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**URUGUAY ROUND ISSUES: ELEMENTS OF A MULTILATERAL FRAMEWORK
FOR TRADE IN SERVICES **/**

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ELEMENTS OF A MULTILATERAL FRAMEWORK FOR TRADE IN SERVICES:

Background technical brief prepared by the project

Introduction

1. The brief addresses and comments upon various elements which have been proposed during the negotiations in the Uruguay Round Group of Negotiations on Services, for inclusion in the multilateral framework envisaged in Part II of the Declaration on the Uruguay Round. It is accompanied by annexes examining (i) the course of the negotiations, (ii) broad concepts and international instruments relevant to the negotiations, and (iii) models which contain some elements for a multilateral framework on trade in services. This brief will be revised, extended and updated during the course of the negotiations.

Determinant factors

2. The determinants of the developing countries position in the negotiations on trade on services under Part II of the Uruguay Round Declaration would emerge from the combination of the following elements.¹

(a) The TNCs based in developed market economy countries are, through their domination of new technologies and possession of human and financial capital and international information networks capable of supplying services on a global scale. Within the economies of developed countries, services, particularly "knowledge-based" producer services have come to provide a means of transmitting specialized knowledge into the productive process and a new source of dynamism and improved employment opportunities, and supportive of manufacturing and other sectors. They contribute both to improving competitiveness in exports of goods and as a source of value added.²

(b) This dynamism has not been apparent in the service sectors of developing countries as, due to inadequately developed human capital and infrastructures they are required to import an ever increasing amount of services, especially knowledge and capital intensive services, which in many cases exacerbate balance of payments disequilibria and debt servicing burdens. Exports of services by developing countries generally involve persons crossing international frontiers, e.g. tourism, or services provided by their nationals abroad. Often their ability to retain value added from such exports is hindered by lack of capital and information.³

(c) In order to strengthen their service sectors and develop a capacity to penetrate foreign markets, developing countries require a transfer of technology in the services sector, improved infrastructures, access to information, participation in or access to information networks, more liberal conditions for the export of services by means

¹ Developments in the Group of Negotiations on Services (GNS) have been described in Annex I.

² See "Note on Relationships Among the New Issues" below.

of the movement of persons to foreign countries, means of entering markets already dominated by developed country firms and the cooperation of developed countries in importing services from developing countries.

(d) Services are of strategic importance in the economic, social and cultural development of developing countries as well as in their national independence and national security.

(e) Certain developed countries maintain and implement trade legislation requiring their trade authorities to take retaliatory action against "unfair", "discriminatory" or "unreasonable", "barriers" facing their "trade" in services, with all these terms being defined unilaterally. For example, "barriers" to trade in services can be unilaterally interpreted to include measures affecting investment or transborder data flows. United States trade legislation (Trade and Tariff Act of 1984) aims at achieving the removal of such unilaterally determined barriers, either through negotiation or threat of retaliation, (confirmed and extended in the Omnibus Trade and Competitiveness Act of 1988). In the interest of developing countries a multilateral framework should confirm the legitimacy of their policies and measures aimed at increasing the contribution of services to their development process, so as to shield them against such bilateral pressures.

Negotiating Issues

3. The Ministerial Declaration on the Uruguay Round provides, in its Part II, for the negotiating objectives in the area of trade in services as follows:

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

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

4. Given the above, it would seem that the main objectives of a multilateral framework for trade in services could be taken as being:

- (i) the identification of general criteria which could be elaborated upon in the specific context of the sectoral agreements;
- (ii) the assurance of balance among these criteria; and
- (iii) the legitimization of certain principles, policies and measures so as to preclude unilateral interpretations.

More particularly, the framework would need to ensure that the interests of all countries, particularly weaker trading partners, would be preserved in sectoral negotiations, and the objective of economic growth and the development of developing countries furthered. It would also need to have binding obligations to result in wide adherence as well as trade effect. However, only principles or obligations which would be relevant to a broad range of sectors would seem to be relevant

involve exploring how the fundamental objectives of the framework as laid out in the Uruguay Declaration, could be elaborated upon to give them a more precise and binding character which, at the same time, could be generally applicable to all service sectors.

5. The following paragraphs briefly examine the main elements proposed for inclusion in the multilateral framework for trade in services and comment on their implications for developing countries.

Definitions

6. One of the key issues facing the GNS is the question of the definition of trade in services. Developed countries have tended to take the position that a definition of trade in services may not be necessary (they argue that no definition of trade in goods existed when GATT was negotiated) or that a definition could be worked out in parallel to the negotiation of a framework drawing from the selection of sectors. For developing countries, however, such definition would seem a matter of importance, not only to clearly establish the parameters of the negotiations and to thus prevent modifications in the mandate at later stage, such as in subsequent sectoral negotiations, but also to limit the possibility of powerful countries applying coercive measures based on their own unilateral and subjective definitions, particularly as to what constitute "barriers" to trade in services.⁴

7. While it may not be possible to arrive at a generic definition of trade in services, it should be possible to have an indicative illustrative definition which could at least clarify what was not "trade" in services. Such a definition might stress that "trade" in services could be transmitted by certain modes, i.e., persons, capital, information or goods, but it would be essential to differentiate trade from immigration and investment (which is one of the major reasons why a definition is necessary in services, while less important for trade in goods).⁵ Possible criteria could include (a) that the cross-border movement should be for the specific purpose of providing or receiving a specific service and, (b) that it be, in principle, of a temporary nature, (i.e. that necessary to provide or receive the service). This concept of providing or receiving a specific service could be included in the multilateral framework, and elaborated upon in detail in the context of the sectoral negotiations; that of temporality could be set in the legal sense, e.g. through the periodic issuance of permits or licences. These concepts are to a certain extent already applied to trade in services effected through the cross-border movement of goods in the context of origin rules for special tariff items or preferential regimes (i.e. to differentiate products repaired or processed abroad from imports of goods). They could be applied to persons and capital as suggested above.

Statistics

8. A second question is whether negotiations can take place without the existence of adequate statistics which would at least sufficiently disaggregate trade in the most important sectors and enable countries to identify their trading partners. Statistics on services in the balance of payments are generally considered to be very rough and inadequate, due to such factors as (a) different methods of classification and reporting as between countries, (b) general lack of disaggregation, and (c) inability to identify sources and destinations.

9. Developed countries have recognized the inadequacies of internationally comparable data, but consider that the negotiations cannot await major improvements which would inevitably involve many years of work at national and international levels. At the same time, they have launched major programmes aimed at improving their own statistical methodologies for trade and production in services.⁶ The developing countries consider that statistical data on trade in services is

⁴ See paragraph 16 of Annex I.

⁵ These concepts were described in TD/B/1162, TDR 8 Part II and in UNCTAD/MTN/CB/RLA/CB.4. In a more recent publication, G. Feketukety used the term 'money' instead of 'capital', G. Feketukety, *International Trade in Services - An Overview and Blueprint for Negotiations*, Ballinger, Cambridge, Mass., USA, 1988.

of great importance for the successful conduct of negotiations, and in order to quantify the effects of rights and obligations under the future framework agreement. The negotiation of the multilateral framework cannot perhaps await the establishment of a new statistical system. However, mechanisms should be established as soon as possible for developing countries to have access to the most advanced methodologies of developed countries and technical assistance to help them in improving their statistical methods. On the other hand, an improved detailed sectoral data base would appear essential for launching negotiations aimed at establishing detailed sectoral arrangements.

Multilateral framework

10. A major issue in the negotiations to date is the relation between the multilateral framework for trade in services and the negotiation of sectoral disciplines. Some countries have favoured the negotiation of the framework as a prerequisite to sectoral negotiations while others have considered that the framework and the sectoral negotiations could take place in parallel. Developing countries might see merit in the former approach as the prior negotiation of a framework which clearly reflected their rights and interests would enable them to diffuse coercive approaches and strengthen their position in the subsequent sectoral negotiations, where these negotiating delegations might be less numerous and less influential and, thus, would require a clear frame of reference to protect their interests. Such a framework would be of particular importance if elements of the "appropriate regulation" approach proposed by certain developed countries were to be adopted as a negotiating technique.⁷

11. Another question has been the nature of the principles or disciplines of the multilateral "umbrella" framework i.e., would it provide an enforceable mechanism for governing countries' "service trade policies" or would it simply provide a set of guidelines for the negotiation of more detailed sectoral disciplines. The presentations with respect to ITU, UN Code of Conduct on Liner Conferences and ICAO to the GNS, have in themselves demonstrated the heterogeneity and complexity of sectoral arrangements, and the difficulty in applying a general set of GATT-type guidelines to specific service sectors. The purpose of the framework should thus be to provide a set of principles and rules for the negotiation of sectoral agreements to ensure that the main aims and objectives of Part II of the Uruguay Round Declaration were faithfully applied in sectoral negotiations. The multilateral framework should also serve to establish the legitimacy of development-oriented measures in the service sector, to protect developing countries against unilateral interpretations and coercive approaches.

Progressive liberalization

12. A fourth issue is that of how to provide for liberalization and effective access to markets. Developed countries have made a variety of differing proposals in this respect, but the essential elements have been investment-oriented i.e., (a) the need for a "presence" in the market necessary to effectively provide the service, (b) "national treatment" for foreign firms so established, and (c) unrestricted transborder data flows. GATT terminology has been heavily resorted to, but often out of context. Proposals by developed countries have elaborated in some detail on these concepts, in particular they have included the concepts of "access to markets" through "presence" or "establishment", "national treatment" and "transparency".⁸

⁷ See paragraphs 6 and 7 of Annex I

The GATT Model

13. GATT can provide guidance with respect to certain principles that could be applied in the progressive liberalization of trade in services. One is that of transparency, through the publication of trade laws and regulations, although in the case of services this would call for an agreement on the definitional aspects so that government would understand which laws and regulations they would be obliged to publish. A second important GATT principle is that of agreement to enter into multilateral negotiations aimed at progressive liberalization.

14. Liberalization under GATT has been achieved through:

(a) recognizing the legitimacy of certain protective measures (i.e. the customs tariff), which are reduced on the basis of mutual benefit, reciprocity and extension of concessions under the unconditional most-favoured-nation clause of GATT Article I,

(b) recognizing that the integrity of tariff concessions could be frustrated by the use of other measures, whose application has been restricted through ever-increasing common disciplines to enforce the prohibition of QRs, the application of national treatment etc.

15. The GATT thus establishes acceptable and thus negotiable forms of protection. The GATT recognizes that protection through the customs tariff is legitimate but that quantitative measures are in principle prohibited, permitted only in exceptional cases and thus not negotiable. Similarly, the "national treatment" obligation (Article III) is intended to prevent "cheating" through resort to internal discriminatory measures. This differs radically from the "national treatment" as applied to enterprises, which has been accepted in an OECD instrument.⁹

16. With respect to services, it is generally difficult to envisage the application of frontier price measures comparable to the custom tariff, access to the market requires the cross border movement of persons, capital, goods and information, and regulations dealing with trade in services would have to address such movements.

17. It should be noted that the establishment or presence in the market, combined with national treatment (and the unrestricted flow of data) would in effect imply the total removal of protection, something that has never been achieved for goods. Developed countries have attributed priority importance to the inclusion of the "national treatment" principle in the multilateral framework, although some have seen it as an "operative provision", others have considered it as a "yardstick".¹⁰ The basic difficulty of developing countries in even considering the national treatment provision is that in the context of services, it is presented as an obligation or concession in itself, not linked to frontier measures and thus an unreasonable intrusion on their "national economic space". Entry into serious negotiations for access to markets may turn out to be dependant upon prior agreement on (a) which measures affecting trade in services would be permitted *per se* to be negotiated through the exchange of concessions (comparable to tariff rates in GATT); and (b) which measures would be dealt with through action aimed at progressive uniformity with generally accepted criteria. Possible scenarios for negotiations involving national treatment and market presence could include (i) that, for the sectors concerned, both "presence" and "national treatment" would be negotiable, (ii) "presence" would be recognized as a right with "national treatment" negotiable, (iii) or "national treatment" recognized as a right and "presence" negotiated. The third scenario is closer to the OECD approach, but the first may be more in the interests of developing countries which may wish the presence of foreign firms, but only to the extent necessary to carry out a limited number of specific activities.

18. It has been suggested that negotiations could be based on the concept of "appropriate" regulation. It would be recognized that the regulations on services were necessary to achieve national objectives, but that they might contain elements which served to impede access for foreign suppliers although not being essential for the attainment of the desired objective of the regulation. These latter elements would be subject to a procedure of identification, negotiation and elimination. The "appropriate regulation" approach would appear to be in the interests of developing countries to the extent that the criteria against which "appropriateness" is judged would be drawn from a

⁹ See Annex II.

multilateral framework which adequately protects the interests and recognises the rights of the developing countries, and so long as it did not imply opening up all their service regulations to scrutiny but only those with respect to which they had entered into international agreements. It might prove to be somewhat impractical to negotiate solely on the basis of "appropriateness", the GATT model would suggest that there would have to be room for negotiations on the basis of reciprocity without depending entirely on value judgements or generally accepted criteria. The approach of the Standards Code, in which adherents agree to adopt a common set of rules (based on harmonized international standards) while maintaining protection through other, legitimate means, and that of the Code on Government Procurement, in which adherents accept common rules, but negotiate concessions with respect to the coverage of such rules, would both seem to illustrate some of the elements to be considered in negotiating a multilateral framework for trade in services.

19. The application by certain countries of GATT concessions through the differentiation between "autonomous" and "concessional" tariffs may also be instructive for service negotiators. For example, some countries maintain their legal tariffs on the books, but apply "concessional" tariff rates to those countries with whom they have negotiated such rates on a reciprocal basis, or which are entitled to them under the unconditional most-favoured-nation clause of GATT Article I or other arrangements. The legal rates are not changed and if concessions are withdrawn for any reason, the legal rates enter into effect. Such an approach could enable countries to implement concessions on services without fundamentally changing basic laws dealing with immigration or investment. This approach *inter alia*, enables governments to pursue their national objectives, and would modify the relevant laws and regulations only to the extent necessary to conform to the conditions of specific multilateral sectoral agreements in which they would participate.

Most-Favoured-Nation Treatment

20. The fundamental, cornerstone principle of GATT is the unconditional most favoured nation clause (Article I) under which any concession extended to one country has to be extended unconditionally to all other GATT contracting parties.¹¹ This clause was generally respected in GATT negotiations up until the Tokyo Round, when some countries applied certain of the Codes on non tariff measures negotiated during that Round (including that on Government Procurement mentioned above) only to the signatories of the Codes, or those accepting special undertakings. Their argument for resort to this "conditional mfn" application was that those countries which had mutually agreed to accept higher levels of obligation should not be required to extend the same treatment to countries which were unwilling to do so. This argument has been repeated in the GNS.

21. Apart from its inconsistency with GATT, (which is not in itself an argument against applying the conditional approach in services) the main disadvantage of the conditional approach is not only the discriminatory nature of the application of the results of the negotiations, but also the fact that if it is decided, right from the beginning, that the negotiations are to be conducted according to the conditional principle,¹² there is no need to take account of the needs of smaller, poorer, less "interesting" countries, and thus the multilateral negotiations would inevitably degenerate into limited arrangements among "like minded" countries. This would seem detrimental to the interests of the majority of developing countries and inconsistent with the concept of "multilateral framework" as provided in Part II of the Uruguay Round Declaration.

Differential and more favourable treatment

22. Since the negotiation of the "Enabling Clause" during the Tokyo Round, GATT has recognized the legitimacy of differential and more favourable treatment in favour of developing countries, which also includes principles previously contained in Part IV of GATT negotiated in the

¹¹ See paragraph 33 of Annex II.

early 1960's, (e.g. non-reciprocity). The GATT approach to development has involved dealing with the trade and development needs and problems of developing countries by permitting exceptions to the generally applicable rules, either by the developing countries themselves, or by the developed countries in favour of developing countries' trade. It is simply assumed that the application of GATT will result in the development of the developing countries and the consequent phasing out of such differential treatment. This has provided the seed for "graduation" arguments which are now being used against developing countries for protective and negotiating purposes. As Part II of the Uruguay Round Declaration recognises the development of developing countries as a principal aim of the multilateral framework, such framework should specifically provide for positive measures to promote development, and exclude any measures inhibiting development. Thus differential and more favourable treatment in the GATT sense should not be applied in the multilateral framework for trade in services; rather the development objective should be an inherent component of the overall structure of the rules and principles contained in the multilateral framework and in any sectoral arrangements. Most developing countries have adopted this position in the GNS.¹³

Reciprocity

23. GATT negotiations are to be conducted on the basis of reciprocity and mutual advantage.¹⁴ According to Part IV, developed countries should not seek reciprocal concessions from developing countries which are inconsistent with their trade, development and financial needs. The major discrepancy between developing and developed countries' GATT obligations i.e. differences in the level of tariff binding, however, arises not from the application of this "non-reciprocity principle", but from the difficulties of incorporating countries with narrow export product interests into the multilateral tariff negotiating mechanism.

24. "Relative reciprocity" has been maintained as a possible principle for the negotiations on trade in services,¹⁵ however, the basic methods for calculating reciprocity: trade coverage of improved access and degree of adherence to common criteria could only be worked out in the sectoral negotiations.

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

26. The main problem would be to provide meaningful reciprocity to developing countries, as comparable liberalization by developed countries would not provide them with reciprocal benefits as they would lack the means of delivering their services to developed country markets. Moreover, application of reciprocity in the liberalization process would be disadvantageous in the negotiations for the developing countries, as they are still in the process of framing regulations for their services sector. Reciprocity would, therefore, give a premium to the developed countries with highly regulated services sector, as they would have more with which to bargain.

