The Resumption of the Doha Round and the Future of Services Trade

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I. PROLOGUE

Since the 2006 suspension of the Doha Development Round of World Trade Organization (WTO) negotiations, we have seen the obvious weaknesses and deficiencies of the multilateral trading system. As a reaction to these weaknesses, we have also seen the proliferation of regionalism – which has been developing for quite some time – as well as bilateralism. The substance and nature of

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1. For more information on the WTO's function and structure, see generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].


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services negotiations in the Doha Round are quite different from those of the Uruguay Round; the Uruguay Round laid the ground rules for trade in services in the General Agreement on Trade in Services (GATS), whereas the Doha Round focused on extending liberalization and complementing those ground rules. This article addresses the current WTO negotiations on trade in services within the framework of the Doha Development Agenda (DDA) and analyzes the legal implications that these services negotiations have for the European Community (EC) in the world trading system.

The integration of the European Union (EU) is an ongoing process. The EU currently faces serious challenges as a result of the demands of its citizens. This is certainly the case of trade policy-making. In view of the current state of EC law, as created by the Nice Treaty, there is a question as to what will happen to the services trade in the Doha Round. In other words, from an EC law viewpoint, by the time the Doha Declaration is signed as an international trade agreement by mid-2007 or later, will it be (1) a mixed agreement, signed by all EU Member States and the EC; or

3. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994) [hereinafter GATS]. “Expansion of the GATS scope and the sectors it covers is now underway in the so-called ‘GATS 2000’ negotiations. Currently, the GATS 2000 negotiations are in the ‘request/offer’ phase, where WTO members engage in bilateral negotiations requesting that other countries open up service sectors and offering sectors that they themselves will put on the negotiating table. For example, the EC has requested that WTO countries liberalize their water service, and the U.S. has requested that Brazil open for ownership by U.S. corporations elements of public higher education services. Once a sector is committed to the GATS, it is virtually impossible for the public to reinstall control over it because the GATS rules require financial compensation to every WTO member to do so.” LORI WALLACH, PUBLIC CITIZEN’S GLOBAL TRADE WATCH, POCKET TRADE LAWYER: THE ALPHABET SOUP OF GLOBALIZATION 6-7 (2005), available at http://www.citizen.org/documents/Pocket_Trade_Lawyer_January_2006_Final.pdf.

4. That said, there are still some controversial issues of the Uruguay Round in the Doha Round, namely the audiovisual services.

5. Interestingly, rich countries call this agenda of negotiations the “Doha Development Agenda,” whereas poor countries refer to it as the “Everything but Development Round.” It has certainly been a mistake to call this round the “development round,” since the DDA is a trade negotiation with very little input on development. Chakravarthi Raghavan, An “Everything But Development” Round from Doha, SOUTH-NORTH DEV. MONITOR, Nov. 16, 2001, available at http://www.twnside.org.sg/title/twe268a.htm.

(2) a pure Community agreement, signed only by the EC, in the framework of the Doha Round? The answer depends on two factors. The first is the interpretation of the Nice Treaty with respect to services trade. The second is whether there will be a separate GATS revision or just one global WTO Trade Agreement. This Article will explore the repercussions that each option will have on EU citizens in terms of accountability.

The proposals of the failed EU Constitutional Treaty are also analyzed to see whether they could be, in part, the optimal solution to the trade-off of efficiency versus accountability in trade policy decision-making. This article concludes with several proposals and recommendations to reform the EC’s common commercial policy in search of the optimal position of the EC, specifically with respect to services trade in the Doha Round, and in the world trading system more generally.

This Article generally explores the position of the EC in the WTO, specifically in the DDA, as well as the trade position adopted by the EC and its member states in the new international trade services negotiations. This article will also analyze the consequences of the Nice Treaty reform of EC Treaty Article 133 with regard to changes to and impact upon trade in services. Certainly, the collapse of the 2003 talks in Cancun, Mexico, “illuminates the complexities of the European Union as a unified actor in international trade relations and more precisely in multilateral trade negotiations.”

This Article is divided into two parts. Parts II-IV provide a general overview of the world trading system with respect to trade in services. It also explores the position of the EC in the WTO generally, and in the DDA more specifically. Part V analyzes the treaties of Nice, the EU Constitution and Lisbon in relation to services trade. This Part also analyzes to what extent the amendments introduced by the Nice Treaty and the EU
Constitutional Treaty are heading toward the eradication of mixed agreements or shared competence in the European Union.

II. DEFINING A ROUND AND DETERMINING WHETHER A NEW ROUND WAS NECESSARY

A. Definition of a Round

"WTO member countries tend to negotiate over several years on new agreements for a group of subjects. These series of negotiations are called 'rounds.' They are often lengthy but can have the advantage of offering a package approach to trade negotiations, as opposed to negotiations on a single issue, as was the case in the mid-1990s negotiations on financial services and telecommunications. The package approach can sometimes be more fruitful; there is always something beneficial for every participant in the negotiation, and therefore the ability to trade-off various issues can make an agreement easier to reach. This has political and economic implications. Concessions (or commitments to bound tariff rates) can be obtained more easily in the context of a package because it may contain both politically and economically attractive benefits. Thus, reforms in politically sensitive sectors of world trade may be more feasible in the context of a global package. Examples are the Uruguay Round, from 1986 to 1994, and the current round of negotiations, the DDA, which started in 2001. If ultimately successful, the Doha talks would be the ninth such round since the Second World War."
This does not mean that rounds are the only road to success in the international trading system; with respect to telecommunications, financial services, and information technology equipment, single-sector negotiations were successfully concluded in 1997.\textsuperscript{17}

Services schedules are an integral part of the GATS, just as tariff schedules are an integral part of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{18}

During and between the multilateral negotiations on the general trade agreements, members also conduct bilateral, plurilateral, or multilateral talks that result in (1) agreements (1947), with 23 countries; Annency Round (1949), with 13 countries; Torquay Round (1950), with 38 countries; Geneva Round (1956), with 26 countries; Dillon Round (1960-61), with 26 countries; Kennedy Round (1962-67), with 62 countries; Tokyo Round (1973-79), with 99 countries; and Uruguay Round (1986-93), with 125 countries. BREAD FOR THE WORLD, AGRICULTURE IN THE GLOBAL ECONOMY: HUNGER 2003, at 60-61 (2003), available at http://www.bread.org/learn/hunger-reports/hunger-report-2003-download.html.


20. “The plurilateral process, akin to the bilateral request and offer, is informal. It takes place between demandeurs and those from whom they are seeking higher commitments. There are no formal negotiating sessions. There is no formal Chair. There are no minutes of these informal negotiations. And importantly, there is no critical mass of countries representing 80-90% of world trade in that sector, unless the negotiations draw in such a large number of countries that they effectively make up this 'critical mass' (an unlikely situation if it were completely voluntary).” Aileen Kwa, “Plurilateral Request-Offer” Approach in GATS Draft Text: Entry Point for Dangerous Sectoral Negotiations, FOCUS ON THE GLOBAL SOUTH (Nov. 18, 2005), http://www.focusweb.org/plurilateral-request-offer-approach-in-gats-draft-text-entry-point-for-dangerous-sectoral-ne.html. See also PUB. CITIZEN, WTO GENERAL AGREEMENT ON TRADE IN SERVICES (GATS) GLOSSARY 4 (Mar. 23, 2006) available at http://www.citizen.org/documents/glossary_final_03-06.pdf [hereinafter GATS Glossary].

21. In the WTO context, multilateral negotiations, as opposed to plurilateral negotiations, imply the participation of all WTO Members. UNDERSTANDING THE WTO, supra note 11, at 56. The nature of the consequent multilateral agreements from these multilateral negotiations implies that commitments are made by all WTO Members. Id.
on maximum tariffs for goods, quotas, export subsidies and domestic supports for agriculture, and (2) commitments to open domestic markets to services from other members and exemptions from these commitments. These agreements are memorialized in schedules. The goods schedules are annexed to the [GATT], and the services schedules are annexed to the GATS.

Schedules are thus bound and can be changed only through subsequent formal negotiations.

The GATT was a multilateral instrument as well, but a series of new agreements were adopted during the Tokyo Round on a multilateral (selective) basis, which caused a fragmentation of the multilateral trading system. Id.

22. "Quotas are limits on the amount of a good produced, imported, exported, or offered for sale." EC External Trade Glossary, supra note 19. "Quantitative restrictions include quotas, non-automatic licensing, mixing regulations, voluntary export restraints, and prohibitions or embargos." KAMAL MALHOTRA ET AL., MAKING GLOBAL TRADE WORK FOR PEOPLE, at xxix (2003). As for voluntary export restraints, these are "agreement[s] between importing and exporting countries in which the exporting country restraints exports of a certain product to an agreed maximum within a certain period." Id. at xxxii.

23. "There are two general types of subsidies: export and domestic. An export subsidy is a benefit conferred on a firm by the government that is contingent on exports." MEAT & LIVESTOCK AUSTL., TRADE TALK GLOSSARY, available at http://www.mla.com.au/NR/rdonlyres/64EDD9C7-B2B0-45A5-AF7D-C0D2A8E07980/TradeTalk.pdf. In other words, it is "any form of government payment that helps an exporter or manufacturing concern to lower its export costs." EC External Trade Glossary, supra note 19. "A domestic subsidy is a benefit not directly linked to exports." Id.

24. See GATS GLOSSARY, supra note 20; see also UNDERSTANDING THE WTO, supra note 11, at 37; WALLACH, supra note 3, at 9; Andrew L. Stoler, Executive Dir., Inst. for Int'l Bus., Econ. & Law, Workshop on GATS Negotiations: UNCESO/OECD Australia Forum on Trade and Educational Services (Oct. 11, 2004).


26. See GATS GLOSSARY, supra note 20.


31. Id.
In these trade liberalization negotiations, WTO members put on the negotiating table their commitments on market access, i.e., the extent to which a country permits imports. A variety of tariff and non-tariff trade barriers can be used to limit the entry of products from other countries. The term of art schedules refers, in general, to a WTO member’s list of commitments on market access (including bound tariff rates and access to services markets). With these schedules, WTO member countries allow specific foreign products or service-providers access to their markets, thus making these schedules integral parts of the trade agreements. Goods schedules can include commitments on tariffs, and, for the specific case of agriculture, a combination of tariffs, quotas, agricultural export subsidies and domestic support. The provisions for market access and “national treatment” are not general requirements, but function as specific commitments included in schedules annexed to the GATS. “These schedules...

32. GATS art. XVI. “The GATS ‘market access’ rules go well beyond requiring that governments treat foreign firms the same as domestic firms. Rather, these rules flatly prohibit governments from placing certain limits on, or applying certain policies to, foreign service operations in covered service sectors.” GATS GLOSSARY, supra note 20. See also GATS art. XVI (listing limitations on federal, state, and local governments under the GATS “market access” rules).

33. “A schedule is a WTO member nation’s list of service sectors or sub-sectors that it has committed or is offering to submit to the rules of the GATS. A nation’s schedule is listed in a table format with four columns labeled: 1) sector/subsector; 2) limitations on market access; 3) limitations on national treatment; and 4) additional comments. Schedules are difficult to read and even more difficult to write. Typically, a nation will commit a service sector in column one, then indicate whether or not the various modes of supplying that service will be bound to the market access rules of the GATS in column two and/or in the national treatment rules in column three. Limitations may be placed in the horizontal section of the schedule or in column one, two or three.” GATS GLOSSARY, supra note 20.


35. Id.

36. “The national treatment principle is the principle of giving others the same treatment as one’s own nationals.” WTO, An Informal Guide to “WTO Speak,” http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/23glos_e.htm (last visited Feb. 24, 2007) [hereinafter WTO Speak]. In other words, WTO Members must treat domestic and foreign goods, services and/or investors in the same manner for regulatory, tax and other purposes. The treatment must be either formally identical or formally different, so long as it is no less favorable. The treatment is considered less favorable if it modifies the conditions of competition in favor of the services or services suppliers of the WTO Member. GATS art. XVII; see also GATS GLOSSARY, supra note 20.

37. Each WTO Member is required to have a schedule of specific commitments in services. Anna Lanoszka, Inst. for Trade & Commercial Diplomacy [ITCD], Practicum
identify the services and service activities for which market access is guaranteed, and set out the conditions governing this access. Once consolidated, these commitments can only be modified or withdrawn following negotiation of compensation with the country concerned.\textsuperscript{38}

Services commitments are binding on national policymakers.\textsuperscript{39} The schedules amount to “binding commitments on how much access foreign service providers are allowed for specific sectors.”\textsuperscript{40} Schedules include “lists [of] types of services where individual countries claim they are not applying the most-favored-nation principle of non-discrimination (MFN).”\textsuperscript{41} These binding commitments are valuable because they create a more predictable and certain legal system than existing liberalized regimes on trade in services provide on their own. Mainly, binding commitments ensure that there will be no withdrawal or rollback of measures that could force businesses to undo an already-existing commercial presence. Recent changes in Thailand and other Latin American nations highlight the value of such certainty and predictability.\textsuperscript{42}

Supporters of trade liberalization – the reduction of tariffs and removal or relaxation of non-tariff barriers – argue that it is sensible to liberalize trade globally because (1) freer trade allows countries to specialize in what they do best (under a theory of comparative advantage), thereby creating greater economic efficiency and allowing more goods and services to be produced and consumed,\textsuperscript{43} (2) if a market is open to imports, domestic
producers are exposed to competition from overseas (and being successfully competitive at home vis-à-vis imports implies greater chances to be competitive overseas); and (3) competitive imports are beneficial for the consumer from choice, price, and quality viewpoints. A sensu contrario, a policy of maintaining trade obstacles to imports tends to raise the cost of living and reduce consumer choice.

Not everyone, however, is convinced that trade liberalization is beneficial for every WTO Member, especially the poor.44 It has been argued that: (1) "government transfers can shrink as liberalization cuts the government’s receipts of trade-related taxes," (2) "terms of trade can deteriorate as liberalization affects world prices," and (3) "liberalization can impose adjustment costs and raise short-run risk owing to competition from imports and reallocation of productive factors."45

B. Why a New Round Was Needed

Before the creation of Doha Round in 2001, developing and least-developed countries had been marginalized in the world trading system, raising serious economic implications. In response, the new round is called the development agenda; the argument is that a more open and equitable trading system brings more peace to the world.46 In this sense, the DDA should not be approached as a zero-sum game (as many developing countries seem to perceive it). Instead, the new round must be framed as a win-win situation.

Although wealth redistribution does seem vital to truly helping the poor nations of the world, and even while firmly defending the DDA argument that developed countries should

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44. Timothy A. Wise & Kevin P. Gallagher, Doha Round and Developing Countries: Will the Doha deal do more harm than good? (Research and Info. Sys. for Developing Countries, Policy Brief No. 22, Apr. 2006).
help the poor, WTO Director-General Pascal Lamy is correct that the WTO’s role is not about redistribution of wealth. Therefore, a new round is necessary to include poor countries in the world trading system, promote economic development, and alleviate poverty.47

A successful DDA result will mean more growth and development in the world trading system. The failure of the DDA provides no growth or development, especially for the poorest countries on the planet. Additionally, the failure of the DDA will be historically regarded as a missed opportunity to eliminate export subsidies and end trade distortion. Although all countries in the world trading system lose, developing countries would especially feel a failure of the DDA.48 Liberalizing trade among developing countries is an essential part of the Doha exercise because the biggest development gains would certainly be in the core areas of goods, services and agriculture.49

In the case of services trade, a new services negotiation round was necessary and justified because the Uruguay Round was just a first step in the process of trade liberalization.50 Observers tend to agree that while the Uruguay negotiations succeeded in setting up the main structure of the GATS, the liberalizing effects for which the GATS was conceived have been relatively modest.51 Apart

47. This is certainly the position of European trade commissioner Peter Mandelson, who said that far from being responsible for poor labor conditions, free trade could be a ladder out of poverty and “an engine of the very prosperity that helps societies put poor labor conditions behind them for good.” Peter Mandelson, EU Trade Comm’r, Free Trade is not the Enemy of Decent Work, Speaking Points at a Party of European Socialists Conference (May 10, 2006), available at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm098_en.htm. He concludes that “[f]ree trade is not the enemy of decent work. The enemy of decent work is our willingness to turn a blind eye to it. Free trade does not mean trade indifferent to fair conditions of production.” Id.


49. As we saw in the pre-Hong Kong ministerial conference period of negotiations, the agriculture negotiations are considered key to the success of the overall Doha Round of WTO talks. See, e.g., Kate Millar, EU, U.S. Strike Joint WTO Bid to Revive Stalled Farm Talks, TRADE OBSERVATORY, Aug. 13, 2003, http://www.tradeobservatory.org/headlines.cfm?refID=18501.

50. For a view on why the international community should have a new round, see W.T. Eijsbouts et al., Why Are We Having a Round?, 28 LEGAL ISSUES ECON. INTEGRATION 243, 243-47 (2001).

51. See generally Rolf J. Langhammer, The EU Offer of Services Trade Liberalization in the Doha Round: Evidence of a Not-Yet-Perfect Customs Union, 43 J. COMMON MKT. STUD. 311 (2005) (providing a numerical assessment of the degree of trade restrictions in
from exceptions in financial and telecommunication services, most schedules have remained confined to confirming status quo market conditions in a relatively limited number of sectors. This may be explained in part by the novelty of the GATS and the perceived need for WTO Members to gather experience before considering wider and deeper commitments. It could also be a lack of political will, negotiating expertise, or capacity. Moreover, many administrations need time to develop the necessary regulations – including quality standards, licensing and qualification requirements, etc. – that ensure the compatibility of external liberalization with the core policy objectives (quality, equity, etc.) of socially important services.

III. WHAT IS THE GATS?

The GATS is one of the seventeen major international trade agreements achieved during the Uruguay Round and enforced by the WTO, entering into force as part of the WTO substantive law on January 1, 1995. Because the very notion of including the services sector in a trade agreement was controversial, most GATS requirements only apply to the service sectors of countries that specifically agree to be open to competition by foreign corporations.


The GATS consists of three components: (1) a general framework agreement for all WTO Members which lays out the general rules and obligations for trade and investment in services;\(^5\) (2) several important annexes (sometimes called protocols) on specific service sectors;\(^6\) and (3) national schedules of specific commitments\(^7\) concerning market access for each WTO signatory government, listing the specific service sectors that each nation has committed to the agreement.\(^8\)

**A. Objectives and Principles**

Unlike trade in goods, multilateral services trade did not have a multilateral liberalization movement. Multilateral trade in services only came into being after the GATS went into force. This is because services were initially, although incorrectly, perceived as non-tradable. In some services industries, for example, it was considered essential to have the simultaneous presence of

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\(^5\) Obligations contained in the GATS may be categorized into two groups: 1) general obligations which apply directly and automatically to all Members, regardless of the existence of sectoral commitments; and 2) specific commitments whose scope is limited to the sectors and activities where a Member has decided to assume market access and national treatment obligations.” ITCD Practicum, supra note 37. Obligations can also be divided into unconditional and conditional obligations. Unconditional obligations apply to all services except those not subject to coverage by the GATS. Examples of unconditional obligations are the most-favored-nation treatment (except for those listed in the Annex on Article II Exemptions) and certain transparency obligations, whereas conditional obligations are Member-specific and contained in individual Members’ schedules of specific commitments. “Conditional obligations are assumed in a “bottom-up” or positive list approach.” Stoler, supra note 24.


\(^7\) See WTO, Schedules of Commitments and Lists of Article II Exemptions, http://www.wto.org/English/tratop_e/serv_e/serv_commitments_e.htm (last visited Mar. 13, 2007) [hereinafter Schedules of Commitments]; see also WTO Legal Texts, supra note 34. Each WTO Member maintains a schedule of specific commitments listing sectors in which it grants market access and national treatment. Stoler, supra note 24. These are conditional obligations. Unconditional obligations also apply to these sectors. In the case of services, they are the equivalent of tariff schedules in the GATT, laying down the commitments accepted — voluntarily or through negotiation — by WTO Members. India and the WTO, A to Z of WTO: A Glossary of WTO and Related Terms, http://commerce.nic.in/dec05/main.htm (last visited Mar. 13, 2007); Schedules of Commitments, supra note 57.

\(^8\) See Petersmann, supra note 56, at 1161.
producers and consumers within a particular market. The current perception of services, however, is diametrically different than how services were perceived before GATS. The GATS commits WTO Members to undertake negotiations on specific issues and to enter into successive rounds of negotiations to progressively liberalize trade in services. According to Article XIX of the GATS, the first round of negotiations was to start no later than five years after 1995:

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

The GATS is therefore the first set of rules and disciplines governing international trade in services that were agreed to at a multilateral level. The GATS sets rules for who controls or owns services, limits government regulation in the services sector, and covers all services including health care, education and utilities such as water, data management, energy, banking, transportation, and insurance. The GATS is fairly flexible; WTO Members have the freedom to choose the services, as well as the degree to which foreign services suppliers can operate, in their domestic markets. For example, if a WTO Member chooses financial services and commits to open its domestic banking sector for foreign suppliers, it may also restrict market access by limiting the number of licenses it grants.

The GATS was inspired by essentially the same objectives as its counterpart in the trade in goods, the GATT. As outlined by


61. GATS art. XIX (1).

62. See CIEL, supra note 60.

63. See generally Mavroidis, supra note 25, at 1-23.

the WTO, the GATS main objectives are (1) the creation of a credible and reliable system of international trade rules, (2) the stimulation of economic activity through guaranteed policy bindings, (3) the assurance of fair and equitable treatment of all participants (the so-called principle of non-discrimination), and (4) promotion of trade and development through progressive liberalization.\(^6\)

By comparison, the basic principles of the GATT include: non-discrimination (most-favored-nation treatment and national treatment), liberalization of trade, no "unfair trade" (anti-dumping, subsidies, and state trading – under certain conditions), transparency and neutrality of the administration of trade laws, and horizontal exceptions, including special and differential treatment. For the purposes of this Article, we will only deal with the principle of non-discrimination.

Some commentators argue that only a small part of the GATS is about trade. The GATS is often called a "backdoor Multilateral Agreement on Investment (MAI)," because it creates rights for foreign investors to set up service businesses within other WTO countries. The GATS does allow some flexibility for a country to determine which service sectors it wants to subject to GATS full participation and deregulation pressures. Some GATS rules, however, apply to sectors that individual countries may not have committed to the agreement. In addition, the text of the GATS commits all WTO countries to "progressive liberalization."\(^6\)

The GATS is based on the principle of MFN. According to this principle, each WTO member must unconditionally accord services and service suppliers from any other member-state no less favorable treatment than that it accords to services and service suppliers of any other country.\(^6\) However, certain exceptions\(^6\) to the MFN requirement are envisaged in the context of specific service activities within the framework of a list of exemptions.\(^6\) In

\(^{65}\) Id.

\(^{66}\) GATS art. XIX.1.

\(^{67}\) See WEILER & CHO, TRADE IN SERVICES, supra note 52, at 2.

\(^{68}\) "Exceptions are binding provisions on all signatories built into the core text of an agreement that lists the circumstances when a country may violate a term of an agreement without penalty. Exceptions only come into play as a defense when a country's law or policy has been challenged in a dispute resolution as a violation of an agreement." WALLACH, supra note 3, at 17.

\(^{69}\) "Work on this subject started in 2000. As mandated by the GATS, all these exemptions are currently being reviewed to examine whether the conditions which created
fact, in its schedule, each government has included the services for which it guarantees access to its market by setting out the limits it wishes to maintain for such access.70

The drafters of the GATS seem to have reached two conclusions in their attempt to define the scope of services activities subject to the GATS. First, given the enormity of tradable services and the constant change in the description of what is understood by a “service” due to continued technological advances,71 the drafters concluded that for purposes of the GATS it suffices to define only what is meant by trade in services. Secondly, the definition of trade in services should be precise enough to capture all modes for the services trade.72 As Markus Krajewski argues,73 the sectoral scope of the GATS is broad and includes most public services.74 To narrow the scope of the GATS, WTO Members may collectively take legislative steps, such as a change in the agreement itself, or an additional treaty instrument.75

B. Historical Background to the GATS

The GATS is a manifestation of an attempt to expand the principles of the GATT into the field of services.76 The motivation

the need for these exemptions in the first place still exist. And in any case, they are part of the current services negotiations.” UNDERSTANDING THE WTO, supra note 11, at 40.

70. EU Summaries, supra note 38.

71. See Fariborz Moshirian, Trade in Financial Services, in 17 THE WORLD ECONOMY 347, 348-51 (1994) (viewing changes in the definition and content of financial services as a result of development of new telecommunications technology).

72. The “modes” constitute the means of delivering services. Modes of supply are defined on the basis of the origins of the service supplier and the consumer, and the type of territorial presence that both have when the service is delivered. As we will see later, there are four modes of supply. EC External Trade Glossary, supra note 19.


75. See Krajewski, Public Services and Trade Liberalization, supra note 73, at 367.

76. See Petersmann, supra note 56, at 1161.
for the agreement came mainly from developed countries, given that the exports of developed nations are gradually switching to services that require a high level of value-added knowledge, as opposed to traditional industrial products. The globalization of the world economy was underway, trade in services was of major interest to more and more countries, and the expansion of services trade was closely tied to further increases in the worldwide trade in goods.

The GATS is the first multilateral trade agreement to cover trade in services. Its creation was one of the major achievements of the Uruguay Round of trade negotiations that began in 1986 and ended in 1993. This achievement came almost a half century after the GATT entered into force in 1947. Among the several new legal disciplines in the field of international trade stemming from the Uruguay Round, the GATS still remains the most complex and unexplored agreement. While the level of actual liberalization achieved by the WTO in the field of services is relatively low, the new legal disciplines provided in the GATS have the potential to have far reaching implications for all WTO members involved.

