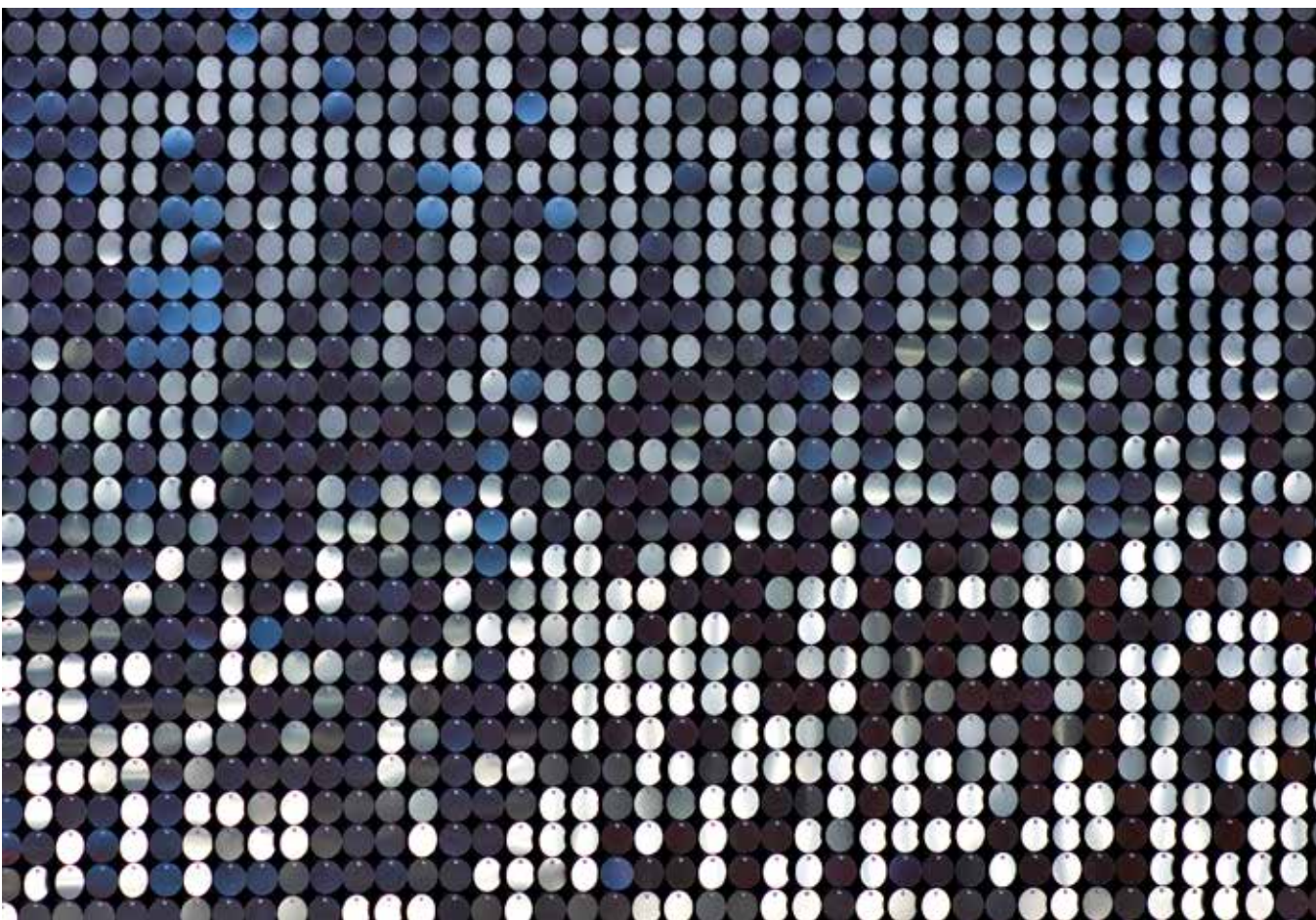




A HANDBOOK ON NEGOTIATING PREFERENTIAL TRADE AGREEMENTS

SERVICES LIBERALIZATION

PIERRE SAUVÉ // SIMON LACEY

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A Handbook on Negotiating Preferential Trade Agreements

Services Liberalization

Pierre Sauvé // Simon Lacey

A Handbook on Negotiating Preferential Trade Agreements: Services Liberalization

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Foreword

Services play an important role in the development of many economies of the Asia-Pacific region. It is not only service sectors that are large employers in many countries; many services are critical inputs in local production and trade. Therefore the efficiency of service sectors contributes significantly to the productivity of other economic activities across all major sectors of agriculture, industry and the service sector itself. Policies that have an impact on the efficiency of the service sector in developing countries are among of the most important policies determining the competitiveness of traded products and services, and the economy in general.

Although the share of Asia-Pacific as a whole in global exports and imports of commercial services rose to almost 30 per cent in 2012, trade in services is still relatively less important than exports of merchandise. Compared to global figure where the services account for slightly more than 25 per cent of total exports, this share for Asia-Pacific only amounted to 20 per cent in 2012. As demonstrated by the effects of the persistent global economic downturn since 2008, merchandise trade is much more susceptible to contraction of growth and demand than services trade. Thus, creating larger services trade potential is an important developmental goal of developing economies in the Asian and Pacific region.

Services entered multilateral trade rules through the negotiation of the Uruguay Round of GATT, and were supposed to be deepened and enhanced with the establishment of the World Trade Organization and the continued evolution of the General Agreement on Trade in Services. However the stalled Doha Development Agenda negotiations affected services in the same way as other areas under the multilateral regime (in fact, no progress has been made since 1995). However, given the importance of services for production and trade, the policymakers then changed tracks and started to place the services trade liberalization into the preferential trade agreements. As a result, building capacity to conduct the preferential services trade negotiations became an urgent priority for many developing economies in the region. Building this capacity is even more complex than in case of general trade policy formulation and negotiations due to the high heterogeneity of services activities and the many actors involved in provision and consumption of services.

ESCAP has developed a reputed evidence-based trade policymaking capacity development programme, and since 2000 more than 3,000 government officials have undergone the training in different trade-related areas. Thus, the ESCAP secretariat in partnership with the secretariat and members of Asia-Pacific Research and Training Network on Trade (ARTNeT) was able to put in place a series of workshops covering different components of the preferential negotiations for services trade. What resulted from those training sessions and work with government officials, the private sector, analysts and other stakeholders, was that the success of negotiations, the implementation of the modalities and development impacts depended crucially on the preparation of negotiations as well as the process of continuous consultation and coordination prior, during and after conducting negotiations. The importance of this fact impressed governments so much that they demanded a guidebook to lead them through that complex process; this handbook has been prepared in response to that request.

This handbook was prepared by Pierre Sauvé (ARTNeT advisor on trade in services and investment) and Simon Lacey, both of whom have designed and delivered workshops and worked closely with selected governments to provide tailored advice on services negotiations.

The handbook is a practical introduction to preparing to negotiate preferential trade agreements. It is aimed particularly at those who may not have extensive negotiating experience, and it seeks to explain the main steps needed to arrive at an agreement, make it enter into force and monitor its implementation. One special value of this handbook is in its coverage of the preparatory

stages for negotiations. Moreover, given the lack of resources and capacity in most developing (and especially least developed) countries to address these concerns, this handbook offers ideas and presents the experiences of other countries (often those that are well versed and successful in this area) as well as opportunities arising from utilization of Aid for Trade in this context.

The handbook is one of a series of publications that have been issued by ESCAP to be used as guides and manuals in policymaking. It is hoped that this latest handbook, as the other similar publications, will become a lasting reference and inspiration-builder for policymakers in the region.

Ravi Ratnayake

Director

Trade and Investment Division

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Abbreviations and acronyms

ACP	African, Caribbean and Pacific Group of States
ANA	American Nurses Association
ASEAN	Association of Southeast Asian Nations
AusAid	Australian Government Overseas Aid Programme
CARIFORUM	Caribbean Forum
CECA	Comprehensive Economic Cooperation Agreement (Australia and India)
ComSec	Commonwealth Secretariat
CSI	Coalition of Services Industries (United States of America)
CSME	Caribbean Single Market and Economy
DFAT	Australian Department of Foreign Affairs and Trade
DSU	Dispute Settlement Understanding of the World Trade Organization (WTO)
EPA	Economic Partnership Agreement
EOUs	export oriented units
EPZs	Export Processing Zones
ESF	European Services Forum
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
EuropeAid	Development and Cooperation Directorate General of the European Commission
FSM	Federated States of Micronesia
FTA	free trade agreement
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade (WTO)
GTA	Global Trade Alert
JICA	Japan International Cooperation Agency
JSG	Joint Study Group (Australia and India)
KORUS	Free Trade Agreement between Republic of Korea and the United States of America
MAS	Monetary Authority of Singapore
MOT	Ministry of Trade (Indonesia)

NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NTE	National Trade Estimate Report on Foreign Trade Barriers
NTP	National Trade Policy
ODI	Overseas Development Institute (United Kingdom)
OECD	Organisation for Economic Co-operation and Development
OIF	Organisation Internationale de la Francophonie
PACER	Pacific Agreement on Closer Economic Relations
PBS	Pharmaceutical Benefits Scheme (Australia)
PTA	preferential trade agreement
SEZs	Special Economic Zones
STPs	Software Technology Parks
STPI	Software Technology Parks of India
STRI	Services Trade Restrictions Index
TPA	trade policy analyst
TPP	Trans-Pacific Partnership
TPR	trade policy review
TRIMs	Trade-Related Investment Measures
TRTA	Trade-Related Technical Assistance
UNCTAD	United Nations Conference on Trade and Development
USSFT	United States-Singapore Free Trade Agreement
USAID	United States Agency for International Development
USTR	United States Trade Representative
WTO	World Trade Organization

INTRODUCTION

This training manual has been prepared under the evidence-based trade policymaking capacity- building programme of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). It is intended to serve as a reference manual for government officials tasked with the difficult job of preparing for, and conducting, negotiations on services liberalization in the context of an upcoming preferential trade agreement (PTA). It assumes that services negotiations will inevitably be part of a wider liberalization agenda being contemplated in the context of negotiations towards either a free trade agreement (FTA) or some other form of economic integration initiative. Therefore, readers are likely to be part of a much larger negotiating team, some of whom will negotiate on issues such as trade in goods, investment or government procurement while others will concentrate more narrowly on services negotiations.

Although this manual holds lessons for all trade negotiators and trade negotiations (including those at the multilateral level), it has been written with particular focus on services trade. It has also been drafted with a view to serving policymakers and trade negotiators in developing and transition economies. The authors have endeavoured, to the greatest extent possible, to rely on sources and reference materials already in the public domain. Readers can thus download most of the cited materials themselves without having to pay expensive subscriptions or other fees for access to content.

Use of this training manual is predicated on readers' having at least a basic understanding of the rules governing international trade in services, including those of the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS). Because this training manual focuses on preparing negotiators for services negotiations in the context of a PTA or regional economic integration initiative, the authors have refrained from providing an explanation of GATS rules and principles; readers seeking more information on these aspects are referred to the many good (and mostly free) sources that exist, including the WTO Introduction to GATS¹ or UNCTAD's Dispute Settlement Training Manual on GATS.² Some familiarity with GATS rules can be considered a necessary starting point to using this publication.