27. Reciprocity could only be obtained by developing countries if (a) they could make access to their markets conditional on contributions by the foreign supplier to their improved competitiveness, (b) the selection of sectors was such as to give priority to those where they have stronger competitive positions, (c) that they would be able to have access for labour and to information and (d) that developed countries would cooperate in seeking mutually beneficial arrangements aimed at expanding the service exports of developing countries.

¹³ See paragraph 16 of Annex I.

¹⁴ See articles XXVIII, XXVIII (bis) and XXXVI of GATT.

Balance of payments/safeguards

28. Under GATT both developed and developing countries are entitled to exceptions from their general obligations when they encounter serious disequilibria in their balance of payments under Articles XII and XVIII :B respectively (the latter cannot be considered as "differential" treatment). Given the importance of services in the balance of payments of most countries, comparable provisions would have to be included in any multilateral framework for trade in services. Trade in services is already a major deficit item in the balance of payments of many developing countries, including heavily indebted countries.¹⁶ However, while there would likely be a need for a general safeguard clause (i.e. comparable to GATT Articles XIX), its specific character could only be decided upon once agreement had been reached on the overall nature and character of the obligations themselves.

Equitable expansion of trade

29. As observed in the preceding paragraphs, GATT contains certain elements which could be applied in designing mechanisms for the progressive liberalization of trade in services as provided in the negotiating mandate, i.e. Part II of the Uruguay Round Declaration. Part II however, implies that unlike the GATT approach for trade in goods, it cannot be assumed that liberalization of trade in services will necessarily result in trade expansion, economic growth of all trading partners nor the development of developing countries. Some of the reasons include the different modes of delivery for services trade, the difference in technological levels and in the availability of financial and human capital as between developed and developing countries and the dominant position of the TNCs. Elements of these models could be included in the multilateral framework adopted or sectors where certain conditions were deemed to prevail. To ensure that liberalization of trade in services leads to equitably shared expansion of trade and economic growth models other than GATT are available.

ICAO model

30. The ICAO and its Chicago Convention, the multilateral sectoral agreement for trade in civil aviation services, provides a model of a different structure of a possible agreement.¹⁷ The ICAO can be said to be structured "vertically", rather than "horizontally" like GATT, in that the principles it is based on (i.e. the so-called five freedoms) are arranged in a hierarchy. The most generally acceptable have been effectively multilateralized, while the more onerous are negotiated bilaterally. The implications of this approach is that countries are free to accept higher levels of obligations when they consider that their interests, including their development needs so warrant; maintenance of lower levels of obligations is not considered as exceptional nor special or differential treatment, and certainly not "unfair" or "unreasonable". One effect of the application of the Chicago Convention has been to ensure all countries some part of world trade in civil aviation services. Such an approach could be applicable in other service sectors.

Liner Code model

31. A second model provided by a multilateral agreement on services is that of the United Nations Code of Conduct on Liner Conferences.¹⁸ This agreement recognizes realistically the dominant position of the Liner Conference and their positive contribution to shipping. The Code is

¹⁶ See TDR, 8, Part II, Chapters 2 and 5.

¹⁷ See discussion in Annex III

therefore not drawn up to establish a free trade situation by abolishing such Conferences but is intended to discipline their practices in such a way as to ensure access for developing countries to the world shipping market. This approach might serve as a model for other service sectors where the supply and/or distribution of services is dominated by a limited number of large corporations, and where the distribution networks of such corporations could be used to promote developing country exports.

Law of the sea model

32. A third model, although not based on a multilateral service agreement, can be found in the United Nations Convention on the Law of the Sea, which recognises that seabed resources are the "common heritage of mankind" and that those countries not at present technologically equipped to exploit such resources should also be permitted to benefit from them.¹⁹ Such a model could conceivably be applied in certain services sectors, particularly those calling for advanced communications or information technologies where access to networks, for example, could be provided to developing countries or reserved for their future use.

Balanced opportunity to provide services

33. As noted above, unlike goods services are provided to foreign markets through different "modes of delivery", and countries and firms have differing abilities to use such modes. Equitable trade growth would not be ensured if the liberalization provided under the framework was such as to discriminate against the movement of persons, the only "mode" available to most developing countries. Developing countries have stressed the need to give priority to services exported through the transborder movement of "persons" or "labour".

34. Recognition of the four modes of delivery (a) people, (b) capital, (c) information and (d) goods, is necessary in the implementation of multilateral agreements on services which will require implementing regulations with respect to immigration, investment, transborder data flows and even trade in goods relating to service trade.²⁰ An agreement could deal with the conditions under which these "modes" or "factors" could cross frontiers either to receive or to provide a service, and to differentiate between the presence needed to provide or receive the service and permanent establishment which would constitute immigration, or foreign direct investment. Certain aspects of the Canada/United States Free Trade Agreement are instructive in this respect, where greater movement of persons associated with trade in services has been achieved.

35. Information flows are not only a means of delivering services to foreign markets, but also are crucial to the competitive position of service suppliers, as well as being an essential element of the global operation of TNCs. Access to information, participation in international information networks would have to be assured to developing countries as part of the multilateral framework translated into more specific provisions at the sectoral level.

Barriers to trade in services

36. Several developed countries have indicated to the GNS what they consider to be barriers to trade in services, which include a variety of measures related to the investment, repatriation of funds, visa problems and data flows, as well as subsidies and discriminatory provision of services. The definition of "barriers to trade in services" is of course dependent upon a definition of what constitutes "trade in services" in the first place. It would flow from the comments with respect to

¹⁹ See paragraph 16 Annex III.

²⁰ There would also appear to be inherent contradiction between requests for 'national treatment' for national corpo-

such a definition made above, that a measure could not be considered a barrier to trade in services unless it effectively prevented a service from being received from, or provided to, a foreign resident. However, such a concept could be stated in general terms in the multilateral framework as the measures impeding trade in services and their impact would differ radically between sectors. In any case, the exercise of national sovereignty over the permanent establishment of persons or enterprises, or over information resources, could not be considered as barriers to trade.

Restrictive business practices

37. Developing countries may have difficulty in competing in world markets (or even their own) due to restrictive business practices.²¹ Any multilateral framework would have to provide for the elimination of RBPs, primarily through a general tightening of the obligations and enforcement mechanism of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which could be dealt with in a more specific manner in the sectoral arrangements. However, the nature of services trade and production, especially information-based services, is such that market dominance may occur through factors such as natural monopolies or established trade marks, without there being any intent to distort competition. For this reason (as observed above), multilateral rules addressed at the practices of TNCs may be necessary to ensure developing country access to markets, without there being any implication of restrictive practices on their part.

The development objectives

38. Appropriate elements to ensure the equitable expansion of trade in services could be expected to benefit the developing countries, however, they would not be enough to ensure that the expansion of service trade had positive development impact. The basic problem would still remain, in that the TNCs would retain their dominant competitive position against which developing country firms would be unable to compete, either in world markets or in their own national markets.

39. There would appear to be essentially two approaches open to developing countries in dealing with this problem. The first, the protective approach is simply to restrict or deny TNCs access to markets. This effect reflects the "infant industry" concept applied in goods. It is not apparent, however, that under such approaches, all the "infants" would ever reach the stage at which they could compete with the TNCs.

40. A second approach is to adopt measures aimed at achieving the other aims of Part II of the Uruguay Round Declaration as mentioned above, while ensuring that any liberalization was conditional upon the implementation of measures aimed at rectifying the disparities in the competitive positions between the foreign firms and domestic developing country firms. Access to markets, according to the provisions agreed to elsewhere in the negotiation of progressive liberalization, would not be provided to those service suppliers unwilling to accept commitments to take measures aimed at strengthening the service sector in the importing (or host) country. Such measures could involve arrangements for the transfer of technology, including training and the development of human capital, upgrading of relevant infrastructures, access to, and participation in, information networks, provision of employment opportunities, contribution to export strategies, use of local services, location of information resources and decision-making entities etc. Some of the provisions of the draft UN Codes on Transfer of Technology and on TNCs are relevant in this respect.

41. The development objective would also have to provide developing countries with the freedom to implement export strategies, and provide for measures by developed countries to encourage imports of services from developing countries. Trade in services currently takes place mainly among countries with highly developed service sectors, measures to strengthen the service sectors of developing countries to rectify current structural imbalances could result in greatly increased

and more equitable trade in services over the longer term.

Elements of a multilateral framework

42. In summary, crucial elements of a multilateral framework relevant to developing countries should include:

(i) recognition of the sovereign right of developing countries to apply measures in the service sector to increase the contribution of services to their development process, and to improve their competitive position in world trade as well as to pursue other economic and social objectives through the development of their service sectors, and of their indigenous technological capacities; measures taken in this respect would not be considered as barriers to trade;

(ii) such framework would include a definition of trade in services which excluded foreign direct investment, access to markets would be that necessary to provide or receive a specific service;

(iii) unconditional most favoured nation treatment;

(iv) equitable access to developed countries' markets for services for developing countries, including through movement of persons and participation in information networks; actions to liberalize trade in services would be taken consistently with development objectives and lead to the expansion of trade of developing countries, in conformity with the Declaration on the Uruguay Round; in such liberalization, preference would not be given to the modes of delivery of services most accessible to developing countries;

(v) provisions to ensure entry for developing countries to the world market for services when impeded by non-regulatory barriers (e.g. domination by TNCs, lack of access to information and information networks, low technological levels, RBPs etc.);

(vi) recognition of rights of developing countries to condition liberalization of access to their markets upon contribution of the foreign service supplier to the development of a competitive national service sector, including access to their information and distribution networks; any improvements in access to markets for services would be matched by improved access to knowledge and information;

(vii) the multilateral framework would provide the guidelines for subsequent sectoral negotiations, the sectors would be selected so as to give priority to those where developing countries have demonstrated competitive strengths;

(viii) the provisions in support of the development process would be an inherent element of the multilateral framework and translated into specific measures at the sectoral level; special, differential or more favourable treatment in favour of developing countries would not be applied as an exceptional treatment but could be an integral and organic part of the framework;

(ix) it would be recognized that in certain service sectors developing countries may not have attained a sufficient level of technological development to compete internationally, where appropriate future access to world markets would be reserved for developing countries;

(x) that the negotiations address the non-regulatory barriers facing the service exports of developing countries. The aim would be to establish guidelines for multilateral cooperation touching upon a variety of areas and falling within the competence

ous forms of action supportive of the expansion of the service sector and service trade of developing countries; and

(xi) necessary measures to enable developing countries to participate progressively and actively in the world export trade would be provided for, therefore, they would be granted suitable latitude to put into practice all policy instruments required to facilitate the export of services which involves action in the realm of export promotion.

Note: The Inter-relationship amongst the "New Issues"

43. Although "new issues", i.e. trade-related aspects of intellectual property rights (TRIPS), trade-related investment measures (TRIMS) and trade in services are treated separately in the Uruguay Round agenda (TRIPs and TRIMs deal solely with trade in goods) they are important links between these issues.²² Together these issues are structural parts of a single global issue, namely the creation of comparative advantage and of international competitiveness. Their inclusion in multilateral trade negotiations would seem to constitute a reflection in trade policy of fundamental changes in the process of production and trade stimulated by advances in information and communications technology. It is the development, rapid diffusion and mastery of technology that permit countries to create comparative advantages and to acquire competitiveness in international markets. Export success and control of international markets depends not so much on fixed or static comparative advantage embodied in natural resources or derived from low labour costs, as on the dynamic capacity of a country to innovate, to adapt, to imitate and to improve technology. The essence of this change is that information is becoming the "key element" in the productive process, innovation competition is becoming more important than price competition, with both raw materials and labour declining as a percentage of production costs.²³

44. Technology is a crucial element in international investment flows, and at the same time it permits the rapid expansion of trade in services either as the substance of service trade itself or as the medium that makes international trade in services possible. From a different perspective, direct foreign investment has facilitated the possibilities for transfer of technology and the flows of information and communication—a larger component of the trade in services—has facilitated innovation, adaptation and imitation of products and services, hence contributing to the rate of technological diffusion.

45. Consequently, one is witnessing an increased demand for specialized knowledge on the part of producers of both industrial and agricultural goods as well as services. The conversion of the results of basic research into commercially applicable information is accomplished by what is described as the "producer service sector". This sector thus provides strategic support to the other sectors, by enabling them to adapt their products continually to the exigencies of international competition.²⁴

46. The Transnational Corporations (TNCs) are the major sources of the evolution of new technologies, through research and development increasingly supported by their home governments. This mastery of advanced information and communication technologies by the TNCs has provided them with an advantage in both the production and trade of both goods and services, given the mutual support of these sectors and their domination of the "modes of delivery" of information and capital based services. Control of markets can be achieved through domination of the service sectors, given the link between goods and service exports, especially for those associated with higher technologies.

47. It is perhaps not an exaggeration to consider the world divided into two categories of countries, "knowledge rich" and "knowledge poor". The position of the latter countries in the world economy and international division of labour is declining as their main advantages, rich natural resource endowment and lower labour costs have become less pertinent. As a result they are exerting considerable efforts to correct this situation through policies aimed at increasing the transfer of technology to them and developing their own indigenous technological capacities. Many developing countries are implementing policies aimed at these objectives.

²² The negotiations in these areas are taking place against the background of Title III of the United States Trade and Tariffs Act of 1984 which provides the United States administration with clearly defined negotiating objectives in the areas of services, investment, intellectual property and high technology goods, and the authority to take retaliatory action in the form of trade restrictions on imports of goods from countries found unilaterally to have taken "unjustifiable", "unreasonable", or "discriminatory" action against United States exports of goods and services in the areas mentioned within a broad definition which includes investment. Trade action against countries who, despite whatever action they may have taken in other areas, have not breached their GATT obligations is clearly not consistent with GATT, and the United States' initiatives have been interpreted by many countries as an attempt to legitimize this law which is otherwise inconsistent with GATT. These provisions have been confirmed and given more precision by the Omnibus Trade and Competitiveness Act of 1988.

²³ J. Schumpeter, *Capitalism, Socialism and Democracy*, Harper and Row, New York, 1975, p.84.

²⁴ see United States Congress, Office of Technology Assessment, "International Competition in Services" Washington

48. On the other hand, the leaders in the development of knowledge and information are obviously tempted to restrict the diffusion of such knowledge with a view both to artificially increase its market value and to affect their competitive position *vis a vis* foreign competitors. In other words, there is a tendency for governments to adopt "strategic" trade policies which are aimed not simply at liberalization of products and services of export importance to them, *per se* but directed toward affecting the competitive position of rival producers, while securing a larger share of the "rent" on the production and export of information.²⁵ Such strategic policies could involve actions aimed at stimulating the development of new technologies while restricting access to knowledge and information, achieving an improved and secure access to world markets for "knowledge intensive" services, particularly through the investment mechanism, while eroding the bargaining leverage of host country governments in negotiating with foreign investors, including with respect to the transfer by such corporations of such information and technology.

49. One element of this "strategic" approach is to control world markets in order to export to them those technologies that are facing a diminishing rate of productivity growth. This also enables extra benefits to be obtained from already amortized R and D investment, and such extra benefits can finance the very expensive R and D activities associated with the new technologies. Second, this approach aims at appropriating new technologies and protecting this property from encroachments, to create new markets to penetrate potential markets for the new technologies in order to recover the high R and D investment and to reduce uncertainty. Thus, the initiative to negotiate new multilateral rules on intellectual property, services and investment²⁶ may reflect in part the implementation of such strategic policies.

50. The initiatives in the Uruguay Round related to TRIPs²⁷ would appear to be part of a more general initiative to expand the traditional boundaries of the intellectual property system, which implies (a) its internationalization, (b) the broadening of the scope of protectable new ideas, (c) the extension of the lifetime of protection, (d) the reduction of the restrictive or regulatory measures which are normally associated with a monopoly situation and (e) the improvement of the enforcement mechanisms, at both national and international levels. The latter objective would appear to constitute the underlying reason for introducing the intellectual property issue into the GATT framework.

51. The defense and enhancement of property rights in the strategy to control markets is extremely important as it provides a mechanism for the appropriation of new innovative ideas and of the results of R and D activities, and for restricting their diffusion; it is an instrument to penetrate markets; and it provides a way of reducing uncertainty.

52. The negotiations on TRIMs would appear linked to the fact that the TNCs have become one of the major sources of information and new technologies. The process of invention is no longer related to the image of the lone inventor motivated by his curiosity, but has become a common interdisciplinary enterprise requiring expensive and sophisticated laboratories and substantial human and economic resources, where the TNC's have a major advantage. Developing country governments have sought to compensate for this advantage by effectively combining restrictions on inputs and investment so as to encourage TNCs to supply local companies with technology at better terms than would otherwise have been the case.²⁸

53. As has been stated frequently in previous studies, advances in information and communications technology have rendered services more transportable, and facilitated the penetration of foreign markets for services. This also means that key producer services can be provided from a distance, and that more services can be "traded".²⁹ This creates both opportunities and challenges

²⁵ For a discussion of the concept of strategic sectors and policies see Paul Krugman, "Strategic Trade Policy and the New International Economics", The MIT Press, London, 1986.

²⁶ "Most licences of technology go to affiliates - foreign joint ventures as well as overseas division of US multinationals - where control of proprietary know-how is easier than with an independent foreign firm", OTA, *op.cit.*, p.18. "When foreign governments combine restrictions on inputs and investment to pressure US-based multinational corporations into licences either at arms length or with joint venture partners, they may be able to help local companies buy technology more cheaply than would otherwise be the case", OTA, *op.cit.*, p.20.

