latitude and assessment of countries' prudential regimes as part of the Financial Sector Appraisal Programme (FSAP) carried out by the IMF and the World Bank. This programme is aimed at assessing vulnerabilities of a country's financial sector and identifying priorities for action, and is carried out partly on the basis of criteria for subjects such as financial regulation and supervision which are part of internationally agreed standards.[71]Financial sectors are now a subject of IMF Article IV surveillance, and FSAP can provide inputs to this process.
The implications of such a link for relations between work in the WTO and that on international initiatives concerning financial standards raise a number of questions. Many developing countries are likely to have reservations about an approach along these lines. Acceptance of the key financial standards is not universal. Objections focus not only on the contents of some of these standards but also on the resources and time required for their implementation. Moreover several have long-standing reservations as to constraints through the GATS on their autonomy regarding prudential measures standards.[72]One might also expect developing countries' still limited participation in

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challenge raises questions concerning connections between work in the WTO and in the IMF, and concerning their mutual coherence.

[71]The design and implementation of financial standards have been assigned a major role in ongoing efforts to strengthen the international financial system. The Financial Stability Forum, a body established by the finance ministers and central-bank governors of the G-7 in February 1999 to promote international financial stability through improved exchange of information and cooperation with respect to financial supervision and surveillance, has identified 12 key financial standards which it considers particularly relevant for this purpose. Each of these standards concerns a particular subject area and has an issuing body (which is not necessarily that responsible for promoting and vetting its implementation). Taken together the 12 key standards cover macroeconomic policy and data transparency, institutional and market infrastructure, financial regulation and supervision, corporate governance and accounting, and money laundering and terrorist financing. For descriptions of the origins and initial contents of these standards see A.Cornford, "Standards and regulation", in Y.Akyuz (ed.), **Reforming the Global Financial Architecture: Issues and Proposals** (Geneva, Penang (Malaysia), London and New York: UNCTAD, Third World Network , and Zed Books, 2002) (which is reprinted from UNCTAD, **Trade and Development Report, 2001**, Part Two, chapter IV), and G.A.Walker, **International Banking Regulation; Law, Policy and Practice** (The Hague,: Kluwer Law International, 2001), pp.307-311 and 316-338.

[72] During the Uruguay Round in 1990, for example, the SEACEN group of countries (Indonesia, Malaysia, Thailand, Nepal, Sri Lanka, South Korea, Philippines, Singapore and Myanmar – SEACEN being a group of their central banks or

standard-setting exercises to be raised here, and perhaps as a pertinent corollary the governance structure of the IMF and World Bank, where many developing countries feel their voice has too little weight in decision making. [73]Perhaps paradoxically linking the permissible scope of prudential measures under the GATS to standards-setting exercises elsewhere might serve as an argument for strengthening developing countries' case for improved representation in such exercises. The case would be based on the Annex on Financial Services itself and on Article VII of the GATS. The language here covers accession to standard-setting exercises and agreements *per se*, and not voting weights or the quality of participation.[74]Nevertheless, strengthening the links between work in the WTO and that in other international organisations on issues related to financial services (a proposal advanced by developed countries) may in the area of prudential measures actually furnish developing countries with an argument for shifts in imbalances in the existing structure of international financial governance.

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7. Global policy coherence

Traditionally the principal subject on which there has been GATT- or WTO-IMF coordination are exchange restrictions imposed by a member country for balance-of-payments reasons. Under Article XV of the GATT member countries accept the findings of the IMF as to whether the restrictions are in accordance with the latter's Articles of Agreement. An analogous role is attributed to the Fund under Article XII of the GATS. But the issues of international capital movements and prudential regulation (discussed in sections F.1 and F.3) are likely to lead to new overlaps between the work of the WTO and initiatives regarding the international financial system in other multilateral institutions. The need to review such overlaps has been raised during the new round of negotiations. Moreover these overlaps are arguably subsumed under the general issue of global policy coherence, a subject on which governments adopted a declaration as part of the final outcome of the Uruguay Round. This declaration noted that "the interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies". But this call was subject to provisos concerning the need to respect the mandates, confidentiality requirements and decision-making autonomy of each institution, and to avoid "the imposition on governments of cross-conditionality or additional conditions. The latter proviso could have implications for any initiative along lines described in

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monetary authorities) made submissions expressing opposition to allowing prudential measures to be susceptible to dispute settlement under the GATS and, indeed, to subjecting any safeguard measure for the financial sector (whether temporary or of longer duration) to multilateral procedures or prior consultations.

[73]The representativeness of the bodies responsible for international standard setting varies, reflecting in many cases historical origins associated with organisations and initiatives involving the membership or participation of limited groups of countries. The BCBS, the body assigned the responsibility for standard setting in the area of banking supervision, has a long history of efforts at outreach consisting of contacts and increasingly collaboration and consultations with non-member regulatory bodies and other supervisory groups. However, these efforts have not succeeded in quelling criticism of its representativeness, and there are indications of increasing acceptance among developed-country supervisors that more needs to be done on this front both in the BCBS and other bodies responsible for the setting of international standards. See, for example, H.Davies, "Is the global regulatory system fit for purpose in the 21st century ?", address by Howard Davies, Chairman of the Financial Services Authority, UK at the Monetary Authority of Singapore Lecture 2003, Singapore, 20 May 2003, reprinted in **BIS Review** 25/2003.

[74] To quote 3(a) (on recognition) of the Annex on Financial Services: "A Member that is a party to...an agreement or arrangement {related to the recognition through harmonization or otherwise of another country's prudential measures}, whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement."

section F.3 to link WTO members' latitude regarding prudential measures and assessments by the IMF and World Bank of countries' regulatory regimes.

Financial services are not the only topic with respect to which the agenda of the WTO poses questions as to global policy coherence. Nevertheless, the interaction of the so-called real economy and of money and finance has long been a fruitful source of issues under the heading of such services, and their importance lies in their links not only with production and trade but also with the functioning of the international financial system more generally. Perhaps the most explicit follow-up to the Declaration described above in the work programme of the ministerial declaration launching the new round of multilateral trade negotiations at Doha in November 2001 is the establishment of a working group to examine ways in which the multilateral trading system can contribute to a durable solution of developing countries' external indebtedness and to strengthening the coherence of international trade and financial policies with a view to safeguarding the system from the effects of monetary and financial instability. Past experience and realism about the willingness of the major actors to envisage changes in international economic governance argues against expecting too much from this working group. But the discussion of earlier sections does indicate that the more general issue of international financial stability, which is connected in several ways to subjects raised under global policy coherence, will nevertheless significantly influence actual sectoral negotiations in the current round such as those on financial services.

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