In preparing this training manual, the authors have drawn on several decades of combined experience, either as trade negotiators or as advisors to trade negotiators in and/or from more than 40 countries, developed and developing. The authors have therefore endeavoured to tailor this work to the specific needs of, and challenges faced by, negotiators in developing countries and transition economies. A comprehensive treatment of the subject matter work would likely comprise several hundred pages,

¹ Available at www.wto.org/english/tratop_e/serv_e/gsintr_e.doc (accessed 31 May 2012).

² Available at http://unctad.org/en/docs/edmmisc232add31_en.pdf (accessed 31 May 2012).

but the authors have tried to keep this manual to a more easily accessible length. In doing so, it was assumed that readers will familiarize themselves with the contents of the manual in one or several sittings, and then use it as a reference for future work as particular needs arise. It is also for this reason that most of the sources used are open-access, allowing readers to delve more deeply into many of the sources cited.

Because it is primarily directed at policymakers and trade negotiators in developing countries and transition economies, this training manual also contains a lengthy section on Aid for Trade in services (chapter 3) which is intended: (a) to provide readers with some insight into the type of assistance that is available to stakeholders; (b) to stimulate readers to think about what type of assistance would best suit the specific needs of their economies; and (c) how to craft provisions in a PTA that will ensure such assistance is provided in a timely and effective manner as part of the quid pro quo inherent in any PTA's request-offer and mutual exchange of concessions dynamic.

This manual is based on the belief by both authors that developing countries and emerging economies are the ultimate masters of their own policy destinies. It is, accordingly, up to political leaders, policymakers and negotiators of such countries to approach trade negotiations with the proper preparations, a clear set of objectives and a well-conceived strategy for attaining these objectives. This manual is intended to be an aid in the pursuit of that task, no more and no less.

The authors hope they have provided a useful resource for policymakers and negotiators who have been tasked with the preparation and conduct of services negotiations in the context of an upcoming or pending PTA. It is also hoped that in doing so, a contribution has been made to closer economic integration and development cooperation between developed and developing countries, in the spirit of open regionalism.

CHAPTER I

PREPARING FOR NEGOTIATIONS

Preparing for negotiations on services is largely about doing one's homework and preparing, to the greatest extent possible, for the challenges that negotiators can be expected to face, both in the negotiating room and outside. This chapter deals with the various aspects of this preparatory phase, focusing first on establishing the right working structures and relationships within government, before discussing the need to consult broadly outside government circles, i.e., with the private sector and any civil society stakeholders that are likely to take in interest in one or more aspects of the negotiations. The findings and recommendations from this chapter are derived largely, albeit not exclusively, from recent reference works by Marconini and Sauvé (2010) and Feketekuty (2008). Box I.1 gives a brief outline the terminology used in this publication.

Box I.1. Note on terminology

At this point, a brief note is probably required on terminology. The authors use the abbreviations FTA, PTA and EPA largely interchangeably, despite the substantive differences that may, in reality, exist between the terms that they stand for in any given instance (free trade agreement, preferential trade agreement and economic partnership agreement, respectively). The term “free trade agreement” is normally used in the context of an international trade agreement to liberalize trade among two economies (although the Free Trade Agreement of the Americas [FTAA] was intended to encompass many nations from North, South and Central America). A “preferential trade agreement” can be an FTA, but it might also be an “arrangement” under which two or more countries agree to accord preferential market access, with or without this being done on a reciprocal basis. The term Economic Partnership Agreement is a more recent addition to the trade policy lexicon, and is typically used when an international treaty is concluded between a developed and developing country on economic cooperation and trade. Unless otherwise indicated, when the term PTA or FTA is used in this publication, it means an international trade agreement that has been concluded between two or more economies and which entails some degree of reciprocal exchange of trade liberalization commitments on substantially all trade (i.e., with no sector excluded).

Source: Authors' notes.

A. Establishing the mandate – political endorsement from the highest levels

Marconini and Sauvé (2010) pointed out that trade negotiations on services inevitably focused on behind-the-border measures that fall within the ambit of regulatory agencies who may have little understanding of, or even much interest in international trade policy. Officials in such agencies generally tend to be concerned with a different set of regulatory objectives, such as monetary

stability or managing inflation (in the case of financial regulators), or overseeing the viability and integrity of communications networks (in the case of the telecoms regulator) than about ensuring non-discriminatory market access or national treatment that are the essential tenants of a trade official's policy portfolio. For this reason, and because of the inherently complex and sometimes conflicting policy nexus that negotiating on behind-the-border regulatory frameworks touches upon (its cross-cutting nature), it is important that the negotiating mandate be rooted in some degree of inter-agency consensus. Even more importantly, it must have the backing, support and endorsement of the highest level of political leadership.

It is thus recommended locating overall responsibility for negotiations on trade and services “at the highest levels of government”³ and this advice is certainly very sound. The decision to embark on negotiations towards an FTA or PTA should ideally come from the president or prime minister and should be the result of an understanding to do so between the Heads of State of the countries concerned.⁴

B. Identifying and mobilizing actors within government

Once the decision to launch PTA negotiations has been taken and announced, the agency that will take the lead in services negotiations must begin a wide-ranging process of consultations with the many sectoral ministries and regulatory agencies likely to be affected by the type of commitments the country is sure to be asked to make. This consultation process should also include those lawmakers who are likely to play an instrumental role in getting the results of the negotiations ratified so they can become law. The consultation process serves to inform all stakeholders and helps to achieve “buy-in” from them for when their help is needed at a later stage (Feketekuty, 2008). Many domestic political and commercial stakeholders need to be included in the consultation phase in order to determine what the country's national economic interests are in upcoming negotiations on services liberalization. The discussion here focuses first on those agencies within the executive branch of government before discussing the (often overlooked) legislative branch.

1. Executive agencies

Many governments have, in recent years, become cognizant of the cross-cutting and inter-departmental nature of trade in services, and have taken commensurate organizational steps to establish working groups and consultative mechanisms within existing institutional structures.⁵ Similarly, most countries that have recently acceded to the World Trade Organization (WTO) (including many transition economies), have gained valuable experience in establishing an inter-agency or inter-ministerial committee to coordinate the acceding country's decision-making processes and policy commitments during the accession process.⁶

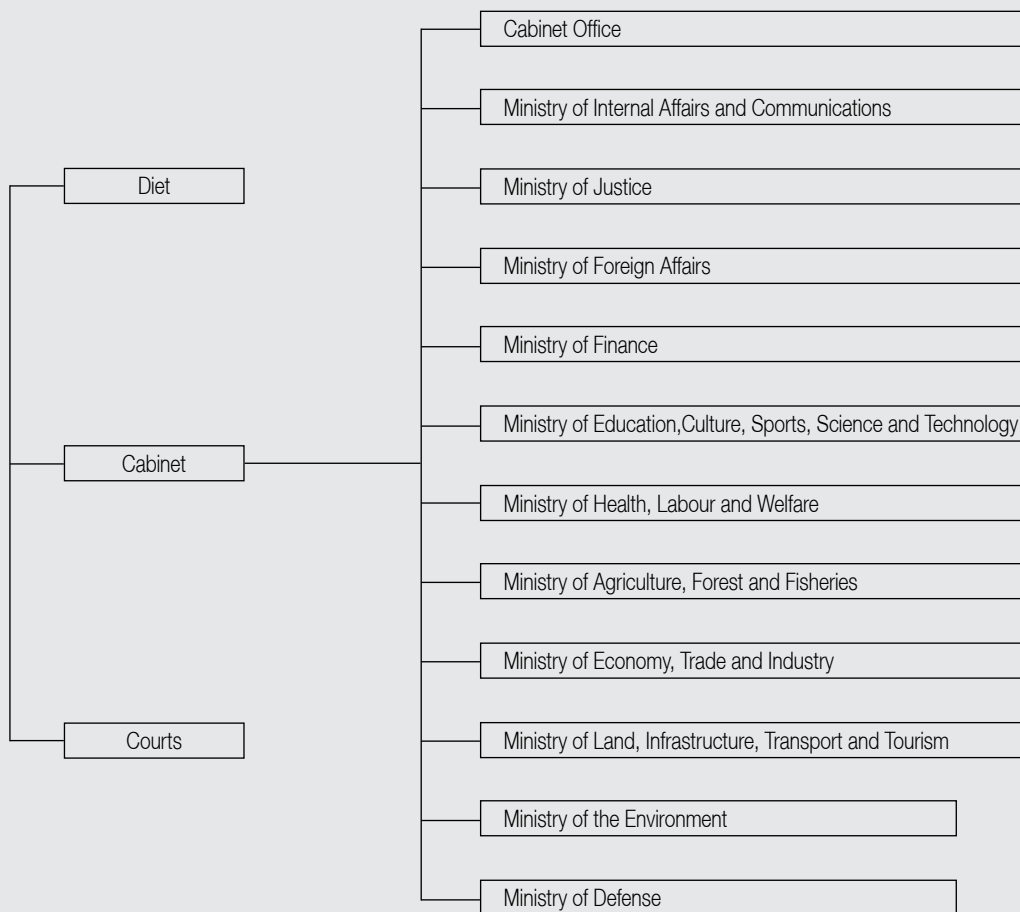
³ Namely, in the office of the presidency or the prime minister. See Marconini and Sauvé (2010) for additional explanations.

⁴ In this context, reference is made to the now famous anecdote that the decision to launch an FTA between Singapore and the United States was taken during a midnight round of golf between then United States President Bill Clinton and then Singapore Prime Minister Goh Chok Tong (see Koh and Lin, 2004, pp. 6-7).

⁵ Both authors were involved with the Indonesian Trade Assistance Project in 2007, one element of which was the establishment in 2007 of a team within the Ministry of Trade to deal specifically with services negotiations, at WTO, within the Association of Southeast Asian Nations (ASEAN) and in PTAs (United States Agency for International Development, 2009).

⁶ See, for example, the case study by Pan (2011) of Cambodia's accession to WTO.

Box I.2. Organizational structure of the Government of Japan



Source: Authors' adaptation from www.kantei.go.jp/foreign/constitution_and_government_of_japan/charts_e.html (accessed 20 May 2012).

Box I.2 shows a simplified organizational chart of the Government of Japan, with the 12 main ministries across which the executive's numerous policy portfolios are spread. Of the 12 listed, arguably only the Ministry of Agriculture, Forestry and Fisheries would not have to be part of government-wide consultations to determine the various agencies' specific interests in upcoming negotiations on services.⁷ Each and every one of the other ministries will have various interests requiring consultation, and which should be incorporated as appropriate into the country's negotiating strategy.

As mentioned above, with the exception of the Ministry of Agriculture, Forestry and Fisheries, each ministry is likely to have responsibilities and regulatory objectives that could be affected by, or even conflict with the concessions to be made in negotiations on services liberalization. It bears recalling here that the scope of services agreements, whether the General Agreement on Trade

⁷ Even this statement must be qualified by the fact that many PTAs with developing countries specifically exclude or restrict from services or investment liberalization any market access or national treatment concessions for commercial farming, forestry or fishing activities.

