GATS and Financial Services: Redefining Borders

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GATS AND FINANCIAL SERVICES: REDEFINING BORDERS

Jeffrey Simser

1. INTRODUCTION

Borders are ideas erected between age groups, social classes, all sorts of hierarchical entities, so that society may function as predictably and as decently as possible. They are not solid brick walls.¹

This paper examines the impact of the General Agreement on Trade in Services ("GATS") on financial services and borders. The traditional notion of a "border" and its underlying concept of sovereignty has been challenged over the past two decades. Borders have become porous.² Capital movements occur freely and virtually instantaneously between borders, as the rapid exit of capital from Mexico and the subsequent peso collapse recently demonstrated. Information travels unimpeded over phone lines while goods traverse the globe in hours. A rogue trader working out of Singapore on derivative transactions tied to the Tokyo markets can apparently bring down an English bank that financed the wars against Napoleon.³

¹ Counsel to the Ministry of Economic Development, Trade, and Tourism. The views expressed hereinafter are those of the author and in no way represent the views of the government of Ontario.

² Consider the difficulty currently being experienced in keeping goods produced in the Chinese Laogai (or prison system) from entering North America. See Alex Gillis, Tools of the Trade, THIS MAG., Nov., 1995, at 14.

Nations within Europe, North America and South America have to varying degrees become more integrated while map makers marvel at the constantly shifting borders of the former Soviet Union and Yugoslavia. The Berlin Wall has collapsed both literally and figuratively; the world is no longer bifurcated and capitalism has quietly become a dominant political and economic philosophy. As the role of government generally reduces in the Western world to address accumulated debt and as protectionist policies like import substitution fall away in many nations, the role of the state and the importance of borders diminishes.

The agreements creating the World Trade Organization (the "WTO"), a restatement of the General Agreement on Tariffs and Trade ("GATT 1994") and GATS form a significant multilateral effort to liberalize the world trading system. Canada continues to play an active role in the on-going process to refine the WTO as one of the so-called "quadrilateral" or "Quad" countries (along with the triad of the U.S., E.U. and Japan). The first part of this paper focuses on the context in which the GATS was negotiated: the market context, the foreign policy context, the economic policy context and the negotiating history. The second part of the paper will review GATS, dispute resolution and the financial services protocols. Finally the

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5 There were voices in the U.S. Congress suggesting that the WTO impinged on U.S. sovereignty, although this political invective has been dismissed by many, including other Congressmen, as inaccurate, see Thomas J. Dillon, Jr. The World Trade Organization: A New Legal Order for World Trade?, 16 Mich J. Int'l Law 349, 355 (1995).
6 By the end of 1993 there were 117 signatories; 124 countries and the Commission of the EU were formally represented at Marrakesh. One country, among many, presently seeking membership is the People's Republic of China. Negotiations continue, with the U.S. taking a hard line in rejecting a compromise proposal recently floated by the E.U., Kantor Rejects EU Proposal, 43 Inside U.S. Trade 1, at 21 (1995).
paper will look at the implications of the financial services provisions of GATS on Canadian law, with a particular focus on banking.

PART I: CONTEXT

2. THE MARKET CONTEXT FOR GATS

*The ubiquitous and irrepressible law of supply and demand no longer respects national borders.*

The internationalization of capital markets commenced with the development of the Eurodollar in the 1950's. The Soviet Union, fearful that the U.S. would seize accounts in the event of hostilities, began placing U.S. dollar accounts in Paris and London. This led to the Eurodollar market, a phrase which came to describe any commercial deposits outside the country of issue. In the 1970's the fixed exchange rates devised at Bretton Woods were adjusted for U.S. balance of payments deficits, the imbalance of payments for oil producing companies created during the OPEC crisis were recycled through Euromarkets and the U.S. and Germany began removing capital controls as part of a larger financial deregulation. The 1980's and 1990's heralded new financial instruments, technological change and a new regulatory environment for financial institutions.

In addition to the internationalization of capital markets, services have played an increasingly important role in the economies of developed countries in the latter part of this century. Canada, like

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many developed countries, sees its service sector contributing more to gross domestic product and employment than any other sector.\textsuperscript{10} Banking has become particularly important. According to one commentator: "since the 1970's, international banking has grown at more than 20\% per annum, which is approximately twice as fast as world trade (12\%) and world output (10\%)."\textsuperscript{11} A survey of eleven industrial countries and eight offshore centres revealed that almost one third of banking assets had international characteristics.\textsuperscript{12}

Prior to the Uruguay Round, aside from regional trade agreements\textsuperscript{13} there had been no comprehensive multilateral agreement on trade in services, although the Organization for Economic Co-operation and Development ("OECD") established international frameworks (referred to as "Codes") for liberalizing trade in services. The Codes were created to "progressively abolish . . . restrictions on the movement of capital"\textsuperscript{14} and "eliminate . . . restrictions on current invisible transactions and transfers."\textsuperscript{15} "Invisible transactions" are service transactions, including repair and assembly, technical assistance, author's royalties, commission and brokerage fees, profits from business activity and so on.\textsuperscript{16} The OECD agreements were limited in a number of ways: the Codes only applied to members of the

\begin{footnotes}
\item[11] Footer, supra note 9, at 344.
\item[13] The North American Free Trade Agreement or NAFTA contains comprehensive provisions on services. \textit{See} Jeffrey Simser, \textit{Financial Services Under NAFTA: A Starting Point} (1995), 10 BANKING \& FIN. L. REV. 187. The 1985 Israel-United States Free Trade Agreement addressed services. In 1992, the Agreement establishing the European Economic Area ("EEA") which was constituted by the European Union and the European Free Trade Area (Sweden, Norway, Finland and Austria) addressed services (The Agreement on the European Economic Area, May 1992, Luxembourg). Finland, Sweden and Austria are now part of the EU.
\item[16] \textit{See generally id.}, at Annex A.
\end{footnotes}
OECD, the Codes lacked a dispute settlement provision with binding arbitral powers and finally, the Codes made it easy to reserve obligations on a number of different grounds. Therefore, the OECD Codes did not provide a comprehensive or effective multilateral agreement to liberalize trade in services.

3. THE FOREIGN POLICY CONTEXT FOR GATS

It is an unfortunate, if perhaps unavoidable, paradox of globalization that as economies have grown more integrated, national governments have become increasingly preoccupied with their own domestic advantage - to the point where economic rather than military rivalry has become the main source of international competition.  

