

**MULTILATERAL TRADE  
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Structure and Mechanism for a General Agreement  
on Trade in Services

Key Issues

The attached communication is circulated at the request of the Delegation of New Zealand to the members of the Group of Negotiations on Services.

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## STRUCTURE AND MECHANISM FOR A GENERAL AGREEMENT ON TRADE IN SERVICES

### KEY ISSUES

#### Introduction

In the discussions in the GNS to date, a number of views have been expressed as to how a multilateral agreement on trade in services might be structured and how it might operate. For some time, however, the debate has focussed on individual concepts and principles which participants in the GNS have examined against the background of their own views on the structure and mechanism for a framework agreement. In New Zealand's view the time is now ripe for the broader picture to be addressed once again. This paper suggests an approach for developing a General Agreement on Trade in Services (GATS) to achieve expansion of trade through a process of progressive liberalisation, in fulfillment of the GNS mandate. A full discussion of the issues raised in the paper will be a vital pre-cursor to achieving our end of year commitment to "assemble the necessary elements for a draft which would permit negotiations to take place for the completion of all parts of the multilateral framework".

#### Guiding Principles

- 2     -     The Agreement must be dynamic and forward-looking;
- it must set out long-term objectives and contain provisions which will ensure those objectives are achieved;
- it must be flexible enough to be applicable to the broadest range of traded services;
- it must establish a set of multilateral rules and disciplines which will provide predictability and certainty for traders and governments, and ensure that trade in services takes place under fair and equitable conditions;
- it must contain mechanisms to allow for the progressive achievement of trade liberalisation and the gradual elimination of unfair or discriminatory policies affecting trade in services.

3 The secrets of GATT's success are that it is the only body of internationally accepted and enforceable rules governing trade, and that it is based on a limited number of broad trade policy principles that are recognised as appropriate (with one or two exceptions!) to all forms of goods trade. For the GATS to be successful, it must be built on similar, strong foundations.

### Structure

4 GATS would consist of a framework of generally applicable rules and disciplines, accompanied by individual country schedules of reservations and of concessions.

- The framework would establish a series of obligations to ensure that, where trade in services takes place, it occurs under non-discriminatory, equitable conditions.
- A schedule of reservations would allow each signatory to spell out clearly those areas (ie sub-sectors or activities) to which the obligations of the framework could not be immediately applied.

In order to achieve the longer-term aims of the Agreement, through the fullest application of the rules and disciplines contained in its provisions, it would also contain a precise mechanism for progressive liberalisation through, inter alia, regular multilateral negotiating rounds. The results of a multilateral exchange of concessions would be embodied in schedules of bindings for each signatory. Bindings would allow for the provision of additional market access, and would follow from the gradual elimination of measures inscribed on each country schedule of reservations.

### Coverage/Scope

5 The coverage of the GATS must be universal - ie its provisions would be applicable to all internationally traded or tradeable services. This would need to be spelled out in the Agreement. It is understood that universal coverage and application of the Agreement's provisions cannot be achieved from the date of its entry into force. The system of initial 'reservations' would highlight those areas which are not currently in conformity; ensure, as a minimum, the maintenance of current levels of liberalisation and openness; and provide the agenda for future multilateral efforts to achieve further liberalisation.

6 The scope of the GATS will need to be defined. New Zealand does not favour seeking to negotiate an agreed definition of "services", nor does it consider that coverage of the GATS should be established by means of an agreed list of sectors. Where the Agreement contains multilateral rules and disciplines (which it must do to be worth negotiating), it will be impossible to avoid negotiations over the content of a list of covered sectors. Once initiated, negotiations would have little chance of successfully dealing with problems such as a classification system or degrees of disaggregation, much less the more fundamental issue of inclusion/exclusion of certain sectors at all. The ability for countries to ensure certain "difficult" services sectors are excluded from the Agreement will work to the detriment of all smaller participants in the negotiations since, inevitably, major trading powers will be the ones with negotiating leverage to force exclusions through. Once a sector is 'out' of the GATS, it will be extremely difficult to negotiate it back 'in'. Furthermore, each country has its own domestic sensitivities in different areas. To accommodate all these would leave us with the status quo and little prospect for improvement.

7 New Zealand is of the view that the scope of the Agreement should be determined by incorporation of a provision which contains a 'definition' as follows:

"The provision of a service includes, singly or in any combination:

the cross-border movement of payment(s) for the service;

the cross-border movement of consumers of the service;

the cross-border movement of providers of the service;

access to, and use of, domestic distribution systems and telecommunications networks;

the establishment, temporary or permanent, of a branch, subsidiary or other form of commercial presence,

necessary for the effective production, distribution, marketing, sale or delivery of a service."