Box 1.3. Services negotiations and executive branch stakeholders in Japan

- The Cabinet Office will need to be informed at regular intervals on the progress of both consensus building and the actual negotiations, once they start, since it is the Cabinet that sets the Government's policy objectives at the highest level.
- The Ministry of Internal Affairs and Communications has a number of powerful bureaucratic fiefdoms that will want to weigh in heavily before and during negotiations, including the Global ICT Strategy Bureau, the Information and Communications Bureau, and the Telecommunications Bureau.
- The Ministry of Justice will need to be informed during both the consensus-building stage prior to the start of negotiations as well as regularly once negotiations have begun. Its interests in services negotiations stem from the fact that it represents the Government of Japan in international dispute settlement as well as from the fact that it is ultimately responsible for administering the nation's immigration policies (which could be affected by commitments on the movement of natural persons). Finally, it is most likely to be lawyers from the Ministry of Justice who will inevitably have to be involved in the process of legal verification or "scrubbing" of any treaty texts once negotiations have been concluded.
- Although the Ministry of Foreign Affairs in Japan does not take the lead on trade negotiations, it will nevertheless want its views on the potential impact of services liberalization in the context of a PTA with another country on Japan's broader foreign policy interests to be taken into consideration, for obvious reasons. It might also be a useful source of information for trade negotiators trying to gain a more detailed understanding of their PTA negotiating partners.
- The Ministry of Finance will play a key role at all stages of services negotiations, but especially in regard to any concessions that may have a bearing on the country's banking system or the markets for other financial products, such as insurance, securities and consumer credit among others. Finance officials can be expected to exercise a somewhat cautious, conservative and restraining influence on negotiations, and will be much more concerned with the overall stability of the country's monetary and financial system than any need to extend concessions to trading partners. However, the Minister of Finance is a powerful voice in Cabinet and securing his or her buy-in with regard to the ultimate negotiated outcome will be essential. This is even more so the case given the heightened importance placed on the prudential integrity of countries' financial systems, following a spate of financial crises that have rocked the global financial system during the past decade and a half, starting with the Asian financial crisis in 1998.
- The Ministry of Education, Culture, Sports, Science and Technology will also need to be consulted and kept informed during negotiations, since it has interests in such issues as education services and audio-visual services (e.g. under its cultural mandate).
- The Ministry of Health, Labour and Welfare will have sectoral interests that are relatively narrowly defined and will shape its views on upcoming negotiations, but which should equally ensure that it will demand to have these views heard. Health services are increasingly traded internationally through all modes of supply, and commitments on the natural movement of persons will have implications for both the health sector specifically as well as for the national labour market more generally.
- As the lead agency primarily responsible for the negotiations, the interests of the Ministry of Economy, Trade and Industry are obvious.
- The Ministry of Land, Infrastructure, Transport and Tourism will also largely have narrowly defined sectoral interests in any upcoming services negotiations, particularly those on transport services, but also with regard to any concessions that may affect market access or national treatment commitments in the hotel industry or other tourism-related sectors.

Box I.3. Services negotiations and executive branch stakeholders in Japan (continued)

- The Ministry of the Environment is likely to have somewhat narrowly defined sectoral interests focused primarily, albeit not exclusively, on environmental services, and will need to be part of the broader consultation process before negotiations start.
- Finally the Ministry of Defence will inevitably take a broadly formulated interest in how concessions made in services negotiations may open strategically import sectors in terms of national defence, such as telecommunications, aviation and shipping to name just a few.

Source: Authors' notes.

in Services (GATS) or PTAs, is typically very broad, extending to all measures affecting services. As WTO case law has shown on numerous occasions, such scope is often broader than policymakers have typically assumed, such that trade law in services and goods may often be closely linked and provide context for purposes of dispute mediation. Box I.3 contains a more detailed discussion, based on the example of the Japanese executive structures indicated above, of the type of interests each of the ministries shown is likely to have with regard to services negotiations.

Of course, each country is different and each government parcels out and allocates responsibilities for different regulatory sectors in the manner that most befits its own internal political and policy realities and needs. Nevertheless, the description of the various ministries provided in the Japanese examples in boxes I.2 and II.2 should be sufficient to inform readers as to what type of inter-agency structures and mechanisms are likely to be necessary in their own domestic institutional context.

An equally important but often overlooked stakeholder within government, the legislative branch or Parliament is considered in the section below.

2. Parliament

Some constitutional systems have a particularly well-established and robust separation of powers, in which the legislative branch is given considerable influence in both the formulation of trade policy – and thus the framing of a given negotiating mandate – as well as the more traditional power to give trade agreements the binding force of law by means of ratification. The United States is perhaps the best known example, where Congress to a very large extent sets the limits on what concessions the United States Trade Representative (USTR) and, by extension, the President may offer. In other constitutional systems, the Parliament plays a very important role in being the ultimate arbitrator of whether or not a given trade agreement will be allowed to enter into force, with lawmakers (particularly opposition Parties) playing the role of “the Sword of Damocles”, threatening to make a negotiated trade agreement mute by refusing to ratify it. Republic of Korea is perhaps the best known and most recent example of this, where opposition politicians repeatedly threatened to block any hope of ratifying the United States-Republic of Korea FTA over various concerns, none of which were specifically related to trade in services. In yet other systems, the Parliament appears to play little more than a “rubber stamp role”, either because its powers have largely been curtailed in favour of the executive, or because it is firmly in the hands of the ruling Party. However, other countries also have such processes in place, such as Thailand, where policymakers and negotiators in the executive branch may not proceed with FTA talks before being given a specific mandate to do so by Parliament (see Marconini and Sauv  , 2010).

Either way, there are many reasons why it is good practice to actively consult with, and inform the legislative branch in the context of future or ongoing trade negotiations on services, the main reason being that doing so increases the legitimacy of the negotiated outcome once it has been achieved. This is all the more so in the case of services, given the regulatory (and hence legislative) intensity of the subject matter. Moreover, there have been numerous instances of the lack of parliamentary support derailing or delaying the ratification of a trade agreement. One prominent recent example was the refusal of Vanuatu's Parliament to ratify its WTO accession package due, among other things, to the detrimental effect that the envisaged tariff liberalization was foreseen as having on the country's public finances.⁸ Box I.4 summarizes the parliamentary scuffles that accompanied the ratification of the United States-Canada FTA in 1988. It also refers to a number of other constituents outside the central Government; these are mentioned following box I.4.

The United States-Republic of Korea FTA also saw its fair share of high political drama before it was finally ratified by both the United States Congress and the Korean National Assembly. Box I.5 contains an excerpt from a newspaper article published on 18 September 2011, which documented some of the difficulties that the ruling Party in the Republic of Korea had in obtaining passage of the bill to ratify the FTA.

In summary, although in many countries consultations with Parliament may not always generate a full consensus between negotiators and policymakers over the Government's negotiating mandate (this may be because parliamentarians lack sufficient technical knowledge of the issues to enable them to provide much actionable guidance), it is equally true that failing to consult with, and inform Parliament can result in unpleasant surprises for the executive branch and trade negotiators who wish to see the results of their hard-fought efforts ratified swiftly.

Box I.4. Canadian parliamentary scuffles and ratification of the United States-Canada FTA in 1988

After a prolonged absence, the Conservative Party returned to power by winning the 1984 federal elections. A senate committee had already recommended in 1982 that Canada should sign a free trade agreement (FTA) with the United States. After much negotiation, a treaty was signed in 1987 between the American and Canadian Governments. Before it could take effect, the treaty had to be approved by a law passed in the United States Congress and the Canadian Parliament. This resulted in vigorous debate; the Liberal Party and the New Democratic Party accused the Conservative Party of basically selling Canada to the United States and reducing its sovereignty. There was also a debate between the provinces and Ottawa. While some provinces supported the treaty, such as Quebec, others such as Ontario, were adamantly opposed to it. Lobby groups also became involved in the debate.

While some business sectors were in favour of the agreement, union groups were not. The FTA was also scrutinized from the point of view of women who were fighting for better jobs and working conditions. Although the House of Commons, which was controlled by the Conservative Party, adopted a law on the FTA, the Senate, controlled by the Liberal Party, decided to block it. As a result, a federal election was called and the FTA became a key election issue. The Conservative Party was re-elected and again brought the Canada-United States Free Trade Agreement to Parliament. It was again presented in the House of Commons, and this time, the Senate had to oblige and approved the treaty. The treaty was ratified in 1988 and entered into effect on 1 January 1989.

Source: Historica Foundation of Canada (www.historica.ca/peace/page.do?pageID=346 (accessed 31 May 2012)).

⁸ There was also an issue involving liberalization of telecoms services (Grynberg and Joy, 2000).

Box 1.5. Parliamentary opposition to ratifying international trade agreements: The case of the Republic of Korea-United States FTA

Opposition parties hang onto hard line position on ratification bill

Ruling and opposition parties are preparing to lock horns once again over the free trade agreement between Republic of Korea and the United States (KORUS).

Main opposition Democratic Party lawmakers on the Parliamentary Committee on Foreign Affairs and Trade left the meeting room as the Grand National Party submitted the FTA ratification bill to the panel Friday.

The Democratic Party vowed to expose shortcomings in the revisions made to the KORUS FTA and block its ratification, while the ruling Grand National Party promised to seek approval from opposition parties in passing the bill at the parliamentary session.

Democratic Party lawmakers said that they would confirm a Wikileaks revelation of further FTA concession. Last week, the website released a United States diplomatic cable that Kim Jong-hoon, Minister for Trade, on 29 August 2007, told then United States Ambassador to Republic of Korea, Alexander Vershbow, and then-congressman Earl Pomeroy, that after the FTA signing the Government of [the Republic of] Korea would renegotiate tariff rates for rice imports with the United States after 2014.

This date is when the suspension of the application of tariffs to rice by the World Trade Organization is to expire. The allegation contradicts the Government's stance that rice tariffs and FTA would be dealt with separately.

Rep. Kim Dong-cheol of the Democratic Party said the information showed the Republic of Korea's submissive attitude toward the United States. "Yes, we do respect [the] Korea-US alliance but this is too much," he said. He suspected that there were more things behind the FTA deals.

Kim and other opposition lawmakers were also expected to pitch their voices against the Grand National Party's unilateral reference of the FTA bill.The opposition walked out of the room when Foreign Affairs Minister Kim Sung-hwan explained future procedure of the FTA bill passage and its effect after the reference.

Source: Excerpt from an article in the Korea Herald, dated 18 September 2011, titled "Parties to clash over US FTA again", available at <http://view.koreaherald.com/kh/view.php?ud=20110918000239&cpv=0> (accessed 31 May 2012).

The following section discusses the case of other stakeholders whom policymakers should ideally consult when preparing for negotiations on trade in services if they wish to have the best possible handle on their negotiating objectives. The private sector is considered first, followed by civil society.