Conflict among nations, particularly during the Cold War period, was often analyzed in the West by foreign policy commentators steeped in the theory of "realism." Realism posits that states are primary actors, "autonomous, self-interested and animated by the single-minded pursuit of power" while operating in a Hobbesian world "characterized by anarchy." States are expected to

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17 The original members of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States pursuant to the Convention on the OECD, December 14, 1960; the following countries became members through accession: Japan, Finland, Australia, New Zealand and Mexico.

18 See generally, Code of Liberalisation of Capital Movements supra note 14. Reservations could be scheduled, exceptions could be found on the grounds of public order and security, or where an economic or financial situation justifies a derogation.


reliantly pursue their own self interest. Underlying "realism" is an emphasis on sovereignty. Multilateral trade agreements appear to undermine sovereignty to the extent that a state, either on a de jure or de facto basis, cedes control over its ability to control its borders, whether through tariffs, countervailing measures or even immigration policies. The end of the Cold War has coincided with three trends that in part call into question the analytical assumptions underlying "realism" and in part may be responsible for the laying the groundwork necessary to create GATS.

Firstly, state and sub-state actors have always interacted at a multitude of different levels, but the focus of this interaction has changed. National economies are inter-related; markets and multinational corporations operate globally. Tourists effortlessly frequent all corners of the globe. Fibre optic cable can connect geographically diverse business people on the telephone or at computer terminals without passing through a customs agent. While not irrelevant, the state is clearly less relevant. Secondly, the fall of communism not only ended the Cold War but also the socialist alternative: capitalism has become the intellectual lingua franca of the trading world. Deeply embedded in multilateral trade agreements, be they GATS or NAFTA, is the philosophy of Adam Smith's invisible hand, as discussed in the next section of this paper.21 Free trade theory has, particularly for its neo-conservative proponents, an appealing political corollary: removing barriers increases wealth at small fiscal cost, and while reduced tariffs mean less tax revenue, there is the appeal of less "government" (i.e. the need for bureaucrats to

administer complex customs regimes, subsidy regimes and so on). In the Western hemisphere there are numerous multilateral trade agreements\(^2\) with others in various states of negotiations\(^3\) which

\(^2\) The WTO Secretariat has been notified of 108 regional economic groupings, 33 of those within the last five years. See generally Multilateral Trade Developments, The Economist Intelligence Unit Doc # 2267675, May 31, 1991. Some of the agreements, such as the EU's preferential trade links with African, Pacific and Caribbean countries are quite limited. Some like the 17 member Asia Pacific Economic Co-operation forum are being negotiated. Others are extensive, for example: NAFTA (the "North American Free Trade Agreement") between Canada, the U.S. and Mexico, and the G-3 ("Group of Three") between Mexico, Columbia and Venezuela are free trade areas. A number of other organizations have a common market as their goal: CARICOM (the "Caribbean Community") between Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, and Trinidad & Tobago; the Andean Pact between Bolivia, Peru, Ecuador, Venezuela and Colombia; CACM (the "Central American Common Market") consisting of Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica (Panama and Belize participate in CACM summits) and MERCOSUR (the "Southern Common Market") between Brazil, Argentina, Uruguay and Paraguay. At the substate level there are groupings such as PNWER (the "Pacific Northwest Economic Region") consisting of Alaska, Alberta, British Columbia, Idaho, Montana, Oregon and Washington. See e.g., After Free Trade Euphoria, Now Comes the Hard Part, 12 INT'L TRADE REP. 129 (1995).

\(^3\) Bloc-to-bloc talks between NAFTA and the Southern Cone Common Market will occur in February of 1996 in Buenos Aires. See generally U.S. Backs Mercosur offer for Bloc-to-Bloc Talks before Cartagena, 13:48 INSIDE U.S. TRADE 14 (1995). The FTAA (the "Free Trade Area of the Americas") is currently being negotiated by Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and the Grenadines, St. Lucia, St. Kitts and Nevis, Suriname, Trinidad and Tobago, Uruguay, the U.S. and Venezuela. There are some discussions involving the accession of Chile to NAFTA and/or to MERCOSUR. There have also been proposals for a SAFTA or South American Free Trade Agreement. See e.g., Denver Declaration, Work Plan Paves Steps for FTAA, 13:26 INSIDE U.S. TRADE 1 (1995). Please note that many of the articles in Inside U.S. Trade, the International Trade Reporter and Inside NAFTA are written without author attribution. Canada has decided to negotiate free trade agreement with Israel and they
reflect this free trade theory. Thirdly, state rivalries on a military scale are less likely to be conducted through unilateral actions, particularly by the United States. U.S. actions in the Persian Gulf, Somalia, Bosnia and so on have all been painfully concocted as multilateral actions under the auspices of the United Nations, the North Atlantic Treaty Organization and so on. While it is difficult to draw conclusions, it is possible to state that there is a trend towards multilateralism.

Multilateral trade agreements are difficult to craft in a world where states rigorously pursue self-interest with a one-way appetite for free trade. A state acting in its own interests will seek to maximize exports whilst minimizing imports; the state is exposed to the classic "prisoner's dilemma." In the prisoner's dilemma, two prisoners are arrested, housed in separate cells and interrogated separately. The police offer the prisoners two choices: remain silent or confess. If one confesses and the other remains silent, the silent prisoner is jailed whilst the confessing prisoner goes free; if they both confess, they get a three year sentence; if they both remain silent, they get a one year sentence. The safest choice is to confess, but both are better off if they can trust each other enough to remain silent. In trade relations, the safest choice is to maximize exports while minimizing imports, but the more a state restricts imports, the more likely it will encourage other states to limit their exports. Comparative advantage dictates that if states can trust each other enough to stay silent, that is not restrict imports, states will have arrived at an optimal choice.


A binding trade regime to temper the anarchy of international relations can engender such trust.

