Trade and Investment in Services: OECD Agreements and the GATT

by

James A. Everard

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OECD AGREEMENTS AND THE GATT

James A. Everard

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I INTRODUCTION

Trade and investment in services has emerged as an area of intense discussion and negotiation in bi- and multilateral fora. This is attributable to a variety of factors including the growing economic interdependence of nations, a shift in industry composition in many developed and some developing countries, greater awareness of the interlinkages between goods and services, advances in technology, and the initiatives of various developed countries.

The central focus of this paper is the work of the Organization for Economic Cooperation and Development (OECD) on trade and investment in services as contained in the OECD Codes, Declarations and Decisions. This analysis reveals that these Codes, Declarations and Decisions contain important concepts, principles and approaches to trade and investment in services which are relevant to the current GATT negotiations.

To place the OECD work in perspective this paper commences by examining the relationship between trade in services and investment in services from the perspective of various governments, organizations and as contained in various free trade agreements. Section III provides an overview of the OECD Codes, Declarations and Decisions, as well as an analysis of the concepts, principles and implications of these agreements. Section IV critically examines the OECD Elements of a Conceptual Framework on Trade in Services and Section V identifies the relevance of the GATT Articles and Codes for services. The paper

concludes with a section on integrating various approaches to facilitate the negotiation of service issues.

There are a number of key points that these sections will reinforce.

1) "Trade in service" issues are regarded as including aspects of trade, investment and immigration. Trade and investment in services are identified as individual and sometimes overlapping concepts. Trade refers to services that can be traded like goods, while investment refers to the capital flow associated with a physical presence (necessary due to market demands or regulation). The greatest challenge is in finding broad support for determining the distinctions between trade and investment.

2) The theoretical assumptions of this paper include a) the comparative advantage theory for goods seeming to apply to international trade and factor movements involving services,[1] and b) the liberalization of barriers to international trade in services and to international factor mobility increasing economic

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[1] See André Sapir and Ernst Lutz, Trade in Services: Economic Determinants and Development-related Issues, World Bank Staff Working Paper No. 410 (Washington: World Bank, 1981), André Sapir, Determinants of Trade in Services, CEME Discussion Paper No. 81/04 (Brussels: Free University of Brussels, 1981), Brian Hindley and Alastair Smith, "Comparative Advantage and Trade in Services", The World Economy, December, 1984. Nevertheless Professor Deardorff finds that 'it is not clear that comparative advantage is necessarily the most useful criterion for explaining international trade in services." See Deardorff, 'Comparative Advantage and International Trade and Investment in Services', paper presented at the Conference on Current Issues in Trade and Investment in Service Industries: U.S. - Canadian Bilateral and Multilateral Perspectives in Ann Arbor, Michigan, October 19-20, 1984, p.2.

welfare by fostering greater efficiency in resource allocation, in lowering prices and in increasing the variety of options for consumers and firms.

3) The concept of national treatment as defined in various national positions and in some bilateral agreements is either unclear or too far-reaching to encourage wide participation in efforts to liberalize trade and investment in services. This paper will trace the evolution of national treatment from its beginnings as a trade concept applied to services to a broader concept which includes investment and establishment. This broadening may not be an inappropriate evolution, but it may compromise the goal of broad participation in service negotiations.

4) Following from the previous point, it seems that the GATT concept of "national treatment" would have to be modified when applied to services. It is sometimes believed that GATT Article III provides for national treatment for goods-producing industries. Such is not the case: the GATT provides that, except for those circumstances for which quotas on imports are permitted, foreign goods may be treated differently than nationally-produced goods in that their importation may be subject to a tariff or fee. What GATT Article III provides is that for other forms of government intervention in the market or other forms of regulation, the foreign goods are to be treated on the same basis as goods produced domestically. Since many services do not face tariff barriers or fees, it can be argued

that the right to treat foreign services differently from nationally produced services (as in the goods case) should fall to some other instrument, such as regulation. It can also be argued, that in the absence of tariffs or fees, there should be no instruments which allow governments to differentiate between nationally and foreign produced services. This argument represents an important point of departure for an analysis of trade and investment in services.

5) The OECD has conducted significant work which is relevant to the current negotiations and study of trade and investment in services. This includes numerous industry studies and the development and application of trade and investment concepts to services. Much of the work has been in support of the Code of Liberalization of Capital Movements, the Code of Liberalization of Invisible Transactions, the Decision on National Treatment and other Decisions which represent a framework for encouraging the liberalization of trade and investment in services. This framework is deficient in a variety of areas, including some unclear concepts, inadequate provisions for temporary business immigration and, importantly, the absence of an enforcement mechanism. However, the Codes and Decisions provide guidance in a number of ways including the concept and application of the Decision on National Treatment which excludes a right of establishment (a broad right of establishment exists under the Capital Movements Code), and a system of reservations and exceptions which promotes a relatively high degree of transpar-

ency. It should be noted that the structure of the reservation and exception system for the Capital Movements Code has a feature which can bind liberalization. That is, once a reservation from a particular category is withdrawn it cannot be re-introduced (unless a member derogated from the entire Code). Given the swings of national trade and investment policy between protectionism and more open markets, the OECD system can take advantage of open market periods by reducing the number and scope of reservations and thereby complicate any subsequent slide towards protectionism.

6) The OECD Conceptual Framework for trade in services also represents an important step in developing principles for multilateral discussions on services. The Framework is incomplete or silent in a number of important areas such as an enforcement mechanism and the modalities of negotiation. It does, however, focus squarely on the issue of regulation which must eventually be at the centre of trade and investment discussions. Just as the OECD code on government procurement was shifted to the GATT, it seems likely that aspects of the Conceptual Framework will be included in a multilateral agreement on services.

7) Attaining a measure of liberalization of trade and investment in services in the GATT will require considerable flexibility by all participants. Given the diversity of views among potential participants it is clear that the gains achieved in goods trade (and the service inputs) since 1945 will not be

duplicated by services trade and investment in one GATT negotiation. The horizon must stretch well into the next century. Of course, service and investment negotiations could be more abbreviated, but this would be at the cost of fewer participants. Given an objective of broad participation accompanied by meaningful liberalization of trade and investment in services, one approach would be to conclude a non-binding general services statement on principles, concepts, and processes applicable to all services followed by efforts to negotiate codes based on modified legal concepts underlying the GATT. Obligations would be limited to the codes and could be on a conditional or unconditional MFN basis depending on the nature and scope of the code. At the same time the second objective should be to develop information on services, to analyze the issues and implications for national development, to promote a system of transparency and surveillance, and from this process, develop a schedule of regulations which could be the focus of negotiations.

II PERSPECTIVES ON TRADE IN SERVICES AND INVESTMENT IN SERVICES

One of the most contentious issues in services discussions is determining where trade in services ends, where investment in services begins and where any overlap between the two concepts exists. Up until the 1970s, the balance of international opinion tended to see investment (establishment) as a distinct issue from traded services. However, some governments, corporations and individuals now implicitly include investment in their use of the term - "trade in services". It will be demonstrated that these attempts do more to cloud than clarify the trade/investment nexus. To the extent that establishment/investment is acceptable in trade in services discussions, and that the GATT is used as a forum for trade in services discussions, then the introduction of establishment/investment elements into the GATT would be highly significant. This expanded definition of trade in services is not necessarily unwelcome, since some of the most outstanding problems and issues for services involve investment. What is important is recognition of this important evolution and the impact it might have on participation in the Group Negotiating Services (GNS) of the GATT. It may be that this definition of trade will impede rather than facilitate broad participation and adherence to a Statement on trade and investment in services and industry specific Codes.

This section will place the OECD work in its proper context by briefly reviewing the evolution of trade and investment from various perspectives: multinational enterprises, the United

States, Canada, UNCTAD and two bilateral treaties (United States-Israel and Canada-United States).

A) Multinational Enterprises (MNE)

According to a Conference Board survey of 141 firms with 227 international operations, many view the majority of their international operations as both investment and trade. MNEs that can distinguish trade and investment elements see their international operations more in terms of investment than trade. The high number of NA responses is notable (see Table 1 below).[2]

Table 1: International Service Operations - Trading or Investing (in Percent by Area)

Area	Trading	Investing	Both	N.A.
U.S.A.	19	24	28	28
Europe	11	19	59	11
Canada	35	15	20	30
Other	20	20	40	20
Total	19	21	36	23

When the trade/investment question is addressed by industry the importance of investment or trade and investment is even more pronounced (see Table 2). Two-thirds of the operations rely mainly on investing or on both investing and trading. Investing is the highest in the business services sector, while trade accounts for the majority of operations for professional services. The industries which view their service operations primarily as both investment and trade are tourism, transportation and shipping and the financial services sector.

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[2] James R. Pasche, Eliminating Barriers to International Trade and Investment in Services, The Conference Board, New York, 1986, 6.

Table 2: International Services Operations - Trading or Investing (in percent by Industry)[3]

Industry	Trading	Investing	Both	N.A.
Financial Services - total	13	20	50	16
Banking	21	13	51	15
Non-bank financial services	7	26	52	15
Insurance	4	28	48	20
Professional services	45	32	18	5
Transportation and Shipping	37	0	63	0
Business services	5	53	37	5
Telecommunications	20	30	20	30
Utilities	11	0	0	89
Retail stores	29	29	14	29
Tourism	14	0	86	0
Other	17	31	34	17
Total	19	23	42	16

The Conference Board concluded that "given the fact that sometimes more services firms with international operations are involved in investment as against trade, there is a need for future multilateral trade negotiations to consider investment barriers as well as trading barriers if obstacles to doing business in foreign markets are to be eliminated for services industries."[4]

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[3] Ibid, 7.

[4] Ibid, 5.

From the MNE perspective the frontier between trade and investment is indistinct. They believe that liberalization will necessarily require discussion of investment issues.

B) Government Views

The United States

The view of the United States on trade and investment in services has undergone change in recent years. In the 1970s trade in services and investment were viewed as separate issues, primarily for negotiating purposes. Today trade in services includes investment as a result of the conceptual extension of national treatment to initial establishment.

In 1976 a White House interagency task force produced a report on U.S. service industries in world markets.[5] The observations of the report illustrate the thinking on this issue at that time and are extensively quoted below:

> It would be counterproductive -- both to services and to the overall economic self-interest of the United States -- to attempt a wholesale introduction of an overall "service sector" negotiations approach in the MTN or to attempt to introduce in the MTN sectoral discussions of any particular services sector. The problems of most service industries are too related to investment problems for successful discussion on a sectoral basis in the MTN, which generally excludes financial and investment matters. The international problems of most service industries are almost completely concerned, in fact, with investment matters.

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[5] United States, Service Industries in World Markets: Current Problems and Future Policy Development, Washington, D.C., U.S. Department of Commerce, December, 1976.

> Some trade-related problems do exist for various service industries but for the most part these problems are heterogeneous and scattered. Where difficult trade problems resulting from regulation and national interest exist in certain sectors, such as the maritime transport industry, the mere fact of introduction in the MTN would not serve to reduce fundamental disagreements or to promote progress toward liberalization...
>
> A selective approach to introducing service industry trade problems into the MTN, however, appears warranted. Some of the trade problems raised by the service industries appear appropriate for negotiation and should be discussed with our trading partners for possible inclusion within the context of the MTN. Such problems include quantitative restrictions, discriminatory government procurement practices, subsidies, and the granting of favourable tax treatment to competitors. These are problems similar in kind to many non-tariff barriers (NTBs) faced by U.S. exporters of goods...[6]

The problem with traded services during this period was that they were viewed to be too closely related to investment, which was excluded from the MTN.

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[6] Ibid, 58.

In April 1980 the U.S. government introduced a comprehensive work program to deal with the issue of services.[7] This five point plan sought the removal of foreign impediments and domestic export disincentives to U.S. services. There were no separate references to the issue of investment, it being subsumed within "trade in services."

Reinforcing the inclusion of investment into trade in services were the amendments to Section 301 of the Trade Act in 1979. The revised Section 301 "includes, but is not limited to, services associated with international trade, whether or not such services are related to specific products." The Senate Finance Committee wrote in 1979 that "what is comprehended in the term 'commerce' includes international trade in services as, for example, the provision of broadcasting, banking, and insurance services across national boundaries." The inclusion of investment in Section 301 jurisdiction was clarified on 3 March 1983 when the term "commerce" was said to include new services as well as foreign direct investment by U.S. persons with implications for trade in goods or services.[8]

Furthermore, the Trade and Tariff Act 1984 defines international trade to include goods, services and foreign direct investment by U.S. persons, especially if such investment has

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[7] International Services Newsletter, Vol. 1, Issue 4, January/June 1981, 13-16.

[8] This clarification was in large part due to the Canadian National Energy Program and the Foreign Investment Review Agency.

implications for trade in goods or services. Issues such as the right of establishment and performance requirements now are dealt with as trade policy issues. Significantly, the Act clarifies and expands the scope of remedial measures under Section 301 so that such measures may be used to remove barriers to service trade and trade-related investment.

Multilaterally, the United States sought to subject G.S.P. eligibility to improved access for American goods and services in developing country markets. Included in the new Administration objectives were elimination of performance requirements on foreign investment and non-discriminatory treatment of American firms providing such services as insurance, banking and accounting.[9]

One of the first public documents which argued for an expanded interpretation of trade was the U.S. National Study on Trade in Services. The study attempts to distinguish trade in services from investment in services in terms of a) access versus ownership of a distribution system, b) services produced abroad (trade), versus services produced locally by a foreign-owned facility (investment) and c) when domestic regulatory authorities require establishment to sell services (which is considered trade). The Study acknowledges that "if countries are to embark on the formulation of rules for trade in services, they must know whether this can be done in a meaningful way without dealing with

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[9] Harold Malmgren, "New Restrictions on GSP", World Trade Outlook Vol 6 No. 1, 1984, 7-8.

the more sensitive issue of investment in services."[10] Nevertheless, the Study states that a right of establishment (that is, a right to investment) should exist under the national treatment principle for trade in services:

> Under current trade rules covering trade in goods, the national treatment principle ensures that foreign producers of goods receive the same treatment under domestic regulations as domestic producers. If the national treatment principle were adopted for trade in services, a domestic regulation requiring legal establishment of insurance companies should be treated in the same way as any other domestic regulation. In other words, foreign insurance companies granted access to the local market under trade rules, would have a right to establish themselves legally under the national treatment principle.[11]

It is unclear how incorporating the right of establishment within the national treatment principle helps to avoid dealing with the more sensitive issue of investment in services. What results are expanded parameters for negotiations, leaving uncertainty as to the boundaries of issues and concepts. According to the passage quoted above the United States seems to view local presence in two forms: 1) access to the local market

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[10] United States, Office of the United States Trade Representative, United States National Study on Trade in Services, 1983, 5.

[11] Ibid, 72.

under trade rules, and 2) a more formal legal establishment. The granting of (1) allows (2). One of the issues therefore is what "trade rules" exist that grant access to the local market?

The key to the U.S. attempt to try to distinguish trade in services from investment in services is found in the distinctions (b) and (c) above. These distinctions assume it is possible to separate services, or components of services, which are traded (produced abroad) from the services, or components of services "which can only be produced locally."[12] The latter point is of critical importance. How can it be clear whether a service is either being produced locally due to market/consumer preference as opposed to government regulation? According to the Study, establishment due to market/consumer preference connotes investment, while establishment due to government regulation is a trade issue. By way of example, the Study states that data processing services provided locally by a foreign owned computer processing facility is an investment activity, and that establishment by an insurance company in a country which requires legal establishment as a precondition to delivering services is a trade activity.

For many developed countries the above definition of trade is a constructive step towards liberalizing trade (and investment) in services. However, for many developed and developing countries the proposed distinction between trade and investment would eliminate or reduce the ability to control the establish-

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[12] Ibid, 71.

ment of foreign banking, insurance and other financial firms, broadcasting and telecommunications firms, and maritime and aviation firms. Even if developing countries accepted that investment has trade implications, it is not clear whether this should necessarily restrict the ability of nations to control investment. From this perspective it should be asked what trade is being permitted subsequent to establishment. The provision of local services to residents by a foreign controlled bank might seem to involve little in the way of traditional trade. From this discussion it is reasonable to expect that a broad group of developing countries would not accept the distinction of trade and investment as outlined in the U.S. Study.

Possibly at the heart of the U.S. attempt to introduce elements of investment into trade is the view that establishment regulations for foreign firms are "no different from any other regulatory requirements imposed by governments for the protection of local citizens, such as health, safety or environmental regulations."[13] Given this outlook, the U.S. tends to view establishment regulations as negotiable issues. What other countries might argue is that this outlook ignores the fact that sovereignty issues may be more important to establishment regulations than to health, safety and environmental regulations. This difference in the perceived role and importance of regulations is potentially a major obstacle to liberalization in the service sector.

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[13] Ibid.

B) Canada

A background report prior to Canada's submission to the GATT separates trade in services (tourism, service embodied in goods and transported across frontiers, and service transported via telecommunications and transportation networks) from the establishment of service affiliates abroad. In the latter case "The resulting transfers are not international trade as usually understood, although the transactions to which they give rise are important and can lead to significant flows of funds across borders. This type of service transfer can be called 'establishment' transactions."[14] The study favoured a focus on traded services rather than establishment transactions.[15] The study also observed that "we would no doubt need to bring out the fact that the notion of national treatment does not readily translate from goods trade to services trade. Many countries would suffer if it were automatically so applied."[16]

Thereafter the differences between investment and trade in service became less distinct. The concept of national treatment was extended from goods trade to services trade in a manner similar to changes in the United States. This situation was confirmed in the Canada - U.S. Free Trade Agreement. This agree-

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[14] Task Force on Trade in Services, Background Report, Ottawa, October, 1982, 7.

[15] "The most fruitful course could lie in encouraging discussion of "traded' services, i.e. questions of access to markets across frontiers, rather than establishment and investment issues." Ibid., 99.