C. Consulting with stakeholders outside of government

Apart from the various stakeholders within the executive and legislative branches of government that are discussed above, some of the most crucial inputs towards formulating negotiating objectives and determining the likely limits of domestic support for future commitments in services trade negotiations can, and do, come from the private sector. Another important set of stakeholders can be found within civil society; this is particularly the case with organized labour and environmental groups, many of which tend to view trade liberalization with a certain degree of scepticism. Each of these two broad stakeholder communities is discussed separately below.

1. *Private sector*

The depth and sophistication of the private sector's engagement in consultations prior to trade in services negotiations varies immensely from one economy to another; even in some advanced developed countries, policymakers may be at a loss on how to obtain sufficient input from private sector stakeholders. This was notably the case in Singapore when its negotiators were preparing to begin trade talks with the United States. Despite its best efforts, the Government of Singapore was unable to garner much active participation from the private sector in formulating an inventory of negotiating requests to present to the United States.

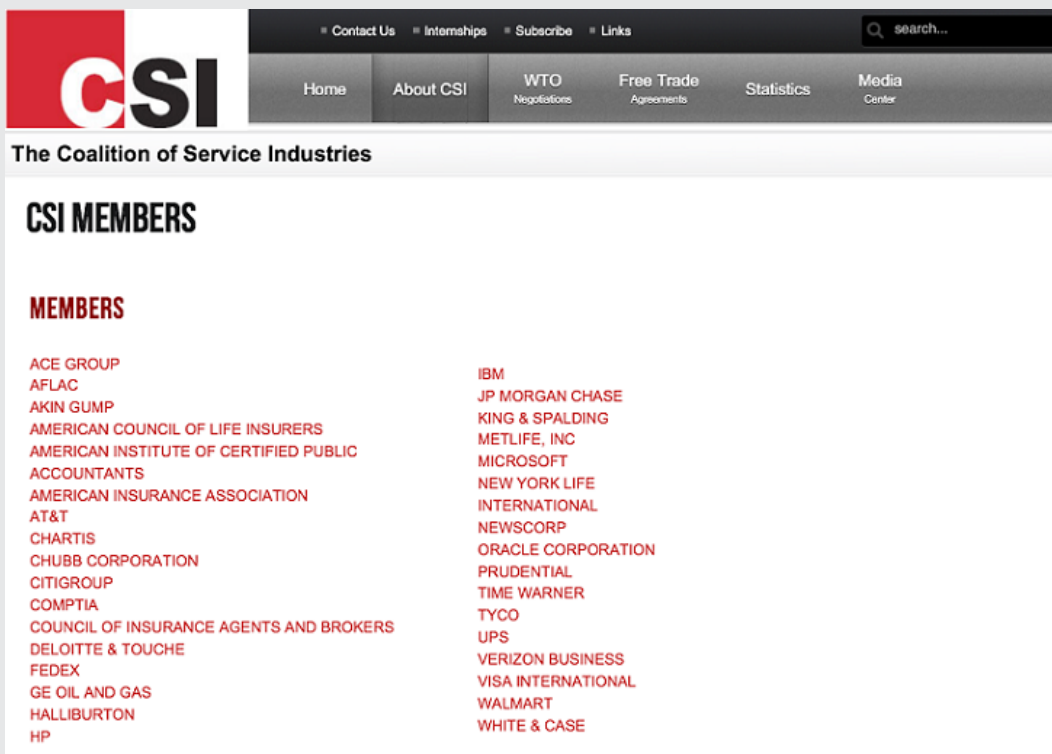
Some countries, such as the United States and Canada, have long had formal and effective mechanisms for garnering and harnessing the support of the private sector in the lead-up to services trade negotiations. In the United States, one of the most important bodies in this process is the Coalition of Services Industries (CSI),⁹ which regularly lobbies both the legislative (Congress) and executive (USTR and other agencies) branches of government in order to achieve the desired outcomes of its members, who include some of United States (and the world's) largest and most influential service sector multinationals. Box I.6 contains a website screenshot of the CSI "Members" section. Readers will notice that some of these companies have a global footprint in industries as diverse as financial services, logistics and distribution, telecommunications or IT services. Other countries such as Australia, Hong Kong, China, and Malaysia also have trade associations which unite their leading service exporting companies and aim to influence trade policy (and other regulatory developments) in favor of their members. Other such industry bodies that regularly engage with policymakers in the United States with a view to shaping the substance and outcome of services trade negotiations include:

- American Insurance Association;
- National Retail Federation;
- National Foreign Trade Council;
- Securities Industry and Financial Markets Association;
- Telecommunications Industry Association;
- United States Chamber of Commerce;
- United States Council for International Business.

In the United States, these industry bodies are afforded various means by policymakers to have their views heard, such as submitting written comments to the USTR directly, providing testimony at Congressional hearings on upcoming negotiations, or (more significantly) participating in the so-called Trade Advisory Committee process. Established in 1974, and modified several times since then, such committees are formally constituted bodies comprising representatives from a broad swath of industries and economic sectors, and are convened by the USTR. Box I.7 contains a diagram of the Trade Advisory Committee structure as it was in 2009 (it has since been slightly modified).

⁹ See <http://uscsi.org/> (accessed 31 May 2012).

Box I.6. Website screenshot of CSI “Members” section



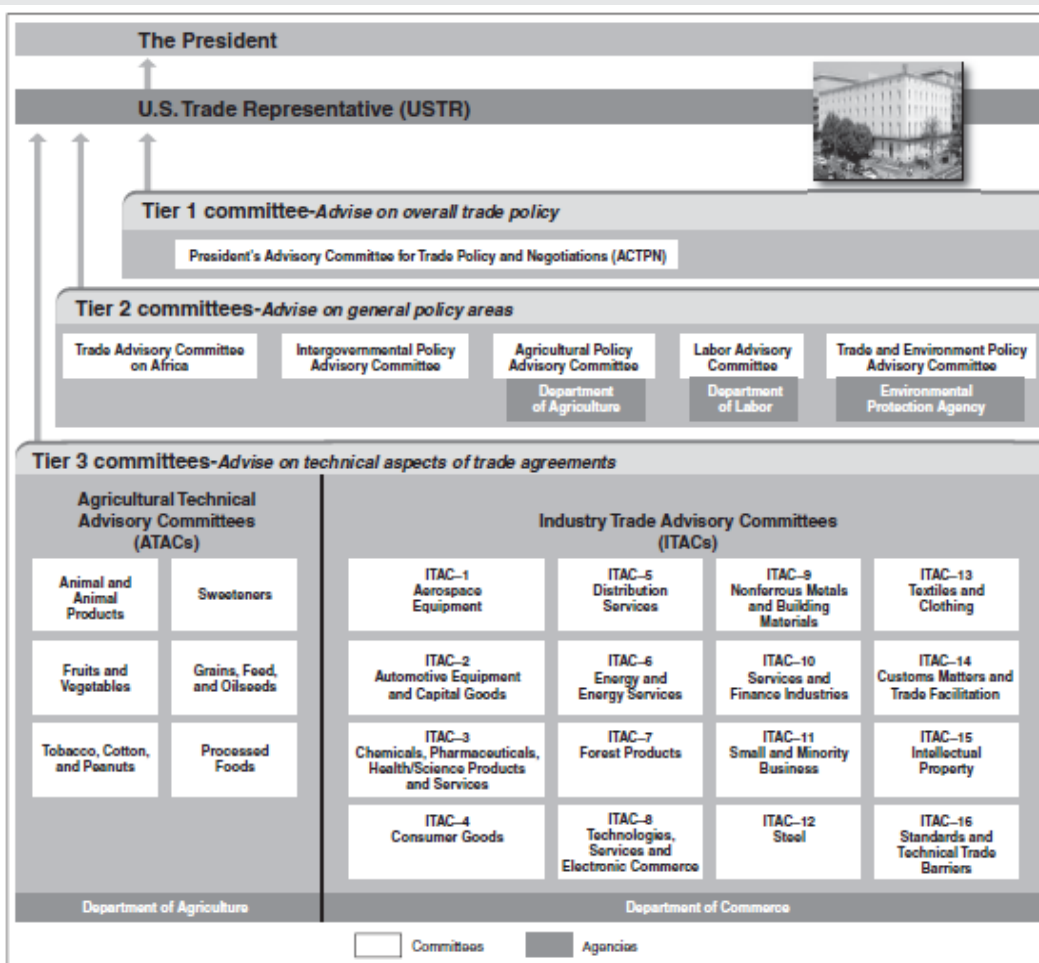
Source: <http://uscsi.org/about-csi/csi-members> (accessed 31 May 2012).

In Europe, the equivalent body is the European Services Forum (ESF), which has a membership of more than 30 major European companies, more than 30 European and National Business Federations, spanning 20-plus different sectors and represented in all 27 European Union member States.¹⁰ In the context of WTO and preferential trade negotiations, ESF takes positions and tries to influence decision makers in Europe (particularly the European Commission and the Council of Ministers and, increasingly, the European Parliament). The CSI and ESF websites both serve as uniquely informative sources of information for market access and other issues of the greatest concern to services exporters in these two large trading partners.

For many countries, the establishment of a formal and permanent structure such as the policy advisory committees discussed above would not be practical, not least due to cost reasons. Nevertheless, there are other ways for governments to solicit input from the private sector with a view to upcoming negotiations on trade in services. Several countries publish their intentions to enter into trade negotiations in the near future and solicit input from any stakeholder with an interest. Examples of this include Australia and New Zealand, which regularly invite citizens, corporations, or any other bodies to share their concerns regarding future FTA negotiations. Box I.8 contains an excerpt from the Australian Department of Foreign Affairs and Trade (DFAT) website

¹⁰ See www.esf.be/ (accessed 17 July 2012).

Box I.7. United States Trade Advisor Committee structure



Source: www.gao.gov/assets/130/123085.pdf (accessed 20 May 2012).

summarizing the results of such public consultations in the context of a planned trade agreement with Pacific Island nations (PACER Plus).

Because it is not governments that engage in trade but rather businesses, it is crucial for governments to seek and obtain inputs from the private sector as policymakers start to formulate negotiating objectives in anticipation of launching negotiations on trade in services. This is equally true in terms of offensive as well as defensive interests, with exporting service providers able to provide input on the first set of interests, and import-competing service providers able to do so for the second. Consulting with and actively affording the private sector a chance to participate in this process can do more than merely provide key insights to policymakers. Doing so can also help strengthen the business case for – and resulting democratic legitimacy of – any ultimate negotiated outcomes.

Box 1.8. Public consultations in the context of planned Pacific Agreement on Closer Economic Relations (PACER) Plus negotiations

Summary of views expressed in consultations on PACER Plus

On 6 August 2009, Pacific Islands Forum leaders agreed at their meeting in Cairns to commence negotiations on a new regional trade and economic integration agreement, which is referred to as PACER Plus.

The first round of negotiations, which will discuss the scope and timetable for negotiations, is expected to be held no later than November 2009.

In line with the Government's commitment to ensuring Australia's trade objectives are pursued on the basis of community consultation, public consultations on Australia's participation in PACER Plus negotiations commenced on 1 July 2009.

