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GATT URUGUAY ROUND
NEGOTIATIONS RELATING
TO SERVICES

by

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GATT URUGUAY ROUND NEGOTIATIONS RELATING TO SERVICES

by

Melvin G. Clark

1. The purpose of this paper is to examine the GATT Uruguay Round negotiations on services. The paper, inter alia, will summarize the programme for services adopted by participating countries on 28 January 1987 for the initial phase of the negotiations, comment on the provisions of agreements that might be negotiated, the types of such agreements and the services that might be included in them. The paper will also note Canada's interests in the GATT negotiations where they are known.

I. Background

2. Services consist of a wide and diverse group of economic activities, including banking, finance, insurance, real estate, engineering, construction, transportation, tourism, advertising, consulting and communications. Some services such as maritime transportation go back to the earliest days of commerce, while others like data processing are on the frontiers of new technology. Virtually all services are affected by technological change.
3. The economies of the industrialized countries have increasingly become services economies with services accounting for a much larger percentage of both GNP and employment than the production of goods. During the 1970s, about 80 per cent of new jobs created in Canada originated in the service sector; at the beginning of the 1980s, services accounted for 65 per cent of Canada's GNP and employment.

4. International trade in services is large and growing. Although statistics are not entirely reliable, a recent estimate is that international trade is in the order of U.S. \$400 billion a year. For decades, however, governments have been pre-occupied with trade in goods and about a quarter of trade in goods.* GATT reflects this situation and does not apply to a substantial part of trade in services. This means that there is no contractual agreement between governments that limits their flexibility to use measures to restrict or distort services trade. Not only is current trade in services affected by restrictive measures, but both it and future trade are vulnerable to even more restrictions.

5. GATT is much maligned these days with the media reporting derogatory comments almost daily. Many of the comments are to the effect that there is a new protectionism that has seriously eroded GATT. Such comments, however, are not consistent with the facts. At the end of World War II, the Western Allies, for the first time in history, constructed a system for the conduct of international trade and finance; the trade pillar of the system was GATT. GATT and the agreements concluded at the end of the Tokyo Round of multilateral trade negotiations under GATT are contractual agreements between governments that limit contracting parties' flexibility to restrict and/or distort trade. The Atlantic Council's Advisory Trade Panel recently observed that GATT has been

* The Atlantic Council of the United States, *The Uruguay Round of Multilateral Trade Negotiations Under GATT: Policy Proposals on Trade and Services*, Policy Papers Series, November 1987, p. 66.

"extraordinarily effective in successive rounds of trade negotiations in bringing down the levels of tariffs among the contracting parties to a relatively low level and in dealing with a variety of non-tariff barriers".* In fact, the industrial tariffs of the developed market economies are substantially lower than during the 1930s and probably lower than at any time since the late 1870s. In addition, GATT has brought about a substantial reduction in the use of non-tariff measures. From the inception of GATT to the present, there has been a substantial net reduction of protection.

6. Past negotiations, however, have left a number of problems unresolved and new problems have arisen. To address these problems, a meeting of Ministers at Punta del Este, Uruguay, in September 1986, decided to launch a new round of negotiations to be completed in four years. As part of the new round, Ministers also decided to initiate negotiations on trade in services.

II. Negotiating Programme

7. In January 1987 the participating countries adopted a negotiating programme that states that the negotiations "shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a

* Ibid., p. 10.

view to expansion of such trade under conditions of transparency and progressive liberalization" The purpose of such a multilateral framework is to promote the "economic growth of all trading partners and the development of developing countries". The framework "shall respect the policy objectives of national laws and regulations applying to services" The Group on Negotiations on Services was established to carry forward the negotiations.*

III. GATT and Services

8. The drafting history of GATT indicates that it was primarily designed to apply to goods and not services. GATT provisions, however, apply to services that are physically linked to traded goods such as books, motion picture films and computer tapes. GATT provisions also apply to certain services that are complementary to trade in goods but are not physically linked to the goods such as transportation, banking and insurance.**
9. Tariffs reduced and/or bound in GATT negotiations would, of course, liberalize the trade of services linked to goods classified under such tariffs. The value established for customs purposes generally attempts to reflect the value of any service components as well as the goods components of products.

* GATT, FOCUS, GATT Newsletter, January-February 1987.

