

Services and the international contestability of markets

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This article explores how ongoing analytical work on the international contestability of markets relates to trade in services. It highlights some of the key policy- and rule-making lessons emerging from negotiations under the General Agreement on Trade in Services, noting that the Agreement represented the first true test of multilateral rule-making in an environment of deep economic integration. The article identifies some of the "architectural" challenges left outstanding in the services area, particularly as regards the Agreement's approach to scheduling liberalization commitments. The article suggests some practical means of enhancing the Agreement's user-friendliness, notably through the adoption of a negative-list approach to scheduling and the incorporation in the World Trade Organization of a horizontal set of rules on investment and the temporary movement of business people. The article, finally, explores the extent to which the Agreement's built-in agenda of ongoing sectoral negotiations and rule-making initiatives in the areas of subsidies, safeguards and government procurement can further the objective of more internationally contestable services markets.

Introduction

For a number of years, analytical work and discussions have taken place in various fora on the "new" dimensions of market access arising in a world of deepening economic integration (OECD, 1995). This work has

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emphasized the need for policy makers to approach the issue of market access in a much broader manner than that which prevailed even as recently as during the Uruguay Round. This broad approach is one that embraces the continuum of trade, investment and competition policies, its chief focus being on the need to stem anti-competitive practices that impede what has come to be called the "international contestability of markets".

While the notion of market contestability has rendered long and distinguished services in industrial organization theory (Baumol *et al.*, 1982) and antitrust practice, it is a relative newcomer to the world of trade. From a broad, new dimension of market-access perspective, the term "internationally contestable markets" describes market conditions in which the competitive process—i.e., the rivalrous relationship between firms—is unimpeded by public or private anti-competitive conduct. Hence, market-access and market-presence conditions and, more generally, the competitive process, should not be unduly impaired or distorted by the totality of potential barriers to contestability. These include traditional border barriers (of the tariff and non-tariff barrier varieties), investment conditions, domestic regulatory conduct, structural impediments as well as private anti-competitive practices (Beviglia Zampetti and Sauv , forthcoming).

A second key feature of this broader approach lies in its emphasis on the desirability of taking an integrated and "horizontal" approach to—and no longer operating with what are often artificial or bureaucratic distinctions between—goods, services, ideas, investments/investors and business people, these being the main forces driving the process of deepening integration.

An important challenge confronting the multilateral trading system in the post-Uruguay Round period arises from the need to address these new dimensions of market access in a more integrated manner, so that the removal of impediments in any one policy area is informed by, coordinated with, and complements efforts in other areas. This implies a determined attempt at ensuring that the architecture of multilateral rules is able to keep up with the times., i.e., evolve in ways that are responsive to the potentially contrasting needs of the system's core constituencies: governments, consumers and internationally-active firms.

The recent years have revealed a widening gulf between the ever-broadening scope of objectives assigned to the trading system—ranging from calls to address the market-access implication stemming from regulatory heterogeneity, to securing rights of establishment and higher degrees of

protection for investors, to disciplining private restraints to trade and investment—and the still limited range of multilateral instruments with which to pursue them. The Dutch economist Jan Tinbergen won the first Nobel Prize in economics for pointing out (among other important contributions) a simple truism in economic policy-making: the need for a rough equivalence between policy objectives and policy instruments (Tinbergen, 1952). Overcoming the “assignment problem” deriving from the asymmetry between objectives and instruments is key to preserving support in the multilateral trading system. Indeed, in the absence of a more complete and coherent multilateral architecture of rules with which to maintain or enhance the multilateral trading system’s credibility and relevance, countries may be tempted to eschew multilateralism and favour regional or plurilateral routes to liberalization. They may also be attracted by unilateral (and often extra-territorial) or bilateral approaches out of a belief that the multilateral system can no longer “deliver the goods” (and, increasingly, the services) for which it was created.