The Department of Foreign Affairs and Trade, via newspaper advertisements, e-mails to stakeholders and its website, called for public submissions providing views on PACER Plus negotiations and specifically invited comment on the economic, regional, social, cultural, regulatory and environmental impacts expected to arise from Australia's participation. Reflecting the development aims of the negotiations, views were also sought on capacity-building issues. The Department received more than 30 written submissions from a variety of stakeholders.

Consultations were held with representatives from companies, industry bodies, academics, non-governmental organizations, unions and individuals, as well as State and Territory Government officials. All non-confidential submissions received will shortly be available on the Department's website.

The Australian Government welcomes all the submissions received and the views expressed during the initial consultations. These submissions and views will be considered in the formulation of our future approach to PACER Plus negotiations. The Australian Government will continue to provide an opportunity for domestic stakeholders to express their views throughout the course of the PACER Plus negotiations.

Priorities and objectives

A proportion of stakeholder views expressed indicate that there is clear support for the Australian Government's overall priorities and objectives for negotiation of a new Pacific trade and economic integration agreement with trade capacity-building and development assistance elements.

The Australia and New Zealand Banking Group's submission also indicated it was "strongly supportive of Australian Government efforts to work with Forum Island Countries to build the capacity and infrastructure they require to take greater advantage of trade across the region, including through more liberal trade in goods, services and investment. A comprehensive trade pact in the Pacific will assist countries in the region to share in the benefits of increased trade and economic growth. Notwithstanding, for any trade pact to deliver meaningful outcomes for Forum Island Countries, both Australia and New Zealand will need to ensure [that] the Forum Island Countries are provided with assistance to address supply-side constraints in key trade-supporting disciplines such as education and technical assistance."

The National Institute of Accountants written submission was another instance of support for the negotiation of a "new trade and economic agreement between Australia, New Zealand and Forum Island Countries, known as PACER Plus, and believes it will provide further assistance to the region to promote sustainable economic development."

Box I.8. Public consultations in the context of planned Pacific Agreement on Closer Economic Relations (PACER) Plus negotiations *(continued)*

The Australian Industry Group supported the “Government’s proposal to commence negotiations on PACER Plus, and its objective to include in the Agreement’s framework trade capacity-building and trade development assistance to strengthen Pacific island countries’ ability to trade.”

Source: Excerpt from the DFAT website at www.dfat.gov.au/fta/pacer/pacer-views.html (accessed 31 May 2012).

2. Civil society

Like the private sector, civil society also contains various other stakeholders who hold strong views on the perceived impact of future negotiations on trade in services. As stated above, this is particularly true for organized labour and environmental groups. It can also be the case with organizations that pursue social, developmental or sector-specific objectives in the home country or the country with which negotiations are being contemplated. The latter groups often tend to approach trade and investment negotiations with a greater degree of scepticism than many private sector actors. They also often tend to be concerned with broader economic and social policy objectives than just improving market access to, or the conditions of competition, in foreign services markets. Despite any opposition such groups may have, and regardless of how well-founded such opposition may or may not be, it is important from the perspective of the legitimacy of negotiated outcomes to include these groups in the consultation process early on. A failure to do so could prove costly at the ratification stage.

Box I.9. Civil society concerns regarding PTA negotiations

6. Uniting Church position on (PACER) Plus

6.1. The Uniting Church’s position is set out in the appended paper as follows:

“Many Pacific Island countries face particular challenges to development associated with small size and isolation, natural resource constraints, frequent natural disasters and vulnerability to climate change induced sea-level rise. The agreements under negotiation will have significant implications for development in the Pacific. Pacific churches and civil society organisations are concerned that these agreements will curtail their governments’ ability to develop policies which are tailored to their particular development needs. In particular, they are concerned that the agreements will:

- Erode government revenue, resulting in cuts to services such as health and education;
- Prevent governments from taking measures to support the development of local industries and service sectors;
- Restrict the ability of governments to ensure essential services are provided to all citizens.

Pacific Island churches are concerned that the European Union, Australia and New Zealand are bullying Pacific Island governments in trade negotiations and attempting to push them into trade liberalization on unacceptable terms.”

Source: Excerpt from a submission made by the Uniting Church of Australia in the context of the PACER Plus negotiations <http://www.dfat.gov.au/fta/pacer/pacer-views.html> (accessed 31 May 2012).

As explained by the excerpt shown in box I.9, a submission by the Uniting Church of Australia appears to be advocating an approach that is wider than just merely promoting a narrowly-defined set of export-orientated economic interests in favour of one that takes the economic and social development needs of Australia's trading partners into consideration. Whereas it is probably fair to say that the Uniting Church does not represent a large or influential constituency in Australia, similar groups may wield much greater influence in many other countries, making it imperative that policymakers consult them throughout the preparatory and negotiating process.

Organized labour is often one of the most vocal voices among civil society stakeholders, and often comes down on the defensive side of the various economic interests in contention. Whereas organized labour is typically more focused on shaping negotiating outcomes in negotiations involving the liberalization of goods trade, it is not uncommon that various potentially adversely affected

Box I.10. American Nurses Association efforts to influence the focus and outcome of trade negotiations on nursing services in the late 1990s

Impact of global trade on nursing

US nurses face increased competition

ANA has been working on many fronts to ensure fair play for US nurses; they successfully advocated for a delay of Congressional "fast-track" trade legislation, in part because the legislation's extension proposals focused on trade in goods, not services. As a result, nursing's concerns were not addressed. ANA is "committed to international trade agreements that protect and enhance all participating countries' public health systems and promote rising wage standards and working conditions for nurses," says Peterson [Cheryl A. Peterson, MSN, RN, senior policy fellow, international affairs, ANA's Department of Health and Economic Policy].

ANA also worked closely with Representative Bobby Rush (D-IL) and Senator Richard J. Durbin (D-IL), who introduced legislation (H R2 759) designed to allow for limited, temporary immigration of foreign nurses to work at hospitals that are having difficulty recruiting domestic RNs. The Bill was spurred by nurse staffing needs at two hospitals – one in Chicago and one in Laredo, Texas – and would establish the H1-C visa to allow foreign nurses in to a small number of US hospitals that meet carefully defined shortage criteria.

[...]

Barriers to working abroad

According to Peterson [...] US nurses wishing to work abroad [...] face hurdles. Among them is an inequity under current NAFTA treaty provisions toward US nurses who seek to work in Ontario or Quebec. Currently, US nurses wanting a licence to practice in these two provinces must [either] be permanent residents or obtain Canadian citizenship. This is a direct contradiction to the basic principles upon which NAFTA was negotiated. No similar barrier faces Canadian nurses wishing to work in the US.

[...]

[A]lthough it's difficult for American nurses to work in England, Australia and Canada, it is relatively easy for nurses from those countries to work in the US [...] "The playing field is far from level for US nurses," [says Peterson]. As the US readies to enter into trade agreements with other nations – Chile being the next likely candidate – ANA is acting now, before current and future in equities are cast in stone and before entering into a free-trade relationship ..."

Source: Stewart, 1998.

groups will also weigh in with regard to upcoming services negotiations. Box I.10 sets out efforts by the American Nursing Association (ANA) to influence the focus and outcome of these negotiations, both during and after the North American Free Trade Agreement (NAFTA).

The scope of such concerns has heightened in recent years with the IT-induced possibility of offshoring many services transactions. Labour concerns over services negotiations also typically extend to the treatment of labour mobility in services agreements. This is a consequence of the labour market effects arising from the benefits of temporary entry commitments agreed in trade agreements.

As box I.9 indicates, ANA argued its case on the basis of various considerations, including the integrity of public health systems as well as the objectives of improving wage standards and working conditions for their members. However, ANA also couched its arguments in terms that were more easily incorporated into the existing cultural and intellectual dynamics of trade negotiations, i.e., non-discriminatory and reciprocal market access.

Because services negotiations inevitably have an impact on regulatory frameworks that operate far behind a country's borders, and because so many different services are traded internationally through the various modes of supply, policymakers can and should expect the commitments they seek and grant in the context of services negotiations to have an impact on a wide range of stakeholders, both market participants and other constituencies. They must therefore ensure that they consult as widely and as comprehensively as resources and time allow. Failing to do so may have two main implications: (a) negotiators will be less well-informed than they should be about their immediate offensive and defensive interests going into negotiations; and (b) the eventual negotiated outcome could run seriously afoul of potentially powerful and well-organized opposition, either making ratification uncertain or subjecting such ratification to unwanted delays.

3. *Some process-related comments on stakeholder consultations*

Consultations need to be designed to satisfy multiple objectives as sectoral consultations tend to involve vertical discussions with industry and the relevant regulatory agencies. The latter are often hostile to externally-induced change and resistant to liberalization. Horizontal consultations aim to compare issues that arise across several sectors and involve both users and providers, domestic and foreign economic actors, so that in these consultations the views expressed may differ considerably. By way of an example, telecommunications suppliers operating in oligopolistic markets may wish to slow down the pace of liberalization, whereas banks and IT companies may push for more rapid market opening with a view to reducing their input costs and improving their bottom lines

The key is to design the consultation process in such a way that it can provide government with a clear sense of the pros and cons of market opening as well as a sense of how the costs and benefits of liberalization are likely to be distributed spatially within a country, between small and larger firms and across various worker categories. This sort of analysis will allow a government to compare and contrast the views of users and providers, as well as those of domestic versus foreign actors, and those of established firms relative to those of potential market entrants.

It will ultimately be up to the coordinating ministry, i.e., the ministry that sets the domestic agenda for the negotiations (trade, foreign affairs, and the office of the prime minister or the president) that must arbitrate between the differences that inevitably arise when competing and conflicting interests vie with one another to influence the decision-making process in the context of a policy dynamic as inherently distributional as trade negotiations. It will fall on the coordinating ministry to arbitrate on distributional

matters in clashes between government ministries and agencies over regulatory turf (and thus potential sources of licensing revenue and regulatory power) as well as clashes between import-competing and exporting interests, and between oligopolistic rent seekers and those seeking to benefit from greater competition.

D. Conducting research on the trade policy regime of future PTA partners

At the start of this chapter it is noted that preparing for services negotiations is largely about doing one's homework. This section focuses on a very important part of that homework, i.e., research on the trade policy regime of negotiating partners. Thanks to the Internet, this task is now vastly simpler than it was just a few years ago. The discussion here is limited to two sets of publications, i.e., those that address market access barriers specifically from the perspective of a given country's exporters, and those prepared by international organizations.

1. Market access reports

Several countries now produce and regularly update inventories of the market access barriers faced by their exporters, including the United States, the European Union and Japan. By far the most comprehensive of these inventories is produced by the United States. The United States inventory of trade and investment barriers is called the "National Trade Estimate Report on Foreign Trade Barriers (NTE)" and is updated on an annual basis, usually appearing in April of any given year.