[16] Ibid., 99-100.

ment commits both countries to national treatment of services (including a right of commercial presence) and national treatment of investment for goods and services.

C) United Nations Conference on Trade and Development (UNCTAD)

The UNCTAD Working Party on Obstacles to International Trade in Services has been unreceptive to an expanded definition of trade in services.

> The attempts to introduce services conceptually into a trade policy framework have been unable to delineate trade from foreign investment issues; efforts to equate trade concepts such as "access to markets" with investment concepts such as "establishment" have further obscured the debate...there is a difference in perception as between transnational corporations which view the world as a single market for services, and governments. To TNCs the issues of trade and investment ("access" and "establishment") are elements of their global strategy. To governments trade and investment are two distinct issues.[17]

The ever-expanding definition of trade in services helps explain the reluctance of many developing countries to enter into discussions of this nature. Many developing countries do not wish to liberalize their national investment provisions and would therefore be reluctant to discuss trade in services issues which incorporated the main elements of investment.

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[17] UNCTAD, Services and the Development Process, September, 1984, 65.

E) Trade and Investment: U.S – Israel Free Trade Agreement

The United States and Israel Agreement represented the first occasion where broad trade in services principles were included in an international agreement. The Declaration is no more than a statement of principles which are not legally binding on either party. The central elements include open market access, national treatment, regulatory agencies, public monopolies, transparency, and an agreement to consult periodically. The Declaration covers, but is not limited to the following: transportation, travel and tourism services, communications, banking services (representative offices only), insurance, other financial activities, and professional services (such as consulting in construction, engineering, accounting, medicine, education, and law, the providing of other professional services such as management consulting; computer services; motion pictures; advertising. See Annex I for the full Declaration).

The principle of national treatment in this Declaration does not grant each party a full right of establishment. Rather, it states, in part:

> Each party will endeavor to provide that a supplier of a service produced within the other nation is able to market or distribute that service under the same conditions as a like service produced within the first nation, including situations where a commercial presence within the nation is necessary to facilitate

> the export of a service from the other nation or is required by that Party.[18]

Presumably the clause "or is required by that Party" extends the commercial presence concept beyond situations of simply facilitating an export, without securing a right of establishment for services firms of either party. This is clearly a much diluted definition of national treatment compared to that of the 1983 U.S. National Study.

Another broad principle of the Declaration is that of "open market access." The Declaration calls on parties to "endeavor to achieve open market access for trade in services with the other nation, taking into account the different regulatory regimes for specific service sectors in the two nations."[19] This article seems to provide a more general fall-back liberalization clause should either party not be satisfied with progress under Article 3. Both articles are heavily qualified by the word "endeavor". Thus the trade/investment issue is limited to the narrow concept of commercial presence which will need to be defined for each service sector. The implementation and enforcement mechanisms have no effect beyond that which is created by consultation and consensus.

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[18] Article 3. In the area of commercial banking the concept of a commercial presence refers to the activities of representative offices, but not to agencies, branches or subsidiaries of commercial banks.

[19] Article 2.

E) Trade and Investment: Canada - U.S. Free Trade Agreement

The most far-reaching bilateral agreement on general services has recently been negotiated by Canada and the United States in the context of the Canada - U.S. Free Trade Agreement (FTA).[20] The treatment of trade and investment in services in the FTA is more developed than any other general bilateral trade agreement. The FTA includes broad concepts applicable to goods and services, binding commitments on business travel, trade in services and investment in services, and specific service industry agreements for financial services, architecture, tourism, and computer services and telecommunications-network-based enhanced services. The scope and coverage of the services chapter includes:

a) the production, distribution, sale, marketing and delivery of covered services and the purchase of use thereof;

b) access to, and use of, domestic distribution systems;

c) the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering, or facilitating a covered service; and

d) subject to Chapter Sixteen (Investment), any investment for the provision of a covered service and any activity associated with the provision of a covered service.[21]

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[20] Canada Department of External Affairs, The Canada - U.S. Free Trade Agreement, 1987. Hereafter cited as FTA.

[21] See Annex II for the chapter on services.

Trade in services is apparently covered in (a) through (c) while investment in services (d) is treated separately. National treatment[22] is the central principle of FTA, and is applicable to trade in services and investment in services, that is, the FTA provides for the national treatment of right of establishment. There is some flexibility built into this system. First, either party may accord different treatment for legitimate purposes such as consumer protection or safety, so long as the treatment is equivalent in effect.[23] Second, the obligations are prospective and, third, the principle of national treatment apply only to covered services (and in some cases only to a limited degree).

While both parties view the FTA as setting as example for the MTN it is difficult to envisage transposing national treatment investment elements negotiated by two like-minded nations into heterogeneous multilateral fora. While national treatment may only be a principle which can, therefore, be limited by applying it to a few sectors, the actual obligations for any one sector can be overwhelming. It is unclear whether such a powerful principle could be workable for a large group of nations.

A middle ground may, however, exist between (b) and (c). The growing influence of transborder data flows on the delivery

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[22] Article 105. Each Party shall, to the extent provided in this Agreement, accord national treatment with respect to investment and to trade in goods and services.

[23] FTA, 195.

of traditional services is lessening the need for establishment. Thus the provisions of (b) and (c) can liberalize this kind of trade. However the boundary between trade and investment with regard to commercial presence is indistinct. The coverage of commercial presence will need to be defined for the relevant service sectors. Commercial presence can, if properly defined, represent a middle ground between pure trade and investment.

Summary of Trade and Investment in Services

To place the OECD work in context, this section has traced the evolution of national treatment related to trade in services to national treatment related to investment in services. Originally the concept of national treatment excluded investment issues, as the latter were viewed as being too contentious for negotiation. However, over the past decade national treatment for services has been extended to include the main elements of initial establishment by many countries. This extension has also been rejected or heavily qualified by numerous countries for application to broad multilateral discussions. National treatment for goods permits discrimination in the form of a tariff or fee, but the more recent application of national treatment to services offers no substitute protection. Without the development of some tariff or fee analog for services, which settles on an agreed method for discrimination, it will be exceptionally difficult to generate broad national support for this application of the concept. This does not mean this extended concept is inappropriate for agreements with limited partnerships between relatively like minded nations, as in the case of the Canada - U.S. FTA, but it is unlikely that there would be support for this extended concept in the MTN. Further work must be focussed on developing a middle ground, which may be possible through the detailed application of commercial presence obligations.

III THE OECD CODES, DECLARATIONS AND DECISIONS

A) Overview

i) Code of Liberalization of Current Invisible Operations

In 1950 the OECD predecessor body, the Organization for European Economic Co-operation (OEEC) agreed to establish the European Payments Union and at that time a Code of Liberalization which applied to the movement of goods was also approved. During the following decade, rules for the liberalization of invisible transactions were also established. By 1961 the OEEC boasted that "the great bulk of current invisible transactions and transfers between the Members has been freed and, in particular, those related to foreign trade, to production and business, and to income from work and capital."[24] Nevertheless the actual Code recognized that there remained "restrictions on transactions connected with inland transport, insurance and films, where some Members still find it difficult to make progress."[25] In 1961, the OECD adopted the Code of Liberalization of Current Invisible Operations which was directly derived from the preceding OEEC Code. Since the 1950s the OECD has observed that "further progress in liberalizing current invisible operations has proved more difficult to achieve over most of this period, but it is important to note the very substantial liberalization of invisible transactions achieved in the early 1950s has been main-

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[24] Liberalization of Current Invisibles and Capital Movements, by the OEEC, March 1961, 15.

[25] Ibid.

tained, with such transactions remaining free of exchange controls even in countries suffering from payments difficulties."[26]

The Current Invisibles Code is a commitment by OECD members to eliminate restrictions between one another on a range of invisible transactions and transfers. This includes operations which are listed in Annex III under the following headings: business and industry, foreign trade, transport, insurance, films, income from capital, travel and tourism, personal income and expenditure, public income and expenditure, and a "general" category which includes items such as advertising, professional services and the registration of patents and trademarks. This Code also dedicates special Annexes to Insurance, Air Transport, Films, and Bank Notes. The Annex on Insurance covers a broad range of activities including life assurance, insurance relating to goods in international trade, re-insurance and retrocession and "all other insurance" under certain conditions. The Air Transport Annex has limited applications. The Annex on Bank Notes establishes minimum levels for the import and export of foreign and domestic bank-notes. Finally, the Film Annex allows:

a) "for cultural reasons systems of aid to the production of printed films for cinema exhibition [to be] maintained provided

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26 Liberalization of Trade and Investment in the Services Sector: The Role of the OECD Codes, OECD, DAFFE, November 15, 1985.

that they do not significantly distort international competition in export markets",[27]

b) for screen quotas for printed films for cinema exhibition, and

c) for freedom from duties, deposits or taxes.

The OECD claims that the Current Invisibles Code covers "virtually" all current invisible operations except for those services that did not exist when the Code came into effect, such as communications services and computer information.[28] However, while a broad range of operations are covered, the depth of coverage varies considerably. For example, the insurance section deals with conditions for establishment and operation of branches and agencies of foreign insurers, while the application of the Code to banking is dealt with only in terms of transactions, specifically, income from capital (interest, profits, dividends and shares in profits, and rent).[29] Even in areas where the Code appears to provide depth of coverage, progress has been regarded by some as minimal.[30]

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[27] Code of Liberalization of Current Invisible Operations, OECD, 1961 (March 1986 edition), 49.

[28] OECD, Introduction to the OECD Codes of Liberalisation, Paris, 1987, 16.

[29] See Annex III, Section F.

[30] Ron Shelp, Beyond Industrialization: Ascendancy of the Global Service Economy, New York: Praeger, 1981, 136. A more critical view of the insurance aspects of the Code can be found in John N. Geracimos, "International Insurance Transactions," Journal of Law and Commerce, Vol. 6, issue 2, 1986, 505-6. The OECD has addressed some of these criticisms in the fifth examination of reservations relating to insurance items. As a result

The shortcomings are being addressed by numerous OECD committees. The role of this Code will continue to liberalize transactions and transfers, possibly with greater emphasis on applying the general obligations of the Capital Movements Code to specific sectors.[31]

ii) Code of Liberalization of Capital Movements

Efforts to liberalize capital movements met with greater resistance than was the case with invisible transactions. Capital movement obligations were viewed as a potential cause of balance of payments difficulties, which might lead to undesirable restrictions in certain national economic situations. Nevertheless, in 1955 the OEEC adopted a Recommendation which included some limited provisions dealing with several specific matters, among them blocked funds and the re-transfer of proceeds of liquidated investments. Two years later the Organization agreed on some firm obligations to liberalize long-term investment, and in 1959, the OEEC adopted a Code of Liberalization of Capital Movements.

When the OECD was established in December 1960, member countries agreed "to pursue their efforts to reduce or abolish

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of this examination fourteen countries indicated they were prepared to withdraw 24 reservations and four countries would limit the scope of 7 reservations. Despite these results numerous more difficult reservations remain, while sub-federal authorities in Canada and the United States are even outside the reservation process.

[31] OECD, Introduction, op. cit., 24.

obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements."[32] The principle instrument formulated by the Organization in the pursuit of this objective was The Code of Liberalization of Capital Movements which was adopted in 1961. In Article 1(a) of this Code, member countries agreed to "progressively abolish between one another...restrictions on movements of capital to the extent necessary for effective economic co-operation."[33]

The Code requires (subject to certain exceptions) that member countries automatically authorize transactions and transfers involving direct investment which is defined as "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."[34] In 1984 the Capital Movements Code was amended to extend its coverage to deal with measures and practices which restrict the right of establishment of foreign investors.

The Capital Movements Code covers a wide range of inward and outward capital movements, including direct investment (and its liquidation), admission of securities to capital markets, buying and selling of securities and of collective securities,

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[32] OECD Convention, December, 1960.

[33] Code of Liberalization of Capital Movements, OECD, 1961 (March 1982 edition).

[34] Ibid, Annex A, 27.

operations in real estate, commercial credits, financial credits and loans, personal capital movements, capital transfers arising under life assurance contracts, sureties and guarantees, physical movement of capital assets, and the disposal of non-resident owned blocked funds. See Annex IV for a list of the operations covered by this Code.

iii) Declaration on International Investment and Multinational Enterprises and Related Decisions

In 1976 the OECD issued a Declaration on International Investment and Multinational Enterprises, several related Decisions which contain the National Treatment instrument, and the Guidelines for Multinational Enterprises and the International Investment Incentives and Disincentives instrument (see Annex V). The National Treatment instrument has been a focus of efforts to promote greater liberalization and consistency in the treatment of firms already established in a host country. The National Treatment instrument does not apply to initial investment and establishment. Thus, this interpretation of national treatment is significantly different from the definition as currently employed by the United States, Canada and even the OECD in its Elements of a Conceptual Framework. With this notable feature, considerable work has been conducted in a) defining the scope and nature of national treatment in other circumstances, b) encouraging more uniform interpretation of "public order and essential security interests" and other terms which can be used

to limit the scope of the national treatment instrument, c) developing a survey which enumerates member deviations from national treatment d) identifying the scope of the national treatment instrument as related to the Capital Movements Code, to mention a few initiatives.

While this work helps to develop a stronger base for the effective functioning of national treatment in the OECD, there has only been a limited number of changes to national treatment in member countries since 1978, with no perceptible overall trend.[35]

iv) Declaration on Transborder Data Flows, 1985

Transborder data flows (TBDF) represent a critical element in trade in services discussions. TBDF is a growing economic activity on its own, and an important factor service for other services and goods transactions. For these and other reasons it has become evident that maintenance of a liberal trading environment is desirable for this sector. The OECD Declaration on Transborder Data Flows (see Annex VI) was one of the first multilateral steps to address this issue. Although the Declaration is generally only of symbolic importance, it represents a modest attempt to encourage a more liberal environment for this sector.

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[35] OECD, The 1984 Review of the 1976 Declaration and Decisions, Paris, 1984, 46.

v) OECD Committee Work

The Codes, Declarations and Decisions are the responsibility of various OECD Committees. These committees are responsible for all matters relating to the Codes, Declarations and Decisions. These matters include surveys, questionnaires and recommendations.

The Committee on International Investment and Multinational Enterprises (CIME) is responsible for all matters relating to the National Treatment Instrument, the Guidelines for Multinational Enterprises, and the Decision on International Investment Incentives and Disincentives.

The Committee on Capital Movements and Invisible Transactions (CMIT) is responsible for all matters relating to the Capital Movements Code and the Invisibles Code.[36]

The Committee for Information, Computer and Communications Policy (ICCP) is generally responsible for issues related to TBDF.

The Trade Committee is responsible for, inter alia, defining the elements of a conceptual framework which would facilitate broadly the liberalization of trade in services.

Finally, there are numerous other committees (e.g. Committee on Financial Markets) which tend to deal with separate industries or industry groupings.

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[36] For more details on history, mandate and status of this Committee, see OECD, Introduction op. cit., 26-28.

III B) Concepts and Principles of the OECD Codes, Declarations and Decisions

i) Overview

The OECD Codes, Declarations and Decisions represent important agreements in international trade and investment in services. These agreements promote international liberalization of trade and investment in a variety of ways, including:

1) Adherence of member countries to Council Recommendations pertaining to services. These recommendations are important and highly visible political commitments.

2) Development of the separate concepts of the right of establishment and national treatment, as well as other concepts central to trade and investment in services.

3) Promotion of a system of transparency which is flexible to encourage maximum participation, and which also can be used as a benchmark liberalization in member countries.

4) Establishment of the goal of liberalization and not simply non-discrimination.

5) Development of a process which has led to a much better understanding of the critical issues which impact on trade and investment in services.

At the same time, however, the OECD agreements suffer from a number of deficiencies including:

1) Application to a limited number of relatively like-minded nations.

2) An extensive system of reservations, exceptions and derogations which can be used to circumvent the intended effects of services liberalization.

3) The absence of a mechanism to induce greater discipline.

4) Incomplete or non-existent coverage for some industries and concepts.

These drawbacks should not necessarily be interpreted as criticisms of the OECD agreements; rather, they reflect the manifest difficulties which are attendent to any agreement on trade and investment in services. These issues will be examined in greater detail in the following paragraphs.

ii) Establishment Issues

The Capital Movements Code is relevant to direct investment and, broadly, issues dealing with establishment. When the Code was drawn up, it required that member countries automatically authorize transactions and transfers involving direct investment, which was defined as "investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possiblity of exercising an effective influence on the management thereof."[37] While this requirement (and others of the Code) seem to establish a degree of discipline on direct investment, in practical terms the Code says members shall treat all non-resident owned assets in the same way. "Although it [the Code] provides for the free transactions and transfers of funds for direct investment, it does not guarantee foreign investors access to restricted sectors or ensure equal treatment."[38] The limitations of the Code were acknowledged in 1974 when the Committee on Invisible Transactions concluded that "the text of the Capital Code contains no suggestions that a general right of establishment, in the sense of operational rights in addition to the right of entry, was also to be created."[39] Thus the Code did not cover a number of signifi-

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[37] Code of Liberalization of Capital Movements, OECD, 1961 (October, 1986 Edition), Annex A, 27.

[38] Ronald Shelp, 129.

[39] The Right of Establishment Order for the Code of Liberalization of Capital Movements, Committee on Invisible Transactions, OECD, (DAF/INV/74.15/Paris, Feb. 25, 1974).

cant establishment issues.[40] In 1984 the Code was amended to address some of these shortcomings. The Council added a new paragraph to the Code which provides that the authorities of Members shall not maintain or introduce:

> Regulations or practices applying to the granting of licenses, concessions, or similar authorizations, including conditions or requirements attached to such authorizations and affecting the operations of enterprises, that raise special barriers or limitations with respect to non-resident (as compared to resident) investors, and that have the intent or the effect of

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[40] Ronald Shelp reported that the Codes do not provide for:
- freedom from expulsion
- free access to the various legal forms of enterprise (company, partnership, and so on)
- freedom for foreigners to control all or part of capital and management
- complete access to local financial markets
- freedom to move and select a location
- freedom to associate with national or foreign enterprises through joint venture partnerships, and the like
- freedom in the internal organization and mangement of the enterprise
- freedom to contract (including freedom to hire personnel, rent property and hire services)
- freedom to manufacture, sell, lease, rent transfer products, and acquire raw materials for use in manufacture
- freedom to import and export materials and products
- access to courts and administrative bodies
- nondiscriminatory treatment in matters of taxation customs and social security
- freedom to practice regulated professional activities - engineering, architecture, etc.