²⁷ The negotiating proposals with respect to TRIPs, TRIMs, and trade in services are described in the paper "Review of Developments in the Uruguay Round", UNCTAD, MTN/INT/CB.7

²⁸ See Office of Technology Assessment, "International Competitiveness in Services", U.S. Congress, 1987, p.20.

²⁹ The term "trade in services" has only recently emerged in economic debate, in parallel with initiatives to establish a

for developing countries. While access to more sophisticated services from developed countries is facilitated, overreliance on such services could undermine possibilities for development of a strong domestic producer services sector, whose strategic character in developing a national capacity and infrastructure for the production of higher value-added manufacturing goods is becoming more widely recognized.³⁰ In this context, it has become clear that it is somewhat inaccurate to refer to one country or group of countries as possessing "comparative advantage" in goods and others in services, for services have become crucial to the efficient production of goods and their ability to compete in world markets. As the "service content" of goods increases, so does the demand for such services, and the value added accruing to the suppliers of producer services. Many developing countries find themselves with a persistent and accelerating deficit in trade in these services.³¹

54. At stake in earlier GATT multilateral rounds, and in many areas of the Uruguay Round, is the ability of countries to compete on more equal terms with domestic suppliers through the liberalization of trade barriers. In the "new issues" negotiations, what may be at stake is the ability of countries to develop a competitive capacity to produce and export in the future, as well as the ability to retain the value added from such production. Traditional economic theory assumed that all parties would gain from the mutual elimination of barriers to trade through the application of the theory of comparative advantage. However, the negotiations with respect to the new issues risk being a zero-sum negotiation. Developing countries would obviously lose from any international trade rules that would exclude them from the benefits of new technologies. Thus, the internationalization of the property right system, above all if backed up by threats of trade retaliation, could well impede the diffusion of new technologies to developing countries and their development of indigenous capacities. Similarly, developing countries would clearly lose from rules which reduced their bargaining leverage in negotiations with TNCs by placing the trade retaliatory power of the home countries behind the TNCs in such negotiations and legitimizing such retaliation under GATT. A further loss by developing countries would occur from the adoption of any rules which failed to recognize the legitimacy of developing countries' efforts to develop their services sectors and again legitimize retaliatory trade measures against such actions. Ironically, therefore, proposals being presented as aimed at further liberalization of trade and investment may have the perverse result of creating barriers to market entry for developing countries, and of increasing the market domination of the TNCs.

and Services', paper presented to the International Association for Research on Income and Wealth, Twentieth General Conference, Rocca di Papa, Italy, 23-29 August 1987, (mimeo).

³⁰ see Office of Technology Assessment "International Competitiveness in Services op. cit.

ANNEX I

The Ministerial Mandate:

1. At the Ministerial Meeting that launched the Uruguay Round, (held in Punta del Este, Uruguay in September 1986, the "Ministers", (as opposed to the "Contracting Parties" of the GATT) agreed to launch negotiations on trade in services as a part of the new round of MTN. Their decision was embodied in Part II of the Uruguay Declaration as follows:

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

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

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

³² The above text carefully balances the United States' objective of including services in the Uruguay Round, and the developing countries' dual objective of maintaining multilateral action on services (as distinct from goods) outside the GATT, and of obtaining recognition of the priority of development objectives and the supremacy of national laws and regulations.

Developments at the GNS

2. On 28 January 1987, the GNS decided upon its work programme for the initial stages of the negotiations,³³ during which the following five "elements" would be addressed:

- Definitional and statistical issues;
- Broad concepts on which principles and rules for trade in services, including possible disciplines for individual sectors might be based;
- Coverage of the multilateral framework for trade in services;
- Existing international disciplines and arrangements; and
- Measures and practices contributing to or limiting the expansion of trade in services, including specifically any barriers perceived by individual participants, to which the conditions of transparency and progressive liberalization might be applicable.

The discussion that has taken place to date indicates that there are different views regarding the relative weights to be given to the five elements. Moreover, views also vary as to the extent to which it is necessary to deal with one element before another can be adequately dealt with. The discussions, however, reflect an awareness of the linkages that exist between the issues that emerge

³² Ministerial Declaration on the Uruguay Round (MIN(86)/6)

when dealing with the elements. At the stocktaking held at the end of 1987 in order to determine how to carry forward the negotiating programme, it was recognized that the negotiating programme will be carried forward on the basis of the examination of the five elements in the initial phase of the negotiations as well as other issues arising therefrom. At the last meeting of the GNS in July 1988, the Chairman suggested that with a view to being in a position to present to Ministers for the mid-term review meeting in Montreal a positive picture of the efforts undertaken so far in the GNS, The Group should concentrate its attention in the immediate future on some of the issues in the list of concepts and principles which appeared to be of key importance: i.e. national treatment/progressive liberalization/ expansion of trade; development objective; and movement of factors.

Negotiating Positions

3. Submissions by the developed countries to the GNS have addressed expansion of trade, progressive liberalization, and transparency aspects of the negotiations. These submissions provide for a framework agreement which would facilitate liberalization of trade in services based on a definition of trade in services which includes investment and transfer of funds. Developing countries' submissions have addressed the objectives of economic growth and development of developing countries. These submissions call for a framework agreement covering cross-border trade in services.

Negotiating Position of Developed Countries

4. At the November 1987 meeting of the GNS, the United States presented a submission³⁴ addressing the general considerations that should be taken into account in elaborating the framework, together with a number of specific concepts. In the United States' view, the priority objective is to reach an early agreement on a legally binding framework of rules that would achieve a "progressive liberalization" of a wide range of services sectors in as many countries as possible and allow the GNS maximum scope for subsequent negotiation on individual sector agreements. The framework would deal only with measures that restrict the access and operation of foreign service providers and that restrict or distort trade. In the meantime there should be a standstill on new services restrictions and the elimination of existing barriers within a multilateral framework. The United States submission seeks elimination of regulations governing the flow of services across the border and controlling the establishment of foreign branches and subsidiaries for purposes of producing or delivering the service within the host country. The submission envisages a combination of a general framework with binding rules and disciplines containing a degree of liberalization and sectoral understandings which would further liberalize specific sectors. The framework would be based on the following concepts: transparency, non-discrimination, national treatment, discipline on state-sanctioned monopolies, subsidies, nondiscriminatory accreditation procedures, consultation and dispute settlement. The United States has defined these concepts in the following manner:

- **Transparency:** Since measures used by governments to control services industries are often promulgated for reasons unrelated to trade, it is necessary to provide a structure that allows for the examination of such measures, existing and future, directed at services and service providers and affecting the coverage of a services framework agreement. The structure would also need to cover identification of both intended and unintended effects of government measures on the access and treatment of foreign services and service providers to a particular market. The obligation on transparency should require governments:

(i) to publish proposed and final rules and regulations affecting services and, subject to certain exceptions, to provide interested parties the opportunity to comment on proposed rules and regulations. The rules and regulations which are legally effective and whose content are considered to be inconsistent with the framework could be subject to review under the traditional

³⁴ "Concepts for a Framework Agreement in Services" see *News of the Uruguay Round of Multilateral Trade Negotiations* NUR 012, 10 December 1987, issued by the information service of the GATT. See also C. Raghavan *Trade: US Proposes Framework Agreement on Services* Special United Nations Service (hereinafter SUNS) No. 1817.

notification/consultation procedure.

(ii) to notify other countries, through an agreed procedure, of a certain category of government measures affecting services, which would be subject to consultations, including those that the notifying country itself recognized as potentially having an adverse impact on the trade of others, either through its own internal assessment or by virtue of the measure having been called to its attention by other signatories.

- Non-discrimination: the signatories to the framework agreement should extend its benefits unconditionally to all signatories. Exceptions limited in number and extent to the coverage of the agreement would be permitted; however, provision for non-application to those countries that have taken exceptions excessively would be included.
- National Treatment: should generally require that foreign service providers receive treatment no less favourable in like circumstances than that accorded to domestic service providers, so as to prevent discrimination against foreign service providers as compared with their domestic counterparts.³⁵ National treatment should also apply to access to local distribution networks, local firms and personnel, customers and licenses, and the right to use brand names. In cases where national treatment alone will not assure liberalization in all services, for example when regulators have effectively limited the number of suppliers in a given services market by denying the issuance of new licenses, the framework agreement should provide for a degree of foreign participation or minimum access. Where establishment or investment requirements imposed on foreign service providers bear no relationship to legitimate regulatory needs, service providers should, in the United States' view, be able to sell their service across the border.
- Disciplines on state-sanctioned monopolies: such a provision should be included in a framework agreement, and ensure that a sole service monopoly provides its service to foreign-based users on a non-discriminatory basis with respect to price, quality, and quantity. It should provide appropriate compensation to affected signatories or their affected entities when a government decides to transform the provision of a service from a competitive to a monopoly environment.
- subsidies: there should also be provision for rules on domestic or export subsidies in the framework agreement, analogous to some of the approaches existing for trade in goods in various GATT instruments. A mechanism for the resolution of disputes over the interpretation of the subsidy provisions, and authority to take offsetting measures equivalent to the impact of the injurious subsidy, should also be provided for in the agreement, although countervailing duties in the traditional sense are not viewed by the United States, as a practical way of dealing with subsidy practices, because of the different means of trading services across borders.
- non-discriminatory accreditation procedures: the framework should discourage licensing measures that are unrelated to competence and ability to perform, and prohibit those measures whose purpose or effect is to discriminate against foreign providers of licensed services.
- consultation and dispute settlement: the proposal includes this concept which might be similar to Articles XXII and XXIII of GATT or similar provisions of the various non-tariff measure agreements.

5. The United States second submission covers procedures for reaching and implementing a multilateral framework for trade in services.³⁶ This submission elaborates on the procedures for reaching a framework agreement, as well as on procedures for negotiating the reduction or elimination of measures that are not otherwise liberalized under the framework. It concentrates on the phases and sequence which the negotiations should follow towards a progressive liberalization of services trade by the end of the Uruguay Round. The negotiations, in the US view, could be visualized as a three phase process. These phases could be characterized as follows:

- Phase one : the "general rules drafting phase" which would involve political commitment and the negotiation of the rules and disciplines that would be initially included in an informal understanding and subsequently incorporated in a legally binding framework whose provisions would be generally applicable to a wide range of service sectors ;

³⁵ Modifications to this approach would be permitted such as in cases of national security and fiduciary responsibilities, but the modified treatment would have to be equivalent in effect. Non-identical treatment would have to be justified to ensure against disguised violations of the national treatment principle. It should be noted that in this submission national treatment is included as an operative provision of the framework agreement.

³⁶ "Procedures for Reaching and Implementing a Multilateral Framework for trade in Services" See C. Raghavan

- Phase two: the "sectoral coverage phase" which would involve reaching agreement on a common list of specific services industries to which the framework agreement would be applicable in all signatory countries. The proposal suggests the anonymous notification to the GATT Secretariat of the sectors by delegations. On the basis of these anonymous notifications, the Secretariat would prepare a consolidated list of all sectors notified, constituting a point of departure from which the negotiation would then be undertaken to arrive at an agreed list of services sectors subject to the framework. Procedures would also need to be developed to add new sectors to the list subsequent to the Uruguay Round. Participants would be allowed to notify reservations with respect to existing measures which would not be brought into conformity with the framework agreement. These reservations would be subject to future negotiations aimed at reduction or elimination on a reciprocal basis. On the other hand, to stop any abuse of this mechanism a non-application provision could also be envisaged. Interpretative notes to the agreement which might take the form of sectoral annexes could also be included that would clarify the application to individual service sectors for all signatories. Finally, separate sectoral agreements with rules that were legally apart from the provisions of the framework agreement could be considered in very limited instances.
- phase three: "further liberalization phase" which would involve negotiations among signatories aimed at the progressive liberalization of measures not liberalized in phases one and two. These negotiations would include reservations made during the second phase. The final phase would also establish a process for agreeing to a series of subsequent negotiations after the Uruguay Round.

With respect to the timing of the phases, the representative of the United States has proposed that the Mid-term review to be held in Montreal in December 1988, would provide the occasion for a political undertaking and notification of sectoral coverage which would be terminated by the end of 1988. Subsequently, in 1989 the third phase would be dealt with and would be completed by 1990.

6. The EEC supports a multilateral framework of principles and rules to govern international trade in services.³⁷ The framework agreement, in the opinion of the EEC, should include the following core concepts: (i) progressive liberalization of market access and respect for policy objectives; (ii) preservation of international competition; (iii) transparency; and (iv) development compatibility. These are considered as conditions for the attainment of trade expansion which is presented in the EEC proposal as the major aim of the Agreement. However, the EEC view is that not all perceived barriers to trade in services could be subject to liberalization, since regulations are usually the expression of national policy objectives, and that accordingly an agreed distinction is required between appropriate and inappropriate regulations. As different services sectors have their own characteristics, any future multilateral framework should therefore take into account these sectoral specificities. The multilateral nature of liberalisation would be ensured through some form of MFN principle. In the EEC opinion, the national treatment principle would serve as a yardstick for determining the existence of discrimination against foreign producers *vis-a-vis* domestic producers. The framework agreement, however, should contain an obligation that the parties are prepared to negotiate towards national treatment and market access. There should be a standstill on inappropriate regulations.

7. The EEC, thus, seeks progressive liberalization based on a set of principles for the determination of "appropriate regulations" and believes that a final agreement would be possible only through a balanced result with "mutual advantage" for industrial and third world nations. The definition of tradeable services should be such as to embrace all types of transactions necessary to achieve effective market access. In their opinion, this might be done through an illustrative list of types of transactions covered in each sector of tradeable services. Moreover, the EEC provides in its submission for development compatibility and national definition of the content of the concept of development, reflecting differences in the economic structures and policies of different countries. The EEC, however, views the development objective of the Punta del Este Declaration to be less of a direct objective than the objective of trade expansion. Any rules, therefore, that reduce trade are unacceptable even if it is argued that they were promoting growth and development. In their opinion, while development is an important criterion, rules should be checked

³⁷ The EEC statement at the GNS Meeting of 23-25 February 1987 and the Discussion Paper: A Possible Conceptual Structure for a Services Agreement submitted to the GNS meeting on 14 and 15 of December see the *News of the Uruguay Round of Multilateral Trade Negotiations* NIIR 013: 21 December 1987 and SUNS No. 1846. 17

against the absolute criterion of expansion of trade. The EEC paper also provides for an illustrative list of additional concepts, such as dispute settlement, balance of rights, obligations and benefits, escape clauses, exceptions, government procurement, and evolutionary adaptation.

8. The EEC believes that the GNS has identified the following two criteria against which future discussions should be evaluated:

(i) how far do different concepts conform to the objectives set out in the Punta del Este Declaration; and

(ii) how far are general propositions appropriate in individual sectors?

9. Switzerland has made two submissions³⁸ in which it stipulates that three essential points should be made concerning the framework:

(i) progressive liberalization of trade in services should take place, without seeking to impose a general liberalization or to oblige countries to adopt a uniform behaviour;

(ii) principles of the framework should be comparable to those of the General Agreement, in particular freedom of trade and equal treatment, to ensure that the regimes for trade in goods and services are not incompatible;

(iii) readiness to innovate, in particular in case of opening of markets for services (scope of such openness and the grounds and modalities for reservations) and equal treatment of parties (MFN and non-discrimination) should be considered.

Owing to the difficulty of application of the MFN treatment to services, the Swiss submission provides for the optional most-favoured-nation clause (OMFN) as a starting point (OMFN would consist in giving any third country the right to become party to the agreement concerned). To enjoy such right or option, the countries concerned would in exchange have to offer a counterpart, such agreements would make it possible to define the specific scope of equivalent treatment, and even of the national treatment corresponding to the subjects dealt with. The submission also envisages that provisions governing competition applicable for example with respect to state monopolies, subsidies, antidumping, standards surveillance, dispute settlement, sanctions, transparency should also be established; Switzerland believes that there is need for exceptions, concerning for example public health, the service consumer and security. Moreover, the need to provide safeguard possibilities and define their conditions and modalities, should also be examined.

10. Australia, Canada, Japan and the Nordic countries³⁹ have also made submissions on broad concepts on which principles and rules on trade in services could be based. Australia in its initial submission provides that in the application of the non-discrimination concept to a services agreement, the "conditional" MFN approach would be warranted. Since the barriers to services trade would be mainly non-tariff barriers, Australia raises the issues of unconditional and conditional MFN, and the exceptions to these rules in accordance with national policy objectives. In a second submission, Australia provides an "illustrative outline" of a framework agreement which is based on the establishment of strong rules of general application which would nevertheless allow to a certain extent individual member countries to find their balance of rights and obligations and market access benefits. The discretion of each party would be limited by requirements for reciprocity. There would be initial listings in the form of schedules by each individual member country of national regulations to be excluded from the coverage of the agreement and market access undertakings. Through an "open season" procedure the schedules of exclusion would be shortened and the market access undertakings expanded through regular rounds of plurilateral negotiations. The outline contains three parts as follows:

- Part I on objectives and scope, which includes a reference to development, that is provision consistent with the rules and principles of the agreement, for the economic development needs

³⁸ See *New of the Uruguay Round of Multilateral Trade Negotiations* NUR 013, 21 December 1987, and SUNS No. 1984, 21 July 1988.