Box I.11. Barriers to trade in services confronting United States exporters in the Japanese market

Distribution services

The United States Government continues to urge Japan to take a variety of steps to improve customs processing and to facilitate other faster and lower-cost solutions in the distribution sector. In this regard, the United States Government welcomes Japan's work to formulate an Authorized Economic Operator (AEO) system, which allows exporters with good compliance records to process goods more expeditiously through Customs. Exempting AEO exporters from paying the 5 per cent consumption tax for cleared cargo would help facilitate more efficient cargo flows. Currently, Japan customs refunds this tax, but an exemption would reduce the administrative burden of filing for a refund. Japan was also encouraged to raise the Customs Law *de minimis* ceiling from 10,000 yen to a higher level. The customs clearance process and clearance times could also be further facilitated by, for example, allowing all users of Nippon Automated Cargo and Port Consolidated System to select the Customs Office for declaration, and by allowing customs officials to be co-located at the bonded premises of private companies handling shipments. Strengthening Japan's system for advanced rulings would also improve transparency and predictability for United States exporters.

Legal services

Japan imposes restrictions on the ability of foreign lawyers to provide international legal services in Japan in an efficient manner. The United States Government continues to urge Japan to liberalize the legal services market further. Legislation was submitted to the Diet in March 2012 that would allow foreign lawyers to form Japanese professional corporations that are permitted to establish branch offices within Japan. Another important step would be to allow foreign lawyers to establish multiple branch offices in Japan, whether or not they have established a professional corporation. Japan is invited to take other important measures, including ensuring that no legal or Bar Association impediments exist to Japanese lawyers becoming members of international legal partnerships, and accelerating the registration process for new foreign legal consultants.

Source: 2012 National Trade Estimate Report on Foreign Trade Barriers (NTE) pp. 214 and 216, available at www.ustr.gov/sites/default/files/Japan_0.pdf (last accessed on 11 June 2012).

Box I.11 contains an excerpt from the 2012 NTE concerning barriers to trade in services being experienced by United States exporters in the Japanese market. If United States service suppliers are experiencing certain difficulties in a given market, the chances are relatively good that this involves a practice or measure that affects most or all foreign services suppliers in the market in question. Thus, the NTE can be a valuable source of business intelligence for negotiators seeking to identify what possible offensive interests they may wish to assert in upcoming services negotiations.

Any of the concerns expressed by the United States in box I.11 could form the basis for a request by another country in the context of its services negotiations. Reports such as the one cited here are thus a potentially very useful source of freely available intelligence on the regulatory regimes and policies affecting market access and conditions of competition in foreign services markets.

2. Reports prepared by international organizations

(a) WTO trade policy review process

Another informative source of intelligence on the trade policy regime of a future PTA negotiating partner is the WTO website, provided that said partner is a WTO member. The WTO Trade Policy Review (TPR) is one of several monitoring instruments that WTO operates, whereby each WTO member is, in principle, subject to a regular and relatively comprehensive review of its trade policy regime at intervals of differing frequency, depending upon the respective member's importance to world trade and level of development. The reports prepared by the WTO Secretariat itself and the minutes of the meetings during which a given TPR is adopted are likely to be the most informative sources of any policies or measures affecting trade in services in the member under review.¹¹

Box I.12 Regulatory requirements in Chinese banking services

(5) Services

Foreign banks

118. Only foreign commercial banks that have maintained a representative office in China for at least two years prior to application, and which have total assets of not less than US\$ 10 billion at the end of the year preceding the application, may apply to establishment a wholly foreign-funded bank (subsidiary). The same asset requirement applies for the establishment of a Chinese-foreign joint venture bank. A foreign bank wishing to establish a branch must have total assets of not less than US\$ 20 billion at the end of the year preceding the application, and must have maintained a representative office in China for at least two years in the area in which it applies to establish its first branch. The minimum asset requirements are higher for the establishment of branches than for locally incorporated entities. In addition, foreign financial institutions wishing to establish any type of operational foreign-funded bank must have persistent profit-earning capacity and a good reputation; have experience in international financial activities; have in place an effective anti money-laundering system; and be subject to supervision, and have its application approved, by its home country regulator.

Source: Trade Policy Review 2012 of China Report by the Secretariat, p. 127 (WT/TPR/S/264, 8 May 2012) available at www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm (last accessed 11 June 2012).

¹¹ More information on the WTO Trade Policy Review Mechanism, and the various reports and documents that have been produced by it, can be viewed at https://www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm.

Box I.12, for example, demonstrates the existence of specific conditions applied to foreign banks in China, which were identified and described in the TPR of China (2012). Any of the restrictions mentioned in this box might be the subject of a request in the context of services negotiations.

The issues raised by Japan in the context of adopting the TPR Report of China (box I.13) might also prove insightful for other negotiators preparing for or engaged in negotiations with China on the liberalization of trade in services. Thus any official charged with helping to prepare for negotiations on trade in services with a WTO Member is well advised to familiarize him or herself with the respective country's most recent TPR report.

Box I.13. Trade Policy Review 2010 of China: Excerpt from the statement by the representative of Japan

Japan is particularly interested in the improvement of commitments, in the financial services, telecommunications services and construction services in particular. In services in general, Japan would like to see more transparency in domestic regulations, smoother administrative procedures and the steady implementation of commitments already made. In particular, Japan is interested in seeing relevant legislations being operated consistent with the WTO rules.

Source: Trade Policy Review 2010 of China. Record of the Meeting of Trade Policy Review Body of 31 May and 2 June 2010, p. 32 (WT/TPR/M/230, 29 June 2010), available at www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm (last visited on 11 June 2012).

(b) WTO-OECD-UNCTAD report for the G-20 on trade and investment restrictions

Another, more recent, tool that seeks to monitor any changes to the openness of selected country's trade policy regime is the bi-annual WTO-OECD-UNCTAD report for the G-20 on trade and investment restrictions. Initially adopted as a mechanism to report on an incremental increase in protectionist measures in the wake of the 2008 financial crisis, this instrument continues to be a valuable resource, despite the limited number of countries it covers.

Box I.14. Trade and investment restrictions: October 2011 WTO-OECD-UNCTAD G-20 report

The Indonesian authorities introduced implementing regulations to the Law on Shipping (17/2008, 8 April 2009) that limit the right to cabotage to Indonesian vessels only. As of May 2011, only Indonesian vessels have the right to transport passengers and cargo within the country. However, a recently enacted regulation (Government Regulation 22 of 2011) postponed the entry into force of the restrictions on foreign-flagged shipping in the area of oil and gas.

The new regulation provides that foreign-flagged ships may be used in offshore drilling until end-December 2015, in oil and gas surveys until end-December 2014, and in dredging, salvage and offshore construction until end-December 2012. The new regulation also stipulates that a permit allowing a particular foreign vessel to operate will be issued only where there has first been an (unsuccessful) attempt to charter an Indonesian vessel.

Source: WTO Report on G-20 Trade Measures, 25 October 2011, pp. 13-14, available at www.wto.org/english/news_e/news11_e/igo_26oct11_e.htm (accessed 11 June 2012).

The measure listed in box I.14 and the trend that it appears to indicate, could form the basis of a request to be formulated and made in upcoming services negotiations. The WTO Report on G-20 Trade Measures has many such examples, from many countries, and is thus well worth consulting in the preparatory phase.

(c) World Bank and OECD Services Trade Restrictions Indices

These relatively new sources are still very much in their early stages of development but will almost certainly become two of the best sources of intelligence on barriers to trade in services in developed and developing countries. Work on Services Trade Restrictions Indices (STRI) indices essentially comprises two different but complementary tools: (a) a database of regulatory measures affecting trade in services on a country-by-country, sector-by-sector basis and mode of supply basis; and (b) an index that provides a quantitative measure of services trade restrictiveness. The World Bank dataset has just been released for public use. The data cover five key sectors: (a) finance (banking and insurance); (b) telecommunications (both fixed and mobile); (c) retail distribution; (d) transportation (air and maritime (both domestic and international), road and rail); and (e) professional services (accountancy, auditing and legal services). The data set, which covers 114 developed and developing countries, can be accessed at <http://iresearch.worldbank.org/servicetrade>.

The OECD dataset is still under development and has yet to be made public (box I.15). From limited information publicly available, it can be stated that the OECD STRI aims to cover a number of significant sectors, including computer services, telecommunications, construction, professional services (engineering, architecture, legal and accounting), transport (air, maritime, rail, road, courier), distribution and audio-visuals in some 34 member countries. As work on the Index continues, the ultimate goal is to have all commercially significant services sectors covered.

Meanwhile, work recently commenced at WTO on mapping existing sectoral and modal restrictions to market access and national treatment in member countries, thus complementing the efforts of the World Bank and OECD. The WTO work aims to pursue an already completed analysis in the field of air transport services through its Quantitative Air Service Agreement Reviews dataset, which can be accessed at www.wto.org/english/news_e/news10_e/serv_14jun10_e.htm.

Box I.15. OECD Services Trade Restrictiveness Index (STRI) in telecommunications services

Examples of measures included in the regulatory database: Telecommunications				
Policy Area	Measure*	Result	Source	Country
Foreign ownership & market entry restrictions	Joint ventures are required	Qualitative information	Link to regulation (law, administrative decision), etc.	Country confirms entry or provides correction
	Screening of investment			
Restrictions on temporary movement of people	Quotas			
	Labour market tests			
Other discriminatory measures	Foreign participation in government procurement			
Barriers to competition	Whether access to networks and interconnection is regulated			
Regulatory transparency	Information on spectrum regulations publically available			

*Measures shown are examples for illustrative purposes only

Source: www.oecd.org/trade/stri (accessed 11 June 2012).

3. Other sources

For the sake of brevity, only two of the most informative sources, i.e., the Global Trade Alert (GTA), a private initiative of the Centre for Economic Policy Research, and the media (newspapers in particular) are discussed here.

(a) Global Trade Alert

Set up shortly after the onset of global financial crisis of 2008, GTA is a predominantly private effort that brings together donors from the public sector and civil society. It seeks to offer real-time intelligence on any measures enacted by governments that impose additional restrictions on trade in goods or services. Although not limited to trade in services, GTA is nevertheless a unique and timely tool for policymakers preparing for services negotiations, and provides a significantly more up-to-date resource than the USTR's NTE report or the WTO's TPR reports.

Arguably the most informative GTA outputs are its reports on protectionism published by the Centre for Economic Policy Research and freely downloadable from www.globaltradealert.org/. The eleventh GTA report, which was published on 14 June 2012, documents in great detail how many governments have imposed protectionist measures that either contravene the spirit or letter of their stated commitments to keeping global trade open as many countries struggle to recover completely from the 2008 crisis.

A part of any diligent policymaker's preparation for trade negotiations will inevitably involve consulting the GTA website and reports for updated information on any harmful trade measures in place between his or her home country and the country with which negotiations are intended to be launched. Such measures will invariably have to be part of the negotiating objectives to be formulated, particularly if the economic and political economy impact of the measures in question are significant.