Unlike goods negotiations, services negotiations entail a lengthier, more complicated process of ascertaining precisely which limitations and conditions should apply to the entry and treatment of foreign services suppliers. The GATS negotiations are essentially a bilateral request/offer exercise. No particular format is needed for the requests, though it should be clear as to what is being requested. The request could be a letter or a

78. “Globalisation is the result of the worldwide spread of flows of goods, services, capital, technologies and people against a background of deregulation. It is driven by the development and diffusion of information technologies and the internet. Globalisation can create more wealth for everybody, but it is also disruptive and needs to be harnessed by international rules. When business goes global, the rules for fair play must also be set globally.” EC External Trade Glossary, supra note 19.
79. See WEILER & CHO, THE SYNTAX AND GRAMMAR OF INTERNATIONAL TRADE LAW, supra note 17, at 1.
80. WTO, GATS Training Module: Historical Background, http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1pl_e.htm (last visited Feb. 19, 2007) [hereinafter GATS Historical Background].
81. Id.
82. See id.
83. GATS Negotiations, supra note 24.
template. In framing a request, negotiators should refer to the Services Sector Classification List. Typical requests include removal of existing limitations, requests for additional commitments, removal of most-favored-nation exemptions, and modifications to "horizontal commitments." As for the offer, it is normally presented as a draft schedule of commitments. Potential contents of an offer include an agreement to additional coverage of a sector, agreements to liberalize for all modes of delivery in both market access and national treatment (or possibly just certain modes and retain some limitations), agreements to total liberalization of limitations (or possibly just ease the impact partially), and agreements to modify horizontal commitments.

C. Scope of the GATS

There have been several proposals for reforming the objectives of the WTO. One example is the proposal by Aaditya Mattoo and Arvind Subramanian to broaden the scope of negotiations in the framework of the WTO to include all fields of production, including capital and the labor force. For the

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84. Id.
85. Id.
86. See GATS art. XVIII (stating additional commitments are commitments under the GATS made on regulations relating to qualifications, standards, licensing or competition matters, which do not discriminate against foreigners).
87. Stoler, supra note 24. The GATS consists of a horizontal and vertical commitment framework. The horizontal commitment contains basic signatory obligations across the board to the entire WTO membership, whereas the vertical commitment applies to a service or sub-sectors thereof which governments have chosen to open up (partially, fully, or not at all) for competition. Each government must provide a schedule of commitment. The most relevant Article in the horizontal commitment is the GATS Article II on Most-Favored-Nation Treatment, while GATS Article XVII on National Treatment and GATS Article XVI on Market Access stand out in vertical commitments. See, e.g., WEILER & CHO, THE SYNTAX AND GRAMMAR OF INTERNATIONAL TRADE LAW, supra note 17, at 5-6 (discussing a countries' commitment to market opening, market access, and national treatment).
89. Modes of delivery are a classification related to trade in services. Services can be sold in four different ways: (1) The service itself can cross a border (i.e., a sale over the internet); (2) it can be consumed abroad (i.e., a training course, a medical operation, or a tourist visit abroad); (3) it can be purchased from a foreign company that is established locally; or (4) the personnel of a foreign firm can travel temporarily to a host country to perform services (i.e., key management for a construction project). See WEILER & CHO, THE SYNTAX AND GRAMMAR OF INTERNATIONAL TRADE LAW, supra note 17, at 9.
90. Stoler, supra note 24.
91. Id.
purposes of this Article, however, the focus will be on the scope of services negotiations.

1. Measures Within the Scope of the GATS

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

The GATS not only sets constraints on governmental policies which directly relate to services, but also extends to “measures by [WTO] Members affecting trade in services.” This broad definition of services means that all governmental policies that affect services are constrained by the GATS, including those not specific to services, such as general labor market policies or other broad regulations. Also, the GATS clearly states that no sector is excluded a priori, meaning no sector can be carved out altogether, and that countries are bound to follow some of the GATS rules even if they do not explicitly agree to subject a service sector to the GATS coverage. Some GATS defenders incorrectly claim that the GATS rules apply only to sectors that governments volunteer for coverage. In reality, there are some GATS rules which apply unconditionally to all service sectors, whether or not they are offered by a country covered by other GATS terms.

92. GATS art. I ¶ 3.b.
94. GATS art. I ¶ 3.a.i.
95. GATS art. I ¶ 3.a.ii.
96. See Panel Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA (May 22, 1997) (“[GATS] Article I (1) refers to any measure in terms of their effect, which means that they could be of any type or relate to any domain of regulation.”).
97. GATS art. V ¶ 1.a (“[T]his condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of supply.”).
98. See SCOTT SINCLAIR & JIM GRIESEHABER-OTTO, FACING THE FACTS: A GUIDE
Defenders of the GATS also argue that WTO Members were able to list exceptions to the MFN principle when initial commitments were made under the GATS. However, the GATS defenders who make this argument forget to mention that, under the GATS provisions, WTO Members are to phase out such exemptions within ten years, and that "[i]n any event, they shall be subject to negotiation in subsequent trade liberalizing rounds."

Another incorrect interpretation rendered by GATS supporters is that the GATS explicitly excludes all public services. They point to a provision in the GATS that allows for certain government-provided services to be excluded from GATS coverage, but this provision is limited to government services that are neither provided on a "commercial basis" nor "in competition with one or more service suppliers."

In many countries, public services are provided by both governmental and private operators. Examples include primary education, medical and hospital services, retirement pensions, and transportation. Even in the case of services provided exclusively by the government, only services delivered directly from government-to-people are exempt from the GATS. Despite this situation, many governments provide many public services through a mixed delivery system that includes both public and private components. The Organization for Economic Cooperation and Development (OECD) noted that "[t]his exception is, however, limited: where a Government acts on a commercial basis and/or as competitor with other suppliers, its activities are treated like those of any private supplier."

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99. See GATS art. II (stating that in relation to the most-favored-nation principle that "with respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment which is no less favourable than that it accords to like services and service suppliers of any other country").

100. See SINCALIR & GRIESEHABER-OTTO, supra note 98, at 30.

101. GATS Annex on Article II Exemptions art. 6.

102. SINCALIR & GRIESEHABER-OTTO, supra note 98, at 19-20.

103. Id.; see also GATS art. I at ¶ 3.b ("[A] service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.").

104. See SINCALIR & GRIESEHABER-OTTO, supra note 98, at 20.

105. URSULA KNAPP, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], THE GENERAL AGREEMENT ON TRADE IN SERVICES: AN ANALYSIS 7 (1994), available at http://www.oecd.org/document/12/0,2340,en_2649_33783766_2085452_1_1_1_1,00.html.
2. Measures Not Within the Scope of the GATS

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

- Immigration rules, provided they do not contravene Commitments on temporary entry under mode 4;
- Services supplied in the exercise of governmental authority, defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers;"
- Fiscal policy and taxation measures, provided the taxes do not discriminate against foreign services or service suppliers;
- Air transportation services, i.e., measures affecting traffic rights or services directly related to the exercise of traffic rights;
- Import restrictions on equipment necessary for the supply of a service;
- Restrictions on short-term capital movements, or measures that affect property rights, provided they are nondiscriminatory;
- Exchange rate management;
- Privatization of state-owned property, though there are disciplines for state-owned trading entities and monopolies.

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

106. GATS art. I ¶ 1.
107. E.H. Leroux, What is a 'Service Supplied in the Exercise of Governmental Authority' Under Article I:3(b) and (c) of the General Agreement on Trade in Services?, 40 J. WORLD TRADE 345 (2006).
108. GATS art. I ¶ 3.c.
109. ITCD Practicum, supra note 37.
110. "Safeguards are actions taken to protect a specific industry from an unexpected rise of imports. It is governed by Article XIX of the GATT 1994." EC External Trade Glossary, supra note 19.
111. Government procurement is the "[p]urchase of goods and services by
D. What is Trade in Services?

Although the GATS does not define “services,” it does define “trade in services.” As we will see, the definition of “trade in services” applies not only the cross-border supply of services, but also to transactions involving the cross-border movement of capital and labor.

The term “service” refers to a diverse group of transactions that may differ in nature, and thus there are many sectors of services. Because of this diversity, no agreement is found in economic theory on the general definition of a “service.” By contrasting the term with goods, Tycho H.E. Stahl sees services from an empirical point of view as “the dominant component of the GNP of developed countries such as the United States and are a major component of international trade.” From a theoretical economic viewpoint, services are “intangible processes that are traded via interaction between producers and consumers in cross-border movements of capital assets or personnel. They are also subject to extensive government regulation and are extremely difficult to measure.”

112. See Henk Kox & Hildegunn Kyvik Nordås, Services Trade and Domestic Regulation (OECD Trade Policy, Working Paper No. 49, 2007), at 2, 12, 27, available at http://www.olis.oecd.org/olis/2006doc.nsf/43bb6130e5e86e5fc12569fa005d004c/4e6e6ce4616ae431c12572800408b67/$FILE/JT03221792.PDF (finding it is not regulation that hampers international trade in services, but rather regulatory heterogeneity that has relatively large impact on both market entry and subsequent trade flows).

113. GATS art. I § 2.

114. Cross-border supply of services refers to a situation “where the trade takes place from the territory of one WTO Member into that of another. Only the service itself crosses the border, without the movement of persons, such as information and advice passing by means of fax or electronic mail, or cargo transportation. The service supplier does not establish any presence in the territory of the Member where the service is consumed.” EC External Trade Glossary, supra note 19.

115. Among the many services sectors, we have inter alia audiovisual, accounting, banking, business, computer, distribution, education, health, hotel and restaurant, professional, insurance, telecommunications, financial, and transport services. Dep’t of Commerce (India), GATS: Frequently Asked Questions 24, annex I, available at http://commerce.nic.in/wto_sub/services/faqs_gats.pdf (last visited Mar. 7, 2007).

116. See Herbert Grubel, All Trade Services are Embodied in Materials or People, in 10 WORLD ECON. 319 (1987) (discussing the different views on the definition of a service).


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

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

The following quotation illustrates these difficulties: "[W]ould contracting parties which refuse to extend national treatment to foreign banks risk retaliation in the form of the withdrawal of tariff concessions on bananas or orange juice? Such an approach opens a


123. Id. Such concerns made France, Italy, and other EU Member States initially oppose services trade liberalization. See Maffucci, supra note 120, at 388.

virtual Pandora’s Box of coercion and retaliation . . .” According to one scholar:

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

Regarding the more specific question of trade in services, it is important to note that the peculiar characteristics of trade in services require that any international instrument for their regulation depart from the concepts and rules incorporated in the GATT.

In the late 1980s, academics undertook extensive examination and analysis to determine the best method of dealing with international trade in services prior to the final adoption of the GATS. In this sense, the Group of Negotiations on Services (GNS), at what used to be the GATT (now the WTO), considered a series of proposals for a possible agreement on principles for trade in services. The literature focused almost exclusively on three main points: (1) whether the GATT/WTO could be legally augmented for the incorporation of services; (2) the benefits from liberalization; (3) the costs for developing countries, as well as whether they should participate in a multilateral agreement on services.

125. Leal-Arcas, supra note 121, at 64 (quoting Murray Gibbs, Continuing the International Debate on Services, 19 J. WORLD TRADE L. 199, 215 (1985)).
126. Nayyar, supra note 120, at 40.
128. Leal-Arcas, supra note 121, at 64.
129. As early as April 1987, after the Uruguay Round was launched, the Group of Negotiations on Services met to organize the Uruguay Round’s work and to undertake negotiations. Problems arose including lack of data on services, difficulties in negotiating trade in services, and countries making commitments without knowing how they would be affected. These problems consequently gave birth to the Group of Negotiations Services. See Chakravarthi Raghavan, Third World Still Terra Incognita on Services Data, THIRD WORLD NETWORK, Feb. 19, 2000, http://www.twnside.org.sg/title/terra.htm.
130. See Nicolaides, supra note 127, at 128.
131. See, e.g., Brian Hindley, Introducing Services into GATT (1986); Jagdish Bhagwati, Services, in The Uruguay Round: A Handbook on the Multilateral Trade Negotiations 207, 207-17 (J. Michael Finger & Andrzej Olechowski eds., 1987); Jagdish Bhagwati, Trade in Services and the Multilateral Trade Negotiations, 1 WORLD
There are four general differences between trade in goods and trade in services: (1) services are intangible and non-storable;\textsuperscript{132} (2) there are different modes for trade in services (contrary to the exclusively cross-border mode for trade in goods, services can be provided at the location of the service supplier, at the location of the service consumer, or at neither of these two locations);\textsuperscript{133} (3) international trade in services usually requires movement of one or more factors of production, such as the establishment by the service supplier of a commercial presence\textsuperscript{134} at the location of the service consumer (movement of capital) or the transfer by the service supplier of personnel to the location of the service consumer (movement of labor);\textsuperscript{135} and (4) the level of national regulation of services trade is more extensive than that of trade in goods.\textsuperscript{136} Contrary to the exclusively cross-border mode for trade in goods, services can be provided at the location of the service supplier, at the location of the service consumer, or at neither of these two locations.\textsuperscript{137} Most barriers to international trade in services are not designed to restrict trade in services but merely to regulate the service sectors in the national economy.\textsuperscript{138} Nevertheless, these barriers are perceived as having the effect of discouraging entry into the local market by foreign services suppliers.

The definition of services trade under the GATS is four-pronged and dependent upon the territorial presence of the

\textsuperscript{BANK ECON. REV. 4 (1987).}
\textsuperscript{132. See generally Nicolaides, supra note 127, at 126 (discussing the differences between goods and services).}
\textsuperscript{133. See generally Gary Sampson & Richard Snape, Identifying the Issues in Trade in Services, 8 WORLD ECON. 172, 172-75 (1985) (discussing the classification of international transactions in services based on the proximity of supplier and consumer).}
\textsuperscript{134. Commercial presence refers to "the possibility of a service provider to be physically present (a branch or subsidiary, for instance) within the territory of a member of the GATS for the purpose of supplying a service." EC External Trade Glossary, supra note 19.}
\textsuperscript{135. Leal-Arcas, supra note 121, at 64-65. It has always been recognized that trade in services would usually require movement of capital or labor. This accounted for the GATT's reluctance to expand into the services area, since it would involve investment issues, which is an area traditionally beyond the scope of the GATT.}
\textsuperscript{136. Id. at 65.}
\textsuperscript{137. See Sampson & Snape, supra note 133.}
\textsuperscript{138. UN CONFERENCE ON TRADE AND DEV. [UNCTAD] & WORLD BANK, LIBERALIZING INTERNATIONAL TRANSACTIONS IN SERVICES: A HANDBOOK 20-24 (1994).}
\textsuperscript{139. See Josh Trachtman, Trade in Financial Services Under GATS, NAFTA, and the EC: A Regulatory Jurisdiction Analysis, 34 COLUMBIA J. TRANSNAT'L L. 37, 46 (1995).}
supplier and the consumer at the time of the transaction.\textsuperscript{140} Pursuant to GATS Article I (2),\textsuperscript{141} the GATS covers the following:

- **Mode 1** — Cross-border trade: services supplied from the territory of one member into the territory of any other member.\textsuperscript{142} For example, a user in country A receives services from abroad through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.\textsuperscript{143}

- **Mode 2** — Consumption abroad: services supplied within the territory of one member to the service consumer of any other member.\textsuperscript{144} For example, nationals of A have moved abroad as tourists, students, or patients to consume the respective services.

- **Mode 3** — Commercial presence: services supplied by a service supplier of one member, through actual commercial presence in the territory of any other member.\textsuperscript{145} For example, the service is provided within A by a locally-established affiliate, subsidiary, or


\textsuperscript{141} Id. at 328. GATS Article I (2) reads:

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

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

\textsuperscript{142} See Andrea Appella, Comment, *Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement*, 45 INT’L & COMP. L.Q. 440, 447 (1996) (giving the following example: “A firm of architects established in country A supplies an electrical installation project to a firm of engineers established in country B.”)


\textsuperscript{144} See Appella, supra note 142, at 147 (giving the following example: “Services supplied in country A to tourists from country B.”).

\textsuperscript{145} See id. (giving the following example: “A supply and establishment of services in country A by undertakings or professionals from country B. Banking service is an example of this.”)
representative office of a foreign-owned and —
controlled company (bank, hotel group, construction
company, etc.).

- **Mode 4** — Presence of natural persons: services
  supplied by a service supplier of one member, through
  the presence of natural persons of a member in the
territory of any other member.  

For example, a foreign national provides a service within A as an
independent supplier (e.g., consultant, health worker)
or employee of a service supplier (e.g. consultancy
firm, hospital, construction company).  

This last mode can be misinterpreted as an open door for
migration. It is in Mode 4 where there is the greatest discrepancy
among EU member states in services trade; while some EU
countries are in favor of liberalizing Mode 4, others are more
reluctant.  

A large group of developing nations remains disappointed
with developed countries’ offers, particularly in Mode 4. Many of
these nations are reluctant to open their service markets to them
because of the poor quality of offers made in Mode 4. Some
developing countries consider the lack of progress on negotiating
over agriculture, industrial goods, and rules as the reason for their
inability and lack of drive to make more liberal offers in services.
On the other hand, wealthy nations maintain that developing
countries bear the responsibility for the low quality of offers. In
the view of developed countries, “the issue of linkage with other

146. See id. at 447 (giving the following example: “An undertaking from country A
supplies services in country B by means of workers coming from country A, such as in
construction work.”); see also WTO, GATS Training Module: Definition of Services
cbt_course_e/c1s3p1_e.htm (last visited Feb. 24, 2007) [hereinafter Definition of Services
Trade and Modes of Supply].  
147. Definition of Services Trade and Modes of Supply, supra note 146.  
148. See Press Release, EC, Summary of the EU’s Revised Services Offer in the Doha
reference=MEMO/05/190&format=HTML&aged=0&language=EN&guiLanguage=en.  
149. For relevant literature on Mode 4, see, for example, Rupa Chanda, Movement of
Natural Persons and the GATS, 24 WORLD ECON. 631, 631-54 (2001); Rupa Chanda,
Movement of Natural Persons and Trade in Services: Liberalising the Temporary
Movement of Labour Under the GATS (Indian Council for Research on Int’l Econ.
Relations, Working Paper No. 51, 1999); WTO Secretariat, Presence of Natural Persons
(Mode 4), S/C/W/75 (Dec. 8, 1998); Neela Mukherjee, Exporting Labour Services and
Market Access Commitments Under GATS in the World Trade Organization, 30 J. WORLD
negotiating areas is a two-way street—i.e., substantial offers in services could facilitate negotiations in other areas” of the trade agenda.150

Although the movement of natural persons under the GATS represents a very small subset of overall migration, some WTO members argue that the issues being discussed in the context of overall migration might inform the Mode 4 work of the Council for Trade in Services at the WTO.151 Moreover, the Swiss delegation to the WTO has proposed a method which seeks to help improve transparency and comparability of assessing the quality of offers in numeric terms.152

The WTO’s definition of services trade under the GATS is significantly broader than the balance of payments (BOP) concept of services trade:

While the BOP focuses on residency rather than nationality — i.e., a service is being exported if it is traded between residents and non-residents — certain transactions falling under the GATS, in particular in the case of [Mode 3], typically involve only residents of the country concerned. Commercial linkages may exist among all four modes of supply. For example, a foreign company established under mode 3 in country A may employ nationals from country B (mode 4) to export services cross-border into countries B, C, etc. Similarly, business visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3).153

With such a definition, the GATS has failed to provide a legal definition of what “services”154 should mean for purposes of the Agreement. Although GATS does not define services, but it does define trade in services, GATS “applies to measures by members affecting trade in services.”155 Instead, the Appellate Body has so
far taken a pragmatic approach in adjudicating under the GATS by merely indicating which sector was affected.\footnote{156. See Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, ¶ 157, WT/DS142/AB/R (May 31, 2000) [hereinafter Canada – Automotive Industry]; Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, ¶¶ 223-28, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter EC – Bananas].}

The Appellate Body’s failure to address these definitional matters certainly raises issues concerning scope of applicability of the GATS. Although the scope of the GATS is not limited to any list of covered sectors, to date there has been no agreement on an exhaustive list of services.\footnote{157. LORI WALLACH & PATRICK WOODALL, WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO 116-17 (The New Press 2004) (1991).} The genesis of this problem can be found in the negotiations on electronic commerce at the WTO.\footnote{158. See MARC BACCHETTA ET AL., WORLD TRADE ORGANIZATION, ELECTRONIC COMMERCE AND THE ROLE OF THE WTO: SPECIAL STUDIES 2 (1998).}

However, the lack of a comprehensive agreement has surmountable legal implications; namely, although WTO members may impose restrictions when scheduling their specific commitments, the general GATS obligations apply to all services.\footnote{159. See GATS.}

During the Uruguay Round, a “Services Sectoral Classification List” was developed.\footnote{160. See GATT Secretariat, Services Sectoral Classification List, MTN.GNS/W/120 (July 10, 1991) (giving such examples as reinsurance and retrocession (CPC 81299) and voice mail (CPC 7523)).} It is based on the UN Central Product Classification System (CPC) and classifies services by sector.\footnote{161. The UN Central Product Classification System is intended to facilitate future statistical comparisons of services domestically produced with those internationally negotiated and traded. The UN Provisional CPC code (“CPCprov”) is a concordance of goods and service-sector definitions that are used by many countries to identify service sectors in the GATS negotiations. Most WTO governments place the CPCprov code next to the service sector they are offering in these negotiations. It is only by going to the CPCprov data base on the UN web site and looking at the categories, subcategories and sub-subcategories that a person can begin to get a more complete picture of what services are being offered, and what is at stake. For instance, under the benign category of “wholesale distribution,” which the United States committed in 1995, a close examination of the CPCprov shows that the commitment includes wholesale distribution of nuclear fuel. Thus, U.S. restrictions on the trade and sale of this product could constitute a GATS violation. The CPCprov can be found at UN Statistics Div., Classifications Registry: Detailed Structure and Explanatory Notes, http://unstats.un.org/unsd/cr/registry/ regcst.asp?Cl=9&Lg=1 (last visited Apr. 30, 2007).} The use of the Services Sectoral Classification List is not
mandatory. Yet many WTO members have adopted it as a basis for scheduling their commitments under the GATS.\textsuperscript{162}

As Dilip K. Das argues, trade in services tends to be more heavily protected than trade in manufactured products.\textsuperscript{163} Developing economies have more restrictive barriers vis-à-vis trade in services than industrial economies.\textsuperscript{164} Developing economies protect their services in various ways, since they are a rather heterogeneous group.\textsuperscript{165} On the other hand, industrial economies seem to have more liberal markets in services trade, and governments have higher levels of market-access commitments.\textsuperscript{166}

\textit{E. Progressive Liberalization of Services Trade}\textsuperscript{167}

The Uruguay Round was only the beginning of liberalization of services trade. GATS Articles XIX through XXI deal with progressive liberalization: Article XIX on the negotiation of specific commitments; Article XX on the schedules of specific commitments; and Article XXI on the modification of schedules. However, the GATS requires more negotiations. These negotiations began in early 2000 with the aim to achieve a higher level of liberalization of trade in services.\textsuperscript{168} Liberalization will be aimed at enhancing the level of commitments in the schedules and reducing the adverse effect of measures taken by member governments.\textsuperscript{169} In this sense, services negotiations started officially

\textsuperscript{162} See GATS arts. XVI, XVII, and XVIII.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{168} After the Seattle Ministerial Conference in 1999, the WTO launched new negotiations to expand global rules on cross border trade in services in a manner that would create vast new rights and access for multinational service providers, and would newly constrain government action taken in the public interest world wide. Negotiations are currently underway at the WTO in Geneva, aimed at expanding the General Agreement on Trade in Services (GATS). The original text of the GATS was agreed in 1994, and the current GATS 2000 negotiations are part of the 'built-in agenda' which the WTO inherited on its formation in 1995. GATSwatch.org, GATS 2000: Where Are We Now?, http://www.gatswatch.org/GATSandDemocracy/wherenow.html (last visited Feb. 23, 2007).
\textsuperscript{169} See EC, TRADE IN SERVICES: CONDITIONAL OFFER FROM THE EC AND ITS
in early 2000 under the WTO Council for Trade in Services.\textsuperscript{170}

In March 2001, the WTO Services Council fulfilled a key element in the negotiating mandate by establishing the negotiating guidelines and procedures.\textsuperscript{171} Thus, the negotiations on services were already almost two years old when they were incorporated into the DDA in 2001. These negotiations guidelines aimed to increase the participation of developing countries in trade in services. GATS Article XIX:2 provided for the appropriate flexibility for individual developing country members to participate. Special priority was granted to least-developed country members as stipulated in GATS ArticleIV:3. The guidelines made clear that due consideration should be given to the needs of small and medium-sized service suppliers, particularly those of developing countries. Moreover, the negotiations were to take place within the existing structure and principles of the GATS, retaining the right to specify sectors in which commitments to the four modes of supply were to be undertaken.

As for the scope of the negotiations on trade in services, it is important to note that MFN exemptions are subject to negotiation according to paragraph 6 of the Annex on GATS Article II. In such negotiations, appropriate flexibility is accorded to individual developing country members of the WTO. In relation to the modalities and procedures achieved by the WTO Services Council guidelines, it was agreed that future negotiations would be conducted in special sessions of the WTO Council for Trade in Services and regular meetings of its relevant subsidiary committees or working parties.\textsuperscript{172} These groups would report on a regular basis to the General Council, in accordance with decisions taken by the General Council. Needless to say, the negotiations would have to


\textsuperscript{171} W TO, The Doha Declaration Explained, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#services (last visited July 26, 2004) [hereinafter Doha Declaration Explained].