³⁹ Australia: see SUNS Nos 1786 and 1984 of 24 September 1987 and 21 July 1988 respectively, Canada: see SUNS Nos 1786 and 1940 of 24 September 1987 and 19 May 1988, Japan (SUNS Nos 1786 and 1985, 24 September 1987 and

- of developing countries;
- Part II on obligations and benefits, including non-discrimination, national treatment, market access, preservation of market access, transparency, monopolies, subsidies, accreditation and licensing procedures, government procurement, economic integration arrangements, consultations and dispute settlement, permanent exceptions, existing international agreements, sectoral agreements, and non-application;
- Part III on institutional provisions including sections on administration of the agreement through the establishment of a governing body and a secretariat, accession of new members and periodic revision of the agreement.

11. The Nordic countries advocate an open-ended approach, where no aspect of trade in services is excluded *ab initio* and the types of barriers which are encountered in such trade would be identified through an analysis of perceived barriers. In their submission, emphasis is placed on an initial analysis of the possible formulation of the principles at the sectoral and sub-sectoral level. This approach, in their opinion, should give rise to clear formulations on a consensus basis and not excessive reservations. Any impediment to trade in services not covered by initial commitments would be open for later negotiations. Immediate elimination of trade-distorting measures was infeasible, owing to either the possibility of gradual adjustment to the rules of an agreement or to the existence of exceptions based on important national policy objectives. In the Nordic countries' submission the framework should include the MFN principle, access to service markets dealing with establishment-related barriers, and provisions enabling parties to a framework agreement to enter into regional agreements regarding liberalization of trade in services. National treatment need not necessarily mean identical treatment, but rather equal or equitable treatment, taking into account legitimate national policy objectives such as national security. Transparency on an MFN basis applicable to all trade in services would enable suppliers to learn the rules of the game and adjust to varying market conditions; the mechanism for transparency could be based on the GATT model. The Nordic countries believe that the concepts of transparency, non-discrimination, a commitment to endeavour to apply regulatory measures with the least possible impact on trade, some form of stand-still provision on the introduction of new trade restrictions and provisions on consultations and dispute settlement should be included in the framework or "umbrella" agreement. Whilst, national treatment, MFN, right of establishment, safeguards, subsidies, mobility of key personnel, investment and government procurement are more appropriate for the sectoral agreements, as they are not identically applicable to all sectors. Some principles in their opinion, would be split between the framework agreement and the sectoral agreements, for example the principle of transparency could be stricter in each sector agreement than in the framework agreement.

12. Canada's hypothesis on negotiation of a multilateral agreement on trade in services⁴⁰ includes the following four main elements:

- a framework of principles⁴¹ i.e. national treatment for further market access undertakings and trade liberalization;
- a set of rules i.e. transparency, MFN and non-discrimination;
- institutional arrangements for multilateral surveillance, enforcement of the agreement, settlement of disputes and arrangements for further market access liberalization; and
- an exchange of specific market access undertakings and trade liberalization measures, which would determine the commitments of the parties⁴² the practical scope of the Agreement;

13. The Canadian submission sets forth four areas of market access undertakings:

- concessions on measures relating to traded services i.e. those produced in the territory of one country and provided in the territory of another;
- concessions relating to commercial presence, establishment, and national treatment for enterprises providing services once they are established;
- impediments to information and payment flows; and

⁴⁰ NUR 016, 31 May 1988

⁴¹ The distinction between 'principles' and 'rules' is that the former refers to more longterm negotiating aims which requires considerable negotiations, whereas rules are more clear-cut provisions which would be applied in a more categorical and automatic way.

⁴² The commitments under the agreement would be negotiated bilaterally or plurilaterally and then extended on an MFN basis to all the parties. Such commitments would be set out in the form of schedules to the agreement. Notifications

- impediments to temporary movement of business people.

14. The latest Japanese submission⁴³ adopts the approach of having an enforceable general framework incorporating all the principles and rules which must be enforced. This proposal covers four areas: rules and principles; sectoral coverage; negotiation of potential reservations; and future arrangement. In the opinion of Japan, the following principles and rules should be enforceable in the services framework: transparency; most favoured nation treatment (non-discrimination); national treatment; special and differential treatment of developing countries; state enterprises; subsidies; safeguards; exceptions; consultation and dispute settlement; regional and local governments; regional economic integration; and evolving arrangement. On the question of coverage, the Japanese submission envisages the possibility of reservations for measures which are difficult to bring into conformity with the principles. These reservations would be listed in an annex to the agreement and the participating countries would be enjoined to refrain from adopting new trade restrictive or distorting measures during the negotiations. The mechanism for enforcement and management of the framework, including the modalities for further reduction or elimination of existing discriminatory measures and reservations after the entry into force of the framework, would need to be examined. Particular sectoral arrangements could be established where the special characteristics of the sector makes it difficult to bring into conformity with the principles of the general framework or when the enforcement of those principles alone would not remove trade obstacles. In the Japanese view, the provisions of the sectoral agreements would take precedence over those of the general framework. Japan supports the principle of national treatment for imported services, foreign service enterprises or sellers delivering services, and agents thereof as an essential instrument to expand services trade. Japan also suggests the establishment of a mechanism for periodical negotiations to review within the framework agreement, laws and regulations inconsistent with the national treatment principle, together with the obligation to notify such laws and regulations. This submission makes a marginal reference to the needs of developing countries by suggesting that this matter needs further examination which could take into account the work of the GNG on this matter.

Developing Countries' Reaction

15. Certain developing countries have made overall statements on the economic and legal issues at stake in the GNS negotiations. Brazil, for example, has rejected the "naive, theoretical assumption ...that liberalization should be adopted unilaterally as something intrinsically beneficial" and has stressed the "assymetry" in the situations of developed and developing countries, both in the economic sense and in their ability to adequately regulate services to meet national objectives. India has stressed that the mandate cannot be interpreted "to warrant ... an open ended scrutiny of all national regulation in services and subjecting it to multilateral determination of its appropriateness or legitimacy".⁴⁴ In general, however, developing countries comments have been addressed to specific elements of the developed countries' proposals.

16. The developing countries consider that the discussions should first focus on statistical issues, the definition of "services" and "international trade in services" and identification of sectors covered by the multilateral framework. The developing countries also believe that the limitation of the negotiations to "trade" in services (i.e. trade in services that takes place across the national frontiers), would exclude internal trade, as well as the whole series of operations involving investment, production and distribution of services within national borders.⁴⁵ The only criterion against which all proposals for a multilateral framework on services could be tested should be the Punta del Este Declaration and its mandate that the basic objective of a multilateral framework should be "promoting the economic growth of all trading partners and the development of the developing countries".⁴⁶ The developing countries, therefore, question the applicability or validity of some of the GATT concepts and ideas such as "national treatment", "transparency" in regulations and decisionmaking, and "non-discrimination" in the future multilateral framework on services. They also consider that the negotiations should cover those services sectors in which developing countries have demonstrated international competitiveness, in particular, labour-intensive services (such

⁴³ "Structure of a Multilateral Framework for Trade in see SUNS No. 1985, 22 July 1988.

⁴⁴ SUNS No. 1664, 3 March 1987 and SUNS No. 1908, 30 March 1988.

as construction). The negotiations should also, in their view, be accompanied by a parallel effort to relax controls on the cross-border movement of the services sector labour force. Whereas the United States considers this to be an immigration issue, the developing countries believe that it is a traded service.

17. The developing countries⁴⁷ believe the scope, limits and potentials of the existing international disciplines and arrangements in the area of services, (e.g. civil aviation and telecommunication agreements), should be examined, to see whether there is a need to incorporate these sectors in a new multilateral framework or a sectoral discipline. They suggest that the existing international arrangements may also furnish alternative approaches or models. (such as the UNCTAD Code of Conduct for Liner Conferences).

18. Mexico, in its submissions to the GNS,⁴⁸ argues that economic development should be the objective of the framework agreement and of sectoral agreements that may be negotiated, and not a series of waivers, exception or "special treatment", as has so far been the case in GATT. The following are five secondary objectives outlined in the second Mexican submission which give real content to the development objective:

- sustained growth of production and productivity of the services sector in the developing countries, in particular of the producer services;
- sustained growth of employment in the services sector in those countries, especially that of producer services;
- improvement of the international competitiveness of raw materials and processed and semi-processed goods as well as services produced by developing countries;
- sustained growth of exports of developing countries of services, including producer services;
- fair and equitable access to new technologies generated or distributed internationally to the services sector, including technologies related to telecommunications, data processing and access to world information networks.

The submission also provides the following ten concrete measures which are required to implement these objectives:

- principle of "relative reciprocity" should be established recognizing the fact that there cannot be equal treatment among unequal parties;
- labour and labour intensive services should be the subject of negotiations, the Framework Agreement should also deal therefore with regulations that have a negative impact on labour flows;
- "right" of establishment or commercial presence of direct foreign investment should not be included in the negotiations;
- developed countries should undertake not to impose any further restrictions on imports of services from developing countries after the mid-term review meeting at Montreal;
- the following measures adopted by the developing countries should not be considered as barriers to trade in services: laws and regulations that are already in existence or would be adopted in future on the "new" services or the greater transportability of "traditional" services, and on direct foreign investment; exclusion of foreign direct investment from equal treatment for services, whether domestic or imported; and non-discrimination among foreign suppliers of services;
- developed countries should grant developing countries unconditional MFN treatment in the framework agreement and the sectoral agreements;
- in the sectoral agreements preference should be given to the liberalization of services exported by developing countries;
- transfer of technology from developed to developing countries should be speeded up-the Code of Conduct for Transfer of Technology under negotiation at UNCTAD should be studied in this regard;
- the framework agreement and the sectoral agreements should indicate the fact that the main national policy objectives of developing countries' laws and regulations was economic development which relates to the infant industry argument and the fact that only the developing countries themselves could determine their own development needs; and
- sectoral agreements that may be established under the framework agreement should be con-

⁴⁷ The Indian statement at the GNS meeting on 23 February 1987, see SUNS No. 1664, 3 March 1987

sidered as independent of each other and of the results of the negotiations on goods at least for developing countries.

The importance of the concept of "relative reciprocity" that there could not be equal treatment among unequal parties should be highlighted.⁴⁹ Mexico has, therefore, proposed that Labour flows and a number of exceptions for the developing countries -not to be identified with "special treatment"- should also be included in the framework agreement. The exceptions for developing countries, in the view of Mexico, should include such items as the possibilities of regulating new services or traditional services whose transportability has been enhanced by the new technologies, and new regulations required for balance of payments purposes. Mexico also proposes that developing countries should be granted the right to give subsidies to their services industries. Moreover, Mexico stresses the following with respect to principles:

Transparency: Mexico recognizes that this is an extremely important element in the negotiations, but first, agreement must be reached on what is or is not a regulation affecting trade. Mexico has proposed a negative list, in other words, for what should not be considered a barrier to trade in services: (i) laws and regulations on foreign investment; (ii) equal treatment for services, whether local or imported, and not for foreign investment; (iii) non-discrimination among foreign suppliers of services; and (iv) solely in the case of developing countries, law and regulations on the "new" services or traditional services with enhanced transportability.

National Treatment: Equal or equivalent treatment for services and labour, but not for investment (commercial presence or establishment).

Most-favoured-nation: Unconditional and non-discriminatory treatment.

19. Argentina's submission on the elements for a possible framework agreement on trade in services.⁵⁰ contains the following main elements: (i) respect for national policy objectives (laws and regulations which pursue national policy objectives should not be questioned); (ii) the concept of development (this concept goes far beyond mere economic growth and contains elements which would allow developing countries to have an independent decision-making capacity regarding trade in services, ensure those countries a larger share and better integration in such trade, and provide security and capability to adapt to new circumstances in international trade); (iii) definition of trade in services (two approaches are proposed a technical definition or an open-ended annex in which the sectors covered could be detailed); (iv) principles placing signatories on an equal footing whilst providing for the specificity of services trade and sectoral disciplines; (v) uniform treatment (equality of opportunity of market access); (v) unfair practices (export practices, clauses relating to the prohibition of limiting or prohibiting exports of services and clauses guaranteeing access to sources of services and technology); (vi) integration agreements among developing countries (the benefits under such agreements should not be impaired or called into question); (vii) procedure for progressive implementation (practical procedures for parties to gradually adjust their national provisions); (viii) and other elements (transparency, consultation and dispute settlement, exceptions, balance of rights and obligations, and emergency measures). Concerning the concept of development the submission makes some detailed suggestions in relation to the continuing process of adaptation to new trading conditions that might arise from possible regulations in the area of trade in services including:

⁴⁹ At the GNS meeting in July 1988, commenting on the Mexican proposal the representative of India suggested that the concept of "preferential opportunity" might be preferable to that of "relative reciprocity". Concerning the concrete measures on transfer of technology, the representative of India suggested a mandatory arrangement for operators of services to transfer technology. The representative of Hungary suggested another approach which would link the liberalization of certain sectors or dismantling of barriers to transfer of technology from developed to developing countries. The representatives of Hungary, the United States, Japan and Canada pointed out that reservations on sectors could be increased for developing countries. Some developed countries considered that labour as such should not be regarded as a service, although labour intensive services could be considered in the negotiations (Japan, EEC, Canada, New Zealand) The representatives of the United States, Canada, Australia, EEC and Japan agreed with the five objectives outlined in the Mexican proposal and considered the concept of "relative reciprocity" as a positive contribution to the work of the Group, but did not agree with any interpretation of this concept which would include market sharing arrangement. The representative of the EEC believed that preferential opportunities for the developing countries were acceptable but not preferential results. The representatives of Korea, EEC, and Hungary, supported the proposal by Mexico, but pointed out the relationship between transfer of technology and investment. They indicated that right of establishment would help transfer of technology. The representatives of Korea and Australia believed that right of establishment should be included but its content should be negotiated. See SUNS 1984, 21 July 1988.

- adoption of necessary instruments to enable developing countries to participate progressively and actively in the world export trade. Developing countries should be granted suitable latitude to put into practice all policy instruments required to facilitate the export of services. This involves action in the realm of export promotion and allowing various activities aimed at stimulating export flows;
- adoption of measures by developed countries to facilitate imports of services from developing countries should be encouraged to stimulate the integration of developing countries in these new trade flows i.e. the extension of the prohibition on protection within an integration arrangement among developed countries to exporting developing countries;
- adoption by developing countries of *ad hoc*, short term measures to enable services to be imported as inputs for the subsequent export of similar or different services should be taken into account, without a possible criterion of selectivity as regards potential suppliers of such inputs implying a breach of the principles of the general framework by developing countries;
- provision of suitable access to technology for developing countries by linking trade in services with undertakings for the transfer of technology and drawing up rules to ensure that legislation related to intellectual property does not impose monopoly rights over the transfer of technology. In this relation, the question of RBPs, the practical application of the Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and rules of conduct for transnational enterprises in connection with the impact of their activities in developing countries markets should be considered.

ANNEX II

Broad Concepts and Existing International Instruments

1. The following paragraphs examine, in detail, some of the concepts suggested as possible elements of a multilateral framework for trade in services, including their application in existing international instruments.

A. National Treatment

2. The national treatment concept ensures the equality of treatment between foreigners and nationals and between products and services of foreign and indigenous origin. One of the major issues in the services negotiations in the Uruguay Round has become that of "national treatment". Developed countries have suggested that national treatment should be one of the fundamental principles in a multilateral framework for trade in services. Indeed, Internal regulation of services in most countries exceeds regulations on goods,⁵¹ and such regulations are often applied in a manner which restricts the extent to which foreigners or foreign corporations can offer their services.

3. A prime goal of the developed countries in the Uruguay Round is to establish the principle of national treatment in regard to services, building on both OECD and GATT conceptions. In the opinion of developed countries, the application to foreign firms of this principle would be an essential element in improving market access. National treatment would require governments to administer all domestic laws and regulations that are not identified as trade barriers on a non-discriminatory basis. It ensures that domestic and foreign suppliers of products and services are treated equitably. In other words, governments would clearly have to separate the protection of domestic services industries from the regulation of services.

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

5. From the discussions in the Uruguay Round Group on Negotiations on Services (GNS), several approaches to national treatment for trade in services could be identified. For developed countries, national treatment is an essential principle to ensure equal and fair opportunities for competition, and the expansion of trade in services. At the same time, it is recognized that there might be legitimate national policy objectives which would justify exceptions to national treatment. Developing countries are uncertain as to whether the national treatment principle is applicable to trade in services. They have argued that, if it was interpreted as relating to factors of production (investment), it was perhaps more properly dealt with in the context of bilateral investment treaties. For them, the full elimination of protection, which an immediate introduction of the national treatment principle in trade in services would involve, could only be a long term goal. In their view, therefore, the principle should not be included in a multilateral framework, but rather used as a criterion to judge whether particular perceived obstacles to trade in services should be eliminated or not.

6. To some extent, the difference in their views is due to the level of development and experience in developed and developing countries. The developed countries' approach to national treatment, reflects the experience among advance countries in the OECD, many of which are home countries

⁵¹ For reasons discussed in TD/B/1008/Rev.1.

of TNCs. National treatment is a mechanism for providing non-discriminatory treatment to TNCs on a mutual basis. In the "North-South" context, national treatment, and its relation to the establishment of foreign corporations, takes on a different aspect. Developing countries may wish foreign service corporations to establish in their countries to carry out essential tasks (e.g. trade finance), but they also wish to prevent such corporations from using their financial and technological advantages to dominate the domestic market. Liberalization of trade in services through the extension of national treatment might, therefore, be inconsistent with development objectives.⁵²

7. A concept of national treatment for trade in services requires utmost precision in its formulation, in particular with regard to the determination of the measures and actions to which national treatment would be applicable. National treatment may be an appropriate means of liberalizing trade in services among developed countries, but it has an entirely different impact on the economies of developing countries. In this context, it should be noted that the extent to which the concept of national treatment enters into a multilateral framework for trade in services, is related to the outcome of the discussions on a definition of "trade" in services, given that national treatment is largely an investment issue.