Much of ongoing analysis on the issue of international market contestability is thus geared towards reflecting on the best means of fitting the multilateral trading system with a more complete arsenal of competition-enhancing disciplines and on the operational means of translating this objective in negotiating terms. Pursuing a competition-oriented trade agenda in a satisfactory manner would imply initiatives directed at:

- broadening the scope and coverage of World Trade Organization disciplines;
- interpreting existing rules (e.g., subsidies, safeguards, anti-dumping, services, intellectual property) in a competition-oriented fashion (thereby embedding competition values more firmly within the trading system);
- exploring the need to integrate new disciplines (or more comprehensive and coherent ones where these already exist) on investment, competition and standards of regulatory behaviour into the multilateral trading system; and
- engaging in discussions on the consequences of such possible integration for the design and operation of existing norms and institutions, particularly within WTO.

This article concerns itself with how the contestability challenges described above relate to trade in services. It does so in three ways. First, it draws attention to some of the key (and largely positive) policy- and

rule-making lessons emerging from negotiations under the General Agreement on Trade in Services (GATS), recalling that the negotiation of the GATS represented the first true test of multilateral rule-making in the age of deep integration. Second, it identifies some of the "architectural" challenges left outstanding by the Uruguay Round's services negotiations, particularly as regards the GATS' contestability-inhibiting approach to the scheduling of members' liberalization commitments. In so doing, the article suggests some practical means of ensuring that the further development and continuing adaptation of GATS disciplines are both more inherently liberalizing and user-friendly than is currently the case. This largely involves the adoption of a so-called "negative list" approach to scheduling commitments, the incorporation of a comprehensive and generic set of investment-protection and liberalization disciplines within WTO as well as the development of generic (i.e., non-services specific) rules governing the cross-border movement of business people. Third, the article explores the extent to which the GATS' built-in agenda of ongoing sectoral negotiations and horizontal rule-making initiatives in the areas of subsidies, safeguards and government procurement can help promote the objective of progressively more contestable services markets worldwide.

Ahead of its time? The GATS and internationally contestable markets

Despite the criticism that is often (and at times quite deservedly) levelled at the GATS in academic or policy circles (Sauvé, 1995; Hoekman, 1995), the Agreement may be viewed as having anticipated many of the policy- and rule-making challenges posed by the process of deepening economic integration. Indeed, in many respects, one of the key rule-making challenges confronting the multilateral system will be how to respond to some of the lessons taught to policy makers by the GATS, lessons which the globalization process is revealing as quite often inherently generic in nature, i.e., applicable beyond the services domain to all that is (or should be) subject to WTO disciplines. What, then, are these lessons? Six of them come to mind most vividly:

- **It is no longer meaningful to distinguish between the trade and investment modes of doing business.** Both are flip sides of the same coin, and that coin is called market access. This implies that, sooner or
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later, the multilateral trading system will confront the need to integrate a more comprehensive and coherent set of investment-protection and investment-liberalization rules of the game, most likely along the broad lines of those being envisaged in negotiations currently under way in OECD on a Multilateral Agreement on Investment (MAI) (Witherell, 1995). It is important to recall that the ministerial mandate that launched the MAI negotiating process fully recognized the need for the eventual incorporation of MAI-type rules into the multilateral trading system. Moreover, the trade and investment interface was clearly in evidence in the Marrakech Declaration and is a likely candidate for discussion at WTO's first ministerial gathering in Singapore in December 1996 (Ruggiero, 1995; Brittan, 1995).

- **It is not useful distinguish between goods and services.** Despite the fact that the Punta del Este Declaration (which launched the Uruguay Round) placed trade in services onto a negotiating track distinct from that applying to goods trade, it has become increasingly evident (most recently for instance in the context of negotiations on basic telecommunications networks and services) that the production, distribution and marketing of services and goods are fundamentally intertwined. Indeed, it is typically not possible (nor analytically or commercially meaningful from a broad market-access perspective) to focus on services-trade liberalization without simultaneously tackling product-market impediments (e.g., standards, licensing and other regulatory and private barriers) affecting the efficient delivery of services to markets.
- **The key contribution of competition policy to promoting internationally contestable services markets, i.e.,** the need for an approach targeted at anti-competitive conduct, whether its origin is public or private in nature. The more successful governments are in repealing public impediments to contestability through trade and investment-regime liberalization, the greater the scope for such practices to be "privatized" (i.e., for private anti-competitive conduct to fill the vacuum left by the elimination of governmental or state-supported anti-competitive conduct). While the GATS usefully anticipated the important contribution of competition disciplines to achieving effective market access (notably in Articles VIII (Monopolies and Exclusive Service) and IX (Business Practices)), this has become more vivid still in the context of ongoing sectoral negotiations (Low, 1995). Indeed, negotiations in the areas of basic telecommunications, maritime

transport and professional services have already revealed the fundamental importance of ensuring that market-access and market-presence commitments are not nullified or impaired by private (or publicly-sanctioned private) anti-competitive conduct;¹