\textsuperscript{172} W TO, Special Session of the Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, S/L/93 (Mar. 29, 2001).

\textsuperscript{170} W TO, Doha Declaration Explained, supra note 170.
be transparent and open to all members, acceding State territories, and separate customs territories according to decisions taken in this regard by the WTO General Council.

The *modus operandi* of services trade liberalization is through bilateral, plurilateral, or multilateral negotiations, and the main method of negotiation is the request/offer approach. The Council for Trade in Services in Special Sessions must continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of its Article IV in particular. This should be an ongoing activity of the Council and negotiations should be adjusted in the light of the results of the Council's assessment. In accordance with GATS Article XXV, technical assistance is provided to developing country members, on request, in order to carry out national/regional assessments.\(^7\) The negotiations take place in "special sessions" of the WTO Services Council and regular meetings of its relevant subsidiary committees or working parties.\(^7\) The EC should aim at and press for the greatest possible liberalization of services trade. It should also insist on further market opening to the exports of WTO members.\(^7\)

In 1999, the attempt by the EC (and others) to launch a new round of WTO trade negotiations at Seattle was spectacularly unsuccessful.\(^7\) The accompanying street protests raised the


\(^{174}\) Doha Declaration Explained, supra note 170.


\(^{176}\) The criticisms of the WTO were quite diverse in nature, spanning from opposition to its existence to suggesting a serious internal reform. Among the many charges against the WTO are the following: (1) the WTO system of internal governance tends to concentrate power among a small group of developed countries, to the detriment of less-developed country interests; (2) the WTO is undemocratic in its control over national trade policies; (3) the WTO system tramples upon its members' sovereignty; (4) the WTO system favors open markets (capitalism, profits, the interests of multinational corporations) over environmental protection, labor standards, and human rights; and (5) the WTO system prevents governments from protecting the interests of working people displaced by import competition. Publications critical of the WTO include *GLOBALIZE THIS!* THE BATTLE AGAINST THE WORLD TRADE ORGANIZATION AND CORPORATE
question of whether new negotiations to liberalize trade were appropriate at all. While the opposition to negotiations seemed to be inspired by many unconnected issues, certain themes were perceptible: whether trade liberalization itself was an appropriate goal or whether it should be accompanied by or subordinated to other concerns, such as those related to the environment, workings conditions, human rights, and the right of communities to choose and apply their own policies and standards.

Before the launch of the GATS 2000 talks, a coalition of developing countries called for an assessment of the outcomes of service-sector liberalization and the GATS rules prior to undertaking further expansion of those rules during the GATS 2000. A global campaign of civil society groups called for a


180. The concept “GATS 2000 talks” refers to the part of the WTO post-Uruguay Round that concentrates on services trade, specifically the “built-in” services left from the agenda of the Uruguay Round. LORI WALLACH, BACKGROUNDER ON WTO SERVICE SECTOR LIBERALIZATION AND Deregulation (2005), http://www.citizen.org/documents/PC_Gats_Backgrounder_05-05.pdf (hereinafter WALLACH, BACKGROUNDER). The starting date for the talks was set for January 1, 2000, in Geneva. Id. These GATS 2000 negotiations have been confronting two central challenges: (1) the completion of the incipient framework of the GATS rules and disciplines so as to ensure the GATS’s and WTO’s continued relevance in a globalizing environment; and (2) the achievement of greater overall trade and investment liberalization than was possible during the Uruguay Round and in subsequent sectoral negotiations, such as basic telecommunications, financial services, maritime transport, and labor mobility issues (the so-called temporary movement of service suppliers). Pierre Sauvé & Robert M. Stern, New Directions in Services Trade Liberalization: An Overview, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION 2 (Pierre Sauvé & Robert M. Stern eds., 2000).

181. See TUERK & KRAJEWSKI, supra note 173.

182. Special Session on the Council for Trade in Services, Communication from Argentina, Brazil, Cuba, The Dominican Republic, El Salvador, Honduras, India, Indonesia, Malaysia, Mexico, Nicaragua, Pakistan, Panama, Paraguay, The Philippines, Sri
moratorium on the GATS 2000 talks until this assessment was to be conducted. However, these requests were quashed. The WTO Secretariat, the United States, and the EC pushed for the immediate launch of the built-in GATS expansion talks. Indeed, the December 2001 Doha Ministerial Declaration not only dismissed the demands for a services assessment, but also set a specific time line for the GATS 2000 talks to conclude by 2005, which did not happen.

Service-sector liberalization was possible after the conclusion of the Uruguay Round, in part because the political context was favorable toward the Reagan-Thatcher dream of radical deregulation, which was fast becoming a reality in many nations. In the United States, for example, the promotion of market-driven industry self-regulation instead of government oversight brought economic disasters such as the collapse of the savings and loan industry in the 1980s, which cost taxpayers hundreds of billions of dollars, as well as the energy deregulation of the 1990s, which sent energy costs for California consumers soaring. Despite these experiences, the United States continues to push its model on other countries. Europeans, however, are even more vociferous in their service-sector demands, as was the case of the EC in the GATS 2000 talks. Other examples include Russia’s privatization,


183. For the demand letter and a list of available signatories, see Pub. Citizen, Stop the GATS Attack!, www.citizen.org/trade/wto/gats/Sign_on/articles.cfm?ID=1584 (last visited March 1, 2006) [hereinafter Pub. Citizen, Stop the GATS Attack!].

184. Prior to the Hong Kong Ministerial Conference in 2005, GATS negotiations proceeded on a bilateral “request/offer” basis. WALLACH, BACKGROUNDER, supra note 180. This means that one nation issued a request document for service sector liberalization to another and indicated what it was willing to offer in a second document; then the two nations bargained on a bilateral basis. Id.

185. Id.


188. WALLACH, BACKGROUNDER, supra note 180.


191. WALLACH & WOODALL, supra note 157, at 132.

192. WALLACH, BACKGROUNDER, supra note 180.
referred to as the “Looting of Russia,”\textsuperscript{193} and the fight in South Africa against electricity privatization.\textsuperscript{194}

These unfortunate experiences have not prevented member nations to push even further for services trade liberalization. In April 2002, the EC’s GATS requests numbered hundreds of pages and included country-by-country demands for new access to education, health, water, energy, transportation, and entertainment services.\textsuperscript{195} The EC’s requests to the United States alone contained a state-by-state list of zoning, land ownership, liquor distribution, and other regulatory laws that the EC sought to eliminate.\textsuperscript{196} Such demands for market access are concrete examples of the issues at stake in the current GATS negotiations. In the framework of the GATS 2000 talks, Modes 3 and 4 remain the most controversial.\textsuperscript{197} The shift from a focus on trade across borders (mode 1) to establishment of a business within another country (mode 3) brings every domestic policy issue and priority under scrutiny of the GATS.\textsuperscript{198}

In the specific case of Mode 4, the controversy arises because Mode 4 can be associated with immigration policy, even if the relationship between the two concepts does not appear anywhere in the GATS.\textsuperscript{199} In this respect, an agreement among WTO members on the scope of Mode 4 would be a major success. One benefit that Mode 4 brings to the world trading system is the alleviation of the lack of qualified workers in WTO countries.\textsuperscript{200} However, whether exporting countries of Mode 4 will have enough human capital to actually benefit from this input is an issue of concern.\textsuperscript{201} As it stands, some WTO members might not even be able to benefit from Mode 4 because of a lack of highly-qualified


\textsuperscript{195} WALLACH & WOODALL, supra note 157.

\textsuperscript{196} Id.

\textsuperscript{197} Id.

\textsuperscript{198} Id.


\textsuperscript{200} Interview with Jose Plaza, Spanish Trade Diplomat, in Madrid, Spain (Mar. 15, 2006).

\textsuperscript{201} Id.
professionals. Since there is no specific categorization in Mode 4, the only informal requirements are (1) the service is temporary and (2) the service provider does not seek permanent entry in the labor market of the WTO Member where the service takes place.\textsuperscript{202} However, the question remains: which type of service providers will not seek entry in the labor market? Once again, Mode 4 creates a division between developed and developing countries of the WTO; developed countries do not want Mode 4 to become a substitute for immigration, arguing that there is already immigration in developed countries, whereas developing countries want full implementation of Mode 4.\textsuperscript{203}

While the EU has important offensive interests in the area covered by Mode 4, developing countries have placed a particular emphasis on Mode 4. Many developing countries are not pleased with developed countries’ offers to them in this mode, particularly the lack of quality offers has made delegations reluctant to commit to opening their services markets in other areas. Furthermore, some developing countries complain over a lack of progress on important issues to them in areas such as agriculture, industrial goods, and rules. The failure to address these areas has made developing countries more inclined to table more liberal offers in services.\textsuperscript{204} In rebuttal, developed countries argue that the responsibility for poor quality of offers is on developing countries. In the view of developed countries, the issue of linkage with other negotiating areas is a “two-way street,” in other words, major offers in services could encourage negotiations in other areas of interest to developing countries.\textsuperscript{205}

The term “liberalization” is often used incorrectly in academic and political debates.\textsuperscript{206} From a broader viewpoint, liberalization is often associated with a critical view of governmental intervention as well as greater reliance in market

\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Johannes Bernabe & Shuaihua Cheng, The Doha Round Negotiations on Services: An Overview 3 (Unpublished seminar paper), http://www.gmfus.org/economics/template/page.cfm?page_id=106.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} See Markus Krajewski, National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy 1 (2003) [hereinafter Krajewski, National Regulation and Trade Liberalization in Services].
\end{itemize}
processes. From a narrower viewpoint, liberalization is understood as the removal of legal and other barriers to competition. Liberalization can also be referred to in the context of privatizing former public monopolies. Since liberalization can be understood as the process of having more market access (whether domestic or international), this requires the removal of obstacles to market entry and competition. For liberalization to take place, it may require the reduction of regulations or the abolition/replacement of the regulatory regime. Seeking further trade liberalization can also play a valuable part in helping to achieve other global objectives.

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

The liberalization of barriers to international trade in services can contribute to growth in two distinct ways. First, multilateral negotiations on trade in services can stimulate the removal of barriers to domestic competition within individual countries, eliminating internal constraints to the achievement of greater economic efficiency in providing services. Second, multilateral

207. Id.
208. Id. at 4.
209. Id. at 7-9.
210. Id. at 5.
211. Id.
213. See KRAJEWSKI, NATIONAL REGULATION AND TRADE Liberalization in SERVICES, supra note 206, at 6.
214. Id.
negotiations on the services trade can eradicate barriers to external competition for services, which could result in gains in domestic productivity (as domestic producers respond to the international competition), expanded markets for competitively produced services, and lower prices for consumers. In the specific case of developing countries, the significance of liberalizing the services trade arises from several factors: what an efficient service sector can provide to economic development, the consequences of curbing international service transactions, the growing role of services in the economic output and international trade of most wealthy nations, the growing dynamism of services markets, and the small amount of opening in the services market during the Uruguay Round.

Nevertheless, arguments against services trade liberalization remain. Some sectors still need regulation in order to protect the environment, to improve public health, and to maintain a level of economic welfare. Moreover, many nations worry that liberalizing services trade may weaken the sovereignty of local and national governments by jeopardizing, inter alia, control over land use, licensing, and environmental health. In addition, some

216. Id.
218. For more on the specific issue of the clean development mechanism within the environment, see Glenn Wiser, Frontiers in Trade: The Clean Development Mechanism and the General Agreement on Trade in Services, 2 INT'L J. GLOBAI ENVTL. ISSUES 288-309 (2002).
219. Indeed, civil society forces against the WTO are quite clear in their thesis. Although they accept that, at the time when the WTO was established in 1995, its stated purpose was to bring about greater prosperity, increase employment, reduce poverty, diminish inequality, and promote sustainable development around the world through greater free trade, more than ten years later the civil society forces feel that the WTO has had exactly the opposite results: (1) livelihoods are being destroyed, human rights ignored, public health endangered, the environment plundered, and democratic systems eroded; (2) local economies are being undermined, with workers, peasants, small farmers, fishers, consumers, women, and indigenous peoples being especially disadvantaged and exploited; and (3) people's aspirations to guarantee access to the essentials of life, promote health, safety and food sovereignty, as well as to protect cultural and biological diversity are being undermined, and sometimes eliminated. Our World is Not for Sale, Stop Corporate Globalization: Another World is Possible!, http://www.ourworldisnotforsale.org/about.asp?about=signon&lang=english (last visited Mar. 7, 2007). In this context, some members of civil society argue that not only must the efforts of the WTO to further liberalize global trade be resisted, but its jurisdiction must be rolled back from many areas where it has been forcibly imposed, such as services, agriculture, and intellectual property rights. Id.
countries may argue that those international services which are not provided with the same standard or quality as domestic services should be excluded. Furthermore, liberalization and privatization of essential public services would dramatically affect everyone's day-to-day life. This attempt to convert public resources into new profit opportunities for multinational corporations will make many more people aware of the threat that these agreements pose to democratically equitable governance.

Developing economies have been skeptical about the multilateral liberalization of the services trade since as early as the early 1980s. Led by Brazil and India, a coalition of developing economies opposed the inclusion of services trade as an agenda item in the GATT Ministerial Meeting of 1982 held in Geneva. The main source of its skepticism was the perception that the services sector in developing economies is rather inefficient and cannot compete against the highly resourceful services suppliers from the industrial economies. Its hesitation was based on concerns that future negotiations in services would be likely to favor one side and would produce no benefit for developing economies. Worried that the strong bargaining position of industrial economies would result in firms from industrial countries gaining easy access to markets in developing economies, these economies were concerned that the reverse would not happen. Indeed, empirical evidence reveals that many developing economies not only believed that they overcommitted after the completion of the Uruguay Round, but they also felt that they had joined an uneven and detrimental agreement. Developing economies feared that trade in services negotiations would translate into more disproportionate adjustments to their domestic economies.

221. Essential public services tend to be those considered so indispensable to modern life that for moral reasons their universal provision should be guaranteed, and they may be associated with fundamental human rights (such as the right to water). See WALLACH, BACKGROUND, supra note 180. An example of a service which is not generally considered an essential public service is hairdressing. In modern, developed countries the term public services often includes: education, public transportation, broadcasting and communications, electricity and gas, fire service, healthcare, police service, waste management, and water services. Id.

222. See Pub. Citizen, Stop the GATS Attack!, supra note 183.


224. An example of hostility to services liberalization can be found in the
Accordingly, developing nations implement protective policies either because they may have a stake in the operations of their domestic firms or because they fear vulnerability from pressures by domestic interest groups that benefit from national protection. When governments do not have the ability to threaten to liberalize, domestic firms may have an incentive to pre-commit to high costs or poor quality. Such behavior forces governments to prolong socially-costly protection. Developing countries argue that further trade liberalization is undesirable because (1) domestic political obstacles, often from producer interests, can make liberalization very difficult, and (2) instead of allowing new industries to be exposed to full global competition, developing countries should aim at protecting their new industries (the so-called “infant industries” argument). However, too much infant industry protection can be a long-term problem in the face of world competition.

Therefore, this Article suggests that governments should continue to push toward further global (services) trade liberalization, as is the case in the Doha Round, where governments also looked at non-tariff barriers to goods and services, in addition to tariffs on goods. This removal of trade barriers will encourage greater worldwide economic growth.

226. Id. at 824.
227. Id. at 823. These political obstacles need to be taken seriously in the trade-opening debate at the national level.
231. See generally Petros C. Mavroidis, If I Don't Do It, Somebody Else Will (or Won't): Testing the Compliance of Preferential Trade Agreements with the Multilateral Rules, 40 J. WORLD TRADE 187, 187-214 (2006). For more on preferential trade agreements and services liberalization, see Martin Roy et al., Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the
IV. THE DOHA ROUND AND THE EC\textsuperscript{232} 

Launched at the fourth WTO ministerial conference in November 2001, the Doha Round has three pillars: (1) the opening of trade in agriculture,\textsuperscript{233} (2) manufactured goods, and (3) services.\textsuperscript{234} Although not as broad as the Uruguay Round’s agenda, the Doha Round includes negotiations on a range of subjects, including issues related to the implementation of agreements arising from previous negotiations, namely the 1986–1994 Uruguay Round that created the WTO.\textsuperscript{235} Although the main focus of the Doha Round trade negotiations concerned agriculture – the main engine of the multilateral trade negotiations – discussion focused on other areas of trade liberalization as well, including industrial market access, services, trade facilitation,\textsuperscript{236} WTO rules (i.e., trade remedies, regional trade agreements and fish subsidies), and development.\textsuperscript{237} The goal of the Doha Round was to reduce trade barriers so as to expand global economic growth, development and opportunity.\textsuperscript{238} 

The Doha Round was intended to address issues such as unfair agricultural subsidies that have kept some developing countries out of international markets, to reduce tariff peaks\textsuperscript{239} and escalation\textsuperscript{240} particularly for products of interest to developing countries, and to fine-tune WTO rules in areas like anti-dumping.\textsuperscript{241}


\textsuperscript{234} Doha Declaration, supra note 186, ¶¶ 13-16.

\textsuperscript{235} Id. ¶¶ 28-30.

\textsuperscript{236} Trade facilitation refers to the act of removing obstacles to the movement of goods across borders (e.g., simplification of customs procedures).


\textsuperscript{238} Doha Declaration, supra note 186, ¶¶ 1-2.

\textsuperscript{239} A tariff peak is a single, particularly high tariff on a good.

\textsuperscript{240} Tariff escalation is an increase in tariffs as a good becomes more processed, with lower tariffs on raw materials and less processed goods than on more processed versions of the same or derivative goods. For example, low duties on fresh tomatoes, higher duties on canned tomatoes, and higher yet on tomato ketchup.

\textsuperscript{241} Dumping is exporting at below cost to gain market share. Article VI of the GATT
This section examines the role played by the EC in the Doha Round by analyzing the principles of the DDA. With its twenty-seven member states in the WTO, the EC is the largest and most comprehensive entity in the WTO. The WTO is a member-driven organization that typically makes decisions on a consensus basis. While the twenty-seven EC member states generally coordinate their positions in Brussels and Geneva, the European Commission alone speaks for the EC and its member states at almost all WTO meetings.

A. Principles of the Doha Development Agenda

A conference of WTO trade ministers takes place every two years. As the highest decision-making body in the WTO, the ministerial conference offers trade ministers from WTO members the opportunity to meet and discuss important developments in the multilateral trading system and the global economy. The three WTO ministerial conferences held prior to Doha were Singapore (1996), Geneva (1998), and Seattle (1999); the last one perhaps best remembered for the anti-globalization movement that it provoked. Doha was the forum for the fourth WTO

1994 permits the imposition of anti-dumping duties against dumped goods equal to the difference between their export price and their normal value, if dumping causes injury to producers of competing products in the importing country. GATT art. VI.

242. In the WTO, voting consensus is achieved if no Member "present at the meeting when the decision is taken, formally objects." Each WTO Member has one vote, regardless of its economic clout, and among them, developing countries are increasingly making their presence felt. WTO Agreement art. IX; EC, Statement on World Economic and Social Forums at the European Parliament Plenary Session (Feb. 10, 2003), available at http://trade-info.cec.eu.int/doclib/docs/2004/july/tradoc_118263.pdf. The WTO cannot therefore be hijacked by a group of countries or multinational companies.


245. Id.

246. Much academic literature has been produced in relation to the analysis of the global phenomenon of "globalization." See generally PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND INTERNATIONAL FINANCIAL INSTITUTIONS, (Kevin P. Gallagher ed., 2005); JOSEPH E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2005); UN MILLENNIUM PROJECT, INVESTING IN DEVELOPMENT: A PRACTICAL PLAN TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS: OVERVIEW (2005), available at www.unmillenniumproject.org/reports/index_overview.htm; MARTIN WOLF, WHY GLOBALIZATION WORKS (2004); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); PETER SINGER, ONE WORLD: THE ETHICS OF
ministerial conference, held in November 2001. Because the various WTO members were divided on the subject of the WTO’s future agenda, the Doha ministerial conference put off all major decisions until the following WTO ministerial conference, held in Cancun in 2003. The principal aim in Cancun was to present an overview of the progress of the negotiations in the framework of the DDA. In Cancun, talks that were intended to forge agreement on the Doha Round’s objectives collapsed due to strong North-South divide on agricultural issues. Developing nations gained in strength, succeeded in rejecting a deal which they viewed as unfavorable, and formed two new negotiating groups – the G-20 group of middle-income developing countries, and the G-90 group of poorer developing countries.

The Cancun conference failed to accomplish its objectives. The idea there was to take stock of progress made in the multilateral trade negotiations and to agree on the scope of further negotiations. However, the conference collapsed and the WTO’s ever-growing crisis of legitimacy burst into the public view when the United States and the EC stubbornly rejected the demands of the majority of the WTO members to make global trade rules fairer.


247. Doha Declaration, supra note 186, ¶¶ 45-46.
248. The Group of 20, or G-20, is a group of developing countries focused on tearing down industrialized countries’ barriers to agricultural trade. In March 2006, the group included 21 countries: Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Philippines, South Africa, Thailand, Tanzania, Uruguay, Venezuela and Zimbabwe. See G-20, Official Website, http://www.g20.org/ (last visited Oct. 9, 2007).
249. The G-90 is a tripartite alliance of the Africa Union (AU), the African, Caribbean and Pacific Group (ACP) and least-developed countries (LDCs), forming a majority of developing countries in the WTO.
250. Doha Round Suspended Indefinitely After G-6 Talks Collapse, BRIDGES WKLY. TRADE NEWS DIG., July 26, 2006, http://www.ictsd.org/weekly/06-07-26/story1.htm. When arguing the importance of making global trade rules fairer, it is also implicit in the argument the need to change the current attitude of corporations in global trade. The
Arguably, the main substantial and organizational reasons for the failure of Cancun were fourfold: (1) the joint U.S.-EC position on agriculture, which antagonized developing countries by appearing to retract elements of the Doha Declaration, such as the non-fulfillment of the commitment to reduce export subsidies with a view to phasing them out entirely; (2) U.S. reluctance to move on cotton, which was perceived by many as a sign of lack of interest of the Americans in making a success of the Doha Round; (3) the Singapore issues; and (4) the actual procedure of the WTO ministerial conference later that year.

The only decision made in Cancun was to meet again at WTO headquarters to assess the situation. Following Cancun’s failure, major corporate interests and their respective governments scrambled to lay blame anywhere other than the WTO and its failed globalization model. The last and most recent ministerial conference took place in December 2005 in Hong Kong, which was vital for moving the then four-year-old DDA negotiations forward sufficiently enough to conclude the round in 2006.

The destructive, social, political, and environmental consequences of the pro-corporate, neo-liberal model of globalization has elicited rising resistance from a broad range of civil society organizations and social movements around the world, including at WTO Ministerial Conferences in Seattle, Doha, Cancun, and Hong Kong. Pub. Citizen, Stop the GATS Attack!, supra note 183. Various NGOs against the process of a corporate-led globalization pose the vision of a global economy built on principles of economic justice, ecological sustainability, and democratic accountability, asserting thereby the interests of people over corporations; in other words, that over corporate interests other interests should prevail, such as those of workers, peasants, farmers, fishers, small producers, and those marginalized in the current system—such as women and indigenous people. See Our World is Not for Sale, supra note 219; see also Transnat’l Inst., WTO Introduction, www.tni.org/intros/WTI Intro.htm (last visited Mar. 7, 2007) (arguing that the WTO favors transnational corporations over indigenous peoples).

251. The so-called Singapore issues refers to four working groups set up during the WTO Ministerial Conference of 1996 in Singapore, namely investment protection, competition policy, transparency in government procurement, and trade facilitation.


On July 31, 2004, WTO members agreed on a framework package to keep the Doha Round trade negotiations alive. After almost a year of stalled negotiations following the breakdown of talks at the last Ministerial meeting in Cancun... Members had set the end of July [2004] as a deadline for agreeing on a negotiating framework package. The 31 July 2004 Agreement allowed countries to send an important political message that the Doha Round is still alive. The EC, the United States, Japan, and Brazil agreed to eliminate all agricultural export subsidies, reduce trade-distorting subsidies, and lower tariff barriers. Developing nations consented to reduce tariffs on manufactured goods, with the right to protect key industries. The Doha Round was intended to eliminate or reduce industrial tariffs: Taking this into account, the main points of discussion of the Doha ministerial conference were to “review and advance the ongoing work of the WTO, including addressing developing countries’ concerns regarding implementation of Uruguay Round commitments, considering ways to facilitate the accession process for least-developed countries [LDCs], clarifying WTO rules and disciplines where necessary, determining ways to provide more and better coordinated assistance to help improve the capacity of poorer countries to trade; making the WTO more open and transparent, and strengthening the dispute settlement system.”

Among the various far-reaching goals of the Doha Round, the WTO members hoped to achieve the following:

“Launch a new WTO round – the [DDA] – comprising both further trade liberalization and new rule-making with commitments to strengthen substantially assistance to developing countries; [h]elp developing countries implement

256. WTO: July Framework Agreed at Eleventh Hour, supra note 237.
257. See Chakriya Bowman The Pacific Island Nations: Towards Shared Representation, in WTO CASE STUDIES, supra note 27, Case Study 33. available at http://www.wto.org/english/res_e/books_e/casestudies_e/case33_e.htm#intext10 (presenting an empirical study that explains the difficulties of these nations in the world trading system).
258. CDFAIT, supra note 244.
the existing WTO Agreements; [i]nterpret the TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement in a manner that ensures Members’ rights under TRIPS to take actions to protect public health.”