4. THE ECONOMIC POLICY CONTEXT

*What is prudence in the conduct of every private family, can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.*

Understanding the economic theory behind trade policy is an important tool for understanding an agreement like GATS, although a detailed analysis is beyond the scope of this paper. Three economic theories purport to explain the forces governing international trade. "Mercantilism," dominant particularly in 18th Century Britain, viewed trade as a zero sum game: the gain of country A was invariably at the expense of Country B. Further, the goal of a nation was to maximize the silver and gold it could accumulate through trade. In 1776, Adam Smith challenged the premises of mercantilism, arguing that the goal of a nation was not to accumulate precious metals, but rather to satisfy the consumer needs of citizens. Smith stated that trade amongst nations was not a zero-sum enterprise but rather an evolving source of wealth from which the most competitive will reap the greatest reward. David Ricardo refined this idea by introducing the notion of comparative advantage: nations exporting that which can be produced efficiently and importing

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26 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS Book IV, Ch. 2 (1776). This quotation was used in FREDERIC M. SCHERER & RICHARD S. BELOUS, UNFINISHED TASKS: THE NEW INTERNATIONAL TRADE THEORY AND THE POST-URUGUAY ROUND CHALLENGES, at 4 (1994).

27 See generally TREBILCOCK & HOWSE, supra note 25; see SCHERER & BELOUS, supra note 26.
everything else. For example, imagine that a lawyer can produce a
document at twice the speed of her secretary. If the lawyer's hourly
wage is $200 and the secretary's hourly wage is $20, the document is
more usefully done by the secretary (even if it takes twice as long),
freeing the lawyer to bill her services at the higher rate. In the trade
context, countries should concentrate on producing goods and
services where their comparative advantage is greater and import
where there is a comparative disadvantage.

A third economic theory, protectionism, has been attributed to,
among others, Jean-Baptiste Colbert, Alexander Hamilton and
Friedrich List. Protectionists argue that comparative advantage and
open markets serve dominant economies at the expense of developing
economies which need time and space in which to become
competitive. Protectionism in its various iterations places national
security ahead of free trade and advocates the use of tariffs and
countervailing measures to shelter infant industry. Germany and pre-
Second World War America used tariff barriers and protectionism to
nurture infant industries. Agricultural subsidies and protectionism, rice
in Japan for example, is better understood in light of this theory.
Mexico clung to their policy of “import substitution” until the early
1980's.

Countries continue to advance arguments in favor of free trade
or protectionism depending on their relative comparative advantage.
Early in this century, two Swedish economists developed the
Heckscher-Ohlin theorem which further refined our notion of
comparative advantage. The theories of Adam Smith and David
Ricardo were modified to account for the fact that even if England
produced cloth and Portugal produced wine, each with a comparative
advantage, the fact remained that Portugal might still produce cloth.
The Heckscher-Ohlin theory states that nations with an abundance of
capital will have a comparative advantage in capital intensive
industries whilst nations with an abundance of labor will have a

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28 Trebilcock & Howse, supra note 27, at 5.
comparative advantage in labor intensive production. An intense examination of this theorem by an American economist found that in 1950's America, a period where the U.S. had an abundance of capital, Americans had a surplus in exporting labor intensive products. This paradox came to be known as the Leontief Paradox and its discovery led to a new school of thought known as new international trade theory or NITT.

Proponents of NITT generally agree that comparative advantage governs international trade flows; there is less agreement on the forces underlying the comparative advantage of a given nation. When the European Community was in its infancy, many expected that nations would specialize on an industry wide basis: the Germans in the automotive sector, the French in wine making and the Italians in textiles. This expectation was not realized. Each country developed a comparative advantage within specified industries: the Germans successfully exported Volkswagen cars, Mercedes Benz autos and their Moselles; the French exported their Citreons and Renaults to down scale markets and their Bordeaux to upscale markets; the Italians exported textiles, low-end Fiats and high-end Ferraris along with their Chianti. This intra-industry specialization is one of many factors that NITT economists look to in establishing comparative advantage. Other factors include research and development, economies of scale and oligarchies. In addition many of the traditional economic trade theories did not take into account the ability of capital, services and labor to rapidly move across borders.

29 See generally SCHERER & BELOUS, supra note 27.
The cumbersome GATT process often seemed like trench warfare, the smaller players standing by helplessly as negotiations between the U.S. and the E.U. ground on.\textsuperscript{30}

The individuals at the Uruguay Round negotiating tables calculated their nation's negotiating position through foreign policy and economic analysis; the shape of their analysis created the shape of the agreement. By the end of the Tokyo Round (1973-1979), the seventh round of GATT negotiations, GATT had attained an institutional permanence, although not to the degree envisaged under the ill-fated International Trade Organization contemplated in the 1940's.\textsuperscript{31} Largely at the behest of the U.S. government,\textsuperscript{32} there was an unsuccessful effort to expand GATT to include services during the Tokyo Round. From 1979 through to 1985, the core members of GATT strove to establish the need for, and the parameters around, another round of negotiations. The introduction of services was a contentious issue, particularly for unenthusiastic developing countries. Developing countries were concerned for a number of reasons: firstly, the trade in services issue was being addressed, at least partially, by UNCTAD;\textsuperscript{33} secondly, there were a number of unresolved trade issues, particularly in respect of agriculture and textiles, and developing countries feared that their resolution would require linked concessions in the services sector; thirdly, there was a lack of

\textsuperscript{30} COYNE, supra note 21, at 76.

\textsuperscript{31} GATT was created as a stop gap measure to kick start tariff reductions whilst the Havana Charter was being negotiated. The ITO floundered in the U.S. Congress; in fact Truman withdrew his request for a Senate vote on the ITO. GATT however remained and over a number of years achieved "quasi-organizational status" largely by default. See, e.g., Dillon, supra note 5, at 354.

\textsuperscript{32} Benz, Trade Liberalisation and the Global Service Economy, 19 J. WORLD TRADE 98 (1985).

knowledge and expertise in the area of services and a concomitant fear
that a multilateral agreement would "perpetuate the state of
dominance of developed countries in this sector"; finally, developing
countries feared that the GATS proposals strongly favored
comparative advantages held by developed countries (capital, know-
how and technology-intensive services) whilst paying scant attention
to issues of importance to developing countries, such as labor
intensive services. At the same time, the United States had a surplus
of $57 billion for trade in services and a $133 billion deficit for
merchandise trade.

