The Death of the Doha Round. What Next for Services Trade?

By

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Abstract

With the indefinite suspension of the WTO multilateral trade negotiations in July 2006 by WTO Director-General Pascal Lamy, the world trading system must now find ways and means to unblock what is perceived as a danger to the world order. This article analyzes the legal and policy implications of the currently fatal Doha Round for the two main developed WTO Members, i.e., the U.S. and the EC, and the most relevant developing countries of the WTO. The specific focus of attention will be mainly on services trade. Thoughts on alternative ways to move forward in the multilateral trading system are presented for a hopefully prompt resumption of the Doha talks.
I. Prologue

This chapter addresses the current World Trade Organization (WTO)\textsuperscript{1} negotiations on trade in services in the framework of the Doha Development Agenda (DDA),\textsuperscript{2} and analyzes the legal implications that these services negotiations have for the European Community (EC) in the world trading system. Since July 2006, we have seen the

\textsuperscript{1} The World Trade Organization (WTO) is a global trade agency that was established through the GATT Uruguay Round Agreement signed in 1994. The WTO provides dispute resolution, administration, and continuing negotiations for the seventeen substantive agreements that it enforces. The WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. It is argued by some commentators (Lori Wallach being one of the most relevant activists in the public domain) that the WTO system, rules, and procedures are undemocratic and non-transparent. The WTO’s substantive rules systematically prioritize trade over all other goals and values. Each WTO member is required to ensure “the conformity of its laws, regulations and administrative procedures” [WTO Agreement Article XVI (4)] to the WTO’s substantive rules. National policies and laws found to violate WTO rules must be eliminated or changed; otherwise, the violating country faces trade sanctions. The economic, social and environmental upheaval being suffered by many countries that have lived under the WTO regime since 1995 means that business-as-usual at the WTO is over. It remains to be seen whether the handful of powerful WTO members who have dictated WTO policy since 1995 will adapt to the new reality. By the same token, it is also unclear whether countries demanding changes to the WTO’s current system of rules that are damaging their national interests may begin to withdraw if those changes do not take place. Regarding withdrawal from the WTO Agreement, although Article XV (1) is clear and reads that “Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO,” the withdrawal from certain rules or agreements is not entirely clear.

\textsuperscript{2} Interestingly, rich countries call this agenda of negotiations the “Doha Development Agenda,” whereas poor countries refer to it as the “Everything but Development Round.” It has certainly been a
obvious weaknesses and deficiencies of the multilateral trading system and, as a reaction, the proliferation of regionalism – although this has been happening for quite some time now\(^3\) – and bilateralism. We will see that the substance and nature of the services negotiations in the Doha Round are quite different from those of the Uruguay Round: the latter laid the ground rules for trade in services in the General Agreement on Trade in Services (GATS);\(^4\) the former is about extending liberalization and complementing those ground rules.\(^5\) The chapter also analyzes the consequences of


\(^4\) General Agreement on Trade in Services, April 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1B, “The Results of the Uruguay Round of Multilateral Trade Negotiations –The Legal Texts,” 325, 33 I.L.M. 1167 (1994). For a full text of agreements resulting from the Uruguay Round, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, “Legal Instruments –Results of the Uruguay Round,” 1 (1994), 33 I.L.M. 1125 (1994). The GATS is one of the Agreements implemented by the WTO. The GATS sets rules for who controls or owns services and limits government regulation in the services sector. The GATS covers all services including health care, education and utilities such as water, data management, energy, banking, transportation, and insurance. Some commentators –especially Lori Wallach- argue that only a small part of the GATS is about trade. The GATS is often called a “backdoor Multilateral Agreement on Investment (MAI),” because it creates rights for foreign investors to set up service business inside other WTO countries. The GATS allows some flexibility for countries to determine which service sectors they want to subject to the GATS full participation and deregulation pressures. However, some GATS rules apply even to sectors where countries have not committed. In addition, the text of the GATS commits all WTO countries to “progressive liberalization” (Article XIX.1 of the GATS). Expansion of the GATS scope and the sectors it covers is now underway in the so-called “GATS 2000” negotiations. Currently, the GATS 2000 negotiations are in the “request/offer” phase, where WTO members engage in bilateral negotiations requesting that other countries open up service sectors and offering sectors that they themselves will put on the negotiating table. For example, the EC has requested that WTO countries liberalize their water service, and the U.S. has requested that Brazil open for ownership by U.S. corporations elements of public higher education services. Once a sector is committed to the GATS, it is virtually impossible for the public to reinstall control over it because the GATS rules require financial compensation to every WTO member to do so.

\(^5\) That said, there are still some controversial issues of the Uruguay Round in the Doha Round, namely the audiovisual services.
the Nice Treaty reform in relation to trade in services as it appears in the new version of Article 133 of the Nice Treaty. We shall explore the position of the EC in the WTO generally, and in the Doha Development Agenda more specifically, as well as the trade position adopted by the EC and its Member States in international trade negotiations. Does the Nice Treaty change anything to trade in services? What is the impact of the Nice Treaty on trade in services? What are the practical consequences of all these changes both for the EC and its Member States? Certainly, Cancun showed the complexities of the European Union (EU) as a unified actor in international trade relations, and more specifically in multilateral trade negotiations. All these questions are analyzed throughout the chapter.

The integration of the European Union is an ongoing process. It is currently facing serious challenges as a result of the demands of its citizens. This is certainly the case of trade policy-making. In view of the current state of EC law by the Nice Treaty, what will happen to services trade in the Doha Round? In other words, from an EC law viewpoint, by the time the Doha Declaration will be signed as an international trade agreement at the end of 2006, will it be 1) a mixed agreement, signed by all EU Member States and the EC or 2) a pure Community agreement, signed only by the EC, in the framework of the Doha Round? The answer depends on the interpretation of the Nice Treaty with respect to services trade, as well as on whether there will be a separate General Agreement on Trade in Services (GATS) revision or just one global WTO Trade Agreement. What repercussion will this have for EU citizens in terms of accountability? An exploration of this issue as a mixed agreement and as a pure Community agreement is presented. The proposals of the failed EU Constitutional Treaty are also analyzed to see whether they could partly be

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7 The phenomenon of a pure Community agreement, whereby only the EC without its Member States signs an international trade agreement, is accepted by paragraphs 2 & 3 of Article 133 EC.
the optimal solution to the trade-off of efficiency versus accountability in trade policy decision-making. The chapter concludes with several proposals and recommendations to reform the EC’s common commercial policy in search of the optimal position of the EC in the Doha Round specifically with respect to services trade, and in the world trading system more generally.

The chapter is divided into two parts. Part I (Sections II-IV) provides a general overview of the world trading system with respect to trade in services. It also explores the position of the EC in the WTO generally, and in the Doha Development Agenda more specifically. Part II (Section V) analyzes the Nice Treaty and the EU Constitutional Treaty in relation to services trade. This Part also analyzes to what extent the amendments introduced by the Nice Treaty and the EU Constitutional Treaty are heading toward the eradication of mixed agreements/shared competence in the European Union.

II. What is a Round? Is a New Round Necessary?

A. What is a Round?

WTO member countries tend to negotiate over several years on new agreements for a group of subjects.\(^8\) These series of negotiations are called rounds. They are often lengthy but can have the advantage of offering a package approach to trade negotiations, as opposed to negotiations on a single issue, such as the negotiations in financial services and telecommunications in the mid-1990s. The package approach can sometimes be more fruitful since there is always something beneficial for every

\(^8\) Article III:2 of the WTO Agreement clearly states that among the various functions of the WTO is that of negotiating: “The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members.
participant in the negotiation, and therefore the ability to trade-off various issues can
make the agreement easier to reach.

This has political and economic implications. Concessions (or a list of bound
tariff rates)\(^9\) can be obtained more easily in the context of a package because it may
contain politically and economically attractive benefits. Thus, reforms in politically
sensitive sectors of world trade may be more feasible in the context of a global
package. Examples are the Uruguay Round, from 1986 to 1994, and the current round,
the Doha Development Agenda which started in 2001. If ultimately successful, the
Doha talks would be the ninth such Round since the Second World War.\(^10\) This does
not mean that rounds are the only road to success in the international trading system:
with respect to telecommunications, financial services, and information technology
equipment, single-sector negotiations were successfully concluded in 1997.\(^11\)

During and between the multilateral negotiations on the general trade
agreements, members also conduct bilateral,\(^12\) plurilateral,\(^13\) or multilateral\(^14\) talks that

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\(^9\) WTO negotiations produce general rules that apply to all members, and specific commitments made
by individual member governments. The specific commitments are listed in documents called
“schedules of concessions.” The schedules reflect the “concessions” a member has given in trade
negotiations. For more information, see World Trade Organization, “Members’ Commitments,” in
http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited March 28,
2005).

\(^10\) The previous rounds were, in chronological order: Geneva Round (1948), with 23 countries; Annecy
Round (1949), with 13 countries; Torquay Round (1951), with 38 countries; Fourth Round (1956), with
26 countries; Dillon Round (1962), with 26 countries; Kennedy Round (1967), with 62 countries;
Tokyo Round (1979), with 102 countries; and Uruguay Round (1994), with 123 countries.

Organization*. Unit I: The Syntax and Grammar of International Trade Law, p. 28, in

\(^12\) A bilateral agreement is an agreement between two states which is only legally binding for these two
states with the benefits typically not shared with other (third) countries. On the recent proliferation of
bilateral agreements in the world trading system, see Lee, Y.S. “Bilateralism Under the World Trade

\(^13\) The plurilateral process, akin to the bilateral request and offer, is informal. It takes place between
demandeurs and those from whom they are seeking higher commitments. There are no formal
negotiating sessions. There is no formal Chair. There are no minutes of these informal negotiations.
And importantly, there is no critical mass of countries representing 80-90% of world trade in that
sector, unless the negotiations draw in such a large number of countries that they effectively make up
this “critical mass” (an unlikely situation if it were completely voluntary). That negotiations can take
place through a plurilateral request/offer approach is already outlined in paragraph 11 of the
Negotiating Guidelines agreed to by all Members before the GATS negotiations commenced in 2001.
result in (1) agreements on maximum tariffs for goods, and agreements on quotas, export subsidies and domestic supports for agriculture, and (2) commitments to

At the 2005 Hong Kong Ministerial Conference, developed countries succeeded in getting language permitting plurilateral negotiations, in addition to the bilateral request/offer negotiating method. This means that a group of countries will issue one request document demanding broad GATS coverage in a particular sector to one country or a group of countries. Rather than negotiating bilaterally, the countries would negotiate as a group. Developing nations were successful in preventing a text which would have made entering into plurilateral negotiations mandatory, because they were concerned that it would result in developed countries “ganging up” on individual developing countries.

As part of the plurilateral negotiating process, the WTO formed 13 “Friends Groups” that will develop joint request documents and a list of countries to which these requests will be submitted. Other Friends Groups may be formed or operate in a less formal manner. Although the Friends Groups will be made up of WTO country representatives, major multinational service businesses have been working closely with each group on both content of the offer and strategy to break into the service markets of countries high on their priority lists. Below is a list of known Friends Groups, and the country chairing their discussions:

1. Audio-visual services (Chinese Taipei)
2. Air Transport (New Zealand)
3. Computer-related services (Chile)
4. Construction services (Japan)
5. Energy services (EU)
6. Environmental services (EU)
7. Express Delivery services (USA)
8. Financial services (Canada)
9. Legal services (Australia)
10. Logistical services (Switzerland)
11. Maritime services (Japan)
12. Mode 3 (Switzerland)
13. Mode 4 (Canada)
14. Telecommunication (Singapore).

In the WTO context, plurilateral negotiations, as opposed to plurilateral negotiations, imply the participation of all WTO members. The nature of the consequent multilateral agreements from these multilateral negotiations implies that commitments are taken by all the WTO members. The GATT was a multilateral instrument as well, but a series of new agreements were adopted during the Tokyo Round on a multilateral (selective) basis, which caused a fragmentation of the multilateral trading system. A tariff is a tax on imported goods. It is levied at the point of entry and paid to the government of the importing country. In other words, a tariff is a customs duty on merchandise imports. Tariffs are levied either on an ad valorem basis (percentage of value) or on a specific basis (e.g., $7 per 100 kg). Tariffs give price advantage to locally produced goods and raise revenues for the government. Tariffs are allowed to protect domestic industries. However, they are reduced through negotiations between countries in the WTO and then they are “consolidated.” This means that they cannot be increased again unless the principally affected exporting countries, which negotiated the concession, are compensated by concessions on other products (GATT Article XXVIII). Tariffs have been reduced in the previous eight trade Rounds, as a result of which the EU average industrial tariff is now about 3%, down from 35% in 1947.

Quotas are limits on the amount of a good produced, imported, exported, or offered for sale. There are two general types of subsidies: export and domestic. An export subsidy is a benefit conferred on a firm by the government that is contingent on exports. In other words, it is any form of government payment that helps an exporter or manufacturing concern to lower its export costs. A domestic subsidy is a benefit not directly linked to exports. Commitment refers to measures that countries are willing to adopt that will open up further their markets to foreign trade. In other words, it is the legal term used to describe what precise obligations a country has undertaken under the GATS with regard to specific service sectors. Most commitments are specific to certain service sectors and sub-sectors. For instance, the United States “committed” the following service sectors in the first round of GATS negotiations, which concluded in 1995: insurance (including health care), other financial services, telecommunications, sewerage services, wholesale and retail distribution services (which implicates local land use policies), gambling, construction and many others. In the new round of GATS negotiations, the United States is proposing to make new commitments in higher education and energy services. In relation to commitments on market access
open domestic markets to services from other members and exemptions from these commitments. These agreements are memorialized in schedules. The goods schedules are annexed to the General Agreement on Tariffs and Trade (GATT), and national treatment, let us remember that individual countries’ commitments to open markets in specific sectors—and how open those markets will be—are the outcome of negotiations. The commitments appear in “schedules” that list the sectors being opened, the extent of market access being given in those sectors (e.g., whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). So, for example, if a government commits itself to allow foreign banks to operate in its domestic market, that is a market-access commitment. And if the government limits the number of licences it will issue, then that is a market-access limitation. If the government also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, then that would be an exception to the national treatment principle. Other types of market-access limitation are limitations on the number of services suppliers, limitations on transactions or assets (for example, banks), restriction on the total number of operations (or quantity of output, i.e., for broadcasting), limitation on the number of natural persons per establishment, restrictions on the type of legal entity permitted, or limitations on capital participation (cap on an equity percentage).

A limitation on a commitment is an attempt to limit the scope of the commitment in some manner. For instance, the United States committed the service sector “wastewater services,” but limited that commitment to those wastewater services “contracted by private industry.” This limitation is an attempt to exclude municipally-owned and operated sewerage services from the scope of its GATS waste water commitment. Sometimes the words “exemption” or “reservation” are also used for limitation. They basically imply that each country puts forward lists of law for which they would like to take a reservation and then these lists are negotiated among trade partners. Once agreed upon, reservations are annexed to the completed agreement. In addition to the limitations that may apply to a particular sector, most WTO countries have reserved a section of their schedule for “across the board” or horizontal limitations that apply to all sectors. For instance, the United States uses its horizontal schedule to limit the number of service workers who can enter the country via Mode 4. These commitments are usually, but not always, referenced in the sectoral schedules. As an illustration, in the U.S. schedule, the phrase “unbound, except as indicated in the horizontal section” appears in the Mode 4 row of each service sector commitment. The goods schedules are annexed to the General Agreement on Tariffs and Trade (GATT), and national treatment, let us remember that individual countries’ commitments to open markets in specific sectors—and how open those markets will be—are the outcome of negotiations. The commitments appear in “schedules” that list the sectors being opened, the extent of market access being given in those sectors (e.g., whether there are any restrictions on foreign ownership), and any limitations on national treatment (whether some rights granted to local companies will not be granted to foreign companies). So, for example, if a government commits itself to allow foreign banks to operate in its domestic market, that is a market-access commitment. And if the government limits the number of licences it will issue, then that is a market-access limitation. If the government also says foreign banks are only allowed one branch while domestic banks are allowed numerous branches, then that would be an exception to the national treatment principle. Other types of market-access limitation are limitations on the number of services suppliers, limitations on transactions or assets (for example, banks), restriction on the total number of operations (or quantity of output, i.e., for broadcasting), limitation on the number of natural persons per establishment, restrictions on the type of legal entity permitted, or limitations on capital participation (cap on an equity percentage).

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In the schedules, one can see an “Additional Commitments” column. It may relate to issues such as qualifications, standards, licenses, or competition disciplines inter alia. It is the scheduling of commitments not falling under GATS Article XVI (market access) or GATS Article XVII (national treatment). This right-hand column in the schedules is to be used only to add to, not subtract from, a WTO member’s commitments. However, in some instances the United States has attempted to place limitations in this column, jeopardizing, rather than protecting, the listed policies. For instance, in the U.S. “legal services” commitments, the additional commitments column for the State of California states: “Practice of 3rd-country law: not permitted.” This limitation should be properly listed as a market-access limitation in the market-access column of the schedule.

The General Agreement on Tariffs and Trade, signed in 1947, was created by the Bretton Woods meetings that took place in Bretton Woods, New Hampshire (U.S.), in 1944, setting out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers. The GATT is one of the three mechanisms for global economic governance established at Bretton Woods, being the other two the International Monetary Fund (IMF) and the World Bank. The GATT was a collection of rules applied temporarily, without an institutional basis, unlike the WTO, which is a permanent organization with a permanent framework and its own Secretariat. For almost
the services schedules are annexed to the GATS. In other words, the services schedules are an integral part of the GATS, as tariff schedules are an integral part of the GATT. They are thus bound and can be changed only through subsequent formal negotiations.

In these trade liberalization negotiations, WTO members put on the negotiating table their commitments on market access. The term of art schedules refers, in general, to a WTO member’s list of commitments on market access (bound tariff rates; access to services markets). With these schedules, WTO member countries allow specific foreign products or service-providers access to their markets. The schedules are integral parts of the trade agreements. Goods schedules can include commitments on tariffs, and for the specific case of agriculture, combination of tariffs and quotas, agricultural export subsidies and domestic support. The provisions on

fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set the terms for countries who wanted to trade with each other. The GATT signatories were called “contracting parties.” The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. The GATT has now become one of the eighteen agreements enforced by the WTO.

A schedule is a WTO member nation’s list of service sectors or sub-sectors that it has committed or is offering to submit to the rules of the GATS. A nation’s schedule is listed in a table format with four columns labeled: 1) sector/subsector; 2) limitations on market access; 3) limitations on national treatment; and 4) additional comments. Schedules are difficult to read and even more difficult to write. Typically, a nation will commit a service sector in column one, then indicate whether or not the various modes of supplying that service will be bound to the market access rules of the GATS in column two and/or in the national treatment rules in column three. Limitations may be placed in the horizontal section of the schedule or in column one, two or three.

The GATS “market access” rules (Article XVI) go well beyond requiring that governments treat foreign firms the same as domestic firms. Rather, these rules flatly prohibit governments from placing certain limits on, or applying certain policies to, foreign service operations in covered service sectors. Under the GATS market access rules, federal, state and local governments may not:

1. limit the number of service suppliers, including through quotas, monopolies, economic needs tests or exclusive service supplier contracts (absolute bans on certain service sector activities, such as bans on hotel construction on protected shoreline have been interpreted as GATS-prohibited “zero quotas” by two WTO trade tribunals);
2. limit the total value of service transactions or assets, including by quotas or economic needs tests;
3. limit the total number of service operations or the total quantity of a service;
4. limit the total number of natural persons that may be employed in a particular service sector;
5. establish policies which restrict or require specific types of legal entity or joint venture through which a service supplier may provide a service; or
6. limit foreign ownership expressed as a maximum percentage or total value.
market access and national treatment\textsuperscript{26} are not general requirements but specific commitments included in schedules annexed to the GATS.\textsuperscript{27} These schedules identify the services and service activities for which market access is guaranteed, and set out the conditions governing this access. Once consolidated, these commitments can be modified or withdrawn only following negotiation of compensation with the country concerned.