B. The EC and the Doha Development Agenda

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

The DDA is the EC’s most important trade policy priority to boost global economic growth and development opportunities. The EC advocates a declaration where all parts of the negotiation need to continue to move forward together.

The European Commission reaffirmed that in the context of the negotiations on the liberalization of services trade, success may only be achieved in the context of a broad and time-bound framework of negotiations. However, the agenda proposed by the EC may be too complex to address in a short period of time. Four major issues are proposed by the Commission in the Doha Round: “(1) to secure further trade liberalization and create improved conditions for competitiveness; (2) to strengthen the WTO and make it ‘a truly universal instrument for the management of international trade relations; (3) to enhance the developmental role of the WTO, and (4) to ensure that the WTO

263. See Doha Development Agenda, supra note 260.
264. See id.
265. See id.
addresses issues of broad concern such as health, environment, and social concerns."

At a special session in Doha on November 14, 2001, the EU Council decided to approve the conference texts and authorized the Commission to convey the agreement of the Community and its member states to the draft ministerial declaration at the conclusion of the conference. According to the negotiation mandate of the EU Council, the EC's general priorities in the DDA include the following:

- Better access to markets;
- Further liberalization of agriculture;
- Giving developing countries a better deal;

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268. There is no such thing as "a" Doha mandate, but rather a series of EU Council conclusions adopted in various phases of the negotiations which, together, constitute the Doha mandate. Although a negotiating mandate is not easy to find, since mandates do not tend to be published for obvious negotiating strategies reasons, these are as follows: Council of the European Union, Preparation of the Third WTO Ministerial Conference – Draft Council conclusions, Oct. 22 1999, 12092/99 (on file with author); General Affairs Council on the WTO, SN 73/01, Oct. 29, 2001 (on file with author); Council of the European Union, Special Session of the Council, held in Doha (Qatar) from 10 to 14 November 2001, PV/CONS 66, Nov. 21, 2001 (on file with author); Council of the European Union, WTO negotiations on agriculture: outline of the EC comprehensive negotiating proposal – Conclusions of the Agriculture Council, 13656/00, Nov. 22, 2000 (on file with author); Press Release, Council of the European Union, Special Council meeting, General Affairs and External Relations, Geneva (July 30, 2004) (on file with author); Council of the European Union, Council Conclusions on the WTO Doha Development Agenda, Oct. 18, 2005 (on file with author); Council of the European Union, General Affairs and External Relations Council, Council Conclusions on WTO – DDA, Nov. 21, 2005 (on file with author).

269. See Doha Development Agenda, supra note 260.

270. In as much as further market-access negotiations on services should bring considerable market opportunities for businesses as well as benefits to consumers worldwide, the EC has no intention to aim at general deregulation or privatization of sectors where principles of public interest are at stake, i.e., education or healthcare. These, as well as further agricultural reform, are areas where the EC would not make concessions. See Swedish Inst. for European Policy Studies [SIEPS], Report From the Seminar on “Which Priorities for the New Commission in the WTO?,” in Stockholm, on Thursday, 16 December 2004, at 1 (2004) (arguing that member countries of the WTO need to make better efforts to open their services markets), available at http://www.sieps.se/sem/2004/sem_1216/041216_referat.pdf.
Protection of the environment;\textsuperscript{272} and

Better international governance and the promotion of sustainable development (achieved by an update to the world trade rulebook in order to obtain a fair, predictable and transparent rules-based system to govern trade and investment).\textsuperscript{273}

All EU member states have much to gain from a successful outcome of the Doha Round. An open trading regime has traditionally benefited European economies. The removal of technical barriers to trade will certainly help provide additional opportunities for further open trading success.\textsuperscript{274} In the specific case of the UK, services play a major part of its economy.

On the other hand, more protectionism\textsuperscript{275} will be generated worldwide if the Doha Round fails.\textsuperscript{276} These protectionist tendencies of some WTO countries have been the subject of recent political debate in various countries on the grounds that jobs in services were being exported from developed to developing

\begin{footnotesize}
\begin{enumerate}
\item “The concept of sustainable development refers to a form of economic growth, which satisfies society's needs in terms of well-being in the short, medium and -- above all -- long terms. It is founded on the assumption that development must meet today's needs without jeopardising the ability of future generations.” EC, Glossary Inforegio English, http://ec.europa.eu/regional_policy/glossary/glos6_en.htm (last visited Mar. 7, 2007). Practically, the term means planting the seeds for long-term economic development while respecting the environment and involves both industrialized and developing nations encompassing economic, environmental and social aspects. Id.
\item The technical barriers to trade (TBT) are related to product standards and conformance. The aim of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) is to ensure that mandatory technical regulations, voluntary standards, as well as procedures for assessing conformity with technical regulations and standards do not generate avoidable obstacles. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 120, available at http://www.wto.org/English/docs_e/legal_e/17-tbt_e.htm [hereinafter TBT Agreement].
\item Protectionism is the economic policy of restraining trade between jurisdictions, through methods such as high tariffs on imported goods and restricting imports in an attempt to protect industries in a particular locale from competition. Black's Law Dictionary 567 (2d Pocket ed. 2001).
\end{enumerate}
\end{footnotesize}
Employers in developed economies have been exporting their services to economies where the service provider is much less expensive. Some politicians, such as Patricia Hewitt, the UK Secretary of State for Trade and Industry, argue in this respect that “an extra job in India is not one less job in Britain.” It is not only one fewer person in poverty in India: “it is also one more potential customer for our goods and services.”

C. The Case of Services Trade

The services sector is currently by far the most dynamic of any other sector. It already contributes to worldwide economic growth more than any other sector, and accounts for almost two-thirds of the gross domestic product and employment in the EU. As a rule of thumb, the services sector contributes 44 percent to the GDP in developing economies, and up to 69 percent in the industrial economies. However, the true value of trade in services is understated because a good deal of it is conducted by expressly-created corporate establishments in their export markets. This means that this trade in services is not recorded in the balance of payments statistics. Furthermore, given the invisibility and intangibility of many services when they are delivered to a trade partner, their passage is often not recorded by the customs department. Statistics on trade in services are therefore not entirely reliable.

Developed countries are quite keen on seeing an agreement reached for liberalization of the services trade because substantial gains are to be made for both developed and developing countries.


280. Id.


282. See id.

283. Id. at 166.

284. See id. at 163.
by increasing trade in this sector. Thus, countries should open their service markets to external competition for the benefit of all. Countries such as India, whose service sector is rapidly growing, are positioned to profit from the liberalization of global markets.

Written into the GATS is a commitment by WTO members to progressively liberalize trade in services by entering into successive rounds of negotiations. At the fourth WTO ministerial conference in Doha, Qatar, negotiations on services were incorporated into the DDA:

The negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries. We recognize the work already undertaken in the negotiations, initiated in January 2000 under Article XIX of the General Agreement on Trade in Services, and the large number of proposals submitted by members on a wide range of sectors and several horizontal issues, as well as on movement of natural persons. We reaffirm the Guidelines and Procedures for the Negotiations adopted by the Council for Trade in Services on 28 March 2001 as the basis for continuing the negotiations, with a view to achieving the objectives of the General Agreement on Trade in Services, as stipulated in the Preamble, Article IV and Article XIX of that Agreement. Participants shall submit initial requests for specific commitments by 30 June 2002 and initial offers by 31 March 2003.

The Doha Declaration called for participants of the Doha round to submit initial requests for specific commitments from other WTO members by June 30, 2002, and to present initial offers to other WTO members by March 31, 2003. The EC, which has played a major role in implementing and negotiating under the GATS, submitted sectoral proposals to the WTO in December 2000, setting out its negotiating objectives in twelve services sectors covered by the GATS. A communication on the EC's general objectives for the negotiations was submitted in March 2001.

The European Commission believes that negotiations are

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285. GATS Article XIX.
286. Doha Declaration, supra note 186, ¶ 15.
conducted by the Commission in a transparent way. Its objectives are stipulated in a mandate given to the Commission by the EU Council and the European Parliament in October/November 1999. To intensify and expedite services negotiations, Annex C of the Draft Hong Kong Ministerial Declaration introduced an interesting mode of negotiations—plurilateral negotiations. Unlike conventional bilateral negotiations, plurilateral negotiations permit a group of members to present collective requests to other members in any sector or mode of supply. Furthermore, "the plurilateral approach has solidified a platform for interested [WTO] Members to build upon initial, sector-specific discussions, either through an extended round of negotiations similar to what transpired after the Uruguay Round, or in the context of the next round of services negotiations mandated under GATS." However, Annex C failed to deliver any timelines for service negotiations, even in a preliminary sense.

The Doha Declaration endorsed the work of the Council for Trade in Services, reaffirmed negotiating guidelines and procedures, and established some key elements of the negotiation timetable including, most importantly, the deadline for concluding the negotiations as a part of a single undertaking. Following the Doha Declaration, the roadmap for the Doha Round could be summarized as follows:

- Continue negotiations started in 2000 under the Council for Trade in Services;
- Accept initial requests for market access by June 30, 2002;
- Present initial offers of market access by March 31, 2003;
- Stock taking in 2003 at the fifth WTO ministerial conference in Cancun.

Use of the term "initial" was indicative of the reality of the

290. See, e.g., TNC: Lamy Outlines Doha Round Roadmap for Hong Kong and Beyond, supra note 288.
negotiating process, which in itself was a succession of requests-and-offers operations. Each WTO member submits an initial request which does not have to be exhaustive. WTO members do not necessarily have to think of every possible item that they wish to request of the other WTO members.

The principal aim of services negotiations for the EC is to improve market access for European services exporters. During the Uruguay Round, the EC made liberal commitments in more than 120 sub-sectors. Thus, the main objectives of the EC are the elimination of entry barriers (such as limitations on the number of services suppliers), limits on foreign ownership or shareholding, restrictions on the type of legal entity, and compulsory joint-venture or numerical quotas. Specifically, the EC is seeking improved commitments and clarification of existing commitments. At the same time, the EC is seeking a reduction in scheduled limitations, both of a horizontal and sector-specific nature.

On July 1, 2002, the EC fulfilled a major step in its DDA by presenting its initial requests for improved market access on services to 109 WTO members in Geneva. These requests, which sought a reduction in restrictions and an expansion of market access opportunities, cover the following sectors: professional services, telecommunications, business services, postal services, distribution, construction and related engineering services, financial services, environmental services, tourism, news agency services, and energy services. No requests were made to any country on health services or audiovisual services, however, and only the United States received a request limited to privately-funded higher education services. Requests on environmental services did not touch on the issue of access to water resources which, in the EC's view, in no way undermined or reduced host governments' ability to regulate pricing, availability and affordability of water supplies as they chose. The EC requests were not intended to dismantle public services or to privatize

294. "Public services" does not have a precise legal meaning. See Carol Harlow, Public Services, Market Ideology, and Citizenship, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW 49, 49-51 (Mark Freedland & Silvana Sciarra eds., 1998); Colin Scott,
state-owned companies.

Requests in services trade negotiations that seek to eliminate or reduce exemptions from the obligation to accord MFN treatment in financial services might be folded into the plurilateral discussions on financial services. Other areas regarded by the Commission as being more sensitive, such as education, health, and audiovisual sectors, would remain off limits. Addressing journalists in Brussels on June 2, 2005, EU trade commissioner Peter Mandelson said, "[t]ime is running out for others to match our level of ambition and bring real market-access opportunities to the table." Referring to the sixth WTO ministerial conference in Hong Kong, at which it was hoped that a long-awaited breakthrough in the stalled Doha negotiations would be achieved, Mandelson stated that it was "essential for a successful and balanced agreement" to be reached at the Hong Kong conference.

Services trade is a major area of interest to the EC. The EC has a solid background in the field thanks to the EU internal market experience, making EU member states like-minded in most areas of services. Although press reports of the Doha Round focused on agriculture, the EC actively pushed for opening up services markets in developing countries. Such a policy would open up essential public services in the developing world, such as health, water, and transportation to competition from western corporations.

The European Commission feels that public services are not threatened by the GATS negotiations and has stated that public services are an essential feature of the social model and of each country's cohesion. Public services are at the heart of the

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296. Id.


298. See id.
European social model and, in this respect, the European Commission expresses a commitment to ensuring that this remains so. According to the WTO Secretariat, the GATS negotiations are about opening up service trade, not about deregulating services. All WTO members would arguably remain free to pursue the following legitimate policy options regarding public services: (1) to maintain the service as a monopoly, public or private; (2) to open the service to competing suppliers, but to restrict access to national companies; (3) to open the service to national and foreign suppliers, but to make no GATS commitment on it; (4) to make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers.

This view on the impact of the GATS negotiations on public services is not universally shared. In all these cases, governments remain free to set levels of quality, safety, price or any other policy objective they see fit. It is inconceivable that any WTO member would agree to surrender such a fundamental right.

On January 24, 2005, the EC submitted revised requests for improved market access on services to the WTO members in Geneva. The revised requests seek a reduction in market access restrictions and an expansion in trading opportunities for the European services industry. To guide the negotiations to a successful conclusion in services trade, a work plan was created in the pre-Hong Kong ministerial conference phase. This plan included setting an ambitious level for market access to services and developing a negotiating strategy to achieve an ambitious level of global services liberalization, particularly in key sectors such as financial services, telecommunications, computer and related services, express delivery, distribution, and energy services.

The EC provides market access in services trade. Within the WTO, countries agree to open trade in services on the basis of requests and offers to other WTO members. Each country decides

301. Id.
302. Id.
303. See SIEPS, supra note 270, at 1.
which sectors it wants to open to international trade. There remain some sectors within the EU in which market access for services imports from third countries could be improved. It is a win-win situation, where it is in the mutual interest of the EC and its trading partners to reduce barriers to trade. Thus, the EC’s agenda is to seek better access for European services exporters in foreign markets and to secure a more transparent and predictable regulatory environment for services. This scheme would also be beneficial for developing countries because they depend on access to modern services, including finance, telecommunications, transport and IT services, to obtain economic development and export growth.

The EC can achieve this goal by requesting that WTO member countries reduce restrictions and expand market-access opportunities for the European services industry. This is important to the EC because the services sector is the single most important economic activity in the European Union. EU Member States should press for a wide-ranging EC approach to the Doha Round, aimed at tackling the main barriers to trade in services. It is not surprising that tourism is the sector in which there is the highest number of binding commitments. Health and education, meanwhile, have the lowest number of binding commitments. This proves that the GATS is respectful of the diversified economic and social realities among its member countries.

Despite this potentially fruitful approach, the EC and its member states tabled their initial offer for ongoing DDA services negotiations under the GATS framework in April 2003, after giving careful consideration to the requests submitted by WTO


305. For a historical perspective of trade in services for the EU, see Christiaan Timmermans, Common Commercial Policy (Article 113 EEC) and International Trade in Services, in Du Droit International Au Droit de l’Intégration 675-89 (Francesco Capotorti et al. eds., 1987).


members, particularly those submitted by developing countries.\textsuperscript{308} The decision reached by the WTO General Council on August 1, 2004, on the DDA work program (the so-called "July package") provided renewed impetus for services negotiations and set forth a process for improving the quality of the offers submitted. Following the conditional offer from the EC and its Member States on April 29, 2003, developing countries have accused the EC of being protectionist in this sector.\textsuperscript{309} The EC offer was conditioned on the submission of substantive offers from WTO members in sectors where the EC had made requests. The EC, therefore, retained its right to withdraw any elements of the offer at any time during the negotiations. As stated above, in July 2002 the EC already submitted its initial requests for improved market access in services to WTO Members.

On June 2, 2005, the EC submitted a revised services offer in the Doha negotiations.\textsuperscript{310} The new proposal outlined the extent to which the EC is prepared to further open access to its services market in exchange for improved access to other WTO Members' markets. As with the initial offer, this revised offer was conditional on other WTO members making substantive offers in sectors where the EC has made requests. While ambitious in scope and responsive to requests for access from developing countries, the EC's offer safeguards public services such as education, health, and audiovisual services. It would allow lawyers, accountants, bookkeepers, architects, and engineers to open offices in the EU or to offer their services from abroad. Specialists such as computer programmers could obtain short-term residence permits through Mode 4. Working conditions, minimum wage requirements, and collective wage agreements of the EU and member nations would apply. EU Member States would continue to be able to refuse entry to persons who pose a security threat or are considered to be at risk of abusing the terms of their entry.

This revised offer covers horizontal commitments, MFN

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\item \textsuperscript{308} Rolf Langhammer, \textit{The EU Offer of Service Trade Liberalization in the Doha Round: Evidence of a Not-Yet-Perfect Customs Union}, 43(2) \textit{J. COMMON MKT. STUDIES} 311, 311-25 (June 2005).
\item \textsuperscript{310} EC, \textit{COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES: CONDITIONAL REVISED OFFER} (2005), \textit{available at} http://trade.ec.europa.eu/doclib/docs/2005/june/tradoc\_123488.reduced\%20cells\%20v2.pdf
\end{enumerate}
\end{footnotesize}
exemptions, and specific commitments in individual service sectors. By no means should the revised offer of the EC be construed as offering the privatization of public undertakings or as preventing the EC from regulating public services in order to meet national policy objectives. The EC focused on many of the same sectors as the United States, which showed an interest in continuing the lowering or elimination of equity caps on foreign investment “along with the binding of existing levels of cross-border services’ supply into other markets and expanded commitments in financial, telecommunications, energy, computer-related, distribution, express delivery, and audio-visual services.”

In addition, the EC also identified environmental services as a sector where they will continue to press trading partners to undertake commitments.

EU Member States use two main instruments to enforce their national policy guidelines: the economic needs test and residence criteria. First, Article XVI:2 GATS permits resort to an economic needs test. Through such a test, when it comes to wholesale and retail services trade, the governments of Belgium, Denmark, France, Italy, and Portugal set a limit on the number of department stores in order to prevent ruinous competition, to facilitate transport infrastructure planning, and to regulate the special distribution of stores. This needs test creates uncertainty about the stability of market accessibility. As for residence criteria, companies are restricted in supplying specific insurance services through Mode 1 only if the head office is based in the EU. Residence criteria are also applicable to natural persons if they act in a position of responsibility on behalf of the company (i.e., the CEO, founder, board of directors, supervisory council etc.). Such restrictions are often found in offers for trade in financial and insurance services.

It is interesting to note that, although the EU is a customs union in trade in goods, when it comes to services trade it has not yet

311. Members Looking at Potential Compromises on Services, BRIDGES WKLY. TRADE NEWS DIG., Mar. 14, 2007, http://www.icts.org/weekly/07-03-14/story3.htm (noting that there is some exception in the area of audio-visual services, where France’s insistence on protecting cultural diversity requires Brussels to exclude the sector from any liberalizing commitment).
312. Id.
reached the same level of integration. It is difficult to assess how far
the EU has to go from becoming a customs union in services trade
because the nature of trade restrictions is non-quantitative. Mainly,
serious differences in national policies are the reason for lack of a
customs union in services trade in the EU. An example is the
discrepancy among EU Member States concerning the perception of
Anglo-Saxon dominance in audiovisual services. External influences
such as the Doha Round may help in the creation of a customs union
for services trade, as was the case of industrial goods during the
Dillon and Kennedy Rounds.

D. Hong Kong: The Sixth WTO Ministerial Conference

1. Objectives of the Conference

The goals of the sixth WTO Ministerial Conference in Hong
Kong\(^{314}\) were to secure (1) an agreement on the modalities (i.e.,
detailed negotiating parameters) for negotiations in agriculture
and non-agricultural market access (NAMA); (2) an effective
negotiating framework for a significant result in services; (3)
directions to ensure that WTO rules remain effective and in some
cases are strengthened,\(^{315}\) and (4) the outline of an agreement on
trade facilitation.\(^{316}\)

The overarching goal before the WTO Members was to settle
issues that were expected to shape a final agreement of the DDA,

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314. See generally WTO, The Sixth WTO Ministerial Conference,
http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (last visited Mar. 2,
2007).

315. See, e.g., Will Members Reveal Their Cards in Time? BRIDGES DAILY UPDATE,
en051215.htm (“Several high-level trade officials – including the U.S. Trade
Representative, the EU agriculture commissioner, trade ministers from New Zealand and
Senegal, the agriculture secretary of the Philippines, the Brazilian fisheries secretary and a
representative of Chile’s foreign affairs minister – joined forces with the UN Environment
Program (UNEP) and the environmental group World Wildlife Fund (WWF) to call for
urgent action on disciplining fisheries subsidies in the WTO at a press conference in the
Hong Kong WTO Ministerial Conference.”).

316. See WTO, Ministerial Declaration of 18 December 2005, WT/ MIN(05)/DEC
(Dec. 22, 2005) [hereinafter Dec. 18 Ministerial Declaration], “Despite the suspension of
the DDA, EU Trade Commissioner Peter Mandelson has called for WTO Members to
pursue negotiations on a trade facilitation agreement and on an Aid for Trade package to
address developing countries’ capacity constraints and help them deal with the costs of
customs modernization. The WTO Doha Development Round, EURACTIV, June 4, 2007,
which WTO Members hoped to complete by the end of 2006, a year later.\(^{37}\) As in the Uruguay Round, the system that would be used in future global trade negotiations is the so-called “single undertaking,” to which all WTO Members were required to subscribe, although with differing implementation periods. In accordance with the single undertaking principle, nothing is agreed until all subject areas are agreed upon.\(^{38}\) In that regard, Commissioner Mandelson made a statement to the General Affairs Council regarding the framework of the Doha Round negotiations and the Commission mandate:

At the heart of the EU mandate is of course the imperative need for balance within the agricultural negotiations and across the different areas of negotiation, linked to the principle of the single undertaking. I have made clear that no agreement will be reached on agriculture until agreement is reached on other issues. Nothing is agreed until everything is agreed. . . Let me be clear. It is absolutely and unequivocally not the intention of the Commission to use the DDA negotiations to precipitate a new phase of CAP (Common Agricultural Policy) reform. . . Surely it would be the wrong reaction and a terrible mistake for the EU at the first sign of serious movement in the talks – movement that we have been calling for – to lose confidence and pull in our horns. I hope that is not the message of our meeting today.\(^{39}\)

An alternative to the single undertaking procedure is the so-called “variable geometry.”\(^{30}\) This term refers to situations where obligations for the various WTO Members differ and some WTO Members may choose to take on more or fewer obligations.\(^{32}\) One

\(^{317}\) See Cal. Chamber of Commerce, supra note 254.


\(^{319}\) Id.

\(^{320}\) In the EU context, the variable geometry concept refers to a situation in which some countries integrate agreed-upon provisions faster than others. RODNEY LEACH, A CONCISE ENCYCLOPEDIA OF THE EUROPEAN UNION (3d ed.), http://www.euroknow.org/dictionary/v.html (last visited Mar. 6, 2007). “The 1997 Treaty of Amsterdam represented the first attempt to formalise this principle. Before that, however, the UK’s and Denmark’s opt-outs on the EMU, the UK’s and Ireland’s exemptions from the Schengen Agreement and Denmark’s opt-out on anything to do with a common EU defence policy had already created de facto variable geometry.” Id.

\(^{321}\) Id. These obligations, however, may or may not be enforceable through the dispute settlement mechanism of the WTO.
example of variable geometry is differential treatment in giving special recognition for the needs of developing countries; another example is regional or other GATT Article XXIV agreements.\textsuperscript{322} Out of the nine plurilateral agreements that the Tokyo Round generated, only two remain operational: those agreements covering government procurement (subscribed by only around one-fifth of the membership) and agreements regarding trade in civil aircraft (subscribed by even less of the membership).\textsuperscript{323}

In the plurilateral agreements, members might negotiate on single topics or across a broad agenda. The risk of this plurilateral approach, however, is to marginalize WTO Members—typically the weakest and poorest members of the WTO family.\textsuperscript{324} To avoid this risk, the world trading system should allow members to participate in the plurilateral negotiations, but provide them with the freedom to opt out if a counter-productive would result.

a. Background

The initial objective at Hong Kong was to conclude a final agreement, but the progress made up until that point was too feeble to accomplish this goal.\textsuperscript{325} Instead, members reached a deal in which rich nations agreed to allow quota and tariff-free imports from all least-developed countries (LDCs),\textsuperscript{326} with a 2013 deadline for eliminating agricultural export subsidies.\textsuperscript{327} Thus, as a result of the Cancun failure, expectations of what could be achieved had been diminished in Hong Kong. In this respect, the Singapore issues were removed from the negotiations agenda, allowing WTO Members to concentrate on the main topics, i.e., agriculture, non-agricultural market access, and trade in services.

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\textsuperscript{323} Peter Nørgaard Pederson, \textit{From the Trenches}, WORLD TRADE REV., Mar. 2006, at 103, 128 n.67.

\textsuperscript{324} Faizel Ismail, \textit{How Can Least-Developed Countries and Other Small, Weak and Vulnerable Economies Also Gain from the Doha Development Agenda on the Road to Hong Kong?}, 40 J. WORLD TRADE 37, 41 (2006).


\textsuperscript{326} Id.