** M.G. Clark, "Services and the General Agreement on Tariffs and Trade", The Institute for Research on Public Policy, Discussion Paper 8603, January 1986.

10. GATT customs valuation provisions also permit the inclusion of the cost of certain complementary services when determining the customs value of goods (e.g., commissions and brokerage, except buying commission; the cost of packing whether for labour or materials; engineering, development, art work, design work and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods; royalties and licence fees; the cost of transport to the port or place of importation; loading, unloading and handling charges; and insurance). The illustrative list of prohibited export subsidies annexed to the Tokyo Round Agreement on Subsidies and Countervailing Measures includes certain complementary services in four of the twelve types of prohibited subsidies (e.g., internal transport and freight charges and export credit guarantee or insurance programmes).
11. The GATT agreements relating to government procurement, technical barriers and civil aircraft also contain provisions that impinge on trade in services. The Government Procurement Agreement lifts buy-national practices from services incidental to the supply of goods purchased by entities covered by the agreement providing the value of the incidental services does not exceed that of the products. The Technical Barriers Agreement provides that signatories accord national treatment to all other signatories in each part of the agreement where it is relevant, including access to certain service operations, such as the preparation, adoption and application of technical regulations and standards; the determination of the conformity of products with technical regulations and standards; and the

administration of certification systems. The Civil Aircraft Agreement eliminated all tariffs and charges of any kind on trade in civil aircraft, including those that might be levied on repairs and service components for such aircraft. In addition, it provides that the agreement on technical barriers shall apply to the services required to ensure that aircraft meet certification requirements and specifications on operating and maintenance procedures.

12. Generally barriers to trade in those services covered by GATT have been substantially reduced during the past forty years and the security of access to export markets for such services has substantially increased. For example, tariffs levied on services (i.e., as a component of many agricultural products) are probably lower than at any time since the 1870s.

13. This background is provided in order to demonstrate that the services covered by GATT are services linked to or complementing trade in goods. The GATT's track record of 40 years suggests that the most effective way to further reduce barriers to trade of services covered by GATT, as well as increase security of access for such trade, would be to negotiate them under the plans established for negotiating the goods to which the services are linked or complement. Since the Uruguay Round was launched, the participating countries have established a negotiating plan for services; in addition, they have also established plans for tariffs, non-tariff measures, tropical products, natural resource-based products, textiles and clothing, agriculture, GATT articles, safeguards, agreements and arrangements

negotiated in the Tokyo Round, subsidies and countervailing measures, dispute settlement, trade-related aspects of intellectual property, trade-related investment measures and functioning of the GATT system. Negotiating under these plans would not only have the advantage of negotiating in a framework that generally has brought about a substantial liberalization of trade in services linked to traded goods, it would also ensure that the principles, procedures and practices built into the framework -- as well as the considerable body of knowledge and experience that has accumulated over the years -- could be deployed in order to advance the negotiations. For example, if the political will exists it would appear to be easier to lift buy-national practices from the purchases of services by governments within the framework of the Government Procurement Agreement than to establish a new framework -- indeed, what advantages would negotiating in a new framework provide? Although Article IV provides for negotiations to liberalize or eliminate film quotas, many such quotas are still in effect. It is suggested, however, that the reasons for the limited liberalization of films are related more to divergent national interests than to GATT. The fact that Article IV is a derogation of Article III (national treatment) is evidence that such divergent interests are not only deep-rooted, but that they existed when GATT was drafted and have limited liberalization of trade in films for forty years.

IV. Services not covered by GATT

14. A substantial part of trade in services, however, is not covered by GATT or any other contractual agreement between governments that limits their flexibility to use measures to restrict and/or distort such trade. Services trade that is vulnerable to restrictions consists largely of services that are traded without a relationship with goods (e.g., banking, other than that related to trade in goods; professional services such as accounting, architectural, engineering, legal and medical; real estate; telecommunications, data processing and information services; and travel) and services that substitute for trade in goods (e.g., franchising, chartering and leasing). Trade in these services is as vulnerable to restrictions as trade in goods before GATT.

IV.i Principles, Practices and Procedures

15. The expansion and liberalization of trade in services called for in the Uruguay Round negotiating programme includes increasing security of access for such trade as well as reducing barriers to it and promoting economic growth for all trading partners. It is suggested that the achievement of these objectives will require the application of the GATT principles, practices and procedures summarized below to services trade not now covered by them.
- a) Generally the principles of comparative advantage, competition and the effective operation of the price mechanism should apply, although there may be exceptions or partial exceptions to them.