- **The central importance of effective market access and effective market presence, i.e., the need for a de facto standard of national treatment**, which focuses attention on a host of regulatory determinants of access and presence. At the same time, the GATS has focused policy attention on the extent to which conditions of effective access and presence in a market are also conditioned by non-discriminatory measures (i.e., quantitative restrictions of numerous sorts).
- **The key importance of domestic regulatory conduct to the international contestability of markets** and the need for countries to go about their sovereign right to regulate in ways that are more informed by the international (i.e., market-access, market-presence, market-entry and market-exit) impacts of domestic regulatory conduct.
- **The central role assumed by the temporary movement of business people** as agents of deep integration and of more contestable service markets.

Architectural challenges: re-thinking the GATS’ “scheduling technology”

As the discussion above has attempted to highlight, there is much to learn from the GATS in adapting the multilateral trading system to the needs of tomorrow—indeed in adapting it to the needs of today. At the same time, there is a need to reflect on some of the architectural or rule-making chal-

¹ While there is increasing awareness of the positive complementary contribution that competition policy can make to trade and investment-regime liberalization, the jury is still out as to the best means of addressing such complementarity in institutional and rule-making terms. Consensus also tends to be lacking as to the forms of private anti-competitive conduct that are most damaging to international commerce. A central issue confronting (and typically dividing) the trade and competition-policy communities is thus that of determining the optimal mix of domestic and international disciplines that could be brought to bear on private anti-competitive practices most likely to impair the efficient functioning of markets by unduly restricting trade and investment opportunities (e.g., international price-fixing, undue differences in merger-review procedures, abuse of dominance, bid-rigging).

lenges left outstanding by the Uruguay Round's services negotiations and on the best means of addressing them. Two such challenges come to mind immediately:

- The fact that **the Agreement contains so few obligations that are of truly general application**. This comes in marked contrast to all other constituent parts of WTO and gives the GATS a distinct "à la carte" flavour.
- **The Agreement's use of an unsatisfactory approach to scheduling liberalization commitments**, through its combination of a positive list approach to coverage and recourse to scheduling by sector and mode of supply. This "scheduling technology" has introduced a number of shortcomings, chief among which is the generation of schedules of commitments that lack user-friendliness. This has:
 - significantly complicated attempts at interpreting, documenting and measuring the tangible liberalization benefits achieved under the GATS, rendering the Agreement's "marketing" more difficult with respect to business users;
 - generated insufficient transparency, especially in non-scheduled (i.e., non-bound or non-liberalized) sectors;
 - allowed for the maintenance of potentially significant gaps between the nature and level of bindings and the actual regulatory situation prevailing in any given services market (recalling an interesting mercantilistic negotiating "coinage" analogy between applied and bound tariff levels in the area of trade in goods);
 - introduced a scheduling bias against the cross-border provision of services and in favour of the commercial presence mode of supply (i.e., generating what could be described as a TRIM-like outcome) (Sauvé, 1994); and,
 - introduced complexities in data-collection terms by suggesting the need to measure services transactions along mode-of-supply lines.

The above problems are not trivial given the regulatory nature of impediments to contestability in the services area. By allowing GATS members to undertake binding commitments at less than the regulatory status quo (an issue that featured particularly prominently in the final stages of negotiations in the financial services area) and not to shed light on the nature of

impediments applying to sectors not inscribed in members' schedules of commitments, the Agreement may be viewed as lacking noticeably in competition-enhancing transparency.