\textsuperscript{327} Id.
According to various reports, the Doha Round of trade talks in Hong Kong was in danger of failing before it even began.\footnote{328} \footnote{What Happened in Hong Kong? Initial Analysis of the WTO Ministerial 5, (Oxfam Int'l, Briefing Paper No. 85, 2005), available at http://www.oxfam.de/download/What_happened_in_Hong_Kong.pdf.} WTO Director-General Pascal Lamy stressed that time was running out and that the WTO was “faced with mountains of work and very little time.”\footnote{329} In a speech given on October 22, 2005, he stated: “[P]ositions are still too far apart on agricultural market access to allow the negotiations to progress.”\footnote{330} On November 7, 2005, EU trade commissioner Peter Mandelson commented that the Doha Round had been “pushed into an agricultural siding” by the aggressive stance of the United States, Brazil, and Australia.\footnote{331} He called the EC offer to cut farm subsidies “unprecedented” and blamed the lack of progress on other WTO members who seem focused on securing an agreement on farm subsidies before opening negotiations on industrial goods and services.\footnote{332} In an attempt to avert this delay, ministers from various countries, including India, the EU, the United States, Japan, and Brazil, held an informal meeting in London on November 7, 2005, to work out their differences.\footnote{333} On November 8, 2005, these ministers joined others in Geneva for further talks hosted by Lamy.\footnote{334}

b. Issues

Efforts to reach a preliminary agreement on the crucial Doha trade round had been stalled on the issue of agricultural subsidies and tariffs. The big trading blocs in the WTO (the United States, Brazil, and Australia on one side, and the EC on the other) had been engaged in a tit-for-tat struggle, refusing each other’s offers of subsidy cuts as inadequate.\footnote{335} To further complicate matters, the

\footnote{330} Id.
\footnote{331} See Mandelson Turns Hopes for WTO Deal from Hong Kong to 2006, EU BUSINESS, Nov. 11, 2005, http://www.eubusiness.com/Trade/05111102313.7alkxnxc.
\footnote{332} Id.
\footnote{335} “Tit-for-tat” is the modus operandi in international trade. For example, country A raises barriers on product X because country B did it to product Y. See ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD
G-20 demanded heavier cuts from both sides. In response to a U.S. offer to cut farming subsidies by 60 percent, the EC offered to reduce its tariffs on agricultural goods by 38 percent (on average) – an insufficient figure in the eyes of developing countries and the United States. The EC, however, was driven by internal conflict, with France accusing Commissioner Mandelson of exceeding his mandate.

The EC also continued to work towards improving bilateral trade relationships. Commissioners Mandelson and Benita Ferrero-Waldner met with Chinese trade minister Bo Xilai on November 4, 2005, to discuss not only the Doha trade round, but also a wide range of issues including the environment, energy, and intellectual property.

At the Hong Kong conference, the WTO trade ministers hoped to agree on the main points of the agricultural section – tariff cuts, the reduction or elimination of quotas, and the elimination of export subsidies for farm products by 2013 and make progress on manufacturing and services. To this end, Lamy suggested that ideally the Hong Kong conference would finalize two-thirds of the still-outstanding DDA negotiations.

2. Intent and Examples from the Hong Kong Ministerial
Declaration

The Declaration coming out of Hong Kong intended to capture the progress that countries had made in negotiations since July 2004, as well as build on progress in key areas so that Hong Kong could be a launch pad for full negotiating modalities later on. In the eyes of EU Trade Commissioner Peter Mandelson, the modalities must set a level of ambition high enough to match the levels of ambition set in the areas of agriculture and NAMA. A high level of ambition to reform trade in services is therefore necessary to have a balanced DDA package that will be acceptable to the EU. In Mandelson’s view, four elements should be taken into consideration while drafting the modalities for the Doha Round: (1) a multilateral formula for commitments by WTO members, (2) agreement on the principle of sectoral model schedules, (3) firm dates for proposing new revised offers and final offers, and (4) agreement on targets for negotiations on rules (i.e., government procurement, emergency safeguards, and subsidies) in the services areas.

A multilateral formula for commitments by WTO Members should be based on a mandatory numerical target for the number of services sectors in which each WTO Member would be required to make offers. The current services negotiations are based on the traditional bilateral request-offer system in which each WTO Member tables a request from another member and a parallel offer of what it is willing to provide. Since the current level of

342. See Dec. 18 Ministerial Declaration, supra note 321. The term “modality” is used here to refer to a plan or method to accomplish the goals of tariff and subsidy reduction: the target dates for these reductions, the actual quantity of reduction, and so on.
344. Id.
345. The sectoral model schedule approach “sets out agreed objectives for the liberalization of a specific service sector and can be achieved in various ways.” See Sherry M. Stephenson, Multilateral and Regional Services Liberalization by Latin America and the Caribbean 23 (OAS Trade Unit Studies Series No. 9, 2001).
346. An emergency safeguard mechanism is a form of safety valve to allow a government to support a domestic industry that is facing difficulties in coping with intensified international competition in the domestic market due to trade liberalization obligations. See WTO, Technical Information on Safeguard Measures, http://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm (last visited Jan. 25, 2007).
347. Mandelson Statement, supra note 343.
348. See id.
progress is rather disappointing, the proposed system aims to establish certain minimum numbers of sectors to be covered, and to produce model schedules within certain sectors that will provide ambitious benchmarks at which WTO Members can take aim.\textsuperscript{349}

As for agreeing to the principle of sectoral model schedules, the EC proposes to produce benchmarks to guide the level of commitment in sectors of interest to WTO Members.\textsuperscript{350} Efforts should be focused on those sectors where a large number of WTO Members show an interest.\textsuperscript{351}

The EC's proposal for setting dates for new revised offers and final offers also contemplated using the sixth WTO Ministerial Conference as a forum to fix clear and firm dates for the presentation of revised offers on reform in services trade.\textsuperscript{352} The EC hoped that these deadlines would fall within the first four months of 2006 and reflect both multilateral targets and sectoral model schedules.\textsuperscript{353} Thus far, not much progress has been made.

3. Actual Modus Operandi of Services Negotiations: How to Deal With 152 Members and the Outcome of Hong Kong

It is said that negotiations under the GATS are relatively easy to conduct due to its remarkable flexibility.\textsuperscript{354} This enables WTO Members "to determine the level of market liberalization obligations that they would like to assume."\textsuperscript{355}

Four main features are responsible for the GATS flexibility.\textsuperscript{356} First, WTO Members identify the sectors and sub-sectors for making commitments to foreign services suppliers.\textsuperscript{357} Since there is no minimum requirement of commitments, even if there is a schedule of commitments, WTO Members have the liberty to identify any part of one sector (no matter how small) for guaranteeing the rights of foreign suppliers to provide services.\textsuperscript{358} Second, a WTO Member has the right to set limitations on market access and the degree of national treatment that they are willing to

\textsuperscript{349} See id.
\textsuperscript{350} Id.
\textsuperscript{351} Id.
\textsuperscript{352} Id.
\textsuperscript{353} Id.
\textsuperscript{354} GATS – FACT AND FICTION, supra note 300, at 6.
\textsuperscript{355} Id.
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Id. at 7.
guarantee. Third, WTO Members frequently limit their commitments to one or two of the recognized “modes of supply” through which services can be traded. Fourth, WTO Members are free to make deviations from the MFN principle to provide favorable treatment to certain trading partners.

The GATS is composed of several general obligations that apply to all services sectors. The MFN principle is the most significant of all the general rules applicable to the GATS. Apart from the general obligations, each WTO member defines its own rules in its own obligations through the commitments in its national schedule. The GATS accepts that developing countries would liberalize fewer services sectors than the industrial economies. This means that the commitments of developing economies are less extensive. That said, many delegations at the WTO, especially those with strong interests in securing improved market access across a wide range of services activities, are resigned to accept that the offers of market access commitments already on the table may be as good as it gets.

The loud complaints during the Cancun WTO Ministerial Conference with respect to inclusiveness and transparency have far from disappeared. More than 4,000 protesters – mostly from Korea, India and Indonesia – marched on the Hong Kong Convention Centre on the first day of the Sixth WTO Ministerial Conference chanting the “WTO is killing farmers.” From a practical standpoint, most WTO Members seem to have accepted that the Ministerial Chair’s consultative group meetings (so-called “Green Room” meetings) are the only realistic way to
accomplish reform in a 152 member organization.\textsuperscript{370} These meetings, normally consisting of between twenty and forty delegations, are the major workhorse for accomplishing compromises in negotiations.\textsuperscript{371} No one has been able to find an alternative way of achieving consensus on difficult issues because it is virtually impossible for members to change their positions voluntarily in meetings of the full membership.\textsuperscript{372}

Green Room meetings can be called by either a committee chairperson or the WTO director-general and can take place anywhere, such as at ministerial conferences.\textsuperscript{373} In the past, delegations have sometimes felt that Green Room meetings could lead to compromises being struck behind their backs.\textsuperscript{374} To combat this mistrust, extra efforts are made to ensure that the process is handled fairly, with regular reports sent back to the full membership.\textsuperscript{375} In the end, decisions reached in the Green Room have to be approved by the consensus of all members.\textsuperscript{376}

In addition to member country negotiations, NGOs also can positively contribute to the negotiations to liberalize trade in services. Some NGOs, such as Oxfam International,\textsuperscript{377} know the world trade agenda well and can help facilitate meaningful and positive agreement on certain divisive areas.\textsuperscript{378} Accordingly, the main problem confronting NGOs is not one of expertise and influence, but one of conflicting paradigms. Free trade is seen as good for development by certain factions yet harmful by others. In this respect, it is difficult for governments to cooperate with NGOs that do not believe in the benefit of free trade. But even some

\begin{itemize}
\item director-general’s conference room. WTO, Whose WTO is it Anyway?, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Jan. 25, 2007) [hereinafter Whose WTO is it Anyway?].
\item Brinkmanship Marks First Day’s Proceedings, supra note 46.
\item Whose WTO is it Anyway?, supra note 369.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Oxfam International is “a confederation of 13 organizations working together with over 3,000 partners in more than 100 countries” to find lasting solutions to poverty, suffering and injustice around the world. Oxfam Int’l, Frequently Asked Questions, http://www.oxfam.org.uk/about_us/faq/index.htm (last visited Feb. 22, 2007).
\end{itemize}
NGOs that believe in the added value of free trade in relation to development argue instead that the manner in which it is carried out is incorrect, undemocratic, and unfair.\(^{379}\)

For developed WTO Members (principally the EC, the United States and Canada) who were keen on the further liberalization of trade in services, the legal document on which they agreed, GATS Article XIX, was insufficiently particular in achieving this goal.\(^{380}\) For developing countries, however, the text did not sufficiently emphasize Mode 4 and was too detailed on what should be liberalized in each of the modes.\(^{381}\) Developing countries also wanted to have the right to reject the praxis of plurilateral negotiations if they thought it would damage their national interest.\(^{382}\)

At Hong Kong, the G-90 used a slightly different strategy from the ordinary praxis in that they presented a new document and tried to use this legal text as the basis for the WTO trade negotiations.\(^{383}\) One trade diplomat perceived this as a way to break with or violate the normal procedure of international trade negotiations.\(^{384}\) Negotiations in the Green Room brought amendments of minor importance.\(^{385}\) What changed was the language used in the government procurement agreement, emergency safeguards, and subsidies.\(^{386}\)

Regarding the content and outcome of the conference, the trade ministers’ main decision in Hong Kong was simply to keep talking.\(^{387}\) By continuing the dialogue and putting off discussions on the most contentious issues in the Doha Round negotiations, the ministers could avert another Cancun-style collapse.\(^{388}\) The ministers gave themselves until the end of April 2006 to reach agreement on these issues.\(^{389}\) Some delegates had suggested that an
April deadline for finalizing “full modalities” was improbable, and that June or July 2006 would have been a more realistic timeline.\(^{390}\) If an agreement was not going to be reached by July 2006 (as it stood then, the Hong Kong Ministerial Declaration called for WTO members to translate these modalities into draft commitment schedules by the end of that month), it was going to be difficult for them to meet their stated goal of concluding the Doha Round by the end of the year.\(^{391}\)

Services negotiations moved into a new phase with the launch of the plurilateral (or collective) sectoral request process agreed to by the ministers at Hong Kong.\(^{392}\) This has been the most relevant consequence of the conference regarding the services trade. Starting February 28, 2006, groups of WTO Members are expected to present their requests on various services sectors to other WTO Members.\(^{393}\)

It is important to note that negotiations on trade in services remained a focal point of discussion during the last days of the conference as members reacted to the G-90’s revised Services Annex proposal.\(^{394}\) Contrary to the wishes of the EC and the United States, the proposal weakened the mandatory language of the original draft.\(^{395}\) However, for some countries, even the revised draft of the service annex was unacceptable. Venezuela, for example, was unwilling to even look at a proposal as long as it was based on the proposed annex’s original language.\(^{396}\)

The EC was noticeably less proactive during the negotiations in areas of shared competence than it would normally be when negotiations concerned a field of exclusive EC competence.\(^{397}\) In shared competence issues, the Commission listens more to the

\(^{390}\) Doha Negotiations to Start Again Next Week in Geneva, supra note 387.

\(^{391}\) Id.


\(^{393}\) Id.


\(^{395}\) Revised Ministerial Draft to be Issued Today, supra note 394.

\(^{396}\) Id.

\(^{397}\) Interview with Raimund Raith, Legal Advisor, Permanent Delegation of the European Commission to International Organizations, Geneva (Nov. 7, 2005).
needs of EU member states individually prior and during negotiations. At Hong Kong, there was absolute consensus on the European negotiating position among the EU members in services trade. The broader question among them was to what extent had Annex C—with which all of the then twenty-five EU member states were unhappy—had been kept. This was a dubious point for EU member states, but it was nevertheless clear that it had to be the basis for the Hong Kong negotiations.

Korean trade minister Kim Hyun-Chong, while summing up the proceedings of his “open-ended” meeting, reportedly remarked that “15 delegations had intervened to ask for revisions to the text, while 26 wanted to preserve it.” Kim Hyun-Chong emphasized the need for direct talks between members in addition to his consultation sessions. Of particular importance to the United States was the strengthening of qualitative targets on cross-border trade (Mode 1) and commercial presence (Mode 3). He also noted that the EC was “pursuing at the Hong Kong Ministerial Conference a reference to ambitious sectoral coverage, possibly in the body of the declaration, as well as seeking stronger commitments on Mode 3, plurilateral market access negotiations, and sectoral liberalization initiatives.”

The original text’s controversial annex on services was also modified in an attempt to make it acceptable to more WTO members, despite the risk of making it less acceptable to the EC. Some delegations were reportedly disappointed with changes presented in the December 18, 2005, draft declaration’s services annex that reaffirmed the non-prescriptive nature of its

398. Id.
399. Id.
400. Id.
401. Id.
402. Id.
403. Id.
404. Id. On a related note, Mitchell Smith had already argued that “sectoral liberalization has advanced significantly [in the European Community] during that period [1990s], even if under critical constraints. It remains unlikely that a new conception of industrial policy will supplant the hegemonic position of competition, or fundamentally alter Europe’s state of liberalization.” MITCHELL SMITH, STATES OF LIBERALIZATION: REDEFINING THE PUBLIC SECTOR IN INTEGRATED EUROPE 191 (2005).
recommendations, as well as the fact that the reference to it in the body of the text (paragraph 25) remained bracketed. Instead of obliging members to enter into plurilateral market-access negotiations, the new text stipulates that they "shall consider such requests" in line with different rules and guidelines for conducting services negotiations. The EC was also reportedly disappointed by the removal of the December 7 version's implicit reference to a 2002 EC proposal (S/WPGR/W/39) that laid out a framework for liberalizing government procurement in services. Emma Harrison, a campaign director for Consumers International, a global consumer protection organization, expressed concern that countries with insufficient regulatory systems would be pressured into liberalizing "essential services" sectors such as water and electricity. She noted that the text made no mention of universal public access.

In a speech to European Parliament members on January 16, 2006, EU trade commissioner Peter Mandelson blamed the G-20 in particular for failing to offer new concessions on NAMA and services. He said that the EC would be willing to let the negotiations fail rather than "pay for a round that offers nothing new on industrial market access, services, [geographical

406. Id.
407. Id.
408. See WTO, Draft Ministerial Text, WT/MIN(05)/W/3 (Dec. 7, 2005), available at http://www.wto.org/english/tratop_e/minister_e/min05_e/draft_text3_e.htm (last visited Feb. 27, 2006). "This document is a revision of JOB(05)/298/Rev.1, incorporating three amendments agreed by the General Council, namely the addition of brackets in paragraph 21 (Services), the removal of brackets in paragraph 53 (accession of Tonga), and the addition of some wording at the end of paragraph 34 (TRIPS & Public Health)." Id. at n.1.
412. Id.
indications], or other rules that lend strength to the multilateral way of managing our international affairs.

E. Post-Hong Kong WTO Ministerial Conference

As time progresses toward the conclusion of the Doha Round, developing countries seem to have increasing doubts as to whether it is worth it to continue negotiating. According to Mandelson, there is no reason why the Doha talks should not succeed. In his opinion, NGOs that suggest developing countries should walk away from the Doha talks are wrong. For developing countries, a successful Doha Round means the opportunity to lock in farm reform in the developed world, open new markets for their exports, and develop new trade among them. It can produce new multilateral agreements on trade rules that benefit developing countries and aid that will boost their capacity to trade. In Mandelson’s view, it would be a considerable mistake for the developing world to walk away from the table. This is considered a “free” round for the fifty least-developed countries in that any advances that are made will be free of cost to these countries.

Carlo Trojan, EU Ambassador to the WTO, said that he was “personally convinced” that a comprehensive deal could be made before the summer holidays. However, for such an agreement to be concluded, a breakthrough on modalities and sufficient progress on issues other than agriculture and NAMA would have

414. Geographical indications are place names (or words associated with a place) used to identify products (for example, “Champagne,” “Tequila,” or “Roquefort”) which have a particular quality, reputation or other characteristic because they come from that place. See WTO, Negotiation, Implementation and TRIPS Council Work, http://www.wto.org/english/tratop_e/minist_e/min99_e/english/about_e/10trips_e.htm (last visited Feb. 25, 2007).

415. See Conclusions of the Sixth WTO Ministerial Conference, supra note 413.


417. See Conclusions of the Sixth WTO Ministerial Conference, supra note 413.

418. Id.

419. Id.

420. Id.

421. Id.


to be made by mid-June 2006.\textsuperscript{424} The EU has been seeking deeper industrial tariff cuts from the G-20 developing countries.\textsuperscript{425} It has also come under heavy pressure from the G-20 and the United States to offer deeper cuts to its own farm tariffs.\textsuperscript{426} Trojan stressed that success in the negotiations would depend on "a preparedness to accommodate each others' genuine political red lines."\textsuperscript{427} He noted that "much remains to be done" to strike an appropriate exchange rate between market access in agriculture and NAMA.\textsuperscript{428}

The initial target was to finalize the Doha Round negotiations by the end of 2005, so that the agreement could be approved by the United States under the fast-track procedure and avoid a lengthy Congressional debate.\textsuperscript{429} Although some progress was achieved along the way – notably in December 2005 in Hong Kong where rich nations agreed to eliminate all of their farm export subsidies by 2013 and to allow quota- and tariff-free imports from all LDCs – a final deal remained elusive.\textsuperscript{430} Successive deadlines were missed.\textsuperscript{431} Finally, at the July 2006 G8 meeting in Saint Petersburg, Russia, leaders of the world's biggest economies pledged to give their trade negotiators the flexibility they needed to reach a compromise deal and to hold last ditch talks during the weekends of July 23-24 and 28-29, 2006.\textsuperscript{432}

1. Suspension of the Multilateral Talks

On July 24, 2006, WTO Director-General Pascal Lamy formally announced the suspension of the talks, bringing five years of negotiations to an end.\textsuperscript{433} The WTO suspension of the Doha

\begin{itemize}
  \item \textsuperscript{424} Id.
  \item \textsuperscript{425} Id.
  \item \textsuperscript{426} Id.
  \item \textsuperscript{427} Id.
  \item \textsuperscript{428} Id.
  \item \textsuperscript{430} Id.
  \item \textsuperscript{431} Id.
  \item \textsuperscript{433} Doha Round Suspended Indefinitely After G-6 Talks Collapse, supra note 250; see also Pradeep S. Mehta et al., Suspension of Doha Round Talks: Reasons and the Possible
Round followed the refusal of the United States to make bigger cuts to its farm subsidies if the EC and emerging developing countries such as India, China, and Brazil did not reduce their tariffs on agricultural and industrial products. Major trading powers, including the EC, blamed the United States for the collapse. Trade officials have continued to meet informally since then, particularly since there was a soft re-launch of discussions in November 2006.

This is not the first time that one of the WTO negotiation rounds has broken down. Negotiations are inevitably complex as each WTO member has veto power over the final agreement. The Uruguay Round, which began in 1986 and led to the replacement of the GATT by the WTO in 1995, was frozen for over a year due to antagonism between the EC and the United States, although it was never formally suspended.

Since the failure of the Doha Round, the Commission appears ready to refocus its commercial strategy on bilateral free trade agreements so as to catch up with the United States and Japan. Bilateralism/regionalism is the normal consequence of failed multilateralism, which has certainly dangerous repercussions on weak economies. Officially, concluding the Doha Round remains the EC’s number one priority; however, since negotiations were suspended, the EC has been looking for other ways to open up foreign markets and keep up with its main trade rival, the United States. The Americans are currently leading the race to conclude

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434. Doha Round Suspended Indefinitely After G-6 Talks Collapse, supra note 250.
437. The WTO Doha Development Round, supra note 429.
438. Id.
439. Id.
441. But see Leon Trakman, The Proliferation of Free Trade Agreements: Bane or Beauty? (Univ. of New S. Wales Faculty of Law Research Series, Working Paper No. 54, 2007 (claiming bilateralism can actually help developing countries in the world trading system).
442. See id. Nevertheless, according to Peter Sutherland, this proliferation of bilateral trade agreements outside the WTO process is perceived as betraying the multilateral
free trade agreements (FTAs) with high-market-potential countries. The Commission’s decision to launch new bilateral trade negotiations with countries such as India, South Korea, and the ten ASEAN states “could further complicate its trade regime, and divert interest from the multilateral trading system,” according to a bi-annual report carried out by the WTO on the EC’s trade policies and practices. The Commission also hopes to negotiate more far-reaching agreements than would be possible under the WTO talks by tackling issues such as investment, competition policy, and public procurement – the Singapore issues – dropped from the Doha agenda in 2003. This return to a system of bilateral agreements and FTAs will mean that the large WTO members would be able to strong-arm the small members. Further, it will generate higher transaction costs. In a speech to the European Parliament’s International Trade Committee on October 17, 2006, Lamy warned that bilateral deals could contribute to weakening the multilateral trading system.
Moreover, he argued that the growing number of bilateral and regional trade talks risked distracting from attempts to clinch a long-elusive global deal. When it came to bilateral talks, some countries appeared to be promising concessions beyond what would be needed to unblock the multilateral negotiations. Before the U.S. Chamber of Commerce, Lamy said:

While bilateral agreements can be a useful complement, I do not believe they can substitute a strong multilateral trading system. Bilateral agreements are by their very nature discriminatory. They have obvious limitations in terms of issues covered since they do not tackle the toughest areas where trade restrictive and distorting measures, such as subsidies, still prevail. They may lead to trade diversion as opposed to trade creation. And they complicate the trading environment of economic operators who have to abide by a spaghetti bowl of different rules. In short, bilateral agreements are not the easy way out.

Patrick Messerlin argues along the same lines by saying that multilateral liberalization of trade “should be the center of European trade strategy.” He claims that the recent shift in EC trade policy to negotiate bilateral agreements is taking the EC into “dangerous waters” because the “bilateral trade agreements considered by the EC are generally characterized by high tariff and non-tariff barriers in goods, and by restrictive regulations in services and investment.”

sppl_e/sppl44_e.htm.


453. The same argument is made by a WTO report, which claims that the EC’s decision to seek bilateral free-trade agreements, as agricultural tariffs rise, could be detrimental to the Doha negotiations on a global-trade pact. See EC, Trade Policy Review, WT/TPR/G/177 (Jan. 22, 2007), available at www.wto.org/english/tratop_e/tpre/s177-00_e.doc.

454. Id.


457. Id.
Stephen Woolcock, however, argues that the EC’s increased use of FTAs is compatible with its commitment to multilateralism, but only if the bloc redefines its concept of “all trade” as being 95 percent of trade and avoids excluding large bands of sensitive products in specific sectors such as agriculture. While the EC will find that it might be able to address some of its specific concerns through bilateral agreements, it will not be able to answer all of them. In addition, the countries that the EC will negotiate with in these bilateral negotiations will want to see concerns like subsidies in agriculture addressed, and that will be possible only be through the multilateral WTO process.

In the face of globalization, the EC must remain open. It must also ensure that markets abroad are open to its exports. European businesses often find it difficult to access foreign markets due to high tariff and non-tariff barriers, as well as discriminatory measures applied against foreign companies. Removing such barriers is particularly important in the services sector, which represents around 70 percent of Europe’s jobs and the EU’s gross domestic product (GDP).

This proposed strategy of negotiating bilateral trade agreements is diametrically opposed to the EC’s previous trade strategy, which focused strongly on multilateral negotiations within the WTO. In the past, free trade deals were driven primarily by the logic of development or geopolitical goals, rather than economic interests. That said, U.S. businesses in Europe urged EU and U.S. leaders to stop neglecting the transatlantic relationship in favor of boosting relations with China and India. They argued that the two transatlantic economies have become so interdependent that their future growth and job

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459. EU to Boost Competitiveness Through Bilateral Trade Agreements, supra note 440.
460. Id.
461. Id.
463. EU to Boost Competitiveness Through Bilateral Trade Agreements, supra note 440.
creation relies not on improving their relations with China and India, nor in completing a successful Doha Round, but in removing existing barriers to trade and investment in order to create a veritable transatlantic single market. Now, an ambitious deal on service liberalization is of key interest to the EC because of its economic benefits. Increased trade in services would also contribute to development goals because improved transport, information technology and telecommunications, banking, and insurance sectors form the backbone of a growing economy.

