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Elements of a Multilateral Framework for Trade in Services

*Murray Gibbs & Mina Mashayekhi**

I. Introduction

Through their domination of new technologies and possession of human and financial capital and international information networks, the Transnational Corporations (TNCs)¹ based in developed market economy countries are capable of supplying services on a global scale. Within the economies of developed countries, services (particularly "knowledge-based" producer services²) provide major contributions to overall trade vitality and act as new sources of economic dynamism. Services function as a means of transmitting specialized knowledge into the productive process, improve employment opportunities, support most other trade sectors, improve competitiveness in goods exports, and are a source of value-added.³

This dynamism, however, has not been apparent in the service sectors of developing countries. Due to inadequately developed human capital and infrastructures, developing countries are forced to import increasing amounts of services, particularly knowledge and capital intensive services. In many cases, this undesirable importation exacerbates balance of payments disequilibria and debt servicing burdens. Exports of services by developing countries generally involve persons crossing international frontiers, for example, tour-

* The authors are staff members of UNCTAD secretariat. The views expressed in this article are their own and do not reflect those of UNCTAD.

¹ Such enterprises are characteristically made up of a parent firm located in one country and a cluster of affiliated firms located in a number of other countries. Enterprises of this sort commonly operate in such a way that the affiliated firms, although in different countries nevertheless share the following characteristics:

(1) They are linked by ties of common ownership.

(2) They draw on a common pool of resources, such as money and credit, information and systems, and trade names and patents.

(3) They respond to some common strategy.

R. VERNON & L. WELLS, *MANAGER IN THE INTERNATIONAL ECONOMY* 1-2 (5th ed. 1986).

² Knowledge-based services include accounting, consulting, advertising, travel planning, and so on, as opposed to services such as shipping and warehousing.

³ See *infra*, p. 903.

ism or services provided by their nationals abroad. Often, the ability to retain value-added from such exports is hindered by lack of capital and information.⁴

Further worsening the developing nations' problems in this area, some developed countries require their trade authorities to take retaliatory action against unilateral "unfair," "discriminatory," or "unreasonable" "barriers" facing their "trade" in services. For example, "barriers" to trade in services may be interpreted to include measures affecting investment or transborder data flows.⁵

Services are of strategic importance for the economic, social, and cultural growth of developing countries as well as for their national independence and security. In the interest of developing countries, a multilateral framework should confirm the legitimacy of their policies and measures aimed at increasing the contribution of services to their growth. To strengthen their service sectors and increase their ability to penetrate foreign markets, developing countries need:

- * a transfer of technology in the services sector;
- * improved infrastructures;
- * access to information and participation in or access to information networks;
- * more liberal conditions for the export of services by means of the movement of persons to foreign countries;
- * means of entering markets already dominated by firms from developed countries; and
- * the cooperation of developed countries in importing services from developing countries.

This Article discusses various elements that were proposed during the first stage of negotiations in the Uruguay Round Group of Negotiations on Services⁶ for inclusion in the multilateral framework envisaged in Part II of the Declaration on the Uruguay Round.⁷ The

⁴ See *International Trade In Goods And Services: Protectionism, Structural Adjustment And The International Trading System—Services, Report by the UNCTAD secretariat*, UNCTAD Res. 159, 34(2) U.N. TDBOR (Agenda Item 6(c)) at 10-20, U.N. Doc. TD/B/1162 (1988) [hereinafter *Services Report*]; U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *TRADE AND DEVELOPMENT REPORT*, 1988, at 135-222, U.N. Doc. UNCTAD/TDR/8, U.N. Sales No. E.88.11.D.8 (1988) [hereinafter 1988 *TRADE REPORT*].

⁵ Nevertheless, not all unnecessary legislation creates barriers. U.S. trade legislation aims at achieving the removal of such barriers, either through negotiation or threat of retaliation. See *The Trade and Tariff Act of 1984*, Pub. L. No. 98-573, 98 Stat. 2948 (1984) (codified at 19 U.S.C. §§ 1671-1677h (Supp. IV 1986)) [hereinafter *U.S. Trade Act*]. Confirmed and extended in the *Omnibus Trade and Competitiveness Act of 1988*, H.R. 3, 100th Cong., 2d Sess. § 1101(b)(9), 133 CONG. REC. H1883-2008 (daily ed. Apr. 20, 1988). See also deKieffer, *The Omnibus Trade and Competitiveness Act of 1988: Amendments to Section 301*, in *THE NEW TRADE LAW—OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988* 171 (1988).

⁶ The Uruguay Round was initiated in Punta del Este, Uruguay in September 1986.

⁷ GATT Press Communiqué No. 1396, Sept. 25, 1986, reprinted in KELLY, KIRMANI,

proposed elements examined here are:

- (1) the inter-relationships of the "new issues;"
- (2) the major negotiation issues;
- (3) the concepts and international instruments relevant to the negotiations; and
- (4) the ingredients for a multilateral framework on trade in services.

The position of the developing countries in the negotiations on trade services under Part II of the Uruguay Round has not fully emerged. Therefore, a discussion at this time of the major elements that will determine their position is appropriate.

II. The Inter-relationships of the "New Issues"

Although the "new issues" (that is, trade-related aspects of intellectual property rights (TRIPS),⁸ trade-related investment measures (TRIMS),⁹ and trade in services), are treated separately in the Uruguay Round agenda,¹⁰ important links exist between these issues.¹¹ Together they form the structure of a single global problem, namely the creation of comparative advantage and international competitiveness. Their inclusion in multilateral trade negotiations reflects fundamental changes in the processes of production and trade caused by advances in information and communications technology.

In today's world, the development, rapid diffusion, and mastery of technology are what enable countries to create comparative advantages and become competitive in international markets. Export

XAFA, BOONEKAMP & WINGLEE, ISSUES AND DEVELOPMENTS IN INTERNATIONAL TRADE POLICY app. II (International Monetary Fund Occasional Paper No. 63, Dec. 1988) [hereinafter IMF Paper].

⁸ "The negotiations in the Uruguay Round Group on [TRIPS] aim to identify GATT provisions that might apply to TRIPS, elaborate new disciplines, as appropriate, and develop a multilateral framework in counterfeit goods, building on the work already done in the GATT." *Id.* at 39.

⁹ "The Uruguay Round Group on [TRIPS] is identifying relevant TRIMS, such as local content and export requirements, and it is examining various GATT Articles to assess their relevance for trade-distorting or trade-restrictive effects of investment measures." *Id.* at 39-40.

¹⁰ TRIPs and TRIMs deal solely with trade in goods.

¹¹ The negotiations in these areas are taking place against the background of Title III of the U.S. Trade Act, *supra* note 5, §§ 301-308. This law mandates U.S. negotiating objectives in the areas of services, investment, intellectual property, and high technology goods. *Id.* §§ 305-308. It also grants authority to take retaliatory action in the form of trade restrictions on imports of goods from countries found unilaterally to have taken "unjustifiable," "unreasonable," or "discriminatory" action against U.S. exports. *Id.* § 301. The term "export" is given very broad definition, and includes external investment. *Id.* § 307.

Trade action against countries who, despite whatever action they may have taken in other areas, have not breached their GATT obligations is clearly not consistent with GATT. Because of this, the United States' initiatives have been interpreted by many countries as an attempt to legitimize this law which is otherwise inconsistent with GATT.

success and control of international markets depends less on the fixed or static comparative advantage of natural resources or low labor costs, and more on the dynamic capacity of a country to innovate, adapt, imitate, and improve technology. In essence, information is becoming the key element in the productive process, and competition in innovation is becoming more important than price competition. Conversely, raw materials and labor are declining as a percentage of production costs.¹²

Technology is a crucial element in international investment flows, and at the same time it makes possible the rapid expansion of trade in services. Direct foreign investment has allowed the transfer of technology and the flow of information. Communication, a larger component of the trade in services, has increased the innovation, adaptation, and imitation of products and services, and thereby contributed to the rate of technological diffusion.

Consequently, there is an increased demand for specialized knowledge by producers of industrial and agricultural goods and producers of services. Converting basic research into commercially applicable information is accomplished by the "producer service sector."¹³ This sector provides strategic support to the other sectors by enabling them to adapt their products continually to international competition.¹⁴

TNCs are the major sources of technological evolution, through research and development increasingly supported by their home governments. This mastery of advanced information and communication technologies by the TNCs has given them an advantage in the production and trade of goods and services. Their domination has been enhanced by the mutual support that exists between the goods and services sectors, and by the TNC's domination of the "modes of delivery" of information- and capital-based services. Control of markets, especially those associated with higher technologies, can be

¹² J. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 84 (1975).

¹³ [Producer services act] as the interface between improvements in the technological and physical infrastructure and the producer. They translate improvements in the infrastructural services into production while, at the same time, they derive the value added from this function. The demand for producer services is most pronounced in those firms wishing to penetrate new markets, to adapt or expand their products (or services) or to adapt to new technologies.

Services Report, *supra* note 4, at 11. For a list of exemplary producer services, see *id.* at Annex.

¹⁴ See U.S. CONG., OFF. OF TECH. ASSESSMENT, *INTERNATIONAL COMPETITION IN SERVICES* 20 (1987) [hereinafter OTA REPORT]. See also *International Trade in Goods and Services: Protectionism, Structural Adjustment and the International Trading System, Services and the development process: further studies pursuant to Conference resolution 159 (VI) and Board decision 309 (XXX)*, Report by the UNCTAD secretariat, UNCTAD Res. 159, 33 U.N. TDBOR (Agenda Item 9) at 15-17, U.N. Doc. TD/B/1100 (1986) [hereinafter *Further Services Study*]; *Services Report*, *supra* note 4, at 10-12; 1988 TRADE REPORT, *supra* note 4, at 173-184 & 211-219.

achieved through the domination of the service sectors, given the link between goods and service exports.

The world can be divided into two categories of countries: the "knowledge rich" and the "knowledge poor." The position of the knowledge-poor countries in the world economy and international division of labor is declining as their main advantages, rich natural resource endowment and lower labor costs, have become less important. As a result, they are making considerable efforts to increase the transfer of technology to themselves and build an indigenous technological infrastructure. Many developing countries are implementing policies with these objectives in mind.

On the other hand, the knowledge rich are obviously tempted to restrict the diffusion of knowledge with a view both to artificially increase their market value and improve their competitive position. In other words, governments tend to adopt "strategic" trade policies aimed not at the liberalization of products and services of export importance to them, but designed to reduce the competitiveness of rival producers. The knowledge rich can then secure a larger share of the "rent" on the production and export of information.¹⁵

Under one strategic policy scenario, actions are aimed at stimulating the development of new technologies while restricting access to knowledge and information. The knowledge rich achieve improved and secure access to world markets for "knowledge intensive" services, particularly through the investment mechanism. Meanwhile, the bargaining leverage of host-country governments negotiating with foreign investors is eroded, including the ability to demand the transfer by these investors of information and technology to the host country.

One aim of this strategic approach has been to control world markets for the purpose of exporting to developing countries those technologies that are facing a diminishing rate of productivity growth.¹⁶ Further goals of this approach are to appropriate new technologies and protect this property from encroachment, to create new markets, to penetrate potential existing markets, and to reduce uncertainty. The initiative by knowledge-rich countries to negotiate new multilateral rules on intellectual property, services, and investment¹⁷ may reflect the implementation of such strategic policies.

¹⁵ For a discussion of the concept of strategic sectors and policies, see generally P. KRUGMAN, *STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS* (1986).

¹⁶ This also provides extra revenues from already amortized research and development (R&D) investment, which can finance very expensive R&D activities associated with new technologies.

¹⁷ "Most of these licenses [of technology] go to affiliates—foreign joint ventures as well as overseas divisions of U.S. multinationals—where control of proprietary know-how is easier than with an independent foreign firm." OTA REPORT, *supra* note 14, at 18.

The initiatives in the Uruguay Round related to TRIPs¹⁸ are part of a general movement to expand the traditional boundaries of the intellectual property system. This expansion includes:

- (1) internationalization of the intellectual property system;
- (2) broadening the scope of protectable new ideas;
- (3) extension of the lifetime of protection;
- (4) reduction of the restrictive or regulatory measures normally associated with a monopoly situation; and
- (5) improvement of the enforcement mechanisms at national and international levels.