Moreover, and as noted above, the scheduling technology of the GATS raises practical problems from a data-collection and empirical measurement viewpoint, for example, with regard to the otherwise very user-friendly Database on Measures Affecting Services Trade (MAST) developed by the UNCTAD Secretariat. By anchoring its database on the contents of GATS members' schedules, MAST is generating a mass of information that may not be of optimal relevance to business users, who will want to know the precise nature of the regulatory impediments they will encounter in foreign markets, as opposed to those barriers in regard to which GATS signatories have lodged binding commitments. It may similarly not provide trade negotiators with a complete inventory—indeed a clear road-map—of what remains to be done by way of further services trade and investment liberalization.

It is important to note that the scheduling technology adopted in the GATS does not derive from any specific provision found in the Agreement. Rather, the GATS' hybrid approach to scheduling, which combines a negative list of non-conforming measures maintained in a positive list of scheduled sectors and modes of supply, was adopted in a largely ad hoc manner towards the later stages of the negotiations.² While nothing prevents GATS members from revisiting the Agreement's scheduling approach, this issue has yet to be seen as worthy of renewed attention in the context of the GATS' built-in agenda on rule-making matters.³

² Two main factors, one substantive, the other more procedural, fuelled resistance to a negative list approach. In substantive terms, many countries (particularly but not exclusively developing ones), were of the view that such an approach would result in greater pressure to liberalize than they were prepared to undertake and would leave them "naked" (or fully liberalized) in sectors where regulatory regimes were weak or undeveloped. The positive list approach was preferred because it allowed considerably greater progressivity and selectivity in market opening and did not generate an automatic standstill in prevailing regulatory regimes. Procedurally, resistance to negative listing owed mainly to the prevailing sentiment that (especially in the run-up to the December 1990 Brussels Ministerial meeting, where the Uruguay Round was initially scheduled for conclusion) there was not sufficient time for countries, particularly developing ones, to complete their negative lists of non-conforming measures.

³ This is hardly surprising given that the Uruguay Round has never really ended as far as the GATS is concerned, negotiations having continued since the Round's "completion" in December 1993. Services negotiators have thus not had an opportunity to step back and assess the Agreement's existing parameters in a (positively) critical manner.

An opportunity to re-examine the scheduling technology of the GATS would however present itself if and when WTO members collectively decided to tackle the issue of investment rule-making in a more comprehensive manner, given the numerous substantive overlaps that would arise between the commercial presence-related provisions of the GATS and an overarching set of investment-liberalization and protection disciplines embedded at the very core of WTO's architecture. Work carried out in the OECD Trade Committee in recent years suggests that the case for equipping the multilateral trading system with sound rules of the game on investment is very compelling (OECD, 1996). Indeed, investment is central to eventually completing WTO's contestability arsenal and reducing the incidence and importance of the assignment problem diagnosed earlier.

Incorporating a broad set of investment rules of the game into the WTO system would, however, give rise to a number of "architectural" changes in the design and operation of existing WTO agreements. This most obviously concerns the GATS, but also the TRIMs, TRIPs and Subsidies Agreements, as well as WTO's Dispute Settlement Understanding.⁴ In the case of the GATS, three significant architectural changes come to mind, all of which relate to some extent to the Agreement's reliance on modes of supply:

- **The opportunity of adopting a negative list approach to scheduling commitments.** The central thrust of the liberalization mechanism embodied in recent or ongoing attempts at investment rule-making (for

⁴ A comprehensive set of WTO investment disciplines would most likely need to subsume the provisions found in the TRIMs Agreement and seek to broaden considerably the range of prohibited performance requirements, possibly along the lines of what was accomplished under Article 1106 (Performance requirements) of the North American Free Trade Agreement (NAFTA). It would also need to redress an important shortcoming of the Uruguay Round's (and NAFTA's) treatment of investment-related matters by establishing an explicit link between the prohibition of performance requirements and the development of credible disciplines on investment incentives, the granting of which is typically tied to an investor's willingness to undertake (on a mandatory or voluntary basis) performance requirements. The extent to which the WTO Subsidy Agreement establishes disciplines in this area remains an open question (UNCTAD, DICI, 1996). Finally, in regard to dispute settlement, by far the most significant implication of addressing investment matters more comprehensively under WTO would be the necessity (once again as was done in NAFTA) to provide investors with direct recourse to the multilateral body's dispute-settlement system (so-called investor-state arbitration) in instances where private agents deem their benefits under the Agreement to have been nullified or impaired by government conduct. The provision of investor-state dispute resolution is viewed by internationally-active firms as an essential ingredient of credible investment rule-making.