(b) Media

Finding newspaper reports on matters that relate to international trade in services these days is as easy as typing a few key terms into the search box at Google News or a similar search engine. Some subscriber-only access news organizations, such as World Trade Online and the Washington Trade Daily offer updated coverage of the most important current developments affecting trade policy and trade negotiations in general, but might not always be the best source of information on the enactment of a specific measure affecting trade in services in any country. Other media groups, such as the *Financial Times*, the *Wall Street Journal* and Bloomberg represent global news organizations that can and do follow regulatory and business developments governing various areas of economic activity, including important services sectors.

The measure complained about in box I.16 by Tesco could easily form the basis for a request by any Party negotiating or planning to negotiate services negotiations with the Republic of Korea.

Box I.16. Dismantling retail distribution restrictions in the Republic of Korea

Tesco attacks Seoul's 'red' retail policy

By Christian Oliver in Seoul

"Tesco's chairman in South Korea – its biggest market outside the United Kingdom – has launched an unusually caustic attack on Seoul's policymakers, accusing them of being "red" for attempting to protect small family-run shops from the expansion of supermarkets".

[...]

"Seoul has introduced a law that smaller urban supermarkets cannot open within 1km of small stores without first gaining the local communities' consent. It is also blocking large retailers from running certain kinds of store between midnight and 8a.m., when small stores generally cannot compete".

Source: Financial Times, 29 February 2012 online edition, available at www.ft.com (accessed 11 June 2012.)

4. Requests made by PTA partners and stakeholder consultations

The old adage that there is nothing new under the Sun applies to trade negotiations generally and to services trade negotiations specifically. The type of market access commitments previously requested and/or obtained by the PTA partner in earlier negotiations with other countries and economies need to be reviewed, as doing so will easily be the best indication of the PTA partner's offensive interests, in terms of service sectors and modes of supply. These commitments can also provide context and insights into the political economy and trade policy formulation dynamics at play in the PTA partner, which shrewd negotiators will be able to utilize to their own advantage when preparing their countries' own offers and requests.

Similarly, consulting domestic stakeholders is important in terms of both determining defensive lines in the sand (for offers) as well as for developing an offensive strategy (for requests) that is truly in line with an economy's existing or potential export interests. Although this process is discussed in some detail in section C above, it needs to be reiterated here since this step should also be contemplated once negotiators have a tentative but clearly emerging idea of what requests can typically be expected from the PTA partner. Again, the rationale behind this type of process should be clear – inter-agency and external stakeholder consultations serve the purpose of assessing trading partner requests. In fact, in many developing countries, where offensive interests are weak or weakly articulated, the main task of consultations will be to consider whether, and at what pace, to heed the market opening requests formulated by offensive-minded partners in the domestic market. For developing countries, where Mode 1 and Mode 4 interests tend to predominate in the offensive side of the equation, consultations carried across a broad range of domestic stakeholders will ensure that negotiators are ready to assert their own national economic interests.

E. Determining desired development outcomes

Advanced economies arguably engage in trade liberalization in order to maintain and increase competitiveness and national welfare. While such aims also motivate developing country efforts, trade liberalization in such countries often also aims to serve a broader set of economic development objectives. Thus, when preparing for services negotiations, policymakers must understand what these economic development objectives are as well as how trade liberalization in general (and liberalization

of trade and investment in services in particular) may be harnessed to further these objectives. Subsection 1 below discusses national development plans and how to formulate negotiating objectives that align with the over-arching goals contained in such plans.

1. National development plans

Most developing countries have prepared individual national development strategies in cooperation with either the World Bank and/or one of the regional development banks, such as the Asian Development Bank, or with one of the various United Nations agencies that work on development issues, such as the United Nations Development Programme. Most national development plans tend to group their various objectives under the familiar headings of economic growth, social equality (or harmony), improved governance and environmental protection. Trade liberalization in general and liberalization of trade in services in particular can be made to serve a number of these outcomes.

Most development plans share a number of common objectives, such as alleviating poverty for those still living in its grip as well as achieving economic growth that benefits both rural and urban areas, and generates better employment opportunities for both men and women. Improving transparency, accountability and governance standards more generally in the public sector are also often reiterated objectives of national development plans, as is realizing the benefits of economic progress with minimal impact

Box I.17. Afghanistan National Development Strategy, 2008-2013

By the solar year 1400 (2020), Afghanistan will be:

- A stable Islamic constitutional democracy at peace with itself and its neighbours, standing with full dignity in the international family;
- A tolerant, united and pluralistic nation that honours its Islamic heritage and the deep-seated aspirations toward participation, justice and equal rights for all;
- A society of hope and prosperity based on a strong, private-sector led market economy, social equity and environmental sustainability.

Our goals

The Afghanistan National Development Strategy serves as Afghanistan's Poverty Reduction Strategy Paper and uses the pillars, principles and benchmarks of the Afghanistan Compact as a foundation. The pillars and goals of the strategy are:

1. Security: Achieve nationwide stabilization, strengthen law enforcement and improve personal security for every Afghan;
2. Governance, rule of law and human rights: Strengthen democratic processes and institutions, human rights, the rule of law, delivery of public services and government accountability;
3. Economic and social development: Reduce poverty, ensure sustainable development through a private sector-led market economy, improve human development indicators and make significant progress towards the Millennium Development Goals.

A further vital and cross-cutting area of work is eliminating the narcotics industry, which remains a formidable threat to the people and State of Afghanistan, the region and beyond.

Source: www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf (accessed 15 June 2012).

on the environment, or in a manner that is environmentally sustainable. Most national development plans also set out the general objective of improving the investment climate and the business environment more broadly.

Of the development goals listed in box I.17, many of those under goals (2) and (3) could be directly or indirectly affected by the outcome of trade negotiations. Before formulating negotiating objectives in anticipation of services negotiations, it is important that policymakers familiarize themselves with their respective national development plans, so that they do not find themselves ultimately working at cross-purposes with these plans. Moreover, a well-written national development plan will also discuss some of the constraints or bottlenecks (physical, infrastructural, human-resource related or policy-related) that have hitherto held back economic growth; policymakers preparing for services negotiations must also have an understanding of these constraints, both when formulating offensive objectives as well as defensive needs.

Even in the absence of a national development plan, the Millennium Development Goals (referred to in the Afghanistan National Development Strategy cited above) adopted by the United Nations in 2000, or the Poverty Reduction Strategy Papers many countries have developed with World Bank and other sources of donor assistance, can provide policymakers with useful overall guidance on the type of development objectives their trade policy in general and their strategy in services negotiations in particular should ultimately be serving. Box I.18 sets out the Millennium Development Goals.¹²

Box I.18. Millennium Development Goals

The Millennium Development Goals are eight international development goals that all 193 United Nations member States and international development organizations have set themselves to achieve by 2015. The individual goals are:

1. Eradicating extreme poverty and hunger;
2. Achieving universal primary education;
3. Promoting gender equality and empowering women;
4. Reducing child mortality rates;
5. Improving maternal health;
6. Combating HIV/AIDS, malaria, and other diseases;
7. Ensuring environmental sustainability; and
8. Developing a global partnership for development.

Source: www.un.org/millenniumgoals/bkgd.shtml (accessed 15 June 2012).

Although these goals do not in and of themselves contain much specific guidance to policymakers trying to determine a given set of objectives in anticipation of trade in services negotiations, they should provide help in contextualizing where a country's development efforts should be focused. Eradicating poverty through private sector growth, increasing education levels across the board and promoting the participation of women in economic life are all goals that trade policy tools such as services liberalization can be harnessed to help achieve.

¹² In 2015, the Millennium Development Goals are to be replaced by the Sustainable Development Goals.

2. Formulating negotiating outcomes for development

In addition to national development plans, many countries have also formulated a national trade policy as part of a broad range of policy instruments aimed at furthering the objectives set forth in the national development plan. Known as “mainstreaming trade”, this has been part of the so-called Enhanced Integrated Framework approach, whereby trade policy is to be treated as one of the central tools for achieving economic development goals. Policymakers preparing for upcoming services trade negotiations should take the time to determine whether such a national trade policy was ever drafted and, if so, to what extent it remains relevant.

Box I.19 refers to the National Trade Policy (NTP) of the Federated States of Micronesia, as formulated in January 2011. Although still pending adoption by the nation's Parliament, the NTP contains a set of relatively clearly defined objectives, although it admittedly falls short of defining detailed strategies for using services trade liberalization to achieve these objectives. Nevertheless, it should be relatively easy for policymakers from Micronesia to formulate negotiating objectives and strategies for achieving the objectives, based on the guidance contained in the NTP.

Box I.19. Mainstreaming trade into development strategies – National Trade Policy of the Federated States of Micronesia

The ultimate objective of the National Trade Policy is to promote export-led sustainable economic growth and self-reliance, with the ultimate objective of creating employment, alleviating hardship and raising the living standards of citizens of the Federated States of Micronesia. The Trade Policy provides clear recommendations on what needs to be done in order to promote private sector development and export-led economic growth.

Services contribute about 77 per cent to GDP but exports of services are very low. The main services export is tourism, but it is still underdeveloped. Another potential source of “exports” is the temporary movement of natural persons abroad. Technical and financial assistance is needed to upgrade the training institutions to develop skills that are needed to turn around the economy and export the surplus skills.

The Federated States of Micronesia will liberalize and upgrade the key service sectors such as telecommunications, financial and transport services among other sectors, to promote efficiency and reduce the cost of doing business. However, diagnostic studies need to be undertaken prior to liberalization and some regulations need to be put in place to protect public interests.

The key policies outlined in the table below will be pursued in order to promote trade and investment in the identified priority sectors.

Sectors	Trade policy
<i>Services</i>	
Transport	Liberalization of the transport sector (air and maritime) to improve efficiency, reliability and quality of service.
Tourism	Liberalization of the tourism sector to allow foreign investment and improve the quality of services offered to tourists.
Financial services	Liberalization of the financial sector to improve the quality of services to the private sector including the small and medium-sized enterprises.

Box I.19. Mainstreaming trade into development strategies – National Trade Policy of the Federated States of Micronesia *(continued)*

Sectors	Trade policy
Education and human resources development	Strengthening and upgrading the education system/programmes to improve the quality of education and produce work-ready graduates for the local market, and export the surplus skills to the international labour market.
Telecommunications	Liberalization of the telecommunications sector to improve the quality of services and reduce the costs of business.
Energy	Liberalization of the petroleum sector and promotion of investment in renewable energy.

Source: Federated States of Micronesia Trade Policy, January 2011, available at www.fsmdr.fm (accessed 15 June 2012).

With or without a national trade policy, the strategic negotiating implications of many of the specific objectives set out in a given country's national development plan will be relatively obvious to most policymakers as they start to prepare for services negotiations. Thus, the objective of encouraging foreign direct investment (FDI) in a number of strategic sectors (such as tourism) can be achieved by making relatively liberal market access and national treatment offers in the sectors concerned, and by removing any regulatory constraints that might currently be preventing potential FDI in this sector.

This last point leads to the discussion, in the next section of this chapter, of the need by policymakers preparing for services negotiations to: (a) obtain a detailed understanding of their own regulatory regime as it governs different service sectors; and (b) learn to appreciate how existing regulations may be having an impact on foreign service supplier, for better or worse.