See Shelp, 128.

preventing or significantly impeding inward direct investment by non-residents.[41]

It should be noted that there is no grandfathering element attached to this new paragraph. The scope of coverage is, therefore, extremely broad.

The OECD Council has indicated that the expanded definition of inward direct investment includes "the main aspects of the right of establishment."[42] As a result of this change the OECD claimed that: "At a stroke, a wide variety of sectoral restrictions contained in domestic legislation, policies and practises became subject to liberalization obligations for the first time."[43] Examples of measures that may interfere with the right of establishment for non-residents include:

- a licence or concession needed to carry on business (e.g., in insurance) may not be granted more freely, or on more favourable conditions, to resident than to non-resident applicants.

- non-resident ownership might be excluded or restricted to a certain percentage of the equity capital of an enterprise operating in broadcasting or air transport.

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[41] Council Decision of the Council Amending Annex A to the Code of Liberalization of Capital Movements, C(83) 106 (Final).

[42] Introduction to the OECD Codes of Liberalization, OECD, Paris 1987, 23.

[43] Ibid.

- non-resident investment in banking may be permitted in the form of a subsidiary but not a branch.[44]

Exceptions to the requirements of this expanded definition are those relating to public order or essential security interests.

Member countries were permitted to lodge reservations on the expanded or re-defined parts of the codes which were not covered by previous exceptions. In the case of inward direct investment, member countries have introduced some new measures and have been more specific in their reservations as compared to the pre-1984 reservations. Annex VII catalogues the new or more specific measures against which members now reserve.[45] This list reveals a relatively large number of reservations. Nevertheless, it is considered preferable to have a greater number of specific reservations than a few broad general reservations, since greater specificity promotes transparency which in turn gives examining and reviewing authorities more defined and manageable items to address.

Despite the expanded definition of inward direct investment and the associated reservations, it is evident that the coverage of the new definition is still less than complete. As previously mentioned, reservations do not need to be entered when the

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[44] Ibid.

[45] In 1985 Canada acceded to the Capital Movements Code. The detailed Canadian reservations can be found in James Everard, "The OECD Codes and Declarations and Trade in Services", Series on Trade in Services, The Institute for Research on Public Policy, 1987.

following issues are involved - national security, public health, public and private monopolies and reciprocity. When the issues related to these items are added to the reservable items in Annex VII, the inventory of issues which fall outside the Code is impressive. Just such a list was developed by the OECD (starting in 1984) to provide all members with a comprehensive list of impediments to inward direct investment.[46] A review of this list illustrates the weakness of the Codes with respect to creating or upholding the right of establishment. What it does achieve, however, is a degree of transparency which is important for the conduct of business. Moreover, the lists of reservations could potentially serve as the basis for an exchange of concessions, as tariff schedules have done in GATT negotiations.

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[46] Survey of Controls and Impediments to Inward Direct Investment in OECD Member Countries, OECD, Paris, 1987. Also see earlier work: International Direct Investment Trends, Committee on International Investment and Multinational Enterprises, 1981.

iii) National Treatment

National treatment is addressed in the OECD Declaration on International Investment and Multilateral Enterprises. The OECD principle of national treatment is different from the trade concept contained in the GATT. National treatment under the GATT (Article III) refers to non-discrimination between products of local and foreign origin, while the OECD principle refers to non-discrimination between domestic and foreign-owned or controlled enterprises operating in the country in question. Since the OECD principle includes elements of investment (not initial investment, but post-establishment investment), it is potentially more relevant for trade in services.

The Declaration states that member countries should:

a) consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to peace and security, accord, to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country, treatment under their laws, regulations and administrative practices consistent with international law and no less favourable than that accorded in like situations to domestic enterprises;

b) endeavour to ensure that their territorial subdivisions apply "National Treatment";

c) recognize the need to give weight to the interest of Member countries affected by specific laws, regulations and

administrative practices in this field providing official incentives and disincentives to international direct investment, and

d) endeavour to make such measures as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available.[47]

The Declaration provides that member countries "will consider applying 'National Treatment' in respect of countries other than Member countries."[48] It is also stated that the Declaration "does not deal with the right of Member countries to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises."[49] This latter distinction is helpful in separating the issue of national treatment for trade in services from the right of establishment for services. The distinction recognizes that national treatment can only apply once establishment is granted. (However, without establishment, national treatment may have no application). Conceptually, liberalization can be separated into a series of relatively distinct principles or concepts. This separation is more desirable than attempting to develop one concept which

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[47] Declaration on International Investment and Multinational Enterprises, (II,4) OECD, Paris, 1976.

[48] Ibid.

[49] Measures which are not considered as exceptions but are reported for the sake of transparency include measures restricting investment operations of international transportation companies operating through branches, representative offices, sales offices and agents. The 1984 Review of the 1976 Declarations and Decisions, OECD, Paris, 1984, 44.

covers both trade and investment. Separating negotiating principles and concepts into smaller more distinct liberalizing steps facilitates broader acceptance. The one concept approach would likely be met with greater resistance given the necessary scope of the concept.

The Declaration is deficient in a number of respects. It has not been sufficiently defined in terms of detail, exceptions are numerous and adherence is left largely to member country discretion. For example, the terms "public policy" and "essential security interests" have no standard definition. The term "treatment...no less favourable than that accorded to domestic enterprises" does not extend to discriminatory measures derived from the existence of a public monopoly; such measures are not considered to be exceptions to national treatment. Exceptions to national treatment do not include situations where enterprises under foreign control receive treatment at least as favourable as the least well treated domestic enterprise but less favourable than the best treated domestic enterprise.

As mentioned, CIME reviews the laws, regulations and administrative practices of member countries which depart from national treatment. This review process clarifies the obligations of members under this instrument. These clarifications generally produce a more liberal interpretation and often result in members entering exceptions to the newly interpreted items. A review of the exceptions list category since 1976 reveals that items in this category have been growing. This is not necessar-

ily due to members departing from the obligations of the instrument; rather, it reveals a maturing of the process from coverage broadly interpreted to more narrowly defined. The increased number of exceptions is an essential step in developing a more transparent system. The CIME publishes the list of exceptions as well as measures which fall outside the exceptions category, in the interest of transparency.[50]

Two clarifications and surveys have been conducted since 1976 and these have better defined the substance and coverage of the instrument. Some of the more important points of the second review are summarized below.

1. Investments by established foreign owned or foreign controlled enterprises.

The national treatment instrument does not cover initial investment by a foreign non-resident company. The instrument does cover investment of subsidiaries already established in a host country. "However, where additional investment in the country in question is undertaken by the parent company and not by an already established local subsidiary, it would not fall under the national treatment instrument."[51] This situation would be covered by the Code of Liberalization of Capital Movements. Similarly, investment carried out through branches normally does

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[50] International Investment and Multinational Enterprises Mid Term Report on the 1976 Declarations and Decisions, OECD, Paris, 1985.

[51] The 1984 Review of the 1976 Declarations and Decisions, op cit., 42.

not fall under the national treatment instrument, but is covered by the Capital Movements Code. In practice, distinguishing the differences between branches and subsidiaries may be very difficult in some countries. Furthermore, given the differing criteria for "foreign control" embodied in national legislation, some member countries may disagree, on behalf of a multinational corporation headquartered in their country, with the classification and treatment of the multinational offshore. There is currently no alternative but goodwill negotiation on such issues.

2. Access to bank credit and capital markets.

The instrument covers measures that restrict the ability of foreign-controlled enterprises to collect deposits. It also calls on member countries to review the branching of foreign banks on a case-by-case method. This would avoid the process which determines whether an exception exists based solely on "like situations" of branches of locally owned banks. The attempt here is to stop countries who claim that the denial of branching to a foreign bank falls outside even the exceptions category.

3. Measures taken on the basis of public order and essential security interests fall outside the exceptions category.

As previously stated transparency is essential for the conduct of meaningful negotiations. An important element in this transparency is ensuring that there is some consistency in the issues which fall outside the scope of the exceptions category. The CIME has initiated such discussions with a view to

developing a more standard interpretation of member country measures based on public order and essential security interests.

4. Exceptions to the national treatment instrument have been the subject of a CIME survey. The three most important categories of the survey are discussed below.

i) Measures relating to investment by established foreign-controlled enterprises: the protected sectors include air and maritime transport, mining and natural resources, banking, insurance, and broadcasting and publishing.

ii) Measures related to government procurement and public purchasing: the Business and Industry Advisory Committee to the OECD (BIAC) has suggested that, in terms of foregone revenue, this area may be the most significant as regards discrimination.[52] Defence procurement represents a majority of the exception measures, and the remainder appear to have a moderate overall effect.[53]

iii) Measures related to government aids and subsidies: it was noted that fifteen of twenty OECD members reported measures constituting exceptions to national treatment. This highlights the weaknesses of the exceptions category since all members subsidize sectors of their economy. The survey also accurately suggests that transparency is not complete.

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[52] BIAC, National Treatment: A Major International Investment Issue of the 1980's, 1986.

[53] OECD, The 1984 Review..., 45.

iv) Measures related to tax obligations: the survey reported few measures which represented exceptions to the national treatment instrument.

In summary, the OECD declarations and statements relating to the right of establishment and national treatment are examples of the important work which the Organization has undertaken and which continue to contribute to trade in services. This review has shown also that the progress of Codes and Declarations is far from complete. Debate about the effectiveness of the Codes and Declarations is polemic. Between 1978 and 1984 the OECD noted that the trends with respect to national treatment are indistinct; while the United Kingdom removed restrictions on government procurement of computers from foreign controlled enterprises and restrictions on access to credit, Canada introduced exceptions to national treatment in the oil and gas exploration and production sectors.[54] Looking at the banking and securities sector, the degree to which the laws and regulations relating to these industries have become less restrictive with regard to establishment and national treatment, is not clearly related to the Codes and Declarations. The reshaping of the regulatory regimes for financial institutions appears to be more closely correlated to technological improvements, financial innovations, customers' needs and corporate strategy. Similarly the Codes and Declarations have not been the main catalyst in the liberaliza-

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[54] OECD, National Treatment for Foreign-Controlled Enterprises, 53.

tion of telecommunications or air transport operations. Nevertheless elements of the Codes and Declarations are important in ensuring that this liberalization is not reversed. The binding of progressive moves towards a more liberal trading environment is an important function of the Codes.

iv) Non-Discrimination

The Codes direct members to apply liberalization (and restrictive) measures to all member countries on a non-discriminatory basis. Furthermore, the Codes call on members to extend, where possible, these liberalization measures to other members of the IMF. According to a report by the drafters of the Codes

> there should be no attempt by countries to bargain with their neighbours individually in securing reciprocal concessions on specific items. Reciprocity is to be sought only over the whole geographical area and over the wide range of visible and invisible transactions - nothing less. Even members which are in economic difficulties and cannot themselves liberalize must not be discriminated against and must continue to receive the economic advantages of liberalization granted by other members.[55]

Non-discrimination has been generally respected since reciprocity has been limited to issues of direct foreign investment, elements of which were not included in the Capital Movements Code until 1984. The 1984 interpretation highlighted the inconsistencies of reciprocity and non-discrimination within the Code. Therefore, in 1986 a new annex was added to the

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[55] OEEC, "Liberalization of Current Invisibles and Capital Movements by the OEEC", March 1961, 17. However Article 10 does allow, as an exception to the principle, a special customs or monetary system. While this article has been used to accommodate the EC, and the Belgium-Luxembourg Economic Union, the loose wording could likely be used by any two members who declare a special customs or monetary system.

Capital Movements Code. The annex acknowledged that reciprocity "has operated with other factors...to broaden the effective sphere of liberalization,"[56] but that "more extensive use of reciprocity and/or discriminatory approaches in matters pertaining to inward direct investment or the right of establishment could reduce the effective sphere of liberalization among member countries."[57] As a result members are required to notify the Organization of all measures of reciprocity or discrimination concerning inward direct investment or establishment. Members are required to progressively abolish these measures "without, in so doing, extending the scope of restriction to inward direct investment or establishment."[58]

Member countries have informed the Organization of some of their measures and practises which are subject to reciprocity consideratons and/or requirements. These measures and practises are considered to have a different status from that of restrictions against which reservations can be lodged, but the procedures to be applied to them are essentially the same.[59]

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[56] Code of Liberalization of Capital Movements, op. cit., 118.

[57] Ibid.

[58] Ibid.

[59] Introduction to the OECD Codes of Liberalization, op. cit., 14.

v) Transparency

Transparency is a practice to be implemented rather than a principle which helps to clarify the principles involved in trade and investment in services. The nature of services shaped by government and industry regulations, NTBs and other controls complicates achieving a transparent system. These complications must be overcome if progress is to be achieved. A comprehensive and open enumeration of barriers to trade and investment in services is an objective of primary importance. This should also extend to the full disclosure of subsidies. Transparency not only facilitates orderly and open negotiations, but helps validate basic assumptions such as the applicability of comparative advantage theory to international trade and factor movement involving services.[60]

By their construction the OECD Codes promote a system of transparency. This is one of the most significant aspects of the Codes. Broad principles or obligations are declared and member countries are required to list their reservations, derogations or exceptions to these principles and obligations.

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[60] A validated comparative advantage theory would facilitate the analysis of the effects on economic welfare of the existing structure of trade and factor mobility in services and possible changes in this structure. To determine this existing structure the major impediments facing firms engaged in trade and investment in services needs to be catalogued. The transparency objective would help develop such a catalogue (see Robert M. Stern and Bernard M. Hoekman, "Issues and Data Needs for GATT Negotiations on Services", The World Economy, Vol 10, no.1, March 1987, 44.

When certain new obligations of the Codes are added and members feel they cannot comply, they notify the Organization by entering a reservation corresponding with the item of non-compliance. In this way the reservation serves as a formal notice that a rule, guideline, regulation, or practise is exempt from the liberalization guidelines. These reservations thus encourage a more transparent system. Under the Invisibles Code these reservations can be limited or withdrawn, but they cannot be re-introduced or expanded. Under the Capital Movements Code, the reservations of member countries appear on either List A or List B of the Code. Reservations on List A are subject to the same liberalization bias as in the Invisibles Code. List B reservations were introduced to accommodate members who require temporary derogations. Reservations on this list can be re-introduced after having been lifted. This feature of flexibility was designed to encourage a degree of participation and coverage which would otherwise not exist. It also potentially introduces less discipline into the system. These two aspects are examined in greater detail in the final section of this paper.

Furthermore, Article 7 of both Codes permits general and specific derogations. First, where a country's economic and financial situation in general is such that it cannot accept the whole of the liberalization obligations under the Code, a general derogation under Article 7(1) of the Codes may be invoked. Second, if a member country needs to re-introduce

restrictions because of a seriously deteriorating balance-of-payments situation or because any measures of liberalization it has taken "result in serious economic or financial disturbance" in the country concerned, a specific derogation may be invoked under Article 7(b) or 7(c) respectively. In any of these cases the Member country must notify the Organization of their invocation of the derogation provisions of the Code and justify their action. Derogations must be temporary and are reviewed periodically by the Organization to encourage the restoration of a more liberal regime as soon as possible.

The move towards greater transparency in the Codes, Declarations and Decisions has until recently been relatively slow. The recent initiatives to clarify coverage of the right of establishment and national treatment has contributed to a more transparent system. While acknowledging the progress brought about by these initiatives, there remain a significant number of unacknowledged barriers to trade and investment in services. The exceptions category can still shield or camouflage protectionist regulations or activities, subsidies are virtually untouched, and undetected government favouritism generally exists for many firms or industries.

What members consider reservable, or which fall outside the exceptions category, seems to exclude a number of significant impediments. For example, the United States implies that, beyond its few reservations for both Codes, foreign service firms have unrestricted access to trade and investment in their country.

The plethora of real restrictions casts some doubt on the U.S. position.[61] For example, by not entering a reservation for certain aspects of financial services the United States implies that there are no restrictions or that federal powers eliminate potential restriction. However, through the course of the Canada - U.S. free trade negotiations over 125 separate barriers to financial service exports to the United States were identified. It is likely that, upon closer inspection, there are numerous other currently undisclosed or perceived barriers which ultimately restrict service trade and investment in all countries.

Any system of transparency would also have to ensure the cataloguing of subsidies, as they potentially operate as an impediment to service trade and investments. In 1982 a sub-group of the OECD research programme on Positive Adjustment Policies found that member countries had not established a data bank for subsidy information:

> In most countries examined, information about subsidies is not collated under a single heading, but diffused in a multitude of national income and expenditure reports and statements. Publically available data on subsidies is generally incomplete and hard to find in numerous different documents in which it is scattered.

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[61] See Raymond J. Waldmann, Direct Investment and Development in the United States, Transnational Investments Ltd., Washington, D.C. 1980-81, and Barriers to Foreign Investment in the United States, Policy, Research and Communications Branch, Foreign Investment Review Agency, 1982.

> There are only two possible reasons for this state of affairs. Either governments simply do not want people to obtain detailed and comprehensive information about subsidies; or there has been no incentive and no inclination in most countries to make the effort of assembling information about the array of subsidies that are available.[62]

The low degree of transparency was also recognized by the 1985 Leutwiler Report which urged that private and public companies declare the degree to which they benefit from subsidies.[63] The absence of subsidy information from the OECD transparency process is a significant omission.