instance in NAFTA or the MAI⁵), the broad parameters of which may well be expected to influence how investment is eventually incorporated into WTO, consists of a negative list approach to liberalization. Such an approach has a number of distinguishing features. For one, it enshrines and affirms the up-front commitment of signatories to an overarching set of general obligations. This is currently the case in the GATS solely with respect to the Agreement's provisions on most-favoured-nation treatment (Article II, though with the possibility of time-bound exemptions) and transparency (Article III), with all other obligations and disciplines applying to sectors and modes of supply on those terms inscribed in members' schedules of commitments. A second, and perhaps more immediately operational, characteristic of a negative list approach lies in its ability to generate a standstill, i.e., establish a stronger floor of liberalization by locking-in the regulatory status quo. Yet another liberalizing characteristic is the fact that negative listing implies that all non-conforming measures are fully liberalized unless otherwise "reserved" in a highly transparent manner. Such an approach may also lend itself more easily to formula-based liberalization, for instance by encouraging members to agree to phase-out "revealed" non-conforming measures over an agreed and most likely differentiated timetable (depending on the level of development of member countries). While a negative list approach is often viewed as administratively burdensome, particularly by developing countries, experience has shown that the gains in transparency and in user-friendliness tend to outweigh such an administrative burden. This burden, moreover, can be mitigated by allowing for progressivity in the completion of members' negative lists of non-conforming measures. Under NAFTA, for instance, sub-national governments (provinces and states) were given an extra two years to complete their lists of non-conforming measures maintained in the areas of services and invest-

⁵ Recognizing the shortcomings of existing international rules governing investment-related matters, OECD member governments agreed at their May 1995 ministerial meeting to launch negotiations aimed at achieving a MAI by mid-1997. The Agreement would be open to all OECD members and the European Union, and to accession by non-OECD member countries. If successfully completed, such an agreement would bind participating countries, and its obligations would be reinforced by the inclusion of an effective dispute-settlement mechanism (providing for both state-to-state and investor-to-state arbitration). The rules under discussion include the principles of investment protection, national and most-favoured-nation treatment, as well as transparency of national laws and regulations. The agreement would apply to all levels of government, including to policies applied in the context of regional economic integration organizations (Witherell, 1995).

ment. Progressivity, it may be recalled, also proved central to securing compliance with the TRIMs Agreement.⁶ Finally, but not unimportantly, a negative list approach can yield significant (if somewhat unexpected) regulatory reform benefits by encouraging countries at all levels of development to take a comprehensive look at the optimality of existing regulatory structures and practices.

- **The scope for replacing the commercial presence dimension of the GATS by a more generic set of investment disciplines applicable to all substantive areas subject to WTO disciplines.** Under such an approach, which would be reminiscent of the complementary linkages between services and investment-regime liberalization pursued under NAFTA, the GATS could be made to relate exclusively to measures affecting the cross-border provision of services. Establishment-related “trade” would be governed for its part by a generic (i.e., broadly applicable to goods, services and TRIPs) and horizontal set of investment-protection and liberalization rules.
- **The desirability of doing the same as regards the movement of service supplier mode of supply.** Business people cross borders for a number of reasons other than to supply services. This points to the challenge for the international community to elevate the importance it attaches to issues regarding the cross-border movement of people by replacing the current set of temporary movement confined to the GATS with yet again a generic and horizontal set of disciplines applicable to a broader range of people crossing borders and establishing temporary residence for business purposes.⁷

⁶ The TRIMs Agreement requires the mandatory notification of all non-conforming TRIMs covered by its Illustrative List and maintained at the national and sub-national levels, and calls for their elimination over transition periods which vary according to members’ levels of economic development; two years from entry into force of WTO for developed countries; five years for developing countries; and seven years for least-developed countries.