- b) It would be essential to apply most-favoured-nation treatment at least to other signatories and national treatment at least with respect to internal taxes.
- c) Export subsidies should be prohibited.
- d) Since services and their export can be assisted by means of subsidies other than export subsidies and can be dumped so as to cause injury to industries in other countries, an agreement should contain provisions that permit signatories to neutralize injurious subsidies and dumping and in the case of subsidized exports to third countries to restore the balance of rights and obligations.
- e) State-trading enterprises should be required to make their purchases and sales of services solely in accordance with commercial considerations and most-favoured-nation and national treatment.
- f) Signatories should be required to give best endeavours undertakings that their regional and local governments will observe the provisions of an agreement.
- g) Transparency should be provided by requiring signatories to: (i) notify the use of subsidies, (ii) publish laws, regulations, judicial decisions, administrative rulings and government agreements pertaining to trade measures and policies; and (iii) maintain judicial, arbitral or administrative tribunals or proceedings to promptly review and correct administrative action relating to access for importing services.
- h) Conditional exceptions should be available to permit signatories to act to prevent injurious imports, protect essential security interests,

and possibly to safeguard the balance of payments and protect some other interests covered in Article XX such as public order, health, safety and morals.

- i) A key operating principle of an agreement should be that it represents a balance of rights and obligations among signatories and that the balance should be maintained, if necessary, by retaliation.
- j) Signatories should have the right to use the GATT system to settle disputes relating to an agreement.

IV.ii Legal Protection

- 16. An important issue to be resolved is whether signatories could legally protect domestic service industries from import competition if they believed that it was in their interest to do so. GATT permits contracting parties to protect domestic producers of goods, and tariffs are the legal means for doing so. Providing tariffs are not prohibitive, they permit the price mechanism to operate because foreign producers can measure their protective incidence, export over them and compete with domestic producers on the basis of price, quality etc.
- 17. If it is decided to establish the right to protect domestic service industries not now covered by GATT, it is unlikely that tariffs could be used to do so for many such industries. In many cases such imports of these services are intangible, and it is difficult, if not impossible, to identify them at the border (e.g., banking, data processing and insurance), and the measures protecting domestic producers are applied internally (e.g., establishment

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regulations which prohibit or limit the operations of certain foreign companies; obstacles to the movement of persons across national boundaries such as local labour requirements, licensing of professionals, visas and work permits; and refusal to make contracts subscribed in a foreign country enforceable in local courts.) Many internal measures limit the offering for sale, distribution or use of foreign services as compared to domestic services. Since GATT has not yet assembled a comprehensive inventory of the measures that impinge on trade in services, it is difficult to comment on whether any one measure could be used to provide protection or whether different measures would be needed, depending on the nature of the trade.

18. Again, if it is decided to permit protection for domestic service industries, three additional GATT practices should be applied: periodic negotiations directed to reducing the protection; and binding the level of protection agreed in negotiations against increase (Article II); the obligation to negotiate and seek the agreement of other signatories before increasing a bound level of protection (Article XXVIII). A further GATT practice that might be followed for services would be that negotiations could be scheduled in advance, as in the aircraft and government procurement agreements or held when a consensus develops to negotiate as in Article XXVIII bis.

IV.iii National Treatment

19. On the other hand, if it is decided that signatories will not be permitted to legally protect domestic service industries and should provide unimpaired access for imports, unlimited national treatment would be a means of doing so. National treatment is a means to achieve the objective of eliminating or preventing recourse to measures that restrict or distort trade so as to afford protection to domestic production. National treatment provides that a country accords to another country or countries treatment identical to the treatment that it provides nationally. When assessing the consequences of national treatment, its objective should also be taken into account.

20. National treatment does not have a theological or pure meaning on the one hand and a sectarian or pragmatic meaning on the other; differences in the national treatment provisions of international agreements arise from the scope of their application. For example, the General Agreement (Article III, paragraph 1) limits national treatment to ". . . internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions" GATT does not provide for the application of national treatment to a range of trade measures that affect imports such as customs, anti-dumping and countervailing duties and emergency safeguard action to protect domestic producers. Nor do GATT national treatment obligations apply to foreign

persons and firms. In addition, GATT national treatment does not apply to foreign investment per se and contracting parties can embargo, restrict or discriminate against such investment, although certain conditions attached to foreign investment could be inconsistent with Article III (e.g., the Foreign Investment Review Act requirements that investors purchase goods of Canadian origin, or goods from Canadian sources).^{*} Moreover, GATT national treatment does not apply to services such as banking and insurance, except when the services are related to trade in goods; other financial services such as investment dealers; professional services such as accounting, architectural, engineering, legal and medical; real estate; and telecommunications, data processing and information services.