The last objective may be the underlying reason for introducing the intellectual property issue into the GATT framework. The enhancement of property rights in a strategy to control markets is an extremely important mechanism for appropriating new ideas and research and development (R&D) innovations, and for restricting their diffusion. Strong intellectual property rights are also an effective instrument for penetrating markets and reducing uncertainty.

The negotiations on TRIMs may be linked to the fact that the TNCs have become one of the major sources of information and new technologies. Gone are the days of the lone inventor, who is motivated only by curiosity and works in a garage. The R&D process has become a common, interdisciplinary enterprise requiring substantial human and economic resources such as sophisticated laboratories and research staff. In these respects, TNC's have a major advantage. To compensate for this advantage, developing countries place restrictions on inputs and investment, thereby encouraging TNCs to give technology to local companies at better terms.¹⁹

As previous studies have indicated, advances in information and communications technology have rendered services more transportable, and have facilitated the penetration of foreign markets for services.²⁰ These advances also mean that key producer services can be provided from a distance and that more services can be "traded."²¹ Such changes create both new opportunities and challenges for de-

¹⁸ For a discussion of the negotiating proposals with respect to TRIPs, TRIMs, and trade in services, see *Uruguay Round Papers on Selected Issues*, at 81-219, U.N. Doc. UNCTAD/ITP/10 (1989).

¹⁹ See OTA REPORT, *supra* note 14, at 20. "When foreign governments combine restrictions on inputs and investment to pressure U.S.-based multinational corporations into licenses either at arms length or with joint venture partners, they may be able to help local companies buy technology more cheaply than would otherwise be the case." *Id.*

²⁰ See 1988 TRADE REPORT, *supra* note 4, at 179-83.

²¹ The term "trade in services" has only recently emerged in economic debate, in parallel with initiatives to establish a multilateral framework for such "trade" in the context of GATT. Some economists have expressed doubts as to whether services can be "traded" at all. See T. Hill, *The Economic Significance of the Distinction between Goods and Services* (Aug. 23-29, 1987) (unpublished paper presented to the Int'l Assoc. for Research on Income and Wealth, 20th General Conf., Rocca di Papa, Italy, on file with the N.C.J. Int'l L. & Com. Reg.).

veloping countries. While access to more sophisticated services from developed countries is easier, over-reliance on such services can be harmful. The development of a strong domestic service producing sector is widely recognized as strategic for developing an indigenous ability to produce higher value-added manufacturing goods.²²

In this context, the clear connection between services and goods and services and competitiveness cannot be overstated. Services have become crucial to the efficient production of goods and the ability generally to compete in world markets. It is inaccurate any longer to refer to one country or group of countries as possessing a comparative advantage in goods and others an advantage in services. As the service content²³ of goods increases, so does the demand for such services and the value-added accruing to their suppliers. Many developing countries find themselves with a persistent and accelerating trade deficit in these services.²⁴

At stake in earlier GATT multilateral rounds and in many areas of the Uruguay Round was the ability of exporting countries to compete on more equal terms with domestic suppliers through the liberalization of trade barriers. In the "new issues" negotiations, the concern is for the future production and exporting capacity of countries, as well as the ability to retain the value-added from such production.

Traditional economic theory predicts that all parties gain from the mutual elimination of barriers to trade through application of the theory of comparative advantage. The "new issues" negotiations, however, risk becoming a zero-sum negotiation. Developing countries would lose from any international trade rules that excluded them from the benefits of new technologies. For example, the internationalization of the property rights system, especially if backed up by threats of trade retaliation, would impede the diffusion of new technologies to developing countries and their development of indigenous capacities. Developing countries would also lose from rules that placed the trade retaliatory power of the home countries behind the TNCs and legitimized such retaliation under GATT. A further loss would occur from adopted rules that fail to recognize the legitimacy of developing countries' efforts to develop their services sectors and that legitimize retaliatory trade measures against such actions.

Ironically, proposals being presented as advancing further liber-

²² See OTA REPORT, *supra* note 14, at 34. "Knowledge-based services . . . provide a critical part of the foundation and infrastructure for the production of high-value-added manufactured goods." *Id.*

²³ "[L]ines are usually drawn so that the category labelled services includes nearly all economic activities *except* production of tangible goods." OTA REPORT, *supra* note 14, at 35 (emphasis in original).

²⁴ See 1988 TRADE REPORT, *supra* note 4, at 153-54.

alizations of trade and investment may actually create barriers to market entry for developing countries, and increase the market domination by the TNCs.

III. Developments at the Group on Negotiation on Services

At the Ministerial Meeting that launched the Uruguay Round of GATT,²⁵ the "Ministers"²⁶ agreed to include negotiations on trade in services as a part of the new round of Multilateral Trade Negotiations (MTN). Their decision was embodied in Part II of the Uruguay Declaration as follows:

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.

GATT procedures and practices shall apply to these negotiations. A Group on Negotiations on Services is established to deal with these matters. Participation in the negotiations under this Part of the Declaration will be open to the same countries as under Part I. GATT secretariat support will be provided, with the technical support from other organizations as decided by the Group on Negotiations on Services. The Group of Negotiations on Services shall report to the Trade Negotiations Committee

When the results of the Multilateral Trade Negotiations in all areas have been established, Ministers meeting also on the occasion of a Special Session of the CONTRACTING PARTIES shall decide regarding the international implementation of the respective results.²⁷

This text carefully balances the United States' objective of including services in the Uruguay Round, and the developing countries' dual objectives of including services in the Uruguay Round and maintaining multilateral action on services (as distinct from goods) outside the supremacy of national laws and regulations.

On 28 January 1987, the Group on Negotiation on Services (GNS) decided that during the initial stages of the negotiations²⁸ the following five items would be addressed:

- * Definitional and statistical issues;

²⁵ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. This meeting was held in Punta del Este, Uruguay in September 1986.

²⁶ The Ministers are a different group from the "Contracting Parties" of the GATT.

²⁷ Ministerial Declaration on the Uruguay Round, *see* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 33 B.I.S.D. Supp. 19 (42d Sess. 1987).

²⁸ The Program for the Initial Phase of the Negotiations 33 B.I.S.D. Supp. 48 annex 4 (42d Sess. 1987).

- * Broad concepts on which to base principles and rules for trade in services, including possible disciplines for individual sectors;
- * Coverage of the multilateral framework for trade in services;
- * Existing international disciplines and arrangements; and
- * Measures and practices contributing to or limiting the expansion of trade in services, including barriers to which transparency and progressive liberalization might be applicable.

At a meeting held at the end of 1987, the GNS agreed that the future negotiating program must be based on the five initially identified items, as well as other issues arising from those negotiations. At the GNS meeting held in July 1988, the Chairman²⁹ suggested that in the short term the GNS should concentrate on the key issues related to establishing principles and rules for trade in services. These include³⁰ the interrelationship between national treatment, progressive liberalization, and expansion of trade; development objectives; and movement of factors.³¹

The submissions put forth by the developed countries to the GNS have addressed expansion of trade, progressive liberalization, and transparency aspects of the negotiations.³² These proposals provide for a framework that would liberalize trade in services, including investment and transfer of funds. Developed countries support the concept of "access to markets"³³ through "presence" or "establishment,"³⁴ "national treatment,"³⁵ and "transparency."³⁶

²⁹ The Chairman at the July 1988 meeting was Colombian Ambassador Felipe Jaramillo.

³⁰ This list was agreed upon as the elements to be addressed at the first stage of the negotiations.

³¹ The Chairman had hoped to be able to present to the Ministers at the mid-term review meeting in Montreal in December 1988 a positive picture of the efforts undertaken so far in the GNS.

³² For a synopsis of the positions of developed market-economy countries and of developing countries that is provided in this Article, information has been drawn largely from material published by the GATT secretariat in various issues of *News of the Uruguay Round of Multilateral Trade Negotiations* (issued by Information Service of the General Agreement on Tariffs and Trade) and by the International Foundation for Development Alternatives (IFDA), Nyon, Switzerland, in various issues of *Special United Nations Service (SUNS)*, as follows:

News of the Uruguay Round of Multilateral Trade Negotiations: Issues: Dec. 10, 1987; Dec. 21, 1987; May 31, 1988; Aug. 2, 1988; Oct. 5, 1988; Nov. 30, 1988. *Special United Nations Service*: Issues: Mar. 3, 1987 (No. 1664); Sept. 24, 1987 (No. 1786); Nov. 6, 1987 (No. 1817); Dec. 17, 1987 (No. 1846); Mar. 30, 1988 (No. 1908); May 19, 1988 (No. 1940); July 21, 1988 (No. 1984); July 22, 1988 (No. 1985); Sept. 7, 1988 (No. 2000).

³³ The concept of "access to markets" is being defined in the course of negotiations.

³⁴ See *Further Services Study*, *supra* note 14, at 21. The concept of "presence" or "establishment" with respect to trade in services is defined in the following context: "[G]iven characteristics peculiar to services, the penetration of foreign markets for services generally requires some form of 'presence' in the market . . . Various terms are used to describe what is desired, *i.e.*, 'right to do business,' 'right of access,' 'right of commercial presence,' but it is difficult to avoid the conclusion that the basic issue is the familiar one of 'right of establishment' of foreign enterprises." *Id.*

³⁵ National treatment is the concept which requires that "internal taxes, and other

On the other hand, the developing countries' submissions have so far addressed the objectives of economic growth and development of developing countries. Their proposals call for a framework agreement covering cross-border trade in services.³⁷

IV. Negotiating Issues

Any multilateral framework for trade in services clearly needs to draw its principles, rules, and parameters from this Declaration.³⁸ Such a framework should also respect the policy objectives of national laws and regulations applying to services. Thus, the negotiation of the multilateral framework needs to build upon the progressive liberalization of trade in services as a means of expanding trade and economic growth of all trading partners, particularly developing countries. The framework also should include general obligations accepted by all countries covering actions they will take to further these objectives. The obligations then could be applied *mutatis mutandis* in the more concrete context of specific sectors.

Given all this, the main objectives of a multilateral framework for trade in services should be:

- (1) the identification of general criteria that could be elaborated upon in sectoral agreements;
- (2) the assurance of balance among these criteria; and
- (3) the legitimization of certain principles, policies, and measures so as to preclude unilateral interpretations.

More importantly, the framework must ensure that the interests of all countries, particularly weaker trading partners, will be preserved in sectoral negotiations, and that the objective of economic growth for developing countries is furthered. The framework also needs binding obligations, which will ensure wide adherence and result in a significant effect on world trade.

Negotiators must use caution, however, in developing the principles that will govern sectoral agreements. Only principles or obli-

internal changes, and laws, regulations and requirements affecting the internal sale, purchase transportation, distribution, or use of products and internal quantitative regulations . . . should not be applied to imported or domestic product so as to afford protection to domestic production." *Further Services Study, supra* note 14, at 21.

³⁶ The concept of transparency requires that "regulations that hamper or distract trade in services should be transparent, *i.e.*, open and unambiguous." U.S. GOVERNMENT, U.S. NAT'L STUDY ON TRADE IN SERVICES: A SUBMISSION BY THE U.S. GOVERNMENT TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE 57 (1984) (SUDOC PrEx 9.2:T 67/4) [hereinafter U.S. NATIONAL STUDY].

³⁷ See *supra* note 32.

³⁸ "Part II of the Ministerial Declaration of Punta del Este on the Uruguay Round of Multilateral Trade Negotiations states that negotiations shall aim to establish a multilateral framework of principles and rules for trade in services . . ." *Services Report, supra* note 4, at 19.

gations relevant to a broad range of sectors can be included in such a framework. Moreover, before sectoral agreements are reached, the applicability of the principles to specific sectors must be tested. Drawing up the multilateral framework, therefore, involves exploring how the fundamental objectives of the Uruguay Declaration can be given a more precise and binding character that will be generally applicable to all service sectors.

The following discussion briefly examines the main elements proposed for inclusion in the multilateral framework for trade in services and comments on their implications for developing countries.

A. Definitions

One of the key issues facing the GNS is how to define "trade in services." Developed countries take the position that a definition of trade in services may not be necessary³⁹ or that a definition could be worked out at a time parallel to the negotiation of a framework. For developing countries, however, a clear definition of trade in services is important. Such a definition would establish the parameters of the negotiations and prevent modifications in the mandate at a later stage.⁴⁰ Also it would limit the powerful countries from applying coercive measures based on their own unilateral and subjective definitions, particularly as to what constituted "barriers" to trade in services.