8 Each country, in examining its national legislation and regulatory framework, would have the opportunity to identify areas within individual services sectors where the provisions of the GATS could not be immediately applied, and would seek a reservation. Where legislation existed which was not sector-specific, but affected one or other of the above forms of trade (specifically, investment or immigration laws), details of the legislation could be notified. Any area not so reserved would be presumed to be in conformity with GATS provisions. (This "presumption", however, could of course be challenged through the dispute settlement mechanisms of the Agreement by other member countries.) In view of the size of the task, it would be possible to agree on a limited "grace period", within which further reservations could be notified. Wherever possible, intending signatories should nominate a date by which inconsistent measures should be terminated.

#### **Rules and Disciplines of the GATS**

9 The provisions of the Agreement would include, but not be limited to, the following obligations:

- MFN/Non-discrimination:

The benefits of any concession would be extended immediately and unconditionally to all signatories of GATS. Access to any services market available under the Agreement would not discriminate between foreign suppliers of the service.

- Transparency:

The Agreement would contain provisions ensuring the publication of all relevant laws, regulations and administrative practices; the availability of information through the establishment of enquiry points; and the notification (in summary form) of all relevant laws and regulations.

- Market Access:

Access may be provided through one or more of the modes of delivery listed above, and should be increased progressively through bilateral or plurilateral negotiations. Restrictions on market access could only take certain agreed forms, and would operate under strict conditions of, inter alia, transparency.

- National Treatment:

When market access is available, foreign suppliers of a service would be accorded treatment no less favourable than domestic services providers in the same market.

- Other Provisions:

including Safeguards, Subsidies, Monopolies, Regional Economic Integration, General Exceptions, dispute settlement etc.

- Progressive Liberalisation:

A mechanism to provide for further rounds of multilateral negotiation; to establish country schedules of concessions as well as procedures for concessions to be renegotiated.

**Market Access : Establishing and Expanding Trade in Services**

10 An approach based on obligations combined with a system of reservations has implications for market access. Under the scenario advocated by New Zealand, full market access would not be available as an automatic right under the Agreement. To do otherwise would result in unacceptably long lists of reservations by each Contracting Party. Furthermore, a basic aim of the GATS is to liberalise trade in services progressively: this aim could only be achieved by a combination of gradually bringing measures affecting trade in services into conformity with rules ensuring non-discrimination (in the broadest sense), and providing for additional market access through multilateral negotiations.

11 In an ideal world, no government-mandated restrictions on trade in services should exist. This is not, however, an ideal world. New Zealand therefore accepts that certain, narrowly defined types of access restrictions could be tolerated under the Agreement. Nevertheless, it would be clearly understood that such restrictions, which remain inherently undesirable, should be gradually eased over time. Negotiations to reduce or eliminate these barriers to access would constitute one means of achieving progressive liberalisation (along with the gradual removal of reservations from country schedules and the provision of additional market access through an exchange of concessions).

12 New Zealand suggests that "acceptable" forms of access restrictions should be limited to the following:

- a surcharge on foreign service suppliers, in the form of a differential fee or charge (which could be reduced and bound through negotiations); or

- a restriction on the number of foreign service suppliers able to enter a market (which could be increased and bound through negotiations).

These forms of access restriction can be seen as analagous to the protective measures tolerated under the GATT. In other words, a surcharge could be seen as a tariff equivalent, while a restriction on foreign suppliers is clearly a form of QR. (In the case of a surcharge, however, the analogy cannot be exact, since this would not necessarily operate as a border measure. New Zealand is not advocating widespread introduction of surcharges as a means of providing long-term protection to domestic service providers, but rather the acceptance of certain existing restrictions which take these forms, on the understanding that they remain negotiable through being gradually reduced.) Similarly to the GATT, those Contracting Parties resorting to access restrictions would be required to fulfil certain conditions, including transparency (a requirement to notify full details of the restriction) and non-discrimination. In the case of a quantitative restriction, there would be no provision for an outright prohibition on trade. Furthermore, since the aim of GATS is towards greater liberalisation, restrictions could not be worsened following their initial notification: the GATS dispute settlement procedures would allow for a case to be brought on the basis of nullification and impairment of benefits.