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

*Bilateral Treaties and National Treatment*⁵³

9. National treatment obligations have been traditionally contained in Friendship, Commerce and Navigation (FCN) treaties. A number of FCN treaties negotiated by the United States contain broad national treatment provisions both for persons and companies.⁵⁴ A typical national treatment clause in FCN treaties concluded by the United States is: "...treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."⁵⁵ They do not usually provide for establishment, but rather that such persons and firms of the country doing business and being present in the other shall be treated on the same basis as national persons and companies. In these treaties such provisions generally cover services activities, as well as persons and firms engaged in other activities. The United States national study on services reports that there are eleven treaties signed by the United States since 1953 providing for national treatment with respect to the operation of business firms. Some of these treaties

⁵² National treatment of TNCs could jeopardize the achievements of developing countries in the adoption of the Declaration on the Establishment of a New International Economic Order (GA resolution 3201(S-VI)) and the Programme of Action thereof (GA resolution 3202 (S-VI)) and the Charter of Economic Rights and Duties of States (GA resolution 3281 (XXIX)) which has as one of its objectives to strengthen the negotiating capacity of host countries, in particular the developing countries in their dealings with the TNCs.

⁵³ The scope for national treatment may be circumscribed by the application of a regime of bilateral reciprocity, which may involve limitations on the right of foreign-controlled firms as compared with domestically-controlled firms. In such a regime, national treatment is likely to be granted in regard to a number of specific regulations, such as the taxation of individuals or the taxation of business income or property.

⁵⁴ e.g. Treaty of Friendship, Commerce and Navigation concluded between the United States and the Argentine Confederation, 1983, article IV; Treaty of Friendship, Commerce and Navigation between the United States and Korea, 1956, articles VII, XII and XV.

specifically exclude major service sectors such as banking, communication, and transportation.⁵⁶ There are also various bilateral treaties relevant to services in force between the United States and certain developing countries (Egypt, Korea, Liberia, Argentina, Bolivia, Chile, Costa Rica).

10. In 1981, the United States began the negotiation of a series of investment treaties. These treaties are relevant because ultimately investment is the fundamental issue underlying the debate on services. The United States Study reports that three treaties of this kind have been signed (Panama, Egypt, Senegal). These treaties provide MFN rights to national treatment. For example, Article 2 of the Panama-United States Treaty Concerning the Treatment and Protection of Investment, provides that each party shall maintain favourable conditions for investment in its territory by nationals and companies of the other party, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals and companies of any third country, which ever is the more favourable. The treaties, however, provide for the exclusion from the scope of the national treatment provision, of various key sectors, many of them in the services category. The need for such exclusion by the United States arises as a result of the existing United States legislation which specifically prohibits or limits participation or establishment by foreigners in certain sectors. The services industries excluded from the national treatment obligation are: banking; insurance; air transportation; shipping; radio and television broadcasting; submarine cable services; satellite communications; customs brokers; and telephone and telegraph services. It should be noted that the Declaration on Trade in Services by the United States and Israel of April 22, 1985⁵⁷ expressly provides that trade in services should be "governed by the principle of national treatment". The United States-Canada Free Trade Agreement also provides in its Article 1402 for the extension of the principle of national treatment to the providers of a list of commercial services which include agriculture and forestry services, mining services, construction services, distributive trade services, insurance and real estate services, commercial services, computer services, telecommunications-network-based enhanced services, and tourism services.⁵⁸ This means that Canada and the United States have agreed not to discriminate between Canadian and American providers of the covered services. This does not entail, however, an obligation to harmonize. Therefore, if Canada chooses to treat providers of one service differently than does the United States, it is free to do so, as long as it does not discriminate between Americans and Canadians. Each government also remains free to choose whether or not to regulate and how to regulate. National treatment in the Free Trade Agreement also does not mean the treatment has to be the same in all respects. For example, a party may accord different treatment for legitimate purposes such as consumer protection or safety, so long as the treatment is equivalent in effect. It should be noted that the national treatment obligations

⁵⁶ Exchange of information pursuant to the ministerial decision on services: Communication from the United States. 25 January 1984, p. 76.

⁵⁷ ILM, 1985:679

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Article 1402: Rights and Obligations

- (1) Subject to paragraph 3, each Party shall accord to persons of the other Party treatment no less favourable than that accorded in like circumstances to its persons with respect to the measures covered by this Chapter.
- (2) The treatment accorded by a Party under paragraph 1 shall mean, with respect to a province or a state, treatment no less favourable than the most favourable accorded by such province or state in like circumstances to persons of the Party of which it forms a part.
- (3) Notwithstanding paragraphs 1 and 2, the treatment a Party accords to persons of the other Party may be different from the treatment the Party may be different from the treatment the Party accords its persons provided that:
 - (a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
 - (b) such different treatment is equivalent in effect to the treatment accorded by the Party to its persons for such reasons; and
 - (c) prior notification of the proposed treatment has been given in accordance with Article 1803.
- (4) The Party proposing or accorded different treatment under paragraph 3 shall have the burden of establishing that such treatment is consistent with that paragraph.
- (5) Paragraphs 1, 2, and 3 of this Article and Article 1403 shall not apply to:
 - (a) a non-conforming provision of any existing measure;
 - (b) the continuation or prompt renewal of a non-conforming provision of any existing measure; or
 - (c) an amendment to a non-conforming provision of any existing measure to the extent that the amendment does not decrease its conformity with any of the provisions of paragraphs 1, 2 or 3 of Article 1403.
- (6) The Party asserting that paragraph 5 applies, shall have the burden of establishing the validity of such assertion.
- (7) Each Party shall apply the provisions of this Chapter with respect to an enterprise owned or controlled by a person of the other Party notwithstanding the incorporation or other legal constitution of such enterprise within the Party's territory.
- (8) Notwithstanding that such measures may be consistent with paragraphs 1, 2 and 3 of this Article and Article 1403, neither Party shall introduce any measure, including a measure requiring the establishment or commercial presence by a person of the other Party in its territory as a condition for the provision of a covered service, that constitutes a means of arbitrary or unjustifiable discrimination between persons of the Parties or a disguised restriction on bilateral trade in covered services.
- (9) No provision of this Chapter shall be construed as imposing obligations or conferring rights upon either Party with respect

in this Agreement are prospective, that is they do not require either government to change any existing laws and practices. Any new regulations for covered services will have to conform fully to the national treatment obligation and in changing existing regulations the parties would be guided by the obligation not to make such regulations any more discriminatory than they are already.

11. The Protocol on trade in Services to the Australia /New Zealand Closer Economic Relations Trade Agreement provides for national treatment in its Article 5. Each member state should accord to persons of the other member state and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them. The treatment a member state accords to persons of the other member state may be different from the treatment of its own nationals, provided that the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety or consumer protection reasons and such different treatment is equivalent in effect to the treatment accorded by the member state to its ordinary residents for such reasons.

12. The United Kingdom has also used in bilateral treaties the MFN and the national treatment concepts in regard to persons and firms including those in the services sectors. The Treaty of Commerce, Establishment and Navigation negotiated in 1955-62 with Japan is a notable example of such treaties. The Treaty ensures MFN treatment, when appropriate, and national treatment to the extent feasible in regard to persons and companies e.g., cabotage in Article 20(5).

13. These bilateral treaties demonstrate that while in the interest of trade expansion and resource flows, national treatment of services has been considered a desirable goal towards which to strive, ultimately it can be overridden by other priorities as perceived by individual sovereign states. The exclusions which the United States itself provides for in its bilateral treaties, as mentioned above, are typical examples of how the national treatment principle is exercised with limitations.

National Treatment in GATT

14. The 'national treatment' concept is one of the fundamental elements of GATT. Article III of GATT, entitled National Treatment on Internal Taxation and Regulation, provides that imported products should be accorded identical treatment to that of domestic products in regard to internal taxation, other internal charges and government regulations. Each Contracting Party is bound by the provisions of Article III whether or not it undertook tariff commitments in respect of the goods concerned. The obligations under Article III are, however, subject to the general and security exceptions of Article XX and XXI.

15. It is a fundamental element of the GATT system that protection is to be implemented only through negotiated tariff rates imposed at the frontier, and not through quantitative restrictions, except under defined circumstances, or through domestic measures, other than government procurement. The basic purpose of the 'national treatment' obligation is, therefore, to ensure that the tariff concessions contained in the GATT schedules of concessions or other GATT provisions, such as the prohibition of quantitative restrictions or the unconditional most-favoured-nation clause of Article I, are not undone by domestic laws applied differentially to imports.

16. The key provisions of Article III are set out in paragraphs 1 and 2. The first of these states a general principle of refraining from the use of internal taxes and internal government legislation and regulation to afford protection to domestic production: "The Contracting Parties recognize that internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production".

17. Paragraph 2 sets forth in precise language obligations with respect to internal taxes: products of the territory of any Contracting Party imported into the territory of any other Contracting Party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Contracting Party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

18. Paragraph 4 is also important as it provides that imported products should be accorded

treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, requirements affecting the internal sale offering for sale, purchase, transportation, distribution or use. It further provides that differential internal transportation charges are allowed if based exclusively on the economic operation of the means of transport and on the nationality of the product. This paragraph is drafted in general terms to include laws and regulations which might drastically affect the equitable conditions of competition between imported and domestic products.

19. Two exceptions to the national treatment obligations are production subsidies and government procurement. These are provided for in paragraph 8 of Article III. It should be noted that the text of Article III contains many ambiguities; there is a need for substantial clarification of its provisions, especially with respect to government procurement policies, multistage turnover taxes and border adjustments.

20. The essential difficulty with applying the national treatment provision contained in Article III of GATT to trade in services is that the GATT national treatment clause is formulated to protect the integrity of negotiated levels of protection. In services, there are no such levels, nor even agreement as to which measures would be appropriate subjects for negotiation. As the very nature of the service trade usually precludes the application of duties at the frontier, protection to service industries is usually implemented by either restricting entry of the foreign service, restricting entry of foreign persons capable of supplying the service, denying foreign corporations the right to establish, or once they are established, restricting their activities within the country. National treatment relevant to transactions in services thus involves the treatment of enterprises (i.e. the producers of services).

21. The GATT rules on national treatment were given more precision and coverage as a result of the negotiation of the Codes on Technical Barriers to Trade and on Government Procurement during the Tokyo Round. The Code on Technical Barriers to Trade ("Standards Code"), is primarily intended to ensure that technical standards are not applied so as to frustrate the national treatment obligation. In this case the "appropriateness" is measured in terms of conformity with agreed international standards, technical regulations not based on such standards should be applied so as not to "have the effect of creating unnecessary obstacles to international trade". The object of the Code is to maintain national treatment in the GATT sense, i.e. to protect the integrity of negotiated levels of protection, if there are no such negotiated levels, (which could be zero) the national treatment provision loses its relevance.

22. Another GATT instrument related to the national treatment obligation is the Code on Government Procurement. Government procurement being an exception from the rules of Article III of GATT, the purpose of the Code is to provide a mechanism toward establishing national treatment in this area. This has been accomplished through the negotiation of detailed provisions to ensure national treatment in government purchasing procedures and to negotiate a list of government procurement entities to which this rules will apply, the idea being to increase the coverage through a series of subsequent negotiations, including its extension to services. Again, the purpose of the Code is to extend the application of national treatment not to eliminate protection *per se* as the purchases under the Code from foreign suppliers remain subject to applicable customs duties.

National treatment and the OECD

23. The concept of "national treatment" as applied in the OECD (rather than GATT) seems, therefore, more relevant to the service negotiations. National treatment is one of the three major elements of the OECD Declaration on International Investment and Multinational Enterprises of 21 June 1976. In the Declaration, the Governments of OECD countries declare:

That Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to peace and security, accord to enterprises operating in their territories and owned or controlled directly or indirectly by nationals of another Member country (hereinafter referred to as "Foreign-Controlled Enterprises") treatment under their laws, regulations and administrative practices, consistent with international law and no less favourable than that accorded in like situations to domestic enterprises (hereinafter referred to as "National

The OECD has also adopted a Decision on National Treatment,⁵⁹ which provides that member countries shall accord to foreign-controlled enterprises operating in their territory treatment, under their laws, regulations and administrative practices, no less favourable than that accorded to locally owned enterprises. While the instrument is aimed at limiting as much as possible discriminatory restrictions on foreign-controlled companies so that they can contribute to economic growth, it is recognized that various motivations may lead to differential treatment of such enterprises. These motivations relate, for instance, to public order, essential security interests, and commitments related to peace and security but also to other bases on which reported measures related to national treatment may be found. Similar qualification is found in Article 3 of both OECD Codes of Liberalization of Current Invisible Operations and of Liberalization of Capital Movements which provide as follows:

The provisions of this Code shall not prevent a Member from taking action which it considers necessary for: (i) the maintenance of public order or the protection of public health, morals and safety; (ii) the protection of its essential security interests; (iii) the fulfilment of its obligations relating to international peace and security.

A wide range of deviations has been identified, including in the areas of subsidies, taxes and government procurement, and it has been found that such treatment has frequently been made conditional upon reciprocity.

24. National treatment in the OECD is the subject of a number of reservations and exceptions. It should be noted therefore, that developed countries have not as yet found it possible to accept a comprehensive national treatment obligation concerning foreign controlled firms, even those producing goods rather than services.⁶⁰ It appears that the OECD is studying alternative concepts such as "fair or equivalent treatment" in order to deal with problems peculiar to the service sector.

25. A recent OECD paper proposes a conceptual framework based on a stated definition of trade in services which contains general principles against which regulations and practices can be evaluated as being appropriate or inappropriate, and therefore a barrier or not a barrier to trade in services.⁶¹ The paper proposes national treatment as an important element of the conceptual framework and defines it as treatment no less favourable than that granted to domestic firms. This treatment would be given to imported services or to foreign service firms in a number of areas, relating to regulation, taxation, access to government assistance and to appeals procedures. The paper sets forth the idea that one way to achieve market access could be to consider regulations which deny national treatment as inappropriate or unacceptable. At the same time the paper argues that the concept of national treatment in the context of services probably needs to be defined flexibly since it must be adaptable to differing situations or specific forms of marketing. It could, for example, take the form of "similar" or "equivalent" treatment so as to take due account of how local regulations for certain activities would be applied to foreign service firms.

26. Thus, the concept of national treatment could be interpreted also as signifying that the first establishment of a foreign firm would require to be in compliance with local regulations on the marketing of services, in conditions similar, or equivalent, to those applying to local firms. But, where the regulations are such as to preclude market access by any new firm, whether domestic or foreign, national treatment would not provide an adequate response to the desire for liberalisation. Provisions would have to be made for additional measures in the negotiation context.

27. Although as mentioned above, the OECD Decision is subject to many reservations and exceptions in practice, it clearly reflects the philosophy of the OECD countries, and suggests an approach under which national treatment should be considered as a right, as in GATT, while the "right of establishment" could be a subject of negotiation. It should be noted that, if both "national

⁵⁹ The complete text of the 1976 Declaration and the Decisions has been published by OECD under the title: International Investment and Multinational Enterprises.

⁶⁰ It should also be noted that it is only in the EEC, and outside the EEC only in regard to insurance, that there is any significant area of agreement on right of establishment; national treatment, therefore, is relevant only to such firms which may be allowed to establish. Therefore, many countries do in practice grant de facto national treatment to foreign-controlled firms once they have been allowed to establish. Consequently, it is the control on establishment which is critical. This has been the position, for example, in the United States, where establishment as an issue has been addressed by the enactment of specific prohibitions.

treatment" and "market presence" are accorded, then there is virtually no other way of protecting the domestic producers in most service sectors.

The Treaty of Rome and National Treatment

28. A broad formulation of the national treatment concept is found in the Treaty of Rome of 1957, establishing the European Economic Community. Article 7 of the Treaty provides that within the scope of application of the treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

B. Most-Favoured-Nation Treatment

29. The unconditional most-favoured-nation concept means that, if a nation grants to another nation more favourable treatment, it must extend such treatment unconditionally to other nations, thus ensuring equality of treatment between products and services of different national origins.⁶²

30. It should be noted that, by contrast with the national treatment provision, contained in Article III of GATT, which requires the contracting parties to treat imported goods the same way as they treat like products made domestically, the MFN clause requires only that a contracting party treat all foreign goods equally; there is nothing to prevent domestic products being treated more favourably than the foreign goods.

31. The developed countries consider that the MFN principle should be applicable to the liberalisation and expansion of services trade.⁶³ They believe that the economic considerations behind the central role of the MFN principle in GATT also apply to services trade. Recognizing that non-discrimination in services is the exception rather than the rule, some developed countries such as Japan, Switzerland and Australia envisage a "conditional MFN" approach for services.

32. The developing countries, on the other hand, have many hesitations concerning the conditional application of the MFN principle to trade in services.⁶⁴ Developed countries argue that conditional MFN agreements promote the expansion of trade by reducing the impact on members of an agreement on tariff and nontariff barriers that would not otherwise have been negotiable. But developing -and some developed- countries are concerned that conditional MFN agreements could limit the scope for liberalisation of trade by encouraging the application of restrictions to trade with non members of the agreement, thus creating "selective" protection.

33. The unconditional MFN principle is the basis of the GATT, and one which would provide a stable and predictable framework for the conduct of trade among the majority of countries in the world if adhered to. The MFN principle has been eroded not so much by resort to permitted formal exceptions, such as regional trading arrangements like free trade areas and customs unions

⁶² See Yearbooks of the International Law Commission 1969, 1970, 1973, 1976, 1978 for a history of the MFN concept, the important national and international jurisprudence.