During and prior to the Uruguay Round negotiations, the
United States demonstrated a tendency to invoke unilateral trade
sanctions against trading partners. Under U.S. law, any private
individual may petition the United States Trade Representative
("USTR") to inquire whether a foreign government has unfairly
blocked access to their markets. If the USTR finds that the
complaint has merit and is unable through negotiations to open the
market in question, then the President has the power to take
retaliatory action, through trade sanctions for example, against that
foreign country. These "section 301" complaints particularly alarmed

34 Michael Rom, Some Early Reflections on the Uruguay Round Agreement as seen
from the Viewpoint of a Developing Country, 28 J. WORLD TRADE 5 at 23-24 (1994).
The U.S. initially proposed to bifurcate "services" into two groups: stand alone
services, like banking, which the Uruguay Round would address; and services such
as inputs for goods (construction for example) which the Uruguay Round would not
address. The proposal heavily favored developed countries and fell away from
negotiations. TREBILCOCK & HOWSE, supra note 27, at 217.
35 The WTO's Agreement on Trade in Services - After the Show, THE ECONOMIST
INTELLIGENCE UNIT DOC #2281588 Aug. 28, 1995 at 3.
36 "Section 301": Trade Act of 1974 §§ 301-10 codified as amended at 19 US §§
2411-2421(1988). Offshoots include "Super 301" Id. §2412, "Special 301" Id. §2413
and "Telecommunications 301" Id. §§3101-3112. These sections are used in a variety
of situations and have even been considered [instead of a Chapter 20 process under
NAFTA] in the U.S. - Mexico dispute over U.S. small-package delivery firms
operating in Mexico USTR, Small-Package Firms May File NAFTA Dispute After
Europeans and the existing GATT dispute structure offered little or no protection.\textsuperscript{37} One commentator has speculated that the U.S. actions and the international reaction to them became an important factor in the creation of the WTO.\textsuperscript{38}

The Uruguay Round began with the Punta del Este declaration aiming for the expansion of trade, the promotion of economic growth and the development of developing countries. The means of achieving these aims were progressive liberalisation and transparency. According to one commentator: "the parties compromised with respect to policy objectives underlying the domestic regulation of service activities."\textsuperscript{39} This compromise set the table for GATS, particularly in heavily regulated areas like financial services.

\section*{PART II: GATS}

6. GATS: THE ARCHITECTURE

\textit{The aim is to steer between the Scylla of a minimal trade position where market access is virtually non-existent and the Charybdis of totally unregulated trade and access with the consequence that many national systems would be overwhelmed by large international firms.}\textsuperscript{40}

\begin{footnotesize}
\begin{enumerate}
\item Footer, \textit{supra} note 9, at 348.
\item Peter A. Vipond, \textit{The Regulation of Trade in Financial Services}, 2 J. FIN. REG. & COMPL. 248 at 249 (1994).
\end{enumerate}
\end{footnotesize}
GATS was created as one of several annexes to the Marrakesh Agreement Establishing the World Trade Organization. Architecturally, GATS breaks down into three tiers. The first tier contains the basic commitments and the rules of general application. The second tier consists of horizontal and sectoral commitments contained in annexes, protocols and Ministerial decisions. In respect of financial services, there is a first and second annex, there is a first and second protocol, and a number of decisions on Financial Services (by the Ministers, by the Committee on Trade in Financial Services and by the Council for Trade in Services). This mixture is largely the result of conflict between the EU, US and Asian players. The third tier of GATS consists of schedules of reservations; the review in this paper of reservations will focus primarily on Canada.

The commitments under GATS are addressed at two different levels. The basic commitment, most-favored-nation or MFN treatment, is dealt with in the same way as principles under NAFTA were. NAFTA employed a "negative" approach to commitments: the agreement applied to all sectors unless a member chose to schedule an exemption in the Annexes. A similar approach is used for MFN treatment under GATS: unless a member schedules an exemption, MFN applies universally. The opposite approach is adopted for other commitments under GATS. National Treatment, for example, is only applicable to commitments scheduled in the Annexes. So for example, if country A does not schedule a sector under its reservations and commitments then the presumption is that MFN applies to the sector while National Treatment does not.
7. GATS, The First Tier: Scope and the Basic Commitment

Services represent the largest portion of the economy in most developed countries, and increasingly in developing countries as well. It is the fastest growing sector of world trade.⁴¹

Under the general provisions, GATS applies to all governmental measures affecting trade in services. Of interest, GATS applies to three levels of government (central, regional and local) as well as non-governmental bodies exercising governmentally delegated authority. In the case of some industries, the securities industry for example, this may lead to asymmetries between nations that delegate regulatory authority (for example, the Ontario Securities Commission) and those that permit self-regulation (some aspects of the London markets, for example).⁴² While “services” are not defined, the modes of service supply are. These modes consist of the supply of a service:

(i) from one territory into another (this would include services provided over the Internet or on the telephone, where the service provider does not have to leave his or her territory);
(ii) through consumption abroad (tourism, for example);
(iii) through the establishment of a commercial presence (this might include a Canadian company establishing a service company subsidiary in Japan, for example); and,
(iv) through the presence of a natural person from one territory in another territory (for example an engineer or other professional temporarily traveling into another country to provide a service).

Services supplied as an exercise of governmental authority, that is not supplied on a commercial basis and not in competition with

⁴² See, TREBILCOCK & HOWSE, supra note 27, at 228.
other service suppliers (policing might be an example), are excepted from the definition of "services." The definition of services was heavily negotiated, with many developing countries seeking a definition limited to cross border trade; in the end an all encompassing definition for modes of supply was arrived at.43

Most-favored-nation treatment ("MFN") found in Article II, roughly the counterpart to Article I of GATT, is the core general commitment under GATS. MFN requires each "Member" to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than it accords to like service and service suppliers of another country."44

Just as developing countries had resisted a broad definition of "services," developed countries resisted extending MFN to all members. MFN is not necessarily a trade liberalizing concept. A country wishing to close its market may do so, as long as it is consistent with all trading partners; that same country can benefit from open markets in other countries, which are precluded by the MFN clause from closing their markets to the restrictive country. This "free rider" problem complicated the GATS negotiations particularly in respect of the financial services sector.

In GATS, unlike GATT's Article I, Members are permitted to schedule exemptions from MFN application.45 At the time the WTO Agreement came into force, Canada had listed two exemptions related to financial services: firstly, licenses for establishment require reciprocity from the applicant's home country; and secondly a Quebec licensing preference for loan and investment companies incorporated


44 General Agreement on Trade in Services, Apr. 15 1994, art.II, § II. 33 ILM 1168. The various components of the Marrakesh agreement will be referred to in the notes as the GATS, WTO agreement, GATT 1994 and so on. "Member" is the term for member countries used in the agreement.