However, trade in services faces considerable restrictions, mostly based on national regulations such as technical standards or licensing requirements and procedures. According to a study by Decreux and Fontagne, more could be gained by developing and developed countries alike from a 25 percent cut of the barriers in services than from a 70 percent tariff cut in agriculture in the North and a 50 percent cut in the South. Eliminating barriers to trade in services could result in enormous income gains for developing countries.

Prior discussions in the WTO focused on establishing disciplines to ensure that domestic regulatory measures do not create unnecessary barriers to trade. Although significant progress was made in this area, negotiations on market access stalled because of the lack of movement on agricultural and industrial market access. In a speech to the EU-India Business Summit on October 12, 2006, Lord Vallance said that developed and developing countries will miss out on enormous potential economic gains because services have once again been taken hostage by agriculture, even though the latter represents only 8

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465. Id.
466. Id.
468. The WTO Doha Development Round, supra note 429.
471. See generally WTO Doha Development Round, supra note 429.
472. Id.
percent of world trade and 2 percent of developed countries' economies.  

a. The Failure of Multilateralism?

The Doha talks were suspended on July 24, 2006, after ministers from the EC, the United States, Australia, Brazil, India, and Japan (the so-called G-6 countries) failed once again to reach a deal on agriculture and industrial goods "modalities"—formulae and figures for tariff and subsidy cuts as well as exceptions to them—primarily due to differences on farm trade. WTO Director-General Pascal Lamy lamented at the lost opportunity to demonstrate that multilateralism works and to integrate more vulnerable members into international trade, which offers "the best hope for growth and poverty alleviation." He warned of the negative impact on the world economy with the possible resurgence of protectionism. "Today there are only losers," he said. Similar words were used by the International Food & Agricultural Trade Policy Council, an organization that pursues pragmatic policies in food and agricultural trade and development by seeking pragmatic trade and development policies, to express its concern over the failed talks.

Lamy blames the deterioration of the Doha round on "far too many negotiators focused on the small picture, forgetting the bigger one." He recommended that countries should shift their focus away from domestic politics and broaden their vision. In his
view, "the challenge is less technical, than political. It is about leadership, about compromise, about countries recognizing their common interest in success and the collective costs of failure." According to Lamy, new concessions would have to be made in order for the talks to resume.

Similar thoughts were expressed by Paula Lehtomaki, the Finnish Minister for Foreign Trade and Development, who declared that "neither industrial countries nor developing countries win" with the suspension of WTO Doha negotiations.

Before the World Bank Board of Governors, World Bank President Paul Wolfowitz argued at the 2006 annual meeting in Singapore:

"[E]very party in this deal needs to compromise. The United States needs to accept further cuts in spending on trade-distorting agricultural subsidies. The European Union needs to reduce barriers to market access. And developing countries such as China, India, and Brazil need to cut their tariffs on manufactures. Developing countries also need to remove trade barriers that make it harder for low-income countries to trade directly with each other."

All EU member states have much to gain from a successful outcome of the Doha Round. Traditionally, an open trading regime has been beneficial to European economies. The removal of some technical barriers to trade will provide additional opportunities for further success. On the other hand, more protectionism will be generated worldwide if the Doha Round fails.

483. Id.
484. Summary 24 July 2006, supra note 475.
486. See Paul Wolfowitz, President, World Bank, Path to Prosperity, Address to Board of Governors of World Bank Group (Sept. 19, 2006).
487. The technical barriers to trade are related to product standards and conformance. The aim of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) is to ensure that mandatory technical regulations, voluntary standards, as well as procedures for assessing conformity with technical regulations and standards do not generate avoidable obstacles. See generally TBT Agreement, supra note 274.
b. Consequences of Protectionism: Competing Views of NGOs

NGOs offered their own opinions as to the growth of protectionism and the possible failure of the Doha Round. Oxfam International, a prominent NGO, stressed the enormous cost of further delay. According to Oxfam, "the EU and the United States remain free to subsidize their biggest agricultural producers and continue dumping, while developing countries continue to struggle to ensure survival of subsistence farmers and break into rich Northern markets." The group said the United States and EC must “make fundamental changes to their offers” in order to contribute to the development goal. According to Oxfam’s view, the EC should make more and greater concessions to keep the development negotiations on track. Moreover, Oxfam argued that the suspension of the Doha talks would not solve the underlying reasons why a development deal remained deadlocked and in crisis. Oxfam feared that multilateralism would deteriorate further, and was therefore “concerned that the EU and the U.S. [would] turn to damaging regional trade agreements to break open developing country markets.”

Not every NGO shares the same opinion. Friends of the Earth, which applauded the suspension of the Doha talks, argued that the WTO should have greater powers to manage trade opening to ensure that environmental and other considerations were taken into account. According to Friends of the Earth, the failure of the talks allowed time to review and reconsider the

490. Id.
491. Id.
492. Id.
493. Id.
multilateral trading system in its entirety.\textsuperscript{497} The group argued that this news would be welcomed around the world because the proposed WTO deal would have further impoverished the world’s poorest people and caused irreparable damage to the environment.\textsuperscript{498} Friends of the Earth pointed to the fact that some developing countries had refused to proceed with the talks because they feared that a WTO deal would cause immense harm to millions of small and subsistence farmers.\textsuperscript{499}

Other NGOs more critical of free trade viewed the collapse of talks as good news for the world’s poor and the environment, on the grounds that it is better to have no deal than a bad deal. In particular, Greenpeace called on world leaders to use the opportunity to build a “new global trade system based on equity and sustainability.”\textsuperscript{500} According to a report published by Greenpeace, there is a need to “secure a safe political and legal space for the environment.”\textsuperscript{501} The report goes on to outline “a number of alternative approaches, which would enable governments to move the current negotiations on the relationship between trade rules and MEAs [multilateral environmental agreements] from the WTO to a more suitable forum.”\textsuperscript{502} According to the report, “the emergence of more environment-related trade dispute... has re-emphasized the need” for an alternative to the WTO dispute settlement procedure for “solving trade and environment conflicts.”\textsuperscript{503}

c. Trying to Get Negotiations Back on Track and the Way Forward

Little was discussed in the way of specific new concessions that could spur the resumption of multilateral trade negotiations.\textsuperscript{504}

\begin{footnotes}
\item[497] See Press Release, Friends of the Earth Europe, supra note 495.
\item[498] Id.
\item[499] Id.
\item[502] Id.
\item[503] Id.
\item[504] Doha Round Starting To Thaw?, BRIDGES Wkly. TRADE NEWS DIG., Sept. 13,
Nevertheless, ministers and senior officials from WTO members including the G-20 developing countries, the United States, the EC, Japan, and four West African cotton-producing nations pledged to work towards re-launching the stalled talks at a September 9-10, 2006 meeting in Rio de Janeiro. The meeting, which coincided with a G-20 ministerial summit, marked the first big gathering at that level since July 2006. Brazil’s Minister of Foreign Affairs said that he had seen signs of flexibility from other countries during the weekend’s discussions. Upon his return to Tokyo, Japan’s Agriculture, Forestry, and Fisheries Minister Shoichi Nakagawa told journalists that there should be some signs indicating the end of the cessation in October 2006. However, governments needed to agree on modalities by the end of July 2006 in order to translate them into a Doha Round package of legal agreements before the mid-2007 expiration of the Bush administration’s congressional mandate to negotiate trade agreements. Without this “trade promotion authority,” the Bush administration is unable to submit trade deals to Congress for a yes-or-no vote without the possibility of major amendments; thus, the United States ceases to be a credible negotiator. Many trade observers, as well as senior U.S. officials, suggested that if an agreement appeared to be coming together by March 2007, Congress might have been persuaded to extend the

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506. Id.
507. Id.
508. Doha Round Starting to Thaw, supra note 504.
509. Id. Fast-track trade authority [now known as trade promotion authority] allows the President to submit to Congress for an up-or-down vote on a bill to implement into U.S. law any international trade agreement entered into by the United States. WALLACH, supra note 3, at 3. It is an unusual procedure through which the U.S. Congress delegates the President constitutional authority to set the terms of trade for the purpose of negotiating trade agreements. Id. The fast-track mechanism also provides special rules which strictly limit Congress’s role regarding such trade agreements to a “yes” or “no” vote on a completed deal, with no amendments allowed and only twenty hours of debate. Id. Fast-track causes an extraordinary shift in power, with the White House empowered to sign and enter into trade agreements before Congress ever votes on them. Id.
administration's trade promotion authority. Failing that, the Doha negotiations are likely to remain stagnant until 2009.

Since the Trade Promotion Act (TPA) of 2002 expired in July 2007, Congress subsequently resumed its power to make amendments to any trade deal presented to it. This makes it less attractive for other WTO members to participate in negotiations, because there is uncertainty surrounding their ability to obtain real commitments from the United States. The U.S. administration signaled that it would attempt to extend the TPA to make concluding an agreement more feasible; otherwise, trading partners are unlikely to agree to a trade deal that could later be picked apart by U.S. lawmakers. However, "[p]ersistent skepticism in sections of Congress about the benefits of economic globalization means that support for some bilateral and multilateral trade deals is far from clear. Also unclear is the willingness to renew the TPA.

Some Geneva-based negotiators believe that it may be possible to secure a short-term extension of this TPA to cover the end of the Doha Round negotiations, even with the recently-elected Democratic Congress. Some Geneva-based negotiators believed, however, that in order to get the Bush administration and Congress interested, there had to have been hard evidence of a viable deal by the end of March 2007. Another said that there were no guarantees that attempts to win Congressional support would ultimately succeed. In fact, most press accounts suggest that the U.S. legislature's already-shaky support for bilateral and multilateral trade talks will be further weakened by the

511. Id.
513. Id.
514. Id.
515. Id. at 5.
516. Id.
518. Id. at 3.
519. Id.
Democrats’ ascent to power in both the House of Representatives and the Senate. In particular, the Bush administration is now believed to be even less likely to get Congress to extend its fast-track negotiating authority past the expiry date of July 2007. “Without this, chances to conclude the struggling Doha Round negotiations in the next few years would virtually disappear,” even if WTO Members had managed to revive the talks early in 2007.

Midterm Congressional elections in the United States, which took place on November 7, 2006, had been looming over the negotiations. However, U.S. Trade Representative Susan Schwab argued that the outcome of the elections would not change Washington’s stance in the negotiations. Broadly restating the standard U.S. position, she noted that “to break the current deadlock, we need commitments that take us beyond current positions in four key areas.” These key areas are (1) substantial improvements by the EC, Japan, and other G-10 countries in agricultural tariff cuts, especially for sensitive products that would be exempted from the full tariff cuts; (2) deeper cuts in agricultural tariffs by major developing countries, including for sheltered special products; (3) deeper EC and U.S. reductions in trade-distorting support; and (4) cuts in industrial tariffs by developed and major developing countries.

Pascal Lamy called an informal meeting of the Trade Negotiations Committee (TNC) on the morning of November 16, 2006. The stated purpose of the heads-of-delegation level gathering was to discuss the situation in the DDA negotiations. This was the first session of the committee charged with overseeing the Doha Round negotiations since they were suspended in July 2006. The committee meeting might imply that several WTO members would use the informal TNC meeting to

521. Id.
522. Id.
524. Id.
525. Id.
526. See Doha Round: The “Time Out” is Over, But Will Negotiations Resume?, supra note 517.
527. Id.
agitate for the resumption of the whole multilateral trade negotiation business as usual, including the resumption of work in all of the Doha Round negotiating committees. However, WTO Members need to decide on how to revive the talks, particularly since it was far from apparent that deadlock-breaking offers of tariff or subsidy cuts would be forthcoming.

A November 10, 2006, Green Room meeting to which Lamy invited about twenty influential members, including those from the United States, Brazil, EC, Japan, Australia, New Zealand, Canada, and India, was pivotal in Lamy’s decision to convene the informal TNC. According to one WTO ambassador, participants at that meeting broadly fell into two camps: those reluctant to restart formal negotiations and those who felt the suspension of negotiations in July failed to do what it had been intended to do. The former group argued that no new concessions had been made. Resuming the talks, they said, would quickly lead to the old impasse – this time perhaps for good. Those pushing to restart negotiations ultimately carried the day. They argued that the suspension of talks, instead of shocking countries into softening their stances, had the opposite effect of taking off pressure altogether. They argued that the resumed talks would at least force key WTO Members to state publicly that they had nothing new to bring to the negotiating table.

In a speech at Chatham House on November 14, 2006, Peter Sutherland argued that the cost of failure was potentially prohibitive, because “if the Doha Development Agenda goes out of the window so, eventually, may the effective functioning of the multilateral trading system.” He further argued that once negotiations resume, WTO members would do well to agree on an achievable, if less ambitious Doha agreement, in the interest of preserving the multilateral trading system.

528. Id.
529. Id.
530. Id.
531. Id.
532. Id.
533. Id.
534. Id.
535. Id.
537. Id.
emphasized that such a deal would be "well worth having and would deliver some creditable development goals." More significantly, "it would show that multilateralism can deliver, before all credibility is lost."

As for Commissioner Mandelson's strategy to re-launch negotiations, it will have to be based on convincing others that what was on the table in July 2006 is better than no deal at all, for it seems unlikely that further concessions will be made by the EU. Although in his November 2006 speech at the Hindustan Times Leadership Summit, Mandelson pledged "to improve[the EC's] farm-tariff offer by adding substantially to the 39% it offered a year ago." Although this offer was within close reach of the cuts demanded by developing countries, it was met by resistance from the United States. Mandelson further stated:

[If Doha fails, the systemic and economic costs will be felt everywhere. It is not just the hundreds of billions of euros annually in new goods and services trade that will be lost – but the multilateral agreements, too, that will extend duty free quota, free access for the poorest nations and straighten out customs rules and add billions of euros to developing country revenues.]

In a December 2006 report, Lamy seemed quite confident that it was possible to get the Doha negotiations back on track and conclude the Doha Round in 2007, thanks to an increasing level of engagement among the various WTO Members. However, this could only happen if countries came forward with new concrete concessions. Otherwise, the Doha talks risked total collapse.

That said, Lamy acknowledged that no one was going to simply come forward and specify how much more they were willing to
offer and how much less they were willing to accept in return.\textsuperscript{546} He said that since there is a tradeoff between ambition and flexibility — the deeper the overall tariff and subsidy cuts, the more flexibility WTO Members will demand to shelter specific products from reforms — trade officials could examine alternatives for potential compromises.\textsuperscript{547}

WTO countries "would also have to test these different scenarios with influential domestic constituencies to assess what they could tolerate."\textsuperscript{548} Lamy had already indicated that full-fledged negotiations, including those at the ministerial level, could only restart once governments explicitly offered deeper subsidy or tariff cuts and moderated what they wanted in exchange.\textsuperscript{549} But Lamy had no intentions to break the deadlock by proposing a compromise text of his own, because such a maneuver would be "very risky" and would sit uneasily with the "bottom-up" principles of the WTO.\textsuperscript{550}

In order to avoid a compromised text, Commission President José Manuel Barroso and U.S. President George W. Bush agreed that the EC and the United States must urgently resolve differences that have been blocking the conclusion of a global trade pact.\textsuperscript{551} At the meeting, President Barroso stressed the need for the United States to make further concessions if the Doha Round is to succeed: "The U.S. holds the key to making a deal possible in 2007."\textsuperscript{552} Commissioner Mandelson said after the meeting that "[t]here’s not an agreement to be announced on key issues or key numbers, but there’s certainly much greater understanding and a measure of convergence now."\textsuperscript{553} U.S. Trade Representative Susan Schwab said at the meeting that "nobody is going to reach an agreement on the basis of an artificial deadline [of March 2007] if the content isn’t there that is substantively and politically viable."\textsuperscript{554} Hence, even if the major trade actors of the WTO agree that there is a need to act quickly, precaution is also

\textsuperscript{546} Id.
\textsuperscript{547} Id.
\textsuperscript{548} Id.
\textsuperscript{549} Id.
\textsuperscript{550} Id.
\textsuperscript{552} Id.
\textsuperscript{553} Id.
\textsuperscript{554} Id.
At the World Social Forum 2007, which brought together activists in favor of an alternative globalization rather than that of the business and political elite (as represented at the annual meetings of the World Economic Forum in Davos), civil-society groups were more skeptical about reviving the Doha Round. These groups say that the Doha Round has lost sight of what should have been its main priority – helping developing nations to escape from poverty.

During a Green Room meeting on January 22, 2007, Lamy agreed to a request by the United States, the EC, and Japan that he stress that services trade is a critical component of the overall market-access negotiations in Davos. Specifically, they requested he emphasize that meaningful offers of services liberalization could help unlock possible concessions by major developed countries in the agriculture and industrial goods talks. Domestic regulation has long been guarded jealously by WTO Members as their sovereign prerogative. Domestic regulations typically cover qualification requirements, qualification procedures, licensing requirements, licensing procedures, and technical standards for suppliers. All have the potential to be unduly trade-restrictive.

White House officials indicated that President Bush
attempted to call on Congress to renew his TPA mandate. Extending this mandate is widely believed to be essential to concluding the Doha Round in the foreseeable future. However, the Democratic leaders that control the U.S. Congress indicated that any extension of fast track authority would be accompanied by additional trade policy conditions. Regardless, U.S. trade officials seemed hopeful that a breakthrough in the negotiations by spring 2007 would help win support in Congress for TPA renewal.

In order to achieve a successful deal Lamy has said for the past year that the basic ingredients of a Doha deal are clear: the United States must agree to deeper cuts to its ceiling on trade-distorting farm subsidies, the EC must offer more agricultural market-access, and developing countries such as Brazil and India must further reduce their industrial tariffs. Further, several things are required in order to move such a complex international trade negotiations scenario forward. Certainly, a necessary ingredient is political leadership from major WTO Members since the deadlock in agriculture and NAMA has "haunted both bilateral and plurilateral consultations on services." Then, once the previous uncertainty in these areas is cleared, the chances increase for a more ambitious services package. However, services negotiations are not simply "pulled" by negotiations in other fields, but also by playing a role in "pushing" forward the Doha Round.

Second, expectations of WTO Members about services trade

563. See id.
564. Id.
566. But see Bryan Mercurio, The WTO and its Institutional Impediments (Univ. of New S. Wales Faculty of Law Research Series, Working Paper No. 46, 2007), available at http://law.bepress.com/unswwps/flrps/art46/ (arguing that systemic institutional impediments still exist, which not only hinder the successful conclusion of the Doha Round, but also prevent effective long-term institutional governance and vision).
568. Id.
569. Id.
may need to be modified in accordance with the overall development of negotiations in the Doha Round.\textsuperscript{570} Regarding access to the market, certain major developed nations may have very little room to offer anything amounting to breakthrough in Mode 4.\textsuperscript{571} For example, "[t]he United States remains caught up with security concerns and border control measures against illegal migration stemming from its common border with Mexico," and the EU continues to have its own political difficulties managing intra-EU migration.\textsuperscript{571}

Third, through their development agencies, many developed countries have tried to help developing nations by providing technical and financial assistance.\textsuperscript{573} These nations should continue these practices with the goal of improving the ability of nations "to implement the appropriate services trade restructuring and regulatory reform, thus increasing their capacity to engage actively in international trade and trade negotiations."\textsuperscript{574}

Fourth, the WTO must create a safety net in the form of an "emergency safeguard mechanism."\textsuperscript{575} This would allow WTO Members to modify their commitments temporarily if liberalization results in unpleasant negative consequences.\textsuperscript{576}

Lastly, aid for trade in services should be made available to strengthen (1) "the ability of developing countries to negotiate from a more informed position;" (2) "the capacity to better manage the process of market opening and domestic regulation;" and (3) "the ability to supply newly-opened foreign markets."\textsuperscript{577} To implement these ideas, some suggest making adjustments to the special and differential treatment proposals in a positive manner by making binding commitments on aid for trade in services.\textsuperscript{578} Others have proposed redrafting one of the LDC modalities articles to achieve the same result.\textsuperscript{579}

\textsuperscript{570} Id.
\textsuperscript{571} Id. at 5-6.
\textsuperscript{572} Id. at 6.
\textsuperscript{573} Id.
\textsuperscript{574} Id.
\textsuperscript{575} Id.
\textsuperscript{576} Id.
\textsuperscript{577} Id.
\textsuperscript{578} Id.
\textsuperscript{579} Id.
2. Resumption of the Multilateral Talks

On February 7, 2007, Lamy was able to report to the WTO General Council that the talks had resumed across the board.\(^{580}\) In his report to the council, Lamy said that, “political conditions are now more favorable for the conclusion of the Round than they have been for a long time.”\(^{581}\) He added that “political leaders around the world clearly want us to get fully back to business, although we in turn need their continuing commitment.”\(^{582}\) As for the future, he added: “With regard to timing, in my view we should not attempt to set [for] ourselves any false deadlines. We are all very much aware of the urgency of the task ahead, but it is also important to reach a substantive outcome which is acceptable to everyone.”\(^{583}\)

Since the negotiations stalled in July 2006, political and business leaders have acknowledged the considerable costs that would be incurred by a failure to conclude a global-trade pact. Business groups have voiced their concern about the potential loss of considerable economic welfare gains, both for industrialized as well as developing countries, and the risk of weakening the safety net that the WTO provides against rising protectionist tendencies.\(^{584}\) Furthermore, the Global Services Coalition (GSC) held a series of meetings with WTO ambassadors and officials, pressing the case for renewed efforts to produce a more commercially attractive package of liberalization commitments in the current Doha Round.\(^{585}\) Lord Vallance of Tummel, Chairman

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581. Id.
582. Id.
583. Id.
584. See Trans Atlantic Business Dialogue [TABD], European Business for Doha: Save the Doha Round Now, Jan. 25, 2007, available at http://static.tabd.com/manilaGems/EuroBusforDoha250107.pdf. This joint EU industry statement supporting the Doha Round was joined by the American Chamber of Commerce to the EU (AmCham EU), European Services Forum (ESF), Eurochambres, EuroCommerce, Foreign Trade Association (FTA), and the Confederation of European Business (UNICE).
585. See generally Press Release, Global Services Coalition [GSC], Progress in Services Negotiations Needed to Secure Business Support for Doha Round (Feb. 21, 2007), http://www.uscsi.org/press/022107GSC_final_press_statement.doc. GSC membership includes the leading service industry associations from Australia, Brazil, Canada, the Caribbean region, Chile, EU, Hong Kong, Japan, India, New Zealand, Taiwan, and the United States. Id.
of the European Services Forum, expressed "cautious optimism" about the prospects for completion of the Doha Round. His comments were tempered by his warning that much more progress is needed on services if a Doha Round trade deal is to gain the support of the global services industry.

For its part, as has been the case in earlier stages of the WTO negotiations, the official community has continued to stress that further progress in the services area is linked inextricably to its interests being satisfied in other areas of the Doha Round talks, notably in agriculture and in goods trade. In this sense, during their first formal meeting in Delhi in April 2007 since global trade talks broke down in July 2006, the EC, United States, India, Brazil, Japan, and Australia expressed confidence that a deal could be concluded by the end of the year. A consensus among these six WTO Members was considered crucial to an agreement among all WTO Members. Negotiators wanted to "imprint a sense of urgency on the talks" by setting a new year-end target. As evidence of this urgency, the EU Trade Commissioner, U.S. Trade Representative, Brazilian Foreign Minister, and Indian Commerce and Industry Minister indicated that they would meet in mid-May to "assess progress and instruct their officials on how to proceed." On April 18, the EU trade chief said that the four representatives would meet three times over the next two months. However, Indian Commerce Minister Kamal Nath, who hosted the gathering, said that meeting the year-end deadline would depend on whether his nation’s concerns were addressed. He stressed that content was more important than the speed of

586. Id.
587. Id.
590. Id.
591. Id.
593. Id.
Meanwhile, as the ICTSD pointed out, "some countries had been growing increasingly uneasy about the G-4's discussions, and all the more so with their apparent failure to make meaningful progress." The secrecy with which these discussions were conducted only heightened anxieties. G-4 officials declined to provide details of the incremental progress that they claimed to be making on issues such as cutting farm tariffs and subsidies. This led some observers to wonder whether the four nations were in the process of putting together a compromise, or simply trying to manage the political fallout from an eventual collapse. On the diagnosis of the G-4 meeting, Pascal Lamy argued that they were locked in a "prisoners' dilemma." They "are somewhat paralyzed by fear that any move in the negotiation by any one of them will be pocketed by the others and will not lead to reciprocal moves."

After their April meeting in Lahore, Pakistan, ministers from the Cairns Group of farm exporters warned that "action is needed now to avoid putting the Doha Round at grave risk of drifting indefinitely, or even failing." They called on the EC, United States, and Japan to "come forward with concrete contributions without any further delay," saying that "as members responsible for the greatest distortions in global agricultural trade," they "must do much more to give effect to the far-reaching mandate for agricultural reform."