Despite the shortcomings of transparency in the OECD, it should be emphasized that the process is sound and lends itself to a broader application. Future negotiations may centre on the exchange of requests and concessions. This request/concession list could be developed from the transparency process. What is more certain is that the absence of a high degree of transparency would reduce the opportunities to liberalize trade and investment

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[62] George Eads and Edward M. Graham, "Transparency: A Prerequisite for Positive Adjustment", OECD Observer, Paris, November, 1982, 6-7.

[63] "In each country, the making of trade policy should be brought into the open. The costs and benefits of trade policy actions, existing and prospective should be analyzed through a 'protection balance sheet.' Private and public companies should be required to reveal in their financial statements the amount of any subsidies received. Public support for open trade policies should be encouraged." Fritz Leutwiler et al., Trade Policies for a Better Future, Geneva: GATT Secretariat, 1985, 35.

in services.

vi) Consultation/Dispute Settlement Mechanisms

One of the significant features of the OECD Codes and the National Treatment Instrument is the manner in which member countries consult and settle differences. Proposals are based on developing consensus positions. Discussions take place in private and the formal proposals of various committees are non-binding, even if they are adopted by the Council, thereby becoming Recommendations. According to the Second Revised Decision of the Council on International Investment Incentives and Disincentives:

> Consultations will take place in the framework of the Committee on International Investment and Multinational Enterprises at the request of a Member country which considers that its interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another Member country which provide significant official incentives and disincentives to international direct investment. Having full regard to the national economic objectives of the measure and without prejudice to policies designed to redress economic regional imbalances, the purpose of the consultations will be to examine the possibility of reducing such effects to a minimum.[64]

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[64] OECD, International Investment and Multinational Enterprises: National Treatment for Foreign Controlled Enterprises, Paris, 1985, 148.

On the positive side the United States has observed that "although this voluntarism creates problems of compliance it is also a strength in permitting less inhibited discussions by governments, and greater freedom to concentrate on the more sensitive issues that cannot be addressed contractually."[65] While the strengths of voluntarism are acknowledged, this observation minimizes the magnitude of the compliance problem. Countries can only, at worst, be placed in embarrassing situations. This is inferior to a system which contains provisions for compensation or the witholding of benefits by injured parties. Future negotiations on trade and investment in services should recognize the short-comings of this aspect of the Codes and National Treatment Instrument. Voluntarism and suasion should be supplemented by mechanisms which would more firmly encourage liberalization.

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[65] United States, Office of the United States Trade Representative, United States National Study...op.cit., 5.

III C) Declaration on Transborder Data Flows (TBDF)

An exceptionally important component of many services is TBDF. TBDF are influencing the concepts of trade and investment since these data flows increase the tradeability of some services. For example, the necessity for investment decreases for services such as banking (formerly limited to wholesale banking, but now moving down even to retail banking), insurance and accounting as TBDF becomes more sophisticated.[66]

Recognizing the increasing importance of TBDF to services issues, the OECD directed the ICCP to work on TBDF issues in 1982. Three years later the Declaration on Transborder Data Flows was issued by the governments of the OECD member countries. The Declaration was the first multilaterally agreed instrument to focus on the transborder flow of non-personal data. Its importance lies not so much in what it changes in current TBDF, but what it helps to prevent, namely the continued low level of restrictions on TBDF. It provides "a halfway base between no international rules and fully developed international rules covering transborder data flows. It...provide(s) a pragmatic basis for solving problems."[67] The importance of the Declaration could also be enhanced over time if it were applied by govern-

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[66] For a more detailed review see Karl P. Sauvant, "Services, TDF and the Code", The CTC Reporter, No. 22 (Autumn 1986).

[67] Geza Feketekuty and Johnathan Aronson, "Meeting the Challenges of the World Information Economy", The World Economy, 7 (March 1984), 81.

ments and thereby acquires the status of customary international law.[68]

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[68] For a discussion of this evolution see Hans Baade, "The Legal Effects of Codes of Conduct on Multinational Enterprises," in Norbert Horn, ed., Legal Problems of Codes of Conduct for Multinational Enterprises, Deventer: Kluwer, 1980, 3-38.

IV ELEMENTS OF A CONCEPTUAL FRAMEWORK FOR TRADE IN SERVICES

In 1982 the Trade Committee began work to define the elements of a conceptual framework that would broadly facilitate the liberalization of trade and investment in services. In March 1987 the Committee released a document entitled Elements of a Conceptual Framework for Trade in Services. The Framework highlights numerous principles and their applications, exceptions and safeguards, methods and techniques of negotiation and refers to specific undertakings which would be required to recognize the interests of at least some developing countries. Being an initial draft, the document does not always offer specific undertakings but proposes various alternatives to certain issues. The Framework does not establish a legal framework for the establishment of rights and obligations and the exchange of concessions. It is more a guide or statement of how certain principles and practices for services might appear in a general agreement on services. Sub-agreements or codes would be necessary to address the particularities of specific sectors.

The Framework diverges from the OECD Codes, Declarations and Decisions in a number of important ways. It expands the concept of national treatment to include limited elements of right of establishment. It also tries to clarify the frontier between trade and investment but is unsuccessful in this attempt. There is also the development of a general "market access" concept, which is more an objective than a principle, and as such seems to have limited value. Finally, the Framework is

silent on how transparency can be achieved, how effective access can be determined and what constitutes reasonable or unreasonable regulation. These and other issues are discussed in subsequent sections.

A) Introduction

The introduction to the Conceptual Framework outlines the limitations of the document. It acknowledges that not all concepts are covered, that some issues such as government procurement and technical barriers are not treated separately and that the problems arising from unequal economic development situations are not addressed. The document emphasizes that the modalities of negotiations on liberalization are not examined. Clarifying the relationship and the boundary between trade in services and international investment in services is an area of particular focus for the Framework. To bring greater distinction between the issues of trade and investment, the Framework defines trade in a circular fashion:

> The present draft nonetheless focusses on "trade", it being understood that trade in certain services requires an extension of the traditional meaning of the word to include some elements of commercial presence (and if required of investment) without which trade cannot take place.[68]

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[68] OECD, Elements of a Conceptual Framework for Trade in Services, Paris, 1987, 3.

It is unclear how defining trade in terms of those aspects of presence or investment related to trade helps to achieve the goal of greater clarification. For example, arguments have been advanced that no "trade in banking" exists where Bank A from Country A has representation in Country B.[69] The only "trade" might be the factor service income flows e.g. interest, dividends between the two countries. This interpretation is not acceptable; thus the only other possible "trade" in this situation is the actual act of investment. While there is apparently high acceptability of broadening the trade concept to include elements of investment within the OECD, it is less certain whether this view is shared by other countries. To the extent that this view is not shared by other countries, the frontier between trade and investment will require flexibility. The framework does not fully address this important issue.

B) Market Access

The Framework identifies market access as a concept central to trade in services. Definitional boundaries for the term "market access" are not developed, but examples of market access are outlined as being:

i) the right of foreign firms to sell services under conditions of fair competition which in turn requires

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[69] For example see James R. Melvin, Services: Dimensionality and Intermediation in Economic Analysis, Institute for Research on Public Policy, Ottawa, 1987, 27-30.

ii) effective access of foreign suppliers or suppliers of imported services to the national distribution system for the services concerned and access to local commercial presence as required.

iii) the provision of the right for foreign service industries or suppliers to sell those services on the national market under no less favourable conditions than those accorded to national industries.

iv) the right to sell under a brand name and access to qualified personnel.

v) initial establishment in certain cases.

One of the most important aspects of market access centres on establishment. According to the Framework:

> ...to facilitate trade, it is accepted that "trade in services" may include sales via a local commercial presence in the customer country; the form of this presence has to be defined according to the circumstances, the sector, the country, and according to what is required in order to gain effective access to the foreign market. Thus, some limited aspects of right of establishment, of direct international investment and of corresponding financial aspects may be considered part of trade in services in some sectors.[70]

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[70] Elements of a Conceptual Framework...op. cit. 5. It is noteworthy that the Framework discusses the "limited aspects" of right of establishment in some trade in services sectors, whereas

The Framework states that this paragraph explains

> the relationship which may exist in certain circumstances with aspects of establishment and international direct investment when cross-border trade is not possible, and when these aspects are required for effective market access (notably when a regulation makes establishment a condition for marketing services) (author's emphasis). Initial establishment may therefore constitute an element of access in certain cases.[71]

According to the first paragraph, a right of establishment exists when a firm (or person?) must establish in order to gain effective access to the foreign market. The pivotal issue here would be determining the activities and service sectors or subsectors which require effective access to the local market. It is likely that most service industries could develop a case for effective access.

An apparent refinement of the right of establishment is suggested in the second paragraph. In this case a right of establishment may exist when cross border trade limits effective market access. Effective market access remains undefined, but a

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right of establishment for trade in services in the Code on the Liberalization of Capital Movements is regarded as covering "most aspects of the right of establishment". While neither definition is more accurate, the language of the Framework is more acceptable to countries concerned about unlimited foreign trade or investment in direct services.

[71] Ibid.

number of examples of obstacles to cross border trade are offered. These include

> prohibitions, restrictions or measures of equivalent effect; obstacles to certain transactions on the basis of local presence (firms or persons) such as restrictions on the granting of licenses, authorizations, etc; any discriminatory operating conditions which may accompany the granting of such licences and, more generally, discrimination within the customer country affecting marketing of services by foreign-controlled firms. The obstacles to be considered are those concerning access to private as well as public markets. Some obstacles may result from the practices of public or private monopolies or dominant firms or from distortions in conditions of completion.[72]

This definition of cross-border trade is considerably different than that associated with goods. It would seem to suggest that some form of a right of establishment exists in a number of service sectors including insurance, commercial banking and other financial services, construction engineering and related consultancy services, shipping, aviation and other modes of international transport, tourism, the audiovisual sector, computer and data services, telecommunications, advertising, accounting, management and other business services, artistic and cultural services, and medical and hospital services. Again,

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[72] Ibid., 6.

the actual extent of a right of establishment very much depends on whether effective market access is assessed as a prerequisite to commercial operations. The Framework is silent on how effective market access is determined. Given that the market access notion is really more a goal as opposed to a concept, and considering both the difficulty of better defining the notion and the possibility that concepts exist which would promote this objective (right of establishment, right of commercial presence), this "concept" requires considerable refinement.

C) National Treatment

The Framework claims to draw on the concept of national treatment as contained in the GATT and the OECD instrument concerning international investment. It is noteworthy that the Framework does not draw on the OECD concept of national treatment. To do so would exclude the elements of right of establishment from the concept of national treatment. As stated before, it is unclear whether this approach is the most advantagous for promoting liberalization. One way to achieve national treatment could be to consider regulations which define national treatment as "inappropriate" or "unacceptable". These terms would need to be defined from the viewpoint of trade liberalization. The Framework examines these terms in a separate section on regulation.

Due to the myriad service industries and functions, the OECD Conceptual Framework stresses the need to define national

treatment in a very flexible manner. National treatment "must be sufficiently flexible to apply to a number of different situations -- cross-border trade with no local presence; trade with a local presence; and full establishment if this is required by local regulations for the marketing of certain services."[73] This latter point overlaps the market access/right of establishment principle described in the previous section. The Framework states that "it is felt by some that the granting of a licence to a foreign firm to set up a first establishment, in compliance with local regulations on the marketing of services and under conditions similar to those applicable to national firms, should be viewed as the application of national treatment with respect to access and establishment."[74] While this construction avoids the notion of effective market access, the national treatment of establishment remains unclear.

Where access to the activity concerned is closed to all firms (national or foreign), granting national treatment is of little use. Whether the concept of national treatment or that of right of establishment is used to promote liberalization may not be the overriding issue. The focus must be on determining whether there are "acceptable" or "unacceptable" regulations in place which limit liberalization. Flexible national treatment should be held as one indicator of "acceptable" or "unacceptable" legislation for firms already established

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[73] Ibid., 8.

[74] Ibid.

in a foreign country, and in situations where no establishment exists a review process should be encouraged to examine the rationale for national restrictions and determine if the original rationale remains. The concepts of "acceptable" or "unacceptable" regulations are examined further on in this paper.

In addition to the examples of required flexibility for any concept of national treatment for services, is the need to deal with the differences in the applications of national treatment in different jurisdictions. For example, national treatment accorded to foreign firms in country A may be considerably more liberal than national treatment to country A's firms in foreign countries. While national treatment promotes liberalization the unequal distribution of liberalization may be difficult to accept in practical terms. Some aspect of "equivalent" treatment will need to be introduced.

D) Non-Discrimination

The Framework acknowledges the desire to encourage a system based on non-discrimination. However, "the need for countries opening their markets to each others' industries to obtain certain guarantees in this area may justify attaching an element of conditionality to non-discrimination."[75] The Framework raises the possibility that reciprocity could be a liberalizing influence in certain circumstances, or alternately, reciprocity could be an instrument which would accentuate market compartment-

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[75] Ibid.

alization. Interestingly, the 1986 update of the Code on the Liberalization of Capital Movements is decidedly against the use of the principle of reciprocity. By not rejecting reciprocity, the Framework leaves open the possibility of conditional MFN agreements on services.

E) Regulation

The section entitled "Objectives to be taken into account in National Regulations" is essentially an examination and clarification of national regulations which either prohibit cross-border trade (restrict establishment) or do not extend national treatment, and it introduces the concepts of "appropriate" and "inappropriate" regulation. The Framework focuses on developing a concept of appropriate regulation which facilitates liberalized trade. The list is so comprehensive that it is difficult to envisage situations where countries could not apply one of the "appropriate" reasons for regulations. Some "appropriate" reasons include regulation

- to safeguard the privacy, prosperity, health, safety and general well-being of the consumer.

- to safeguard national security, sovereignty and heritage; cultural identity; environment.

- to ensure the assurance of conditions necessary for a proper functioning of the national economy.

- to maintain the quality of service provided.

- to regulate and/or stimulate demand.[76]

The above list is certainly too broad to be meaningful as a basis for negotiation, however, it is a step in the right direction.

Service negotiations will require the examination of national regulations and the establishment of some form of appropriate standard of regulation is required. Regulatory barriers must be identified and classified. It may be possible to have these "appropriate" reasons effectively become exceptions to national treatment, right of establishment and other principles. Once treated as exceptions they could be subject to periodic review and negotiation.

The Framework notes that differences in regulatory systems are a major barrier, especially to achieving national treatment. While some form of harmonization would be required in these circumstances, the Framework acknowledges that "there is no agreement on the possibility that a framework for trade liberalization should include commitments with regard to harmonization of national regulations (and even less as to the idea of supranational disciplines)."[77] Nevertheless, some convergence of the principles underlying regulations will be necessary if any services agreements are to be meaningful.

Another difficult issue in bringing regulation into an agreement on services is the treatment of decentralized regula-

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[76] Ibid., 10.

[77] Ibid.

tory systems. These differences in national and sub-national regulatory competence must be addressed to the satisfaction of all parties. The Framework suggests five possible methods of dealing with national/sub-national regulatory differences:

1) derogations could be provided in a given area.

2) the central government could commit itself to providing detailed transparency.

3) a "best endeavours" solution which would bring the appropriate national/subnational groups closer together in the preparation and subsequent implementation of negotiations.

4) countries would have to accept the international consequences of a sub-national entity denying benefits to a partner country.

5) intense review with an aim towards a modification of commitments.

Regulations are also responsible for the existence of monopolies. While the Framework acknowledges the reasonable existence of service monopolies for essential national interest and/or economic reasons, it recommends that they be reviewed to "determine whether the initial justifications for a given monopoly still exist or whether the situation has changed."[78] This review could determine whether "appropriate" or "inappropriate" regulation underpins the monopoly.

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[78] Ibid., 11.

F) Transparency

The Framework recognizes the importance of transparency and seeks to promote transparency whenever possible. The Framework contemplates the following actions:

1) the enumeration of all country legislation and regulation related to trade in services, including any aspects of laws and regulations which can affect foreign suppliers of services

2) prior notification of potential regulatory changes

3) the requirement to reply to trading partner requests for clarification.

Transparency is a pre-requisite to developing an agreement on trade and investment in services. Many services are regulated or semi-regulated, at one or many levels. A complete inventory of regulations and laws which determines the shape of service industries is essential.

However, it is also recognized that there are many countries where the listing of regulations in isolation may not completely reflect the effect of regulation, and great efforts in examining the effects of regulation will be required if substantial progress on transparency is to be realized. An effective process for developing an inventory of national regulations must be developed.

G) Competition Issues

The Framework recognizes the requirement for competition rules at the international level, but there is no agreement on how this could be encouraged. Some countries have expressed the belief that existing competitive laws are adequate to deal with the potential problem of dominant suppliers (e.g. a deregulated monopoly without sufficient parallel increase in competition). Other countries believe new international disciplines would be required.

H) Subsidies

The Framework suggests that subsidies be controlled by identifying unacceptable subsidies, negotiating a standstill agreement on subsidies and then working towards the removal of existing subsidies. In the case of injury, countervailling duties would require a new type of offsetting measure. The Framework is silent on how injury would be determined, but supposedly a tribunal could determine injury and outline a range of offsetting measures.

I) Exceptions and Safeguards

These issues are discussed in general terms. The scope and nature of exceptions are examined. These include listing examples of exceptions which include conflicts of obligation between the Framework and pre-existing multilateral agreements

in certain service sectors. Some examples are national security, protection of cultural identity, balance of payments and equivalent measures under Article XIX of the GATT (emergency action). Exceptions would not include regulations concerning policies for protecting privacy, intellectual property, health, environment and consumer interests. It is suggested that these issues be considered in the section on regulation.

Establishing the parameters of exceptions and safeguards is considered especially difficult and will require further study. It is not surprising that this section is open-ended. The scope of items that can be exempted or subject to safeguard provisions will play a large part in determining the effectiveness of the Framework.

J) Procedures

The Framework deals with procedures in a superficial manner. It acknowledges that:

1) a dispute settlement mechanism is important.

2) countries should give foreign firms access to complaint procedures at a national level.

3) transparency must be promoted and the safeguard issues defined.