While it may not be possible to arrive at a generic definition of trade in services, it should be possible to formulate an illustrative definition, which could clarify what was not trade in services. The definition should stress that "trade" in services could be transmitted by certain modes, that is, persons, capital, information, or goods.⁴¹ Nevertheless, it is essential to differentiate trade from immigration and investment.⁴²

Criteria for a definition in trade in services should include: (1) that cross-border movement is for the specific purpose of providing or receiving a specific service and, (2) that cross-border movement is temporary and necessary to provide or receive the service. The concept of providing or receiving a specific service could be included in the multilateral framework and elaborated upon in full detail in the

³⁹ They argue that no definition of trade in goods existed when GATT was negotiated.

⁴⁰ See 1988 TRADE REPORT, *supra* note 4, at 215-16.

⁴¹ *Service Report*, *supra* note 4, at 4; 1988 TRADE REPORT, *supra* note 4, at 150. In a more recent publication, G. Feketukety used the term "money" instead of "capital." G. FEKETUKETY, INTERNATIONAL TRADE IN SERVICES—AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS (1988).

⁴² This is one of the major reasons why a definition is necessary for trade in services, but less important for trade in goods.

context of the sectoral negotiations; that of temporariness could be established through legal mechanisms such as the periodic issuance of permits or licenses.

These concepts are to a certain extent already applied to trade in services through origin rules for special tariff items or preferential regimes on trade in goods.⁴³ They should be extended to cover persons and capital as well.

B. Statistics

A second question is whether negotiations can take place without adequate statistics to sufficiently disaggregate trade in the most important sectors and enable countries to identify their trading partners. Statistics on services in the balance of payments are crude and inadequate due to different methods of classifying and reporting statistics by countries, a general lack of disaggregation, and an inability to identify sources and destinations.

Developed countries have recognized the inadequacies of internationally comparable data, but believe the negotiations cannot wait for major improvements, which would involve many years of work. At the same time, developed countries have launched major programs aimed at improving their own statistical methodologies for trade and production in services.⁴⁴

The developing countries consider statistical data on trade services important for conducting successful negotiations, and for quantifying the effects of rights and obligations under the future framework agreement. The negotiation of the multilateral framework cannot await the establishment of a new statistical system. Nevertheless, mechanisms should be established so that developing countries have access to advanced methodologies and to technical assistance.⁴⁵

C. Multilateral Framework

A major issue in the negotiations to date is the relation between the multilateral framework for trade in services and the negotiation of sectoral disciplines. Some countries favor the negotiation of the framework as a prerequisite to sectoral negotiations, while others believe that the framework and the sectoral negotiations can proceed simultaneously. Developing countries prefer the former approach because the prior negotiation of a framework that clearly reflects their rights and interests enables them to diffuse coercive ap-

⁴³ These preferential regimes differentiate products repaired or processed abroad from imports of goods.

⁴⁴ See *Service Report*, *supra* note 4, at 6-8.

⁴⁵ A more thorough sectoral statistical base is also essential for launching negotiations on detailed sectoral arrangements.

proaches and strengthen their position in the subsequent sectoral negotiations. In these sectoral negotiations, the developing countries' delegations might be less numerous and influential, and thus require a clear frame of reference to protect their interests. Such a framework is particularly important if elements of the "appropriate regulation" approach proposed by certain developed countries are adopted as a negotiating technique.⁴⁶

Another important question concerns the nature of the disciplinary principles governing the multilateral "umbrella framework." That is, would the framework provide an enforceable mechanism for governing countries' "service trade policies" or would it simply provide a set of guidelines for the negotiation of more detailed sectoral disciplines? Presentations with respect to ITU,⁴⁷ UN Code of Conduct on Liner Conferences,⁴⁸ and ICAO⁴⁹ to the GNS, have demonstrated the heterogeneity and complexity of sectoral arrangements, and the difficulty of applying a general set of GATT-type guidelines to specific service sectors.

The framework should provide principles and rules for the negotiation of sectoral agreements that ensure the main goals of Part II of the Uruguay Round Declaration are faithfully applied in sectoral negotiations. The multilateral framework should also legitimize development-oriented measures in the service sector to protect developing countries from unilateral interpretations and coercive tactics by developed countries.

D. Progressive Liberalization

A fourth issue facing the GNS is how to provide for liberalization and effective access to markets. Developed countries have a variety of proposals, but the essential elements are investment-oriented, including:

- (1) the need to establish a "presence" in the market to provide the service;
- (2) "national treatment" for foreign firms so established; and
- (3) unrestricted transborder data flows.

GATT terminology has been heavily used, but often out of context. Proposals by developed countries elaborate in some detail on these terms; in particular they have discussed the concepts of "access to markets" through "presence" or "establishment," "national treat-

⁴⁶ That is, the EEC has argued that negotiations should address the unnecessary protective aspects of services regulation rather than that which is appropriate to the achievement of the essential objectives of the regulations.

⁴⁷ See U.N. Conference on Trade and Development, Services and the Development Process, at 55, U.N. Doc. TD/B/1008/Rev. 1, U.N. Sales No. E.85.II.D.13 (1984) [hereinafter Development Process].

⁴⁸ *Id.* at 58-59.

⁴⁹ *Id.* at 55.

ment," and "transparency."⁵⁰

E. The GATT Model

GATT provides guidance on certain principles applicable to the progressive liberalization of trade in services. One principle is that of transparency through the publication of trade laws and regulations. In the case of services, however, this requires an agreement on which laws and regulations governments must publish.

A second important GATT principle is that of agreement to enter into multilateral negotiations aimed at progressive liberalization. Liberalization under GATT has been achieved by:

(1) recognizing the legitimacy of certain protective measures (for example, customs tariffs), which are reduced on the basis of mutual benefit, reciprocity, and extension of concessions under the unconditional most-favored-nation clause of GATT Article I;⁵¹ and

(2) recognizing that the value of tariff concessions is frustrated by the use of other protective measures.⁵² Thus, the GATT establishes acceptable, negotiable forms of protection, such as customs tariffs. Quantitative measures are in principle prohibited or permitted only in exceptional cases,⁵³ and therefore are not negotiable. Similarly, the "national treatment" obligation recognized in GATT⁵⁴ is intended to prevent host countries from using internal discriminatory measures. This differs radically from "national treatment" as applied to enterprises, which has been accepted in an OECD

⁵⁰ See *infra* at pp. 914-43 for definitions of these.

⁵¹ The relevant clause of Article I provides, *inter alia*:

3. The margin of preference on any product in respect to which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(a) in respect of duties or charges on any product described in such Schedule, the difference between most-favored-nation and preferential rates provided for therein . . . ;

(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favored-nation and preferential rates existing on April 10, 1947.

GATT, *supra* note 25, art. I(3)(a)-(b).

⁵² The application of these other measures has been restricted through ever-increasing common disciplines to enforce the prohibition of QRs, the application of national treatment, and so on.

⁵³ The exceptional cases permitting protection through quantitative measures are:

(a) any measure of internal quantitative control in force in the territory on any contracting party on July 1, 1939 or April 10, 1947, at the option of the contracting party; *Provided* that any such measure which would be in conflict with the provisions of paragraph 3 of this Article shall not be modified to the detriment of imports and shall be subject to negotiation for its limitation, liberalization or elimination;

(b) any internal quantitative regulation relating to exposed cinematograph films and meeting the requirements of Article IV.

GATT, *supra* note 25, at art. III(4)(a)-(b) (emphasis in original).

⁵⁴ *Id.*, art. III.

instrument.⁵⁵

With respect to services, however, it is difficult to envision the application of frontier price measures comparable to the custom tariff. Access to the market requires cross-border movement of persons, capital, goods, and information, and regulations dealing with trade in services must address such movements. Note, however, that establishment or presence in the market, combined with national treatment (and an unrestricted flow of data) implies the total removal of protection, something that has never been achieved for goods.

Developed countries give priority to the inclusion of the "national treatment" principle in the multilateral framework. Although some see national treatment as an "operative provision,"⁵⁶ others consider it only a "yardstick."⁵⁷ Nevertheless, developing countries have difficulty even considering the national treatment provision in the context of services because it is presented as an obligation or concession in itself, not linked to frontier measures. This attitude by developed countries is an unreasonable intrusion on developing countries' "national economic space."⁵⁸

Entry into serious negotiations for access to markets depends upon prior agreement on:

- (1) which measures affecting trade in services are to be negotiated through the exchange of concessions (comparable to tariff rates in GATT); and
- (2) which measures are to be dealt with through action aimed at progressive uniformity with generally accepted criteria.

Possible scenarios for negotiations involving national treatment and market presence could include:

- (1) that both presence and national treatment are negotiable for the sectors concerned;
- (2) that presence is recognized as a right and national treatment is negotiable; or
- (3) that national treatment is recognized as a right and presence is negotiable. The third scenario is closer to the OECD ap-

⁵⁵ A vehicle through which the OECD has attempted to provide a basis for liberalizing trade in services is the Code of Liberalization of Current Invisible Operations, adopted by the OECD Council in 1961. See U.S. National Study, *supra* note 36, at 45-46. "Drawbacks [of the Code] would include the (1) current limitations on membership to OECD members; (2) the apparent ease with which obligations can be reserved and derogated; (3) the absence of strong enforcement mechanisms, binding arbitration, dispute settlement mechanisms, concepts of compensation or penalties; and (4) the general, though not complete, absence of the rights of establishment and to conduct business and of national treatment from listed liberalization measures." *Id.* at 46-47.

⁵⁶ For example, the United States.

⁵⁷ For example, the EEC nations.

⁵⁸ For example, India and Brazil.

proach,⁵⁹ but the first may be more in the interests of developing countries. This is because developing countries may want the market presence of foreign firms, but only to the extent necessary to carry out a limited number of specific activities.

Negotiations could be based on the concept of "appropriate regulation." Regulations on services would be recognized as necessary to achieve national objectives. Nevertheless, elements of the regulations might impede access to the market by foreign suppliers while not being essential to achieve the desired objective of the regulation. These latter elements would be subject to a procedure of identification, negotiation, and elimination.

The "appropriate regulation" approach is in the interest of developing countries, provided two limitations are imposed. First, the criteria against which "appropriateness" is judged must be drawn from a multilateral framework that adequately protects the interests and recognizes the rights of the developing countries. Second, this approach cannot imply that developing countries must open all their service regulations to scrutiny by all parties. Only the regulations involved in an international agreement should be subject to review, and only by the parties involved. It may be impractical, however, to negotiate solely on the basis of "appropriateness." The GATT model suggests there must be room to negotiate on the basis of reciprocity without depending entirely on value judgments or generally accepted criteria.⁶⁰

The application of GATT concessions by differentiating between "autonomous" and "concessional" tariffs may also be instructive to service negotiators. For example, some countries maintain legal tariffs on their books, but apply concessional tariff rates to trading parties. Recipients of these beneficial rates are countries with whom the concessional rates have been negotiated on a reciprocal basis, or countries entitled to the concessional rates under the most-favored-nation clause of GATT.⁶¹ The legal rates are not changed and if concessions are withdrawn for any reason, the legal rates enter into effect.

Using this approach countries can implement concessions on services without fundamentally changing basic immigration or investment laws. The concessional approach enables governments to

⁵⁹ The OECD countries have subscribed to a Declaration on National Treatment. No meaningful provision exists on the right of establishment.

⁶⁰ The approaches of the Standards Code and the Code on Government Procurement both illustrate some of the elements to be considered in negotiating a multilateral framework for trade in services. Under the Standards Code, adherents agree to adopt a common set of rules (based on harmonized international standards) while maintaining protection through other, legitimate means. Under the latter code, adherents accept common rules, but negotiate concessions with respect to the coverage of such rules.

⁶¹ GATT, *supra* note 25, art. I.

pursue their national objectives because the relevant laws and regulations are modified only to the extent necessary to conform to the conditions of specific multilateral sectoral agreements in which the governments participate.

F. Most-Favored-Nation Treatment

The fundamental, cornerstone principle of GATT is the unconditional most-favored-nation clause (MFN)⁶² under which any concession extended to one country has to be extended unconditionally to all other GATT contracting parties. This clause was generally respected in GATT negotiations until the Tokyo Round, when some countries applied certain nontariff code measures⁶³ only to signatories of the Codes, or those accepting special undertakings.⁶⁴

The argument to resort to this "conditional MFN" application was that countries which had mutually agreed to accept higher levels of obligation should not be required to extend the same treatment to countries which were unwilling to do so. This argument has been repeated in the GNS.