In the specific case of services trade, two weeks of intensive market-access negotiations in services trade started at the WTO in mid-April 2007. These marked the first services meetings to be

595. Id.
597. Id.
598. Id. The G-4 refers to the United States, Brazil, India, and the EU. Id.
599. Id.
601. Id.
603. Id.
conducted in formal negotiating mode since the Doha Round talks broke down in July 2006, although there had been informal talks in the interim.\textsuperscript{605} This first week was dedicated to plurilateral meetings between groups of demandeur countries, who were seeking new market-opening commitments, and groups of predominantly developing countries, to which the demandeur countries had submitted collective requests for liberalization in February 2006.\textsuperscript{606} Although many developing countries were reluctant open their foreign services markets any further without seeing more progress in agriculture and industrial tariffs discussions, some of the major demandeur members of the WTO, including the EC and the United States, identified key “breakthrough” sectors where they were “especially eager to see new liberalization.”\textsuperscript{607} According to observers, the plurilateral negotiations were more focused than they had been in the past, and benefited from “more thorough preparation by the requesting [WTO] Members.”\textsuperscript{608} “Each of these sector-specific negotiations [were] coordinated by one sponsor of the collective request, and each had a structured agenda unlike the more free-wheeling discussions in previous plurilateral discussions.”\textsuperscript{609} The participating countries were specifically asked whether they would meet the liberalization commitments set out in the collective request, and give explanation for their inability to do so.\textsuperscript{610} Each targeted country was also “asked whether they were prepared to formally bind the level of liberalization actually applied in practice in each sector” and, if they were unable to do so, to give an explanation for this inability.\textsuperscript{611}

The second week was reserved for bilateral negotiations between individual WTO countries.\textsuperscript{612} After a failure to achieve

\begin{itemize}
\item \textsuperscript{606} Id.
\item \textsuperscript{607} Id.
\item \textsuperscript{608} Id.
\item \textsuperscript{609} Id.
\item \textsuperscript{610} Id.
\item \textsuperscript{611} Id. In the past, it had proved easier for countries facing requests to take a defensive approach when they wanted to, by asking the different sponsors a series of technical questions about precisely what they were seeking. See Services: Demandeurs, Requested Members Both Content with Initial Plurilaterals, BRIDGES WKLY. TRADE NEWS DIG., Apr. 12, 2006, http://www.ictsd.org/weekly/06-04-12/story1.htm.
\item \textsuperscript{612} Services Cluster Finishes with New Focus on “Breakthrough Sectors,” supra note
substantive results via plurilateral talks which took place in the first half of 2006, the United States, a key demandeur, refocused its negotiating strategy on the bilateral approach, "where it could more effectively apply its stronger negotiating leverage against developing country trading partners." The bilateral negotiations were even more focused than the plurilateral negotiations, as major demandeurs targeted WTO members on their most critical export interests. The EC, for example, identified financial, telecommunications, computer-related services, maritime transport, distribution, postal and courier services, construction, environment, and legal services as its breakthrough sectors. The "breakthrough sectors" idea further prompted Mexican Ambassador Fernando de Mateo, chair of the services negotiating body, to "adopt a sectoral approach in his continuing series of 'enchilada talks' with a group of ambassadors from about two dozen selected WTO members." However, this move prompted debate among a smaller circle of demandeurs, the so-called "Really Good Friends of Services," over precisely what the breakthrough sectors should be and how to set the order of their discussion. In the view of one delegate, the combination of bilateral and plurilateral negotiations during the ongoing cluster of services meetings is a response to the different approaches favored by various WTO members.

613. Services Cluster Finishes with New Focus on "Breakthrough Sectors," supra note 605. Among these were Brazil, India, China, and the four big markets within ASEAN - Indonesia, Malaysia, the Philippines, and Thailand. Id.
614. Id.
615. Id.
616. Id.
617. Id. For some time, it has been obvious that the old Quad (composed of Canada, the U.S., the EC, and Japan) could no longer play a leading role in providing direction for international negotiations and then securing support for their position from other delegations. J. Robert Vastine, Services Negotiations in the Doha Round: Promise and Reality, GLOBAL ECON. J., 2005, at 10. This was due to the fact that WTO membership has become very large and unwieldy, and because new blocs of WTO members have formed to represent regional interests (such as the G-20). Id. In this context, the "Really Good Friends of Services" was conceived to try to fill this void. Id. However, its membership grew too large and included members that did not share similar interests. Id.
618. Services Clusters Underway with Plurilateral Market Access Talks, supra note 613.
V. IMPACT OF THE NICE, CONSTITUTIONAL, AND LISBON TREATIES
ON SERVICES NEGOTIATIONS

The developments of the Nice Treaty are significant for the built-in agenda of the WTO negotiations,619 which states that several areas of trade, including intellectual property rights and services trade, should be reviewed for further liberalization every five years.620 Since the Nice Treaty, the EC's competence to conclude agreements with third states or international organizations explicitly covers trade in services and the commercial aspects of intellectual property rights.621 Ever since corporations have demanded further centralization of EC decision-making in international trade via the Nice Treaty, EU NGOs have campaigned against providing the EC with a fast-track system in WTO negotiations.622 Jean-Victor Louis describes the amended paragraph 5 of Article 133 of the EC Treaty as a way of extending the EC treaty-making powers in trade policy issues to

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619. Nice Treaty: Commission Equipped For New WTO Disasters, CORP. EUR. OBSERVER, Apr. 2001, http://www.corporateeurope.org/observer8/nice.html. The GATS, including its Annexes and Related Instruments, sets out a work program that is normally referred to as the "built-in" agenda. See id. The program reflects both the fact that not all services-related negotiations could be concluded within the time frame of the Uruguay Round, and that Members have already committed themselves, in Article XIX of the GATS, to successive rounds aimed at achieving a progressively higher level of liberalization. In addition, various GATS Articles provide for issue-specific negotiations intended to define rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). These negotiations are currently under way. At the sectoral level, negotiations on basic telecommunications were successfully concluded in February 1997 and negotiations in the area of financial services in mid-December 1997. In these negotiations, Members achieved significantly improved commitments with a broader level of participation.

620. Id.

621. Nice Treaty, supra note 8, art. 133 ¶ 5. The Treaty of Amsterdam had already created an enabling clause for the EU Council to extend the application of the common commercial policy provisions in Article 133, paragraph 5, to international negotiations and agreements on services and intellectual property. However, the EC had not yet made use of this possibility. See Treaty of Amsterdam Amending the Treaty on European Union, Treaties Establishing the European Communities and Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

622. Following the U.S. experience in trade agreements, the EU fast-track procedure refers to the authority that the EU trade commissioner has to negotiate agreements that the EU Council can approve or disapprove but cannot amend. The Council agrees on the mandate, and votes the trade agreement once it has been concluded. The European Parliament makes recommendations via its avis (simple or conforme) about the mandate or the course of the negotiations. See Rafael Leal-Arcas, The EU Institutions and Their Modus Operandi in the World Trading System, 12 COLUM. J. EUR. L. 151-53 (2005).
trade in services and the commercial aspects of intellectual property rights. In other words, the Nice Treaty has created a communitarian approach to services trade, with the exception of health, education, and audiovisual services.

The amended paragraph 5 does not affect the right of the EU Member States to maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with Community law and other relevant international agreements. In other words, the competence to negotiate agreements is not exclusive EC competence and not new to EC law; shared competence had already been used in Article 111, paragraph 5, EC on economic and monetary policy, Article 174, paragraph 4, EC on environmental policy, and Article 181, paragraph 2, EC on development cooperation (as inserted by the Maastricht Treaty). Much case law from the European Court of Justice, as well as a vast body of literature deals with the

624. Nice Treaty, supra note 8, art. 133 ¶ 5(4).
625. EC Treaty art.111. Article 111, ¶ 5 EC reads: "Without prejudice to Community competence and Community agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements."
626. EC Treaty art. 174, Article 174 (4) EC reads: Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.
627. Id at art. 174. Article 174 (4) EC reads: Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.
allocation of external competences between the EC and its member states before Nice.

A. Nature of and Ways to Exercise the Powers

As opposed to the powers in Article 133, paragraphs 1-4 of the EC Treaty as amended by the Nice Treaty, those in Article 133, paragraphs 5-7 are shared between the EC and its member states. One scholar, however, argues that these are exclusive powers and further claims that in Article 133, paragraph 5(4), there is a *habilitation spécifique*.

Another commentator claims that this provision establishes concurrent powers. Article 133, paragraph 5(4) states that paragraph 5 does not affect the right of the EU Member States to maintain and conclude agreements with third countries or international organizations insofar as such agreements comply with EC law and other relevant international agreements. This provision applies to trade in services and the commercial aspects of intellectual property rights, because agreements in this field are not covered by paragraphs 1-4 of Article 133. Paragraph 5 tacitly recognizes shared competence between the EC and its member states, although there is no explicit statement of such. Therefore, one would wonder whether there is a duty to cooperate between the EC and its member states, as referred to by the ECJ’s Opinion 1/94.

What appears to be a requirement in the exercise of their concurrent powers is that EU member states must comply with EC law. This means that EU member states must abstain from

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633. Nice Treaty, supra note 8, art. 133. Article 133, paragraph 5.4 reads: “This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.”


entering into agreements in matters where the EC has enacted intra-EC rules. Article 133, paragraph 6(1) states that the EC alone cannot conclude agreements if the agreements include provisions which go beyond the EC's internal powers. Therefore, a regime of mixed agreements exists because the conclusion of these agreements would require the signature of the EC and its member states. This article was introduced to prevent the adoption of agreements that would go beyond the EC's internal powers and lead to harmonization in areas where the Treaty expressly rules this out. The next subparagraph corroborates this interpretation by stating that agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall be concluded as mixed agreements by both the EC and its member states.

In such situations, the question of who is competent for what in relation to international agreements where the EC and its Member States have shared competence is unavoidable. Some authors say that shared competence "complicates the allocation of powers and responsibilities between the EC and the member states and is thus bound to cause difficulties for both international trade negotiations and for potentially necessary dispute settlement in the WTO." The inclusion of this derogation took place at the insistence of the French government, which was worried that globalization could lead to the disappearance of its national

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636. Krenzler & Pitschas, supra note 635, at 455; Hermann, supra note 635, at 272.

637. Nice Treaty, supra note 8, art. 133. Article 133, paragraph 6.1 reads: "An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation."


639. See Opinion 1/94, supra note 634, para. 1 (ruling on the EC's competence in relation to trade in services and the commercial aspects of intellectual property rights, as well as the relation between external and internal competence with respect to the harmonization of legislation).

640. Nice Treaty, supra note 8, art. 133.


heritage and culture. Derogation was important to preclude a situation where the EC, when exercising its external powers, could circumvent member states' internal procedures and, therefore, extend illegitimately the powers conferred to it by the Nice Treaty.

When negotiating and concluding an agreement on trade in services or on the commercial aspects of intellectual property rights, unanimity is required in the Council of Europe in the following three scenarios: (1) where such an agreement includes provisions for which unanimity is required for the adoption of internal rules (Article 133, paragraph 5 of the Nice Treaty) (For trade in services, only in a few cases does the adoption of internal EC rules require unanimity, namely Articles 47, and 57 EC); (2) where the agreement relates to a field in which the EC has not yet exercised the powers conferred upon it by the EC Treaty for the adoption of internal rules (Likewise, the ECJ has determined in its Opinion 1/94 that the EC does not have exclusive competence to conclude international agreements in fields in which it has not acted internally); and, (3) in the case of the negotiation and conclusion of the so-called horizontal agreements.

B. Reflections on the Scope of EC Power in Services Trade

Based on the scope and nature of the EC trade policy powers in the EC Treaty Article 133, paragraphs 5-7 as amended by the Nice Treaty and the way in which these are exercised, it is clear that these powers are about the defense and promotion of the EC interests in the wider world. Rather than opting for shared competence between the EC and its member states in services trade and the commercial aspects of intellectual property rights, the Nice Intergovernmental Conference (IGC) could have included these matters within the scope of Article 133 of the EC Treaty as had been anticipated. The Nice Treaty could have made the qualitative jump by treating services trade and the commercial

643. Id. at 32.
644. Id. at 33.
645. EC Treaty art. 47. Article 47, paragraph 2.
646. EC Treaty art. 57. Article 57, ¶ 2.
647. Nice Treaty, supra note 8, art. 133, ¶ 5(2).
649. Nice Treaty, supra note 8, art. 133, ¶ 5(2). By horizontal agreement it is understood an agreement which deals with several fields.
aspects of intellectual property rights in the same way as trade in goods, given the important role of services trade in the EC's economy, the growing share of services trade in the EC's external trade, and the current trends in the WTO regarding services trade negotiations and rule-making.

The services trade and the commercial aspects of intellectual property rights are of concern because there could be situations where an EU member state would not be able to solve a trade matter individually in the most advantageous way. The EC collectively is in a much better position to negotiate. The Nice IGC failed to give the EC the important position it needs in the world trading system by treating services trade differently than goods trade, and by focusing too much on internal matters of decision-making. Thereby, it created potential intra-EU fragmentation. However, it is empirically true that requirements of unanimity alone do not necessarily lead to a reduced position of the EC in the international sphere.

The Nice IGC missed the opportunity to give the EC greater weight in all issues of international trade negotiations. Requiring unanimity in the EU Council and shared competences may jeopardize the efficiency and effectiveness of the EC in the world trading system. In addition, the Nice IGC granted the extension of EC trade policy powers in the field of services trade and the commercial aspects of intellectual property rights only at the conclusion of international agreements, not to the implementation of such agreements.

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

650. For example, the EC had a leading role in the Uruguay Round, despite its internal decision-making rules.
651. See Nice Treaty, supra note 8, art.133 § 6.
652. Id. art. 133 § 5(1).
653. Id. art. 133 § 5(2).
C. Are the Nice Treaty and the Constitutional Treaty the Beginning of the End of Mixed Agreements/Shared Competence?

The evolution of the EC's common commercial policy seems to empower the EC in trade matters, diminishing the ability of EU member states to interact in the international trade arena, as demonstrated in the Treaty Establishing a Constitution for Europe, analyzed below.

1. A Note on Mixed Agreements

Mixed agreements ("mixity") are agreements where both the EC and its member states are contracting parties to an international agreement with a third party. Mixity has been a topic for scholarly debate.

Interestingly enough, mixed agreements, important as they are, were not foreseen in the Treaty of Rome. However, the concept does appear in the Treaty establishing the European Atomic Energy Community (EAEC), and is incidentally

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654. McGoldrick, supra note 638.


656. Granvik, supra note 655, at 256.

inscribed in Article 133(6) EC as amended by the Nice Treaty. As scholar Lena Granvik correctly asserts, "the very same article [Article 102 of the Treaty establishing the EAEC] has later been accepted [by EC law-makers] as a suitable model for the EC." Following this same line of thought, some scholars also point out that there is no doubt about the existence and legal validity of the concept of "mixed agreement." Their proof lies in Article 102 of the Euratom Treaty, where "[a] form of mixed agreement is recognized and which makes explicit provisions for treaties that are to be concluded by the Community and one or more Member States." It is nevertheless unfortunate that the Constitutional Treaty did not expressly recognize mixed agreements in the legal text.

The legal phenomenon of mixed agreements poses various complex issues. These agreements must be ratified by all the EU national parliaments of the countries that are contracting parties to a given mixed agreement. This process creates uncertainty as to the liability of the EC and its member states to third parties, as well as the limits of the ECJ's competence to interpret such agreements.

The mixed procedure as a legal phenomenon has been used since the 1960s in many policy areas ranging from commercial policy to environmental policy, from international cooperation to the management and conservation of the resources of the sea.

reads:

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

658. Nice Treaty, supra note 8, art. 133.
659. Granvik, supra note 655, at 256.
660. MACLEOD ET AL., supra note 630, at 143.
661. Euratom Treaty, supra note 657. It is precisely in Article 102, which reads: Agreements or contracts concluded with a third State...to which, in addition to the Community, one or more Member States are parties, shall not enter into force until the Commission has been notified by all the Member States concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws."

662. MACLEOD ET AL., supra note 630, at 143-44.
664. JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER
The general trend towards the use of the mixed formula both in the multilateral and bilateral contexts seems to be continuing.665

There should be no doubt about the general validity or actual practical significance of the mixed procedure; important EC and Member States’ international relations policy areas are organized based on the mixed agreements technique. As a matter of principle, this procedure is no longer contested on any legal grounds.666

The ECJ has recognized in Ruling 1/78, Opinion 1/78, Opinion 2/91, and Opinion 1/94 (regarding the WTO Agreement) inter alia that some agreements require the participation of both the Community and the member states.667 From this, one can deduce that not all Community competence is exclusive.668 Furthermore, the concept of mixed agreement is a well-established part of EC law in the everyday practice of the Community institutions.669 An example of this is Demirel v. Stadt Schwäbisch Gmünd,670 in which the ECJ used the term “mixed agreement” to describe the Association Agreement between the Community and the member states on one side and Turkey on the other.671

Mixed agreements raise difficult and interesting legal and political issues about the role of the Communities and the EU Member States in the international arena.672 Despite the legal uncertainties, in practice, the Community and the EU Member States participate together effectively in various international agreements.673 Mixed agreements in the field of international treaty

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665. Id. at 2-3. Almost all the EC’s association agreements under article 310 EC have been concluded as mixed agreements, the only exceptions being the agreements with Cyprus and Malta. Republic of Cyprus, 1973 O.J. (L 133) 2; and Malta, 1971 O.J. (L 61) 2.
668. See Opinion 2/91, 1993 E.C.R. I-1061, para. 5 [on the ILO Convention No. 170 on Safety in the Use of Chemicals at Work, which is only open to Members of the ILO (Art. 21)].
669. MACLEOD ET AL., supra note 630, at 144.
671. MACLEOD ET AL., supra note 630, at 144.
672. Id.
673. Id.
law reflect the changes that international law has undergone through the establishment of entities such as the EC.\textsuperscript{674}

In this same vein, Allan Rosas argues:

The European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only natural that its external relations in general and treaty practice in particular should not be straightforward. The phenomenon of mixed agreements \[\ldots\] offers a telling illustration of the complex nature of the EU and the Communities as an international actor.\textsuperscript{675}

We speak of complex nature because the agreement must be a Community and a national agreement at the same time. This means that Europe has twenty-seven voices (one for each member state) plus one more voice coming from any of the European communities.

The phenomenon of mixed agreements is, therefore, not only deeply interrelated to EC law and its division of powers doctrine, but also to public international law. Dominic McGoldrick points out that “each international agreement will require consideration of its subject matter to determine the allocation of competence between the EC and the Member States, and the nature of that competence.”\textsuperscript{676} This allocation of competence can evolve over the lifetime of an agreement. This is so even during the drafting of an agreement, such as the agreement in Commission v. Council (\textit{FAO Fisheries Agreement}),\textsuperscript{677} or a series of agreements. This also has been the case with the GATT.\textsuperscript{678} According to public international law, the rights and obligations that derive from an agreement form an undivided entity.\textsuperscript{679} This does not necessarily mean, however,

\begin{footnotes}
\item[674] C. Tomuschat, \textit{Liability for Mixed Agreements, in MIXED AGREEMENTS, supra} note 655, 125, 125-32.
\item[675] Rosas, \textit{supra} note 655, at 125 (“The possibility of mixed agreements is expressly recognized in Article 102 of EURATOM. The expression “mixed agreements” has been used by the Court of Justice, e.g., in Case 12/86, Demirel [1987] ECJ 3719 at 3751 (paragraph 8).”). \textit{See also} DOLMANS, \textit{supra} note 655; Neuwahl, \textit{Mixed Agreements, supra} note 655; MACLEOD ET AL., \textit{supra} note 630, at 142-64.
\item[676] McGOLDRICK, \textit{supra} note 638, at 78-79.
\item[677] Id. at 79. Case C-25/94, Comm’n v. Council (\textit{FAO Fisheries Agreement}), 1996 ECR 1-1469.
\item[678] McGOLDRICK, \textit{supra} note 638, at 79; \textit{see also} Ernst U. Petersmann, \textit{Participation of the European Communities in the GATT: International Law and Community Law Aspects, in MIXED AGREEMENTS, supra} note 655, 167, 167-98.
\item[679] \textit{See generally} McGOLDRICK, \textit{supra} note 638.
\end{footnotes}
that the EC and its member states cannot respect the internal division of competence according to EC law.  

2. A Note on Shared Competence

Shared competence between the EC and its Member States implies the fragmentation of unity in the EC and translates into less power for the EC in the international arena. Alternatively, EC exclusive competence facilitates international negotiations, because the European Commission is the only competent actor in any given matter. Experience has shown that mixed agreements can and do cause delays, which can actually worsen negotiating situations.

Trade is one area where EU Member States have politically agreed to delegate representation. However, EU Member States have started to question the transfer of sovereignty to the EC level, especially on issues such as services, investment, and intellectual property rights. Opinion 1/94 of the ECJ clearly

682. Id.
683. Id.
684. See EC Treaty art. 300 §1: "[T]he Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it."
685. See generally PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION (2004). Sovereignty is one of the most used and misused concepts of international affairs and international law. Sometimes, it refers to the role of states in international organizations. Other times, it refers to internal division of power, or the degree of government authority toward its citizens. Richard N. Haass has defined sovereignty in the following manner:

Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components — internal authority, border control, policy autonomy, and non-intervention — is being challenged in unprecedented ways.

acknowledged that the EC and the EU Member States share competence in these areas.\textsuperscript{686} A few years later, the Amsterdam Treaty reinforced restrictions on transfers of sovereignty to the EC level in the area of trade by allowing EU member states to decide to delegate competence on a case-by-case basis at the end of negotiations.\textsuperscript{687}

With the new balance between Brussels and national institutions as well as that between national institutions and regional and local authorities, a rebellion of sorts has started in Europe.\textsuperscript{688} As Yves Meny rightly points out, “any attribution of powers is arbitrary and therefore political; in fact, even if some criteria of efficiency and rationality are taken into account, it is mainly on the basis of political criteria that powers are distributed among the various decision-making ... levels.”\textsuperscript{689} Even if there are expectations for eliminating overlap in competences between the EC and its Member States, “[the] economic and social reality is so extremely complex that the hope of reaching a clear separation of powers is an illusion.”\textsuperscript{690} It is therefore important to establish the methods and instruments for the exercise of competences.\textsuperscript{691}

Competences in the EC are joint because member states prefer to preserve their own national competence.\textsuperscript{692} This approach, which is reflected in the Opinion 2/91,\textsuperscript{693} weakens the

\begin{footnotesize}
\begin{enumerate}
\item Opinion 1/94 1994 E.C.R. I-5267.
\item Treaty of Amsterdam, supra note 621. The Treaty of Amsterdam is the result of the Intergovernmental Conference launched at the Turin European Council on March 29, 1996. It was adopted at the Amsterdam European Council on June 16 and 17, 1997 and signed on October 2, 1997 by the Foreign Ministers of the then fifteen EU Member States. It entered into force on May 1, 1999 (the first day of the second month following ratification by the last Member State) after ratification by all the Member States in accordance with their respective constitutional requirements.
\item Yves Meny, The External and Internal Borders of the Great Europe, INTERNAT’L SPECTATOR, Apr.-June 2002, at 19, 22. Brussels is used to refer to the EU supranational apparatus of decision-making, where many of the EU institutions reside.
\item Id.
\item Id.
\item Id.
\item Opinion 2/91, 1993 E.C.R. I-1061.
\end{enumerate}
\end{footnotesize}
constitutional position of the Community in the field of external relations. On the other hand, shared competence arguably increases the leverage of the most protectionist EU countries. Shared competence implies a strong voice if EU Member States and the Commission sings as a polyphonic "choir." In mixed agreements, if there is more than one negotiator other than the EC, then the EC's negotiating position, (although not necessarily that of Member States) is weakened. As long as the external competence is not exclusively EC competence, member states remain free to enter into multilateral treaty relations either alone or collectively. The tension created by the mixture of competences between the EC and its member states is seen as an obstacle to the achievement of Community interests as a whole, and are a problem for Europe's trade partners. Even though Article 133 of the EC Treaty gives exclusive competence in commercial policy to the EC, the treaty also limits this competence.

According to Jean Groux, it is preferable for third states to have a mixed procedure because they are not familiar with dealing with the EC, the competences and responsibilities of which they know only imperfectly. For example, if a third party like the United States has complete information about the member states' positions, then it is easier to accept that the EC acts with a single voice. For third parties, there are at least three main variables to take into consideration: (1) secrecy, (2) physical difficulty for a third party to obtain information, and (3) institutional processes.

Secrecy means having the EC represented as a single entity in international agreements obscures information about an individual member states' position. Since secrecy causes diminished

694. Editorial Comments, supra note 682, at 386.
696. Even if de jure this is a plausible situation, de facto it has never happened.
697. See generally McGoldrick, supra note 638, at 86-88 (examining the practical effects of mixed agreements on the negotiation, conclusion, and implementation of agreements).
700. Id.
701. Id.
702. Id.
transparency, agreements might be more difficult to reach.\footnote{Groux, supra note 655. See also MEP Urges EU Council to Prop up Transparency, EURACTIV, Feb. 24, 2006, http://www.euractiv.com/en/governance/meps-urge-eu-council-prop-transparency/article-152940. The term 'transparency' is often used in a broad sense to mean openness in the way the Member States' and EU institutions work. EU institutions are committed to greater openness and are taking steps to improve public access to information and to produce clearer and more readable documents. See id.} The physical difficulty associated with a third party obtaining information is linked closely to secrecy.\footnote{Id.} Having a single voice in the EC can make it harder for a third party to negotiate.\footnote{Id.} Furthermore, exclusive EC competence requires a third party to understand the unique institutional processes that may involve various Directorates-General of the European Commission, for example.\footnote{See generally MACLEOD, supra note 638.}

Knowing that the presumption in the EC is for collective action, is there really a “common” European interest? If there is a common interest, is this interest so great that it creates a presumption that member states will act with a single voice? Do Member States truly have enough commonality in their national interests to act with one voice in the international sphere?