⁷ While the recent GATS negotiations on the movement of service suppliers showed that the political “market” for liberalization is far greater in regard to capital than to labour, there remain compelling reasons to revisit the treatment of labour mobility-related matters within the multilateral trading system (without at the same time opening the Pandora’s box of national immigration regimes or of policies governing the temporary movement of unskilled labour). This is so both from the perspective of ensuring greater symmetry in the treatment of factors of production within the trading system and of tackling the numerous border impediments to temporary labour mobility maintained in developed and in developing countries alike. Though far from fully satisfactory, the generic set of provisions contained in Chapter 16 of NAFTA on the Temporary Entry of Business People suggests how governments can go about responding to the needs of internationally-active firms to deploy their human resources more effectively across borders.

The changes depicted above would in effect do away with the need for a modes-of-supply approach, both to defining trade in services and to scheduling commitments. It would also do away with the need for the movement of consumers mode of supply, which has not proven to be of central analytical or negotiating moment. More broadly, it would contribute to equipping the multilateral trading system with a more coherent architecture of complementary trade and investment rules with which to promote in an undifferentiated manner the international contestability of markets for goods, services, ideas and investments while enhancing the cross-border mobility of business people.

Contestability and the GATS' built-in agenda

Much of the GATS' built-in agenda, which comprises both ongoing sectoral liberalization negotiations and substantive horizontal rule-making, can be expected to yield important tangible benefits in terms of greater international market contestability. At the sectoral level, few negotiations hold the potential for promoting greater dynamic efficiencies on a global basis than those relating to the liberalization of basic telecommunications networks and services. The stakes of the current talks, and the commensurate economy-wide benefits to be derived from their successful conclusion by each participating member, are all the more greater given the dual nature of telecommunications as a sector of ever-increasing economic importance in its own right but also as a vector for transmitting information and efficiency gains in the design, production, sales and distribution of a host of other goods- and services-related activities.

The basic telecommunications negotiations are of particular importance for another reason: namely because they offer a ready-made laboratory in which to experiment with novel approaches to the regulatory and competition-policy dimensions of market access in a trade-policy setting. A central feature of ongoing negotiations has indeed been the development of so-called Pro-competitive Regulatory Principles aimed at ensuring that domestic regulatory regimes in the telecommunications area do not nullify or impair the liberalization benefits accruing to signatories of the agreement. Issues under discussion go to the heart of the contestability debate, by seeking to ensure that new entrants in foreign markets have a chance to compete

with entrenched monopolies or dominant suppliers.⁸ Once these negotiations are completed in mid-1996, it will be important to assess the degree to which such policy- and rule-making experimentation is relevant beyond services trade to all areas subject to WTO disciplines. Telecommunications, however, is hardly the only sector characterized by such “networking duality”. This suggests that the direct and indirect benefits to be derived from deeper trade- and investment-regime liberalization in the areas of financial services, maritime transport and professional services could also be significant.

One important issue that has arisen in the context of ongoing sectoral negotiations, and which bears potentially significant implications for the best means of promoting progressively higher liberalization commitments, is that relating to issue linkages and the difficulty of achieving an overall balance of benefits when negotiating along purely sectoral lines (e.g., financial services vs. movement of service providers or basic telecommunications vs. maritime transport) rather than against the backdrop of an all-encompassing negotiating round.

While discussions are still at an early stage, the three areas earmarked for substantive future rule-making initiatives under the GATS—subsidies, safeguards and government procurement—all bear some implications from the perspective of furthering the international contestability of services markets. As regards subsidies, two important challenges will be: first, to reach agreement on the types of measures the negotiations should be addressing; and, second, to explore the degree and incidence of subsidization in services trade. This would help determine whether a traffic-light approach such as that developed for goods trade in the Uruguay Round could be replicated in the services area.⁹

It is worth noting that, with the exception of the European Union, where disciplines on state aids apply equally to goods- and services-related activities, no regional integration agreement has to date developed a set of disciplines on subsidies related to trade in services. The prevalence of state

⁸ Such issues include conditions of access to and use of essential facilities; prevention of anti-competitive practices; transparency of interconnection to essential facilities; public availability of licensing criteria and accounting rates; independence of regulatory bodies; allocation and use of scarce resources.