21. A review of the drafting history of GATT discloses that important discussions relating to national treatment focused on the scope of its application. Government procurement was specifically excluded from national treatment (Article III: 8 (a)). Opposition to applying national treatment to domestic film quotas resulted in an explicit derogation from it (Article III.10) and a special Article (Article IV) that permits the establishment or maintenance of quantitative regulations that reserve screen time for films of national origin.

* GATT, Basic Instruments and Selected Documents, Thirtieth Supplement, 1984, p. 140.

22. The European Free Trade Association (EFTA) treaty, in effect, incorporates the GATT national treatment obligations (Article VI) and extends them to import duties on industrial products which have been eliminated. The U.S.-Israel Free Trade Agreement, in effect, contains the GATT obligations and extends them to import duties on all products, agriculture and fish as well as industrial, which will be phased out by January 1, 1995, and certain government procurement contracts. Neither agreement applies national treatment to dumping and countervailing duties, emergency action on imports, foreign investment, services, the exploitation of resources and the sharing of available supplies. The U.S. and Israel will, however, on a best endeavours basis, "assure that trade in services . . . is governed by the principle of national treatment". In accordance with this principle, each party "will endeavour 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."

23. The European Economic Community Treaty envisaged the creation of a single integrated internal market including "the abolition of obstacles to the free movement of persons, services and capital" (i.e., national treatment for services). A provision in the Treaty provided that restrictions on the freedom to provide services should "be progressively abolished during the transitional period". The EC Commission has observed

that not only did the member states fail to implement this provision during the transition period, but over important areas they have failed to implement it at all. Since the Commission believes that "it is no exaggeration to see the establishment of a common market in services as one of the main preconditions for a return to economic prosperity", it has recommended that "swift action should be taken to open up the whole market for services. This applies both to the new service areas such as information marketing and audiovisual services; and to the traditional (but rapidly evolving) services such as transport, banking and insurance"* The Commission further recommended that the member states approve a detailed programme and timetable to remove all such barriers by 1992. Although the Commission made these recommendations in June 1985, the member states have still not approved the programme and timetable.

24. National treatment obligations impinge directly on domestic policies and limit the freedom of governments to use or adapt such policies -- perhaps for this reason many of the complaints tabled in GATT claim impairment of national treatment obligations. The greater the scope of national treatment obligations exchanged in an agreement, the greater the limits that the agreement places on the freedom of signatory governments to use domestic policies.

* Completing the Internal Market, White Paper from the Commission to the European Council, June 1985. See especially pages 4, 5, 26 and 27 of the White Paper and pages 23 to 29 of the Annex.

25. The GATT negotiating programme, however, states that the "...framework of principles and rules for trade in services...shall respect the policy objectives of national laws and regulations applying to services. . . ." Many measures that protect domestic service industries are directed to achieving essential national goals. For example, certain telecommunications and data processing regulations are designed to protect individual privacy or national sovereignty and certain banking and insurance regulations are designed to protect the public against unprofessional and insolvent firms.

26. The considerations outlined above raise the question whether it would be feasible to obtain agreement to apply unlimited national treatment to trade in services or even a substantial part of such trade? To the extent that it is not possible to apply unlimited national treatment, it will be necessary to agree on the scope of the national treatment that is to be applied as well as the measure or measures that could be used to legally protect service industries.

IV.iv Types of Agreement

27. For services not now covered by GATT, it is suggested that priority be given to negotiating a general agreement that would apply to virtually all trade in services and supplementary agreements that would apply to the trade of selected service industries (i.e., sector agreements). A general agreement would initiate the process of liberalizing trade in services as GATT initiated the process of liberalizing trade in goods in 1948.

Supplementary sector agreements would permit participating countries to go further to liberalize trade than might be possible under a general agreement; they would also provide more flexibility in the selection of the legal means of protection and the scope of national treatment.