Nevertheless, the concessional approach contains a number of disadvantages. It is inconsistent with GATT⁶⁵ and has a discriminatory effect when applied. More importantly, when negotiations are conducted according to the principle, the needs of smaller, poorer, less "interesting" countries are ignored. Multilateral negotiations that followed this principle would degenerate into limited arrangements among "like-minded" countries.

G. Differential and More Favorable Treatment

Since the negotiation of the "Enabling Clause" during the Tokyo Round,⁶⁶ GATT has recognized the legitimacy of differential treatment, including principles previously contained in Part IV of GATT negotiated in the early 1960s (for example, non-reciprocity). The GATT approach to development has involved dealing with the trade and development needs and problems of developing countries by permitting exceptions to the generally applicable rules. It has been assumed that the application of GATT will lead to growth in the developing countries and the consequent phasing out of differ-

⁶² *Id.*

⁶³ This includes that on government procurement which was mentioned above.

⁶⁴ The United States, for example, generally does not extend the benefits of the Code on Subsidies and Countervailing Duties or the Code on Government Procurement to nonsignatories.

⁶⁵ Inconsistency with the GATT is not in itself an argument against applying the conditional approach in services.

⁶⁶ The Enabling Clause agreement, which resulted from the Tokyo Round, provides for differential and more favorable treatment of developing countries in various areas of trade policy. See GATT ACTIVITIES 1986, at 79 (June 1987).

ential treatment. This presumption was the basis for the graduation arguments,⁶⁷ which are now used against developing countries by the developed countries for protective and negotiating purposes.

Part II of the Uruguay Round Declaration recognizes that growth of developing countries is a principle aim. Thus the multilateral framework for trade in services should specifically provide positive measures promoting development and exclude any measures inhibiting development. Differential and more favorable treatment in the GATT sense should not be applied in the multilateral framework for trade in services. Rather, the developmental objective should be an inherent component of the multilateral framework's overall structure and an inherent component of the principles and rules in any sectoral arrangements. Most developing countries have adopted this position in the GNS.

H. Reciprocity

GATT negotiations are to be conducted on the basis of reciprocity and mutual advantage.⁶⁸ According to Part IV, developed countries should not seek reciprocal concessions from developing countries that are inconsistent with their trade, development, and financial needs. Nevertheless, the major discrepancy between developing and developed countries' GATT obligations, which is the difference in the level of tariff binding, does not arise from the application of this "non-reciprocity principal." Instead, it comes from the difficulty of incorporating countries with narrow export product interests into the multilateral tariff negotiating mechanism.

In a related context, "relative reciprocity"⁶⁹ has been maintained as a possible principle for the negotiations on trade in services. The basic methods for calculating reciprocity, trade coverage of improved access, and the degree of adherence to common criteria, however, could only be worked out in the sectoral negotiations.

Reciprocity must be provided to developing countries within the scope of the services negotiations. Offers to provide compensatory concessions on *goods* for concessions by developing countries on *services* are not consistent with the Uruguay Round Declaration. They are tantamount to asking developing countries to endanger their future development prospects in return for short-term gains.

⁶⁷ The graduation argument asserts that some countries which consider themselves developing countries have progressed to newly industrialized country (NIC) status and, therefore, no longer require subsidies traditionally given only to developing countries. Singapore and The Republic of Korea are often cited as examples.

⁶⁸ See GATT, *supra* note 25, arts. XXVIII, XXVIII (bis), XXXVI.

⁶⁹ Relative reciprocity is a concept put forward by the Mexican delegation which provides that a developing country will not be expected to make contributions and shall not be required to make concessions which are inconsistent with their individual development, trade and financial needs.

The main problem in this area is to provide meaningful reciprocity to developing countries. Comparable liberalization by developed countries does not provide developing countries with reciprocal benefits because the latter lack the ability to deliver their services to developed country markets. Moreover, applying the principle of reciprocity during negotiations concerning trade liberalization is simply not fair to developing countries. These countries have not fully developed regulations governing their services sector. Thus when reciprocity is used as a negotiating tool it gives a premium to the developed countries which have highly regulated services sector and therefore more with which to bargain.

Reciprocity is only useful to developing countries if:

- (1) they can make access to their markets conditional on contributions by foreign suppliers to the developing countries' improved competitiveness;
- (2) the selection of sectors gives priority to those where the developing countries have stronger competitive positions;
- (3) the developing countries have access *for* labor and *to* information; and
- (4) the developed countries cooperate in seeking arrangements that expand the services exports of developing countries.

I. Balance of Payments/Safeguards

Under GATT all countries are entitled to exceptions from their general obligations when they encounter serious disequilibria in their balances of payment.⁷⁰ Given the importance for most countries of services in the balances of payment, comparable provisions must be included in any multilateral framework for trade in services. Trade in services is already a major deficit item in the balances of payment of many developing countries, including heavily indebted countries.⁷¹ Nevertheless, while a general safeguard clause is needed,⁷² its specific character cannot be decided upon until an agreement has been reached on the overall nature and character of the general obligations themselves.

J. Equitable Expansion of Trade

As mentioned previously, GATT contains certain elements that apply when designing mechanisms for the progressive liberalization of trade in services as provided in the negotiating mandate, Part II of the Uruguay Round Declaration. Part II, however, implies that unlike the GATT approach for trade in goods, it cannot be assumed

⁷⁰ GATT, *supra* note 25, arts. XII, XVIII:B, respectively. The latter cannot be considered as "differential" treatment.

⁷¹ See 1988 TRADE REPORT, *supra* note 4, Part II, chs. 2, 5.

⁷² This is comparable to GATT, *supra* note 25, art. XIX.

that liberalization of trade in services necessarily results in trade expansion, economic growth of all trading partners, or the growth of developing countries. A number of factors produce this result including the different modes of delivery for services trade, the difference in technological levels and in the availability of financial and human capital between developed and developing countries, and the dominant positions of TNCs.

Elements of these models can be included in the multilateral framework adopted for trade services or in the sector negotiations. Of course, models other than GATT are available that would help ensure liberalization of trade in services leads to an equitably shared expansion of trade and economic growth. Some of these models will be examined below.

K. ICAO Model

The International Civil Aviation Organization (ICAO) and its Chicago Convention, the multilateral sectoral agreement for trade in civil aviation services,⁷³ provide an alternative structural model for a possible agreement. While not aimed at development objectives per se, the Chicago Convention has a structure that prevents advanced countries from completely dominating trade in civil aviation services and that permits vigorous international competition. To accomplish this, the Convention balances market access and benefits and the principle of reciprocity. The ICAO is structured "vertically" rather than "horizontally" like GATT. This means that the ICAO's principles (the so-called five freedoms)⁷⁴ are arranged in a hierarchy, with the most generally acceptable principles effective multilaterally, while the more onerous principles are negotiated bilaterally.

Under the ICAO structure, countries are free to accept higher or lower levels of obligations. Convention countries may accept more responsibilities when they believe their interests, including their de-

⁷³ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

⁷⁴ The five freedoms are set out in two companion agreements to the Chicago Convention. The International Air Services Transit Agreement provides for the first two freedoms on transit rights: (1) the privilege to fly across its territory without landing, and (2) the privilege to land for nontraffic purposes. International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693, E.A.S. No. 487, 84 U.N.T.S. 389. The International Air Transport Agreement provides for the exchange of the Five Freedoms of the Air, which includes the two listed above and the following: (1) the privilege to put down passengers, mail, and cargo taken on in the territory of the State whose nationality the aircraft possesses; (2) the privilege to take on passengers, mail, and cargo destined for the territory of the State whose nationality the aircraft possesses; and (3) the privilege to take on passengers, mail, and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail, and cargo coming from any such territory. International Air Transport Agreement, 1942, 59 Stat. 1701, E.A.S. No. 488, 171 U.N.T.S. 387. See also T. BUERGENTHAL, LAW MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 154-55 (1969).

velopment needs, warrant it. Maintenance of lower level obligations is not considered exceptional, unfair nor unreasonable. The Chicago Convention has ensured that all countries have some part in the world trade of civil aviation services. Such an approach may be applicable in other service sectors.

L. *Liner Code Model*

A second model provided by a multilateral agreement on services is the United Nations Code of Conduct on Liner Conferences.⁷⁵ This agreement recognizes the dominant position of the Liner Conferences and their positive contribution to shipping. The Code, therefore, does not establish a free trade environment by abolishing such conferences, but disciplines the conference's practices to ensure developing countries have access to the world shipping market. The provisions of the Code are designed to deal with the manifest problems of developing countries in the liner shipping industry, particularly restricted access to liner conferences, inadequate cargo shares, and inequitable relations between liner conferences and shippers.

The Code provides rules for the participation by member lines in the trade carried by conferences. To determine a share of trade within a pool operated under a conference, the Code requires that the national shipping lines of the two countries involved in the trade have equal right to participate in the freight and volume traffic.⁷⁶ Third country shipping lines, or cross-traders, have the right to acquire a significant part, such as twenty percent, in the freight and volume of traffic.⁷⁷ The Code also sets forth rules for establishing pools or other types of trade-sharing arrangements in conferences, as well as other internal conference activities, such as self-policing.⁷⁸ The same principles guide other types of trade-sharing arrangements in the absence of a pool.⁷⁹ The implementation of cargo-sharing provisions is normally left to conferences.⁸⁰

The ICAO Code reflects a number of principles under discussion in the GNS, such as nondiscrimination, transparency, market access, and regional economic integration. Nondiscrimination is reflected in the treatment of national shipping lines at both ends of

⁷⁵ Convention for a Code of Conduct for Liner Conferences, adopted Apr. 6, 1974, entered into force Oct. 6, 1983, U.N. Doc. TD/CODE/13/ADD.1 [hereinafter Liner Code].

⁷⁶ *Id.* art. 2(4(a)). See Guidelines Towards the Application of the Convention on a Code of Conduct for Liner Conferences, UNCTAD/STship/1 (1986) [hereinafter Guidelines].

⁷⁷ Liner Code, *supra* note 75, art. 2(4(b)).

⁷⁸ *Id.* art. 5. See also Guidelines, *supra* note 76, at 47.

⁷⁹ Liner Code, *supra* note 75, art. 2(12, 13).

⁸⁰ See Guidelines, *supra* note 76, at 43. The Guidelines provide in part: "The Implicit assumption in the Code is that conferences would administer the cargo sharing system." *Id.*

the trade. The so-called 40:40:20 formula⁸¹ generally referred to in connection with the Code is not spelled out in the Convention, but is arrived at by an oversimplified mathematical deduction. In fact, the provisions of the Convention on trade participation are solely based on the principle of equality among groups of national lines.⁸²

With regard to transparency, the ICAO Code provides for extensive consultation procedures among liner conferences, individual shipping companies, and shippers' organizations on all facets of the conference agreement that are of mutual interest to the parties concerned.⁸³

Concerning market access, Article 2 of the Code guarantees access by recognized shipping lines to conferences serving the trades of their respective countries.⁸⁴ It also assures adequate participation of third country shipping lines in those conferences.⁸⁵ This participation right is not conferred on individual lines but, rather, on a group of third-flag carriers wishing to participate in the trade.

Through the provisions of Article 2, the Code equally contributes to efforts of regional economic integration. To this end, Article 2(8) allows for the regionalization of national cargo shares to the benefit of joint venture shipping companies or similar cooperative arrangements.⁸⁶

This ICAO approach might serve as a model for other service sectors where the supply and distribution of services is dominated by a limited number of large corporations, and where the distribution networks of such corporations could be used to promote developing country exports.

M. Law of the Sea Model

A third model previously mentioned, the Law of the Sea Convention, provides that the deep sea-bed and ocean subsoil are beyond the limits of national jurisdiction (the Area), and that the resources found there belong to the common heritage of mankind.⁸⁷

⁸¹ Unless otherwise agreed when determining a share of trade within a pool operated under a conference, the group of national shipping lines of each of two countries, the foreign trade between which is carried by the conference, shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference. Third-country shipping lines, or cross-traders, if any, shall have the right to acquire a significant part, such as 20%, in the freight and volume of traffic generated by that trade and carried by the conference.

⁸² Liner Code, *supra* note 75, art. 2((4a)).

⁸³ *Id.* art. 11.

⁸⁴ *Id.* art. 2(1).