As previously mentioned, the Framework calls for measures aimed at restoring the balance of benefits where necessary. It is silent on who would identify when benefits are not in balance and how a restoration of benefits would be implemented.

K) Negotiating the Issues

This section deals primarily with the negotiation techniques which would promote a balanced agreement in trade and investment in services. It acknowledges that any agreement will only be achieved in the long term. The first possible stage of negotiation "could consist of the adoption of the framework as a basis for cooperation, as well as some initial liberalization measures ...affecting trade in services and/or the aspects of their regulations not in conformity with the principles in the framework".[79] With regard to the actual negotiations, the Framework suggests two approaches to achieve a balanced agreement. One approach "encourages mutual concessions based on instruments providing for transparent and quantifiable protection which could be substituted at the start for all existing unquantifiable or discriminatory measures."[80] This approach notes that negotiations on goods have at their core a transparent and quantifiable protective measure (the tariff). What needs to be determined is whether it might be possible to develop a protective measure that was similarily transparent and quantifiable to replace discriminatory services regulations. For example, "in the case of foreign bank authorizations, it might be the number of authorizations granted on a non-discriminatory basis or perhaps the opening of a share of the market."[81] The

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[79] Ibid., 16.

[80] Ibid., 17.

[81] Ibid.

second approach envisages equivalent concessions of a legal rather than an economic nature. This approach "would not require the same type of technical preparatory work and appears somewhat less uncertain."[82] A decision on which approach is followed depends on the extent to which NTBs can be quantified. To date there has been limited success in quantifying NTBs. For example, Robert Baldwin and Thomas Lowinger have conducted studies on government procurement.[83] The methodology used in their studies could also be used to assess discrimination in service sector imports for government procurement.

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[82] Ibid., 18.

[83] Robert E. Baldwin, "Nontarrif Distortions of International Trade" Brookings Institution, 1970. Thomas C. Lowinger, "Discrimination in Government Procurement of Foreign Goods in the U.S. and Western Europe," Southern Economic Journal, Vol. 42, January 1976, 451-60. These assessments were determined by 1) examining the sectoral composition of government purchases, 2) applying the economy-wide ration of imports to total supply for each sector to the amounts of sectoral government purchases to compute the level of government import that would exist if the government had "import propensities" similar to those of the private sector. These hypothetical government imports are then compared with actual government imports, and the difference provides a measure of the magnitude of imports forgone because of discrimination in government procurement. Using this methodology Cline et al. calculated that a 60 percent cut in the degree of protection provided by discrimination in government procurement would cause import increases of $600 million in the United States and $545 million in the EEC in 1974 values. William R. Cline, Norboru Kawanabe, T. O. M. Kronsjo and Thomas Williams, Trade Negotiations in the Tokyo Round: A Quantitative Assessment, The Brookings Institution, Washington, D.C. 1978.

Despite the drawbacks of the methodology (e.g. the skewing effect of defence procurement) the model does demonstrate how statistics on government procurement of services can be developed to determine discrimination.

It is also technically possible to develop statistics on the effects of changes (liberalization) in regulation for parties entering service agreements. These statistics would be more subjective than statistics developed for trade in goods. For example, in a bilateral setting it might be possible to approximate the effects of regulatory liberalization between Canada and the United States in the area of banking/ financial services. A quantitative analysis for certain regulatory changes could be conducted, such as one based on the effects of an increase in Canadian asset ownership by U.S. banks, or on a relaxing of the deemed authorized capital requirement, or on increased equity participation in Canadian securities firms. These changes could be translated into approximate figures for asset growth and gross income (to mention only a few possible indices). Similar statistics could be developed by the U.S. Department of Treasury on an expanded presence of Canadian banks in the U.S. These statistics could be analyzed and discussed with the respective private sectors. In this way both sides would have an idea of the quantitative implications for certain negotiating stances. In short, it is theoretically possible to obtain estimates of the trade, employment, price and welfare effects of existing restrictions and to determine how these

effects would be altered if the restrictions were reduced or eliminated.[84]

In practical terms the quantification of the effects of regulatory change is daunting. Regulatory changes do not always produce predictable results. The results of corporate strategies, even in relatively predictable regulatory environments, can be significantly different from preliminary forecasts. For some industries it may not be possible to adequately quantify proposals, and in this case negotiators would have to rely more on equivalent concessions of a legal nature.

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[84] A computational model which analyzes the possible effects of one American - Canadian free-trade agreement on trade and foreign direct investment can be found in Drusilla K. Brown and R. Stern, Evaluating the Impacts of U.S. - Canadian Free Trade: What do the Multisector Trade Models Suggest? Research Seminar in International Economics Discussion Paper No. 171 (Ann Arbor: University of Michigan, 1986).

V GATT AND SERVICES

The GATT has limited experience with services relative to the OECD. This is not surprising given that the GATT was intended mainly as a reciprocal tariff reduction agreement to be appended to the International Trade Organization and not as an organization to deal with international trade in services.[85] Nevertheless, there are a number of direct and tangential references to services in the Articles of Agreement. These are briefly listed below.[86]

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[85] J. H. Jackson, World Trade and the Law of GATT, Charlottesville VA: The Michie Company, 1969, 46-49. It was intended that the Havana Charter cover a broader range of trade issues, including the relationship between some services and restrictive business practices. Article 53 of the charter set out the following procedure for services:

> 53.1 The Members recognize that certain services, such as transportation, telecommunications, insurance and the commercial services of banks are substantial elements of international trade and that any restrictive business practices by enterprises engaged in these activities in international trade may have harmful effects similar to those indicated in paragraph 1 or Article 46. Such practises shall be dealt with in accordance with the following paragraphs of this Article.

The remaining three paragraphs of the Article establish a form of dispute settlement procedure. Investment was partially addressed In Articles 11 and 12 of the Charter. Article 11 obligated members not to take unreasonable or unjustified action injurious to the international investments of other members. Article 12 obligated members to give reasonable opportunities for investments and adequate security for existing and future investments. It also obligated members to negotiate commercial treaties on request but recognized that members have the right to set up "just and reasonable" terms with respect to the ownership of existing and future investments. Finally investment issues could be discussed in the ITO and ultimately the International Court of Justice.

[86] During the negotiations of the ITO Charter, Article 53 was supported by the developing countries and opposed by the major maritime powers (Clair Wilcox, A Charter for World Trade,

Article II:2(c) enables contracting parties to impose "fees or other charges commensurate with the cost of service rendered" on the importation of any product.

Article III provides national treatment for internal taxation and regulation and applies to services supplied domestically to the extent of sales, purchases, transportation and distribution.

Article III:10 and IV contain provisions for exposed cinematographic film. These include the maintenance of screen-time quotas as the controlling method as opposed to internal quantitative restrictions, and makes these quotas subject to negotiation for their limitations, liberalization or elimination.

Article VIII provides that all fees and charges imposed in connection with trade shall be limited in amount to the approximate cost of services rendered. Article V provides for freedom of traffic in transit through the territory of each GATT member and for most-favoured-nation treatment for such traffic.

Article XVII relates to services performed by state-trading enterprises and marketing boards, such as the buying, selling and transportation of goods, and states that such activities be conducted on a non-discriminatory basis and in accordance with commercial considerations. It acknowledges that state trading

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New York: Macmillan, 1949, 108). It was felt that the provisions on services were too narrow in scope. This list can in large part be found in Raymond J. Krommenacker, World Traded Services: The Challenge for the Eighties, Dedham MA: Artech House, 1984, 163.

enterprises "might be operated so as to create serious obstacles to trade" and makes such obstacles subject to negotiation.

Article XXXVII, which applies to services, provides that developed contracting parties commit themselves to make every effort - in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties - to maintain trade margins at equitable levels.

In addition to the Articles of Agreement, a number of Codes negotiated during the Tokyo Round apply to services. The Codes are essentially understandings between signatories on how they will interpret and implement the existing GATT articles.[87] References to services are, therefore, limited.

Agreement on Technical Barriers to Trade

This agreement provides that signatories cannot prepare, adopt, or apply product standards with either the intention or the effect of discriminating against international trade. It does not seek to harmonize individual country standards, but calls for international cooperation emphasizing notification and consultation procedures, recognition of certificates of conformity and dispute settlement procedures.[88] The link with services in this Code is related to testing (Article 5) where it provides

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[87] Gary Clyde Hufbauer and Jeffrey Schott, Trading for Growth: The Next Round of Trade Negotiations, Washington: Institute for International Economics, 1985, 68.

[88] Robert E. Sweeney Jr., "Technical Analysis of the Technical Barriers to Trade Agreement," Law & Policy in International Business, Volume 12, 191.

for MFN treatment and national treatment. The Code does not mention "services", only "products".[89]

2. The Agreement on Government Procurement

This Agreement provides limited coverage for government procurement and covers services incidental to the supply of products procured by certain entities if the value of these incidental services do not exceed that of the products themselves. Initially service contracts per se were not covered, but late in 1986 twenty nations[90] agreed to open up more areas of government procurement business to international competition. Beginning on January 1, 1988 the Agreement will cover the leasing and renting of equipment as well as purchases by government agencies. Signatory countries will be required to provide details of contract awards (including price) within 60 days. The Committee on Government Procurement has also conducted pilot studies on a variety of service contracts including insurance, architectural/consulting engineering services, management consulting, and freight forwarding services. The number of signatory countries to this Agreement - the lowest of all the Agreements - is, in part, a reflection of the uncertainty with which numerous contracting parties approach service negotiations. Uncertainty is not related to disinterest as thirty-two contract-

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[89] Technical Barriers to Trade Agreement, Article 1.3.

[90] The United States, Austria, Canada, Belgium, Denmark, France, West Germany, Ireland, Italy, Luxembourg, The Netherlands, Britain, Finland, Hong Kong, Israel, Japan, Norway, Singapore, Sweden, and Switzerland.

ing parties have observer status - the highest of all the Agreements.

3. The Agreement on Trade in Civil Aircraft

This agreement deals with services to the extent that repairs on civil aircraft are to receive duty free or duty-exempt treatment. Repairs are defined as maintenance, rebuilding, modification and conversion of civil aircraft.

4. Customs Valuation Agreement

The Customs Valuation Code necessarily embodies specific provisions regarding the service component of transactions relating to the import of goods. For example, the cost of transportation after importation and "charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods" are excluded from the value for duty if they are not part of the price paid or payable. The question of services also arises under the Code in the calculation of "assists" -- that is, services, such as engineering, provided by the importer to the producer abroad. Under the first or transaction method of valuation prescribed in the Code, commissions and brokerage (except buying commissions), royalties and license fees are to be added to the price, otherwise paid or payable, to arrive at the value for duty. This imposes a tariff on certain services incidental to the production and import of the goods in question. Most importantly, as Article 8 makes clear, countries are free to include in the value for duty all or part of all costs, insurance, and transport

related to the shipment of the goods from the point of sale to the point of importation.

5. The Agreement on Subsidies and Countervailing Measures

This Agreement prohibits subsidies on all non-primary products and on primary mineral producers. Thus a number of export subsidies which distort services trade are prohibited by the Agreement. Krommenacker lists these prohibitions as follows:

i) internal transport and freight charges on export shipments provided or mandated by governments on terms more favourable than for domestic shipments;

ii) the delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or for services for use in the production of goods for domestic consumption;

iii) the provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programs, of insurance or guarantee programs against increases in the costs of exported products, or of exchange risk programs, at premium rates, which are manifestly inadequate to cover the long term operating costs and losses of the programs.[91]

Finally, the GATT has also been involved in past service

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[91] Krommenacker, 150.

sector discussions including transport insurance[92] and television programs.[93]

The preceding section reflects the limited involvement of GATT in trade in services. Nevertheless, the pressures for including services within the competence of the GATT have been growing. It has been argued that GATT is an appropriate forum for dealing with services since a) it is contractually binding with sanctions, b) it applies to a large number of developed and developing nations and c) as a negotiating framework the GATT has existing structures which are accepted and could, albeit with some difficulty, be extended to services.[94] Conversely it has been argued that the GATT is inappropriate for such negotiations since a) service liberalization necessarily involves investment which may be outside the mandate of the GATT and b) there are too many contracting parties with widely divergent objectives.[95] The validity of these arguments will be tested in the Uruguay Round of the GATT.

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[92] a) 1955 Draft Recommendation for Elimination of Transport Insurance Restrictions.
b) 1959 Recommendation on Freedom of Contract in Transport Insurance.

[93] Draft Recommendation on Television Programs.

[94] Steven F. Benz, "Trade Liberalization and the Global Service Economy" Journal of World Trade Law, Volume 19, no.2 (March/April 1985), 113. Also see Krommenacker, World Traded Services, 183-86.

[95] H. Peter Gray, "A Negotiating Strategy for Trade in Services," Journal of World Trade Law, Volume 17, no. 5 (September/April 1983), 377-88.

Despite considerable speculation that a new GATT round would not take place, largely due to differences over service issues, the Uruguay Round was launched on September 20, 1986. The U.S. sought the full integration of services in the negotiations. Brazil, India and others wanted the GATT to play no part in services. The Swiss/Columbian draft included a square-bracketed passage which called for negotiations on services, but said that "when the framework of principles and rules has been established, the contracting parties should decide regarding its incorporation in the GATT system." The latter draft was adopted. The Punta Declaration separates trade negotiations into two parts. Part I discusses trade in goods, whereas Part II says that "Ministers" also decided, as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services. A GNS will be established, the goal of which will be 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.[96]

The GNS can turn to a number of multilateral organizations and agreements for examples of a framework of principles and rules for trade in services. The OECD is a particularly attract-

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[96] GATT Press Release, September 29, 1986.

ive source of information, knowledge, and expertise. This is due, in large part, to the development and refinement of the OECD Codes, Declarations, Decisions and the Conceptual Framework.

VI NEGOTIATIONS ON TRADE AND INVESTMENT IN SERVICES: THE NEXT STEPS

Liberalization of trade and investment in services can be achieved in a variety of ways including a) bilateral, sector specific agreements (e.g. civil aviation arrangements); b) bilateral general agreements (e.g. the United States-Israel Free Trade Agreement); c) limited multilateral agreements (EEC, OECD) and d) multilateral agreements (GATT and UNCTAD). This section examines how, in the multilateral setting, the GATT could serve as an important forum for service sector liberalization.

There are several options which the GATT might consider in broadening its competence in services. One would include services in the text of the current Articles of Agreement, extend the coverage of the MTN Codes to include services and, where necessary, develop new codes to cover service trade concepts. A second would develop both a general statement on the principles and processes of given service trade activities as well as separate codes to deal in detail with the liberalization process of members for either specific industries, activities, or concepts. There are other options, but these two are examined below.

1. Expand Current GATT Agreement

As previously discussed, the GATT contains limited references to services. It is not unreasonable to consider extending the meaning of the current structure to include services since the General Agreement does not necessarily prohibit the inclusion

of trade in services within its scope.[97] This might be regarded as the most appropriate since a high proportion of services are embodied in goods.[98] This could be a way of bringing services, which are inputs for the production of many manufactured goods (e.g. engineering design) and necessary complements to goods trade (financing/after sales service), into the multilateral negotiating arena. However, under this approach service issues which exist beyond an association with goods or that exist on their own, might not automatically be covered by extending the Articles and Codes. An agreement on business travel as well as investment matters would also be needed, as these central issues are not currently covered by the GATT.

It is doubtful that an initiative to expand the Articles and Codes or introduce new Articles and Codes would be successful. This would likely require the approval of at least two-thirds of GATT Members.[99] Moreover, the last formal amendment to the GATT occurred over twenty years ago and according to John H. Jackson "...it has been increasingly assumed that amendments to

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[97] Philip H. Gold, "Expanding the Scope of GATT", The International Trade Law Journal, Vol. 7, No. 2, 292. Also see Frieder Roessler, "The Competence of GATT", Journal of World Trade Law, Vol. 21, No.3, June 1987, 73-83. This view is not universally accepted. "GATT has clearly no competence in FDI matters...," Karl P. Sauvant, International Transactions in Services: The Politics of Transborder Data Flows, London: Westview Press, 1986.

[98] See Herbert G. Grubel, "All Traded Services are Embodied in Materials or People.", The World Economy, September, 1987, 319-330.

[99] Changes to Articles I, II, XXIX, XXX require unanimous approval.

the GATT are virtually impossible to obtain, with the possible exception of those amendments of great interest to the developing nation majority."[100] A large number of developing nations have demonstrated their opposition to expanding the current GATT Articles of Agreement and Codes to include services. Until this situation changes, it is unlikely that this approach would satisfy the requirements of all members.

2. Principles Statement and Related Codes

This option envisages the development of a general services statement on principles with associated codes on specific concepts or industries where these can be agreed. The broad principles statement would establish a common approach to liberalizing services, but would not be legally binding in the same sense as the articles of the General Agreement. The general services statement would address such central features as the application (and in some cases definition) of MFN treatment, non-discrimination, transparency and surveillance, national treatment, safeguards, dispute settlement and special and differential treatment for developing countries. Early priority should centre on promoting transparency via an effective surveillance mechanism. However, without an agreement on which service activities or which measures affecting such activities should be covered in the negotiations, a standstill agreement would be ineffective. Only after notification of existing regulations is

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[100] John H. Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal", Law and Policy in International Business, Vol. 12, 1980, 32.

reasonably complete can an effective standstill agreement be introduced. The codes could be based on modified legal concepts underlying the GATT and could operate on a conditional or unconditional MFN basis, depending on the scope and detail of the codes. The actual liberalization process would, therefore, take place primarily at the code level.

Given the wide coverage of services and the disparate aspirations of negotiating countries, a liberalization process with some flexibility will be required. The goal of the liberalization process should be to create meaningful levels of obligation to facilitate maximum participation. Rather than requiring signatories to rigidly adhere to a particular obligation at the time of signing - a process which might discourage participation - a more graduated obligation system could be instituted to promote wider participation. This type of system is used for the OECD Codes and Declarations (List A and B), as previously described. Various modifications could be considered for a multilateral agreement on services for either a general statement of principles, but more likely, for the codes. For example, participants could commit to complete liberalization (which would have to be defined) and their countries would be required to list those areas where the liberalization obligations would not apply. This list of exceptions would then represent the schedules of items to be negotiated.