Services commitments include bindings on national treatment.\textsuperscript{28} These schedules are binding commitments on how much access foreign service providers are allowed for specific sectors. The schedules include lists of types of services where

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  \item The national treatment principle is the principle of giving others the same treatment as one’s own nationals. In other words, WTO members must treat domestic and foreign goods, services and/or investors in the same manner for regulatory, tax and other purposes. The treatment must be either formally identical or formally different, so long as it is no less favorable. The treatment is considered less favorable if it modifies the conditions of competition in favor of the services or services suppliers of the WTO member. It is also referred to as the “non-discriminatory” treatment. GATT Article III requires that imports be treated no less favorably than the same or similar domestically-produced goods once they have passed customs. GATS Article XVII and TRIPS Article 3 also deal with national treatment for services and intellectual property protection. GATS “national treatment” rule (Article XVII) not only prohibits treating foreign firms differently than domestic firms (non-discrimination), but it goes farther to prohibit \textit{anything} a government does that modifies the “conditions of competition” in favor of local service suppliers. While GATS proponents say the treaty is geared toward simply ensuring non-discriminatory treatment of domestic service providers and foreign providers, the problem is that the same non-discriminatory regulations –those that apply even-handedly to both foreign and local companies– could still be considered a violation of the national treatment rule. For instance, in the construction sector, the WTO Secretariat has said that even if the same controls on land use, building regulations and building permits are applied to domestic and foreign service suppliers, “they may be found to be more onerous to foreign suppliers.” Thus, permits, subsidies and specific perks, such as road access, that are granted to one service provider, but not another, could be considered a trade barrier for altering the conditions of competition between foreign and domestic service suppliers.
  \item Each WTO Member is required to have a schedule of specific commitments in services. It is a document which identifies the services sectors and modes of supply subject to market access and national treatment obligations. For each listed sector, and mode of supply within that sector, the schedule either indicates that the country has placed no limitation on its market access or national treatment commitments by entering the word “none,” or that the country is conditioning the commitment by listing conditions or by enumerating nonconforming measures. The schedule also includes horizontal commitments and reservations that apply across all sectors. Typical national treatment limitations are discriminatory subsidies and other fiscal measures, nationality and residency requirements; discriminatory licensing/qualification requirements; technology transfer requirements; local content provisions; prohibitions on land/property ownership; language requirements or limitations on insurance portability.

  The GATS does not impose the obligation to assume market access or national treatment commitments in a particular sector. In scheduling commitments, Members are free to tailor the extent of the commitments they take so as to avoid or modify obligations that they consider too demanding at present.
  \item The GATS framework agreement includes a series of binding rules that facilitate the competition of service firms from one WTO member country in another WTO member country’s service markets. These rules also place constraints on the regulatory authority of domestic policymakers at the national as well as state and local level.
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individual countries say they are not applying the most-favored-nation principle of non-discrimination (MFN). 29

Supporters of trade liberalization argue that it is sensible to liberalize trade globally because (i) freer trade allows countries to specialize in what they do best (theory of comparative advantage), creating thereby greater economic efficiency, and allowing more goods and services to be produced and consumed; (ii) if a market is open to imports, domestic producers are exposed to competition from overseas. 30

Being successfully competitive at home vis-à-vis imports implies greater chances to be competitive overseas; and (iii) competitive imports are beneficial for the consumer from a choice, price and quality viewpoints. 31 A sensu contrario, a policy of maintaining trade obstacles to imports tends to raise the cost of living and reduce consumer choice.

29 Most-favored-nation treatment (GATT Article I, GATS Article II and TRIPS Article 4), is the principle of not discriminating between one’s trading partners. In other words, the most-favored-nation (MFN) principle is about treating other WTO members equally. Under the WTO Agreements, countries cannot normally discriminate between their trading partners. If you grant someone a special favor (such as a lower customs duty rate for one of their products), then you have to do the same for all other WTO members.

This principle, known as most-favored-nation (MFN) treatment, is the core principle of the WTO Agreements. It is so important that it is the first Article of the GATT, which governs trade in goods. MFN is also a priority in the GATS (Article II) and the TRIPS Agreement (Article 4), although in each agreement the principle is handled slightly differently. Together, those three Agreements cover all three main areas of trade handled by the WTO. Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group — discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. In the case of services, countries are allowed, in limited circumstances, to discriminate. The agreements, however, only permit these exceptions under strict conditions. In general, MFN means that every time a WTO country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners — whether rich or poor, weak or strong.

B. Why Do We Need a New Round?

In 2001 in Doha (Qatar), a promise was given to developing countries, namely their inclusion in the world trading system, in order to achieve a higher level of justice and equity in the world. That is why the new round is called the development agenda. The argument is that a more open and equitable trading system brings more peace to the world and, in this sense, the DDA should not be approached as a zero-sum game—as many developing countries seem to perceive it—but as a win-win situation. Although wealth redistribution seems to be vital to truly help the poor nations of the world, I would agree with Director-General Lamy that the WTO’s role is not about redistribution of wealth, even while firmly defending the position that the DDA argues that developed countries should help the poor. In this line of thought, developing countries trust Oxfam, and Oxfam helps them in the world trading system. So a new Round is necessary to include poor countries in the world trading system, and to promote economic development, as well as to alleviate poverty.

A successful result of the DDA will mean more growth and development in the world trading system. A sensu contrario, failure of the DDA will imply no growth or development for the world, especially the poorest countries on the planet. In

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32 Mr Mandelson, who referred to a development package for least-developed countries (LDCs) as ‘indispensable,’ indicated at the Hong Kong WTO Ministerial Conference that the EU had committed to step up annual spending on aid for trade to EUR 2 billion by 2010. One billion of this will come from EU Member States, which agreed at the Hong Kong Ministerial Conference to the increase (from EUR 400 million per year); the remainder will come from the European Commission. “Europe did not come to Hong Kong empty-handed on aid for trade,” he said.
33 Oxfam International is a confederation of 12 organizations working together with over 3,000 partners in more than 100 countries to find lasting solutions to poverty, suffering and injustice around the world.
34 This is certainly the position of European trade commissioner Peter Mandelson, who said at a Party of European Socialists conference in Brussels on Decent Work that far from being responsible for poor labor conditions, free trade could be a ladder out of poverty and “an engine of the very prosperity that helps societies put poor labor conditions behind them for good.” “Free trade is not the enemy of decent work,” he concluded; “The enemy of decent work is our willingness to turn a blind eye to it. Free trade does not mean trade indifferent to fair conditions of production.” See the speaking points on “Free Trade is not the Enemy of Decent Work,” given by commissioner Mandelson at a Party of European Socialists conference in Brussels on May 10, 2006, available at
addition, the failure of the DDA will be regarded as a missed historic opportunity to eliminate export subsidies, to put an end to trade distortion. Consequently, all countries of the world trading system will lose, especially developing countries. In this respect, the biggest gains to development will certainly be in the core areas of goods, services and agriculture, and so liberalizing trade among developing countries is an essential part of the Doha exercise.\textsuperscript{35} That is why the international community cannot miss the opportunity offered by the DDA, which can set a vision for the global economy for the next decades and make a major contribution to development.

In the case of services trade, a new services Round was indeed necessary\textsuperscript{36} and is justified because the Uruguay Round was just a first step in the process of trade liberalization. Observers tend to agree that while the negotiations succeeded in setting up the main structure of the GATS, the liberalizing effects conceived have been relatively modest. Apart from exceptions in financial and telecommunication services, most schedules have remained confined to confirming \textit{status quo} market conditions in a relatively limited number of sectors. This may be explained in part by the novelty of the GATS and the perceived need of WTO Members to gather experience before considering wider and deeper commitments, as well as the lack of political will, and the lack of negotiating expertise and capacity.\textsuperscript{37} Moreover, many administrations needed time to develop the necessary regulation—including quality standards, licensing and qualification requirements—that ensures that external liberalization is compatible with, and conducive to, core policy objectives (quality, equity, etc.) in socially or infrastructurally important services.

\begin{footnotesize}
\begin{itemize}
\item 35 As we saw in the pre-Hong Kong Ministerial Conference period of negotiations, the agriculture negotiations are considered key to the success of the overall Doha Round of WTO talks.
\item 36 For a view on why the international community should have a new round, see Board, “Why are We Having a Round?” \textit{Legal Issues of Economic Integration}, 28(3): 243-47, 2001.
\end{itemize}
\end{footnotesize}
III. What is the GATS?

The GATS, an international trade agreement, is one of the 17 major Uruguay Round Agreements enforced by the WTO; it came into force on January 1, 1995 as part of the WTO substantive law.38 Because the very notion of including the services sector in a ‘trade’ agreement was so controversial, the GATS is structured as a “bottom-up” agreement. This means that most GATS requirements only apply to service sectors that countries specifically agree to open up to competition by foreign corporations. The GATS consists of three components: 1) a framework agreement which lays out the general rules and obligations40 for trade and investment in services; 2) several important annexes (sometimes called protocols) on specific service sectors (such as financial and telecommunications services); and 3) a schedule of commitments for each WTO signatory government that lists the specific service sectors which each nation has signed up to the terms of the agreement.

A. Objectives and Principles

39 Bottom-up of an approach to a problem is a situation that begins with details and works up to the highest conceptual level, such as “a bottom-up model of the reading process.” Conversely, a “top-down” of an approach to a problem is a situation that begins at the highest conceptual level and works down to the details.
40 Obligations contained in the GATS may be categorized into two groups: 1) general obligations which apply directly and automatically to all Members, regardless of the existence of sectoral commitments; and 2) specific commitments whose scope is limited to the sectors and activities where a Member has decided to assume market access and national treatment obligations. Obligations can also be divided into unconditional and conditional obligations. Unconditional obligations apply to all services except those not subject to coverage by the GATS. Examples of unconditional obligations are the most-favored-nation treatment (except for those listed in the Annex on Article II Exemptions) and certain transparency obligations, whereas conditional obligations are Member-specific and contained in individual Members’ schedules of specific commitments. Conditional obligations are assumed in a “bottom-up” or positive list approach.
The GATS commits WTO Member governments to undertake negotiations on specific issues, and to enter into successive rounds of negotiations to progressively liberalize trade in services. According to Article XIX of the GATS, the first round had to start no later than five years from 1995:

“In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.”

The GATS is therefore the first set of rules and disciplines agreed at multilateral level to govern international trade in services. It consists of three elements: (1) a general framework containing fundamental requirements for all WTO members, (2) national schedules of specific commitments concerning market access and, finally, (3) annexes laying down special conditions to be applied to different sectors. The GATS was inspired essentially by the same objectives as its counterpart in trade in goods, the General Agreement on Tariffs and Trade (GATT). The GATS main objectives are in a nutshell:

1. the creation of a credible and reliable system of international trade rules;
2. the stimulation of economic activity through guaranteed policy bindings;

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41 GATS Article XIX.1.
42 During the Uruguay Round of negotiations (1986-1994), participating countries made market-access commitments and exemptions on a number of services sectors at the same time. These commitments and exemptions are contained in their original services schedules. These schedules of commitments contain the commitments made by individual WTO members allowing specific foreign products or service-providers access to their markets. The schedules are integral parts of the WTO Agreements. In the print version, these schedules comprise about 30,000 pages for all WTO members. Each WTO member maintains a schedule of specific commitments listing sectors in which it grants market access and national treatment. These are conditional obligations. Unconditional obligations also apply to these sectors. In the case of services, they are the equivalent of tariff schedules in the GATT, laying down the commitments accepted —voluntarily or through negotiation— by WTO members. After the Uruguay Round, sectoral negotiations took place in the WTO: on the movement of natural persons (1995), on telecommunications (1997) and on financial services (1997). During the sectoral negotiations, participating countries took new commitments specifically in those sectors. These new schedules replaced the corresponding section in the original schedules.
3. the assurance of fair and equitable treatment of all participants (the so-called principle of non-discrimination); and

4. the promotion of trade and development through progressive liberalization.\textsuperscript{43}

A fundamental requirement is that the Agreement is based on the principle of most-favored-nation treatment (MFN), according to which each WTO Member must accord unconditionally services and service suppliers of any other member treatment no less favorable than that it accords to services and service suppliers of any other country. Certain exceptions\textsuperscript{44} are, however, envisaged in the context of specific service activities within the framework of a list of exemptions from the MFN requirement.\textsuperscript{45} In fact, each government has included in its schedule the services for which it guarantees access to its market by setting out the limits it wishes to maintain for such access.

The drafters of the GATS seem to have reached two conclusions in their attempt to define the scope of services activities subject to the GATS. Firstly, they concluded that given the enormity of tradable services and the constant change in the description of what is understood by a service due to continued technological advances,\textsuperscript{46} it suffices for purposes of the GATS to define only what is meant by trade


\textsuperscript{44} Exceptions are binding provisions on all signatories built into the core text of an agreement that lists the circumstances when a country may violate a term of an agreement without penalty. Exceptions only come into play as a defense when a country’s law or policy has been challenged in a dispute resolution as a violation of an agreement.

\textsuperscript{45} Work on this subject started in 2000. When the GATS came into force in 1995, WTO members were allowed a once-only opportunity to take an exemption from the MFN principle of non-discrimination between a member’s trading partners. The measure for which the exemption was taken is described in a member’s MFN exemption list, indicating to which member the more favorable treatment applies, and specifying its duration. In principle, these exemptions should not last for more than ten years. As mandated by the GATS, all these exemptions are currently being reviewed to examine whether the conditions which created the need for these exemptions in the first place still exist. And in any case, they are part of the current services negotiations.

\textsuperscript{46} For an overview of changes in the definition and content of financial services as a result of development of new telecommunications technology, see Moshirian, F. “Trade in Financial Services,” \textit{17 World Economy} 347, pp. 348-51 (1994).
in services. Secondly, the definition of trade in services should be precise enough to capture all modes for the services trade.\textsuperscript{47} As Krajewski argues, the sectoral scope of the GATS is broad and includes most public services.\textsuperscript{48} To narrow the scope of the GATS, WTO members may collectively take legislative steps, such as a change of the agreement or an additional treaty instrument to limit the scope of the GATS.\textsuperscript{49}

B. Historical Background to the GATS

The GATS is a manifestation of an attempt to expand the principles of the GATT into the field of services.\textsuperscript{50} The motivation for the agreement came mainly from the developed countries, given that the exports of developed nations are gradually switching to services with a high component of value-added knowledge, as opposed to traditional industrial products.\textsuperscript{51} The globalization of the world economy was underway, trade in services was of major interest to more and more countries, and the expansion of services trade was closely tied to further increases in world trade in goods.\textsuperscript{52}
The GATS is the first multilateral trade agreement to cover trade in services. Its creation was one of the major achievements of the Uruguay Round of trade negotiations, from 1986 to 1993. This was almost half a century after the entry into force of the General Agreement on Tariffs and Trade (GATT) of 1947, the GATS’s counterpart in trade in goods.

The need for a trade agreement in services has long been questioned. Large segments of the services economy, from hotels and restaurants to personal services, have traditionally been considered domestic activities that do not lend themselves to the application of trade policy concepts and instruments. Other sectors, from rail transport to telecommunications, have been viewed as classical domains of government ownership and control, given their infrastructural importance and the perceived existence, in some cases, of natural monopoly situations. A third important group of sectors, including health, education and basic insurance services, are considered in many countries governmental responsibilities, given their importance for social integration and regional cohesion, which should be tightly regulated and not left to the rough and tumble of markets.

Nevertheless, some services sectors, in particular international finance and maritime transport, have been largely open for centuries — as the natural complements to trade in goods. Other large sectors have undergone fundamental technical and regulatory changes in recent decades, opening them to private commercial participation and reducing, even eliminating, existing barriers to entry. The emergence of the Internet has helped to create a range of internationally tradeable product variants — from e-banking to tele-health and distance learning — that were

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53 The EC played a key role in the negotiations in financial services and telecommunications that followed the Uruguay Round, due to liberalization in its own markets and lobbying efforts of its financial services and telecommunications firms.
unknown only two decades ago, and has removed distance-related barriers to trade that had disadvantaged suppliers and users in remote locations (relevant areas include professional services such as software development, consultancy, and advisory services). A growing number of governments has gradually exposed previous monopoly domains to competition; telecommunication is a case in point.\textsuperscript{54}

This reflects a basic change in attitudes. The traditional framework of public service increasingly proved inappropriate for operating some of the most dynamic and innovative segments of the economy, and governments apparently lacked the entrepreneurial spirit and financial resources to exploit existing growth potential fully. Services have recently become the most dynamic segment of international trade. Since 1980, although from a relatively modest basis, world services trade has grown faster than merchandise flows. Defying widespread misconceptions, developing countries have strongly participated in that growth. Between 1990 and 2000 their services exports, consisting mainly of tourism and travel services, grew 3 per cent more rapidly per annum, on a balance-of-payments basis,\textsuperscript{55} than developed countries' exports.\textsuperscript{56}

The EU Member States played a key role in the early advances of the Organization for Economic Cooperation and Development (OECD)-where EU Member States negotiate individually- by conceptualizing trade in services, which contributed to the GATS negotiations.

The GATS negotiations are essentially a bilateral request/offer exercise. No particular format is needed for the requests. It is important that the request be clear as to what is requested. It could be a letter or a template. When framing a request,

\textsuperscript{54} In this sense, it is interesting to note the influence of the EC’s Single European Market on the GATS negotiations, such as the deregulation of financial services and telecommunications.

\textsuperscript{55} The balance of payments is the difference between the income and expenditure of a country on its external account, resulting from exports and imports of goods, services, and governmental transactions.

\textsuperscript{56} World Trade Organization, “GATS Training Module: Chapter 1. Basic Purpose and Concepts,” in \url{http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm} (last visited August 24, 2004).
negotiators should make reference to the Services Sector Classification List. Typical requests would include: removal of existing limitations, requests for additional commitments,\textsuperscript{57} removal of most-favored-nation exemptions, and modifications to horizontal commitments.\textsuperscript{58} As for the offer, it is normally presented as a draft schedule of commitments. Potential contents of an offer are: an agreement to additional coverage of a sector; an agreement to liberalize for all modes of delivery\textsuperscript{59} in both market access and national treatment, or possibly just certain modes and retain some limitations; an agreement to total liberalization of a limitation, or possibly just ease the impact partially; and an agreement to modify a horizontal commitment.

C. Scope of the GATS

As we know, there have been proposals for reforming the objectives of the WTO. One example has been the proposal by Subramanian and Mattoo in relation to broadening the scope of negotiations in the framework of the WTO so that liberalization is not limited to goods and services, but also includes all fields of production, such as capital

\textsuperscript{57} Additional commitments are commitments under the GATS made on regulations relating to qualifications, standards, licensing or competition matters, which do not discriminate against foreigners.

\textsuperscript{58} The GATS consists of a horizontal and vertical commitment framework. The horizontal commitment contains basic signatory obligations across the board to the entire WTO membership, whereas the vertical commitment applies to a service or sub-sectors thereof which governments have chosen to open up (partially, fully, or not at all) for competition. Each government must provide a schedule of commitment. The most relevant Article in the horizontal commitment is the GATS Article II on Most-Favored-Nation Treatment, while GATS Article XVII on National Treatment and GATS Article XVI on Market Access stand out in vertical commitments.

\textsuperscript{59} Modes of delivery is a classification related to trade in services. Services can be sold in four different ways:

1. The service itself can cross a border (i.e., a sale over the internet);
2. It can be consumed abroad (i.e., a training course, a medical operation, or a tourist visit abroad);
3. It can be purchased from a foreign company that is established locally; or
4. The personnel of a foreign firm can travel temporarily to a host country to perform services (i.e., key management for a construction project).

In practice, mode 3 is the most important, although this may vary by sector.
and labor force. But for the purposes of this chapter, let us focus on the scope of services negotiations.

C.1. Within the Scope of the GATS

GATS Article I reads that the GATS covers “any service in any sector,” which means that no service is excluded from the Agreement’s scope. All levels of government, “central, regional, or local governments or authorities,” must comply with the GATS terms, which means that the GATS covers local sewer systems, public hospitals, elementary education, and water systems. The GATS constraints also cover actions of “non-governmental bodies in the exercise of powers delegated by” any level of government. Examples thereof are board of universities, hospitals, and professional organizations, such as legal bar associations.

The GATS not only sets constraints on governmental policies directly relating to services, but also extends to “measures by [WTO] Members affecting trade in services.” This rather broad definition of services means that all governmental policies that affect services, including those not specific to services such as general labor market policies or other broad regulations, are included under the GATS constraints. Also, the GATS clearly states that no sector is excluded a priori, which means that no sector can be carved out altogether, and countries are bound to follow some of the GATS rules even if they do not explicitly agree to subject a service sector

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61 GATS Article I (3)(a)(i).