⁸⁵ *Id.* art. 2((4b)). See *supra* note 80 & accompanying text.

⁸⁶ *Id.* art. 2(8).

⁸⁷ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, arts. 136, 137, U.N. Doc. A/CONF. 62/122 (1982) [hereinafter *Law of the Sea*]. This Convention has not yet entered into force, but some of its provisions are customary international law.

This means that claims or exercises of sovereign rights over the Area are legally impermissible and preclude the appropriation of any resources found there.

All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the International Sea-Bed Authority⁸⁸ shall organize and control the activities in the Area, carry out activities in the Area directly through the Enterprise,⁸⁹ and administer its resources.⁹⁰ The Law of the Sea Convention also provides that the needs of developing countries which have not attained self-governing status should be taken into consideration.⁹¹

The concept of common heritage of mankind provides for the equitable sharing of financial and other economic benefits derived from the activities in the Area on a nondiscriminatory basis. Transfer of technology to the Enterprise and developing countries on reasonable commercial terms is envisioned in the Convention.⁹² The international legal obligation to share revenue or otherwise to provide direct benefits to the international community from deep sea-bed mining has been accepted,⁹³ and the existence of revenue-sharing provisions in national legislation on deep sea-bed mining suggests movement towards recognition of an international legal obligation.⁹⁴

The concept of common heritage of mankind may be applicable in service sectors where most developing countries are not yet in a position to participate in world trade because of inadequate technological or financial resources. This model provides guidance in service sectors that call for advanced communications or information

⁸⁸ *Id.* art. 156(2). All State parties are ipso facto members of the authority. *Id.*

⁸⁹ *Id.* art. 170. The enterprise shall be the organ of the Authority which shall carry out activities in the area pursuant to article 153. *Id.*

⁹⁰ *Id.* art. 151. Article 151 delineates the production policies of the Area.

⁹¹ *Id.* art. 140. The Convention also recognizes the needs of groups of people, not just nations, who have not achieved this independence. This status is determined by the United Nations.

⁹² Annex IV of the Convention provides for the Statute of the Enterprise which is the organ of the Authority which shall carry out activities in the Area directly pursuant to article 153(2(a)), as well as the transporting, processing and marketing of minerals recovered from the Area. Law of the Sea, *supra* note 87, Annex IV.

Article 144 of the Law of the Sea provides for the transfer of technology to developing countries. Some legal experts argue that the common heritage concept also reflects an emerging rule of customary law that mankind must benefit from the development of mineral resources of the deep sea-bed. However, the nature of the benefits, pending entry into force of the new Convention establishing a deep sea-bed regime, remains fundamentally unsettled.

⁹³ Law of the Sea, *supra* note 87, arts. 136, 137.

⁹⁴ See, e.g., Deep Sea-bed Hard Mineral Resources Act of 1980, 39 U.S.C. §§ 1401-1473 (1980); Law No. 81-1135 of 23 Dec. 1981 on the Exploration and the Exploitation of the Mineral Resources of the Deep Sea-bed, 1981 J.O. 3499-3500, *reprinted in* 20 I.L.M. 808 (1982); Edict on Provisional Measures to Regulate the Activity of Soviet Enterprises to the Exploration and Exploitation of Mineral Resources of Sea-bed Areas Beyond the Limits of the Continental Shelf, Presidium of the Supreme Soviet, Decree on the Law of the Sea, Apr. 18, 1982, *Izvestia* 94, Apr. 17, 1982, at 1, *reprinted in* 21 I.L.M. 551 (1982).

technologies, where access to networks could be provided to developing countries or reserved for their future use.

N. Balanced Opportunity to Provide Services

As noted above, unlike goods, services are provided to foreign markets through different modes of delivery, and countries and firms have differing abilities to use such modes. Equitable trade growth is not ensured if the liberalization provided under the framework discriminates against the movement of persons, the only delivery mode available to most developing countries. Developing countries stress the need for giving priority to services exported through the transborder movement of persons or labor.

Recognition of the four modes of delivery: people, capital, information, and goods is necessary in the implementation of multilateral agreements on services. Implementing regulations are required for immigration, investment, transborder data flows, and even trade in goods relating to service trade.⁹⁵ An agreement should deal with the conditions under which these delivery modes can cross frontiers either to receive or to provide a service. The agreement should also differentiate between "presence" needed to provide or receive a service and permanent establishment constituting immigration or foreign direct investment. Certain aspects of the Canada/United States Free Trade Agreement are instructive in this respect, where greater movement of persons associated with trade in services has been achieved.⁹⁶

Information flows, as a means of delivering services to foreign markets, are crucial to the competitive position of service suppliers, and are a particularly essential element for the global operation of TNCs. For this reason, access to information via participation in international information networks must be assured to developing countries when the multilateral framework is translated into more specific provisions at the sectoral level.

O. Barriers to Trade in Services

Several developed countries have indicated to the GNS what they believe are barriers to trade in services. These perceived barriers include measures related to investment, repatriation of funds, visa problems, and data flows, as well as subsidies and discriminatory provisions of services.⁹⁷ The definition of "barriers to trade in serv-

⁹⁵ There would also appear to be inherent contradiction between requests for "national treatment" for national corporations in foreign markets and the exercise of extraterritoriality over such corporations.

⁹⁶ United States-Canada Free Trade Agreement Implementation Act of 1988, arts. 1501-1506, Pub. L. No. 100-449, 102 Stat. 1851, 27 I.L.M. 281.

⁹⁷ See *supra* note 34 for the public references to these documents.

ices" is of course dependent upon a definition of "trade in services." At the minimum, a measure could not be considered a barrier to trade in services unless it effectively prevented a service from being received from, or provided to, a foreign resident. Such a concept, however, can be generally stated in the multilateral framework as the measures that impede trade in services and that have radically different impacts in separate sectors.⁹⁸

P. Transfer of Technology

Many developing countries are deeply concerned about the transfer of technology and its relevance to the objectives of the negotiations. The concept of fair and equitable access to new technologies must include not merely the right to establish a network in a territorial space, but also the right of access to a network. To the extent that services affect the pace of over-all development of the economy,⁹⁹ technological advancement in services should assume a central place in the development process. In this context, the UNCTAD draft code of conduct for transfer of technology is pertinent.¹⁰⁰

In particular, the Mexican submission to the GNS¹⁰¹ proposes that ways and means should be studied to speed up the transfer of technology from developed to developing countries. The Paper suggests that GNS study the UNCTAD code of conduct,¹⁰² and it may be that the Group should consider other measures. Under whatever guidelines are deemed appropriate, it is clear that GNS must examine the obligations of operators and their home governments in regard to the transfer of technology.

Q. Restrictive Business Practices

Restrictive Business Practices (RBP) are private (nongovernmental) measures used by enterprises to strengthen their position in a given market. These measures can be used by an enterprise individually to achieve or maintain a dominant market position, or they can be used in concert with other enterprises supplying similar goods or services to limit competition. Enterprises frequently resort to RBPs, either individually or in concert, in an attempt to control a

⁹⁸ In any case, the exercise of national sovereignty over the permanent establishment of persons or enterprises, or over information resources, could not be considered a barrier to trade.

⁹⁹ Services affect the economy not only through their linkages to the production of goods, but also through the provision of critical services such as banking, insurance, and telecommunications.

¹⁰⁰ U.N. CONF. ON TRADE AND DEV., DRAFT INTERNATIONAL CODE OF CONDUCT ON THE TRANSFER OF TECHNOLOGY, at 20, U.N. Doc. TD/CODETOT/47.

¹⁰¹ The Mexican submission to the GNS is a restricted document. See *supra* note 34 for public references to this document.

¹⁰² It has been under negotiation for ten years in UNCTAD.

market; however, the results often produce adverse effects on international trade.¹⁰³ Since TNCs are the main providers of internationally traded services, their control and use of RBPs is an important element of any framework agreement on trade in services.

Since RBPs are barriers to the expansion of trade at the national level, most developed countries, a growing number of developing countries, and some socialist countries have adopted RBP-control legislation.¹⁰⁴ As new entrants in many sectors, developing countries are often seriously threatened by RBPs. Also, many developing countries have difficulties detecting and controlling RBPs.

At the international level, as early as 1947, the Geneva draft of the GATT attempted to regulate RBPs.¹⁰⁵ Nevertheless, although the first part of this draft, which gave birth to GATT, was adopted by the Havana Charter in 1948, its second part, which included provisions on RBPs, was never adopted.¹⁰⁶ In 1980, the United Nations General Assembly adopted a voluntary code called the *Set of Multilaterally Agreed Equitable Principles and Rules For the Control of Restrictive Business Practices*.¹⁰⁷ Its institutional machinery is provided by the Intergovernmental Group of Experts on RBPs operating within the framework of an UNCTAD committee.¹⁰⁸ The principles and rules of the code concern all enterprises, including transnational corporations, and apply to all transactions in goods and services.¹⁰⁹

Given the strategic role of services in the production/distribution chain, any distortion in the functioning of services markets is likely to damage many other markets. In particular, RBPs in producers services will trickle down and hinder those producers for whom the services affected by such RBPs are strategic inputs. Moreover, international trade in services differs from international trade in goods in ways that amplify the effect of RBPs. For example, trade in services involve a higher proportion of factor movements, especially labor and information, than does trade in goods, and RBPs are particularly prevalent in these factor movements. This characteristic of trade in services requires a need for a broader definition of RBPs, which takes into account the effects that an RBP in a crucial service activity will have on other sectors.

¹⁰³ For a multilaterally agreed definition of RBPs, see U.N. CONF. ON TRADE AND DEV., THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES, at 7, U.N. Doc. TD/RBP/CONF/10/Rev.1, U.N. Sales No. E.81.II.D.5 (1981) [hereinafter SET OF PRINCIPLES AND RULES].

¹⁰⁴ The Law of Companies with Foreign Capital Participation, 17 POLISH J. L., item 88 (1986). Also, India has the Monopolies and Restrictive Trade Practices Act of Dec. 27, 1969. Hungary has the Law on the Prohibition of Unfair Economic Activities Act IV of 1984.

¹⁰⁵ GATT, Oct. 30, 1947, art. XIX, 61 Stat. (5), (6).

¹⁰⁶ GATT, Mar. 24, 1948, 62 Stat. 1988.

¹⁰⁷ SET OF PRINCIPLES AND RULES, *supra* note 103, Resolution 35/63, at 3.

¹⁰⁸ *Id.* at 14.

¹⁰⁹ *Id.* at 8.

Given the monopolistic or monopsonistic nature of most major data services markets, developing countries should devote particular attention to RBPs in this area. Moreover, several characteristics of information as a commodity (having to do with the capacities of networks, among other things) tend to make RBPs an almost intrinsic component of corporate strategies in this sector. As with most technology- and research-intensive activities, information services are characterized by the dominant market position of a small number of corporations. Large TNCs might be tempted to further consolidate their market power through the use of various RBPs.¹¹⁰

Any intentional effort on the part of TNCs to distort normal competition, however, may not be relevant in the context of information services. The characteristic of information as both a factor of production and a product can cause "normal" actions, which are actions not intended to distort the market, that have the same results as intentional market-distorting RBPs.

For any company providing information services, the size of its distribution network is a key element. Given the high fixed costs of building and operating international information systems, such networks must be large enough to quickly generate the income necessary to offset these costs. The intrinsic "over capacity" situation of such a network (at least in its initial stage) tends to confer to any global strategies in this sector the status of "ordinary business." The economic reality, therefore, is that only a small number of actors can enter the expensive and knowledge-intensive race to reach a survivable size in information markets. Furthermore, once some participants reach this critical size, the "public good" characteristic of information constitutes an economically insurmountable barrier for newcomers to enter such markets. Thus it is difficult to assess whether or not the formation of large information services groups constitutes a restrictive business practice.

Moreover, at this stage of the negotiations, some corporate objectives are incompatible with certain objectives of developing countries. For instance, some developing countries consider information to be a "natural resource" and information networks as a "common infrastructure." These ideas may collide with notions corporations consider legitimate, such as "intellectual property of information," and "private use of private property." In many cases, norms and standards have been used almost like entry barriers in certain markets. The international exchange of information services

¹¹⁰ These RBPs can be "vertical" (that is, constraints imposed on suppliers, distributors, or consumers) or "horizontal" (generally relating to the constitution of cartels, such as collusive tendering). Typical forms of vertical restraints include refusal to deal, exclusive dealing, reciprocal exclusivity, resale price maintenance, tied selling, differential pricing, predatory pricing, transfer pricing, and concentration of market power through mergers, takeovers, and joint ventures.

calls for a broader vision concerning which trade practices can be considered illegitimately restrictive.