To be successful, this approach would require an accurate enumeration of exceptions. This function could be fulfilled by a

services secretariat who would seek, receive and verify information and produce a standardized list of exceptions. In this way the list of exceptions could be a meaningful basis for commencing negotiations. Within this process, consideration should be given to flexible adherence to obligations. The obligations resulting from these negotiations could, for example, be categorized as a) permanent obligations, b) transition obligations or c) flexible obligations. Under the permanent obligations category, participants would agree to suspend the restrictive action(s) in question and undertake not to reintroduce this measure. Transition obligations would recognize the ability of participants to reintroduce restrictive measures, subject to a timetable which would place an expiry date on the reintroduction capability. Finally, for flexible obligations participants would enjoy the privilege of re-introducing restrictive measures.

One of the weaknesses of this liberalization process is that participants would tend to adhere to the least restrictive level of obligation. To reduce this tendency, countries would be required to publish the reasons for not adhering to the next level of obligation. Thus the burden of proof would fall fully on the country which restricts liberalization. This approach would be similar to the one followed in the Agreement on Technical Barriers to Trade where parties must, upon request, "duly explain" the reasons for not adopting existing international standards. Such action would promote greater transparency.

The process would ultimately need to incorporate some form

of dispute settlement mechanism. The creation of service panels would enable participants to bring disputes (unresolved in previous discussions) to a conclusion. Decisions could only be based on the stated obligations of the participants and whether these obligations were being met. Negative findings could allow retaliation, not in form of new restrictions, but in exempting the offending party from the future liberalization obligations of others.

Whatever structure and process is eventually adopted, the two issues central to services that will need to be defined and clarified are investment and immigration. These issues can be addressed in either a horizontal code with substantive appendices on its application to individual industries, or in a system of industry codes. Failure to deal with these issues would impair any liberalizing efforts for services.

There are innumerable barriers to liberalization of trade and investment in services. The (incomplete) reservation and exception lists of the OECD are evidence of the plethora of such restrictions. Therefore, the need is to identify the preliminary actions which will facilitate liberalization. Clearly there is a need for more information on the service sector prior to any negotiation.[101] This information must be analyzed by national governments to validate the recent findings

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[101] Robert M. Stern and Bernard M. Hoekman, "Issues and Data Needs for GATT Negotiations on Services", The World Economy, March 1987, 39-60.

of multilateral organizations and international economists.[102] This is especially true for less developed countries who may not have had sufficient time or resources to examine these issues. In this regard special funds should be set aside to assist these countries in their analyses. Developed nations might also consider a provision - similar to the Framework for Conduct of International Trade for the Tokyo Round - giving developing countries more favourable treatment for services. The provision might better enable developing countries to adjust to liberalization in the services sector and attract their participation in the Principles Statement and the Codes. There remains a large number of unresolved information issues which must be clarified to maximize participation in service discussions.

Once participants and the services secretariat have identified national restrictions, consideration should be given to a general undertaking which would not permit the introduction of new restrictions (with minimal clearly defined exceptions). With the existing restrictions constituting the negotiable issues, efforts should turn to liberalizing those codes which would be the easiest and most attractive. This paper does not presuppose what those codes might be.

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[102] For example, the World Bank has found that effective financial intermediation is a prerequisite of development, not the consequence of development. Furthermore, Sylvia Ostry, Canada's Ambassador to the MTN argues that the information revolution has made the infant industry approach to development in technology costly and inappropriate. Sylvia Ostry, "Interdependence: Vulnerability and Opportunity", The Per Jacobsson Lecture, Washington, D.C., September 27, 1987.

The foregoing is an outline of elements and issues which should be considered in approaching negotiations. Priority must be given to developing a system which promotes transparency, and which in turn produces schedules of restrictions which can be negotiated on a unconditional or conditional MFN basis. Coinciding with these efforts should be an emphasis on clarifying the issues especially for LDCs. An early and constructive step includes prohibiting the introduction of restrictions on trade or on investment in services. Subsequent negotiation efforts should focus on those codes that have the greatest chance of being accepted and thereby contributing to liberalization.

CONCLUSION

This study has focussed on the work of the OECD on trade and investment in services as contained in the Codes, Declarations and Decisions. This work contains important concepts, principles and approaches to trade and investment in services which can be applied to broader multilateral discussions such as the GATT. Conversely, there are concepts and principles which might complicate rather than promote broad agreement on trade and investment in services.

Trade and investment in services has been defined differently by some governments, UNCTAD, multinational enterprises, and as codified in some bilateral agreements. While not exhaustive, this survey has illustrated the evolution of national treatment from a trade concept to an investment concept. As a trade concept, national treatment (GATT Article III) allows that foreign goods may be treated differently than nationally-produced goods in that their importation may be subject to a tariff or fee; as a services concept, national treatment has, for some participants, come to include a right to invest and establish operations in a foreign country without any service analog to the tariff for goods. Defining national treatment in such broad terms is more likely to hinder than facilitate multilateral agreement on services.

A rough framework for trade and investment in services has been developed by the OECD Codes, Declarations and Decisions. It was noted that despite the various drawbacks to the OECD works,

there were important concepts and principles which are relevant to the current GATT negotiations. This includes the application of a national treatment instrument which excludes initial investment, an increasingly effective system of transparency, and a process of liberalization which can complicate the re-adoption of protectionist measures.

In some respects the recently released OECD Conceptual Framework on Trade in Services represents a synthesis of previous OECD works. The Framework addresses the major issues of trade and investment in services, including temporary immigration, limited elements of investment, regulation, and some recognition of developing country concerns. However, it does not adequately deal with the overlap between trade and investment, nor does it address the modalities of negotiation. The trade/commercial presence/investment issue will have to be clarified to assuage the concerns of many developed and developing countries.

One possible approach to the trade and investment in services issue is the development of a general statement on trade and investment in services, a system of transparency and surveillance and, eventually, Codes for either specific industries, groups of industries and concepts, or a combination thereof. The statment should include general and flexible concepts to deal with trade and investment in services. While national treatment of investment will be too comprehensive for

most participants,[103] efforts could also be aimed at applying national treatment to traded services as well as developing a middle ground based on commercial presence. This latter concept (or something similar) will become increasingly important as TBDF displaces services which previously could only be delivered via physical establishment. The Codes could then apply these concepts to individual sectors, starting with those sectors which have the greatest chance of succeeding (liberalization and broad participation). The process at the Code level could centre on negotiating regulations which had been illuminated by an effective system of transparency. An important trade-off during the negotiations will be between substantive liberalization and broad participation. Although these two goals may not be achieved in the short term, the importance of establishing the basis for ongoing discussions (continual process) is central to preventing or forestalling further protectionism in services. Formalizing these latter steps along the lines previously discussed will be an achievement of considerable importance.

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[103] Since it has taken over twenty-five years for relatively like-minded OECD nations to reach their current levels of commitment.

ANNEX I

Declaration on Trade in Services

Preamble

The Governments of the United States of America and Israel,

RECOGNIZING the significance of trade in services to their economic and social progress and to the world economy;

NOTING the importance of open international markets for trade in services;

ACKNOWLEDGING that the Treaty of Friendship, Commerce and Navigation between their two nations establishes bilateral rights and obligations which provide for open trade in a broad range of services;

RECOGNIZING that other bilateral and multilateral agreements for certain services sectors are in effect;

Declare that, although the principles set forth below shall not be legally binding, they shall endeavor to the maximum extent possible to conduct their policies affecting trade in services between them in accordance with those principles;

Express their desire to work toward international acceptance of these principles in trade in services.

Principles

1. Definition: Trade in services takes place when a service is exported from the supplier nation and is imported into the other nation.

Services encompass, but are not limited to, transportation; travel and tourism services; communications; banking services;[1] insurance; other financial activities; professional services, such as consulting in construction, engineering, accounting, medicine, education, and law, and the providing of other professional services such as management consulting; computer services; motion pictures; advertising.

2. Each Party will endeavor to achieve open market access for trade in services with the other nation, taking into account the different regulatory regimes for specific service sectors in the two nations.

3. Each Party will endeavor to assure that trade in services with the other nation is governed by the principle of national treatment. Each Party will endeavor to provide that a supplier of a service produced within the other nation is able to market or distribute that service under the same conditions as a like service produced within the first nation, including situations where a commercial presence within the nation is necessary to facilitate the export of a service from the other nation or is required by that Party.[2]

4. In situations where services are regulated by political subdivisions, the authorities of each Party responsible for

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[1]For the purposes of this Declaration, commercial banking services are limited to the activities of representative offices.

[2]For example, in the area of commercial banking, the concept of a commercial presence refers to the activities of representative offices, but not to agencies, branches or subsidiaries of commercial banks.

overseeing the operation of this Declaration will consult with such political subdivisions in an effort to assure that such regulations are consistent with the principles of this Declaration.

5. Each Party will endeavor to assure that its regulatory agencies will accord national treatment to suppliers of the service from the other nation, to the extent that such treatment is consistent with those agencies' legal authority, including their exercise of discretion in fulfilling their statutory mandates. The authorities of each Party responsible for implementing this Declaration shall consult with their own regulatory agencies in an effort to achieve consistency with the principles of this Declaration.

6. Each Party recognizes that there may be established public monopolies in the service area with reserved special rights. Nonetheless, each Party will endeavor to provide that, subject to their reserved special rights, such monopolies shall make their purchases and sales of services involving either imports or exports affecting the commerce of the other nation in accordance with the principles of this Declaration.

7. Each Party will make public its domestic laws and regulations affecting trade in services and notify the other Party of laws and regulations which discriminate against a service exported from the other nation. Each Party will provide to the nationals and companies of the other nation reasonable access to established domestic review and judicial proceedings relative to regulations on trade in services.

8. Each Party agrees to consult with the other periodically to discuss specific problems that arise concerning trade in services between the two nations and to review existing regulatory regimes of the two Parties as they affect trade in services.

9. The Parties will review the effectiveness of this Declaration not later than eighteen months from the date that this Declaration is signed. In this review, the Parties will explore further opportunities to strengthen open trade in services between the two nations, including the possibility of transforming the provisions of this Declaration into legally binding rights and obligations.

In Witness Whereof, the respective representatives, having been duly authorized, have signed this Declaration.

Done in duplicate, in the English and Hebrew languages, both equally authentic, at Washington, D.C., this twenty-second day of April, 1985, which corresponds to the First day of Iyar, 5745

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

FOR THE GOVERNMENT OF ISRAEL

ANNEX II

Part Four
Services, Investment and Temporary Entry

Part Four contains the three ground-breaking chapters: services, business travel and investment.

Chapter Fourteen: Services

Trade in services represents the frontier of international commercial policy in the 1980s. Dynamic economies are increasingly dependent on the wealth generated by service transactions. International trade in services, of course, does not take place in a vacuum without rules and regulations. What it has lacked is a general framework of rules incorporating principles of general application such as those embodied in the GATT for trade in goods. Chapter Fourteen provides, for the first time, a set of disciplines covering a large number of service sectors.

The issue is also more than a matter of opening up service markets. It is no longer possible to talk about free trade in goods without talking about free trade in services because trade in services is increasingly mingled with the production, sale, distribution and service of goods. Companies today rely on advanced communications systems to co-ordinate planning, production, and distribution of products. Computer software helps to design new products. Some firms engage in-house, accountants, and engineers, some have 'captive' subsidiaries to handle their insurance and finance needs. In other words, services are both inputs for the production of manufactured goods (from engineering design to data processing) and necessary complements in organizing trade (from financing and insuring the transaction to providing installation and after-sales maintenance, especially critical for large capital goods).

The basic economic efficiency and competitiveness gains expected from the removal of barriers to trade in goods between Canada and the United States also apply to the service sectors. To achieve the same economic gains in services it was necessary to focus the negotiations on the nature of regulations that constitute trade barriers. In some cases, the focus was the right of establishment where such a right is an economic pre-condition to supplying the service, for example, travel agencies. In other cases, the opportunities to foreigners to meet the

professional licensing standards imposed by countries as a condition to offering the service, for example, architecture, was the focus.

In Article 1402, the two governments agree to extend the principle of national treatment to the providers of a list of commercial services established in Annex 1408. With the exception of transportation, basic telecommunications (such as telephone service) doctors, dentists, lawyers, childcare and government-provided services (health, education and social services) most commercial services are covered. This means that Canada and the United States have agreed not to discriminate between Canadian and American providers of these services. Each will be treated the same. But this is not an obligation to harmonize. If Canada chooses to treat providers of one service differently than does the United States, it is free to do so, as long as it does not discriminate between Americans and Canadians. Each government also remains free to choose whether or not to regulate and how to regulate.

The obligation to extend national treatment also does not mean the treatment has to be the same in all respects. For example, a party may accord different treatment for legitimate purposes such as consumer protection or safety, so long as the treatment is equivalent in effect. Additionally, regulations cannot be used as a disguised restriction on trade. Article 1403, for example, specifies that either government remains free to license and certify providers of specific services, but must ensure that such licensing requirements do not act as a discriminatory barrier for persons of the other party to meet.

The obligations are prospective, i.e., they do not require either government to change any existing laws and practices. Rather, the parties agree that in changing existing regulations for covered services, they will be guided by the obligation not to make such regulations any more discriminatory than they are already. However, any new regulations for covered services will have to conform fully to the national treatment obligation.

While there are no rules of origin for the services chapter, as there are for trade in goods, the obligations are meant to extend benefits to Canadians and Americans. Article 1406, therefore, provides that either party remains free to deny the benefits of this chapter if it can demonstrate that a service is in fact being provided by a provider who is a national of a third party. At the same time, neither

government is obliged to discriminate against providers of services from third parties.

Sectoral annexes clarify these general obligations for three service sectors: architecture, tourism and enhanced telecommunications and computer services. Article 1405 provides scope for the two governments to negotiate more sectoral annexes in the future.

Transportation services (marine, air, trucking, rail and bus modes) are not covered by the agreement. In effect, existing arrangements, such as ICAO and the various air bilateral agreements, will continue to govern bilateral relationships.

The new, general rules adopted for trade in services are a trail blazing effort and could lay the foundation for further work multilaterally. Applying these rules prospectively will ensure that new discrimination will not be introduced. This constitutes a major step toward ensuring that open and competitive trade in services continues between the two countries.

PART FOUR
SERVICES, INVESTMENT AND TEMPORARY ENTRY

Chapter Fourteen

Services

Article 1401: Scope and Coverage

1. This Chapter shall apply to any measure of a Party related to the provision of a covered service by or on behalf of a person of the other Party within or into the territory of the Party.

2. In this Chapter, provision of a covered service includes:

a) the production, distribution, sale, marketing and delivery of a covered service and the purchase or use thereof;

b) access to, and use of, domestic distribution systems;

c) the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering, or facilitating a covered service; and

d) subject to Chapter Sixteen (Investment), any investment for the provision of a covered service and any activity associated with the provision of a covered service.

Article 1402: Rights and Obligations

1. Subject to paragraph 3, each Party shall accord to persons of the other Party treatment no less favourable than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter.

2. The treatment accorded by a Party under paragraph 1 shall mean, with respect to a province or a state, treatment no less favourable than the most favourable treatment accorded by such province or state in like circumstances to persons of the Party of which it forms a part.

3. Notwithstanding paragraphs 1 and 2, the treatment a Party accords to persons of the other Party may be different from the treatment the Party accords its persons provided that:

a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;

b) such different treatment is equivalent in effect to the treatment accorded by the Party to its persons for such reasons; and

c) prior notification of the proposed treatment has been given in accordance with Article 1803.

4. The Party proposing or according different treatment under paragraph 3 shall have the burden of establishing that such treatment is consistent with that paragraph.

5. Paragraphs 1, 2, and 3 of this Article and Article 1403 shall not apply to:

a) a non-conforming provision of any existing measure;

b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or

c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of paragraphs 1, 2 or 3 or of Article 1403.

6. The Party asserting that paragraph 5 applies, shall have the burden of establishing the validity of such assertion.

7. Each Party shall apply the provisions of this Chapter with respect to an enterprise owned or controlled by a person of the other Party notwithstanding the incorporation or other legal constitution of such enterprise within the Party's territory.

8. Notwithstanding that such measures may be consistent with paragraphs 1, 2 and 3 of this Article and Article 1403, neither Party shall introduce any measure, including a measure requiring the establishment or commercial presence by a person of the other Party

in its territory as a condition for the provision of a covered service, that constitutes a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on bilateral trade in covered services.

9. No provision of this Chapter shall be construed as imposing obligations or conferring rights upon either Party with respect to government procurement or subsidies.

Article 1403: Licensing and Certification

1. The Parties recognize that measures governing the licensing and certification of nationals providing covered services should relate principally to competence or the ability to provide such covered services.

2. Each Party shall ensure that such measures shall not have the purpose or effect of discriminatorily impairing or restraining the access of nationals of the other Party to such licensing or certification.

3. The Parties shall encourage the mutual recognition of licensing and certification requirements for the provision of covered services by nationals of the other Party.

Article 1404: Sectoral Annexes

The provisions of this Chapter shall apply to the Sectoral Annexes set out in Annex 1404, except as specifically provided in the Annexes.

Article 1405: Future Implementation

1. The Parties shall endeavour to extend the obligations of this Chapter by negotiating and, subject to their respective legal procedures, implementing:

a) the modification or elimination of existing measures inconsistent with the provisions of paragraphs 1, 2 or 3 of Article 1402 and Article 1403; and

b) further Sectoral Annexes.

2. The Parties shall periodically review and consult on the provisions of this Chapter for the purpose of including additional services and for identifying further opportunities for increasing access to each other's services markets.

Article 1406: Denial of Benefits

1. Subject to prior notification and consultation in accordance with Articles 1803 and 1804, a Party may deny the benefits of this Chapter to persons of the other Party providing a covered service if the Party establishes that the covered service is indirectly provided by a person of a third country.