62 GATS Article I (3)(a)(ii).

63 GATS Article I (1). In one of the few WTO decisions on the GATS, what this provision actually means became a central question. The Panel ruled that “Article I (1) refers to any measure in terms of their effect, which means that they could be of any type or relate to any domain of regulation.” See WT/DS27/R/USA, European Communities – Regime for the Importation, Sale and Distribution of Bananas, Panel Report of May 22, 1997, at 7.280.
to the GATS coverage. Some GATS defenders wrongly claim that the GATS rules apply only to sectors that governments volunteer for coverage. Some GATS rules apply unconditionally to all service sectors, whether they are offered by a country to be covered by other GATS terms or not.\footnote{GATS Article V (1)(a), footnote 1 reads that “[T]his condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the \textit{a priori} exclusion of supply.”}

Those who defend the GATS argue that WTO members were able to list exceptions to the MFN principle when initial commitments were made under the GATS. However, the GATS supporters hardly mention that also under the GATS provisions, WTO members are to phase out such exemptions within ten years and that “[i]n any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.”\footnote{GATS Article II in relation to the most-favored-nation principle reads that “[W]ith respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment which is no less favourable than that it accords to like services and service suppliers of any other country.”} Another incorrect interpretation of the GATS supporters is that the GATS rules explicitly exclude all public services. A provision in the GATS states that certain government-provided services are excluded from GATS coverage; however, the provision applies only to government services that are provided neither on a “commercial basis” nor “in competition with one or more service suppliers.”\footnote{GATS, Annex on Article II Exemptions, Article 6.}

Many public services in many countries are provided by both governmental and private operators.\footnote{GATS Article I (3)(b) reads that “[‘]services’ includes any service in any sector except services supplied in the exercise of government authority.” GATS Article I (3)(c) reads that “[‘]a service supplied in the exercise of governmental authority’ means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”\footnote{GATS Article I (3)(b) reads that “[‘]services’ includes any service in any sector except services supplied in the exercise of government authority.” GATS Article I (3)(c) reads that “[‘]a service supplied in the exercise of governmental authority’ means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”} For instance, primary education, medical and hospital services, as well as retirement pensions and transportation. Even in the case of services provided exclusively by the government, only direct government-to-people
delivered services are exempt from the GATS. Despite this situation, many
governments provide a lot of public services through a mixed system of delivery that
includes both public as well as private components. In a paper published by the
Organization for Economic Cooperation and Development unearthed by the Canadian
Centre for Policy Alternatives for its excellent 2002 GATS booklet Facing the Facts:
A Guide to the GATS Debates, it is noted that “[t]his exception is…limited: where a
Government acts on a commercial basis and/or as competitor with other suppliers, its
activities are treated like those of any private supplier.”

C.2.- What is not Within the Scope of the GATS

Although the scope of the GATS is very wide, and deals with all measures “affecting
trade in services,” policy measures in some areas are not covered by the GATS
disciplines, provided the measures are not used to circumvent their GATS obligations:

- immigration rules, provided they do not contravene commitments on
temporary entry under mode 4;
- services supplied in the exercise of governmental authority, defined as “any
  service which is supplied neither on a commercial basis, nor in competition
  with one or more service suppliers;”
- fiscal policy and taxation measures, provided the taxes do not discriminate
  against foreign services or service suppliers;
- air transportation services, i.e., measures affecting traffic rights or services
directly related to the exercise of traffic rights;
- import restrictions on equipment necessary for the supply of a service;

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70 GATS Article I (1).
71 GATS Article I (3)(c).
restrictions on short-term capital movements, or measures that affect property
rights, provided they are nondiscriminatory;

- exchange rate management;

- privatization of state-owned property, though there are disciplines for state-
owned trading entities and monopolies.

Other types of government measures have been put into the GATS work program, though detailed rules are yet to be negotiated. These are: safeguard measures, rules for government procurement, disciplines on subsidies, and disciplines for domestic regulations.

D. What is Trade in Services?

The GATS does not define services but does define “trade in services.” As we will see later, the definition covers not only the cross-border supply of services, but also transactions involving the cross-border movement of capital and labor. Before tackling the more specific question of trade in services, let us focus on the definition of services. The terms service refers to a diverse group of transactions that may differ in nature. There are many sectors of services. Because of this diversity, no agreement is found in economic theory on the general definition of a service. By contrasting the term with goods, Stahl sees services from an empirical point of view

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72 Safeguards are actions taken to protect a specific industry from an unexpected rise of imports. It is governed by Article XIX of the GATT 1994.
73 GATS Article I (2).
74 Cross-border supply of services refers to a situation where the trade takes place from the territory of one WTO Member into that of another. Only the service itself crosses the border, without the movement of persons, such as information and advice passing by means of fax or electronic mail, or cargo transportation. The service supplier does not establish any presence in the territory of the Member where the service is consumed.
75 Among the many services sectors, we have inter alia audiovisual, accounting, banking, business, computer, distribution, education, health, hotel and restaurant, professional, insurance, telecommunications, financial, and transport services.
as “the dominant component of the GNP of developed countries such as the United States and are a major component of international trade.” From a theoretical economic viewpoint, services are “intangible processes that are traded via interaction between producers and consumers in cross-border movements of capital assets or personnel. They are also subject to extensive government regulation and are extremely difficult to measure.”

It is indeed difficult to measure services trade for different reasons. Firstly, the act of introducing services in a foreign market is not always done in discrete and quantifiable units at convenient customs ports. Secondly, balance-of-payment statistics have traditionally not provided disaggregated data on international transactions in services. An example would be internationally traded services that are incorporated into goods trade but are not always reported separately.

These difficulties in measuring services trade obstruct the quantification or comparison of the value of concessions exchanged in services trade negotiations. This impedes services trade liberalization. When the value of reciprocal concessions cannot be quantified or compared, negotiations may degenerate into irrational political exercises not conductive to reciprocal reductions of comparable trade barriers.

78 Ibid.
The following quotation illustrates these difficulties: “[W]ould contracting parties which refuse to extend national treatment to foreign banks risk retaliation in the form of the withdrawal of tariff concessions on bananas or orange juice? Such an approach opens a virtual Pandora’s Box of coercion and retaliation…” 83 Another quotation:

“[H]ow is it possible to exchange landing rights in the aviation sector with the right to open branches in the banking sector? Or how it possible to exchange a relaxation of restrictions on transborder data flows with a relaxation of restrictions limiting the right of doctors to medical practice in foreign countries? Indeed, it is well nigh impossible to conceive a scale which would bring about a progressive reduction of barriers in the context of many service sectors.” 84

Regarding the more specific question of trade in services, it is important to note that the peculiar characteristics of trade in services require that any international instrument for their regulation depart from the concepts and rules incorporated in the GATT. 85 In the late 1980s, academics undertook extensive examination and analysis to determine the best method of dealing with international trade in services prior to the final adoption of the GATS. In this sense, the Group of Negotiations on Services (GNS) 86 at what used to be the GATT (now the WTO) considered a series of proposals for a possible agreement of principles for trade in services. The literature had focused almost exclusively on three main points: 1) whether the GATT/WTO could be legally augmented for the incorporation of services; 2) the benefits from

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86 As early as April 1987, after the Uruguay Round was launched, the Group of Negotiations on Services met to organize the Uruguay Round’s work and undertake negotiations. The problems of lack of data on services, the difficulties in negotiating trade in services and countries making commitments without knowing how it would affect them, came up, and consequently gave birth to the Group of Negotiations Services.
liberalization; and 3) the costs for developing countries, as well as whether they should participate in a multilateral agreement on services. 87

Generally, the differences between trade in goods and trade in services exist at four levels: 1) services are intangible and non-storable; 88 2) there are different modes for trade in services. Contrary to the exclusively cross-border mode for trade in goods, services can be provided at the location of the service supplier, at the location of the service consumer, or at neither of these two locations; 89 3) international trade in services usually requires movement of one or more factors of production, such as the establishment by the service supplier of a commercial presence 90 at the location of the service consumer (movement of capital) or the transfer by the service supplier of personnel to the location of the service consumer (movement of labor); 91 and 4) the level of national regulation of services trade is more extensive than that of trade in goods. Most barriers to international trade in services are not designed to restrict trade in services but merely to regulate the service sectors in the national economy. 92 Nevertheless, these barriers are perceived as having the effect of discouraging entry into the local market by foreign services suppliers. 93

As for the second difference between trade in goods and trade in services mentioned above, i.e., the different modes for trade in services, and according to the

88 For a discussion on the differences between goods and services, see generally Nicolaides, P. “Economic Aspects of Services: Implications for a GATT Agreement,” 23 *Journal of World Trade* No. 1, 125, p. 126 (1989).
89 For a discussion on the classification of international transactions in services based on the proximity of supplier and consumer, see generally Sampson, G. & Snape, R. “Identifying the Issues in Trade in Services,” 8 *World Economy* 172, pp. 172-75 (1985).
90 Commercial presence refers to the possibility of a service provider to be physically present (a branch or subsidiary, for instance) within the territory of a member of the GATS for the purpose of supplying a service.
91 It has always been recognized that trade in services would usually require movement of capital and/or labour. This accounted for GATT’s reluctance to expand into the services area, since it would involve investment issues, which is an area traditionally beyond the scope of the GATT.
WTO, the definition of services trade under the GATS is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to GATS Article I (2), the GATS covers services supplied from the territory of one Member into the territory of any other Member (mode 1 — Cross-border trade); in the territory of one Member to the service consumer of any other Member (mode 2 — Consumption abroad); by a service supplier of one Member, through commercial presence, in the territory of any other Member (mode 3 — Commercial presence); and by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (mode 4 — Presence of natural persons).

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94 GATS Article I (2) reads:

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

(a) from the territory of one Member into the territory of any other Member;
(b) in the territory of one Member to the service consumer of any other Member;
(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

95 In Opinion 1/94 of the ECJ, the EU Council gives the following example of mode 1: A firm of architects established in country A supplies an electrical installation project to a firm of engineers established in country B.
96 Opinion 1/94 of the ECJ gives the following example of mode 2: Services supplied in country A to tourists from country B.
97 In Opinion 1/94 of the ECJ, the EU Council gives the following example of mode 3: A supply and establishment of services in country A by undertakings or professionals from country B. Banking service is an example of this.
98 “Mode 4” commitments allow people to travel to the EU to provide services for a short period of time. Mode 4 is not about access to local labor markets and should therefore be clearly distinguished from economic immigration. While the EU has important offensive interests in this area, developing countries have placed a particular emphasis on Mode 4. By furthering the improvements contained in the initial offer, which the EC had tabled in 2003, the revised EC offer provides additional opportunities as regards the movement of highly qualified natural persons. Following the May 2004 enlargement of the EU, the revised offer will extend access conditions offered in the EU to the new EU Member States. The offer therefore contains a significant number of commitments on the part of the new Member States, which they take in order to match the degree of liberalization already offered in the rest of the EU. This notably concerns the permitted length of stay, the number of sectors that are covered and the length of the underlying contract. In general, no economic needs test can be applied within a numerical ceiling, whose level will be determined in the course of the negotiations. As a result, services companies will for example be able to transfer management trainees to their affiliated companies in the enlarged EU, so as to allow them to get up to one year of European work experience. Overseas companies with a contract to provide services in 21 important sectors will be able to send skilled employees to the EU to provide these services for up to six months at a time. Another improvement brought by the revised offer is to add legal services to those sectors where self-employed services suppliers based overseas will be able to enter the EU for up to six months at a time to provide services to clients based in any of the 25 EU Member States.
Examples of the four modes of supply (from the perspective of an importing country A) are the following:

- **Mode 1: Cross-border**

A user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings;

- **Mode 2: Consumption abroad**

Nationals of A have moved abroad as tourists, students, or patients to consume the respective services;

- **Mode 3: Commercial presence**

The service is provided within A by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and — controlled company (bank, hotel group, construction company, *et cetera*); When the GATS was first started, WTO Members did not think that mode 3 could give major problems. Then arguments of infant industry, unemployment, and anti-competitive services structures within A emerged.

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In all such cases, EU and national working conditions, minimum wage requirements and collective wage agreements will apply. EU Member States will also continue to be able to refuse entry to persons that pose a security threat or are considered to be at risk of abusing the terms of their entry.

99 In Opinion 1/94 of the ECJ, the EU Council gives the following example: An undertaking from country A supplies services in country B by means of workers coming from country A, such as in construction work.


101 Fledgling industries typically require protection from the government in the form of tariffs, quotas, or subsidies in order to survive the lower prices and higher quality of the good or service produced by the industry on the international market. Proponents of the infant industry argument theorize that protectionism will allow the infant industry to grow and develop to the point at which it can compete on the international market without protectionist measures. Nurturing infant industries and import substitution policies often occur in developing nations which are aspiring to greater economic diversity. Though this view is often criticized, it is true that such policies were pursued by many now-developed countries during their formative stages. The recent history is mixed. Although some countries that pursued infant industry promotion in Asia (Korea, for example) were very successful, others were less so, especially in Africa and Latin America. The degree to which the economic miracle in Asia is due to protectionism generally, and infant industries in particular, is a matter of heated debate in academic circles. Among theoretical academic economists, the infant industry argument is often derided, whereas applied economists and economic historians are generally more sympathetic to this viewpoint.
Mode 4: Movement of natural persons

A foreign national provides a service within A as an independent supplier (e.g., consultant, health worker) or employee of a service supplier (e.g., consultancy firm, hospital, construction company). This last mode can be misinterpreted as an open door for migration. It is in this mode 4 where we find the greatest discrepancy among EU Member States in services trade: some EU countries are in favor of liberalizing mode 4, whereas others are more reluctant. Although the movement of natural persons under the GATS represents a very small sub-set of overall migration, some WTO Members argue that some of the issues being discussed in the context of migration overall might inform the work of the Council for Trade in Services at the WTO on mode 4. The Swiss delegation to the WTO has proposed a method which seeks to help improve transparency and comparability of assessing the quality of offers numerically.

The above definition is significantly broader than the balance of payments (BOP) concept of services trade. While the BOP focuses on residency rather than nationality — i.e., a service is being exported if it is traded between residents and non-residents — certain transactions falling under the GATS, in particular in the case of mode 3, typically involve only residents of the country concerned. Commercial linkages may exist among all four modes of supply. For example, a foreign company established under mode 3 in country A may employ nationals from country B (mode 4) to export services cross-border into countries B, C etc. Similarly, business

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visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3).\textsuperscript{104}

With such a definition, the GATS has failed to provide a legal definition of what “services”\textsuperscript{105} should mean for purposes of the Agreement. The GATS “applies to measures by Members affecting trade in services.”\textsuperscript{106} Even if, according to the GATS, “services” include “any service in any sector except services supplied in the exercise of governmental authority,”\textsuperscript{107} which indicates a broad sectoral coverage of the agreement, the GATS does not define services \textit{per se}, as indicated before. Until now, the Appellate Body did not find it necessary to define services in abstract terms and took a pragmatic approach by indicating which sector was affected in the case adjudicated under the GATS so far.\textsuperscript{108}

The failure to address these definitional matters certainly raises issues concerning the scope of applicability of the GATS. Although the scope of the GATS is not limited to any list of covered sectors, there is no agreement on an exhaustive list of services. The genesis of the problem was during the negotiations on electronic commerce at the WTO.\textsuperscript{109} This lack of agreement has surmountable legal implications, namely that the general GATS obligations apply to all services, but WTO Members may impose restrictions when scheduling their specific commitments.

\begin{itemize}
\item[104] \textit{Ibid.}
\item[105] GATS Article I (3)(b).
\item[106] GATS Article I (1).
\item[107] GATS Article I (3)(b).
\end{itemize}
During the Uruguay Round, a “Services Sectoral Classification List”\(^{110}\) was developed. It is based on the UN Central Product Classification System (CPC),\(^{111}\) and classifies services by sector. The use of the Services Sectoral Classification List is not mandatory. Yet, many WTO Members have adopted it as a basis for scheduling their commitments under the GATS.\(^{112}\)

E. Progressive Liberalization of Services Trade\(^{113}\)

The Uruguay Round was only the beginning of liberalization of services trade. GATS Articles XIX to XXI deal with progressive liberalization (GATS Article XIX on the negotiation of specific commitments; Article XX on the schedules of specific commitments; and Article XXI on the modification of schedules). The GATS requires more negotiations, which began in early 2000 and are now part of the Doha Development Agenda, and whose aim is to achieve a higher level of liberalization of trade in services.\(^{114}\) This liberalization will be aimed at enhancing the level of

\(^{110}\) See WTO, Services Sectoral Classification List, MTN/GNS/W/120, 10 July 1991. Examples are advertising services (CPC 871), reinsurance and retrocession (CPC 81299) and voice mail (CPC 7523).

\(^{111}\) The UN Central Product Classification System is intended to facilitate future statistical comparisons of services domestically produced with those internationally negotiated and traded. The UN Provisional CPC code (CPCprov) is a concordance of goods and service-sector definitions that are used by many countries to identify service sectors in the GATS negotiations. Most WTO governments place the CPCprov code next to the service sector they are offering in these negotiations. It is only by going to the CPCprov data base on the UN web site and looking at the categories, subcategories and sub-subcategories that a person can begin to get a more complete picture of what services are being offered, and what is at stake. For instance, under the benign category of “wholesale distribution,” which the United States committed in 1995, a close examination of the CPCprov shows that the commitment includes wholesale distribution of nuclear fuel. Thus, U.S. restrictions on the trade and sale of this product could constitute a GATS violation. The CPCprov can be found at \texttt{http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1}.

\(^{112}\) GATS Articles XVI, XVII, and XVIII.


\(^{114}\) After the Seattle Ministerial Conference in 1999, the WTO launched new negotiations to expand global rules on cross border trade in services in a manner that would create vast new rights and access for multinational service providers, and would newly constrain government action taken in the public interest world wide. Negotiations are currently underway at the WTO in Geneva, aimed at expanding the General Agreement on Trade in Services (GATS). The original text of the GATS was agreed in 1994, and the current GATS 2000 negotiations are part of the ‘built-in agenda’ which the WTO inherited on its formation in 1995.
commitments\textsuperscript{115} in the schedules\textsuperscript{116} and reducing the adverse effect of the measures taken by the governments.\textsuperscript{117} In this sense, the services negotiations started officially in early 2000 under the WTO Council for Trade in Services. In March 2001, the WTO Services Council fulfilled a key element in the negotiating mandate by establishing the negotiating guidelines and procedures.\textsuperscript{118} The negotiations take place in “special sessions” of the WTO Services Council and regular meetings of its relevant subsidiary committees or working parties.\textsuperscript{119} The EC should aim at and press for the greatest possible liberalization of services trade. It should also insist on further market opening to the exports of the WTO Member States.\textsuperscript{120}

In 1999, the attempt by the EC (and others) to launch a new round of WTO trade negotiations at Seattle was spectacularly unsuccessful and the accompanying street protests raised the question of whether new negotiations to liberalize trade were appropriate at all.\textsuperscript{121} While the opposition to negotiations seemed to be inspired by innumerable unconnected issues, certain themes were perceptible. The principal

\textsuperscript{115} Not surprisingly, tourism is the sector with the highest number of bindings; health and education, however, have the lowest number of commitments.


\textsuperscript{118} Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93.


\textsuperscript{121} The criticisms of the WTO were quite diverse in nature, oscillating from opposition to its existence to suggesting a serious internal reform. Among the many charges against the WTO are the following:

1. The WTO system of internal governance tends to concentrate power among a small group of developed countries, to the detriment of less-developed country interests;
2. The WTO is undemocratic in its control over national trade policies;
3. The WTO system tramples upon its members’ sovereignty;
4. The WTO system favors open markets (capitalism, profits, the interests of multinational corporations) over environmental protection, labor standards, and human rights;
5. The WTO system prevents governments from protecting the interests of working people displaced by import competition.

questions seemed to be whether trade liberalization in itself was an appropriate goal or whether it should be accompanied by or subordinated to other concerns, such as those related to the environment, workings conditions, human rights and the right of communities to choose and apply their own policies and standards. Before the launch of the GATS 2000 talks, a coalition of developing countries called for an assessment of the outcomes of service-sector liberalization and the GATS rules prior to undertaking further deepening of those rules under the GATS 2000. A global campaign of civil society groups called for a moratorium on the GATS 2000 talks until this assessment was to be conducted. However, these requests were steamrolled. The WTO Secretariat, the U.S., and the EC pushed for the immediate launch of the built-in GATS expansion talks. Indeed, the December 2001 Doha Ministerial Declaration not only dismissed the demands for a services assessment, but

122 Trade liberalization and environmental policies can and should be mutually supportive of sustainable development. Some aspects of the relationship between multilateral trade rules and instruments of environmental policy would benefit from clarification and from greater policy coherence. The DDA should endeavour to clarify the relationship between WTO rules and Multilateral Environmental Agreements. Another important aspect of the environmental issue in the DDA is the emphasis on liberalization of trade in environmental goods and services in the context of the market access negotiations.


124 The concept “GATS 2000 talks” refers to the part of the WTO post-Uruguay Round that concentrates on services trade, specifically the “built-in” services left from the agenda of the Uruguay Round. The starting date for the talks was set for January 1st, 2000 in Geneva. These GATS 2000 negotiations have been confronting two central challenges: 1) the completion of the incipient framework of the GATS rules and disciplines so as to ensure the GATS’s and WTO’s continued relevance in a globalizing environment, and 2) the achievement of greater overall trade and investment liberalization than was possible during the Uruguay Round and in subsequent sectoral negotiations, such as basic telecommunications, financial services, maritime transport, and labor mobility issues (the so-called temporary movement of service suppliers).