Because the degree of transnational production is greater in services than in other economic sectors, RBPs are more likely to emerge as a systematic distortion of the normal play of market forces in this sector. The intrinsic characteristics of services, in particular the type of relationship they imply between producers and customers of generally perishable items, make RBPs more difficult to track and define in services than in other sectors. Moreover, the fact that international service transactions generally involve a higher proportion of factor movements suggests that some business practices that affect such factors constitute restrictions. In the specific case of information intensive services, the nature of the product may lead to natural monopolies of market power, thus creating an unintentionally restrictive environment. All these elements suggest that a broader definition of RBPs is needed to enable the formation of a coherent and consistent set of rules in the services sector. The 1990 Review Conference, which will consider all the aspects of the Set of Principles and Rules, provides an opportunity to focus on this goal.¹¹¹

Any multilateral framework has to provide for the elimination of RBPs, primarily through a general tightening of the obligations and enforcement mechanism of the *United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, which could be dealt with in a more specific manner in the sectoral arrangements. Nevertheless, the nature of services trade and production is such that unintentional market dominance may occur through natural monopolies or established trademarks. For this reason, multilateral rules addressing the practices of TNCs are necessary to ensure developing countries access to markets, even absent evidence of restrictive practices by TNCs.

R. The Development Objectives

Putting elements in the multilateral framework that ensure the equitable expansion of trade in services will benefit the developing countries. Nevertheless, these elements cannot guarantee that the expansion of services trade has a positive development impact. The basic problem still remains: TNCs retain their dominant competitive position against which developing country firms cannot compete, either in world markets or in their own national markets.

Developing countries have two ways to deal with this problem. First, they may take the protective approach and simply restrict or deny TNCs access to markets. This mirrors the "infant industry" concept applied in the goods sector. Questions remain, however,

¹¹¹ This Conference will take place in Geneva in 1990. The exact date of the meeting has not been determined yet.

whether this approach is effective in helping infant industries reach the stage where they can compete with the TNCs.

The second approach is to adopt measures which achieve the aims of Part II of the Uruguay Round Declaration. In addition, any liberalization of trade must be made conditional upon the implementation by the TNCs of measures that rectify the competitive disparity between those firms and domestic developing country firms. Access to markets would not be provided to those service suppliers unwilling to strengthen the service sector in the importing (or host) country.¹¹² Provisions in the draft UN Codes on Transfer of Technology and on TNCs are relevant in this respect.¹¹³

The development objective must also give developing countries the freedom to implement export strategies, and encourage developed countries to import services from developing countries. Trade in services currently takes place mainly among countries with highly developed service sectors. Strengthening the service sectors of developing countries by rectifying current structural imbalances could result in greatly increased and more equitable trade in services over the longer term.

V. Broad Concepts and Existing International Instruments

This section examines the possible elements of a multilateral framework for trade in services, including their application in existing international instruments.

A. National Treatment

National treatment is one of the major issues in the services negotiations in the Uruguay Round. This concept ensures the equality of treatment between foreigners and nationals and between products and services of foreign and indigenous origin.¹¹⁴ National treatment

¹¹² Possible commitments include arranging for the transfer of technology, training and developing human capital, upgrading relevant infrastructures, giving access to, and enabling participation in information networks, providing employment opportunities, contributing to export strategies, using local services, and locating information resources and decision-making entities locally.

¹¹³ See Draft Code on Transfer of Technology, *supra* note 100, at 11-14; U.N. CONF. ON TRADE AND DEV., THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS, at 39-40, U.N. Doc. No. ST/CTC/SER.A/4, Sales No. E.86.II.A.15 (1985). See also Information Paper on the Negotiation to Complete the Code of Conduct on Transnational Corporations, Completion of the Formulation of the Code of Conduct on Transnational Corporations, *reprinted in* 22 I.L.M. 177 (1983).

¹¹⁴ National treatment obligations have been traditionally contained in Friendship Commerce and Navigation (FCN) treaties. The United States National Study on Services reports that there are eleven such treaties signed by the United States since 1953 providing for national treatment with respect to operation of business firms. See generally U.S. NATIONAL STUDY, *supra* note 36. Some of these treaties specifically exclude major service sectors such as banking, communication, and transportation. (Exchange of information pursuant to the Ministerial decision on services: Communication from the United States, at 76 (Jan. 25, 1984). See also Declaration on Trade in Services, Apr. 22, 1985, United

requires governments to administer all domestic laws and regulations that are not identified as trade barriers on a nondiscriminatory basis. This ensures that domestic and foreign suppliers of products and services are treated equitably. In other words, governments must clearly separate the protection of domestic services industries from the regulation of services.

Developed countries believe that national treatment should be one of the fundamental principles in a multilateral framework for trade in services. Currently, internal regulation of services in most countries exceeds regulations on goods,¹¹⁵ and those regulations often restrict the extent to which foreigners can offer their services. A prime goal of the developed countries in the Uruguay Round is to establish the principle of national treatment in regard to services, building on both OECD¹¹⁶ and GATT models.¹¹⁷ To developed countries, developing a national treatment concept is essential for improving market access.

The OECD, however, is studying alternative concepts such as

States-Israel, Principles para. 3, *reprinted at* 22 I.L.M. 945 (1983)(expressly providing that trade in services should be "governed by the principle of national treatment"); United States-Canada Free Trade Agreement, *supra* note 96, art. 1402 (providing for the extension of the principle of national treatment to the providers of a list of commercial services including agriculture and forestry services, mining services, computer services, telecommunications-network-based enhanced services, and tourism services); Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations-Trade Agreement, Aug. 18, 1988, art. 5 (providing for national treatment—such treatment may be different from the treatment of nationals, if the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons and such different treatment is equivalent in effect to the treatment accorded by the member state to its ordinary residents for such reasons) [hereinafter Australia-New Zealand Agreement].

¹¹⁵ See Development Process, *supra* note 47, at 26.

¹¹⁶ National treatment is one of the three major elements of the OECD Declaration on International Investment and Multinational Enterprises, *adopted* June 21, 1976, art. II. The OECD has also adopted a decision on national treatment which provides that member countries shall accord to foreign-controlled enterprises operating in their territory treatment, under their laws, regulations and administrative practices, no less favorable than that accorded to locally-owned enterprises. Decision of the Council on National Treatment, *adopted* June 21, 1976. National treatment in the OECD is the subject of a number of reservations and exceptions. Developed countries have not accepted a comprehensive national treatment obligation concerning foreign-controlled firms, even those producing goods rather than services.

¹¹⁷ The concept of "national treatment" is also a fundamental element of GATT. GATT, *supra* note 25, art. III. Article III provides that imported products should be accorded identical treatment to that of domestic products in regard to internal taxation, other internal charges, and government regulations. It is difficult to apply the GATT national treatment provision to trade in services because the GATT clause is formulated to protect the integrity of negotiated levels of tariff protection. For services, there are no such levels, nor is there even agreement as to which measures are appropriate subjects for negotiation.

As the very nature of trade in services usually precludes the application of duties at the frontier, protection of service industries is usually accomplished by restricting entry of the foreign service, restricting entry of foreign persons capable of supplying the service, denying foreign corporations the right to become established, or restricting their activities within the country once they are established.

“fair or equivalent treatment” in order to deal with problems peculiar to the service sector.¹¹⁸ A recent OECD paper proposes a conceptual framework based on a specific definition of trade in services. This definition contains general principles against which regulations and practices are evaluated as being appropriate or inappropriate, and therefore a barrier or not a barrier to trade in services.¹¹⁹

National treatment is an important element of the paper’s conceptual framework and is defined as treatment no less favorable than that granted to domestic firms.¹²⁰ This treatment is to be given to imported services or to foreign service firms in a number of areas relating to regulation, taxation, access to government assistance, and appeals procedures.¹²¹ The paper proposes that market access can be achieved by considering regulations which deny national treatment as inappropriate or unacceptable.¹²² At the same time, the paper argues that national treatment in the context of services needs to be defined flexibly because it must be adaptable to different situations and specific forms of marketing.¹²³ For example, under this flexible definition, national treatment can take the form of “similar” or “equivalent” treatment to account for how local regulations of certain activities apply to foreign service firms.

A restriction preventing entry into new service areas may strictly live up to national treatment standards while actually favoring those firms already established in the market. On the other hand, a strict obligation on national treatment might lead to more restrictive policies with respect to the entry of foreign firms.

Several approaches to national treatment for trade in services have emerged from the discussions in GNS. For developed countries, national treatment is an essential principle to ensure equal and fair opportunities for competition, and the expansion of trade in services.¹²⁴ At the same time, they recognize that legitimate national policy objectives exist which may justify exceptions to national treatment. Developing countries are uncertain whether the national treatment principle is applicable to trade in services. They argue that if national treatment is interpreted as relating to factors of production (investment), it is more properly dealt with in the context of

118 ORGANIZATION FOR ECON. COOPERATION AND DEV., ELEMENTS FOR A CONCEPTUAL FRAMEWORK FOR TRADE IN SERVICES, OECD Doc. TC(87)2, at 10 (1987).

119 *Id.* at 9.

120 *Id.*

121 *Id.*

122 *Id.* at 8-9.

123 *Id.*

124 For example, the United States considers national treatment as an operative part of the framework agreement on trade in services currently being negotiated in the GATT, while the European Economic Community (EEC) perceives this concept as a yardstick to identify discrimination and inappropriate regulations.

bilateral investment treaties.¹²⁵ For developing countries, the full elimination of protection from the TNCs, which would result in the trade in services sphere from an immediate introduction of the national treatment principle, can only be a long term goal. In their view, the principle should not be included in a multilateral framework, but rather used as a criterion for judging whether particular perceived obstacles to trade in services should be eliminated.

To some extent, this difference in viewpoints is due to the level of development and experience in developed and developing countries. The developed countries' approach to national treatment reflects the experience among advanced countries in the OECD,¹²⁶ many of which are home countries of TNCs. National treatment provides nondiscriminatory treatment to TNCs on a mutual basis.

In the "North-South" context, national treatment and its relation to the establishment of foreign corporations take on a different aspect. Developing countries may want foreign service corporations to establish within their borders to carry out essential tasks (for example, trade finance), but they may not want those corporations to use their financial and technological advantages to dominate the domestic market. Liberalization of trade in services through the extension of national treatment, therefore, might be inconsistent with development objectives.¹²⁷

A concept of national treatment for trade in services requires utmost precision in its formulation, especially when determining the

¹²⁵ The bilateral investment treaties typically guarantee the three basic standards of treatment awarded to aliens under international law: national, most-favored-nation, and the international standard. The international standard guarantees that the alien and his property shall not only receive equal treatment, but also due treatment under international law, irrespective of the country's domestic policy.

The bilateral investment treaties specifically deal with the right of nationals of each country to establish an enterprise, the terms and conditions under which business activities may be carried on, repatriation of profits and capital, security of investments, dispute settlement and subrogation rights. The basic thrust of the preferential treatment contained in these treaties is related to monetary transfers and nationalization measures, which constitute areas of considerable concern to foreign investors from developed nations.

¹²⁶ In the EEC, and outside the EEC with regard to insurance, there is a significant area of agreement on the right of establishment. National treatment is relevant only to such firms as may be allowed to establish. Many countries do in practice grant de facto national treatment to foreign-controlled firms once they have been allowed to establish. Consequently, the control on establishment is critical. This has been the position, for example, in the United States, where establishment as an issue has been addressed by the enactment of specific prohibitions.

¹²⁷ National treatment of TNCs could jeopardize the achievements of developing countries in the adoption of the Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 6 U.N. GAOR Special Sess. Annex 0 (Agenda Item 7), U.N. Doc. A/9559; the Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, U.N. Doc. A/9559; and the Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. Doc. A/9949 (one of the objectives here is to strengthen the negotiating capacity of host countries, with particular attention to the developing countries and their dealings with the TNCs).

measures and actions to which national treatment is to be applicable. The extent to which the concept of national treatment enters into a multilateral framework for trade in services is related to the outcome of the discussions on a definition of "trade" in services, given that national treatment is largely an investment issue. National treatment may be an appropriate means of liberalizing trade in services among developed countries, but it has an entirely different impact on the economies of developing countries.