28. It is recognized, of course, that the wide and diverse nature of trade in services would likely result in certain industries being excluded (at least initially) from a general agreement, as government procurement was excluded from GATT in 1948. For the same reasons, a general agreement probably would include exceptions (partial or total) from particular obligations in order to accommodate certain special cases, as GATT exempts film quotas from national treatment obligations, export subsidies on primary products from the prohibition of such subsidies and agricultural and fish marketing boards from the prohibition of quantitative restrictions. Despite the likelihood of exclusions and exceptions, it is suggested that a general agreement would liberalize more trade and provide a more effective basis for future negotiations than sector agreements alone. The existence and acceptance of GATT facilitated the negotiation in the Tokyo Round of the agreements relating to civil aircraft, government procurement, technical barriers, anti-dumping and subsidies/countervail and import licensing.
29. Among more likely candidates for supplementary sector agreements would be services that are now traded internationally and the producers of which are operating, or would find it in their interest, to operate on a world-wide rather than a national basis -- e.g., financial services such as commercial

and investment banking. Such service providers could reach an international consensus that they and their customers would benefit from greater trade liberalization than could be achieved under a general agreement, and they could urge their respective governments to negotiate sectoral agreements to obtain such gains. During the Tokyo Round, the U.S., EC and Canadian aircraft industries reached a similar consensus and it resulted in the civil aircraft agreement which, inter alia, provided for the elimination of all tariffs on civil aircraft and on some 85 to 90 per cent of the components of civil aircraft (including the repair of such aircraft, avionics, and flight simulators). Other candidates for sector agreements would be travel and tourism; communications; engineering and related architectural and consulting services; and professional services such as accounting, management, law and education.

30. Two considerations suggest that negotiations relating to a general agreement and sectoral agreements probably will be conducted more or less concurrently. GATT did virtually no preparatory work relating to services before the Uruguay Round was initiated. Although the OECD has done significant conceptual work related to this,* we do not know whether, or to what extent, GATT principles, practices and procedures can be adapted to trade in services not already covered by it. The most effective way for negotiators to obtain such knowledge would be to examine the implications of applying such principles and practices to the trade of specific service sectors.

* Organization for Economic Cooperation and Development, "Elements of a Conceptual Framework for Trade in Services", Paris, March 1987.

31. Another consideration working for concurrent negotiations is that governments would be reluctant to undertake commitments in a general agreement to apply to trade in services most-favoured-nation and national treatment and GATT-type provisions regarding subsidies and countervailing duties and transparency without knowing the implications of doing so. Again, an effective way to develop such knowledge is to apply GATT provisions to the trade of specific service sectors.

V. Canada's Interests

32. Some time ago the Federal Government released a Report of a Task Force on Trade in Services dated July 30, 1982. In so far as is known, the work of the Task Force was the first attempt by the Federal Government to inform itself about trade in services. Although further work probably has been done in connection with the comprehensive bilateral negotiations with the United States, no other comprehensive government assessment of Canada's interests in trade in services has been made public. The 1982 Report, however, states: "It should be underlined . . . that this Report is not the end of the road, and indeed is little more than a beginning. . . . It is quite clear that the full range and depth of Canadian interests have yet to be defined."* Indeed, the Report also states "the Task Force was not directed to study domestic policy and programs".**

* Task Force on Trade in Services, Background Report, October 1982, p. 3.

** Ibid., p. 87.

33. For these reasons suggestions regarding service industries that might benefit from trade liberalization must be based on papers published by certain service industries or institutions such as the Institute for Research on Public Policy, and of service industries that do well in international trade. In November 1983, the Royal Bank proposed that Canada and the U.S. negotiate a bilateral arrangement that "would ensure suppliers and users of computer services in one country assured access to the markets or services available in the other". A report of the Canadian Consulting Engineering Industry dated August 1982 stated: "Exports have become an important activity for consulting engineers . . . and the potential exists for a great deal of growth in the export sale of Canadian consulting engineering services."* Prima facie evidence suggests that other service industries that could benefit from trade liberalization are banking, investment dealers, insurance, telecommunications, consulting and other business services, education and health services, oilfield engineering and travel and tourism.

* The Canadian Consulting Engineering Industry: Realizing the Potential. Prepared for the Department of Industry, Trade and Commerce and Regional Economic Expansion, August 1982.

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