125 World Trade Organization, “Communication from Argentina, Brazil, Cuba, The Dominican Republic, El Salvador, Honduras, India, Indonesia, Malaysia, Mexico, Nicaragua, Pakistan, Panama, Paraguay, The Philippines, Sri Lanka, Thailand, Uruguay and the Members of the Andean Community (Bolivia, Colombia, Ecuador, Peru, Venezuela),” S/CSS/W/13, November 24, 2000, at IV. (11).


127 Prior to the Hong Kong Ministerial Conference in 2005, GATS negotiations proceeded on a bilateral “request/offer” basis. This means that one nation issued a request document for service sector liberalization to another and indicated what is was willing to offer in a second document. Then the two nations bargained on a bilateral basis.
also set a specific time line for the GATS 2000 talks to conclude by 2005 which, as we know, did not happen.\textsuperscript{128}

Service-sector liberalization was being in part possible because since the conclusion of the Uruguay Round, the political context was favorable toward the Reagan-Thatcher dream of radical deregulation, and becoming a reality in many nations. To mention a few empirical examples, in the U.S., the promotion of market-driven industry self-regulation instead of government oversight brought economic disasters, such as the collapse of the savings and loan industry in the 1980s, costing taxpayers hundreds of billions of dollars,\textsuperscript{129} as well as the energy deregulation of the 1990s, which brought soaring energy costs for consumers in California. Despite these experiences, the U.S. continues to push its model on other countries. In the case of the EC in relation to the GATS 2000 talks, the Europeans are even more vociferous in their service-sector demands than the Americans. Other examples were Russia’s privatization, referred to as the “Looting of Russia”\textsuperscript{130} and the fight in South Africa against electricity privatization.\textsuperscript{131}

These most unfortunate experiences have not been an obstacle for pushing even further the process of services trade liberalization. In April 2002, the EC’s GATS requests included hundreds of pages, country-by-country, for a new access to education, health, water, energy, transportation, and entertainment services. The EC’s requests to the U.S. contained a state-by-state list of zoning, land ownership, liquor distribution, and other laws that the EC was seeking to eliminate. These demands for market access are concrete examples of the issues at stake in the current GATS negotiations. In the framework of the GATS 2000 talks, modes 3 and 4 remain most

\textsuperscript{128} See the Doha WTO Ministerial Declaration, para. 15.
controversial. The shift from a focus on trade across borders (mode 1) to establishment of a business within another country (mode 3) brings every domestic policy issue and priority under scrutiny of the GATS.

In the specific case of mode 4, the controversy arises because mode 4 can be associated with immigration policy, even if the relationship between the two concepts (mode 4 and immigration policy) does not appear anywhere in the GATS. In this respect, a major success of the DDA would be agreeing conceptually among the WTO membership on the scope of mode 4. One benefit that mode 4 brings to the world trading system is the alleviation of the lack of qualified workers in WTO countries. However, an issue of concern is whether exporting countries of mode 4 will have enough human capital to actually benefit from this input. As it stands, some WTO Members might not even be able to benefit from mode 4 for lack of (highly)-qualified professionals. Since there is no categorization in mode 4, the only informal requirements are: 1) that the service be temporary, and 2) that the service provider not seek permanent entry in the labor market of the WTO Member where the service takes place. However, the question remains: which type of service providers will not seek entry in the labor market? Once again, mode 4 creates a division between developed and developing countries of the WTO in the sense that developed countries do not want mode 4 to become a substitute for immigration—the argument being that there is already immigration in developed countries—whereas developing countries want a full implementation of mode 4.132

Following this discussion, when analyzing the term liberalization, one can acknowledge that it is often used wrongly in academic and political debates. In the interest of clarifying what often times is a misconception of the term, I would like to

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132 Interview with Mr Plaza, Spanish trade diplomat dealing with international services trade, on March 15, 2006.
provide a definition thereof to have a clear framework of analysis. As a political concept and from a broader viewpoint, liberalization is often associated with a critical view of governmental intervention as well as greater reliance in market processes. From a narrower point of view, liberalization is understood as the removal of legal and other barriers to competition. Liberalization can also be referred to in the context of privatizing former public monopolies. Since liberalization can be understood as the process of having more market access (whether it is domestic or international), this requires the removal of obstacles to market entry and competition. For liberalization to take place, it may require the reduction of regulations or the abolition/replacement of the regulatory regime. Seeking further trade liberalization can also play a valuable part in helping to achieve other global objectives.

International liberalization often matches with domestic liberalization. In services, this statement is certainly the case. The GATS is to services trade liberalization what the WTO is to trade liberalization. In the definition of trade in services in the GATS, the distinction between domestic and international supply of services often depends only on the nationality of the service supplier or consumer. For example, measures which affect the domestic supply of a service (the opening hours of a store) may also affect the international supply of this service, if the storeowner is a foreign service provider. In such cases, when the liberalization of trade in services demands the abolition of certain regulatory measures, it also contributes to domestic liberalization.

The liberalization of barriers to international trade in services can contribute to growth in two distinct ways. Firstly, multilateral negotiations on trade in services can

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stimulate the removal of barriers to domestic competition within individual countries, eliminating thereby internal constraints to the achievement of greater economic efficiency in providing services. Secondly, multilateral negotiations on services trade can eradicate the barriers to external competition in services, making thereby available the gains from increased trade such as domestic gains in productivity as domestic producers respond to the international competition, expanded markets for competitively produced services, and lower prices for consumers.\textsuperscript{135}

However, an argument against services trade liberalization is the fact that some sectors still need regulation in order to protect the environment, to improve public health, and to maintain a level of economic welfare.\textsuperscript{136} Moreover, many nations also worry that liberalizing services trade may weaken the sovereignty of local and national governments by jeopardizing, \textit{inter alia}, control over land use, licensing, and environmental health.\textsuperscript{137} In addition, some countries may argue that those international services which are not provided with the same standard or quality as domestic services should be excluded. Furthermore, liberalization and privatization of


\textsuperscript{136} Indeed, civil society forces against the WTO are quite clear in their thesis. Although they accept that, at the time when the WTO was established in 1995, its stated purpose was to bring about greater prosperity, increase employment, reduce poverty, diminish inequality, and promote sustainable development around the world through greater free trade, more than ten years later the civil society forces feel that the WTO has had exactly the opposite results:

1. livelihoods are being destroyed, human rights ignored, public health endangered, the environment plundered, and democratic systems eroded;
2. local economies are being undermined, with workers, peasants, small farmers, fishers, consumers, women, and indigenous peoples being especially disadvantaged and exploited;
3. people’s aspirations to guarantee access to the essentials of life, promote health, safety and food sovereignty, as well as to protect cultural and biological diversity are being undermined, and sometimes eliminated.

In this context, some members of civil society argue that not only must the efforts of the WTO to further liberalize global trade be resisted, but its jurisdiction must be rolled back from many areas where it has been forcibly imposed, such as services, agriculture, and intellectual property rights. See for more information, \url{www.omc-wto.org}

\textsuperscript{137} See Global Trade Negotiations Home Page, Center for International Development at Harvard University, “Services Summary,” in \url{www.cid.harvard.edu/cidtrade/issues/services.html} (last visited July 21, 2004).
essential public services\textsuperscript{138} would dramatically affect everyone’s day-to-day lives.\textsuperscript{139}

This attempt to convert public resources into new opportunities for multinational corporations’ profits will make many more people aware of the threat that these agreements pose to democratic equitable governance.\textsuperscript{140}

Some governments are reluctant to liberalize immediately either because they may have a stake in their national firms’ operations or because they fear vulnerability from pressures by national interest groups that benefit from national protection. When governments do not have the ability to threaten to liberalize, national firms may have an incentive to pre-commit to high costs or poor quality. Such behavior by the firms forces governments to prolong socially costly protection.\textsuperscript{141} The argument of developing countries is that further trade liberalization is undesired because: (i) domestic political obstacles, often times from producer interests, can make

\textsuperscript{138} Essential public services tend to be those considered so indispensable to modern life that for moral reasons their universal provision should be guaranteed, and they may be associated with fundamental human rights (such as the right to water). An example of a service which is not generally considered an essential public service is hairdressing. In modern, developed countries the term public services often includes: education, public transportation, broadcasting and communications, electricity and gas, fire service, healthcare, police service, waste management, and water services.

\textsuperscript{139} A serious public concern all over the world is the privatization of public health. Even if in the narrowest interpretation of the GATS, there is no requirement under the GATS that services be privatized. However, it is not dispositive. Following an argument based on one of the two main principles of public international economic law (namely, national treatment principle), this same principle creates enormous disincentives for public services to be able to survive once some private sector services are permitted in the same sector. For example, U.S. law requires pharmaceutical companies to offer medicines at reduced prices to Veterans Administration facilities and to hospitalized Medicare recipients. Yet, by requiring equal access to such public funds and benefits for private sector hospitals, the GATS would force the government to choose between either continuing the program at a very high cost, or ending the program all together, which would threaten the survival of the public facilities, leaving these populations without life saving medicine. The other main principle of public international economic law, the MFN principle, makes it difficult for countries to avoid privatization by default since any local government can open an entire sector by merely providing access to any foreign provider or private sector provision of a service otherwise exclusively performed by the government.

\textsuperscript{140} In the eyes of some sectors of civil society, the WTO regime has proven to be profoundly hostile to measures that would promote development, alleviate poverty, as well as help ensure human and ecological survival, both locally and globally. According to those who oppose the WTO, under the locution of “free trade,” WTO rules are used to force open new markets and bring them under the control of transnational corporations. In the same vain, the big trading powers have used the WTO to advance and consolidate transnational corporation control of economic and social activities in areas beyond trade, including development, investment, competition, intellectual property rights, the provision of social services, environmental protection, migration, and government procurement. In advancing their own interests, the big trading powers have made the WTO an arena whose governance and decision-making has become, in the view of anti-WTO groups, notorious for reliance on threat and manipulation. A radical change of direction is necessary, in their view, which will require an intense and long-term mobilization of civil society.
liberalization very difficult. These political obstacles need to be taken seriously in the trade-opening debate at the national level; and (ii) instead of allowing new industries of developing countries to be exposed to full global competition, developing countries should aim at protecting their new industries (the so-called *infant industries* argument). However, too much *infant industry* protection can end up in a long-term problem when facing world competition.

In my opinion, governments should continue to push toward further global (services) trade liberalization as is the case in the Doha Round, where governments also look at non-tariff barriers \(^{142}\) to goods and services, in addition to tariffs on goods. This removal of trade barriers will imply greater economic growth worldwide.

### IV. The Doha Round and the EC

Launched at the Fourth WTO Ministerial Conference in November 2001, the Doha Round, known as the Doha Development Agenda, has three pillars: (i) the opening of


\(^{142}\) With this concept, the WTO characterizes any law or policy that is not a tariff, but has the effect of limiting trade. For example, a law that prohibits import of food containing carcinogenic pesticides residues could be considered a non-tariff barrier to trade, since it restricts trade in food. The WTO sets very narrow rules for which non-tariff barriers are permitted. The fact that a regulation that effects trade is aimed at health or environmental protection, or is applied equally to domestic goods and imports does not necessarily mean that it is a permissible non-tariff barrier under WTO rules.

In the transatlantic spectrum, as opposition to more trade liberalization grows in the U.S. Congress, Members of the European Parliament (MEPs) have voted for a transatlantic market without barriers to be implemented within the next ten years. An own-initiative report on transatlantic economic relations written by MEP Erika Mann (PES, Germany), and adopted in the European Parliament's Committee on International Trade on 18 April 2006, stops short of calling for the abolition of tariffs. Instead, it calls for the abolition of non-tariff barriers in financial services by 2010, and in a number of other key markets by 2015. An agreement envisaged would rest on three pillars:

1. cooperation on regulatory issues;
2. a set of operational cooperation tools (an early warning system, a bilateral mechanism for settling trade disputes, and a third-generation agreement on the application of competition law); and
3. sectoral economic cooperation Agreements building on the joint EC-US work programme.

In addition, the MEPs call for a strengthening of the parliamentary dimension of the transatlantic dialogue on trade. The vote comes at a critical stage of EC-U.S. trade relations, with time running out for a deal in the Doha Round to be concluded by the end of 2006. As part of a major reshuffle of President Bush's trade team, the influential U.S. trade representative Rob Portman was replaced by the
trade in agriculture, \(^{143}\) (ii) manufactured goods, and (iii) services. Although not as broad as the Uruguay Round in terms of its agenda, it includes negotiations on a range of subjects, and work on issues related to the implementation of agreements arising from previous negotiations, namely the 1986–1994 Uruguay Round, which created the WTO. Although the main focus of the Doha Round trade negotiations is in agriculture—the main engine of the multilateral trade negotiations, the following areas are also highly relevant for trade liberalization: industrial market access, services, trade facilitation, \(^{144}\) WTO rules (i.e., trade remedies, regional trade agreements and fish subsidies), and development. The goal of the Doha Round is to reduce trade barriers so as to expand global economic growth, development and opportunity.

The Round is, therefore, intended to address issues such as unfair agricultural subsidies that have kept some developing countries out of international markets, to reduce tariff peaks and tariff escalation particularly for products of interest to developing countries, and to fine-tune WTO rules in areas like anti-dumping. \(^{145}\)

Let us now see an overview of the EC in the Doha Round, by analyzing the principles for the Doha Development Agenda. The EC and its 25 Member States in the WTO is the largest and most comprehensive entity in this member-driven organization (i.e., the WTO), with decisions mainly taken on a consensus basis. \(^{146}\)

While the 25 Member States coordinate their positions in Brussels and Geneva, the more junior Susan Schwab who, commentators say, will have a harder time trying to convince the U.S. Congress of the need of more liberal international trade rules.

\(^{143}\) It is interesting to see the differences of opinion between the G-20's strong stance on eliminating agricultural subsidies and the EU trade commissioner Peter Mandelson's statement that while there was a need for an ambitious Doha Round outcome, focusing on agriculture alone would be counter-productive.

\(^{144}\) Trade facilitation refers to the act of removing obstacles to the movement of goods across borders (e.g., simplification of customs procedures).

\(^{145}\) Dumping is exporting at below cost to gain market share. Article VI of the GATT 1994 permits the imposition of anti-dumping duties against dumped goods equal to the difference between their export price and their normal value, if dumping causes injury to producers of competing products in the importing country.

\(^{146}\) In the WTO, voting consensus is achieved if no Member “present at the meeting when the decision is taken, formally objects.” Each WTO Member has one vote, regardless of its economic clout and,
European Commission alone speaks for the EC and its Member States at almost all WTO meetings.

A. Principles for the Doha Development Agenda

A WTO Ministerial conference takes place once every two years, bringing together trade ministers from all WTO Members. As the highest decision-making body in the WTO, the Ministerial conference offers trade ministers from WTO Members the opportunity to meet and discuss important developments in the multilateral trading system and the global economy. Doha was the forum for the fourth WTO Ministerial conference in November 2001, giving birth to the Doha Development Agenda, as the result of the world population’s needs. Because major divides exist among the various WTO members in relation to what the WTO’s future agenda should comprise, the Doha Ministerial conference text put off all the major decisions until the following WTO Ministerial conference in Cancun, whose principal aim was to present an overview of the progress of the negotiations in the framework of the DDA.

The previous three WTO Ministerial Conferences to Doha were respectively in Singapore (1996), Geneva (1998), and Seattle (1999), this last one remembered for the anti-globalization movement that it provoked.147 After Doha came Cancun (2003), among them, developing countries are increasingly making their presence felt. The WTO cannot therefore be hijacked by a group of countries or multinational companies.

which failed for substantial and organizational reasons. In Cancun, the WTO’s ever-growing crisis of legitimacy burst into public view as the WTO Ministerial conference collapsed when the U.S. and the EC stubbornly rejected the demands of the majority of the WTO members to make global trade rules fairer. The only decision made in Cancun was to meet again at the WTO headquarters on December 15, 2003 to assess the situation. Instead of focusing on the WTO and its failed globalization model, after Cancun major corporate interests and their client governments scrambled to lay blame anywhere else. The last and most recent Ministerial conference took place in December 2005 in Hong Kong, which was vital for enabling the then four-year-old Doha Development Agenda negotiations forward sufficiently to conclude the round in 2006.

WTO Members on 31 July 2004 agreed on a framework package to keep the Doha Round trade negotiations alive. After almost a year of stalled negotiations following the breakdown of talks at the last Ministerial meeting in Cancun, Members had set the end of July 2004 as a deadline for agreeing on a negotiating framework package. The 31 July 2004 Agreement allowed countries to send an important

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148 When arguing the importance of making global trade rules fairer, it is also implicit in the argument the need to change the current attitude of corporations in global trade. The destructive, social, political, and environmental consequences of the pro-corporate, neo-liberal model of globalization has elicited rising resistance from a broad range of civil society organizations and social movements around the world, including at WTO Ministerial Conferences in Seattle, Doha, Cancun, and Hong Kong. Various NGOs against the process of a corporate-led globalization pose the vision of a global economy built on principles of economic justice, ecological sustainability, and democratic accountability, asserting thereby the interests of people over corporations; in other words, that over corporations interests other interests should prevail, such as those of workers, peasants, farmers, fishers, small producers, and those marginalized in the current system -such as women and indigenous people.

149 Globalization has raised living standards in the rich countries overall, and has also helped some of the poorest nations in the world (China, India) lift millions out of poverty. Yet, the principles on which the current model of globalization is anchored and the international economic institutions upholding them are more controversial than ever. Widening inequality in the advanced countries and marginalization of large parts of the developing world (such as Sub-Saharan Africa) raise the question: can we improve on the current set of rules and generate greater poverty reduction and social inclusion globally?
political message that the Doha Round is still alive. The Doha Round should aim to the eliminate or reduce industrial tariffs. Taking this into account, the main points of discussion of the Doha Ministerial Conference were to review and advance the ongoing work of the WTO, especially addressing developing countries’ concerns regarding implementation of Uruguay Round commitments; considering ways to facilitate the accession process for least-developed countries (LDCs); clarifying WTO rules and disciplines, where necessary; determining ways to provide more and better coordinated assistance to help improve the capacity of poorer countries to trade; making the WTO more open and transparent; and strengthening the dispute settlement system.

Among the various far-reaching conclusions, the WTO members reached the following inter alia:

- Launch a new WTO round, i.e., the Doha Development Agenda (DDA), comprising both further trade liberalization and new rule-making with commitments to strengthen substantially assistance to developing countries.

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150 A few major corporations blamed three sets of actors of being responsible for the failure of Cancun: the majority of WTO members that defended their publics’ interests in Cancun, the Mexican diplomat who chaired the summit, and civil society groups and social movements.


152 The least-developed countries (LDCs) are the 49 poorest nations in the world, often disproportionately experiencing the negative effects of corporate globalization. These 49 recognized countries, as defined by the United Nations, are deemed structurally handicapped in their development process, facing more than other developing countries the risk of failing to come out of poverty as a result of these handicaps, and in need of the highest degree of consideration from the international community in support of their development efforts. Numerous indicators can be used to illustrate that these are really the poorest nations on earth, such as their increasing marginalization in the world economy, as reflected in their tiny share of world exports. Although they make up around 10% of the world’s population, LDCs account for less than 0.5% of world exports. In 1980, their share was 0.8%. ‘LLDC’ is sometimes used for ‘least-developed countries’ in opposition to ‘LDC,’ which then stands for ‘less-developed countries.’ An empirical study that explains the difficulties of these nations in the world trading system is: Bowman, C. “The Pacific Island Nations: Towards Shared Representation,” in Gallagher, P., Low, P. & Stoler, A.L. (eds.) Managing the Challenges of WTO Participation: 45 Case Studies, Case Study 33, December 2005, available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case33_e.htm#fntext10 (last visited May 14, 2006).


154 For an overview of EU services trade liberalization, see Lopez Escudero, M. “La liberalizacion del comercio de servicios en la Union Europea: un modelo de referencia para el GATS?,” in Remiro
• Help developing countries implement the existing WTO Agreements, and
• Approve the waiver from WTO rules of the Cotonou preferential trade agreement between the EC and African, Caribbean and Pacific countries.\textsuperscript{155}

B. The EC and the Doha Development Agenda

Having a new round of multilateral trade negotiations was partly a European responsibility. Former EU trade commissioner, Sir Leon Brittan, launched the idea of starting a new round of multilateral trade negotiations, which was called the Millennium Round. His reasons for creating a new round were well founded: under the in-built agenda of the WTO, new negotiations on the further liberalization of trade in agriculture and trade in services had to be opened by March 2000.\textsuperscript{156}

Since the DDA is the EC’s most important trade policy priority,\textsuperscript{157} there is a European interest toward the conclusion of the DDA to boost global economic growth and development opportunities. The EC advocates a declaration where all parts of the negotiation need to continue to move forward together.

From the perspective of the European Commission, success in the negotiations on the liberalization of services trade can only be achieved in the context of a broad and time-bound framework of negotiations. However, the agenda proposed by the European Commission may be too complex to deal with in a short period of time.