In conclusion, the national treatment concept as used in Article III of GATT relates to treatment of products and is inappropriate to apply to trade in services. Moreover, the concept of national treatment as used in GATT is applied in a subsidiary manner because it relates to internal protective measures other than tariffs, which are recognized as a legitimate instrument of protection. In the absence of a recognized instrument of protection such as tariffs, national treatment changes from a subsidiary principle into a very powerful concept entailing the elimination of any protection. Given that most developing countries have not reached the state of economic development that enables their enterprises to make use of reciprocity in granting national treatment, this requirement would have negative effects on developing countries' infant and growing enterprises. The full elimination of protection, which an immediate introduction of national treatment principal in the sphere of trade in services entails, can only be a long term goal.

B. *Most Favored Nation Treatment*

The unconditional most-favored-nation concept (MFN) means that if a nation grants to another nation more favorable treatment, it must extend such treatment unconditionally to other nations, thus ensuring equality of treatment between products and services of different national origins.¹²⁸

¹²⁸ GATT, *supra* note 25, at art. I. For a history of the MFN concept and its importance in national and international jurisprudence, see *Most-Favored-Nation Clause [agenda item 4]*, 1969 Y.B. OF THE INT'L L. COMM. Vol. II, 157-86, U.N. Doc. A/CN.4/213/1969/Add.1, U.N. Sales No. E.70.V.8; *Most-Favored-Nation Clause [agenda item 5]*, 1970 Y.B. OF THE INT'L L. COMM. Vol. II, 199-242, U.N. Doc. A/CN.4/228/1970/Add.1, U.N. Sales No. E.71.V.7; *Most-Favored-Nation Clause*, 1976 Y.B. OF THE INT'L L. COMM. Vol. I, 91 *passim*, U.N. Doc. A/CN.4/293/1976/Add.1, U.N. Sales No. E.77.V.4; *Most-Favored-Nation Clause [agenda item 4]*, 1976 Y.B. OF THE INT'L L. COMM. Vol. II (Part I), 111-46, U.N. Doc. A/CN.4/290/1976/Add.1 (Part 1), U.N. Sales No. E.77.V.5 (Part I); *The Most-Favored-Nation Clause*, 1976 Y.B. OF THE INT'L L. COMM. Vol. II (Part II), 4-68, U.N. Doc. A/31/10/SER.4/1976 (Part 2), U.N. Sales No. E.77.V.5 (Part II); *The Most-Favored-Nation Clause*, 1978 Y.B. OF THE INT'L L. COMM. Vol. I, 40 *passim*, U.N. Doc. A/CN.4/309/1978/Add.1, U.N. Sales No. E.79.V.5; *Most-Favored-Nation Clause [agenda item 6]*, 1978 Y.B. OF THE INT'L L. COMM. Vol. II (Part I), 1-31, U.N. Doc. A/33/10/SER.A/1978/Add.1 (Part 1), U.N. Sales No. E.79.V.6 (Part I); *The Most-Favored-Nation Clause*, 1978 Y.B. OF THE INT'L L. COMM. Vol. II (Part II), 8-24, U.N. Doc. A/CN.4/SER.A/1978/Add.1 (Part 2), U.N. Sales No. E.79.V.6 (Part II).

In contrast with the national treatment provision, the MFN clause requires only that a contracting party treat all *foreign* goods equally; nothing prevents domestic products from being treated more favorably than foreign goods.¹²⁹ Developed countries believe that the economic considerations underlying the MFN principle in GATT also apply to services trade. Nevertheless, in recognizing that nondiscrimination in services is the exception rather than the rule, some developed countries such as Japan, Switzerland, and Australia envision a "conditional MFN" approach for services.¹³⁰

The developing countries have many concerns about the application of a conditional MFN principle to trade in services. Some developed countries argue that conditional MFN agreements promote the expansion of trade by reducing the impact on members of tariff and nontariff barrier agreements, which otherwise would not have been negotiable.¹³¹ But developing and some developed countries are concerned that conditional MFN agreements could limit the scope of liberalization of trade by encouraging the application of restrictions to trade with non-members of the agreement and thus creating selective protection.

The unconditional MFN principle is the basis of the GATT,¹³² and can provide a stable, predictable framework for trade if adhered to by the majority of countries. The MFN principle has been eroded

¹²⁹ There are several exceptions to MFN in the GATT. *See, e.g.*, GATT, *supra* note 25, arts. I, XX, XXI, XXIV, XXV, XXXV (the Grandfather Clause and the Enabling Clause).

The developed countries believe that the MFN principle should be applicable to the liberalization and expansion of trade in services. *See* the Note by the U.S. delegation to the OECD which suggests that nondiscrimination (most-favored-nation treatment) might form one of the basic principles in a conceptual framework. Paragraph 27(E) of this Note provides that: "Countries may wish to extend to each other the opportunity to obtain or negotiate the same benefits granted to other participants in the trade system with regard to the liberalization of trade in services. Bilateral negotiations often yield great benefits, but to the extent that they provide preferential, reciprocal agreements they can become protectionist and trade distorting. Countries might adopt a principle of non-discrimination to minimize disruptions and contribute to mutually beneficial trade liberalization. Special exceptions might be accepted, but generally agreements should extend to those adhering to the principle of non-discrimination on an equal basis." This principle is firmly grounded in both OECD and GATT precedents. Modified application of most-favored-nation treatment may be needed for trade in services, however, because of the no-tariff nature of many service trade obstacles. Nonetheless a conditional form of MFN treatment might extend commitments to liberalize barriers to trade in services to countries adhering to a common set of principles. *See also* Australia-New Zealand Agreement, *supra* note 114, art. 6 (providing for MFN treatment).

¹³⁰ Conditional MFN requires that parties to the agreement provide reciprocal concessions to gain the benefits and action available under the agreement. The unconditional form provides that all new concessions negotiated bilaterally are extended without compensation to others. The United States, for example, used the conditional clause in its trade treaties until 1922, and has since adopted the unconditional form. The United States Tariff Act of 1922 and the Trade Agreements Act Of 1934 include the authority to offer unconditional MFN treatment.

¹³¹ Supporting this position are the Nordic countries, Japan, Australia, and Switzerland.

¹³² *See* GATT, *supra* note 25, art. I.

not so much by resort to permitted formal exceptions like free trade areas and customs unions as by unilateral deviations from the unconditional MFN clause. The latter threatens to undermine completely the working of the multilateral trading system. Some examples of such deviations are:

- (a) the application of certain Tokyo Round Codes on a "conditional" basis, with the implication that "conditional MFN" solutions will be sought in the Uruguay Round multilateral negotiations;¹³³
- (b) continuing pressure for a "selective" safeguard clause;
- (c) resort to discriminatory action outside GATT, such as voluntary export restraints (VER), quantitative restrictions (QR), and multifibre arrangements (MFA); and
- (d) recourse to bilateral solutions, where multilateral disciplines are unilaterally determined to be unsatisfactory, with consequent discrimination against third countries.¹³⁴

Within the context of its own jurisdiction, OECD has established nondiscrimination commitments (or MFN treatment) between OECD-Member countries. The two existing OECD liberalization codes are both based on the twinned principles of liberalization and nondiscrimination.¹³⁵ Article 9 of the Code of Liberalization of Current Invisible Operations (LCIO) provides for the principle of nondiscrimination as follows: "A Member shall not discriminate as between other Members in authorizing current invisible operations, which are listed in Annex A, and which are subject to any degree of liberalization." Article 10 further provides that: "Members forming part of a special customs or monetary system may apply to one an-

¹³³ The danger of "conditionality" in the application of tariff rates and trade concessions was recognized as early as the 1930s, and identified as one of the main factors contributing to the collapse of international trade relations during that period.

The League of Nations condemned the "conditional clause" in unequivocal terms:

It cannot be too often repeated that a conditional clause has nothing whatever in common with the sort of clause which the (1927) International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption. It is in fact the negation of such a clause, for the very essence of the most-favored-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination, it does not offer any of the advantages of the most-favored-nation clause proper, which seeks to establish it on firmer foundations.

Specific Matters Arising From The Resolutions, Recommendations And Other Decisions Adopted By The Conference At Its Fifth Session Requiring Attention Or Action By The Board At Its Twenty-Fifth Session: Multilateral trade negotiations, Background notes by the UNCTAD secretariat, 25 U.N. TDBOR, at 16, para. 45, U.N. Doc. TD/B/913 (1982). Support for the "conditional" approach affects negotiations and attitudes, and weakens the position of less powerful partners.

¹³⁴ See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 270-71 (1969).

¹³⁵ Article 1(d) in both the Code of Liberalization of Current Invisible Operations (LCIO) and the Code of Liberalization of Capital Movements (CLCM) should also be noted: "Members shall endeavor to extend the measures of liberalization to all members of the International Monetary Fund."

other, in addition to measures of liberalization taken in accordance with the provisions of Article 2(a), other measures of liberalization without extending them to other Members.”

Articles 9 and 10 of the Code of Liberalization of Capital Movements (CLCM) contain similar provisions dealing with nondiscrimination and exceptions to the principle of nondiscrimination, namely special customs or monetary systems. The limitations on the scope of the LCIO and CLCM instruments have a similar basis for excluding certain areas from the scope of nondiscrimination clauses. For example, the LCIO Code does not explicitly cover all service sectors. Some of the exceptions result from the application by certain Member countries of the reciprocity principle. Also different treatment occurs between EEC countries and the other OECD-Member countries arising under the Directives on freedom of establishment and freedom to provide services, and the special rules governing insurers in the Member States of the Community. Other examples exist of individual countries discriminating between OECD-Member countries, both within the Community (regardless of any community directive) and outside of it.

OECD recently produced a paper discussing elements of a conceptual framework for trade in services. It proposes nondiscrimination as one of the principles to permit a high degree of liberalization in trade in services. This principle is promoted in its broadest sense, including both national and most-favored-nation treatments. It would also apply to free access to markets and freedom of establishment in a nondiscriminatory manner. In other words, no discrimination would be allowed between foreign firms or services of differing origin, nor between foreign and local firms.

The nondiscrimination principle would also be applicable to foreign firms, and to services of foreign origin, after their entry or establishment in a country. The OECD paper argues that including a nondiscrimination clause in the framework is important to guarantee that liberalization of trade in services takes place under an open, multilateral system. At the same time, the paper notes that domestic regulation is an important aspect of the proper functioning of some service industries. Consequently, the need for countries to open their markets to each others' industries, so as to obtain certain guarantees, may justify attaching an element of conditionality to nondiscrimination. Countries that negotiate concessions and advantages should be willing to enter into similar negotiations with other countries ready to contribute.

In conclusion, the conditional approach suffers because its application will discriminate against some countries. Furthermore, if negotiations on trade in services are conducted according to the conditional principle, the needs of smaller, less interesting countries will

be ignored. Multilateral negotiations conducted under this principle will degenerate into establishing limited arrangements among like-minded countries. This result is inconsistent with the multilateral framework concept as provided in Part II of the Uruguay Round Declaration and detrimental to the interests of most developing countries.

C. *Right of Establishment*

The term "right of establishment" does not have a well defined meaning.¹³⁶ It usually refers to the lengthy residence of an alien in the territory of another country to pursue some activity. In the case of trade in services, it refers to the right of presence in the market so as to conduct business effectively.¹³⁷

While developed countries support the application of right of establishment as necessary for effective access to markets, developing countries oppose the idea that establishment should be a right guaranteed in foreign markets to the provider of services. Developing countries believe that such a guarantee contradicts the right to control establishment of foreign enterprises. Moreover, they point out that the latter right has been acknowledged at the international level by the United Nations,¹³⁸ and at the regional level by OECD-Member countries when dealing with the question of national treatment for foreign controlled enterprises. In the view of developing nations, no right of access to markets or any reciprocal right of "access to resources" is established by GATT. Therefore, the developing countries argue that granting a right of establishment to foreign companies in the area of services goes much further than what is foreseen for goods in GATT.

For a number of services the penetration of foreign markets is facilitated by some form of "presence" in the importing country, either by persons or corporate entities. The forms of market penetration in services differ considerably both within and among service sectors. In some sectors, significant investment is required by a foreign firm to sell services on the domestic market, while in others all that may be required is a minimal presence, such as a small office with a computer terminal and access to data from the home base. In

¹³⁶ Right of establishment, being an investment issue and not a trade issue, has no equivalent concept in the GATT.