45 Id. The Annex on Article II exemptions sets the ground rules.
in the United Kingdom and Ireland was retained.46 “In principle”, exemptions are not to run longer than ten years and in any event are to be negotiated in subsequent liberalizing rounds. The Council for Trade in Services (“CTS”) shall review all exemptions with a duration of five years or more. MFN exemptions also exist for Members wishing to confer advantages to “adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.”47 Finally, Article V permits Members to create agreements liberalizing trade amongst themselves (provided certain thresholds are met); for example, concessions from Canada to Mexico under NAFTA do not have to be extended to all Members. There is presently a dispute amongst the Quad countries over the criteria defining regional trade agreements, with Canada arguing that existing rules are too lax and with the EU arguing that in the future the WTO rules should be waived to accommodate negotiations in Eastern Europe where trade agreements are unlikely to cover substantially all trade.48

The exemptions for MFN and the exemptions on specific commitments discussed below have been described as “structural weaknesses.”49 Many of the obligations are triggered by a “shopping list” approach and GATS can only be understood by reading the schedules both of commitments and exemptions (which run for thousands of pages). The GATS was created after a lengthy period of political negotiating and bargaining. The compromises necessary to create the agreement were driven by political considerations, not purely by technical trade issues. If the goal of GATS was to create an

47 GATS, supra note 44, at art.II, Article II, § III.
48 Agriculture, for example, may be excluded from EU agreements with Eastern Europe. The Quad countries are Japan, the U.S., the E.U. and Canada. Quad Ministers Likely to Clash Over Regional Trade Pacts, 13:42 INSIDE U.S. TRADE 3 (1995).
49 Sauve, supra note 42, at 132. "Nearly all countries have taken some form of exemption ... " see Stockfish & Fricassi, supra note 10.
all-encompassing principle-based agreement, then GATS might be adjudged a failure. However, if GATS is viewed as a first step towards liberalisation along the lines of the 1947 GATT, then the jury is still out. As one commentator has suggested, the key policy feature of GATS is “progressive liberalisation rather than a single reform,” an idea enshrined in the preamble to GATS.

8. GATS, THE FIRST TIER: OTHER GENERAL OBLIGATIONS

The GATS represents an unprecedented attempt at global liberalization and rule-making no less significant than the creation of GATT itself in 1947.  

Part II of GATS, which begins with the MFN principle, goes on to address a number of other principles: transparency, developing country participation, and so on. Article III requires “transparency”, that is all members must publish or make available all measures of general application that may impact on GATS. There are prescribed exceptions for emergencies and disclosure of confidential information. In a heavily regulated area like financial services, transparency provisions are particularly important. Indeed, during the NAFTA negotiations creating transparency, particularly in respect of Mexico, was a primary American objective. A bank seeking to establish operations in a foreign market must know the precise regulatory requirements and tests for entry.

Article VI requires that domestic regulation in sectors where specific commitments are undertaken, such as financial services, be “administered in a reasonable, objective and impartial manner.”

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50 Vipond, supra note 40, at 251.
52 See Simser, supra note 13.
Authorizations for the supply of a service are to be adjudicated on in a "reasonable period of time." Article VI authorizes the Council on Trade in Services, through appropriate bodies, to establish the disciplines necessary to ensure that licensing requirements and so on are based on "objective and transparent criteria", are "not more burdensome than necessary" and do not "in themselves" constitute "a restriction on the supply of a service." These provisions could have a strong impact on financial services.

There are a number of other general commitments contained in the first part of GATS. Article VIII contains disciplines on monopoly suppliers. Article VII provides for the mutual recognition between Members of each others' standards for licensing of service suppliers and permits the harmonization of regulatory standards. Subsidies and government procurement are noted as problems that will require on-going multilateral negotiations. Finally there are a series of prescribed exceptions, emergency safeguard measures, measures to protect the balance of payments and so on.

9. GATS: THE SECOND AND THIRD TIERS

... our economic security has become our national security. ...

Many barriers to trade in services arise from a country's choice of regulatory instrument, be that state monopolies, licensing or rate setting. Removing those barriers can be a difficult political issue: "deregulation and privatisation entail complex transitional issues and formidable challenges of regulatory redesign." Facing those challenges and finding a politically palatable solution is one thing, it is

53 GATS, supra note 43, Article VI.
54 See GATS, supra note 43, Articles VII and VIII.
56 TREBILCOCK & HOWSE, supra note 27, at 226.
quite another to agree to an agenda of change mandated by a multilateral agreement. Countries were not willing to commit absolutely to the wholesale removal of barriers under GATS. Countries felt they needed the flexibility to find their own solutions to their own problems in their own time. For this reason, we see reservations and concrete commitments scheduled rather than the principled approach of other agreements like NAFTA.

Part III of GATS is entitled "Specific Commitments." Article XVI reaffirms MFN treatment to scheduled commitments. A footnote adds that where there is a commitment on a service and where the cross border movement of capital is an essential part of that service, then the Member is committed to allowing that movement of capital. If a market access commitment is made, that Member cannot impose limitations on the number of suppliers, the value of their service transactions or on the participation of foreign capital. Article XVII provides that where a scheduled commitment on national treatment exists, "each member shall accord to services and service suppliers of another Member, in respect of measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers." A footnote to the section states that providing national treatment does not entail making up for any inherent competitive disadvantages that a foreign supplier may have. However, the article goes on to mandate substantive national treatment, even if that entails formally different treatment. Article XVIII permits Members to negotiate further commitments.

Part IV of GATS is entitled "Progressive Liberalisation." While a detailed analysis of this section is beyond the scope of this

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57 Canada has scheduled a number of national treatment exceptions, under horizontal commitments, to cross border consumption (for example tax measures for research and development expenses) but no limitations on market access. Under Sectoral commitments Canada has, for example, placed both national treatment and market access limitations on auditing (primarily related to accreditation and residency). Canada Schedule of Specific Commitments, GATS/SC/16 page 1 and 18.
paper, a few things are worth noting. The purpose of GATS, as with GATT in 1947, is to create and encourage the process of liberalisation. In order to achieve this, there are not only facilitative provisions but also provisions to prevent "backsliding." To the extent that GATS preserves the status quo, there will be a stable and predictable market for entrepreneurs and investors.