Four major issues are proposed by the Commission in the Doha Round:

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    \item Brotons, A. & Esposito, C. (eds.) \textit{La Organización Mundial del Comercio y el Regionalismo Europeo,} Dykinson, 2001, pp. 275-313.
  \end{itemize}
\end{footnotesize}
1. to enhance the developmental role of the WTO;
2. to secure further trade liberalization and create improved conditions for competitiveness;
3. to strengthen the WTO and make it a truly universal instrument for the management of international trade relations; and
4. to ensure that the WTO addresses issues of broad concern such as health, the environment, and social concerns.\textsuperscript{158}

According to the negotiation mandate of the EU Council, the EC’s general priorities in the DDA are the following:

- Better access to markets. In as much as further market-access negotiations on services should bring considerable market opportunities for business as well as benefits to consumers world-wide, the EC has no intention to aim at general deregulation or privatization of sectors where principles of public interest are at stake, i.e., education or healthcare. These, as well as further agricultural reform, are areas where the EC would not make concessions;\textsuperscript{159}
- The EC is determined to further liberalize agriculture and give developing countries a better deal;\textsuperscript{160}
- Protection of the environment; and
- Update the world trade rulebook in order to obtain a fair, predictable and transparent rules-based system to govern trade and investment. In other words,
better international governance and the promotion of sustainable
development\textsuperscript{161} is the ambitious agenda in Doha.\textsuperscript{162}

All EU Member States have much to gain from a successful outcome of the
Doha Round. An open trading regime has been traditionally beneficial to European
economies in the past. So the removal of some technical barriers to trade\textsuperscript{163} will
certainly help provide additional opportunities for further success. In the specific case
of the UK, services play a major part of its economy. More protectionism\textsuperscript{164} will be

\textsuperscript{161} The concept of sustainable development refers to a form of economic growth, which satisfies
society’s needs in terms of well-being in the short, medium and -above all- long terms. It is founded on
the assumption that development must enable us to meet today’s needs without jeopardising the ability
of future generations to meet their needs. It involves both the industrialized and the developing nations,
and it has economic, environmental and social aspects. In practical terms, it means creating the
conditions for long-term economic development with due respect for the environment. The Treaty of
Amsterdam makes explicit reference to sustainable development in the recitals of the EU Treaty.

\textsuperscript{162} See Council Decision 94/800/EC, of 22 December 1994, concerning the conclusion on behalf of the
European Community, as regards matters within its competence, of the agreements reached in the
ision&an_doc=1994&nu_doc=800 (last visited February 24, 2005). See also the joint initiative by the
EU and the U.S. presented on August 13, 2003 to trade partners in Geneva (WTO) with a view to
advancing the negotiations in the Doha Round towards a successful conclusion in Cancun, as requested
by other trading partners, in http://www.europa.eu.int/geninfo/query/engine/search/query.pl
(last visited February 17, 2005); see also European Commission, “The Doha Development Agenda,” in
http://europa.eu.int/comm/trade/issues/newround/doha_da/index_en.htm (last visited December 27,
2004).

\textsuperscript{163} The technical barriers to trade (TBT) are related to product standards and conformance. The aim of
the WTO Agreement on Technical Barriers to Trade (TBT Agreement) is to ensure that mandatory
technical regulations, voluntary standards, as well as procedures for assessing conformity with
technical regulations and standards do not generate avoidable obstacles.

\textsuperscript{164} Protectionism is the economic policy of restraining trade between jurisdictions, through methods
such as high tariffs on imported goods, restrictive quotas, and anti-dumping measures, in an attempt to
protect industries in a particular locale from competition. This contrasts with free trade, where no
artificial barriers to entry are instituted to prevent competition. Protectionism has frequently been
associated with economic theories such as mercantilism, the belief that it is beneficial to maintain a
positive trade balance, and import substitution.

There are two main variants of protectionism, depending on whether the tariff is intended to
be collected (traditional protectionism) or not (modern protectionism). In its historic sense,
protectionism is the economic policy of relying on revenue tariffs for government funding in order to
reduce or eliminate taxation on domestic industries and labor (e.g., corporate and personal income
taxes). In protectionist theory, emphasis is placed on reducing taxation on domestic labor and savings
at a cost of higher tariffs on foreign products. This contrasts with the free trade model, in which first
emphasis is placed on exempting foreign products from taxation, with the lost revenue to be
compensated domestically. In the modern trade arena, many other initiatives besides tariffs have been
called protectionist. For example, some commentators, such as Jagdish Bhagwati, see developed
countries’ efforts in imposing their own labor or environmental standards as protectionism. Also, the
imposition of restrictive certification procedures on imports is seen in this light. Recent examples of
protectionism are typically motivated by the desire to protect the livelihoods of individuals in
politically important domestic industries. Whereas formerly blue-collar jobs were being lost to foreign
competition, in recent years there has been a renewed discussion of protectionism due to offshore
generated worldwide if the Doha Round fails. These protectionist tendencies of some WTO countries have been subject of political debate in various countries recently on the grounds that jobs in services were being exported from developed to developing economies. Employers in developed economies have been exporting their services to economies where the service provider is much less expensive. Some politicians, such as the UK Secretary of State for Trade and Industry Patricia Hewitt, argue in this respect that “an extra job in India is not one less job in Britain. It is not only one less person in poverty in India: it is also one more potential customer for our goods and services.”

C. The Case of Services Trade

The services sector is currently by far the most dynamic worldwide. It already contributes more to economic growth worldwide than any other sector, and accounts for almost two thirds of the gross domestic product and employment in the EU. The EC has been accused by developing countries of being protectionist in this sector. The new proposal, which was submitted to the WTO on 2 June 2005, proposes a careful outsourcing and the loss of white-collar jobs. Most economists view this form of protectionism as a disguised transfer payment from consumers (who pay higher prices for food or other protected goods) to local high-cost producers.

The current tendency of most first-world countries is to eliminate protectionism through free trade policies enforced by international treaties and organizations such as the WTO. Despite this, many of these countries still place protective and/or revenue tariffs on foreign products to protect some favored or politically influential industries, or to reduce the taxation demands on their internal domestic manufacturing, making their products more competitive.

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opening of the EU market. It would allow lawyers, accountants, bookkeepers, architects and engineers to open offices in the EU or to offer their services from abroad. Specialists such as computer programmers could obtain short-term residence permits.

The requests in services trade negotiations seeking the elimination or reduction of exemptions from the obligation to accord most-favored-nation (MFN) treatment in financial services and in audiovisual services might be folded into the plurilateral discussions on financial services and audiovisual services, respectively. Other areas regarded by the Commission as being more sensitive, such as the education and health sectors and the audiovisual sector, would remain off limits. “Time is running out for others to match our level of ambition and bring real market-access opportunities to the table,” said EU trade commissioner Peter Mandelson on 2 June 2005, addressing journalists in Brussels. “This is essential for a successful and balanced agreement at the Hong Kong conference,” said Mr Mandelson, referring to the Sixth WTO Ministerial Conference at which a long-awaited breakthrough in the stalled Doha negotiations was hoped to happen.

Services trade is certainly a major area of interest to the EC. The EC has a solid background in the field thanks to the EU internal market experience, which makes EU Member States be like-minded in most areas of services. Although press reports of the WTO Doha Round have focused on agriculture, the EC is actively pushing the opening up of the services markets in developing countries. According to John Hilary of the UK organization War on Want, this policy is dictated by the European Services Forum, a network of representatives from the European services sector formed in 1999. The policy, in the view of Hilary, aims to open up essential

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170 Id.
public services in the developing world, such as health, water and transport to competition from western corporations.

So the logical question to ask is the following: are essential public services threatened by the GATS negotiations? The immediate answer is no. Public services are an essential feature of the social model and of each country's cohesion. The EC fully shares the importance that citizens in Europe and elsewhere attach to maintaining and developing public services. Public services are at the heart of the European social model and, in this respect, the European Commission is committed to ensuring that this remains so. The GATS negotiations are about opening up service trade, not about deregulating services, many of which are closely regulated for very good reasons. In respect of public services, all WTO members remain free either:

1. to maintain the service as a monopoly, public or private;
2. to open the service to competing suppliers, but to restrict access to national companies;
3. to open the service to national and foreign suppliers, but to make no GATS commitment on it; or
4. to make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers.

In all these cases, governments remain free to set levels of quality, safety, price or any other policy objective they see fit. It is inconceivable that any WTO member would agree to surrender such a fundamental right.

To guide the negotiations to a successful conclusion in services trade, a work plan was created in the pre-Hong Kong Ministerial Conference phase. This plan included setting an overall level of ambition for services market access and an ambitious negotiating strategy in order to achieve a high level of ambition for global
services liberalization, particularly in key sectors such as financial services, telecommunications, computer and related services, express delivery, distribution, and energy services.

The EC provides for unqualified market access in services trade.\textsuperscript{171} Within the WTO, countries agree to open trade in services on the basis of requests and offers to other WTO members. Each country decides the sectors it wants to open to international trade.\textsuperscript{172}

There remain some sectors within the EU in which market access for services imports from third countries could be improved. We are in front of a win-win situation, where it is in the mutual interest of the EC and its trading partners to reduce barriers to trade. The EC agenda is, thus, to seek better access for European services exporters in foreign markets and to secure a more transparent and predictable regulatory environment for services.\textsuperscript{173} For developing countries, it would also be beneficial since they depend on access to modern services, such as in the field of finance, telecommunications, transport and IT services, in order to obtain economic development and export growth.

How can the EC achieve this goal? By requesting WTO member countries a reduction in restrictions to and expansion of market-access opportunities for the European services industry. This is of high importance to the EC, since the services sector is the single most important economic activity in the European Union. EU

\textsuperscript{171} See the views of Peter Carl in a report from the seminar on “Which Priorities for the New Commission in the WTO?,” in Stockholm, on Thursday 16 December 2004, in 


Member States should press for a wide-ranging EC approach to the Doha Round, aimed at tackling the main barriers to trade in services.

As stated above, the EC requests do not intend to dismantle public services, or to privatize state-owned companies. There are no EC requests on health services or audiovisual services to any country. Regarding access to water and other natural resources, the EC in no way undermines or reduces governments’ ability to regulate the price of water, as well as the affordability and availability of water supply. Not surprisingly, tourism is the sector in which we find the highest number of bindings. Health and education, however, have the lowest number of commitments. This proves that the GATS is respectful of the diversified economic and social realities among its member countries.

From the EC point of view, these negotiations are conducted by the Commission in a transparent way. Its objectives are stipulated in a mandate given to the Commission by the EU Council and the European Parliament in October/November 1999. The EC objectives are reflected in the sectoral proposals which the EC submitted to the WTO in December 2000, as well as in a communication on the EC’s general objectives for the negotiations, which was submitted in March 2001.

D. Hong Kong: the Sixth WTO Ministerial Conference

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D.1.- Objectives of the Conference

Hong Kong was chosen as the venue for the Sixth WTO Ministerial Conference. The aim in Hong Kong was to have: (i) an agreement on the modalities (i.e., detailed negotiating parameters) for negotiations in agriculture and non-agricultural market access (NAMA); (ii) an effective negotiating framework for a significant result in services; (iii) directions to ensure that WTO rules remain effective and in some cases are strengthened (for example, by adding new disciplines to subsidies to deal with overfishing); 176 and (iv) the outlines of an agreement on trade facilitation. 177

The main task before WTO Members in December 2005 in Hong Kong, therefore, was to settle this range of questions that will shape the final Agreement of the Doha Development Agenda, which WTO Members hope to complete a year later, at the end of 2006. As in the Uruguay Round, the system that will be used in future global trade negotiations is the so-called single undertaking, to which all WTO Members were required to subscribe, although with differing implementation periods. 178 In other words, nothing is agreed until all subject areas are agreed. This

176 Several high-level trade officials—including the U.S. Trade Representative, the EU agriculture commissioner, trade ministers from New Zealand and Senegal, the agriculture secretary of the Philippines, the Brazilian fisheries secretary and a representative of Chile's foreign affairs minister—joined forces with the UN Environment Program (UNEP) and environmental group WWF to call for urgent action on disciplining fisheries subsidies in the WTO at a press conference in the Hong Kong WTO Ministerial Conference. Pointing to the dire state of global fisheries, they urged WTO Members to take advantage of the opportunity provided by the Doha mandate to promote trade liberalization that also safeguards environmental and social objectives. New Zealand, the U.S. and Chile—all members of the so-called ‘Friends of Fish’ group which is the driving force behind the negotiations—emphasized the environmental dimension of the Hong Kong talks. Brazil, Senegal and the Philippines stressed the need for effective special and differential treatment to account for the particular needs of developing countries.

177 Numerous studies show that trade facilitation is a win-win game. Greater transparency and procedural uniformity at country borders could generate twice as much gain to GDP than tariff liberalization, especially for developing countries because of their comparatively less efficient customs administrations. Despite the suspension of the DDA, EU Trade Commissioner Peter Mandelson has called for WTO Members to pursue negotiations on a trade facilitation agreement and on an Aid for Trade package to address developing countries’ capacity constraints and help them deal with the costs of customs modernization.

178 Before the Uruguay Round, there was no single undertaking (and therefore, GATT Members had opt-out options available when new rules and agreements were being negotiated). Also, there were few
mantra was clarified and put in context by Commissioner Mandelson who, in a statement to the General Affairs Council in the framework of the Doha Round negotiations and the Commission mandate, said in October 2005:

“At the heart of the EU mandate is of course the imperative need for balance within the agricultural negotiations and across the different areas of negotiation, linked to the principle of the single undertaking. I have made clear that no agreement will be reached on agriculture until agreement is reached on other issues. Nothing is agreed until everything is agreed... Let me be clear. It is absolutely and unequivocally not the intention of the Commission to use the DDA negotiations to precipitate a new phase of CAP (Common Agricultural Policy) reform...Surely it would be the wrong reaction, and a terrible mistake for the EU, at the first sign of serious movement in the talks - movement that we have been calling for - to lose confidence and pull in our horns. I hope that is not the message of our meeting today."179

An alternative to the single undertaking procedure is the so-called variable geometry.180 This term refers to situations where obligations differ for the various WTO Members. In other words, some WTO Members may choose to take on more or less obligations.181 Although the WTO Agreement provides for a few plurilateral – therefore, optional and not binding to those Members who do not engage in the agreement- agreements in Annex 4, the consensus rule makes it difficult to add new agreements to that Annex. An example of variable geometry is the special and obligations imposed upon developing countries, and a number of important plurilateral agreements to which membership was wholly voluntary.


180 In the EU context, this concept refers to a situation in which some countries may integrate more (or faster) than others. This phenomenon has been given many other different names - among them, flexibility, differentiated integration, closer (or enhanced) co-operation, concentric circles, Europe à la carte, and two-speed (or multi-speed) Europe. The 1997 Treaty of Amsterdam represented the first attempt to formalize this principle. Before that, however, the UK’s and Denmark’s opt-outs on the EMU, the UK’s and Ireland’s exemptions from the Schengen Agreement and Denmark’s opt-out on anything to do with a common EU defence policy had already created de facto variable geometry. Another example was the admission to the EU of the neutral states of Austria, Finland, Sweden, and Ireland, which were not full members of the WEU and would inevitably be forced to resort occasionally to constructive abstention in foreign and security affairs. Given the prospect of the EU growing even less homogeneous with the accession of former Soviet bloc countries, such divergences appeared likely to increase rather than to diminish.
differential treatment when giving special recognition for developing country needs. Another example is regional or other GATT Article XXIV agreements.\textsuperscript{182} Out of the nine plurilateral agreements that the Tokyo Round generated, only two remain operational: those agreements covering government procurement – subscribed by only around one-fifth of the membership- and trade in civil aircraft – by even less.

In the plurilateral agreements, Members might negotiate on single topics or across a broad agenda. The risk of this plurilateral approach is to marginalize WTO members, typically the weakest and poorest members of the WTO family. To avoid this risk, the world trading system should allow them to participate in the plurilateral negotiations, but provide them with the freedom to opt out of a counter-productive result to them.

D.1.a.- Background:

The initial objective was to conclude a final agreement at this conference but progress made up until then was too feeble to do this. Instead, a deal was reached in which rich nations agreed to allow quota and tariff-free imports from all least-developed countries (LDCs), and 2013 was set as the deadline for eliminating agricultural export subsidies.

According to various reports, the Doha Round of trade talks in Hong Kong was going to be in danger of failing before it began. Pascal Lamy had stressed that time was running out. “We are faced with mountains of work and very little time,”\textsuperscript{183} he said. In a speech given on 22 October 2005, he said: “[P]ositions are still too far

\textsuperscript{181} These obligations may, or may not, be enforceable through the dispute settlement mechanism of the WTO.

Death of Doha Rafael Leal-Arcas

apart on agricultural market access to allow the negotiations to progress.\textsuperscript{184} EU trade commissioner Peter Mandelson said on 7 November 2005 that the Doha Round had been ‘pushed into an agricultural siding’\textsuperscript{185} by the aggressive stance of the U.S., Brazil and Australia. He called the EC offer on subsidy cuts ‘unprecedented’\textsuperscript{186} and blamed the reluctance of other WTO members to negotiate on industrial goods and services for blocking progress. The fear was that the intransigence of each side on agricultural trade issues would sideline the other important questions of industrial goods, services and development. In an attempt to avert this, India held an informal meeting in London on 7 November 2005 with ministers from India, the U.S., Japan, Brazil, and the EU trade commissioner. On 8 November 2005, they joined other ministers in Geneva for further talks hosted by WTO Director-General Pascal Lamy.

D.1.b.- Issues:

Efforts to reach a preliminary agreement on the crucial Doha trade round have been stalled on the issue of agricultural subsidies and tariffs. The big trading blocs in the WTO (the U.S., Brazil, and Australia on one side, and the EC on the other) had been engaged in a tit-for-tat struggle,\textsuperscript{187} each refusing to accept that offers of subsidy cuts from the other had gone far enough. The group of 20 developing nations (G-20)\textsuperscript{188} is demanding heavier cuts from both sides. In response to a U.S. offer to cut farming

\textsuperscript{184} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Tit-for-tat is the \textit{modus operandi} in international trade. For example, country A raises barriers on product X because country B did it to product Y.
\textsuperscript{188} The Group of 20, or G-20, is a group of developing countries focused on tearing down industrialized countries’ barriers to agricultural trade. In March 2006, the group included 21 countries: Argentina,
subsidies by 60%, the EC had offered to reduce its tariffs on agricultural goods by, on
average, 38%—an insufficient figure in the eyes of the U.S. and the developing
countries. The EC, however, was driven by internal conflict, with France accusing
commissioner Mandelson of exceeding his mandate. The EC also continued to work
towards improving bilateral trade relationships. Commissioners Peter Mandelson and
Benita Ferrero-Waldner met with Chinese trade Minister Bo Xilai on 4 November
2005 to discuss the Doha trade round, but also a wide range of issues including the
environment, energy and intellectual property.

At the Hong Kong Ministerial Conference, the WTO trade ministers hoped to
agree on the main points of the agricultural section—tariff cuts and quota easing or
elimination, elimination of export subsidies for farm products by developed countries
by 2013 but the Ministerial text attached a rider that a substantial portion of the
support will have to be eliminated by 2010, and reduction of subsidies in rich
countries— and make progress on manufacturing and services. WTO Director General,
Pascal Lamy, suggested that ideally the Hong Kong Ministerial Conference should be
used as a yardstick to two-thirds of the conclusion of the DDA negotiations.

D.2.- Intent and Examples of the Draft Hong Kong Ministerial Declaration

The Declaration is intended, first, to capture the progress that countries have made in
the negotiations since July 2004; and, second, to build on progress in key areas so that
Hong Kong may be a launch pad for “full negotiating modalities.” These cannot be

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189 EU trade commissioner Mr Mandelson argued in Hong Kong that a great deal of U.S. in-kind food aid was tantamount to an export subsidy to its farmers. He said that the EC would be far more open to the U.S. proposal to eliminate export subsidies by 2010 if the latter agreed to move away from ‘fake food aid’ towards less market-distorting alternatives such as cash payments to countries that require food aid but are not in emergency situations. Former U.S. Trade Representative Rob Portman described the EC as ‘obsessed’ by food aid, and suggested that the approach it favored ran the risk of making people go hungry.
delayed, and must be reached only a few months after the Conference. By *modalities* it is intended a numerical work plan that would set out in full the rates at which tariffs would be cut, subsidies reduced, the target dates, and so on.

In the area of services, where the negotiations are not based on formula reductions, but on intensive discussions between national regulatory authorities on a sector-by-sector basis (such as in banking and insurance), the process can be very time consuming. WTO Members must therefore accelerate the pace of these negotiations — the Draft Declaration provides for benchmarks\(^{190}\) to do that. Let us remember that services represent a major component of developing country trade. In fact, tourism services alone are the main foreign currency earner for most of the least-developed world. We cannot afford, therefore, to set services trade negotiations aside.