2. The Party denying benefits pursuant to paragraph 1 shall have the burden of establishing that such action is in accordance with that paragraph.

Article 1407: Taxation

Subject to Article 2011, this Chapter shall not apply to any new taxation measure, provided that such taxation measure does not constitute a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on trade in covered services between the Parties.

Article 1408: Definitions

For purposes of this Chapter:

activity associated with the provision of a covered service includes the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, or other facilities for the conduct of business; the acquisition, use, protection and disposition of property of all kinds; and the borrowing of funds;

covered service means a service listed in the Schedule to Annex 1408 and described for purposes of reference in that Annex;

investment has the same meaning as in Article 1611; and

provision of a covered service into the territory of a Party includes the cross-border provision of that covered service.

Annex 1408

Services Covered by this Chapter

Services covered by this Chapter shall be limited to those services corresponding to the Standard Industrial Classification (SIC) numbers included in the Schedule to this Annex, with the addition of computer services, telecommunications-network-based enhanced services and tourism services. For purposes of reference, the services covered by this Chapter are broadly identified below.

Agriculture and forestry services

Soil preparation services
Crop planting, cultivating and protection services
Crop harvesting services (primarily by machine)
Farm management services
Landscape and horticultural services
Forestry services (such as reforestation, forest firefighting)
Crop preparation services for market
Livestock and animal specialty services (except veterinary)

Mining services

Metal mining services
Coal mining services
Oil and gas field services
Non-metallic minerals (except fuels) services

Construction services

Building, developing and general contracting services
Special trade contracting services

Distributive trade services

Wholesale trade services
Vending machine services
Direct selling services

Insurance and real estate services

Insurance services
Segregated and other funds services (managed by insurance companies only)
Insurance agency and brokering services
Subdivision and development services
Patent ownership and leasing services
Franchising services
Real estate agency and management services
Real estate leasing services

Commercial services

Commercial cleaning services
Advertising and promotional services
Credit bureau services
Collection agency services
Stenographic, reproduction and mailing services
Telephone answering services
Commercial graphic art and photography services
Services to buildings
Equipment rental and leasing services
Personnel supply services
Security and investigation services
Security systems services
Hotel reservation services
Automotive rental and leasing services
Commercial educational correspondence services
Professional services, such as
    Engineering, architectural, and surveying services
    Accounting and auditing services
    Agrology services
    Scientific and technical services
    Management consulting services
    Librarian services
    Agriculture consulting services
Non-professional accounting and book-keeping services
Training services
Commercial physical and biological research services
Commercial economic, marketing, sociological, statistical and educational research services

Public relations services
Commercial testing laboratory services
Repair and maintenance services
Other business consulting services
Management services
    Hotel and motel management services
    Health care facilities management services
    Building management services
    Retail management services
Packing and crating services

Other Services

Computer services
Telecommunications-network-based enhanced services
Tourism services

Annex III

OPERATIONS COVERED BY THE CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS[1]

A. BUSINESS AND INDUSTRY

A/1. Repair and assembly.

A/2. Processing, finishing, processing of work under contract and other services of the same nature.

A/3. Technical assistance (assistance relating to the production and distribution of goods and services at all stages, given over a period limited according to the specific purpose of such assistance, and including e.g. advice or visits by experts, preparation of plans and blueprints, supervision of manufacture, market research, training of personnel).

A/4. Contracting (construction and maintenance of buildings, roads, bridges, ports, etc., carried out by specialised firms, and, generally, at fixed prices after open tender).

A/5. Authors' royalties. Patents, designs, trade marks and inventions (the assignment and licensing of patent rights, designs, trade marks and inventions, whether or not legally protected, and transfers arising out of such assignment or licensing).

A/6. Salaries and wages (of frontier or seasonal workers and of other non-residents).

A/7. Participation by subsidiary companies and branches in overhead expenses of parent companies situated abroad and vice-versa.

B. FOREIGN TRADE

B/1. Commission and brokerage.

Profit arising out of transit operations or sales of transshipment.
Banking commission and charges.
Representation expenses.

B/2. Differences, margins and deposits due in respect of operations on commodity terminal markets in conformity with normal commercial practice.

B/3. Charges for documentation of all kinds incurred on their own account by authorised dealers in foreign exchange.

B/4. Warehousing and storage, customs clearance.

B/5. Transit charges.

B/6. Customs duties and fees.

C. TRANSPORT

C/1. Maritime freights (including chartering, harbour expenses, disbursements for fishing vessels, etc.).

C/2. Inland waterway freights, including chartering.

C/3. Road transport: passengers and freights, including chartering.

C/4. Air transport: passengers and freights, including chartering.

Payment by passengers of international air tickets and excess luggage charges; payment of international air freight charges and chartered flights.
Receipts from the sale of international air tickets, excess luggage charges, international air freight charges, and chartered flights.

C/5. For all means of maritime transport: harbour services (including bunkering and provisioning, maintenance, repairs, expenses for crews, etc.).

For all means of inland waterway transport: harbour services (including bunkering and provisioning, maintenance and minor repairs of equipment, expenses for crews, etc.).

For all means of commercial road transport: road services (including fuel, oil, minor repairs, garaging, expenses for drivers and crews, etc.).

For all means of air transport: operating costs and general overheads, including repairs to aircraft and to air transport equipment.

C/6. Repair of ships.
Repair of means of transport other than ships and aircraft.

D. INSURANCE

D/1. Social security and social insurance.

Transactions and transfers in connection with direct insurance (other than social security and social insurance).

D/2. Insurance relating to goods in international trade.

D/3. Life assurance.

D/4. All other insurance.

D/5. Transactions and transfers in connection with re-insurance and retrocession.

D/6. Conditions for establishment and operation of branches and agencies of foreign insurers.

E. FILMS

E/1. Exportation, importation, distribution and use of printed films and other recordings — whatever the means of reproduction — for private or cinema exhibition, or for television broadcasts.

F. INCOME FROM CAPITAL

F/1. Profits from business activity.

F/2. Dividends and shares in profits.

F/3. Interest (including interest on debentures, mortgages, etc.).

F/4. Rent.

G. TRAVEL AND TOURISM

No restrictions shall be imposed by Member countries on expenditure by residents for purposes of international tourism or other international travel.

H. PERSONAL INCOME AND EXPENDITURE

H/1. Pensions and other income of a similar nature.

H/2. Maintenance payments resulting from a legal obligation or from a decision of a court and financial assistance in cases of hardship.

H/3. Immigrants' remittances.

H/4. Current maintenance and repair of private property abroad.

H/5. Transfer of minor amounts abroad.

H/6. Subscriptions to newspapers, periodicals, books, musical publications.

Newspapers, periodicals, books, musical publications and records.

H/7. Sports prizes and racing earnings.

J. PUBLIC INCOME AND EXPENDITURE

J/1. Taxes.

J/2. Government expenditure (transfer of amounts due by governments to non-residents and in connection with official representation abroad and contributions to international organisations).

J/3. Settlements in connection with public transport and postal, telegraphic and telephone services.

J/4. Consular receipts.

K. GENERAL

K/1. Advertising by all media.

K/2. Court expenses.

K/3. Damages.

K/4. Fines.

K/5. Membership in associations, clubs and other organisations.

K/6. Professional services (including services of accountants, artists, consultants, doctors, engineers, experts, lawyers, etc.).

K/7. Refunds in the case of cancellation of contracts and refunds of uncalled-for payments.

K/8. Registration of patents and trade-marks.

NOTES AND REFERENCES TO ANNEX I

1. In the Current Invisibles Code, the liberalisation obligations concerning some items are qualified by limiting remarks or explanatory notes. For example, the obligations concerning item C/1 — maritime freights — do not cover transport between two ports of the same Member country. In addition, more detailed provisions defining the obligations in four areas — air transport, insurance, films and travel and tourism — are set out in sub-annexes to the Code. These remarks, notes and detailed provisions have been omitted from the present Annex.

Annex IV

OPERATIONS COVERED BY THE CODE OF LIBERALISATION OF CAPITAL MOVEMENTS[1] [2]

I. DIRECT INVESTMENT

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 mangement thereof:

A. In the country concerned by non-residents by means of:
   1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;
   2. Participation in a new or existing enterprise;
   3. A long-term loan (five years or longer).

B. Abroad by residents by means of:
   1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;
   2. Participation in a new or existing enterprise;
   3. A long-term loan (five years or longer).

II. LIQUIDATION OF DIRECT INVESTMENT

A. Abroad by residents.

B. In the country concerned by non-residents.

III. ADMISSION OF SECURITIES TO CAPITAL MARKETS

A. Admission of domestic securities on a foreign capital market:
   1. Issue through placing or public sale of:*
      a) Shares or other securities of a participating nature;
      b) Bonds.
   2. Introduction on a recognised foreign security market of:
      a) Shares or other securities of a participating nature;
      b) Bonds.

B. Admission of foreign securities on the domestic capital market:

1. Issue through placing or public sale of:*
   a) Shares or other securities of a participating nature;
   b) Bonds.
2. Introduction on a recognised domestic security market of:
   a) Shares and other securities of a participating nature;
   b) Bonds.

IV. BUYING AND SELLING OF SECURITIES

A. Operations in the country concerned by non-residents:

1. Purchase of securities quoted on a recognised security market:
   a) Shares or other securities of a participating nature;
   b) Bonds.
2. Sale of securities quoted on a recognised security market;
   a) Shares or other securities of a participating nature;
   b) Bonds.
3. Purchase of securities not quoted on a recognised security market:*
   a) Shares or other securities of a participating nature;
   b) Bonds.
4. Sale of securities not quoted on a recognised security market:*
   a) shares or other securities of a participating nature;
   b) bonds.

B. Operations abroad by residents:

1. Purchase of securities quoted on a recognised security market:
   a) Shares or other securities of a participating nature;
   b) Bonds.
2. Sale of securities quoted on a recognised security market:
   a) Shares or other securities of a participating nature;
   b) Bonds.
3. Purchase of securities not quoted on a recognised security market:*
   a) Shares or other securities of a participating nature;
   b) Bonds.
4. Sale of securities not quoted on a recognised security market:*
   a) Shares or other securities of a participating nature;
   b) Bonds.

V. BUYING AND SELLING OF COLLECTIVE INVESTMENT SECURITIES

A. Operations in the country concerned by non-residents:

1. Purchase of collective investment securities.
2. Sale of collective investment securities.

B. Operations abroad by residents:
   1. Purchase of collective investment securities.
   2. Sale of collective investment securities.

VI. OPERATIONS IN REAL ESTATE

A. Operations in the country concerned by non-residents:
   1. Building or purchase.*
   2. Sale.
B. Operations abroad by residents:
   1. Building or purchase.*
   2. Sale.

VII. BUYING AND SELLING OF SHORT-TERM TREASURY BILLS AND OTHER SHORT-TERM SECURITIES NORMALLY DEALT IN ON THE MONEY MARKET**

A. Operations in the country concerned by non-residents:
   1. Purchase.
   2. Sale.
B. Operations abroad by residents:
   1. Purchase.
   2. Sale.

VIII. CREDITS DIRECTLY LINKED WITH INTERNATIONAL COMMERCIAL TRANSACTIONS OR WITH THE RENDERING OF INTERNATIONAL SERVICES

i) In cases where a resident participates in the underlying commercial or service transaction.

A. Credits granted by non-residents to residents:
   1. Short-term (less than one year);
   2. Medium-term (from one to five years);
   3. Long-term (five years and longer).**
B. Credits granted by residents to non-residents:
   1. Short-term (less than one year);
   2. Medium-term (from one to five years);

3. Long-term (five years and longer).**

ii) In cases where no resident participates in the underlying commercial or service transaction.

A. —

B. Credits granted by residents to non-residents:

1. Short-term (less than one year);*
2. Medium-term (from one to five years);*
3. Long-term (five years and longer);**

IX. FINANCIAL CREDITS AND LOANS

A. Credits and loans granted by non-residents to residents on:

1. Short-term (less than one year).**
2. Medium-term (from one to five years):
   a) The debtor being a financial institution.*
   b) The debtor not being a financial institution.**
3. Long-term (five years and longer):
   a) The debtor being a financial institution.*
   b) The debtor not being a financial institution.**

B. Credits and loans granted by residents to non-residents on:

1. Short-term (less than one year).**
2. Medium-term (from one to five years):
   a) The creditor being a financial institution.*
   b) The creditor not being a financial institution.**
3. Long-term (five years and longer):
   a) The creditor being a financial institution.*
   b) The creditor not being a financial institution.**

X. OPERATION OF ACCOUNTS WITH CREDIT INSTITUTIONS**

A. Operations by non-residents of accounts with resident institutions:

1. In domestic currency
2. In foreign currency

B. Operations by residents of accounts with non-resident institutions:

1. In domestic currency
2. In foreign currency

XI. PERSONAL CAPITAL MOVEMENTS

A. Family loans.

B. Gifts and endowments.

C. Dowries.
D. Inheritances and legacies.
E. Settlement of debts in their country of origin by immigrants.
F. Emigrants' assets.
G. Gaming*.
H. Savings of non-resident workers.

XII. LIFE ASSURANCE

Capital transfers arising under life assurance contracts.

A. Transfers of capital and annuities certain due to resident beneficiaries from non-resident insurers.
B. Transfers of capital and annuities certain due to non-resident beneficiaries from resident insurers.

XIII. SURETIES AND GUARANTEES

A. By non-residents in favour of residents.
B. By residents in favour of non-residents.

XIV. PHYSICAL MOVEMENT OF CAPITAL ASSETS

A. Securities and other documents of title to capital assets:
   1. Import.
   2. Export.
B. Non-industrial gold**
   1. Import.
   2. Export.
C. Means of payment**
   1. Import.
   2. Export.

XV. DISPOSAL OF NON-RESIDENT-OWNED BLOCKED FUNDS

A. Transfer of blocked funds.
B. Use of blocked funds in the country concerned:
   1. For operations of a capital nature.
   2. For current operations.
C. Cession of blocked funds between non-residents.

NOTES AND REFERENCES TO ANNEX

1. In the Capital Movements Code, the liberalisation obligations concerning some items are qualified by limiting remarks or explanatory notes that are not presented here. For example, the obligations concerning item I/A — inward direct investment — do not cover investments of a purely financial character or those that might have an exceptionally detrimental effect on the interests of the Member country concerned; the obligations do, however, cover the main aspects of the right of establishment, including the obligation to provide equivalent treatment between residents and non-residents in the granting of any concession or licence that may be necessary to do business.

2. Operations to be liberalised under the Code are set out in two lists, List A and List B. Once a Member country has withdrawn a reservation to an item on List A, it cannot lodge a new reservation on that item; a reservation on an item on List B, however, can be lodged at any time. Operations on List B of the Code are indicated here by an asterisk(*). Operations not presently covered by liberalisation obligations — i.e. they are not included in either List A or List B — are indicated by a double asterisk(**).

ANNEX V

SECOND REVISED DECISION OF THE COUNCIL ON THE GUIDELINES FOR MULTINATIONAL ENTERPRISES

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, to Articles 2 d), 3 and 5 a) thereof;

Having regard to the Resolution of the Council of 28th November 1979, on the Terms of Reference of the Committee on International Investment and Multinational Enterprises and, in particular, to paragraph 2 thereof [C(79)210 (Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June 1976 in which they jointly recommend to multinational enterprises the observance of guidelines for multinational enterprises;

Having regard to the Revised Decision of the Council of 13th June 1979 on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises [C(79)143];

Recognising the desirability of setting forth procedures by which consultations may take place on matters related to these guidelines;

Recognising that, while bilateral and multilateral co-operation should be strengthened when multinational enterprises are made subject to conflicting requirements, effective co-operation on problems arising therefrom may best be pursued in most circumstances on a bilateral level, although there may be cases where the multilateral approach would be more effective;

Considering the Report on the Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C(79)102(Final)] and the Report on the Second Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C/MIN(84)5(Final)], including the particular endorsement of the section in the Second Review Report relating to conflicting requirements;

On the proposal of the Committee on International Investment and Multinational Enterprises:

DECIDES:

1. Member Governments shall set up National Contact Points for undertaking promotional activities, handling enquiries and for discussions with the parties concerned on all matters related to the Guidelines so that they can contribute to the solution of problems which may arise in this connection. The business community, employee organisations and other interested parties shall be informed of the availability of such facilities.

2. National Contact Points in different countries shall co-operate if such need arises, on any matter related to the Guidelines relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other National Contact Points are undertaken.

3. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall periodically or at the request of a Member country hold an exchange of views on matters related to the Guidelines and the experience gained in their application. The Committee shall be responsible for clarification of the Guidelines. Clarification will be provided as required. The Committee shall periodically report to the Council on these matters.

4. The Committee shall periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to the Guidelines. In addition, exchanges of views with the advisory bodies on these matters may be held upon request by the latter. The Committee shall take account of such views in its reports to the Council.

5. If it so wishes, an individual enterprise will be given the opportunity to express its views either orally or in writing on issues concerning the Guidelines involving its interests.

6. The Committee shall not reach conclusions on the conduct of individual enterprises.

7. Member countries may request that consultations be held in the Committee on any problem arising from the fact that multinational enterprises are made subject to conflicting requirements. The Member countries concerned should be prepared to give prompt and sympathetic consideration to requests by Member countries for consultations in the Committee or through other mutually acceptable arrangements, it being understood that such consultations would be facilitated by notification at the earliest stage practicable. Governments concerned will co-operate in good faith with a view to resolving such problems, either within the Committee or through other mutually acceptable arrangements.

8. The Committee will continue to serve as a forum for consideration of the question of conflicting requirements, including, as appropriate, the national and internationl legal principles involved.

9. Member countries should be prepared to assist the Committee in its periodic reviews of experience on matters relating to conflicting requirements.

10. The Committee shall periodically invite the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC) to express their views on matters relating to conflicting requirements.