⁹ Such an approach delineated three types of subsidies: (i) those that are *per se* prohibited; (ii) those that are non-actionable; and (iii) those that are actionable but which require a case-by-case (rule of reason type) assessment.

aids (particularly to state monopolies) in a number of key service industries (telecommunications, rail or air transport, for instance) may well be expected to feature prominently in discussions, as will the host of measures through which governments provide locational incentives to investment.

Moreover, the question arises as regards the extent to which domestic regulatory conduct may be considered as inducing subsidy-like outcomes. By decreasing the level of regulation or by making compliance less costly for domestic or established firms, regulatory competition among states may provide competitive advantages to the latter. The significantly greater potential of "regulatory subsidies" in the services area thus raises an important set of definitional challenges. In this regard, it is useful to recall that, by focusing the definition of a subsidy on the existence of a public financial contribution, as opposed to a wider, and more contestability-enhancing notion encompassing any benefit-conferring government action (for example through preferential procurement practices or export insurance guarantees), the Uruguay Round's Subsidies Agreement has made claims against regulatory-related forms of subsidies more difficult to bring forward and substantiate (Beviglia Zampetti, 1995).

Ongoing discussions on **safeguards**, which aim at determining whether a case exists for developing multilateral disciplines, are likely to prove equally challenging to negotiators. While it is clear that the possibility of safeguard action may serve a useful "insurance policy" role by encouraging GATS members to undertake greater liberalization commitments than might otherwise be the case (one may in fact expect more forceful advocacy for safeguard "insurance" under a negative list approach to liberalization given its stronger liberalization bias), a number of practical difficulties remain in applying such an instrument in regard to trade in services.

The discussions held so far in the Working Party on GATS Rules have indeed revealed the complexities of approaching safeguards on a mode-of-supply basis. Given the predominance of establishment-related "trade" in services, the question arises of how to determine what might constitute an injurious import surge. A closely related definitional challenge is the question of the criteria that would need to be developed to determine what constitutes a "foreign" service supplier when trade is not conducted on a cross-border basis.

As in the case of subsidies, it is interesting to note that regional integration agreements concluded to date have largely eschewed the develop-

ment of provisions on safeguard action for services, recourse being rather made to more traditional provisions such as those found in Articles XII (Restrictions to Safeguard the Balance of Payments) or XIV (General Exceptions) of the GATS. In the NAFTA context, for instance, allowance for progressivity in the implementation of trade- and investment-regime liberalization, rather than the adoption of a goods-type safeguard mechanism, was the preferred route in the area of land transport. This came in response to concerns over the ability of the Mexican trucking industry to withstand a substantial immediate increase in cross-border competition. Interestingly, however, NAFTA also saw the adoption of a safeguard-type mechanism in one area (that of financial services) where the scope for potentially injurious competition is far more likely to derive from the successful (and presumably desirable from an economy-wide efficiency perspective) operation of domestically-established foreign enterprises than from cross-border competition.¹⁰

The area of **government procurement for services**, finally, represents what is perhaps the most powerful vehicle for enhancing the international contestability of service markets around the world. It is also one where attempts to address the trade- and investment-distorting effects of public and private corrupt practices could possibly yield the greatest competition-enhancing benefits. Experience gained at the regional level shows quite unambiguously that greater and more secure access to government procurement markets typically represents the most direct and immediate means of securing effective market access for a host of traded services, such as computer services, consulting engineering (alongside many other professional service categories) or construction, that are otherwise subject to few or no regulatory impediments to cross-border trade other than those relating to licensing- or immigration-related measures, which can of course be significantly access-inhibiting themselves (Sauvé, 1995a).

Negotiations carried out in parallel to the Uruguay Round generated a significant expansion in the coverage of the Government Procurement Agreement (GPA), notably by addressing services and construction for the first time and by extending the GPA's reach to the procurement practices of

¹⁰ Annex 1413.6 Section B of NAFTA provides that if the sum of authorized capital of foreign commercial bank affiliates reaches 25 per cent of the aggregate capital of all commercial banks in Mexico, Mexico may request consultations with the other NAFTA parties on the potential adverse effects arising from the presence of commercial banks of other parties and the possible need for remedial action, including further temporary limitations on market participation (WTO, 1995).