In the eyes of Mandelson, the modalities must set a level of ambition high enough to match the levels of ambition set in agriculture\(^{191}\) and NAMA.\(^{192}\) A high level of ambition in services trade is therefore necessary to have a balanced DDA package that will be acceptable to the EU. In Mandelson’s view, four elements should be taken into consideration for the modalities to be agreed in the Doha Round:

1. a multilateral formula for commitments by WTO Members;

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\(^{190}\) Benchmarks are also known as “common baselines” or “targets and indicators.”

\(^{191}\) It is interesting to see the difference in perception and demand between the governmental and the non-governmental sectors in the Doha Round. Regarding the WTO Agreement on Agriculture, quite a few NGOs affirm that the right to food is a basic human right and that the WTO Agreement on Agriculture subordinates this right to corporate profitability. In this vane, some NGOs argue that the WTO Agreement on Agriculture fails to recognize that farming is a way of life as well as the basis of community and culture. Thus, these policies, as well as those of other trade agreements, foster further concentration and increase of power of multinational corporations, and cause the expulsion of millions of peasants from the land and production in northern and southern countries. Therefore, measures must be taken to promote and protect genuine food sovereignty (the right of peoples and communities to define their own food and agricultural policies, as well as the right to produce their basic foods in a manner that respects cultural and productive diversity and supports peasant-based production) as well as food safety and security, both for consumers and producers. The trading system should not undermine the livelihood of peasants, small farmers, agricultural workers, artisan fishers, and indigenous peoples.

\(^{192}\) In the negotiations on NAMA, transnational companies of industrialized countries are aiming to abolish all legislation that would impede them to export their industrial products to southern countries. At present, in the negotiations, further efforts are being demanded from developing countries, blatantly ignoring the principle of special and differential treatment that these countries are entitled to in the context of the development cycle. Thus, they are being denied the tool that has historically helped the
2. agreeing to the principle of sectoral model schedules;\textsuperscript{193}

3. setting dates for new revised offers and final offers; and

4. agreeing on targets for negotiations on rules (i.e., Government procurement, emergency safeguards,\textsuperscript{194} and subsidies) in the services areas.

The first element (a multilateral formula for commitments by WTO Members) should be based on a mandatory numerical target for the number of services sectors in which each WTO Member would be required to make offers. How does this translate into practice? The current services negotiations are based on a request/offer system in which each WTO Member tables a request from other Members and a parallel offer of what it is willing to provide. Since the current level of ambition is rather disappointing, the proposed system aims at establishing certain minimum numbers of sectors to be covered, and to producing model schedules in certain sectors that will provide ambitious benchmarks for WTO Members to aim for.

As for the second element (agreeing to the principle of sectoral model schedules), the EC proposes to produce benchmarks to guide the level of commitment in sectors of interest to WTO Members. Work should be on those sectors where a large number of WTO Members show an interest. In relation to the third element (setting dates for new revised offers and final offers), the EC’s proposal was also to use the 6\textsuperscript{th} WTO Ministerial Conference as a forum to fix clear and firm dates during the first four months of 2006 for the presentation of revised services offers reflecting industrial development of northern economies, i.e., protection of vitally important infant industries, before opening them up to the world market.

\textsuperscript{193} The model schedule is based on a standardized format for schedules defined during the Uruguay Round, but includes certain modifications to help describe more precisely the specific service being committed, and illustrations of schedule entries related to market access, national treatment and additional commitments that may be particularly relevant to that specific service.

\textsuperscript{194} An emergency safeguard mechanism is a form of safety valve to allow a government to support a domestic industry that is facing difficulties in coping with intensified international competition in the domestic market, due to trade liberalization obligations.
both multilateral targets and sectoral model schedules. Finally, not much progress has been made on rules thus far.

D.3.- Actual *Modus Operandi* of Services Negotiations: How to Go about among 149 Members and the Outcome of Hong Kong

The loud complaints during the Cancun WTO Ministerial Conference with respect to inclusiveness and transparency have all but disappeared. More than 4,000 protesters – mostly from Korea, India and Indonesia – marched on the Hong Kong Convention Centre on the first day of the Sixth WTO Ministerial Conference chanting “the WTO is killing farmers.”  

From a practical standpoint, most WTO Members seem to have effectively accepted that the Ministerial Chair’s consultative group meetings (the so-called ‘Green room’) are the only realistic way to move forward in a 149 Member-strong organization, so long as all delegations are kept informed of the process and the discussions.

NGOs can contribute in a positive manner in the completion of the Doha Round. Some NGOs such as Oxfam know the world trade agenda well. The main issue with NGOs is one of paradigms: one paradigm is that free trade is good for

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196 The “Green Room” is a phrase taken from the informal name of the WTO director-general’s conference room. It is used to refer to meetings of 20–40 delegations. These meetings can be called by a committee chairperson as well as the WTO director-general, and can take place elsewhere, such as at Ministerial Conferences. In the past, delegations have sometimes felt that Green Room meetings could lead to compromises being struck behind their backs. So, extra efforts are made to ensure that the process is handled correctly, with regular reports back to the full membership. In the end, decisions have to be taken by all members and by consensus. No one has been able to find an alternative way of achieving consensus on difficult issues, because it is virtually impossible for members to change their positions voluntarily in meetings of the full membership.

197 The argument of free trade as the basis for trading at the WTO is very controversial. Some authors demonstrate that success or failure is strongly influenced by how governments and private sector stakeholders organize themselves at home. When the system is accessed and employed effectively, it can serve the interests of poor and rich countries alike. However, a failure to communicate among interested parties at home often contributes to negative outcomes on the international front. Furthermore, it is argued that the WTO creates a framework within which sovereign decision-making can unleash important opportunities or undermine the potential benefits flowing from a rules-based
development; a second paradigm is that free trade is not only bad and harmful, but it actually provokes under-development. Certainly, there is a clash between the theory and practice of international trade. In this respect, it is difficult for governments to cooperate with NGOs which do not believe in the benefit of free trade. Even the least radical NGOs that believe in the added value of free trade in relation to development argue that the *modus operandi* is incorrect, undemocratic, and unfair.

For developed WTO Members (principally the EC, the U.S., and Canada), who were keen on further liberalization, the legal document with which they arrived to Hong Kong was insufficient to continue the objective of negotiating toward the progressive liberalization of services trade (GATS Article XIX). For developing countries, however, the text was too detailed on what should be liberalized in each of the four modes, as well as the fact that there was not enough emphasis on mode 4. Developing countries also wanted to have the right to reject the *praxis* of plurilateral negotiations if they thought it would damage their national interest. At the 6th WTO Ministerial Conference in Hong Kong, the G-90 used a slightly different strategy from the ordinary *praxis* in that they presented a new document and tried to use this legal text as the basis for the WTO trade negotiations. This was perceived by Mr Plaza as a way to break with or violate the normal procedure of international trade negotiations in Geneva. Negotiations at the Green room brought amendments of minor importance. What changed was the language used in the Government procurement agreement, emergency safeguards, and subsidies.

Regarding the content and outcome of the Hong Kong Ministerial Conference, trade ministers’ main decision at the December meeting in Hong Kong was simply to keep talking: in order to avert another Cancun-style collapse, they simply put off

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198 Interview with Mr Plaza, Spanish trade diplomat dealing with international services trade, on March 15, 2006.
discussions on the most contentious issues in the Doha Round negotiations -specific numbers and tariff structures for reducing subsidies and tariffs- and gave themselves until the end of April 2006 to reach agreement on them. It is to these politically and technically complex issues that negotiators must now turn their attention. Some delegates suggested that this April deadline for finalizing ‘full modalities’ was improbably early, and that June or July 2006 would be a more realistic timeline. If an agreement is not reached by July 2006 -as it stands, the Hong Kong Ministerial Declaration calls for WTO Members to translate these modalities into draft commitment schedules by the end of that month- then it will be difficult for them to meet their stated goal of concluding the Doha Round by the end of the year 2006.

Services negotiations had moved into a new phase with the launch of the plurilateral (or collective) sectoral request process\(^{199}\) agreed by Ministers at the 6th WTO Ministerial Conference in Hong Kong in December 2005. This has been the most relevant consequence of the Hong Kong Ministerial Conference in the case of services trade, as mandated by the Hong Kong Declaration. Groups of WTO Members started presenting, as of 28 February 2006, their requests on various services sectors to other WTO members.\(^{200}\) It is also important to note that the WTO services negotiations remained at the forefront of the talks on the final days of the Hong Kong Ministerial Conference, as WTO Members began to react to the rewritten version of the services annex of the draft declaration text circulated by the G-90.\(^{201}\) The proposal’s weakening of the mandatory and prescriptive language of the draft

\(^{199}\) The plurilateral request has been focused on a specific sector or mode of supply. These request/offer negotiations, be they bilateral or plurilateral, are a process of direct engagement between or among Members. The process starts with submission of requests and continues with private meetings between and among Members concerned. Plurilateral requests will be addressed directly from the demandeurs to other Members to whom these are made. The WTO Secretariat is not systematically informed of such requests or their content. Neither the WTO Secretariat nor the Chairman attends meetings between and among Members in the request/offer process. Exchanges in those meetings are strictly private, unless otherwise provided for by the participants.

declaration’s initial services annex did not, however, sit well with the EC or the U.S., who had wanted the provisions of the Annex C\textsuperscript{202} to be strengthened rather than watered down. Venezuela, for its part, said the original Annex C was totally unacceptable as a basis for further services liberalization.

In the specific case of the EU, Member States may withdraw anytime from the negotiations if they disagree with the Commission’s position. In areas of shared competence, the European Commission is less proactive during the negotiations than it would otherwise be when we are in the field of exclusive EC competence. In shared competence issues, the Commission listens more to the needs of EU Member States individually prior and during the negotiations.\textsuperscript{203} At Hong Kong, there was absolute consensus on the European negotiating position among the EU-25 Members in services trade. The broader question among them was: To what extent had Annex C - with which all 25 EU Member States were unhappy - been kept? This was a dubious point for EU Member States, but it was nevertheless clear that it had to be the basis for the Hong Kong negotiations.

Summing up the proceedings at the ‘open-ended’ meeting he convened, facilitator Kim Hyun-Chong, Korea’s trade minister, reportedly told delegations that 15 delegations had intervened to ask for revisions to the text, while 26 wanted to preserve it. He encouraged them to work out their differences among each other, and indicated that he would continue his consultations with them as well. The U.S. wanted to strengthen the qualitative targets on modes 1 (cross-border trade) and 3 (commercial presence). The EC was pursuing at the Hong Kong Ministerial

\textsuperscript{201} The G-90 is a tripartite alliance of the Africa Union (AU), the African, Caribbean and Pacific Group (ACP) and least-developed countries (LDCs), forming a majority of developing countries in the WTO.

\textsuperscript{202} For a reading of Annex C (annex on services), see the Revision of the Draft Ministerial Declaration in the framework of the Doha Work Program, Hong Kong WTO Ministerial Conference, Sixth Session on 18 December 2005, WT/MIN(05)/W/3/Rev.2, available at \url{http://www.wto.org/english/tratop_e/minist_e/min05_e/draft_text5_e.doc} (last visited February 27, 2006).

\textsuperscript{203} Information gathered in an interview with Mr Raith, Legal Advisor to the European Commission Delegation in Geneva, on November 7, 2005.
Conference a reference to ambitious sectoral coverage, possibly in the body of the declaration, as well as seeking stronger commitments on mode 3, plurilateral market access negotiations, and sectoral liberalization initiatives.\(^{204}\)

The original text’s controversial annex on services was also modified in an attempt to make it acceptable to more WTO Members, despite the risk of making it less acceptable to the EC. Some delegations were reportedly disappointed with changes presented in the 17 December 2005 draft declaration’s services annex that reaffirmed the non-prescriptive nature of its recommendations, as well as the fact that the reference to it in the body of the text (paragraph 25) remained bracketed. Instead of obliging Members to enter into plurilateral market-access negotiations, the new text stipulates that they ‘shall consider such requests’\(^{205}\) in line with different rules and guidelines for conducting services negotiations. The EC was also reportedly disappointed by the removal of the 7 December 2005 version’s\(^{206}\) implicit reference to a 2002 EC proposal (S/WPGR/W/39)\(^{207}\) that laid out a framework for liberalizing government procurement in services. Emma Harrison, a campaign director for Consumers International, expressed concern that countries with insufficient regulatory systems would be pressured into liberalizing ‘essential services’ sectors such as water and electricity. She noted that the text made no mention of universal public access.

\(^{204}\) Mitchell Smith had already argued that “sectoral liberalization has advanced significantly [in the European Community] during that period [1990s], even if under critical constraints. It remains unlikely that a new conception of industrial policy will supplant the hegemonic position of competition, or fundamentally alter Europe’s state of liberalization.” See Smith, M. *States of Liberalization. Redefining the Public Sector in Integrated Europe*, State University of New York, 2005, p. 191.

\(^{205}\) See the Revision of the Draft Ministerial Declaration in the framework of the Doha Work Program, Hong Kong WTO Ministerial Conference, Sixth Session on 18 December 2005, WT/MIN(05)/W/3/Rev.2, para. 7(b), available at http://www.wto.org/english/trade_e/minist_e/min05_e/draft_text5_e.doc (last visited February 27, 2006).

\(^{206}\) See Draft Ministerial Text of 7 December 2005, WT/MIN(05)/W/3, available at http://www.wto.org/english/trade_e/minist_e/min05_e/draft_text3_e.htm (last visited February 27, 2006). This document is a revision of JOBi(05)/298/Rev.1, incorporating three amendments agreed by the General Council, namely the addition of brackets in paragraph 21 (Services), the removal of brackets in paragraph 53 (accession of Tonga), and the addition of some wording at the end of paragraph 34 (TRIPS & Public Health).

In a speech to European Parliament members on 16 January 2006, EU trade commissioner Peter Mandelson blamed the G-20 in particular for failing to offer new concessions on NAMA and services, and said that the EC would be willing to let the negotiations fail rather than pay for a round that offers nothing new on industrial market access, services, geographical indications, or other rules that lend strength to the multilateral way of managing out international affairs.

So what is the impact of the Nice Treaty on services trade? This takes me to Part II, where I will present an analysis of the Nice Treaty in relation to services trade.

E. Post-Hong Kong WTO Ministerial Conference

As time progresses toward the conclusion of the Doha Round, developing countries seem to have more doubts as to whether it is worth it to continue negotiating. According to EU trade commissioner Mandelson, there is no reason why the Doha talks should not succeed. In his opinion, NGOs that suggest that developing countries should contemplate walking away from the Doha talks are wrong. For developing countries, a successful Doha Round means the opportunity to lock in farm reform in the developed world, open new markets for their exports, and develop new trade among them. It can produce new multilateral agreements on rules that benefit them and aid that will boost their capacity to trade. For the developing world, to walk away from the table of Doha trade negotiations would be a considerable mistake, in Mandelson’s view. It is worth remembering too that this is a round for free for the 50

208 Geographical indications are place names (or words associated with a place) used to identify products (for example, “Champagne,” “Tequila,” or “Roquefort”) which have a particular quality, reputation or other characteristic because they come from that place.

least-developed countries – any advances that are made will be for no cost on their part.\(^{210}\)

EU Ambassador to the WTO Carlo Trojan said that he was “personally convinced that a comprehensive deal can be made before the [August] summer holidays”\(^{211}\) but that this would “require a breakthrough on modalities by mid-June and sufficient progress on issues other than agriculture and NAMA.”\(^{212}\) The EU has been seeking deeper industrial tariff cuts from the G-20 developing countries. It has also come under heavy pressure from the G-20 and the U.S. to offer deeper cuts to its own farm tariffs. Trojan stressed that success in the negotiations would depend on “a preparedness to accommodate each others’ genuine political red lines,”\(^{213}\) and that “much remains to be done to find the right exchange rate between market access in agriculture and NAMA.”\(^{214}\)

The initial target was to finalize the Doha Round negotiations by the end of 2005, so that the Agreement could be approved by the U.S. under the fast-track procedure, without having to undergo a lengthy debate within Congress. Although some progress was achieved along the way - notably in Hong Kong in December 2005, where rich nations agreed to eliminate all of their farm export subsidies by 2013 and to allow quota and tariff-free imports from all least developed countries – a final deal remained elusive. Successive deadlines were missed and, at the July 2006 G8 meeting in Saint Petersburg, leaders of the world’s biggest economies pledged to give their trade negotiators the flexibility they needed to reach a compromise deal, deciding to hold last ditch talks during the weekends of 23-24 and 28-29 July.

\(^{212}\) Id.
\(^{213}\) Id.
\(^{214}\) Id.
2006. However, on July 24, 2006, WTO Director General Pascal Lamy formally announced the suspension of the talks, bringing five years of negotiations to an end, and following the refusal of the United States to make bigger cuts to its farm subsidies if the EC and emerging developing countries such as India, China, and Brazil did not reduce their tariffs on agricultural and industrial products respectively. Major trading powers, including the EC, are blaming the U.S. for the collapse.

More recently, after the suspension of the WTO Doha negotiations, the Commission looks ready to refocus its commercial strategy on bilateral free trade agreements so as to catch up with the U.S. and Japan. Since the Doha multilateral trade negotiations reached a fatal situation in July 2006\(^{215}\) - when last resort talks failed to bring an agreement on reducing farm subsidies and lowering tariffs, leading therefore the WTO chief Pascal Lamy to formally suspend the Doha Round - the Commission is now trying to move forward in trade negotiations in a bilateral manner. In the face of globalization, the EC must remain open. It must also ensure that markets abroad are open to its own exports. European businesses often find it difficult to access foreign markets due to high tariff and non-tariff barriers, as well as discriminatory measures applied against foreign companies. Removing such barriers is particularly important in the services sector, which represents around 70% of Europe’s jobs and of the EU’s gross domestic product (GDP),\(^{216}\) but which faces higher trade barriers than goods, mostly due to restrictive national regulations, such as technical standards, licensing requirements or national discrimination.

This proposal of bilateral trade agreements is diametrically opposite to the EC’s previous trade strategy, in which the focus was strongly on multilateral trade and at extending the benefits of globalization to developing countries, has been suspended following the failure of negotiators to reach a compromise about reducing farming subsidies and lowering import tariffs.

\(^{215}\) After five years of troubled negotiations, the Doha Development Round, aimed at freeing global trade and at extending the benefits of globalization to developing countries, has been suspended following the failure of negotiators to reach a compromise about reducing farming subsidies and lowering import tariffs.
negotiations within the WTO, and free trade deals were primarily driven by the logic of development or geopolitics rather than economic interests.

In relation to services trade, an ambitious deal on service liberalization was of key interest to the EC because trade in services makes up around 75% of its economy. Increased trade in services would also contribute to development goals since improved transport, IT and telecommunications, banking, and insurance sectors form the backbone of a growing economy. However, trade in services faces considerable restrictions, mostly based on national regulations, such as technical standards or licensing requirements and procedures. According to a study by Decreux and Fontagne, more could be gained, for developing and developed countries alike, from a 25% cut of the barriers in services than from a 70% tariff cut in agriculture in the North and a 50% cut in the South.217 A study conducted at the World Bank estimates that developing countries could gain nearly $900 billion in annual income from elimination of their barriers to trade in services.218 Discussions in the WTO focused on establishing disciplines to ensure that domestic regulatory measures do not create unnecessary barriers to trade. Significant progress was made in this area but negotiations on market access stood still as a result of the lack of movement on agricultural and industrial market access.

But why has multilateralism failed? The talks were suspended on July, 24 after ministers from the EC, the U.S., Australia, Brazil, India, and Japan (the so-called G-6 countries) failed once again to reach a deal on agriculture and industrial goods 'modalities' -- *formulae* and figures for tariff and subsidy cuts, as well as exceptions to

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216 A region's gross domestic product, or GDP, is one of several measures of the size of its economy. The GDP of a country is defined as the market value of all final goods and services produced within a country in a given period of time.

them -- primarily due to differences on farm trade. 219 “We have missed a very important opportunity to show that multilateralism works,” said WTO Director-General Pascal Lamy. 220 Lamy said that the failure represents a lost opportunity to integrate more vulnerable members into international trade - “the best hope for growth and poverty alleviation,” 221 and warned of the negative impact on the world economy with the possible resurgence of protectionism. “Today there are only losers,” 222 he stated.