11. This Decision shall be reviewed at the latest in six years. The Committee shall make proposals for this purpose as appropriate.

12. This Decision shall replace Decision [C(79)143].

SECOND REVISED DECISION OF THE COUNCIL ON NATIONAL TREATMENT

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, to Articles 2 c), 2 d), 3 and 5 a) thereof;

Having regard to the Resolution of the Council of 28th November 1979 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises and, in particular, to paragraph 2 thereof [C(79)210(Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June 1976 on National Treatment;

Having regard to the Revised Decision of the Council of 13th June 1979 on National Treatment [C(79)144];

Considering that it is appropriate to establish within the Organisation suitable procedures for reviewing laws, regulations and administrative practices (hereinafter referred to as "measures") which depart from "National Treatment";

Considering the Report on the Second Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C/MIN(84)5(Final)];

On the proposal of the Committee on International Investment and Multinational Enterprises;

DECIDES:

1. Measures taken by a Member country constituting exceptions to "National Treatment" (including measures restricting new investment by "Foreign-Controlled Enterprises" already established in their territory) in effect on 21st June 1976 shall be notified to the Organisation within 60 days after that date.

2. Measures taken by a Member country constituting new exceptions to "National Treatment" (including measures restricting new investment by "Foreign-Controlled Enterprises" already established in their territory) taken after 21st June 1976 shall be notified to the Organisation within 30 days of their introduction together with the specific reasons therefor and the proposed duration thereof.

3. Measures introduced by a territorial subdivision of a Member country, pursuant to its independent powers, which constitute exceptions to "National Treatment", shall be notified to the Organisation by the Member country concerned, insofar as it has knowledge thereof, within 30 days of the responsible officials of the Member country obtaining such knowledge.

4. The Committee on International Investment and Multinational Enterprises (hereinafter called "the Committee") shall periodically review the application of "National Treatment" (includng exceptions thereto) with a view to extending such application of "National Treatment". The Committee shall make proposals as and when necessary in this connection.

5. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters related to National Treatment and shall take account of such views in its periodic reports to the Council.

6. The Committee shall act as a forum for consultations, at the request of a Member country, in respect of any matter related to this instrument and its implementation, including exceptions to "National Treatment" and their application.

7. Member countries shall provide to the Committee, upon its request, all relevant information concerning measures pertaining to the application of "National Treatment" and exceptions thereto.

8. This Decision shall be reviewed at the latest in six years. The Committee shall make proposals for this purpose as appropriate.

9. This Decision shall replace Decision [C(79)144].

SECOND REVISED DECISION OF THE COUNCIL ON INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES

THE COUNCIL,

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, Articles 2 c), 2 d), 2 e), 3 and 5 a) thereof;

Having regard to the Resolution of the Council of 28th November 1979 on the Terms of Reference of the Committee on International Investment and Multinational Enterprises [C(79)210 (Final)];

Taking note of the Declaration by the Governments of OECD Member countries of 21st June 1976 on International Investment Incentives and Disincentives;

Having regard to the Revised Decision of the Council of 13th June 1979 on International Investment Incentives and Disincentives [C(79)145];

Considering the Report on the Second Review of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises [C/MIN(84)5(Final)];

On the proposal of the Committee on International Investment and Multinational Enterprises;

DECIDES:

1. Consultations will take place in the framework of the Committee on International Investment and Multinational Enterprises at the request of a Member country which considers that its interests may be adversely affected by the impact on its flow of international direct investments of measures taken by another Member country which provide significant official incentives and disincentives to international direct investment. Having full regard to the national economic objectives of the measures and without prejudice to policies designed to redress regional imbalances, the purpose of the consultations will be to examine the possibility of reducing such effects to a minimum.

3. The Committee may periodically invite the Business and Industry Advisory Committee to OECD (BIAC) and the Trade Union Advisory Committee to OECD (TUAC) to express their views on matters relating to international investment incentives and disincentives and shall take account of these views in its periodic reports to the Council.

4. This decision shall be reviewed at the latest in six years. The Committee on International Investment and Multinational Enterprises shall make proposals for this purpose as appropriate.

5. This decision shall replace Decision [C(79)145].

ANNEX VI : OECD DECLARATION ON TRANSBORDER DATA FLOWS

Ministers of the OECD Member countries, meeting on 11th April, 1985 adopted the attached Declaration on Transborder Data Flows.

This Declaration represents the first international effort to address economic issues raised by the information revolution. It addresses the policy issues arising from transborder data flows such as flows of data and information related to trading activities, intra-corporate flows, computerised information services and scientific and technological exchanges. These flows are playing an increasingly important role in the economies of Member countries and in international trade and services.

In adopting this Declaration, the governments of OECD Member countries expressed their intention to promote access to data and information, to develop common approaches for dealing with transborder data flows issues. They agreed to undertake further work on the main issues emerging from transborder data flows.

Declaration

Rapid technological developments in the field of information, computers and communications are leading to significant structural changes in the economies of Member countries. Flows of computerised data and information are an important consequence of technological advances and are playing an increasing role in national economies. With the growing economic interdependence of Member countries, these flows acquire an international dimension, known as Transborder Data Flows. It is therefore appropriate for the OECD to pay attention to policy issues connected with these transborder data flows.

This declaration is intended to make clear the general spirit in which Member countries will address these issues.

In view of the above, the Governments of OECD member countries:

Acknowledging that computerised data and information now circulate, by and large, freely on an international scale;

Considering the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data and the significant progress that has been achieved in the area of privacy protection at national and international levels;

Recognising the diversity of participants in transborder data flows, such as commercial and non-commercial organisations, individuals and governments, and recognising the wide variety of computerised data and information, traded or exchanged across national borders, such as data and information related to trading activities, intra-corporate flows, computerised information services and scientific and technological exchanges;

Recognising the growing importance of transborder data flows and the benefits that can be derived from transborder data flows; and recognising that the ability of Member countries to reap such benefits may vary;

Recognising that investment and trade in this field cannot but benefit from transparency and stability of policies, regulations and practices;

Recognising that national policies which affect transborder data flows reflect a range of social and economic goals, and that governments may adopt different means to achieve their policy goals;

Aware of the social and economic benefits resulting from access to a variety of sources of information and of efficient and effective information services;

Recognizing that Member countries have a common interest in facilitating transborder data flows, and in reconciling different policy objectives in this field;

Having due regard to their national laws, do hereby declare their intention to:

- Promote access to data and information and related services, and avoid the creation of unjustified barriers to the international exchange of data and information;

- Seek transparency in regulations and policies relating to information, computer and communications services affecting transborder data flows;

- Develop common approaches for dealing with issues related to transborder data flows and, when appropriate, develop harmonized solutions;

- Consider possible implications for other countries when dealing with issues related to transborder data flows.

Bearing in mind the intention expressed above, and taking into account the work being carried out in other international fora, the Governments of OECD member countries,

Agree that further work should be undertaken and that such work should concentrate at the outset on issues emerging from the following types of transborder data flows:

- Flows of data accompanying international trade;

- Marketed computer services and computerised information services; and

- Intra-corporate data flows.

The Governments of OECD member countries agreed to co-operate and consult with each other in carrying out this important work, and in furthering the objectives of this Declaration.

NEW MEASURES AS A RESULT OF THE 1984 DECISION

s a result of the new provisions on inward direct investment the following
eservations were added and/or clarified by member countries.

ıstralia

)ne.

ıstria

) Investment in the form of loans, unless the project concerned serves to foster productive capacity.

i) Establishment of branches of foreign banks, except through an enterprise incorporated in Austria.

.i) Investment in the auditing, mining, energy, transport and legal sectors.

') Acquisition of 25 per cent or more in ships registered in Austria.

elgium

Public takeover bids by investors from non-EC member countries.

.) The acquisition of Belgian flag vessels by shipping companies not having their principal office in Belgium.

enmark

) The ownership of Danish flag vessels, except through an enterprise incorporated in Denmark.

inland

) Investment in forestry, forest based industries and mining.

i) Investment in real estate agricultural products, energy, transactions, provision, information, financial services and brokerage which is subject to particular conditions.

ii) Acquisition of shares in a Finnish enterprise above certain levels of equity capital or acquisition of Finnish businesses if the acquisition conflicts with any essential public interest.

v) Establishment of branches of foreign companies, unless authorization is granted.

) Establishment of subsidiaries of foreign insurance companies, unless the authorization is granted.

ii) Establishment of wholly-owned and majority owned branches or subsidiaries of foreign banks, banking joint-ventures and representative offices of foreign banks, unless an authorization is granted.

Finland Cont'd

vii) Acquisition of shars in a Finnish commercial bank, a mortgage bank or a credit institution when the total foreign ownership exceeds 20 per cent of the share capital and 10 per cent of the combined voting rights, unless an authorization is granted.

France

i) Investment originating from non-EC member countries on the following conditions:

a) Prior notification is required for investments taking the form of the creation of a new enterprise or a participation of less than FF 10 million in an existing enterprise not under foreign control, with the possibility that the Minister of Economics and Finance might, in exceptional circumstances and within one month, exercise his right to postpone the investment.

b) Neither prior notification nor prior authorisation is required for:

- The acquisition of shares in a French enterprise by a group controlled by non-residents that already holds at least 75 percent of the equity capital of the enterprise concerned;

- Complementary financing operations, such as loans between head office and affiliates, subsidiaries, and capital increases, undertaken by non-residents within the enterprises they control, where the total participation of the group controlled by the non-residents is already greater than 75 per cent of the equity capital;

- The creation of real estate companies;

- Up to FF 10 million, the purchase, creation or extention by individuals ("personnes physiques") of an enterprise in the field of retail commerce, hotel management and other trades ("artisanat") provided the enterprise is personally managed by its owner without the formation of a limited liability company;

c) Investments not falling into categories a) and b) above are subject to prior authorisation;

ii) Investment in the following sectors, unless an authorisation or concession is granted: exploration and exploitation of mines (including hydro-carbon mines); quarries and waterfalls; import of crude petroleum, petroleum by-products, residues and refined products; nuclear industry; agriculture (except for nationals of EC member countries);

iii) Establishment of non-resident investors in the air transport sector, unless at least 50 per cent of the equity capital is held by French nationals and subject to the provisions of duly approved international agreements that imply otherwise; moreover, the State has full powers regarding domestic air transport;

France Cont'd

iv) Establishment of insurance companies originating in non-EC member countries to the extent that the criterion of market needs may be taken into account;

v) Participation of more than 50 per cent in the ownership of a French flag vessel, unless the vessel concerned is entirely owned by enterprises having their principal office in France.

Germany

i) Establishment of an airline company, unless German nationals exercise majority control of this company;

ii) Ownership of German flag vessels, except through an enterprise incorporated in Germany;

Greece

i) Establishment by investors from non-EC member countries of a representative office or a new branch of a foreign bank;

Ireland

.) Investment in air transport;

i) Establishment of branches of insurance companies originating from non-EC member countries which is subject to special deposit and asset to localisation requirements;

ii) Acquisition of sea fishing vessels registered in Ireland;

v) Acquisition by investors from non-EC member countries Irish registered shipping vessels, except through an enterprise incorporated in Ireland.

Italy

.) Foreign majority participation in enterprises engaged in the information sector, in enterprises owning aircraft and in enterprises owning Italian ships which offshore-supply and cabotage are reserved;

.i) Establishment of branches of banks originating in non-EC member countries which is subject to a minimum capital requirement.

.ii) Acquisition by investors from non-EC member countries of shares with voting rights in "banks of national interest".

.v) Establishment of branches and agencies of insurance companies originating in non-EC member countries.

Luxembourg

The reservation applies only to public takeover bids by investors from non-EC member countries

Netherlands

i) Investment in enterprises operating an airline;

ii) Ownership of Netherlands flag vessels, unless the investment is made by shipping companies of which two-thirds of the shares are in the possession of nationals residing in the Netherlands.

New Zealand

i) Acquisition of assets used in carrying on a business in New Zealand when the amount involved is above NZ$500,000;

ii) Acquisition of 25 per cent or more of any class of shares in New Zealand firms;

iii) Acquisition of 25 per cent or more of shares of New Zealand enterprises engaged in deep water fishing (except for tuna and squid fishing);

iv) Acquisition of agricultural land;

v) Investment for large scale use of mineral resources;

vi) Establishment of foreign insurance companies, unless an authorisation is granted.

Norway

i) Acquisition of, and certain leasing rights to, mines and waterfalls and other real property, unless a concession is granted, and foreign acquisition exceeding certain levels of the share capital of a company owning or leasing real property subject to a concession requirement;

ii) Investment in air transport, except through a limited liability company in which at least two-thirds of the capital is Norwegian;

iii) Establishment of securities houses;

iv) Establishment of branches of foreign insurance companies to the extent that a minimum deposit is required;

v) Establishment of subsidiaries of foreign banks, unless an authorisation is granted, and the establishment of branches of foreign banks;

vi) Participation exceeding 10 per cent of the share capital of Norwegian banks, finance companies and brokerage houses;

vii) Establishment of travel agencies and tour operators, unless an authorisation is granted;

viii) Ownership of Norwegian flag vessels, except through a partnership or joint stock company where Norwegian citizens own at least 60 per cent of the capital.

ix) Ownership of fishing vessels or of shares in a company owning such vessels, except through a joint stock company in which Norwegian citizens own at least 60 per cent of the capital.

Portugal

i) Investment that is not directed at the priority sectors defined by Resolution No. 382/80 of 8th November 1980 of the Council of Ministers and does not company with the conditions established in the said Resolution;

ii) Investment that is to increase the capital of existing companies and has not already been foreseen in the documents granting initial authorisation;

iii) Investment involving capital increases other than those due to capitalisation of reserves or profits, unless the participation of the non-residents in the company's capital is not altered;

iv) Investment exceeding per annum the lesser value of either twenty million escudos or 50 per cent of the equity capital, when it is not to increase the stock capital of the companies already established in which the participation of a non-resident has been authorised or when by so doing the overall participation of non-residents in the capital of such companies is changed, and foreign investment is above the thresholds given above;

v) Establishement of enterprises engaged in mining, fishing, non-regular air transport and international road transport, unless the majority of capital is held by Portuguese and the majority of shareholders are Portuguese;

vi) Establishment of agencies of foreign insurers, which is subject to a special deposit and financial guarantee requirement and to the condition that the parent company has been authorised for such an activity for at least five years;

vii) Establishment of press enterprises, either for news papers or periodicals, unless the foreign participation does not exceed 10 per cent of the equity capital, without the right to vote in general assemblies;

viii) Establishment of travel agencies, unless it is made through an enterprise incorporate in Portugal;

ix) Establishment of enterprises engaged in coastal trade, unless at least 60 per cent of the equity capital is held by Portuguese and the majority of sharesholders are Portuguese;

x) Ownership of Portuguese flag vessels, unless it takes place through an enterprise incorporated in Portugal.

Spain

i) Investment exceeding 25 per cent of the equity in public utilities and air transport companies;

ii) Investment exceeding 40 per cent of the equity in maritime transport companies;

iii) Investment exceeding 49 per cent of the equity in mining companies, and investment in mercury production;

iv) Investment exceeding 40 per cent of the equity in oil refining companies;

iv) Investment exceeding 40 per cent of the equity in oil refining companies;

v) Investment exceeding 15 per cent of the equity in banks created since 1972 and establishment of subsidiaries and branches of foreign banks, unless an authorisation is granted;

vi) Investment in broadcasting (including television) and in the film industry;

vii) Investment in hydro-electric facilities and water supply to localities;

viii) Investment in gaming, lotteries, lotto and casinos;

ix) Investment by governments, official institutions and public enterprises;

x) Investment in the form of long-term loans, except for purchases of bonds or subscriptions to bonds.

Switzerland

The reservation applies only to the establishment of foreing companies for the distribution and exhibition of films.

Turkey

i) Acquisition of shares in Swedish corporations above certain levels of equity capital;

ii) Acquisition of holdings in Swedish trading partnership;

iii) Acquisition of Swedish business if the acquisition conflicts with any essential public interest;

iv) Acquisition of freehold and leasehold rights to real property and, of the right to claim and exploit mineral deposits;

v) Establishment of branches of foreign banks, except through an enterprise incorporated in Sweden, and foreign acquisition of shares in domestic banks not under foreign control;

vi) Establishment of, or foreign acquisition of shares in, finance houses, brokerage firms, and firms engaged in credit information or other financial services;

vii) Investment, whether directly or indirectly through residents, in the fields of transport and communications, unless a licence, concession or similar authorisation is granted;

viii) Ownership of aircraft registered in Sweden, and ownership of 50 per cent or more of ships registered in Sweden.

urkey

) Investment in the insurance sector;

i) Investment in the mining sector, except through a subsidiary established in Turkey;

ii) Investment, by enterprises controlled or owned by foreign states, in exploration and exploitation of petroleum, unless an authorisation is granted;

v) Investment in refining, transportation through pipelines and storage of petroleum, unless an authorisation is granted;

) Participation in a Turkish bank and the establishment of a subsidiary by a foreign bank, unless an authorisation is granted;

i) Establishment of a branch by a foreign bank, unless an authorisation is granted and subject to a minimum capital endowement;

ii) Investment in all other sectors if the value of the foreign investment is less than $50,000 or more than $50 million, unless an authorisation is granted;

iii) Long-term loans unless the enterprise receiving the loans is benefitting from incentive measures.

nited Kingdom

) Investment in air transport;

i) Investment in broadcasting, other than by nationals of, or enterprises originating in, EC member countries, the Channel Islands or the Isle of Man;

i) Acquisition of United Kingdom flag vessels, except through an enterprise incorporated in the United Kingdom.

nited States

) Atomic energy;

i) Domestic broadcasting (radio and television), unless an authorisation is granted, and the Communications Satellite Corporation;

ii) Domestic air transport;

v) Coastal and domestic shipping (including dredging and salvaging in coastal waters and transporting offshore supplies from a point within the United States to an offshore drilling rig or platform on the continental shelf).

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