10. GATS AND FINANCIAL SERVICES: THE NEGOTIATIONS

Throughout much of the post-war period, the multilateral trading system was rightly seen as a bulwark against a return to the trade chaos of the 1930's. Today, the threat posed by a loss of credibility of the multilateral rules and disciplines would not be a return to the 1930's... but rather a fracturing of the global economy into inward looking and potentially antagonistic trading blocks. 58

The GATS in respect of financial services is currently incomplete as a result of the position taken by the Americans; 59 this section shall briefly review some of the negotiating history behind the current state of affairs. When the Uruguay Round ended in December of 1993, there were a number of important issues unresolved, including financial services. A protocol was agreed to whereby members would have until June of this year to try and resolve the outstanding matters. Americans were dissatisfied with the positions

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59 The U.S. position will be discussed in detail below. The U.S. politics surrounding international agreements is complicated by mandate of the U.S. Constitution: Article II, § 2, cl.2 empowers the President to conduct foreign affairs while Article I, § 8, cl.3 empowers Congress to regulate trade with other nations. The "fast track" procedure created under the Trade Act of 1974, §§ 151-54, 19 USC §§ 1291-94 (1988 & Supp 1993) precludes Congressional amendments to a treaty and ensure action by the House of Representatives and the Senate within a proscribed period. There is a House GOP proposal to amend the existing fast track legislation entitled the Trade Authority Act of 1995 which at the time of writing had not been passed into law.
tabled by a number of developed countries (notably Japan) and a number of developing countries, particularly in Asia and South America (notably India, Malaysia, Indonesia and Brazil). American negotiators feared extending MFN status and creating a free rider problem with a number of states which had threatened to completely close their markets to U.S. access. Ironically, at the time of writing America appears to be (but in fact isn't)\textsuperscript{60} a free rider having reserved on financial services while having access to concessions negotiated principally between the EU and a number of Asian trading partners.

The Americans, while negotiating on GATS, set out to open markets through bilateral agreements. In January of this year, an agreement was reached with Japan\textsuperscript{61} that opened up Japanese markets, particularly in respect of mutual funds and the insurance industry. The market for foreign investment advisory firms was expanded from 25% to 61% of the Japanese financial market. Rules requiring that mutual

\textsuperscript{60} Through mid-1994, some 300 foreign banks operated nearly 600 branches and agencies in the U.S.A. American affiliates of foreign banks accounted for one-fifth of U.S. banking assets. Washington has assured its major trade partners that they would retain all existing access levels and not face new restrictions. The WTO's Agreement see Note 35 above, at p.3. As a practical matter, the U.S. won't wield the exemption because foreign countries here have constitutional guarantees to be operating here. G. Henry of the American Insurance Association quoted in Banham, R, Reactions Mixed to WTO Deal (Dec.7, 1995) J. Of Commerce 19 (Dec.7, 1995).

\textsuperscript{61} Japan-U.S. Measures Regarding Financial Services, 34 ILM 617 (1995). There have been allegations that the Central Intelligence Agency was used by the Clinton Administration and the USTR Mickey Kantor to provide advance information during trade negotiations. In a press conference, Kantor stated that the Clinton Administration does not discuss the intelligence community at all. Japan has formally protested to Washington. A. Mitchell Newsreport (October 18, 1995), NBC Nightly News, Washington. The U.S. Assistant Secretary of State, Winston Lord, would only tell the Japanese ambassador to the United States that the U.S. State Department never comments on intelligence matters and refused to confirm or deny the reports. Japanese Ambassador Says Spying Reports Lead to Distrust of U.S., 13:44 Inside U.S. Trade 12 (1995). Canada has been accused of spying on Mexico during trade talks by former Communications Security Establishment agent S. Lorten. Diebel, L, Mexico Expresses Worry At Spy Claims (Nov.14, 1995) Toronto Star A13.
funds only be sold by Japanese firms were lifted as were restrictions respecting Euro-Yen issues, a domestic asset-backed securities market and the offshore securitization of Japanese assets. Changes to market access and transparency provisions are expected to open up the Japanese insurance market by as much as $1 billion in additional premiums.\textsuperscript{62}

11. GATS AND FINANCIAL SERVICES: THE RESULTS TO DATE

Naturally with one major trading partner unable to improve the commitments it made in 1993 or to offer non-discriminatory access to its market, this must be a second-best result. But it is a very good second best.\textsuperscript{63}

The provisions of GATS respecting financial services can only be determined by looking in a variety of places: GATS itself, the various schedules to GATS, two annexes, two protocols, a Ministerial decision and decisions of the Council for Trade in Services as well as the Committee on Trade in Financial Services. This fragmented structure is the result of the muddled and only partially resolved negotiation process described in the previous section of this paper. By the end of the Uruguay Round, 76 countries had scheduled commitments on financial services; some nations, notably the U.S., felt that those scheduled commitments were insufficient. The First Protocol to GATS created a six month extension for further negotiations. In July of 1995, an agreement (without U.S. endorsement) was reached that created some level of multilateral commitment and further extended the time for negotiation into the fall of 1997. This section of the paper will review the protocols, annexes and decisions respecting financial services under GATS.

\textsuperscript{62} West Revs Up for Access to $600bn Market, Economist Intelligence Unit, document # 223084 (March 1, 1995).

The First Annex of GATS defined financial services broadly to include:

(i) insurance and related services, including reinsurance, retrocession, and intermediation such as brokerage and agency work;
(ii) banking and other financial services, including deposit taking, lending, guarantees, leasing, certain trading activities (including on derivatives) and other forms of intermediation. 64

The First Annex brings financial services into the GATS definition of trade in services.65 Services conducted by a governmental authority, including central bank functions, statutory schemes for social security and retirement funds, and other government activities are excluded from the definition of services provided that such government does not permit private sector competition in the relevant area.66 Members are permitted to retain a "prudential carve-out." That is, measures created for prudential reasons such as the protection of either depositors or financial system integrity are permitted so long as such measures are not designed to defeat the commitments under GATS.67 As with NAFTA, the prudential carve-out may have important implications: it will be the basis to defend virtually all actions in the financial services sector that are the subject of a dispute.