Quite refreshing is Oxfam’s position, which stressed the enormous cost of further delay, as “the EU and the US remain free to subsidize their biggest agricultural producers and continue dumping, while developing countries continue to struggle to ensure survival of subsistence farmers and break into rich Northern markets.” 223 It said the U.S. and EC must “make fundamental changes to their offers” 224 in order to contribute to the development goal. However, not every NGO was of the same opinion: Other NGOs more critical of free trade viewed the collapse of talks as good news for the world’s poor and the environment, calling on world leaders to use the opportunity to build a “new global trade system based on equity and sustainability.” 225

Little has been discussed in the way of specific new concessions that could spur the resumption of multilateral trade negotiations. Nevertheless, ministers and

221 Id.
222 Id.
224 Id.
senior officials from WTO Members including the G-20 developing countries, the
U.S., the EC, Japan, and four West African cotton producing nations pledged to work
towards relaunching the stalled talks at a 9-10 September meeting in Rio de Janeiro.
The meeting, which coincided with a G-20 ministerial summit, marked the first big
gathering at that level since July 2006. Brazil’s minister of foreign affairs said that he
had seen signs of flexibility from other countries during the weekend's discussions.
Upon his return to Tokyo, Japan's Agriculture, Forestry and Fisheries Minister
Shoichi Nakagawa told journalists that there should be some signs indicating the end
of the cessation in October 2006. Governments needed to agree on modalities by the
end of July 2006 in order give themselves enough time to translate them into a Doha
Round package of legal agreements before the mid-2007 expiry of the Bush
administration's Congressional mandate to negotiate trade agreements. Without this
“trade promotion authority,” the Bush administration is unable to submit trade deals to
Congress for a yes-or-no vote without the possibility of major amendments -- and thus
ceases to be a credible negotiator.

V. Impact of the Nice Treaty and the EU Constitutional Treaty on
Services Trade

The developments of the Nice Treaty are significant for the built-in agenda of the
WTO negotiations, which states that several areas of trade should be reviewed for

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225 See Greenpeace International, “‘Face it, Doha is dead’: Time to look at alternatives to WTO,”
Greenpeace Press Releases, 24 July 2006, available at
http://www.greenpeace.org/international/press/releases/doha-is-dead (last visited September 14, 2006).
226 The GATS, including its Annexes and Related Instruments, sets out a work programme which is
normally referred to as the “built-in” agenda. The programme reflects both the fact that not all services-
related negotiations could be concluded within the time frame of the Uruguay Round, and that
Members have already committed themselves, in Article XIX of the GATS, to successive rounds aimed
at achieving a progressively higher level of liberalization. In addition, various GATS Articles provide
for issue-specific negotiations intended to define rules and disciplines for domestic regulation
(Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies
(Article XV). These negotiations are currently under way. At the sectoral level, negotiations on basic
further liberalization every five years. This includes intellectual property rights and services trade. Since the Nice Treaty, the EC’s competence to conclude agreements with third states or international organizations explicitly covers trade in services and the commercial aspects of intellectual property rights. Article 133 (5) of the Nice Treaty deals directly with trade in services and trade aspects of intellectual property rights. EU NGOs have campaigned against providing the European Commission with a fast-track system in WTO negotiations ever since there has been a corporate

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5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.

Following the U.S. experience in trade agreements, fast-track in the case of the EU refers to the authority that the EU trade commissioner has to negotiate agreements that the EU Council can approve or disapprove but cannot amend. In the specific case of the U.S., fast-track trade authority (now known as trade promotion authority, which will expire in mid 2007) in essence allows the President to submit to Congress for an up-or-down vote an unamendable bill to implement into U.S. law any international trade agreement entered into by the United States. In other words, it is an unusual procedure through which the U.S. Congress delegates the President constitutional authority to set the terms of trade for the purpose of negotiating trade agreements. The fast-track mechanism also provides special rules which strictly limit Congress’s role regarding such trade agreements to a “yes” or “no” vote on a completed deal, with no amendments allowed and only 20 hours of debate. Fast-track causes an extraordinary shift in power with the White House empowered to sign and enter into trade agreements before Congress ever votes on them. “Fast-track” trade negotiating authority was first passed in 1974 after the U.S. Congress failed to approve and implement certain non-tariff agreements negotiated by the United States during the Kennedy Round. It was seen as an absolutely necessary legislative procedural device for the United States to be able to conclude and implement trade agreements, given the unique U.S. constitutional system under which the President is responsible for negotiating international agreements while the Congress is responsible for regulating international trade. In order to avoid having Congress attempt to renegotiate the content of trade agreements the President had signed, some legislative device was needed to ensure that Congress would not be allowed to amend implementing bills once they were presented to it by the President but only be allowed to accept or reject such bills in their entirety without amendment. For such a procedure to work, however, there had to be close and ongoing consultation and collaboration between the President and the Congress on the formulation of U.S.
demand in the Nice Treaty for further centralization of EC decision-making in international trade. Louis describes the amended paragraph 5 of Article 133 of the EC Treaty in Nice as a way of establishing the extension of the EC treaty-making powers in trade policy issues to trade in services and the commercial aspects of intellectual property rights.\(^\text{230}\) In other words, the Nice Treaty has meant a communitarization of services trade, with the exception of health, education and audiovisual services.

Another aspect of the new paragraph 5 is the fact that it does not affect the right of the EU Member States to maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements.\(^\text{231}\) In other words, the competence is not exclusive EC competence. This provision is not new to EC law, as it had already been used in Article 111, paragraph 5, EC on economic and monetary policy,\(^\text{232}\) Article 174, paragraph 4, EC on environmental policy,\(^\text{233}\) and Article 181, paragraph 2, EC on development cooperation,\(^\text{234}\) as inserted by the Maastricht Treaty.\(^\text{235}\)


\(^{231}\) Article 133 (5.4) of the Nice Treaty.

\(^{232}\) Article 111 (5) EC reads: Without prejudice to Community competence and Community agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

\(^{233}\) Article 174 (4) EC reads: Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

\(^{234}\) Article 181 (2) EC reads: The previous paragraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements.

With respect to the allocation of external competences between the EC and its Member States before Nice, much case-law from the ECJ, as well as vast literature, deals with it.

A. Nature of the Powers and Ways to Exercise Them

As opposed to Article 133 (1-4) EC, the powers in Article 133 (5-7) EC are shared between the EC and its Member States. Neframi, however, argues that these

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236 Recent ECJ case-law are the so-called “Open Skies” judgments from 5 November 2002.
238 Article 133 (1-4) of the EC Treaty reads:

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.
239 Article 133 (5-7) EC reads:

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6. By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules. The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6. This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.
6. An agreement may not be concluded by the Council if it includes provisions which would go
are exclusive powers and claims that in Article 133 (5.4) EC there is an *habilitation spécifique*. Griller argues that it is a case of concurrent powers.

By having a simple look at Article 133 (5.4) EC, we note that it states that paragraph 5 of Article 133 EC does not affect the right of the EU Member States to maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with EC law and other relevant international agreements. We are, then, in the field of trade in services and the commercial aspects of intellectual property rights, since agreements in this field are not covered by paragraphs 1-4 of Article 133 EC. Paragraph 5 of Article 133 does tacitly recognize shared competence, although nothing explicitly states that this is a matter of shared competence, i.e., a matter for which the EC and its Member States are jointly competent –and therefore, in this sense, one would wonder whether there is a duty to cooperate between the EC and its Member States, as referred to by the ECJ’s Opinion 1/94.

What appears to be a requirement, though, in the exercise of their concurrent powers is the fact that EU Member States must comply with EC law. This means that beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property insofar as they are not covered by paragraph 5."

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242 Article 133 (5.4) EC reads:

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community
EU Member States must abstain from entering into agreements in matters where the EC has enacted intra-EC rules.243

Article 133 (6) EC, first subparagraph, claims that the EC alone may not conclude agreements if they include provisions which go beyond the EC’s internal powers.244 We are, therefore, dealing with mixed agreements, since the conclusion of these agreements would require the signature of the EC and its Member States. This clause was introduced to prevent the adoption of agreements that would go beyond the EC’s internal powers, in particular by leading to harmonization in areas where the Treaty expressly rules this out.245 The next subparagraph corroborates this fact by arguing that agreements relating to trade in cultural and audiovisual services, educational services and social and human health services, shall be concluded as mixed agreements by both the EC and its Member States.246

In such situations, the question of who is competent for what in relation to international agreements where the EC and its Member States have shared competence is unavoidable.247 Some authors go even further to say that shared competence “complicates the allocation of powers and responsibilities between the EC and the Member States and is thus bound to cause difficulties in international trade negotiations and for potentially necessary dispute settlement in the WTO.”248

The inclusion of this derogation took place at the insistence of the French government

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244 Article 133 (6.1) EC reads:

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

245 See Opinion 1/94 (WTO) [1994] ECR I-5267, on the EC’s competence in relation to trade in services and the commercial aspects of intellectual property rights, as well as the relation between external and internal competence with respect to the harmonization of legislation.

246 Article 133 (6.2) of the Nice Treaty.

mainly, worried that through globalization its national heritage and culture could disappear. Why was it so important to include this derogation, would one wonder? To avoid a situation where the EC, when exercising its external powers, could circumvent procedures which are internally prescribed and, therefore, extend illegitimately the powers conferred to it by the Treaty.

In relation to the various ways to exercise these powers, when negotiating and concluding an agreement on trade in services or on the commercial aspects of intellectual property rights, **unanimity** is required in the EU Council in the following three scenarios:

1) where such an agreement includes provisions for which unanimity is required for the adoption of internal rules (Article 133 (5.2) of the Nice Treaty). As a caveat, it must be said that unanimity appears to be required whether or not such an agreement requires amending internal EC rules. In the specific case of trade in services, only in few occasions does the adoption of internal EC rules require unanimity, namely, with respect to certain measures, only Articles 47 (2) EC\(^{249}\) and 57 (2) EC;\(^{250}\)

2) where the agreement relates to a field in which the EC has not yet exercised the powers conferred upon it by the EC Treaty for the adoption of internal


\(^{249}\) Article 47 (2) EC reads: For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.

\(^{250}\) Article 57 (2) EC reads: Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.
rules (Article 133 (5.2) of the Nice Treaty). Furthermore, the ECJ has determined in its Opinion 1/94 that the EC does not have exclusive competence to conclude international agreements in fields in which it has not acted internally. Here we see that the EC Treaty does not require unanimity in the EU Council for the adoption of internal rules in all of these fields; and

3) in the case of the negotiation and conclusion of the so-called horizontal agreements (Article 133 (5.3) of the Nice Treaty).

B. Some Reflections

Based on the scope and nature of the EC trade policy powers in Article 133 (5-7) EC, and the way in which these are exercised, it is clear that these powers are about the defense and promotion of the EC interests in the wider world. Rather than opting for shared competence between the EC and its Member States in services trade and the commercial aspects of intellectual property rights, the Nice Intergovernmental Conference (IGC) could have taken into account the consequences drawn from the important role of services trade in the EC’s economy, as well as the growing share of services trade in the EC’s external trade, and from the current trends in the WTO regarding services trade negotiations and rule-making. That way, it could have made the qualitative jump of treating services trade and the commercial aspects of intellectual property rights the same way as trade in goods, and thereby it would have included these matters within the scope of Article 133 EC as it had been anticipated.

Why is the case of services and the commercial aspects of intellectual property rights of concern? Because there could be potential situations where an EU Member State would not be able to solve individually a trade matter in the most advantageous way. Thus, the EC, collectively, is in a much better position to assist, since public
benefit should take place in the entire EU spectrum. Therefore, the Nice IGC has failed to give the EC the important position it needs in the world trading system by not treating services trade the same way as goods trade, and by focusing too much on internal matters of decision-making, creating thereby potential intra-EU fragmentation when searching an external common position. Yet, it is empirically true that requirements of unanimity or mixity within the EU do not necessarily lead by themselves to a reduced position of the EC in the international sphere.\(^{252}\)

It is in this sense that I believe the Nice IGC missed the opportunity of giving the EC a greater weight in all issues of international trade negotiations. Wanting to preserve national interests, thereby both requiring unanimity in the EU Council and having shared competences, may jeopardize the efficiency and effectiveness of the EC in the world trading system. Yet, it is true that efficiency and effectiveness are not the only values that count in the equation.

In addition, the Nice IGC granted the extension of EC trade policy powers in the field of services trade and the commercial aspects of intellectual property rights only to the conclusion of international agreements, but not to the implementation of such agreements.

As a rule, the EC external powers have been extended insofar as internal powers in the same field have already been conferred on the EC. Furthermore, the EU Council will be required to decide by unanimity when exercising the new external powers in two occasions: 1) when the fact of exercising the parallel internal powers requires unanimity in the EU Council, and 2) when the parallel internal powers have not yet been exercised.

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\(^{251}\) By *horizontal agreement* it is understood an agreement which deals with several fields.

\(^{252}\) See, for example, the Uruguay Round, where the EC had a leading role despite its internal decision-making rules.
C. Are the Nice Treaty and the Constitutional Treaty the Beginning of the End of Mixed Agreements/Shared Competence?

As we will see in this section, the evolution of the EC’s common commercial policy seems to empower more and more the EC in trade matters, diminishing thereby the ability of EU Member States to interact in the international trade arena with time. An example is the EU Constitutional Treaty, which will be analyzed later.

C.1. - A Note on Mixed Agreements

Mixed agreements are agreements where both the EC and its Member States are contracting parties, on the European side, to an international agreement with a third party. While it may be largely unknown to the general public, mixity (or mixed agreements) has become part of the daily life of the EC external relations. Mixity has also been a very complex topic for scholarly debate.253

Interestingly enough, mixed agreements, important as they are, were not foreseen in the Treaty of Rome. However, the concept does appear in the Treaty

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establishing the European Atomic Energy Community, and is incidentally inscribed in the Nice Treaty in Article 133 (6). As Granvik correctly asserts, “the very same article [Article 102 of the Treaty establishing the European Atomic Energy Community] has later been accepted [by EC law-makers] as a suitable model for the EC.”

In this same line of thought, Macleod et al. point out that there is no doubt about the existence and legal validity of the concept of "mixed agreement". Proof of this is Article 102 of the Euratom Treaty, where “a form of mixed agreement is recognized and which [Art 102] makes explicit provisions for treaties which are to be concluded by the Community and one or more Member States.” It is, nevertheless, unfortunate that the Constitutional Treaty did not take into account the express recognition of mixed agreements in the legal text.

The legal phenomenon of mixed agreements poses various complex issues, such as the fact that these agreements must be ratified by all the EU national parliaments of the countries which are contracting parties to that given mixed agreement. Consequently, this creates uncertainty as to the liability of the EC and its Member States to third parties, as well as the limits of the ECJ’s competence to interpret such agreements. In addition to what has been said above, there are various important clarifications to be mentioned in this subtitle in order to facilitate the understanding of the issue. Here are some of them:

254 It is precisely in Article 102, which reads: “Agreements or contracts concluded with a third State…to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws”.


256 Article 102 Euratom reads:

Agreements or contracts concluded with a third State, an international organisation or a national of a third State to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws.
1. Since the early 1960s, the mixed procedure as a legal phenomenon has been used in a wide field of policy areas ranging from commercial policy to environmental policy, from cooperation to the management and conservation of the resources of the sea. The general trend towards the use of the mixed formula both in the multilateral and bilateral contexts seems to be continuing.

2. There should be no doubt about the general validity or actual practical significance of the mixed procedure since important EC and Member States’ policy areas of international relations are organized based on the mixed agreements technique. This, as a matter of principle, is not contested on any legal grounds any more.

3. The European Court of Justice has recognized in its Ruling 1/78, Opinion 1/78, Opinion 2/91 and Opinion 1/94 (Re WTO Agreement) inter alia that some agreements require the participation of both the Community and the Member States. From here one can deduce that not all Community competence is exclusive. Furthermore, in the everyday practice of the Community institutions we see that the concept of mixed agreement is a well-

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258 Almost all the EC’s association agreements under article 310 EC have been concluded as mixed agreements, being the only exceptions the agreements with Cyprus and Malta. See OJ L 133 [1973] p.2 (Republic of Cyprus) and OJ L 61 [1971] p. 2 (Malta).
262 See Opinion 2/91 [1993] E.C.R. I-1061, para. 5 on the ILO Convention No. 170 on Safety in the Use of Chemicals at Work, which is only open to Members of the ILO (Art. 21).
established part of EC law.\textsuperscript{263} An example of this is Case 12/86, \textit{Demirel v. Stadt Schwaebisch Gmuend},\textsuperscript{264} in which the European Court of Justice used the term "mixed agreement" to describe the Association Agreement between the Community and the Member States on the one hand and Turkey on the other.

4. It is a fact of life that mixed agreements raise difficult and interesting legal and political issues about the role of the Communities and the Member States in the international arena. Despite the legal uncertainties, in practice the Community and the Member States participate together effectively in various international agreements.\textsuperscript{265} It is precisely in the field of international treaty law that mixed agreements show the changes that international law has undergone through the establishment of entities such as the EC.\textsuperscript{266}

5. In this same line of thought, Allan Rosas argues that:

\begin{quote}
“the European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organization, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements\textsuperscript{267} [...] offers a telling illustration of the complex nature of the EU and the Communities as an international actor”.\textsuperscript{268}
\end{quote}

We speak of complex nature since the circumstance which has to occur is to have an agreement which is a Community and a national agreement at the

\begin{footnotes}
\item[264] 1987 E.C.R. 3719 at 3751, paragraph 8.
\end{footnotes}
same time. This means that Europe has 25 voices (one for each Member State) plus one more voice coming from any of the European Communities.

6. The phenomenon of mixed agreements is, therefore, not only deeply interrelated to EC law and its division of powers doctrine but it is also interrelated to public international law. As for the division of powers, McGoldrick points out that “each international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and the Member States, and the nature of that competence.”

This allocation of competence can evolve over the lifetime of an agreement [this is so even during the drafting of an agreement, being an example of it Case C-24/95, Commission v UK (FAO Fisheries Agreement)] or series of agreements. This has been the case with the GATT. According to public international law, the rights and obligations which derive from an agreement form an undivided entity. This, however, does not necessarily mean that the EC and its Member States cannot respect the internal division of competence according to EC law.

C.2.- A Note on Shared competence

Shared competence between the EC and its Member States implies the fragmentation of unity in the international representation of the European Community and translates

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into less power for the EC in the international arena. On the other hand, EC exclusive competence facilitates international negotiations, since the European Commission is the only competent actor in any given matter. Experience has shown that mixed agreements can and do cause delays, which can actually worsen negotiating situations.\textsuperscript{273} However, at present the implementation and conclusion of mixed trade agreements is done at the national level. Therefore, a system in which both the EC and its Member States are involved seems to be an optimal situation in terms of efficiency.

Trade is one of the areas where EU Member States have politically agreed to delegate representation. However, EU Member States have started to question the transfer of sovereignty\textsuperscript{274} to the EC level, especially on issues such as services, investment\textsuperscript{275} and intellectual property rights. The famous Opinion 1/94\textsuperscript{276} of the ECJ clearly acknowledged that the EC and the EU Member States actually share competence in these areas. A few years later, the Amsterdam Treaty\textsuperscript{277} reinforced restrictions to transfers of sovereignty to the EC level in the area of trade by allowing

\textsuperscript{273} Information gathered from an interview in June 2001 with Richard Wyatt, First Minister of the Delegation of the European Commission to the UN.

\textsuperscript{274} Sovereignty is one of the most used and misused concepts of international affairs and international law. Sometimes, it refers to the role of states in international organizations. Other times, it refers to internal division of power, or the degree of government authority toward its citizens. Richard N. Haass has defined sovereignty in the following manner: "Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components – internal authority, border control, policy autonomy, and non-intervention – is being challenged in unprecedented ways." (See, in this respect, Haass's remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, entitled: "Sovereignty: Existing Rights, Evolving Responsibilities," on January 14, 2003). Most of the time, though, sovereignty actually refers to questions about the allocation of power, i.e., government decision-making power.

\textsuperscript{275} By foreign direct investment, it is understood the transfer of foreign funds into a country to purchase a service or manufacturing business or to open a new factory or service company.

\textsuperscript{276} [1994] ECR I-5267.

\textsuperscript{277} The Treaty of Amsterdam is the result of the Intergovernmental Conference launched at the Turin European Council on 29 March 1996. It was adopted at the Amsterdam European Council on 16 and 17 June 1997 and signed on 2 October 1997 by the Foreign Ministers of the then fifteen EU Member States. It entered into force on 1 May 1999 (the first day of the second month following ratification by the last Member State) after ratification by all the Member States in accordance with their respective constitutional requirements.
EU Member States to decide what competence to delegate on a case-by-case basis at the end of a negotiation.

With the new balance between Brussels and national institutions and, to some extent, between national institutions and regional and local authorities, some kind of rebellion has started in Europe. As Meny rightly points out, “any attribution of powers is arbitrary and therefore political; in fact, even if some criteria of efficiency and rationality are taken into account, it is mainly on the basis of political criteria that powers are distributed among the various decision-making […] levels.” Even if there are expectations for the elimination of overlap in competences between the EC and its Member States, one should not forget that economic and social reality is so complex that the hope of reaching a clear separation of powers is an illusion. It is therefore important to establish the methods and instruments for exercise of those competences.

Competences in the EC are joint because Member States prefer not to allow Community competence and, instead, preserve their national competence. This approach, which became apparent in the Court’s Opinion 2/91 on the ILO, weakens the constitutional position of the Community in the field of external relations. On the other hand, shared competence increases the leverage of the most protectionist EU countries. Shared competence also would imply a strong voice if the polyphonic “choir” (all the EU Member States and the Commission) sings. This will give the choir strength and independence.