13 With respect to "modes of delivery", which are of course determinants of market access, the Agreement would need to recognise the limitations of existing national legislation with respect to immigration and investment. The restrictions referred to in the preceding paragraph would, therefore, apply to forms of trade other than those involving investment or the movement of service providers. (Once again, however, provisions concerning the nullification or impairment of benefits accruing under the Agreement would be framed to ensure the GATS was not undermined by the introduction of more restrictive investment or immigration legislation). Existing national legislation in these two areas would be included on a country's schedule of reservations (where such legislation was not consistent with GATS provisions). This would be both more transparent and more conducive to progressive liberalisation by ensuring that improvements to conditions of investment or immigration were ultimately negotiable. Alternatively, "acceptance" of existing legislation could be written into the body of the Agreement. If this latter option were followed, it would be important to draft provisions ensuring that (a) concessions could be negotiated for specific services, going beyond the restrictions created by national legislation (ie request/offer to increase access, which would be multilateralised); (b) investment or immigration legislation was administered in the least trade restrictive way; and (c) subsequent negotiating rounds would aim to improve legislation allowing for freer movement of personnel and capital.

### **Balance of Rights and Obligations**

14 Intending signatories to GATS must undertake some level of commitment as part of their "entry fee" to the Agreement. The initial level of commitment would be assessed by a combination of the measures included on a schedule of reservations (ie pressures would operate to keep the list as small as possible in relation to others) and of concessions included in a schedule of bindings (ie counterbalancing pressures to bind as large a list as possible). Where a time limit on any legislative measure was included with a reservation, this would be a 'plus' in assessing an overall level of commitment. Whatever was not included in a list of reservations would, by implication, be fully subject to the obligations of GATS provisions.

15 Any "assessment" of relative levels of commitment would necessarily be subjective, to some extent, but a multilateral process would ensure broad comparability (and hence satisfaction with the undertakings of other intending signatories) and guard against over-use of economic leverage. There may need to be provision for individual non-application of the Agreement, but this should be only under carefully defined conditions. Different levels of economic development (including within different sectors) would be taken into account in assessing the acceptability of individual levels of initial commitment.

### **Reservations vs Concessions**

16 New Zealand envisages two types of country "schedules" to the GATS: a schedule of reservations and a schedule of concessions.

17 A schedule of reservations would outline service activities or sub-sectors which are, effectively, temporary exceptions to certain provisions of the Agreement. Such exceptions should be narrowed down as far as possible - to a sub-sectoral level, for example, or by pin-pointing legislation which would have an impact on trade across a number of services sectors. Exceptions would be narrowed also in the sense that the temporary derogation from obligations of the Agreement would be confined to the GATS provision(s) directly affected. All other obligations would remain applicable to the sector or activity concerned. A schedule of reservations is important for reasons of:

- protection: guarding signatories against the invocation of dispute settlement procedures;



- progressivity: recognising that the provisions of GATS cannot be implemented universally and immediately, and consequently, allowing for the gradual achievement of trade liberalising objectives;
- domestic regulation: allowing time for structural adjustment; and
- transparency: allowing for multilateral assessment of a balance of rights and obligations and establishing an agenda for future negotiations.

18 In summary, a list of 'reservations' would comprise any measure (law, regulation, administrative practice or government decision) relevant to the operation of the Agreement, which materially affected (a) the entry of a foreign service (or service supplier) into a market, with the exception of "acceptable" restrictions on market access, or (b) the operating conditions of suppliers within that market. A reservation could take, for example, the following form:

<u>SECTOR/SERVICE ACTIVITY</u>	<u>NATURE OF EXCEPTION (Relevant legislation)</u>	<u>GATS PROVISION(S) AFFECTED</u>	<u>EXPIRY DATE</u>
Telecommunications: Provision of basic services.	State mono- poly: foreign establishment prohibited (Telecomm- unications Act)	Article (X) Market Access Article (Y) National Treatment	
Banking: Retail banking.	- Licences granted to limited number of foreign banks. Foreign market share limited to X%	Article (Z) MFN/ Non-discrimination Article (Y) National Treatment	

19 There may well be cases where, for example because of the existence of other international arrangements, a particular sector (or sub-sector) is inscribed on virtually all country schedules of reservations. This, however, would be preferable to the entire sector being excluded from GATS. It would allow those few countries which may already have (or

which may be planning) liberalised access, to exchange concessions across sectors. It would also ensure the GATS could remain relevant to a changing trade environment. At the outset, however, it might be possible to accept a widespread derogation from GATS (time-bound to allow for multilateral review) for the particular service activity. Inclusion within the Agreement would ensure minimum provisions, such as transparency, were adhered to, and would allow for progressive liberalisation "at the margins" of the sector.