⁶³ See Note TC(82)14 by the United States which suggests that non-discrimination (most-favoured-nation treatment) might form one of the basic principles in a conceptual framework. Paragraph 27 E of this Note provides that: Countries may wish to extend to each other the opportunity to obtain or negotiate the same benefits granted to other participants in the trade system with regard to the liberalisation of trade in services. Bilateral negotiations often yield great benefits, but to the extent that they provide preferential, reciprocal agreements they can become protectionist and trade distorting. Countries might adopt a principle of non-discrimination to minimise disruptions and contribute to mutually beneficial trade liberalisation. Special exceptions might be accepted but generally agreements should extend to those adhering to the principle of non-discrimination on an equal basis. This principle is firmly grounded in both OECD and GATT precedents. Modified application of most-favoured-nation treatment may be needed for trade in services, however, because of the non-tariff nature of many service trade obstacles. Nonetheless a conditional form of most-favoured-nation treatment might extend commitments to liberalise barriers to trade in services to countries adhering to a common set of principles.

⁶⁴ Conditional MFN requires that parties to the agreement concerned have to provide reciprocal concessions in order to gain the benefits of an action available under the agreement. The unconditional form provides that all new concessions negotiated bilaterally are extended without compensation to others. The United States for example used the conditional clause in its trade treaties until 1972 and since then it adopted the unconditional form. The United States

as by unilateral deviations from the unconditional MFN clause. The latter threaten to undermine completely the working of the multilateral trading system. Some examples of categories of such deviations are:

- (a) The application of certain Tokyo Round Codes on a "conditional" basis, with the implication that "conditional MFN" solutions will be sought in the Uruguay Round multilateral negotiations. The danger of "conditionality" in the application of tariff rates and trade concessions was recognized as early as the 1930's, and identified as one of the main factors contributing to the collapse of international trade relations during that period.⁶⁵ Support for the "conditional" approach affects negotiations and attitudes, and weakens the position of less powerful partners;
- (b) continuing pressure for a "selective" safeguard clause;
- (c) resort to discriminatory action outside GATT, such as VERs, QRs, and MFA arrangements; and
- (d) recourse to bilateral solutions, where multilateral disciplines are unilaterally determined to be unsatisfactory, with consequent discrimination against third countries.

In what follows, approaches to MFN treatment will be examined in the context of, first, bilateral treaties, then GATT, OECD, and finally other, approaches to MFN treatment.

Bilateral Treaties and MFN

34. Friendship Commerce and Navigation (FCN) treaties usually provide for MFN treatment. MFN treatment in these treaties has been defined as follows: the term "most-favoured-nation treatment" means treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.⁶⁶

35. The European countries used the conditional MFN until the 1860's in their commercial treaties. With the 1864 treaty between Britain and France (the Cobden Chevallier treaty), European countries moved to the unconditional MFN form. The standard United States' FCN treaty contains provisions on MFN treatment. The United States used the conditional form until the 1920's;⁶⁷ subsequently, the unconditional form became a key element in the Reciprocal Trade Agreements Program of the 1930's. The last U.S. FCN treaties were signed in the late 1960's. In the late 1980's, the United States launched Bilateral Investment Treaties, which are specifically designed to provide legal protection to investment. Other OECD countries have signed over 150 Bilateral Investment Treaties; such treaties usually provide for MFN treatment.⁶⁸

36. The Protocol on Trade in Services to the Australia/New Zealand Closer Economic Relations Trade Agreement provides in its Article 6 for MFN treatment. Each member state should accord to persons of the other member state and services provided by them treatment no less favourable than that accorded in like circumstances to persons of third states with regard to the provision of services excepted from the application of the Protocol.

GATT and MFN

37. As indicated above, the most important principle on which GATT is based is that of MFN

⁶⁵ The League of Nations condemned the "conditional clause" in unequivocal terms: "It cannot be too often repeated that a conditional clause has nothing whatever in common with the sort of clause which the (1927) International Economic Conference and the Economic Consultative Committee recommended for the widest possible adoption. It is in fact the negation of such a clause, for the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination, it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to establish it on firmer foundations." Quoted in TD, B, 913, paragraph 45.

⁶⁶ FCN treaty between the United States and Ireland, January 21, 1950, Art. XXI. (2).

⁶⁷ The United States signed 13 FCN treaties before 1905 providing for MFN treatment with respect to commerce. Fifteen treaties signed after WWI provide for MFN treatment with respect to the establishment and operation of business. The last FCN treaties were signed in the late 1960's.

⁶⁸ Bilateral sectoral agreements in aviation or shipping provide for fair market access and reciprocity but not the MFN

treatment, contained in its Article I. This establishes that trade must be conducted on the basis of non-discrimination between countries. The GATT embodies unconditional MFN treatment, which protects the value of bilateral concessions, and provides security, by making the bilateral concessions a basis for a multilateral system.⁶⁹

38. Article I of GATT, paragraph I, provides:

With respect to customs duties and charges of any kind imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, which concern (a) internal taxes or other internal charges on products and the laws, and (b) regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products on the domestic market) any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.⁷⁰

In other words, no country must grant special benefits to another, so that all countries are placed on an equal footing, and all enjoy the benefits entailed by any reduction in trade obstacles which, in accordance with GATT, must occur principally as customs duties.

39. The GATT contains a number of other MFN or non-discrimination clauses, concerning internal quantitative regulations (Article III:7), cinema films (Article IV(b)), transit of goods (Article V:5,6), marks of origin (Article IX:1), quantitative restrictions (Article XIII:1)⁷¹, state trading (Article XVIII:20),⁷² and measures essential to the acquisition or distribution of products in short supply (Article XX:j). These provisions are different from the Article I provision, in that they require that products of any contracting party be accorded treatment "no less favourable" than that given to any third country.

40. The application of non-discriminatory treatment (national and MFN treatments) is also explicitly laid down in several of the MTN Codes but, even without any explicit reference, non-discrimination between signatories is implicit in the Codes. Following are some examples of non-discrimination and national treatment:

(i) Article 2 of the Code on Technical Barriers to Trade contains the provision: "products imported from the territory of any party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards"; (ii) Article II of the Code on Government Procurement lays down that: "With respect to all laws, regulations, procedures and practices regarding government procurement covered by this agreement, the Parties shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within customs territories (including free zones) of the Parties, treatment no less favourable than: a) that accorded to domestic products and suppliers; and b) that accorded to products and suppliers of any other Party."

⁶⁹ The unconditional form of the MFN clause was embodied in the ITO draft Havana Charter, Article 16. Details of the historical developments relating to the negotiations of the Havana Charter and the GATT unconditional MFN clause are included in the report of the Special Rapporteur of the International Law Commission in May 1970 (A.C.N. 4/228 and Add. 7).

⁷⁰ Paragraph 1 of Article I is modelled on the standard League of Nations most-favoured-nation clause. The references to "international transfer of payments" and "internal taxes" were introduced into the standard clause by the United States in their original draft. London Report, p. 9, EPCT, C.II 25, p.2. The MFN treatment, which each GATT contracting party extends to all other contracting parties subject to certain exceptions specified in the General Agreement is one defence against the spread of discrimination in trade which is taking place through discriminatory trade agreements. Such agreements are those in which one or more countries provide benefits to, or impose obligations on certain trading partners that are not applicable to all trading partners. Usually such agreements' discriminatory provisions reflect an existing relationship between the members of the agreement such as bilateral trade imbalances, competition for shares of the same market or close political or geographical relations.

⁷¹ Article XI provides for the general elimination of quantitative restrictions. Nevertheless, for restrictions that have not yet been lifted, or are to be reintroduced in the context of safeguards, Article XIII provides for the non-discriminatory application of quantitative restrictions between all supplying countries (import restrictions) or receiving countries, (export restrictions). The reintroduction of quantitative restrictions as a measure intended to safeguard the balance of payments (Article XI) is subject to the non-discrimination rule. This is also how Article XIX is usually interpreted regarding emergency action on imports of particular products.

⁷² Article XVII relating to state trading enterprises lays down that in its purchases or sales involving either imports or exports a state enterprise shall act in a manner "consistent with the general principles of non-discriminatory treatment

In these Codes, the most-favoured-nation clause is, as mentioned above, applied "conditionally": the benefits of the Codes are extended by the signatories to the other signatories of the Codes, but are not required to be extended by them to non-signatories. Therefore, non-discriminatory treatment is conditional on an explicitly reciprocal exchange of rights and obligations, including access concessions, among members of the agreement. The Government Procurement Code is an example of an agreement which places access concessions on a strictly conditional basis. The conditional MFN is used in these agreements because, supposedly, an unconditional MFN may not create the incentive necessary to ensure a comparable standard of treatment of imports by all members. It could be argued that the conditionality of these codes is non-discriminatory because it relates to membership of the agreement rather than to external factors, although it effectively discriminates against countries not in a position to accept the obligations for reasons of their level of development.

41. Article I of GATT, and other GATT Articles and decisions, provide a number of exceptions to the MFN which were adopted for political and economic reasons. An original exception to the MFN clause is the so-called "Grandfather Clause", providing for preferential arrangements contained in paragraphs 2, 3, and 4 of GATT Article I. These provisions allowed the contracting parties which, prior to the GATT, granted or received preferences, to continue to do so, without increase in the margins of these preferences. The British Commonwealth, as well as the preferential treatment extended by France to its colonies, and the preferences by Belgium to its colonies, fall under the provisions of Article I. The reason for this exception was that the countries concerned would not have acceded to an agreement which did not allow the continuation of these long standing preferences. Since this preferential system has been replaced by the EEC and ACP Arrangements, and the adoption of the GSP, the preferences have become of historical importance only.

42. The frontier traffic arrangement provided for in Paragraph 3 (a) of Article XXIV, is another exception to the MFN. This Article stipulates that the provisions of the GATT shall not be construed to prevent advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic.

43. Article XXIV further provides for significant exception to the MFN clause, as it allows the contracting parties to form customs unions and free trade areas, the purpose of which should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties. The formation of EEC, EFTA and regional economic groupings among developing countries, has resulted in an increase in trade on a preferential basis among the member countries of each of these economic groupings.

44. There exist also the exceptions approved by the GATT contracting parties on an ad hoc basis under the waiver provisions of Article XXV, paragraph 5, which provides that, in exceptional circumstances not elsewhere provided for in the agreement, the contracting parties may, after considering the request made by a contracting party, waive an obligation imposed on it to the extent necessary for the implementation of the measure requested. Such decisions have, however, to be approved by a two thirds majority of the votes cast, which must comprise more than half of the contracting parties. Complaints about the erosion of Article I by granting waivers, led the contracting parties to adopt, in 1956, guiding principles that should be followed by them in granting waivers.⁷³ These guidelines provided that waivers should be granted only after full consultations and a thirty-day notice period, and that every waiver should include procedures for future consultation as well as for the annual review of its operation.

45. Among the waivers, the Generalized System of Trade Preferences, may be mentioned.⁷⁴ As early as the late fifties, developing countries began to argue that, in their trade relations with developed countries, the MFN clause of GATT worked to their disadvantage, especially since the principle assumed that all countries were of equal economic strength to begin with. They argued, therefore, that the developed countries should establish preferential tariffs for imports from developing countries. In 1971, the GATT Contracting Parties decided that the provisions of Article I should be waived, for a period of ten years, to the extent necessary, to permit developed contract-

⁷³ GATT Basic Instruments and Selected Documents (BISD) 25, 1957

⁷⁴ This waiver followed the unanimous agreement reached at UNCTAD II in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries. UNCTAD II, New Delhi, the "Agreed Conclusions of the Special Committee on Preferences".

ing parties to accord preferential tariff treatment to products originating in developing countries, without according such treatment to like products of other contracting parties. Other examples of grant of waiver are the Tripartite Agreement concluded in 1967 between Egypt, India and Yugoslavia, and the Protocol relating to Trade Negotiations Among Developing Countries, under which sixteen developing countries have agreed to exchange preferential tariff concessions on a selected number of products.⁷⁵

46. Following the adoption of the Enabling Clause in 1979, these waivers are no longer operative as this clause provides the legal basis for the above-mentioned arrangements. The waiver exception is, however, a general exception that can apply to any GATT obligation. A recent example of the application of the waiver is the one obtained by the United States to extend preferential treatment under its Caribbean Basin Economic Recovery Act to the countries in the Caribbean region.

47. The Enabling Clause itself is a significant exception to the MFN clause. This Clause was adopted to provide preferential and more favourable treatment to developing countries. During the Tokyo Round, a number of countries urged that the MFN rule should be modified to allow the extension by developed countries of preferential treatment to developing countries, covering not only tariffs but also non-tariff measures. The developing countries considered that the conditions laid down by GATT Article XXIV, governing the formation of regional preferential arrangements among developing countries, did not properly take into account the special situation of these countries. In November 1979, a GATT decision was adopted establishing a permanent legal framework for the "Differential and More Favourable Treatment of Developing Countries".⁷⁶ This decision is referred to as "the General Enabling Clause" and its paragraph 1 stipulates: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."

48. The types of preferential treatment are enumerated in paragraph 2 and include : GSP, non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of GATT, regional and global arrangements among developing countries, special treatment for the least developed countries. A footnote to this paragraph provides that it would remain open for the contracting parties to consider on an ad hoc basis, under the GATT provisions for joint action, any proposals for differential and more favourable treatment not falling within the scope of paragraph 2. It should be noted that the Enabling Clause establishes certain conditions and qualifications, which must be observed when granting any differential and more favourable treatment to developing countries. For example, it stipulates that such treatment must be designed to facilitate and promote the trade of developing countries, and not to raise barriers to, or create undue difficulties for, the trade of other contracting parties. Moreover, paragraph 5 of the Clause lays down the principle of non-reciprocity in trade negotiations between developing and developed countries as follows: "The developed countries do not expect reciprocity for commitments made to them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs".

49. Other MFN exceptions include GATT Articles XX and XXI for general and security exceptions, and the non-application provision of GATT Article XXXV. It should be pointed out that Article XX lays down that the measures must not be applied in a manner which would constitute a "means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".⁷⁷

OECD and MFN

⁷⁵ The GATT Contracting Parties adopted a decision on 265 November 1971, waiving the provisions of paragraph 1, of Article I of the General Agreement to permit each participant in the protocol to accord preferential treatment to products originating in other parties without being required to extend the same treatment to like goods when imported from other contracting parties. GATT BISD Eighteenth Supplement, page 27 and UNCTAD document TD/B/C.7/49, 27 October 1981, page 9-10.

50. Within the context of its own jurisdiction, OECD has established non-discrimination (MFN) commitments between OECD Member countries. The two existing OECD Liberalisation Codes are both based on the twinned principles of liberalisation and non-discrimination.⁷⁸ With regard to the Code of Liberalisation of Current Invisible Operations (LCIO),⁷⁹ Article 9 of the Code provides for the principle of non-discrimination as follows:

"A Member shall not discriminate as between other Members in authorising current invisibles operations, which are listed in annex A, and which are subject to any degree of liberalisation". Article 10 further provides that: "Members forming part of a special customs or monetary system may apply to one another, in addition to measures of liberalisation taken in accordance with the provisions of Article 2 (a), other measures of liberalisation without extending them to other Members".

Similar provisions are found in the Code of Liberalisation of Capital Movements, where they are also included in Articles 9 and 10 dealing with non-discrimination and exceptions to the principle of non-discrimination, namely special customs or monetary systems. The limitations on the scope of the above instruments should also be recalled, as they may for the same reasons exclude certain areas from the scope of application of the commitment to non-discrimination between Member countries. For example, the LCIO Code does not explicitly cover all service sectors at the moment. Some of the exceptions noted result from the application by certain Member countries of the reciprocity principle, for instance as regards establishment, in the context of bilateral agreements. Of interest is the differential treatment between EEC countries and the other OECD Member countries arising under the Directives on freedom of establishment and freedom to provide services, and the special rules governing insurers in the Member States of the Community. There are other examples, in which individual countries discriminate between OECD member countries, both within the Community and regardless of any community directive, and outside it.

51. Recently, OECD has produced a paper on certain elements of a conceptual framework for trade in services. It proposes non-discrimination as one of the principles to permit a high degree of liberalisation in trade in services. This principle is understood in its broadest sense, including both national and most-favoured-nation treatments; it would also be applicable to free access to markets and freedom of establishment in a nondiscriminatory manner. In other words, there would be no discrimination between foreign firms or services of differing origin, and no discrimination as between foreign and local firms. The principle would also be applicable to foreign firms, and to services of foreign origin, after their entry or establishment in a country. The paper argues that including a non-discrimination clause in the framework would seem important, in order to guarantee that liberalization of trade in services takes place under an open and multilateral system. At the same time, the paper notes that domestic regulation is an important aspect of the proper functioning of some service industries, and opines that consequently, the need for countries to open their markets to each others' industries, so as to obtain certain guarantees, may justify attaching an element of conditionality to non-discrimination. Countries which negotiate concessions and advantages should be willing, it is argued, to enter into similar negotiations with other countries ready to contribute.