The financial services provisions of GATS are best understood as a road map of intentions rather than as a statement of commitments. While face-saving specific commitments provide some level of firm multilateral commitment as discussed below, the main focus of the financial services provisions are the identification of areas

64 Annex on Financial Services, s.5.1.
65 Annex on Financial Services, s. 1.1; GATS Art.1(2).
66 Central Bank functions are excluded from the exemption. Annex on Financial Services, ss. 1.2 and 1.3; GATS Art. I 3(b).
67 Annex on Financial Services, s. 2.1. Section 2.2 protects Members who withhold information to comply with their banking secrecy laws.
where further liberalisation is desirable. For example, the First Annex provides for the future harmonization of regulatory regimes respecting prudential measures through mutual recognition. Where harmonization exists, for example under the Basel Accord, accession by other Members with similar regulatory and oversight regimes is to be encouraged. Where harmonization measures are being contemplated, the negotiating Members do not have to notify the Council on Trade in Services under paragraph 4(b) of Article VII of GATS, a section designed to broaden liberalisation efforts generally.

The so-called "First Protocol" furthered the process by recognizing and accommodating the need for further negotiations. The First Protocol approach to specific commitments differs from the approach mandated by Part III of GATS (which addressed market access, national treatment and other commitments). The First Protocol is heavily qualified: negotiations can take their course so long as they do not conflict with GATS; Members are still free to schedule specific commitments; any specific commitments negotiated were to be extended on an MFN basis; no presumptions were made about the extent to which any Member was willing to liberalise trade in financial services; and finally, limitations and qualifications were limited to non-conforming measures. Each Member agreed to schedule monopolies in the financial services sector and to endeavour to reduce or eliminate those monopolies. Public entities purchasing financial services were to extend National Treatment and MFN status to non-Member financial institutions established in the country of consumption. Cross-border trade is addressed on two levels.

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68 Annex on Financial Services, s.3.
70 Understanding on Commitments in Financial Services (the "First Protocol") preamble.
residents may, as a principal through an intermediary, provide services accorded national treatment for: insurance risks relating to maritime shipping, commercial aviation and goods in international transit; reinsurance and retrocession; and the provision of financial information and financial services data processing. Secondly, residents may make cross border purchases of the insurance services noted above as well as banking services generally. The First Protocol also contains provisions relating to the processing of information and the entry of personal.

The First Protocol also addresses some of the general issues: the road map for negotiations. The right of establishment, subject to any regulatory requirements that do not conflict with GATS, is to be extended to financial institutions of all Members.\textsuperscript{71} Financial service providers established in the territory of another Member are permitted to offer new financial services.\textsuperscript{72} All Members endeavour to remove or limit the adverse effects of measures, including non-discriminatory measures, that inhibit the ability of non-Member financial service providers to compete and expand into the territory of another Member.\textsuperscript{73} Finally national treatment is to apply to payment and clearing systems, self-regulating organizations such as stock exchanges and official funding and refinancing facilities (although not lenders of last resort).\textsuperscript{74}

In June and July of 1995 a flurry of negotiations resulted in a partial resolution of issues with 29 countries,\textsuperscript{75} including the EU,

\textsuperscript{71} \textit{Id.}, ss. 5-6
\textsuperscript{72} \textit{Id.}, s.7.
\textsuperscript{73} \textit{Id.}, s.10 (excludes measures that would discriminate against a financial service provided for the Member making such changes).
\textsuperscript{74} \textit{Id.}, National Treatment sections 1 and 2.
\textsuperscript{75} The 29 counties signing the protocol were: Australia, Brazil, Canada, Chile, the Czech Republic, Dominican Republic, Egypt, the European Union, Hong Kong, Hungary, India, Indonesia, Japan, Korea, Kuwait, Malaysia, Mexico, Morocco, Norway, Pakistan, Phillipines, Poland, Singapore, The Slovak Republic, South Africa, Switzerland, Thailand, Turkey, and Venezuela. Three countries not signing the protocol but making some concessions: Columbia, Mauritius and the United States.
Canada and Japan, signing the "Second Protocol" with a schedule of various commitments coming into effect on August 1, 1996. Three countries, including the United States, elected not to sign the Second Protocol but did agree to make unilateral commitments. The Council for Trade in Services adopted the Second Protocol in a decision which also permitted Members to revisit their scheduled commitments for a two month period commencing on November 1, 1997 should further negotiations prove unsuccessful. The Americans did not improve their 1993 position nor offer unfettered market access. Despite intensive diplomatic attempts, particularly by the EU, the U.S. felt that more progress could be made through bilateral negotiations; the Americans had been successful with Japan and hoped to repeat that success elsewhere. The U.S. negotiators were particularly chagrined by Indonesia's offer, which was worse than their present practise. The commitments of the 29 countries who signed the Second Protocol vary from country to country and it is difficult to generalize the results. Generally, restrictions on establishment and cross border provision of financial services were reduced, licenses for foreign institutions were increased, nationality requirements for boards of directors were softened and foreign institutions were granted better access to payment and clearing systems. Of the signatories, 19 countries are improving their access for insurance companies, 23 countries are improving the status of foreign banks and 14 countries are lifting some of the restrictions on foreign insurance companies.

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76 The Second Protocol to the GATS was issued on July 24, 1995; the Committee on Trade in Financial Services issued a decision to accommodate the Second Protocol on July 21, 1995; on that same date, two decisions of the Council for Trade in Services solidified the timing details.


78 American insurance companies currently doing business in the [Indonesian] insurance market would not have been assured that their current rights would be protected. See The WTO, supra note 35, at 2.
12. THE IMPACT OF GATS ON THE BANK ACT

_In the borderless world, it is harder every day to see where national interests lie._

The primary change to the _Bank Act_ resulting from the WTO Agreement can be found in the repeal of the “10/25” rules. The “10/25” rules prohibited issues or transfers of shares in a bank “to a non-resident or any entity that is controlled by a non-resident” if as a result such non-resident would acquire a “significant” interest (greater than 10%) in “any class of shares of a bank.” Such issues and transfers were also prohibited where the non-resident would hold more than 25% of the voting rights attached to all shares. Under NAFTA, Mexican and U.S. residents were exempted from these rules. Now the rules have been repealed altogether. Of interest, the beneficiaries of this repeal are not limited to WTO members nor to signatories of the Second Protocol. The restrictions on significant interests in Schedule I banks has been retained and Schedule II banks have a ten year grace period in which to become broadly held. One other significant amendment was made to the _Bank Act_: the power of the Minister to limit domestic assets of non-NAFTA bank subsidiaries to 12% of total domestic bank assets has been repealed.