In mixed agreements, if there is more than one negotiator other than the European Commission, then the EC’s negotiating position is being weakened, though

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278 Brussels is used to refer to the EU supranational apparatus of decision-making, where many of the EU institutions reside.
280 Id.
not necessarily that of the Member States. This is because as long as the external
competence has not become exclusively EC competence, Member States, even acting
collectively, remain free to enter into multilateral treaty relations. The tensions
created by the mixture of competences between the EC and its Member States are
seen as an obstacle to the achievement of Community interests as a whole, and are a
problem for Europe’s trade partners. Even though Article 133 EC gives exclusive
competence in commercial policy to the EC, the treaty also limits this competence.

According to Jean Groux, for third States it is preferable to have a mixed
procedure because they are not familiar with dealing with the European Community,
the competences and responsibilities of which they know but imperfectly. For
example, in the case of a third party like the U.S., if it has complete information about
the Member States’ position, then it is easier to accept that the EC act with a single
voice. In this sense, there are, at least, three variables to take into consideration:

1) secrecy;

2) physical difficulty for a third party to obtain information; and

3) institutional processes.

In the case of the first variable, this would mean that having a single
representation of the EC in international agreements obscures information about the
Member States’ actual position. Therefore, there is less transparency and,
consequently, it might be more difficult to reach an agreement. With regard to the
second variable, it is very much linked to the first one in the sense that having a single

283 Information gathered from an interview with John Richardson in June 2001, Head of the Delegation
of the European Commission to the UN.
284 Even if de iure this is a plausible situation, de facto it has never happened.
287 The term ‘transparency’ is often used in a broad sense to mean openness in the way the Member
States’ and EU institutions work. The EU institutions are committed to greater openness. They are
taking steps to improve public access to information, and they are working to produce clearer and more
voice in the EC makes it harder to negotiate for a third party, since there is less transparency. As for institutional processes, it refers to the fact that sometimes exclusive EC competence involves various Directorates-General of the European Commission.

However, what has been the attitude of third States when the European Community has entirely taken over the responsibilities of the Member States in certain areas? It is only in the last case that third States overtly put pressure on the Community to use the mixed negotiation technique. Here one may cite the example of the negotiations begun in 1975 between the EEC and the Council for Mutual Economic Assistance (CMEA, or commonly known as Comecon)\(^{288}\) with a view to normalizing the relations of the Community with the East European countries. These countries, which were in fact somewhat reluctant to envisage an official recognition of the Community, had much difficulty in accepting the decision of the Council of the Communities that the negotiations would be conducted by the Commission alone, and they tried in vain to ensure the participation also of the Member States.\(^{289}\) As a matter of fact, the EC was not recognized as an international organization by Comecon until 1988.\(^{290}\) This position adopted by Comecon was rectified shortly before Comecon was dissolved.

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readable documents. This includes better drafting of laws and, ultimately, a single, simplified EU Treaty.

\(^{288}\) Comecon was an economic organization from 1949 to 1991, linking the USSR with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, East Germany (1950–1990), Mongolia (from 1962), Cuba (from 1972), and Vietnam (from 1978), with Yugoslavia as an associated member. Albania also belonged between 1949 and 1961. Its establishment was prompted by the Marshall Plan. Comecon was formally disbanded in June 1991. It was agreed in 1987 that official relations should be established with the European Community, and a free-market approach to trading was adopted in 1990. In January 1991 it was agreed that Comecon should be effectively disbanded. See [http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0006083.html](http://www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0006083.html) (last visited June 30, 2005).


That said, and knowing that the presumption in the EC is to have collective action, is there really a “common” European interest? If so, is this interest so great as to assume that in certain circumstances Member States will act with a single voice? Do Members States have enough proximity in their national interests to act with one voice in the international sphere?

C.3.- Applying the Nice Treaty: Services Trade in the Doha Round from an EC Law Perspective

Given that the Constitutional Treaty has failed to be ratified, our current legal framework of analysis is the Nice Treaty. Article 133 (5) of the Nice Treaty gives the EC exclusive competence in all areas of services except for three areas: health, education, and audiovisual services –or cultural exception- (Article 133.6.2 EC). If these three exceptions are the basis of any international trade agreement, the EU Council shall decide unanimously when it comes to the negotiation and conclusion of such agreements (Article 133.5.3 EC). In addition, Article 133(4) EC requires that decisions be made by qualified majority in the EU Council (“[I]n exercising the powers conferred upon it by this Article [133], the Council shall act by a qualified majority”), which means that no EU Member State would be able to use their veto power in the EU Council. In connection with the Doha negotiations on international trade, the exception to this rule would take place if the DDA would include, as part of the Doha package, the three services trade exceptions which appear in Article 133.6.2 EC (health, education and culture), in which case unanimity would apply and EU

291 Article 133 (6.2) EC reads:

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the
Member States would be in a legal position to make use of their veto power in the EU Council in relation to the conclusion of the Doha Round.

The DDA series of negotiations can take two distinct forms of agreements:

1. as a single undertaking, or

2. as a series of individual agreements, organized by subject-matter (the so-called variable geometry).

In view of the current state of EC law, one could assume that some results of the Doha Round would be concluded by the EC alone, and other results by the EC and its Member States together. However, since the Doha Round, as was the case of the Uruguay Round, will most likely be signed as a package, and certain services (namely health, education and culture) are still shared competence in EC law after the Nice Treaty reform, this will make that the Doha Round, as an international trade agreement, be signed as a mixed agreement, which means that it will be signed by both the EC and its Member States.

For the specific case of services trade in the Doha Round, another possibility would be to sign the Doha agreement as a pure EC agreement. How it would be signed (whether as a pure EC agreement or mixed agreement), depends very much on the type of analytical application and interpretation of the Nice Treaty with respect to trade in services, as well as on whether there will be a separate GATS revision (which would include the three services trade exceptions mentioned in Article 133.6.2 EC, namely health, education, and culture) or just one global WTO Trade Agreement. This poses the following question: will there be new commitments in the Doha Round for the EC in sensitive issues such as culture, education, and health?

If that is the case, the question that follows is: will the Doha Round be signed by the EC and its Member States as a mixed agreement in light of the changes

negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States.
introduced by the Nice Treaty to the common commercial policy? Unless we *include* the three exceptions in services trade referred to in Article 133.6.2 EC, the DDA will *not* need to be a mixed agreement, but a pure Community agreement, because there won’t be a need for a mandate from EU Member States, and because the EC will therefore have exclusive competence based on the changes made to Article 133 EC by the Nice Treaty. This will have implications for EU national parliaments in that they will not ratify trade agreements (such as the DDA), but the Council will. What if the Doha Round is not signed as a mixed agreement? And what repercussions will this have for national parliaments (and the legitimacy of trade agreements)? The short answer is that these agreements would not be ratified by national parliaments since it would remain only a matter of supranational nature. Serious questions of (lack of) legitimacy might come out as a result of this *praxis*.

Not everyone, however, has the same conception of the legal consequences of the DDA for EU Member States in the case of the exclusion of the three exceptions of Article 133 (6.2) EC from the Doha agenda. Mr Plaza argues that all EU Member States –with no exception- would need to vote and decide by unanimity in the EU Council when it comes to such delicate issues at the national level as health, education, and audiovisual services. The same is true for the so-called mode 4, which affects national immigration policies. Mode 4 also requires unanimity in the EU Council. Therefore, in his opinion, it is not viable to talk about exclusive competence in trade in services in the Nice Treaty. Certain issues of trade in services cannot be negotiated by the Commission without consulting EU Member States, he argues.292 In fact, it is not possible to talk about trade in services without penetrating in the national regulatory system. So, for this reason, it is not possible to avoid EU Member States from the ratification process of the Doha Agreement. Given the different immigration

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292 Interview with Mr Plaza, Spanish trade diplomat dealing with international services trade, on March 15, 2006.
policies among EU countries for historic reasons – Spain would certainly give a different treatment to Latin American countries than it would to Egypt or Ukraine- it is, in his view, unimaginable to have today an EU common immigration policy.\textsuperscript{293}

Furthermore, the regulation and progressive liberalization of services implies, in Mr Plaza’s view, that the legislator must go well beyond market regulation and the national-treatment principle. Examples are the services directives in the EU which, by law, leave room for manoeuvre to EU Member States, since they affect the national regulatory system. Even if the subject-matter of these directives is international trade, we are dealing with domestic regulation. The only mode where, in Mr Plaza’s opinion, the Commission might avoid EU Member States would be in mode 1, but even in that mode EU Member States still have much to say when it comes to tariffs \textit{et cetera}.\textsuperscript{294}

On the other hand, if the three services trade exceptions presented in Article 133 (6.2) EC are \textit{included} in the DDA package, then the unanimity/veto power of EU Member States in the Council applies. So what impact will this have on the outcome of the Doha Round as a whole? This was the tactic used by France during the pre-Hong Kong negotiations in relation to agriculture. The French government wanted to use its veto power to protect its agricultural policy in the world trading system -even if agricultural policy is exclusive EC competence- by arguing that if the DDA is to be conceived as a single undertaking, the inclusion of the three services trade exceptions in the final package of the DDA would enable France to activate its veto power by virtue of having shared competence with the EC in the matter, and therefore be in a position to reject the DDA as a single undertaking for being in disagreement over agriculture with the rest of the world trade community. In other words, France’s veto power in the services trade exceptions would be used politically to protect its

\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
agriculture in the context of a single undertaking conception of the DDA, and reject the whole DDA because of its differences with other WTO members over agriculture.

How is the Doha Round reconciled with the fact that specific and nationally delicate issues such as culture, education, and health are EU Member States’ exclusive competence? In the past, EU Member States have shown their interest in maintaining their sovereignty. However, even if all EU Member States are contracting parties to the GATS, the Doha Round could potentially be concluded as a pure Community agreement and still be consistent with the legal procedures of the EC external relations practice. Why is this the case? Because since the Nice Treaty, services trade can be the object of a pure Community agreement with shared competence. 295 Certainly, there are interested opinions in this whole debate: the Commission wants to present the Doha agenda in the EU Council as a package to be signed by qualified majority vote (QMV). However, in Mr Plaza’s view, this will not be possible in services trade, not even under the EU Constitutional Treaty, which claims to give exclusive competence to the EU in all areas of the common commercial policy, 296 simply because EU Member States will not accept it. 297

The following diagram explains in a structured format what has been argued above:

<table>
<thead>
<tr>
<th>Type of WTO Agreement from an EC perspective</th>
<th>Voting Requirement in the EU Council</th>
<th>Conception of the DDA conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mixed agreement, if the inclusion of the three services trade exceptions</td>
<td>Unanimity/veto power</td>
<td>Single undertaking</td>
</tr>
</tbody>
</table>

295 See Article 133 (5) of the Nice Treaty.
296 Article I-13 of the EU Constitutional Treaty.
297 Interview with Mr Plaza, Spanish trade diplomat dealing with international services trade, on March 15, 2006.
My prediction is that the outcome of the Doha Round, as was also the case of the Uruguay Round, will be signed as a mixed agreement, even if, in the case of services trade, the substance and nature of the services negotiations in the Uruguay Round and the Doha Round are rather different: the Uruguay Round laid the ground rules for trade in services in the GATS, whereas the Doha Round has as a primordial aim to extend trade liberalization and to complement the ground rules for trade in services in the GATS. But what repercussions would the Doha Round have on the EU Member States if it were to be signed as a pure Community agreement with shared competence between the EC and its Member States in the case of services trade? Probably none. Therefore, the difference between signing the Doha Round as a pure EC agreement or as a mixed agreement is merely procedural in nature.

With respect to the practical consequences of mixed agreements, the current situation is: “[I]f an agreement (also or solely) concerns concessions relating to services, intellectual property or investments, the general rules of the [Nice] Treaty apply. Under those rules, agreements are concluded by qualified majority or unanimously depending on whether the Community's internal decisions in that area (services, intellectual property rights) are taken by qualified majority or unanimously.

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299 That said, some of the controversial issues of the Uruguay Round such as audiovisual services are still on the negotiating trade agenda. See, in this respect, de Witte, B. “Trade in Culture: International Legal Regimes and EU Constitutional Values,” in de Burca, G. & Scott, J. (eds.) The EU and the WTO. Legal and Constitutional Issues, Hart Publishing, 2001, pp. 237-255.
In addition, Member States often wish to exercise their residual powers in those fields in which no internal Community rules apply or do not yet apply. As a result, trade agreements concerning different fields very often have to be concluded unanimously, or even by the Community (Council decision) and by all the Member States as well. This entails ratification by national bodies (‘mixed’ agreements).  

One of the practical consequences of mixed agreements is that the Community's dealings with third countries have to be conducted on a unanimous basis. Statistically, enlargement will increase the risk of a Member State using its veto to prevent the Community from adopting a common position. This collective weakness may work to the advantage of the Community's trading partners.

A careful contextual reading of the term “consequently” in Article 133 (6.2) of the Nice Treaty could lead us to the conclusion that shared competence necessarily requires a mixed agreement. This, however, is inconsistent with the existing practice of the EC under other external relations headings. Thus, one should understand Article 133 (6.2) of the Nice Treaty as a lex specialis for the fields of culture and audiovisual services, education, and social and human health services. These fields fall within shared competence between the EC and its Member States and require mixed agreements as a matter of law for reasons of their particular national sensitivity.

C.4.- The Constitutional Treaty and International Services Trade

The EU Constitutional Treaty has given more competences in trade policy to the supranational level, which causes problems for national governments. In practice, the

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301 For a more in depth analysis of the specific issue of culture and audiovisual services, see Koutrakos,
problems arise because there is no definition or scope of the common commercial policy in the EU Constitutional Treaty. Therefore, if a given agreement is on a subject of national regulation, then it will have to be signed as a mixed agreement, even under the EU Constitutional Treaty.

When analyzing the EU Constitutional Treaty, we note that there are areas where the Union may take coordinating, complementary or supporting action, i.e., public health, culture or education. This seems to be in direct confrontation with the commitments of the Constitutional Treaty in international trade policy (Articles III-314 and 315).


See Article I-17 of the Constitutional Treaty, which reads:

The Union shall have competence to carry out supporting, coordinating or complementary action. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, youth, sport and vocational training;
(f) civil protection;
(g) administrative cooperation.

See also Article III-278 (1) of the Constitutional Treaty, which reads:

1. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.
Action by the Union, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover:
(a) the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education;
(b) monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drug-related health damage, including information and prevention.

303 Article III-314 of the Constitutional Treaty reads: By establishing a customs union in accordance with Article III-151, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.

304 Article III-315 of the Constitutional Treaty reads:

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. European laws shall establish the measures defining the framework for implementing the common commercial policy.
In trade policy, the distinction between qualified majority and unanimity in the Council remains in the Constitutional Treaty, depending on the area of trade policy. The voting requirements of decision-making in the EU Council appear in Article III-315 (4) of the Constitutional Treaty. The idea of the Convention was to provide for the use of qualified majority voting as a rule. However, the Convention

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article III-325 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Section 7 of Chapter III of Title III and to Article III-325.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes such harmonisation.

305 Article I-25 (1) of the Constitutional Treaty defines qualified majority:

1. A qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

306 Article III-315 (4) of the Constitutional Treaty reads:
For the negotiation and conclusion of agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.
version of Article III-315 did not specifically mention it. This was rectified by adding a subparagraph in Article III-315 (4): “for the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority.” This seems to suggest that only the negotiation and conclusion of international agreements shall be subject to the majority rule, but not the adoption of unilateral actions and the implementation of agreements. Nevertheless, majority voting is already in the Nice Treaty the general rule for the exercise of powers in the field of commercial policy. Thus, the proposed provision should be interpreted in such a way that majority voting applies as a general rule, subject to the exceptions provided for in subparagraphs 2 and 3 of Article III-315 (4). That said, a trade agreement which includes issues that require unanimity and qualified majority will be concluded by unanimous vote in the EU Council according to the pastis principle.

More competences have been given to the EU in trade matters with the EU Constitutional Treaty. So does the EU Constitutional Treaty provide protection against liberalization when national interests are at stake? When analyzing the EU Constitutional Treaty, it might be argued that the following Articles protect the rights of the Member States to determine policy on health, education, and cultural/audiovisual services: Articles I-17, III-278 on public health, III-280 on culture, III-282 on education, III-315-4 of the common commercial policy on cultural and audiovisual services, and III-315-5 of the common commercial policy on the delineation of the competences of Member States as against those of the EU.

307 Article 133 (4) EC: “in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.”
308 Pastis is an anise-flavored liqueur and aperitif from France, typically containing 40-45% alcohol by volume, although there exist alcohol-free varieties. Pastis is normally diluted with water before drinking (generally 5 volumes of water for 1 volume of pastis). The resulting decrease in alcohol percentage causes some of the constituents to become insoluble, which changes the liqueur’s appearance from dark transparent yellow to milky soft yellow.
309 According to Lamy, “…under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV [qualified majority vote] water,” argued in a speech given in Brussels, “The Convention and trade policy: concrete steps to enhance the EU’s international profile,” available at http://
However, these Articles offer little legal protection against the provisions of Article I-13-1(e), which gives the Union the exclusive right to determine the EU’s common commercial policy, and Article III-315-1 of the common commercial policy, which includes the right to make “trade agreements relating to trade in goods and services.”

This element of the common commercial policy allows the Commission, after a QMV in the Council of Ministers, to make deals in the GATS and the WTO Agreement on what the Commission itself defines as the commercial aspects of these services. The commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere. The implication of this is that an EU Member State would have to go to the European Court of Justice to challenge the Commission, arguing a defense that would have to show that the Commission was opening trade in non-commercial aspects of these services. This would be a very difficult legal argument to make, since many parts of these services can be broken into individual functions and contracted out. Examples of this can be seen in Ireland and the UK. In practice, the above-mentioned protection Articles are but a fig-leaf covering the overriding drive toward uniform liberalization of trade in services contained in the common commercial policy. If those who cite these Articles are serious about protecting health, education, and cultural/audiovisual services from commercialization, they should at least press for the retention of the unanimity requirement in the Council of Ministers on decisions to open trade in these services.

With regard to culture and audiovisual services, Article III-315-4(a) of the EU Constitutional Treaty gives a veto on changes in the common commercial policy only in the “conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union’s cultural and linguistic diversity.” How such risk is defined, when it is defined, and by whom it is defined, is

open to interpretation. Would a general opening up of the University sector, or of the primary school sector (as is happening in the UK), to unlimited competition pose a threat to cultural and linguistic diversity? For instance, in the case of Ireland, would the same levels of support to linguistically specific radio and TV –like TG4\textsuperscript{310} and projects it supports– also have to be given to private commercial channels like TV3\textsuperscript{311}? How would defenders of linguistic diversity establish, in advance -rather than when deals have been made and the damage is already done- that certain trade agreements pose risks to culture? Who decides what constitutes a risk is not defined in the EU Constitutional Treaty, so those who might see their culture as being at risk will not have veto powers. Certainly, EU Member States will continue to participate in the EU’s trade policy whenever there is a national regulation sector that the European Commission neither controls nor knows about when it comes to national preoccupations. In practice, the European Court of Justice will determine which services should be protected and which should be commercialized.

**VI. Epilogue and Recommendations**

Since the indefinite suspension of the multilateral trade talks, EU Member States should press for a wide-ranging EC approach to the Doha Round aimed at tackling the main barriers to trade in services. The EC should overcome the failure of Cancun and work on a framework for negotiations in order to secure a successful outcome of the Doha Round. The EC needs to adapt to the changes taking place in the world trading system and world trade negotiations. There remains considerable potential for further liberalization, even if the growth of South-South trade over the last decade has been

\textsuperscript{310} TG4 is an Irish television channel aimed at Irish language speakers and established as a wholly owned subsidiary by Radio Telefís Éireann on October 31, 1996. It was known as Teilifís na Gaeilge or TnaG before a rebranding campaign in 1999.

\textsuperscript{311} TV3 Ireland is the sole commercial terrestrial television channel in the Republic of Ireland.
quite remarkable; however, certain fields such as culture, education, health and public services remain a barrier to the current trend of services liberalization.

We need to find a more effective way of negotiating multilaterally. The WTO family has grown very much both in its number of members –at the start of the Uruguay Round, there were only 86 members– and in its agenda in the last years, which means that the legal, economic, and political needs and interests of the various WTO members might differ drastically. Thus variable geometry seems to me a plausible way to move the multilateral trade agenda forward. The same is true for the EU, i.e., the so-called enhanced cooperation. This approach has the advantage of releasing the current frustration at the WTO negotiating table –and sometimes violent protests organized by civil society– because of its slow negotiating pace. However, one possible disadvantage might be that developing countries might feel marginalized at the WTO.