C. Right of Establishment

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

53. Developed countries support the application of the principle of right of establishment or of the minimum necessary presence in the market to effectively supply the service (commercial presence), as necessary for effective access to markets. Developing countries on the other hand oppose the idea that establishment should be a "right" to be ensured in foreign markets to the provider of services. In their opinion, such a right would be in contradiction with the right of states to

⁷⁸ Article 1(d) in both Codes should also be noted: "Members shall endeavour to extend the measures of liberalisation to all members of the International Monetary Fund"

regulate both the entry of foreign investment, and the conditions of establishment of foreign enterprises. Moreover, they point out that the latter right has been expressly acknowledged by the international community, at the United Nations level, by the Charter of Economic Rights and Duties of States and, at the regional level, by the OECD member countries when dealing with the question of national treatment for foreign controlled enterprises. In their view, under GATT there is no right of access to markets or any reciprocal right of "access to resources". Therefore, the developing countries argue, to grant a "right of establishment" to foreign companies in the area of services would go much further than what is foreseen for goods in GATT.⁸⁰

54. The penetration of foreign markets for a number of services generally requires, and is facilitated by, some form of "presence" in the importing country, either by persons or corporate entities. The forms of market penetration in services differ considerably both within and among services sectors. In some sectors, significant investment is required by a foreign firm to sell services on the domestic market, while in others all that may be required is a minimal presence, such as a small office with a computer terminal and access to data from the home base. In some cases no presence or establishment is required at all and obligations to establish are considered as trade barriers by suppliers.

55. Many major service industries provide services both on an across-the-border basis and on an establishment basis. Services provided on an establishment basis may be defined as those services which are generated at the point of use by a stable material installation. This definition does not necessarily mean that right of establishment has been granted to a local enterprise under foreign control. Such services may be provided by local entities under foreign control, which are not necessarily considered local enterprises, as in the case of branches or agencies. Moreover, the consumer may, in some instances, travel to use the services provided on an establishment basis.⁸¹ Services provided on the basis of establishment are those which are consumed through a supplier firm with a permanent establishment at a given place:

- (i) foreign customer moves temporarily to the supplier country to consume services, as in the case of tourism (hotels); and (ii) supplier firm establishes itself in the country of the consumer, which corresponds to the movement of enterprises abroad, and relates to international investment and the right of establishment, as in the case of accounting and legal services, equipment rental, retail trade and some aspects of banking and insurance.

Consequently, it could be concluded that freedom of trade in services may entail service transactions, movement of persons, movement of capital, information flows and, in certain cases, movement of goods.

56. Concerning across-the-border trade in services, the concept includes the following:⁸²

- (i) services which are provided by a supplier in the exporting country for a consumer in another country which means that the enterprise supplying the service and the place of consumption are not necessarily the same. Examples of such trade are cargo and passenger transport, cargo insurance, and telecommunications; (ii) management and technological services, franchising and the provision of intangible assets such as intellectual property to industrial customers in the consumer country; and (iii) other services commonly traded across borders directly to foreign consumers, such as some of the film, information, engineering, banking and insurance sectors.

Such trade would usually include temporary movements of exports or temporary work at the place of use.⁸³

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

58. Several criteria have been proposed for distinguishing trade in services from investment in

⁸⁰ Note the Brazilian statement made at the general debate in the GNS, Annex I, paragraph 15 and 16.

⁸¹ The matter is then one of movement of persons rather than international investment. OECD document TC WP (83)10

⁸² TC WP(83)10.

services. The Note by the United States Delegation to the OECD, in its paragraph 36 to 42, explores the possibilities of such a distinction. One idea was to start from the place where the services are generated, i.e. that across-the-border trade or movement would be defined to occur when the value of the services is generated in one country and transferred to another, and investment in services would be defined to occur when the value is generated in the host country. This assumes that it is possible to dissociate the sale or supply of the service from its actual generation, and to assign an origin to the value added during the successive transactions.⁶⁴

59. Unlike goods, services usually cannot be transported or stored, and to have value must be supplied at the place and time required. Firms supplying services accordingly have to adjust their production network to demand. For service industries, the very nature of the activity may require a presence at the place of consumption; in addition, local regulations (for instance statutory measures to allow government supervision of banks or insurance companies operating in their countries) may oblige firms to be present, via investment, in the country where they wish to operate. In the United States' view, while the condition is then one of investment, the problem nonetheless remains that of "trade in services" as a whole, because in that case there appears no alternative for the foreign firm, if it wishes to have access to the market and operate effectively there than to invest. The United States Note, in its paragraph 38, points out that, from the point of view of liberalising trade in services, it may be necessary to examine:

- (i) the conditions under which foreign services concerns are allowed to do business; and
- (ii) what kind of presence is needed in order to conduct business.

As a rule, firms have a range of options for penetrating a foreign market, such as licencing, representative offices, agencies and branches, subsidiaries, holdings in a local firm, purchase of a local firm, and joint ventures. The form chosen depends on the regulations in the host country which may direct foreign firms towards one option or another, and also on the firm's policy, and the scope of presence that it desires, and needs, to practice in given service industries. The Note, in its paragraph 39, deals with penetration of host countries in terms of the "right" to perform transaction which foreign firms should enjoy. The following are proposed as "rights":

- (i) the right to sell a service generated abroad; (ii) the right to invest in local marketing, sales and distribution systems needed to sell/trade international services; (iii) the right to use foreign employees to maintain the local delivery system; (iv) the right for foreign employees to offer their professional services without undue licencing restraints.

The Note also proposes a more modest alternative approach, which would couple "market access", defined as the right to sell a service generated abroad, with the possibility for foreign service concerns "to compete on equivalent footing with domestic firms for manpower and access to deliver the services".

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

61. The U.S. Study further argues that an important issue concerning the distinction between trade and investment relates to the distribution system. It notes that, under traditional trade concepts the question of access to the distribution system, or to service/maintenance facilities, is a trade issue, while ownership of the distribution system is an investment issue. It further notes that under the principles of the GATT, a product which has overcome the legitimate barriers at the border is entitled to full national treatment, i.e., there is an obligation to treat a foreign producer in the same manner as a domestic producer. Thus, a foreign producer is entitled to the same access to the domestic distribution system as a domestic producer.

62. The Study argues that the existing GATT approach to the distribution system could be applied to trade in services. Thus, access to a local distribution system would be treated as a trade

issue, while ownership of the distribution system would be treated as an investment issue. Access to the distribution system would include the right of a foreign supplier of services to negotiate a contract with local businesses, to provide distribution or servicing facilities. Thus, for example, if the national treatment principle were adopted for trade in services, a foreign insurance company that was able to overcome the agreed restrictions at the border, would have a right to sign a contract with local insurance brokers or claims adjusters to sell their policies and to handle claims.

63. The right of establishment is basically an investment issue because entry and residence are necessary conditions of direct investment by individual companies, while it is possible to pursue commercial activities without being present in the importing country. The need to distinguish between trade and investment concepts has been recognized and it has been stressed that what is sought is the right to that presence in the market necessary to conduct business.

64. From the perspective of the objective of maximizing the contribution of services to development, the actual presence of foreign firms would seem to have less relevance than that of ensuring that this presence effectively contributes to development objectives, and does not simply result in domestic firms being displaced, or prevented from entering, the market. The contribution of such firms could be largely that of establishing new interlinkages, facilitating development of human capital or supporting export efforts. What is important is the determination of those activities from which they are allowed to draw off, and internationalize, savings, and not whether the foreign firms are present in the domestic market. It would thus appear difficult to consider the "right of establishment" and "national treatment" issues separately (i.e. with establishment national treatment is equivalent to total liberalization, with establishment national treatment is meaningless), or to adopt other than a sectoral approach in examining in any detail the application of these principles, given that the same degree of "presence" in the market may imply significantly different economic and social consequences from sector to sector. The need to apply regulations specifically to foreign firms may also differ radically.

Bilateral Agreements and the right of establishment

65. In the FCN treaties, the term "right of establishment" is not always used in the formal text of the agreement; it is, however, commonly in use in referring to some of the rights provided therein. In these cases, the "right" or "freedom" of establishment usually covers the right of an alien : (i) to enter the territory of the State concerned; (ii) to reside there; (iii) to set up and manage companies; (iv) to pursue the economic and other activities expressly listed in the agreement; and (v) sometimes subject to qualifications, to acquire, own and use property in that State. Bilateral agreements, therefore, define the scope and the content of the concessions granted. The FCN Treaty between the USA and Israel provides in its Article VII, paragraph 1:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other activity for profit (business activities) within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired....

The right of establishment granted is, however, limited by Article VII. paragraphs 2 and 3 which provides that:

2. Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, banking, or the exploitation of land or other natural resources. However, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1, shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories: but such formalities may not impair the substance or the rights set forth in said paragraph.

reciprocity in regard to establishment (as regards both services firms and other sector firms). The Canada/United States Free Trade Agreement also refers to commercial presence providing that provision of a covered service includes the establishment of a commercial presence (other than an investment) for the purpose of distributing, marketing, delivering or facilitating a covered service.⁸⁵

GATT and the right of establishment

67. Right of establishment being an investment, not a trade issue, there is no equivalent concept in the GATT.

OECD and right of establishment

68. It may be noted that existing OECD instruments, whose strengthening or extension is under consideration, concern various "rights", which are the right to sell services, the right to invest and the right to operate in equitable circumstances. From the standpoint of the two OECD Codes, the establishment of branches is at present covered by the LCIO Code for insurance. Discriminatory obstacles to the establishment of subsidiaries by foreign firms are covered by Section I/A of the LCM Code. Once they are operating in a country, after setting up in one or another form, firms under foreign control are covered by the CIME Committee's Instrument on National Treatment.

69. Several forms of penetration are covered by the definition of direct investment under the OECD's LCM Code, Annex A, List A:

"1. Direct Investment Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof: A. In the country concerned by non-residents by means of : 1. creation and extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise; 2. participation in a new or existing enterprise; 3. long-term loan (five years and longer)".

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

Treaty of Rome and the "right of establishment"

71. The treaty of Rome provides for temporary "right of establishment" of nationals of all member States in the territory of other member States, defining such freedom essentially in terms of national treatment "under the same conditions as are imposed by that State on its own nationals",⁸⁶ and the "free provision of services",⁸⁷ which corresponds to the distinction between investment by, and operation of, enterprises providing services, on the one hand, and trade in ser-

⁸⁵ Article 1401, paragraph c of US-Canada Free Trade Agreement. see also the Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations Trade in Agreement includes in the definition for provision of services the right of establishment.

⁸⁶ Article 60 of the Treaty of Rome

vices, on the other.

D. Transfer of technology

72. Many developing countries have highlighted the importance of the issue of transfer of technology and its relevance to the objectives of the negotiations. Fair and equitable access to new technologies should be seen as implying that not merely the provision of the right of establishment of a network in a territorial space is of relevance in the GNS but also the right of access into the network, especially for developing countries. To the extent that services affect the pace of over-all development of the economy, not only through their linkages to the production of goods, but also through the provision of critical services such as banking, insurance, telecommunications, etc. technological advance in services should assume a central place in the development process. In this context, the pertinence of the of UNCTAD draft code of conduct for transfer of technology mentioned.

Code of Conduct on Transfer of Technology

73. The Mexican paper³⁸ as its eighth concrete measure for the implementation of the objectives of the framework agreement proposes that ways and means should be studied to speed up the transfer of technology from developed to developing countries. To this end, it further proposes that the GNS should study the code of conduct which has been under negotiation for ten years in UNCTAD and should this code not be sufficient to attain the objective in question, it would be necessary to study further measures. It is appropriate, therefore, to consider at the GNS the obligations of the operators and their home governments in regards to transfer of technology.

74. The need for an international code of conduct that would establish universally acceptable norms and standards for transfer of technology transactions arose in the early 1970's as a result of the rapid growth of international technological flows and of the emergence of a clearer perception of the role played by technology in the development process. While appreciating the beneficial effects of this transfer of technology, the national authorities of some developing countries perceived that certain practices associated with transfer of technology transactions were abusive or contrary to national development needs. It appeared to them that these unacceptable practices arose either because of the imbalance in the respective bargaining powers of the licensees and licensors in these transactions or because of the absence of sufficient regulation. These abusive practices restrict competition and international trade and adversely affect the technological development of the technology-acquiring country. In developed market-economy countries, competition laws are generally used to check the abusive practices that might arise from restrictive practices in licensing and other transfer of technology agreements. In order to remedy this situation, the developing countries also adopted national legislation regulating technology transfer transactions and proscribing certain restrictive practices connected with such transactions. At the multilateral level there are no standards limiting the use of such abusive practices in the area of technology transfer. A United Nations Conference was convened in 1978 to adopt an international code of conduct on transfer of technology. One of the objectives of the draft code is the establishment of "general and equitable standards on which to base the relationships among parties to transfer of technology transactions and governments concerned, taking into consideration their legitimate interests, and giving due recognition to special needs of developing countries for the fulfilment of their economic and social development objectives."³⁹ The sixth session of the Conference was held in 1985, but no agreements were reached on the outstanding issues. Since then consultations have taken place to consider various options for completing the work.

75. The draft code of conduct that has emerged as a result of six sessions of the Conference consists of a preamble and nine chapters dealing respectively with: definitions and scope of application; objectives and principles; national regulation of transfer of technology transactions; re-

nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended....

restrictive practices; responsibilities and obligations of parties; special treatment for developing countries; international collaboration; international institutional machinery; and applicable law and settlement of disputes. The draft code of conduct is of universal application. It is addressed to all parties to transfer of technology transactions and to all countries and groups of countries, irrespective of their economic and political systems and their levels of development. For the purpose of the code, transfer of technology is defined as the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service and does not extend to the transactions involving the mere sale or mere lease of goods.

76. Most of the issues still under negotiations are in chapter 4 of the draft code, dealing with restrictive practices in transfer of technology transactions, and chapter 9 on applicable law and settlement of disputes. With respect to chapter 4, the Conference has drawn up 14 practices to be avoided by parties to transfer of technology transactions which are still under consideration. They include restrictions such as grant-back provisions, challenges to validity, price fixing, restrictions on adaptations, exclusive sales agreements, tying arrangements, export restrictions, patent pool and cross-licensing agreements, restrictions on publicity, payments and other obligations after expiration of industrial property rights and restrictions after expiration of arrangements. In the chapeau and the introductory section of chapter 4, the outstanding questions concern critical points concerning the characterization of the practices to be avoided and the circumstances under which they should be avoided and the criteria to be followed by parties or by competent authorities in the determination of whether a practice is restrictive or not for the purpose of the code. According to one approach, chapter 4 should deal only with restrictions capable of restraining trade, while a second approach holds that it should also deal with restrictions that may hinder the economic and technological development of acquiring countries.

77. The various texts considered during the negotiations of chapter 9 consist of provisions on choice of law, conciliation and arbitration. It appears that there is a broad consensus on the formulation of provisions on conciliation and arbitration; however, there are still differences in the approaches proposed with respect to the provision on the choice of law. According to one view, chapter 9 should recognize, subject to some general limits, the rights of parties to choose the law applicable to their contractual relations as well as the means of settling disputes between them. According to another view, chapter 9 of the code should sanction the specific character of transfer of technology transactions and the particular role to be played by the national laws and national courts of the recipient countries.

E. Discipline of transnational corporations

78. It has been recognized in the debate that the TNCs are dominant participants in international trade in services. As their behaviour will influence the implementation of any multilateral framework for trade in services such impact should be taken into account in its formulation. In the discussions at the GNS frequent reference has been made to the negotiations on a Code of Conduct on Transnational Corporations being carried out in the United Nations Commission on Transnational Corporations.

Code of Conduct on Transnational Corporations

79. The need for a Code of Conduct on Transnational Corporations was acknowledged in a number of instruments adopted by the United Nations, i.e. the General Assembly, in drawing up the Programme of Action on the Establishment of a New International Economic Order in 1974, emphasized that "all efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations" in order to :

- (a) prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations;
- (b) regulate their activities in host countries to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements.

- (c) bring about assistance, transfer of technology and management skills developing countries on equitable and favourable terms;
- (d) regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned;
- (e) promote reinvestment of their profits in developing countries.

This resolution formed the basis of work on a code of conduct for governments and transnational corporations. Work on the code began in 1977 and by 1988 most of the provisions in the code have been agreed *ad referendum* leaving a few issues to be resolved.⁹⁰ The objective of the code of conduct is: to secure effective international arrangements for the operation of transnational corporations designed to promote their contribution to national developmental goals and world economic growth while controlling and eliminating their negative effects.⁹¹ The United Nations code of conduct is envisaged to be an umbrella code to which the appropriate United Nations related codes would be linked, and to deal comprehensively with a wide range of political, economic, legal and social issues with respect to the activities and treatment of transnational corporations. It is also envisaged to be a universal instrument. To achieve this goal a broad consensus has been sought and the interest of the different parties including, those of host countries, home countries, transnational corporations, trade unions and other organizations have been taken into account. One central part of the code lays down broad guidelines for the activities of TNCs; almost all the provisions in this part have already been agreed upon. Their main thrust is to encourage TNCs to maximize their contribution to the development process while minimizing any negative effects that may be associated with their activities. This part of the code does not go beyond what has already been agreed upon by the developed countries on the OECD in the "Guidelines for Multinational Enterprises". Another central part of the Code lays down guidelines for the behaviour of Governments vis-a-vis TNCs; a number of the provisions in this part are also agreed upon, and for the remaining ones formulations exist which seem to be very close to consensus. Their main thrust is to establish a stable and predictable framework for foreign direct investment (FDI) and the activities of TNCs. The code is supposed to cover FDI in services and, therefore, establish an international framework for this activity. They would cover such as issues as applicability of international law or obligations; nationalization; compensation; and dispute settlement; fair and equitable treatment; national treatment; transparency; right of establishment; choice of law; and a number of other principles that are considered important by Governments and which are central to the conduct of international business. For example one of the important outstanding issues is international law or obligations as far as the application of the Code is concerned. The main difficulty in resolving this question rests upon a controversy within the international community as to the content of certain customary international law and the applicability of such rules to the host country/TNC relationship.