¹³⁷ See U.S.-Canada Free Trade Agreement, *supra* note 96, art. 1401, para. c (referring to commercial presence providing that provision of a covered service includes the establishment of a commercial presence, other than an investment, for the purpose of distributing, marketing, delivering, or facilitating a covered service). See also Australia-New Zealand Agreement, *supra* note 129, art. 30 (includes a definition of services in the right of establishment).

¹³⁸ Charter of Economic Rights and Duties of States, General Assembly Resolution 3281.

some cases, no presence or establishment is required at all and *obligations* to establish are considered as trade barriers by suppliers.

Many major service industries provide services both on an across-the-border basis and on an establishment basis. Services provided on an establishment basis are those generated at the point of use by a supplier firm with a permanent establishment. Examples include accounting and legal services, equipment rental, retail trade, and some aspects of banking and insurance. This definition does not necessarily mean that right of establishment has been granted to a local enterprise under foreign control.¹³⁹ In some instances the consumer may travel to use the services that are provided on an establishment basis.¹⁴⁰ Consequently, freedom of trade in services may entail service transactions, movement of persons, movement of capital, information flows, and, in certain cases, movement of goods.

Across-the-border trade in services includes the following:

(1) services that are provided by a supplier in the exporting country for a consumer in another country;¹⁴¹

(2) management and technological services, franchising, and providing intangible assets such as intellectual property in the consumer country; and

(3) other services commonly traded across borders directly to foreign consumers, which usually includes temporary movements of exports or temporary work at the place of use.¹⁴²

The right of establishment may be formulated in a general unconditional MFN form that is coupled with an unlimited right to national treatment or by the negotiation of rights on a bilateral, reciprocal, perhaps even case-by-case basis. The case-by-case method, for example, is being followed by the Canadian banking industry.

Several criteria have been proposed for distinguishing trade in services from investment in services. The Note by the United States Delegation to the OECD explores the possibilities of such a distinction. One idea is to start from the place where the services are generated. Across-the-border trade or movement is defined as occurring when the value of services is generated in one country and

¹³⁹ For example, the enterprise may not necessarily be considered a local enterprise, as in the case of branches or agencies.

¹⁴⁰ For example, a foreign customer who moves temporarily to the supplier country to consume services as in the case of tourism hotels. The matter is then one of movement of persons rather than international investment.

¹⁴¹ The enterprise supplying the service and the place of consumption are not necessarily the same. Examples of such trade are cargo and passenger transport, cargo insurance, and telecommunications.

¹⁴² A number of the transactions covered by the LCIO Code may be construed as across-the-border trade. Examples include portions of the film, information, engineering, banking, and insurance sectors. In the case of insurance, however, the Code at present covers across-the-border trade and also aspects of establishment trade.

transferred to another country, a host country. Investment in services is defined as occurring when the value is generated in the host country itself. This assumes that it is possible to dissociate the sale or supply of the service from its actual generation, and to assign an origin to the value-added during the successive transactions.

Unlike goods, services usually cannot be transported or stored, and to have value they must be supplied at the place and time required. Firms supplying services accordingly have to adjust their production network to demand. For service industries, the very nature of the activity may require a presence at the place of consumption. In addition, local regulations may oblige firms to be present via investment in the country where those firms wish to operate.¹⁴³

In the view outlined by the U.S. OECD Note, while the enigmatic nature of services creates a condition requiring investment, the problem nonetheless remains that of "trade in services" as a whole. Again, because of the nature of services no alternative to investment is available for foreign firms that want effective access to a market. From the point of view of liberalizing trade in services, it may be necessary to examine the conditions under which foreign service concerns are allowed to do business, and then determine what kind of presence is needed in order to conduct business.¹⁴⁴

As a rule, firms have a range of options for penetrating a foreign market, such as obtaining a license; establishing representative offices, agencies, branches, subsidiaries, or joint ventures; or acquiring holdings in or purchasing a local firm. The form chosen depends on the regulations in the host country, the firm's internal policies, and the scope of presence the firm needs.

The U.S. OECD Note deals with penetration of host countries in terms of the "right" to perform transactions that foreign firms should enjoy.¹⁴⁵ The Note proposed the following as "rights":

- (1) to sell a service generated abroad;
- (2) to invest in local marketing, sales, and distribution systems needed to sell or trade international services;
- (3) to use foreign employees to maintain the local delivery system; and
- (4) to have foreign employees offer their professional services without undue licensing restraints. The Note also proposes a more modest alternative approach, that couples "market access"¹⁴⁶ with the possibility for foreign service companies "to compete on equivalent footing with domestic firms for manpower and access to

¹⁴³ For example, statutory measures to allow government supervision of banks or insurance companies operating in their countries.

¹⁴⁴ The Note by the United States Delegation to the OECD, para. 38.

¹⁴⁵ *Id.*, para. 39.

¹⁴⁶ Market access is defined as the right to sell a service generated abroad.

deliver the services.”¹⁴⁷

Furthermore, the U.S. National Study on Trade in Services points out that in order to separate trade and investment issues, countries must be capable of distinguishing between the service or the component of a service that is traded (that is, produced abroad) and the service or the component of service that can only be produced locally.¹⁴⁸ The Study cites data processing services as an example. If data processing services are provided locally by a foreign computer center through long-distance communication links, this activity is clearly trade. Data processing services provided locally by a foreign-owned computer processing facility are, by contrast, investment activity.¹⁴⁹

The U.S. Study also argues that the services distribution system is an important issue when distinguishing between trade and investment. Under traditional trade concepts the question of access to the distribution system, or to service or maintenance facilities, is a trade issue, while ownership of the distribution system is an investment issue. The Study further notes that under the GATT principles a product which has overcome the legitimate barriers at the border is entitled to full national treatment. An obligation arises to treat such a foreign producer in the same manner as a domestic producer. Thus, a foreign producer is entitled to the same access to the domestic distribution system as a domestic producer.

The National Study argues that the existing GATT approach to the distribution system can be applied to trade in services. Access to a local distribution system should be treated as a trade issue, while ownership of the distribution system should be treated as an investment issue. Access to the distribution system should include the right of a foreign services supplier to contract with local business to provide distribution or servicing facilities. Thus, for example, if the national treatment principle is adopted for trade in services, a foreign insurance company that has overcome the border restrictions has a right to contract with local insurance brokers or claims adjusters to sell their policies and to handle claims.

Existing OECD instruments, whose strengthening or extension is under consideration, concern various “rights” related to services, including the right to sell services, to invest, and to operate in equitable circumstances. From the standpoint of the two OECD Codes, the establishment of branches is at present covered by the LCIO Code for insurance. Discriminatory obstacles to the establishment of subsidiaries by foreign firms are covered by the CIME Committee’s Instrument on National Treatment.

¹⁴⁷ U.S. Note to the OECD, para. 39.

¹⁴⁸ U.S. NATIONAL STUDY, *supra* note 36, at 74-76.

¹⁴⁹ *Id.* at 75.

Several forms of penetration are covered by the definition of "Direct Investment" under the OECD's LCM Code.¹⁵⁰ The Code defines the term as follows:

1. Direct Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof:

A. In the country concerned by non-residents by means of:

1. creation and extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of and existing enterprise;
2. participation in a new or existing enterprise;
3. long-term loan (five years and longer).¹⁵¹

The Code describes these various means of investing without discussing the right of foreign operators to set up undertakings in host countries in sectors where a right of establishment exists. A difference may exist between investing in production or distribution systems and operating in a country under the undertaking's own name or through an establishment that it manages. Agencies, branches, and subsidiaries are major means for service industries to set up abroad. Right of establishment, therefore, implies a right of investment with the additional right to operate as an undertaking under its own name, either as a principal establishment or as a subsidiary or branch. Conversely, the right of investment does not imply right of establishment in all its senses, but only in certain aspects. Right of establishment is also relevant to individuals for whom the investment implications are less likely to be significant.

The Treaty of Rome provides for temporary "right of establishment" of nationals of all member states.¹⁵² It defines such freedom essentially in terms of national treatment, that is, "under the same conditions as are imposed by that state on its own nationals,"¹⁵³ and in terms of the "free provision of services."¹⁵⁴ Free provision of services corresponds to the notion of investment by, and operation of, enterprises providing services, as distinct from trade in services.

The right of establishment is basically an investment issue because entry and residence are necessary for direct investment by individual companies, while it is possible to pursue commercial activities without being present in the importing country. The need

¹⁵⁰ Code of Liberalization of Capital Movements, OECD, *adopted* Dec. 1961, Annex A, List A, at 27 (Mar. 1988).

¹⁵¹ *Id.*

¹⁵² Treaty of Rome, *opened for signature* Mar. 25, 1957, art. 60, 298 U.N.T.S. 11, 41.

¹⁵³ *Id.*

¹⁵⁴ *Id.* art. 59. Article 59 provides, inter alia, that "within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional periods in respect of nationals of Member States who are established in a state of the Community other than that of the person for whom the services are intended . . ." *Id.* art. 59.

to distinguish between trade and investment concepts has been recognized, and what is stressed is the right to the market presence necessary to conduct business.¹⁵⁵

To maximize the contribution of services to development, the actual presence of foreign firms is not as important as ensuring that their presence effectively contributes to development objectives. The presence of foreign firms must not result in the displacement or exclusion of domestic firms from the market. Foreign firms could make major contributions to development objectives by establishing new interlinkages, which could facilitate development of human capital or support export efforts. The presence of a foreign firm in a domestic market alone is not an effective criterion with which to define the right of establishment. Rather, the key to determining the limits of this concept is in deciding from which trade activities foreign firms will be allowed to profit. Thus it is difficult to consider the "right of establishment" and "national treatment" issues separately.¹⁵⁶

It is also difficult to adopt any approach other than a sectoral approach in a detailed examination of the application of these principles. This is because the same degree of "presence" in the market may imply significantly different economic and social consequences from sector to sector. The need to apply regulations specifically to foreign firms may also differ radically.

VI. Elements of a Multinational Framework

In summary, there are a number of crucial elements in a multinational framework relevant for developing countries. First, recognition of the sovereign right of developing countries to apply measures in the service sector to:

- (1) increase the contribution of services to their development process;
- (2) improve their competitive position in world trade;
- (3) pursue other economic and social objectives through the development of their service sectors and their indigenous technological capacities. Measures taken in this respect must not be considered barriers to trade.

Second, the framework must include a definition of trade in services that excludes direct foreign investment. Access to markets must be defined as access necessary to provide or receive a specific service. Third, there must be unconditional most favored nation treatment.

¹⁵⁵ *Id.* art. 60.

¹⁵⁶ That is, with establishment national treatment is equivalent to total liberalization. With establishment national treatment is meaningless.

Fourth, the framework must include equitable access to developed countries' services markets by developing countries through movement of persons and participation in information networks. Actions liberalizing trade in services must be consistent with development objectives and lead to the expansion of trade of developing countries in conformity with the Declaration on the Uruguay Round. In such liberalization, preference should be given to the modes of delivery of services most accessible to developing countries.

Fifth, developing countries must be allowed to condition access to their markets upon contributions by foreign services suppliers to the development of a competitive national service sector. This requirement includes the right of access to information and distribution networks. Improved access to services markets must be matched by improved access to knowledge and information.

Sixth, the multilateral framework must provide guidelines for subsequent sectoral negotiations. The selection of sectors should give priority to areas where developing countries have demonstrated competitive strengths.

Seventh, provisions supporting the development process must be inherent in the multilateral framework and translated into specific measures at the sectoral level. Special, differential, or more favorable treatment in favor of developing countries must not be applied as exceptional treatment, but made an integral part of the framework.

Eighth, it must be recognized that in certain service sectors developing countries have not attained a sufficient level of technological development to compete internationally. Where appropriate, future access to world markets should be reserved for developing countries.

Ninth, negotiations must address the nonregulatory barriers facing the service exports of developing countries.¹⁵⁷ The framework must establish guidelines for multilateral cooperation touching upon a variety of areas and falling within the competence of various organizations. Governments should assume responsibility for supporting the expansion of the service sector and service trade of developing countries.

Finally, the framework must include measures necessary to enable developing countries to participate progressively and actively in world export trade. Developing countries must be granted suitable latitude to implement policy instruments necessary to increase exports or services that involve export promotion.

¹⁵⁷ Examples of these barriers include domination by TNCs, lack of access to information networks, low technological levels, and RBP's.