New Zealand considers that the option of drawing up Sectoral Annexes to the GATS should be used in only rare cases; if at all. Should annexes be contemplated, they must not constitute a derogation from the principles of GATS; nor must they establish a separate legal instrument for individual sectors. Instead, they should maintain consistency by amplifying or elaborating the provisions of the Agreement.

20 A schedule of concessions, by contrast, would contain positive bindings, undertaken by signatories as a result of multilateral negotiations, the benefits of which would be extended to all signatories. Bindings would take the form of negotiated commitments, going beyond the provisions of the GATS: in other words, they would comprise commitments to provide additional market access, and could include arrangements to ensure effective market access was achieved, in cases where (for example) granting national treatment was insufficient in itself to allow trade to take place. An entry on a schedule of concessions could take the following form:

<u>SERVICE</u>	<u>ACCESS COMMITMENT</u> <u>(Modes of Delivery)</u>	<u>NEGOTIATING RIGHTS</u>	<u>ORIGINAL</u> <u>CONCESSION</u> <u>NEGOTIATED</u>
Retail	- establishment and	US	1990
Banking	maintenance of	EC	
	branch or subsidiary.	Malaysia	
	- temporary entry		
	for key personnel.		
	[etc]		

#### **Bound vs Unbound Measures**

21 Services entered on a schedule of concessions would be bound. Concessions could be exchanged on a cross-sectoral basis, and those Contracting Parties with relatively "open" services markets would have the choice of withholding bindings for future negotiating rounds. The binding would relate to the modes of delivery for that service sector/activity, and would allow for those with negotiating

rights under the concession to receive compensation, should the terms of the binding be broken. Where negotiations have resulted in the reduction or elimination of a surcharge (or expansion/elimination of a quota), the details of this additional market access would also be inscribed on a country Schedule. A binding would be considered to be broken if national laws, legislation or administrative practices, amended (or intended to be amended) or introduced, had the effect of restricting or prohibiting access to the market through the modes of delivery inscribed. A binding could also be nullified or impaired through amendments to, or the introduction of, legislation affecting the operating conditions of service suppliers in the market (eg by impairing the application of National Treatment).

22 Mechanisms for establishing Contracting Parties with negotiating rights, beyond the Party which originally negotiated the concession, would need to be established (ie counterpart to GATT 'principal supplier' status).

23 By contrast, changes to legislation could be made in unbound areas covered by the Agreement without a requirement to negotiate compensation with affected Contracting Parties, providing those changes or newly introduced measures were consistent with the provisions of the Agreement. The GATS-consistency of any legislative changes could, of course, be challenged by other Contracting Parties through the Agreement's consultation and dispute settlement procedures. The Agreement's transparency obligations would ensure that notice of such changes was brought to the attention of member countries.

24 The system of reservations would obviate the necessity for a specific standstill or freeze commitment, which would merely lock in existing, widely differing levels of protection. With respect to reservations, however, there would be an expectation that each country's list should gradually become shorter, rather than longer. Should a Contracting Party feel impelled to add new GATS-inconsistent restrictions to its list of reservations, this would need to be negotiated, since it would clearly impact on the balance of rights and obligations which had been initially achieved. Any addition to a schedule of reservations would therefore need to be accepted by all Contracting Parties, and would require some form of compensation to maintain the overall balance.

### **Obligations vs Objectives**

25 The Articles of the GATS must take the form of obligations on signatories in order for the Agreement to be effective. This is the only means of ensuring compliance with its fundamental principles, through the establishment of a comprehensive dispute settlement mechanism. An objective, incorporated in the Agreement in the form of a "definition", could not be legally binding.

26 The obligations of the Agreement would all be related to conditions of operation on a market (eg non-discrimination and transparency) and conditions of competition (eg subsidisation, behaviour of monopolies). The Agreement would thus be based on the recognition of a separation between trade barriers (Market Access) and domestic regulations (National Treatment). This distinction, while it may not always be clearcut, can nevertheless be made, provided an understanding of what constitutes access to a market, along the lines set out in this paper, is adopted. Barriers to access would need to be negotiated away - although there would be limits on the trade policy instruments which could be used to restrict access - but whenever market access was available, the national treatment (and other) provisions would apply. In other words, operating conditions for foreign service suppliers to a market would automatically be non-discriminatory, fair and equitable.

### **Conclusion**

27 This paper has not attempted to be exhaustive, but has instead concentrated upon certain key issues in the negotiations. It is only once these have been squarely addressed that a viable framework Agreement on Services can emerge. New Zealand is of the view that the approach outlined in this paper gives clear guidelines to the structure of a sound Agreement on Trade in Services, with precise obligations as well as a mechanism for progressively liberalising international services trade.

18 September 1989