When the EC has had the primary responsibility of negotiating on behalf of its Member States, third-party states have overtly put pressure on the Community to use the mixed negotiation technique.\footnote{See Commission of the European Communities, Directorate-General Information, Communication, Culture, The European Community’s Relations with COMECON and its East European Members 1, 76/X/89, Jan. 1989, available at http://aei.pitt.edu/1681/01/comecon_relations_er_1_89.pdf.} For example, the negotiations between the EEC and the Council for Mutual Economic Assistance (Comecon)\footnote{Comecon was an economic organization from 1949 to 1991, linking the U.S.S.R. with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, East Germany (1950–1990), Mongolia (from 1962), Cuba (from 1972), and Vietnam (from 1978), with Yugoslavia as an associated member. Albania also belonged between 1949 and 1961. Its establishment was prompted by the Marshall Plan. Comecon was formally disbanded in June 1991. It was agreed in 1987 that official relations should be established with the European Community, and a free-market approach to trading was adopted in 1990. In January 1991 it was agreed that Comecon should be effectively disbanded. See RICHARD SCHAEFFER, BEVERLY EARLE & FILIBERTO AUGUSTI, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 102 (4th ed. 1999).} began in 1975 with a view to normalizing the relations of the Community with the East European countries.\footnote{709. See Commission of the European Communities, Directorate-General Information, Communication, Culture, The European Community’s Relations with COMECON and its East European Members 1, 76/X/89, Jan. 1989, available at http://aei.pitt.edu/1681/01/comecon_relations_er_1_89.pdf.}
The East European countries, which were somewhat reluctant to officially recognize the Community, had great difficulty in accepting the decision of the European Council that negotiations would be conducted by the Commission alone. They tried in vain to ensure the participation of the individual Member States.\(^{710}\) In fact, the EC and Comecon did not establish official relations with each other until 1988.\(^{711}\) That position changed shortly before Comecon dissolved.\(^{712}\)

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

Given that the Constitutional Treaty will not enter into force, the Nice Treaty provides the current legal framework of analysis.\(^{713}\) Article 133, paragraph 5, of the EC Treaty as amended by the Nice Treaty, gives the EC exclusive competence in all areas of services except three: health, education, and audiovisual services and culture.\(^{714}\) If these three exceptions are the basis of any international trade agreement, the EU Council must act unanimously in the negotiation and conclusion of such agreements.\(^{715}\) In addition, Article 133, paragraph 4, of the EC Treaty requires that decisions in the EU Council be made by a qualified majority.\(^{716}\) In light of the Doha rounds, the exception to this rule would take effect if the DDA includes the three services


\(^{712}\) See generally Commission of the European Communities, supra note 708.


\(^{714}\) Nice Treaty, supra note 8, art. 133 ¶ 6. Articles 133, paragraph 6 reads:

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

\(^{715}\) Nice Treaty, supra note 8, art. 133 ¶ 5.

\(^{716}\) Id. art. 133 ¶ 4.
trade exceptions that appear in Article 133, paragraph 6 of the EC Treaty (health, education, and culture). If so, unanimity would apply, and EU member states could use their veto power in the EU Council.

The agreements associated with the DDA negotiations can take the form of a single undertaking, or a series of individual agreements, organized by subject-matter (the so-called variable geometry). Given the current state of EC law, one could assume that some aspects of the Doha Round would be concluded by the EC alone and other aspects by the EC and its member states together. However, since the Doha Round (like the Uruguay Round) will most likely be signed as a package, and certain services (namely health, education, and culture) are shared competence in EC law, it would likely result in a mixed agreement signed by both the EC and its member states.

For services trade in the Doha Round, another possibility would be for the Doha agreement to be signed as a pure EC agreement. How it would be signed (whether as a pure EC agreement or mixed agreement) depends on the analysis and interpretation of the Nice Treaty with respect to trade in services, as well as on whether there will be a separate GATS revision (which would include the three services trade exceptions in Article 133, paragraph 6 of the EC Treaty) or just one global WTO Trade Agreement. This raises the question whether there will there be any new commitments in the Doha Round for the EC in culture, education, and health.

It could be argued, then, that the Doha Round could be signed by the EC and its Member States as a mixed agreement, in light of the changes introduced by the Nice Treaty to the common commercial policy. The DDA will not need to be a mixed agreement, however, unless one includes the three exceptions in services trade referred to in Article 133 EC. There will be no need for a mandate from EU Member States, because the EC will have exclusive competence based on the changes made to Article 133 EC by the Nice Treaty. Such an approach will have implications for EU national parliaments in that they will not ratify trade agreements (such as the DDA); instead, the Council will ratify these agreements. If the Doha Round is not signed as a mixed agreement, these agreements would not be ratified by national

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717. Id.
parliaments since they would remain only a matter of supranational nature. Serious questions concerning legitimacy might surface as a result of this praxis.

Not everyone, however, has the same conception of the legal consequences of the DDA for EU Member States where the three exceptions of Article 133, paragraph 6, of the EC Treaty are excluded from the Doha agenda. Jose Alberto Plaza, Deputy Director General of International Services Trade and Electronic Trade at the Spanish Ministry of Industry, Tourism, and Trade, argues that all EU member states should vote and decide by unanimity in the EU Council when it comes to such delicate issues as health, education, and audiovisual services at the national level. The same is true for the so-called Mode 4, which affects national immigration policies. Mode 4 also requires unanimity in the Council of Europe. Therefore, according to Plaza, it is not viable to talk about exclusive competence in trade in services in the Nice Treaty. Certain aspects of trade in services cannot be negotiated by the Commission without consulting EU member states, he argues. In fact, it is not possible to talk about trade in services without penetrating the national regulatory system. For example, given the different immigration policies among EU countries, it is unimaginable to have a common EU immigration policy. For this reason, it is impossible to exclude EU member states from the ratification process of the Doha Agreement.

Furthermore, Plaza argued the regulation and progressive liberalization of services implies that the legislator must go well beyond market regulation and the national-treatment principle. Examples include the services directives in the EU, which by law leave room for EU member states to maneuver because they affect the national regulatory system. Even if international trade is the subject matter of these directives, we are still dealing with
domestic regulation. In Plaza’s opinion, the only mode where the Commission might avoid EU member states’ involvement would be in Mode 1 (tariffs, etc.), but even there EU member states have much to say.\footnote{728}{Interview with Jose Plaza, supra note 200. For more on Mode 1, see supra notes 142-143 and accompanying text.}

On the other hand, if the three services trade exceptions presented in Article 133, paragraph 6, of the EC Treaty are included in the DDA package, then the unanimity/veto power of EU member states in the Council applies.\footnote{729}{Nice Treaty, supra note 8, art. 133 \textsuperscript{6}.} In other words, legally speaking, the ability of any EU Member State to veto a final WTO deal depends on the outline of the final deal, because trade agreements are in fact subject to qualified majority voting in the EU Council, unless they cover certain areas, such as those expressed in Article 133 (6.2), which would then require unanimity. However, the more likely scenario requiring unanimity is that the Doha agreement would be concluded as a single undertaking.

An agreement concluded as a single undertaking would have a significant impact. During the pre-Hong Kong negotiations on agriculture, the French government wanted to use its veto power to protect its agricultural policy in the world trading system – even though agricultural policy is exclusive EC competence.\footnote{730}{French WTO Stance Irks EU Trade Chief, EURACTIV, Jan. 16, 2007, http://www.euractiv.com/en/trade/french-wto-stance-irks-eu-trade-chief/article-160911.} The French argued that if the DDA is to be conceived as a single undertaking, the inclusion of the three services trade exceptions in the final package of the DDA would enable France to activate its veto power across all areas by virtue of having shared competence with the EC.\footnote{731}{Id.} This would put France in a position to reject the DDA as a single undertaking because of its disagreement with the rest of the world trade community over agriculture.\footnote{732}{Id.} In other words, France’s could use its veto power in the services trade exceptions to send a political message in order to protect its agriculture by rejecting the entire DDA due to conflict with other EU member states over agriculture.

How can the Doha Round be reconciled with the fact that specific, nationally delicate issues such as culture, education, and
health are within EU member states’ exclusive competence? In the past, EU Member States have shown their interest in maintaining their sovereignty in these delicate issues. However, even if all EU Member States are contracting parties to the GATS, the Doha Round could potentially be concluded as a pure Community agreement and still be consistent with the legal procedures of the EC external relations practice.

A pure EC agreement can be consistent with the EC’s external relations practice because since the Nice Treaty, services trade can be the object of a pure Community agreement with shared competence. Certainly, there are varied opinions in this whole debate; the Commission wants to present the Doha agenda in the EU Council as a package to be signed by qualified majority vote. In Plaza’s view, this will not be possible in services trade, not even under the EU Constitutional Treaty, which claims to give exclusive competence to the EU in all areas of the common commercial policy, simply because EU Member States will not accept it.

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

<table>
<thead>
<tr>
<th>EC’s Perspective on WTO Agreement</th>
<th>Voting Requirement in the EU Council</th>
<th>Conception of the DDA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mixed agreement, if the inclusion of the three services trade exceptions takes place in the Doha package</td>
<td>Unanimity/Veto Power</td>
<td>Single undertaking</td>
</tr>
</tbody>
</table>

733. See, e.g., Rafael Leal-Arcas, Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice, 30 LEGAL ISSUES ECON. INTEGRATION 3, 8-9 (2003). See also Rafael Leal-Arcas, Doha Negotiations on Trade in Services: Consequences of the Nice Treaty Reform and the Constitutional Treaty (The Federalist Trust for Educ. & Research, Online Paper 22/04, 2004), http://www.fedtrust.co.uk/uploads/constitution/22_04.pdf (citing Ctr. for Int’l Dev. at Harvard Univ., supra note 220 (noting local and national government sovereignty concerns on the additional issues of land use, licensing, and environmental health)).

734.Nice Treaty, supra note 8, art. 133 ¶ 5.

735. Interview with Jose Plaza, supra note 200.


737. Interview with Jose Plaza, supra note 200.
Despite the complexities that an agreement signed as a single undertaking could bring, the Doha Round, as was the case with the Uruguay Round, will be signed as a mixed agreement, even though the substance and nature of the services negotiations in the Uruguay Round and the Doha Round are rather different. 738 The Uruguay Round laid the ground rules for trade in services in the GATS, whereas the Doha Round aims to extend trade liberalization and to complement those ground rules. 739 There would probably be no repercussions of the Doha Round on the EU Member States if it were to be signed as a pure Community agreement with shared competence between the EC and its member states in the case of services trade. In the end, the difference between signing the Doha Round as a pure EC agreement or as a mixed agreement is merely procedural in nature.

With respect to the practical consequences of mixed agreements, the current situation is as follows:

If an agreement (also or solely) concerns concessions relating to services, intellectual property or investments, the general rules of the [Nice] Treaty apply. Under those rules, agreements are concluded by qualified majority or unanimously depending on whether the Community’s internal decisions in that area (services, intellectual property rights) are taken by qualified majority or unanimously. In addition, Member States often wish to exercise their residual powers in those fields in which no internal Community rules apply or do not yet apply. As a result, trade agreements concerning different fields very often have to be concluded unanimously, or even by the Community (Council decision) and by all the Member States as well. This entails

| Pure Community Agreement | Qualified Majority Vote | Series of individual agreements, organized by subject-matter |

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739. That said, some of the controversial issues of the Uruguay Round such as audiovisual services are still on the negotiating trade agenda. See Bruno de Witte, *Trade in Culture: International Legal Regimes and EU Constitutional Values, in The EU and The WTO: Legal and Constitutional Issues* 237-55 (Gráinne de Búrca & Joanne Scott eds., 2001).
ratification by national bodies (‘mixed’ agreements). 740

A practical consequence of mixed agreements is that the Community’s dealings with third countries must be conducted unanimously. 741 “Statistically, enlargement will increase the risk of a member state using its veto to prevent the Community from adopting a common position. This collective weakness may work to the advantage of the Community’s trading partners.” 742

A careful contextual reading of the term “consequently” in Article 133, paragraph 6(2) of the EC Treaty as modified by the Nice Treaty could lead to the conclusion that shared competence necessarily requires a mixed agreement. 743 That notion, however, is inconsistent with existing practice by the EC under other external relations headings. 744 Thus, one should understand Article 133, paragraph 6(2) of the EC Treaty as modified by the Nice Treaty as a lex specialis for the fields of culture and audiovisual services, education, and social and human health services. 745 As a matter of law, these fields fall within shared competence between the EC and its member states and require mixed agreements for reasons of their particular national sensitivity. 746

4. The Constitutional and Lisbon Treaties and International Services Trade

The ratification of the EU Constitutional Treaty failed. It is somewhat paradoxical that in the period since the collapse of the Berlin Wall, at precisely the time in which there were few credible alternatives to liberal democracy, there have been growing doubts about the capacity of the structures and institutions of liberal democracy to respond to contemporary problems. 747 Because the EU Constitutional Treaty did not enter into force, the European

741. Id.
742. Id.
744. See id. at 67.
745. See generally id. at 70-74 (commenting on the complexity of the Nice provisions of Art.133).
746. See generally id. at 137-81 (describing international commitments and mixity).
Council meeting of June 2007 agreed on a fall-back revision treaty which confirms much of the substance of the EU Constitutional Treaty, including the provisions concerning external trade.\textsuperscript{748} Therefore, an examination of these external trade provisions is amply justified, since they are still likely to enter into force, possibly in 2009.

Before the European Council of June 2007, the idea was that when the EU Constitutional Treaty would enter into force, the EC Treaty, the EU Treaty, as well as acts and Treaties which have supplemented or amended them, would have been repealed, as laid down in the general and final provisions in Part IV of the EU Constitutional Treaty. The EU Constitutional Treaty was supposed to enter into force after ratification by all EU Member States. It was also provided for that the Union would succeed to all the rights and obligations, whether internal or resulting from international agreements, which arose before the entry into force of the EU Constitutional Treaty. The case-law of the ECJ would have been maintained as a source of Union law interpretation. As stated in Article 1-6 of the EU Constitutional Treaty, the Constitution and law adopted by the Union’s institutions in exercising competences conferred on it would have had primacy over the law of the Member States.

On 23 July 2007, the Portuguese Presidency launched an intergovernmental conference for the negotiation of a Lisbon Treaty, embracing a revised Treaty on European Union and a revised European Community Treaty, which would be called a Treaty on the Functioning of the European Union. Much if not all of the content of the new Treaties was agreed at the European Council meeting in Brussels on 21 and 22 June 2007. The Portuguese Presidency produced a draft text of the new Treaties on 23 July 2007, reflecting the agreement at the European Council in June 2007. In theory therefore, this intergovernmental conference was meant to be less controversial than its predecessors which led to the Single European Act and the Maastricht, Amsterdam, and Nice Treaties, as well as the abandoned EU Constitutional Treaty. The European Council decided that the intergovernmental conference would conclude before the end of 2007, so that the Lisbon Treaty could be ratified by all 27 EU Member States before the European Parliament elections in

\textsuperscript{748} Presidency Conclusions, Brussels European Council (June 21/22, 2007).
November 2009.

The EU Constitutional Treaty has given more competences in trade policy to the supranational level, which causes problems for national governments. In practice, the problems arise because there is no definition or scope of common commercial policy in the EU Constitutional Treaty. Therefore, if a given agreement is on a subject of national regulation, then it will have to be signed as a mixed agreement.

Under the EU Constitutional Treaty, the EU may take coordinating, complementary, or supporting action in public health, culture, and education. This provision seems to be in direct conflict with the commitments of the Constitutional Treaty in international trade policy (Articles III-314 and 315).

The distinction between a qualified majority and unanimity in the Council in the Constitutional Treaty depends on the area of trade policy. The voting requirements for decision-making in the EU Council appear in paragraph 4 of Article III-315 of the Constitutional Treaty. The idea of the Convention was to provide for the use of qualified majority voting as a rule. However, the Convention version of Article III-315 did not specifically mention qualified majorities. The omission was rectified by adding a paragraph 4 of Article III-315: “For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority.” This amended provision suggests that only the negotiation and conclusion of international agreements shall be subject to the majority rule, but not the adoption of unilateral actions and the
implementation of agreements. Nevertheless, majority voting is already in the Nice Treaty's general rule for the exercise of powers in the field of commercial policy. Thus, the proposed provision should be interpreted in such a way that majority voting applies as a general rule, subject to the exceptions provided for in paragraph 4, subparagraphs 2 and 3, of Article III-315. That said, a trade agreement that includes issues that require unanimity as well as qualified majority must be concluded by unanimous vote in the EU Council according to the Pastis principle.

The EU Constitutional Treaty has provided more competences to the EU in trade matters. Some may argue that the following articles protect the rights of EU members to determine policy on health, education, and cultural/audiovisual services: Articles I-17, III-278 on public health, III-280 on culture, III-282 on education, III-315, paragraph 4 of the common commercial policy on cultural and audiovisual services, and III-315, paragraph 5 of the common commercial policy on the delineation of the competences of Member States as against those of the EU. However, these Articles offer little legal protection against the provisions of Article I-13, paragraph 1, which gives the EU the exclusive right to determine its common commercial policy, and Article III-315, paragraph 1 of the common commercial policy, which includes the right to make “trade agreements relating to trade in goods and services.”

Article III-315, paragraph 1 of the common commercial policy allows the Commission, after a Qualified Majority Vote in the Council of Ministers, to make deals in the GATS and the

756. Nice Treaty, supra note 8, art. 133, ¶ 4 (stating: “in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority.”)
759. Id. art. III-278.
760. Id. art. III-280.
761. Id., art. III-282.
762. Id. art. III-315, ¶ 4.
763. Id. art. III-315, ¶ 5.
765. Id. art. III-315, ¶ 1.
WTO Agreement on what the Commission defines as the commercial aspects of these services.\textsuperscript{766} The commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere.\textsuperscript{767} This implies that an EU member state would have to go to the ECJ to challenge the Commission, arguing that the Commission was opening trade in non-commercial aspects of these services. This would be a very difficult legal argument to make, because many services can be broken into individual functions and contracted out as seen in Ireland and the UK.\textsuperscript{768} In practice, these articles are but a fig-leaf covering the overriding drive toward uniform liberalization of trade in services contained in the common commercial policy. If those who cite these articles are serious about protecting health, education, and cultural/audiovisual services from commercialization, they should at least press for the retention of the unanimity requirement in the Council of Ministers on decisions to open trade in these services.

With regard to culture and audiovisual services, Article III-315, paragraph 4, of the EU Constitutional Treaty allows a veto on changes in the common commercial policy only in the conclusion of agreements “in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union’s cultural and linguistic diversity.”\textsuperscript{769} How such risk is defined, when it is defined, and by whom it is defined, is open to interpretation. Would a general opening up of the University sector, or of the primary school sector to unlimited competition (as is happening in the UK\textsuperscript{770}) pose a threat to cultural and linguistic diversity? For instance, in the case of Ireland, would the same levels of support to linguistically specific radio and TV – like TG4\textsuperscript{771} and the projects it supports – also have to be given to private commercial channels?

\textsuperscript{766} Id. art. III-315, ¶ 1.
\textsuperscript{767} Constitutional Treaty, supra note 736.
\textsuperscript{769} Constitutional Treaty, supra note 736, art. III-315, ¶ 4(a).
\textsuperscript{771} TG4 is an Irish television channel aimed at Irish language speakers and established as a wholly owned subsidiary by Radio Telefis Eireann on October 31, 1996. It was known as Teilifís na Gaeilge or TnaG before a rebranding campaign in 1999. TV3 Ireland is the sole commercial terrestrial television channel in the Republic of Ireland. See TG4 – Irish language television channel, Teilefis Gaeilge – Corporate, http://www.tg4.ie/Bearla/Corp/corp.htm.
like TV3? How would defenders of linguistic diversity establish, in advance rather than after deals have been made and the damage is already done, that certain trade agreements pose risks to culture? The EU Constitutional Treaty does not define who decides on what constitutes a risk, so those who might see their culture at risk might not have veto powers." 772. Certainly, EU member states will continue to participate in the EU’s trade policy whenever there is a national regulation sector that the European Commission neither controls nor knows about when it comes to national preoccupations. In practice, the ECJ will determine which services should be protected and which should be commercialized.

VI. EPILOGUE AND RECOMMENDATIONS

Since the suspension of the multilateral trade talks, EU Member States should have pressed for a wide-ranging EC approach to the Doha Round aimed at tackling the main barriers to trade in services. The EC should overcome the failure of Cancun and work on a framework for negotiations in order to secure a successful outcome of the Doha Round. The EC needs to adapt to the changes taking place in the world trading system and world trade negotiations. There remains considerable potential for further liberalization, even if the growth of North-South trade over the last decade has been quite remarkable. Nevertheless, certain fields such as culture, education, health and public services remain a barrier to the current trend of services liberalization.

The Irish poet W.B. Yeats wrote that, when things fall apart, the center cannot hold." 773. A key question if the Doha round falls apart for good is whether anything can hold the WTO and the multilateral trading system together. Doha could mark the end of multilateral negotiating rounds in favor of a swing toward regional or bilateral trade agreements.

The WTO is in seemingly inevitable drift away from the hard politics of trade liberalization and the rules that underpin it. Serious players will switch to preferential trade agreements, and they will be tempted to disobey existing multilateral rules. In essence, the WTO suffers from severely diminishing returns. In

Resumption of Doha

contrast to the GATT, the WTO has a bigger, messier, and politically more controversial agenda, fraught with multiple and contradictory objectives. Furthermore, decision-making is crippled in a general assembly with near-universal membership.

The EU needs to find a more effective way of negotiating multilaterally. The WTO family has grown substantially, both in its number of members (at the start of the Uruguay Round, there were only eighty-six members) and in its agenda in the last few years. This means that the legal, economic, and political needs and interests of the various WTO members might differ drastically. Thus, variable geometry seems to be the most plausible way to move the multilateral trade agenda forward. The same is true for the EU’s so-called enhanced cooperation. The variable geometry approach has the advantage of removing the current frustration at the WTO negotiating table, as well as the sometimes-violent protests organized by civil society, with its slow negotiating pace. However, one disadvantage might be that the developing countries might feel marginalized at the WTO. Furthermore, the WTO members’ ambitions must be scaled back.

Experience has shown that the expectations of the world trading system’s agenda cannot be met by the current multilateral trade negotiations. It is not possible to get decisive progress without lowering expectations for the Doha Round. Although agriculture is key to disentangling the Doha talks, opening up service markets also remains vital to a successful outcome. Many developing countries consider the sending of services and supplies to lucrative markets under Mode 4 of the GATS to be one of the principal areas of negotiations for the Doha Round. Whether the development promise of the Doha Round is achieved will depend on the extent to which the present level of commitments under Mode 4 is expanded.

With one eye on this round and another on future rounds, this Article recommends governments push for a strong and timely conclusion to the trade talks, to talk to their citizens about the importance of a Doha agreement, and to build the necessary coalitions among diverse stakeholders to pass a final Doha agreement. Finally, four major constraints stand in the way of a strong conclusion to the current trade negotiations: (1) lack of vision, (2) lack of trust, (3) limited process, and (4) narrow vision of development.
Lack of Vision

Leaders are urged to create a new vision for trade agreements that moves beyond narrow mercantilism to focus on the benefits for consumers as well as producers. Leaders should talk about the benefits of service sector reforms and customs procedure improvements — not just improved market access in agriculture and industrial goods. Reforms in financial services, telecommunications, and customs procedures are essential to exporters. Leaders also need to explain to their constituents the role that trade and multilateral institutions can play in improving security and promoting peace. However, leaders are also urged to be more forthright about the challenges that come with trade reforms. Leaders must acknowledge that there are losers from trade reforms, and must address the dislocations caused by trade agreements. They must be careful not to oversell the benefits — or the problems — caused by trade agreements.

Lack of Trust

Some developing countries feel that the Doha Round resembles the Uruguay Round because it could deliver cuts in the level of tariffs and subsidies allowed under WTO rules, but not actual reductions in applied tariffs and current levels of subsidies. So the Doha Round must result in real improvements in market access and real reductions in trade distorting subsidies.

Limited Process

The WTO should facilitate informal conversations across sectors, given the importance of finding balance across agriculture, industrial products, and services. These conversations cannot wait until the last minute in the Green Room. For example, China might be willing to move further in the services negotiations in exchange for reforms in rules, the United States might be willing to make deeper cuts in agricultural subsidies in exchange for improvements in customs clearance in developing countries or in better enforcement of sanitary and phytosanitary rules, and India might be able to be more forthcoming on agriculture and industrial products in exchange for more willingness to negotiate on temporary visas for workers. The WTO should also consider how best to orchestrate improved offers in services that are essential to achieving greater movement in industrial products and agriculture.
Finally, a better outcome might happen if deals on industrial goods, services, and trade facilitation were hammered out first before turning to agriculture, instead of the reverse, as has been happening.

*Narrow Vision of Development*

The term “development” has been equated with special and differential treatment, preferences, and aid for trade during the Doha round. While all of these are important, developing countries are primarily seeking the right to compete under a fair, rules-based trading system. Developing countries want developed countries to remove market barriers as well as distortions in agriculture and in those industrial products that have been left out of the trade negotiations for decades. Developing countries cannot expect – and should not want – a round for free, but neither can developed countries expect to continue to exempt agriculture and other highly-protected products from real WTO disciplines. The fact that this is a development round should be seen as an asset to getting a good agreement, not a liability.