sub-national governments and state enterprises. The new Agreement also introduces a new bid-challenge procedure for suppliers, and forbids the use of "offsets", such as domestic content or other performance requirements. While these are significant and welcome competition-enhancing achievements, they have yet to translate into widened GPA membership (Hoekman and Mavroidis, 1995; Nicholls, 1995). The call for multilateral negotiations on services procurement provides WTO members with an opportunity to reflect on the desirability of confining such talks solely to the services domain. As noted earlier, one of the key policy lessons emerging from the globalization process has been to reveal the limits of operating artificial distinctions between goods and services and to call for a more integrated approach to multilateral rule-making. To the extent that the multilateral community is prepared to engage in negotiations on services procurement, it is perhaps worth reflecting on the economic and negotiating dynamic benefits that could be derived by a more determined attempt at multilateralizing the GPA itself. The unprecedented level of spending on infrastructure development that is going to take place worldwide over the next decade suggests that more internationally contestable procurement markets for both goods and services offer the prospects for significantly enhanced market access opportunities for firms from developed and developing countries alike.

Concluding remarks

This article has argued that the incorporation of services in the multilateral trading system has provided policy makers with the first meaningful opportunity to confront—and to seek to mediate—a number of the policy- and rule-making challenges arising from the globalization process. It is important to view the GATS—like the multilateral trading system itself—as a work in progress. Seen in this light, the process of trial and error and of learning by doing through which a body of rules is coming to govern one of the most vibrant segments of the world economy must be seen as generating a host of useful policy- and rule-making lessons.

As is typically the case with any work in progress, much remains to be done to equip the multilateral trading system with the range of instruments required to go about its core task of promoting greater economic efficiency through continued trade- and investment-regime liberalization and by disciplining market access- and presence-impeding private anti-competitive conduct. Here again, the GATS negotiations have generated—and will continue

to generate—positive policy- and rule-making externalities that may well prove more broadly applicable. In so doing, the GATS negotiations are taking the multilateral system one step closer to the more comprehensive, coherent and horizontal architecture of rules that will be required to underpin (and, at times, to “civilize”) the conduct of business in a globalizing environment.

That being said, the GATS itself will need some re-tooling if it is to become a more effective vehicle for promoting the international contestability of services markets. While the menu of architectural changes suggested in this article have only just begun to elicit greater analytical scrutiny, there is every indication that rising interest in seeing investment-related matters addressed more comprehensively within WTO will likely focus greater attention on such issues. The incorporation of a more generic set of investment-liberalization and protection rules of the game represents what is probably the most direct (and perhaps the only available) route for effecting the types of structural changes suggested in this article.

It is important to acknowledge that the promotion of internationally contestable services markets cannot be expected to derive solely from architectural change, whether of the GATS’ scheduling technology, the adoption of a negative list approach to liberalization, or the horizontal treatment of investment and the temporary movement of business people, however important, desirable and ultimately feasible such changes may be. Contestability remains, first and foremost, an objective that can only be secured through continued attempts at repealing those obstacles, public and private, that may stand in the way of effective access and presence in international markets and of better reconciling producer and consumer/user interests within the trading system.

There is much that the GATS’ built-in agenda can do to further the contestability objective, both in sectoral and substantive rule-making terms. At the sectoral level, the analysis presented in this article has highlighted the central importance of pushing the liberalization frontier further than GATS members have so far shown a willingness to do. Nowhere is this more important than in the area of basic telecommunications, given the sector’s networking dynamics. As regards those areas subject to ongoing rule-making initiatives, four main conclusions emerge. These concern: the desirability of adopting a contestability-enhancing definition of subsidies, so as to discipline the broad range of regulatory-like subsidies affecting trade, investment and competition in services; the need to view progressivity in trade and

investment liberalization as best practice in regard to safeguards-related concerns, bearing in mind however that the adoption of a negative list approach to liberalization may increase the perceived "insurance" value (and, hence, the attractiveness) of safeguard provisions for services; the central importance of achieving greater liberalization of government procurement for services through the multilateralization of WTO's Government Procurement Agreement itself, rather than via the GATS; and the need to assess the degree to which the policy- and rule-making lessons arising from the GATS' built-in agenda may be more broadly applicable beyond the services area, particularly with regard to investment, competition and regulatory-related matters. ■

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