13. THE WTO DISPUTE SETTLEMENT BODY

80 Bank Act, ch. 46, 1991 S.C. 1317 (Can.).
83 Bank Act, ch. 46, §372, 1991 S.C. 1300 (Can.).
84 _Id._ §373, _amended by_ ch.47, §17, 1994 S.C. 6 (Can.).
Nevertheless, some officials predicted that every WTO panel ruling will be appealed. Appeals will be necessary for every country which loses a panel to convince its domestic interests that the government has done all it can in a dispute, one WTO official said.  

The name for the WTO was not established until shortly before the Marrakesh signing ceremony. At the conclusion of the negotiating rounds, the organization was to be called the Multilateral Trade Organization. The Clinton Administration apparently felt that “World” had more sloganeering appeal than “Multilateral” and negotiated the last minute name change. Thus was born the WTO. While it is beyond the scope of this paper to examine the WTO dispute settlement body (“DSB”) in detail, its basic features are worth noting. 

The dispute resolution process is the culmination of compromises between political, economic and social interests as well as “an elaboration on the experience gained under . . . (GATT) over four decades.” The process has three main features. First, there is a unified dispute system with one organization and one set of procedural rules. Second, there is a panel of first instance (formed after no consensus agreement can be reached) and more importantly, an appellate body. Third, decisions rendered by this process will “automatically come into force as a matter of international law in virtually every case.” Under the old GATT system, an adversely affected party could veto any unfavourable decision. In its history only

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87 Scherer, supra note 27, at p. ix.
89 See supra note 82; see also Dillon, supra note 5, at 373.
one GATT decision was not vetoed. Now the process has been inverted in favour of legalism: all Members, including the one bringing the complaint, must agree to veto a decision. The Americans, perhaps concerned with this legalism, are working on domestic legislation (at the behest of Congress with the approval of the Clinton Administration) that would establish a panel of judges to review any WTO decisions; at the time of writing, the legislation has not passed.

There are a few cases presently before or on their way to the dispute settlement process. The Americans and Canadians are pressing for a review of the EU implementation of GATT 1994 in respect of grains. As part of a long running dispute over EU import restrictions on bananas, the U.S. is charging that in addition to GATT violations, license restrictions preventing or limiting the ability of certain suppliers to market their product in Europe discriminate in violation of GATS. The U.S., E.U. and Canada have asked for a panel to review Japanese liquor taxes (GATT ruled against Japan in 1987 but apparently the complainants are unhappy with Japan's implementation). The first WTO ruling, on a challenge by Brazil and Venezuela of U.S. regulations on gasoline, is expected in January of 1996.

14. CONCLUSIONS: WHERE DO WE GO FROM HERE?

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91 Netherlands Measures of Suspension of Obligations to the United States, Basic Instruments & Selected Documents, Article XXIII, Supp. 32 (Nov. 8, 1952).
93 "The main complaint is that the EU is assessing tariffs based on a reference price system, rather than on actual invoice prices on individual shipments." U.S., Canada to Ask for WTO Panel, 13:40 INSIDE U.S. TRADE 3 (1995).
96 See supra note 82.
We [the EU and US] agree to concert our efforts to promote liberalisation of financial services on a worldwide basis. In particular, we will seek to ensure that the interim agreement concluded in July of 1995 is succeeded by a more substantial package of permanent liberalisation commitments from a critical mass of WTO members.  

The leaked agenda of a meeting in late October of 1995 between the Quad countries (Canada, Japan, the EU, and the U.S.), reveals some of the issues that will have to be resolved in the short and long-term future. There is concern about the direction that the next Ministerial meeting, set for Singapore in 1996, should take. For example, will the goal of that meeting be a procedural outcome (that is the establishment of effective working groups to explore new issues) or a concrete outcome? There are a number of areas that a concrete outcome could address: finalizing the financial services provisions with U.S. participation; there are presently 108 regional economic groupings but little direction on how they strengthen or weaken the multilateral trading system administered by the WTO; the accession of China to the WTO is still contentious, in part because it will set a precedent for other countries seeking to accede; the U.S., amongst others, has complained about the overburdened dispute settlement process and the duplication of effort among many of the WTO councils; finally, at present the chairmen of the various WTO councils are not "empowered to pursue a steering role", a task presently undertaken by an informal group of Geneva ambassadors, and there is a need for a formal structure put in place to do that job.

Chile is the focus of attention, at least in the Western Hemisphere. Chile may accede to NAFTA if Congress provides the

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98 See supra note 22.
99 The October 20, 1995 meeting was held in Yorkshire England and the agenda was leaked to a specialty trade journal. Quad Ministers Likely to Clash Over Regional Trade Talks (1995), 13:42 INSIDE U.S. TRADE 3.
Clinton administration with fast-track negotiating authority, although there is sensitivity regarding labour and environmental issues. If Chile does not accede, they may well consummate their negotiations with the Southern Cone Common Market and open up bilateral talks with Canada. In terms of financial services, the Chilean regulatory regime will have to change to accommodate NAFTA. Presently there is a one year waiting period for the repatriation of capital, laws restricting branching and income tax laws which discriminate against non-Chilean banks.

GATS is an important first step in the effort to liberalise trade on a multilateral basis. The agreement itself has architectural weaknesses, particularly in respect of the scheduling approach. The agreement is not without its strengths however. There is a mandated process to encourage further discussion. There is a binding dispute resolution process. In respect of financial services there are many difficult negotiations ahead. During the talks leading to the Second Protocol, certain developing countries (notably Pakistan, India and Brazil) sought a linkage between financial services talks and the right of movement for natural people. That linkage demand was dropped after a two way compromise: the EU reportedly agreed to lift certain immigration restrictions on temporary entry and the U.S. reportedly agreed to allowing parallel talks on the issue. Such is the nature of a multilateral trade agreement. Even with the work to be done, and in light of our ever evolving global economy and our shifting concept of borders, GATS may be the best possible achievement for the moment.

100 Comments of Chile's lead NAFTA negotiator, Juan Gabriel Valdes, made in New York on October 10th. Canada has a considerable amount of investment in Chile, hence the desire for bilateral talks. Without Fast Track, Chile May Pursue Bilateral (1995), 2:22 Inside NAFTA 1.
102 See supra note 35.