F. Restrictive business practices

80. Restrictive Business Practices (RBP) can be defined as non-governmental measures used by enterprises to strengthen their position on a given market. They can be used by an enterprise either individually, in order to acquire or reinforce a "dominant position of market power" or in concert with other enterprises supplying similar goods or services, by agreeing with them to refrain from competing. Be it individually or in concert, RBPs are frequently resorted to by enterprises in attempts to monopolize or control a market, with consequent adverse effects on international trade.⁹² Since TNCs are the main providers of internationally traded services, the control of any RBPs used by them would be an important element of any framework agreement on trade in services. Since these RBPs are barriers to the expansion of trade, at the national level, most developed countries, a growing number of developing countries, as well as some socialist countries have adopted RBP control legislation. For developing countries, as new entrants in many sectors, RBPs

⁹⁰ UNCTC, *The United Nations Code of Conduct on Transnational Corporations* (UNCTC Current Studies, Series A, No. 4) New York, United Nations 1986).

⁹¹ UN Commission on TNCs, Report on the Second Session (March 1976), UN Doc. E/C.10.16, para 39.

⁹² For a multilaterally agreed definition of RBPs see the Set of Multilaterally Agreed Equitable Principles and Rules for

represent an even more threatening type of unilateral measure with serious trade impact. Moreover, these countries also face difficulties in detection and control of RBPs.

81. At the international level, as early as 1948 the Havana Charter contained clauses aimed at regulating RBPs in international trade. However, although the first part of the Charter which gave birth to GATT was adopted, its second part which included its provisions on RBPs, was never adopted. In 1980, the United Nations General Assembly in its Resolution 35/63 adopted the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, which is a voluntary code. Its institutional machinery is provided by the Intergovernmental Group of Experts on RBPs operating within the framework of a Committee of UNCTAD. The Set which concerns all enterprises, including transnational corporations, applies to all transactions in goods and services.

82. Given the strategic role of services, in the production/distribution chain, any distortion in the functioning of services markets is likely to have damaging consequences for many other markets. In particular, RBPs in producers services will trickle down to those producers for whom the services affected by such RBPs are strategic inputs. Moreover, international trade in services differs from international trade in goods in ways which amplify the effect of RBPs. For example, trade in services involve a higher proportion of factor movements especially labour and information, than does goods trade, and RBPs are particularly prevalent as regards these factors. There exists, therefore, a need for a broader definition of RBPs, a definition which would take into account the effects that an RBP in a crucial service activity is bound to have on many other sectors.

83. The notion of RBP implies the existence of an intent to distort the rules of normal competition. This element of intent, however, may not necessarily be relevant in the specific context of services, and more specifically information services. Given the monopolistic/monopsonistic nature of most major data services markets, developing countries should be expected to devote particular attention to RBPs in this area. Moreover, some analytical characteristics of information as a commodity (linked to capacities of networks *interalia*) tend to make RBPs an almost intrinsic component of corporate strategies in certain sectors. As for most technology- and research-intensive activities, information services are characterized by the dominant market position of a small number of corporations. The possibility thus arises that such large TNCs might be tempted to consolidate their market power through the use of various RBPs. Those could be 'vertical' (i.e. constraints imposed on their suppliers or consumers)⁹³ or 'horizontal' (generally relating to the constitution of cartels, such as collusive tendering).

84. The particularities of information as both a factor of production and a product are such that the 'normal' actions (i.e. those not intended to distort the market) of large users and large producers of information services may in fact have the same results as RBPs *stricto sensu*. For any company providing information services the size of its distribution network is a key element: the intrinsic 'over capacity' situation of such a network (at least in its initial stage) tends to confer to global strategies the status of 'ordinary business' in this sector. Given the considerable fixed and sunk costs associated with the building and operating of international information networks, the bigger these networks are, the greater the chance that such costs are quickly offset by profits. The economic realities are, therefore, such that only a small number of actors can enter the expensive and knowledge-intensive race for 'critical mass' or size in information markets, and once some have been able to reach this mass, the 'public good' characteristic of information constitutes an economically insurmountable barrier to entry for newcomers to such markets.

85. It is thus difficult to assess whether or not the formation of large information services groups constitutes a restrictive business practice, since this state of affairs seems to be a direct consequence of the nature of the product involved. Moreover, at this stage of the negotiations, some corporate objectives may seem incompatible with some national objectives of developing countries. For instance, the fact that some developing countries tend to consider information as a 'natural resource' and information networks as a 'common infrastructure' may collide with other notions that corporations would tend to consider as legitimate, such as 'intellectual property of information', and 'private use of private property'. In many cases, norms and standards (including in software) have been used in much the same way as barriers to entry in certain markets. It appears, therefore, that the international exchange of information services calls for a broader vision of which trade practices can be considered as 'illegitimately restrictive'.

⁹³ - Cf. also the text on restrictive practices, paragraph 82, and paragraph 83, and also the 4th paragraph of the text on restrictive practices.

86. In conclusion, the degree of transnationalisation of production being greater in services than in most other economic sectors, RBPs are more likely to emerge as a systematic distortion of the normal play of market forces in this sector. At the same time, the intrinsic characteristics of services, in particular the type of relationship they imply between producers and customers of a generally non-storable item make RBPs more difficult to track and define in services than in other sectors. Moreover, the fact that international service transactions generally involve a higher proportion of factor movements suggest that some business practices that affect such factors do in fact constitute restrictions to the normal transactions of services . Finally, in the specific case of information intensive services, the nature of the product is such that natural monopolies or dominant positions of market power may appear, thus creating a 'restrictive' environment in some service markets without necessarily an 'intent' by any company to adopt restrictive strategies. All these elements contribute to suggest that a broader definition of RBPs is needed in the case of services, in order to allow negotiators to design a coherent and consistent set of rules in the area of RBPs in services sector. The 1990 Review Conference, which will consider all the aspects of the Set of Principles and Rules, provides an opportunity to give the Set the necessary focus with respect to services.

ANNEX III

Possible Models for a Framework for Trade in Services

A. International Instruments

1. The principles and structures of some international instruments such as the GATT, the Chicago Convention on International Civil Aviation, the United Nations Convention on Law of the Sea and the Code of Conduct for Liner Conferences contain examples which could provide guidance on what principles and structures a future framework on trade in services should contain.

(a) GATT

2. The GATT essentially provides a framework for establishing order in the application of trade protective measures and for negotiating their liberalization. It is based on the the principles of (a) unconditional MFN treatment; (b) the legitimacy of protection applied at the frontier by means of customs tariffs; (c) that countries would enter into tariff negotiations to bind and reduce tariffs on the basis of reciprocity and mutual advantage; and (d) the prohibition of quantitative restrictions and domestic internal measures designed to frustrate the integrity of the concessions entered into in these negotiations; (e) that trade regulations would be published. GATT liberalization thus has two tracks. (i) the negotiation of legitimate (i.e. tariff) measures on a reciprocal basis, and (ii) the negotiation of stricter disciplines with respect to the various provisions (e.g. national treatment, elimination of quantitative restrictions etc.) aimed at ensuring that such measures do not "nullify or impair" the tariff concessions (bindings). The original GATT framework assumed that trade in goods would expand as a result of its implementation, and that economic growth of all trading partners would occur as a result; subsequent adjustments intended to promote development did not go beyond measures mainly allowing developing countries to avoid certain obligations under special conditions and strict surveillance, or permitting developed countries to grant them differential and more favourable treatment, in favour of developing countries.

3. In assessing the extent to which GATT principles can be applied to services a number of characteristics of GATT should be taken into account. First, GATT assumes that expansion of trade, economic growth and development will occur as a result of the application of its principles, it contains no obligations with respect to the results of its application, and is heavily based on a philosophy that assumes world welfare will increase as a result of the application of the principle of comparative advantage, without addressing the question of the distribution of such increase in welfare.

4. GATT therefore contains certain principles and approaches which could further the progressive liberalization of trade in services, as listed above. However, this would seem to require the establishment of an international consensus on what protection in the service sector is the legitimate subject of reciprocal negotiation of concessions, (i.e. comparable to the customs tariff), which measures are "appropriate" from the point of view of their consistency of national regulations, and which which should be considered "illegitimate" and subject of reduction and elimination on the basis of common disciplines rather than reciprocity.

5. The implicit recognition in Part II of the Uruguay Round Declaration that liberalization would in itself not result in achievement of its main objectives arises from those characteristics of services which differentiate them from goods which preclude that liberalization could be assumed to result in the main objectives laid down in Part II of the Uruguay Round Declaration, i.e. economic growth of all trading partners and the development of developing countries, (or even the

expansion of trade). The main characteristic is that of the different "modes of delivery" of services.⁹⁴ The most effective modes for delivering services to foreign markets, i.e. capital and information, are largely the property of large TNCs based in developing countries, as is the technology and information necessary for competitive production of such services. It would seem that the assumptions underlying the GATT framework, which resulted in it not providing for any specific obligations with respect to the expansion of trade and economic growth of all trading parties nor the development of developing countries, are not valid with respect to trade in services. This implies that while the GATT provides the basis for obligations with respect to the progressive liberalization of trade in services, elements for elaborating upon these main principles of the multilateral framework for trade in services will have to be sought elsewhere. A number of multilaterally accepted instruments could be examined to see whether elements of their structures or fundamental principles could provide useful models in this respect.

(b) Chicago Convention

6. The Chicago Convention is of interest more for its structure than its principles, while not aimed at development objectives *per se* such structure has prevented the most advanced countries from completely dominating trade in civil aviation services, while permitting vigorous international competition.

7. The Chicago Convention on International Civil Aviation is based on a balancing of market access and benefits and the principle of reciprocity. The International Air Transport Agreement is based on the "five freedoms". The least onerous of the five freedoms which are essentially obligations have been effectively multilateralized in practice, while those of greater economic impact are subject to bilateral agreement. The five freedoms are technical arrangements between states which define the limits of air traffic. They are as follows:

- Freedom to fly over a nation
- Freedom to land in a nation (without picking up or putting down passengers or goods).
- Freedom to carry passengers or goods from the home nation to a foreign nation
- Freedom to carry passengers or goods from a foreign nation to a home nation
- Freedom to pick up and put down passengers or goods belonging to a foreign nation, between intermediate points.

8. The aims and objectives of the Chicago Convention are enunciated in the Preamble and Article 44. The guiding principles for the progress of international civil aviation are safety, equality of opportunity for all states, and sound economics. Certain articles of the Chicago Convention address fundamental issues concerning the exchange of rights between states. These articles are:

- Article 1 on Sovereignty which provides *inter alia* that "The Contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.";
- Article 5 on right of non-scheduled flight, which provides *inter alia* that such flights shall have the right to make flights into or in transit non-stop across a State's territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the overflown State to require landing;
- Article 6 on Scheduled air services, which provides that "no scheduled international air service may be operated over or into the territory of a Contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization;
- Article 7 on cabotage, which provides that each Contracting State shall have the right to refuse permission to the aircraft of other Contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each Contracting State also undertakes not to enter into any arrangements which specifically grant such privilege on an exclusive basis to any other State or an airline of any other State, nor to obtain any such exclusive privilege from any other State;

9. It is useful to note also that the framework of the Chicago Convention provides for a wide range of modes of application, in particular: (i) strict binding agreements; (ii) binding agreements

with the right to make time-limited reservations; and (iii) general recommendations or guidelines with moral obligations only; The Convention also sets out a detail procedure of settlement of disputes, which provides that if any disagreement between contracting states relating to the interpretation or application of the Convention and its Annexes cannot be settled by negotiation, it shall be decided by the Council of the ICAO. Any contracting State may appeal from the decision of the Council to an *ad hoc* arbitral tribunal or to the Permanent Court of international Justice whose decisions will be final and binding by majority vote. Penalties are provided for non-conformity of airlines and States, e.g. suspension of voting rights in the Assembly or the Council, or of the right of operating in the airspace of an airline of another contracting party.

10. The vast majority of regulatory matters affecting the economics of international air transport are, however, covered by bilateral air services agreements between states. Bilateral agreements exist as a result of the principle of national sovereignty over airspace contained in article 1 of the Chicago Convention and the requirement, under article 6 for special permission or other authorization to operate a scheduled international air service into or over another Contracting State and in accordance with the terms of that permission or authorization. Bilateral negotiations usually aim to achieve reciprocity and a general balance in terms of rights, routes and opportunities.

11. This vertical structure could be considered for application to other service sectors; it would have the advantage of providing a framework in which countries could enter into ambitious agreements to liberalize trade in services, while not penalizing countries not ready to accept such onerous obligations, without the latter countries being obliged to plead for "special" treatment, and without their being accused of "unfair" or "unreasonable" trade practices if they were unable to accept such more stringent obligations.

(c) *Liner Conferences*

12. The third example mentioned above, the Code of Conduct on Liner Conferences, is founded on the following concepts and principles:

- to assure that the national shipping lines of developing countries have the right of entry into liner conferences;
- to provide a mechanism for equitable distribution of cargoes between groups of lines;
- to ensure fair and equitable treatment of all shipping lines within a conference; and
- to ensure an equitable relationship between shippers and liner conferences.

The objectives of the Code are, therefore, to ensure rights of participation in trade of national lines so that they are entitled to carry a substantial share of their countries' foreign trade; to balance the interests of suppliers and shipowners; to facilitate the orderly expansion of liner trade; and to ensure the adequacy of shipping services.

13. The provisions of the Code are designed to deal with the manifest problems of developing countries in the liner shipping industry, particularly restricted access to liner conferences, inadequate cargo shares and inequitable relations between liner conferences and shippers. The Code provides rules for the participation by member lines in the trade carried by conferences. Under the Code, and unless it is otherwise agreed, when determining a share of trade within a pool operated under a conference, the group of national shipping lines of each of two countries shall have equal rights to participate in the freight and volume of traffic generated by their mutual foreign trade and carried by the conference. Third country shipping lines, or cross-traders, shall have the right to acquire a significant part, such as 20 percent, in the freight and volume of traffic generated by that trade and carried by the conference. The Code also sets forth rules for the establishment of pools or other type of trade-sharing arrangements in conference, as well as other internal conference activities, such as self-policing. The same principles would guide other types of trade-sharing arrangements in the absence of a pool. The implementation of cargo-sharing provisions is normally left to conferences.

14. The Code reflects a number of principles under discussion in the Group of negotiation on Services. These are mainly those of non-discrimination, transparency, market access, and regional economic integration. Non-discrimination is reflected in the treatment of national shipping lines at both ends of the trade. The so-called 40:40:20 formula generally referred to in connection with the Code is nowhere established as such in the Convention but arrived at by sometimes

oversimplifying mathematical deduction. In fact, the provisions of the Convention on trade participation are solely based on the principle of equality among groups of national lines.⁹⁵ With regard to transparency the Code provides for extensive consultation procedures among liner conferences, individual shipping companies and shippers' organizations on all facets of the conference agreement which are of mutual interest to the parties concerned. Concerning market access article 2 of the Code guarantees access of recognized national shipping lines to conferences serving the trades of their respective countries. Equally, it assures adequate participation of third country shipping lines in those conferences. This latter right is not conferred on individual lines but rather on a group of third flag carriers wishing to participate in the trade. Through the provisions of article 2, the Code equally contributes to efforts of regional economic integration. To this end, article 2 (8) allows for the regionalization of national cargo shares to the benefit of joint venture shipping companies or similar co-operative arrangements.

15. The concept that the expansion of trade should be shared by all trading parties found in the Code might be appropriate in other services sectors where TNC domination is comparable to that of the Shipping Conferences in maritime transport, impedes the access of developing countries to world markets.

(d) The United Nations Law of the Sea Convention

16. The third model mentioned above, the Law of the Sea Convention, provides that the deep sea-bed and subsoil beyond the limits of national jurisdiction (the Area) and their resources are the common heritage of mankind.⁹⁶ It is generally agreed that this means that claims or exercises of sovereign rights over the deep sea-bed and subsoil are legally impermissible, precluding the appropriation of the sea-bed and subsoil beyond the limits of national jurisdiction. All rights in the resources of the Area are vested in the mankind as a whole, on whose behalf the International Sea-Bed Authority shall organize and control the activities in the Area, carry out activities in the Area directly through the Enterprise and administer its resources. The Convention also provides that the interests and needs of the developing countries and of peoples who have not attained full independence or other self-governing status recognized by the United Nations should be taken into consideration. The concept of common heritage of mankind provides for the equitable sharing of financial and other economic benefits derived from the activities in the Area on a non-discriminatory basis. Transfer of technology to the Enterprise and developing countries on fair and reasonable commercial terms and conditions is envisaged in the Convention.⁹⁷ The international legal obligation to share revenue or otherwise to provide direct benefits to the international community from deep sea-bed mining has been recognized and accepted, and the existence of revenue sharing provisions in national legislations on deep sea-bed mining suggests movement towards recognition of an international legal obligation. The concept of common heritage of mankind would thus seem to be of possible application in certain service sectors where most developing countries are not yet in a position to participate in world trade for reasons of inadequate technological or financial resources.

⁹⁵ The United Nations Code of Conduct on Liner Conferences article 2((4a)).

⁹⁶ The United Nations Convention on the Law of the Sea, 1982, Articles 136 and 137. This Convention has not yet entered into force but some of its provisions are customary international law.

⁹⁷ The United Nations Law of the Sea Convention, Articles 140 and 160. Article 144 of the Convention provides for the transfer of technology to developing countries. Some legal experts argue that the common heritage concept also reflects an emerging rule of customary law that mankind must benefit from the development of the mineral resources