F. Performing a trade-related regulatory audit

The benefits of conducting a trade-related regulatory audit are broadly recognized.¹³ Suffice to say here that, for most transition economies, performing a comprehensive trade-related regulatory audit is something that is likely to have been done to a relatively far-reaching extent during the WTO accession process. Such an audit may furthermore have been updated during any subsequent WTO Trade Policy Review. Nevertheless, such an audit can still be performed with a view to helping to prepare for upcoming negotiations and enhancing the quality of needed dialogue between trade negotiators, sectoral regulators and private sector stakeholders.

Furthermore, an audit may prove particularly helpful when PTA negotiations in services (and investment) proceed on the basis of a negative list approach typical to the majority of PTAs in existence today. In this context, drawing up a list of non-conforming measures might be particularly useful for:

- (a) Promoting understanding among trade negotiators and regulators of the implications of making commitments in upcoming services negotiations;
- (b) Benchmarking the national regulatory regime in terms of its effectiveness and compliance with international best practices;

¹³ See, for example, Marconini and Sauvé, 2010.

(c) Anticipating and preparing for requests that are likely to ensue from negotiating partners once services trade negotiations have begun.

1. Promoting understanding between trade negotiators and regulators

As discussed at the beginning of this chapter, regulators will generally have a solid handle on the sectors over which they have been given regulatory oversight. Such regulators are most likely to view these powers through the lens of domestic policy considerations. Trade negotiators on the other hand, may have less of a solid handle on the legal intricacies and regulatory rationales and minutiae governing these various economic sectors and the policy measures governing them; however, they must gain an understanding of them that is sufficient to allow them to sensibly conduct negotiations with trading partners on their eventual liberalization. Enter the trade-related regulatory audit. As some commentators have noted: “[This] internal exercise strengthens interagency coordination and promotes a healthy dialogue among the officials involved in domestic and external policy matters, while also favouring a culture of regulatory reform and regulatory impact assessment.”¹⁴

2. Benchmarking the domestic regulatory regime

The trade-related regulatory audit also allows policymakers to perform a limited cost-benefit analysis of existing regulations in the light of their stated regulatory objectives, and may also allow for a comparison to be made with similar regulations in a country's main trading partners. It should also allow policymakers to address the series of important questions that are summarized in box I.20.

Box I.20. Trade-related regulatory audit: Key questions

- What is the policy objective pursued by the relevant regulatory measure?
- Is the policy objective pursued by the specific measure consistent with overall government policy?
- How transparent is the regulatory measure and the process to adopt it?
- Are private sector stakeholders, domestic and foreign, consulted prior to the enactment of new policy measures?
- When was the policy measure, law, or regulation enacted?
- When was the measure last invoked?
- Is the measure periodically reviewed?
- Is the Government satisfied that the policy objective is being achieved, and has it developed a framework to assess the effectiveness of the regulatory regime?
- Can the policy measure be achieved through other means or in a manner that might lessen the restrictive impact on trade or investment?

Source: Marconini and Sauvé, 2010.

¹⁴ Ibid, p. 36.

3. *Anticipating and preparing for requests*

There are obvious benefits that a trade-related regulatory audit can have in terms of preparing negotiators directly to anticipate likely requests for regulatory change and liberalization of the regime governing the supply of services under existing laws, regulations and administrative practices. This is particularly the case where the audit involves drawing up a negative list of non-conforming measures, or measures that would have to be specifically tabled in order to be exempt from market access and national treatment commitments in a PTA that took a negative list approach towards services trade liberalization (which, as noted above, is increasingly likely to be the case). Box I.21 describes the mechanics of how the trade-related regulatory audit was conducted by Canadian policymakers in the lead-up to the NAFTA negotiations, and the interaction that this inevitably entailed between trade negotiators on the one hand, and regulators on the other hand.

Box I.21. Conducting a trade-related regulatory audit: Canadian approach in NAFTA

In the Canadian context, the compilation of the list of non-conforming measures maintained at the federal level was carried out over four months by a small group of young officials chosen for their expertise in law. The group was under the supervision of a member of the service negotiating team. The supervisor provided the group with a methodology to produce comparable reservations across all service sectors. Once the inventory was completed in draft form, the trade negotiating team met with ministries and sectoral regulatory agencies. The team asked them to verify the accuracy of the information that had been collated.

Then, during a second phase, it engaged in a policy dialogue on the rationale behind the restrictive measures identified, the possibility (or not) of achieving these objectives through other means (including through non-discriminatory measures), and the scope for removing (or not) the non-conforming measures or progressively reducing the level of non-conformity within the context of the negotiations on the North American Free Trade Agreement. A similar dialogue was held with private sector representatives, who were asked about the scope for modifying or eliminating the restrictive measures maintained at the domestic level.

Source: Marconini and Sauvé, 2010.

To be sure, the approach followed by Canada (box I.20) may not be perfectly suited to all countries. However, it does show the kind of inter-agency and cross-cutting cooperation that policymakers in a country preparing to embark on services trade negotiations must be prepared to engage in if they wish to maximize the opportunity with regard to the forward looking and pro-competitive regulatory reform that such negotiations represent.

G. Some final considerations in preparing for service negotiations

Policymakers in developing countries should be aware of the fact that when negotiating with developed countries, the latter will typically have an existing template, on the basis of which it will expect to negotiate. In addition, their willingness or ability to deviate from this template may be limited by domestic political imperatives and the inherent path dependency of the trade negotiating process itself. Policymakers in developing countries who are preparing for services negotiations must therefore carefully study any previous PTAs that their future developed-country negotiating partners have already entered into, and consider the degree to which specific trade disciplines and commitments entered under these agreements are compatible with the development objectives of the negotiating developing country.

As mentioned at the outset of this chapter, preparing for services negotiations is essentially about doing one's homework on a broad range of domestic and foreign economic/trade policy issues. As explained in section C of this chapter, it is also a matter of consulting widely both within and outside of government to better understand the prevailing domestic regulatory frameworks and politico-economic realities. We turn now to some important considerations that should ideally govern policymakers conduct during the course of services negotiations once these have started.

CHAPTER II

CONDUCTING SERVICES NEGOTIATIONS

A. Organizational and procedural issues

This section discusses a number of important considerations of a predominantly structural and process-related nature, starting with who conducts negotiations and then how the negotiations are conducted.

1. *Placing responsibility for the negotiations in the right hands*

Whereas it is true that in the context of PTA negotiations, services are only one of several sectors on which negotiations take place concurrently, it is equally true that the officials charged with negotiating on the various services sectors and other related issues will typically be led by a relatively senior member of the government, someone with both policy expertise and political access/influence. The commitments that will be requested (and, in many cases, made) in services negotiations are bound to be some of the most far-reaching, controversial and institutionally difficult to implement; for this reason, the person ultimately responsible for the negotiations (the chief services negotiator) must be up to the task of conducting them responsibly and subsequently “selling” them to the broader political, regulatory and other domestic stakeholder constituencies.

Some countries appoint a chief trade negotiator for the negotiations as a whole, and then appoint heads of sectoral negotiating groups. This approach can work if the chief trade negotiator is sufficiently experienced and adept at trade in goods, trade in services, trade-related intellectual property rights and the various other issues that increasingly find their way into such agreements, such as investment, government procurement, competition policy, trade facilitation etc. For most transition economies that are relatively new to the business of negotiating trade agreements, it is probably wiser to appoint an official to have ultimate responsibility over all services issues and several sectoral negotiators for the biggest services sectors, and then make another (or several) official responsible negotiations on various clusters of related services sectors. This will ultimately be a question of human resources, since it will depend on how many experienced officials a country is able to field in any given negotiation. Box II.1 contains an excerpt from a case study on the PTA concluded in 2009 between Australia-New Zealand and ASEAN

There is an interesting point worth noting concerning the example involving Australia/New Zealand and ASEAN. Whereas most of the negotiating groups were established at the very start of negotiations, others were only set up once there was sufficient consensus on even negotiating the issues concerned as well as the parameters and objectives to which these negotiations would be subject. This is more likely to happen in a North-South context, where the developed country may typically be looking for a very ambitious outcome, whereas the developing country might be seeking to temper some of that ambition. This aspect is discussed in more detail in subsection 3 of this chapter.

Box II.1. Lessons from negotiating the ASEAN-Australia-New Zealand Free Trade Agreement

A Trade Negotiating Committee was established as the peak decision-making body and negotiating forum for goods and issues not covered in other negotiating groups. From the early stages, detailed negotiations on a range of issues were conducted in working groups (rules of origin, investment, services, legal and institutional issues) and sub-working groups (standards technical regulations and conformity assessment procedures, sanitary and phytosanitary measures, and Customs) that reflected the structure and coverage of the FTA.

Some issues, such as intellectual property and economic cooperation, were controversial and required considerable exploratory work before their coverage could be settled. This meant that the Working Group on Economic Cooperation and the Expert Group on Intellectual Property were only established in the final year of the negotiations.

Source: Mugliston, 2009.

2. Delegating responsibilities and process issues

The size of a negotiating team and how it is structured will first and foremost be a function of the resources that the negotiating country can muster and bring to bear on the negotiations, which, in turn, will be subject to various capacity constraints. Another influential factor determining the potential size of the negotiating team to be fielded is the complexity of the envisaged negotiations themselves and the level of ambition pursued. A country that is content to limit itself to status quo commitments may take a different approach to a country that is keen to advanced, clear offensive interests where a rollback of partner restrictions is the key.

Box II.2. Organizational and process-related issues in FTA negotiations

USSFTA: A personal perspective

By Tommy T.B. Koh

[The] USSFTA has 21 chapters. Ralph Ives and I agreed to create 21 negotiating groups, one for each chapter. In each negotiating group, we appointed a lead negotiator. Several of the more experienced negotiators were asked to be the lead negotiator in more than one group. My deputy chief negotiator, Ong Ye Kung, and I supervised the work of all the negotiating groups. During the negotiating sessions, we would ask each lead negotiator to report on the work in his or her negotiating work at our daily delegation meeting. Ye Kung and I would, whenever necessary, suggest solutions to problems encountered. In between sessions, we would meet with our colleagues in the different negotiating groups in order to take stock of their progress and to assist them in preparing for the next round.

Source: Koh and Chang, 2004.

Box II.2 contains an excerpt from a case study carried out on the United States-Singapore FTA (USSFT) written by Ambassador Tommy Koh. It discusses a number of the organizational and process-related issues that he and his counterpart (United States Chief Negotiator Ralph Ives) were confronted with during the negotiations as well as how they dealt with them.

This interesting excerpt highlights a number of relevant issues, i.e., the need to delegate effectively and to have several senior negotiators involved. It also highlights the importance of having the negotiating team leaders meet regularly to discuss progress and identify bottlenecks and negotiating red lines within and across specific issue areas. This is particularly important if commitments in one sector are to be traded off against commitments in other sectors.

Also worth noting in the context of USSFTA was that separate lead negotiators were appointed for telecommunications/information technology and financial services. Some developing countries may not have the resources to conduct negotiations in this way. However, the dynamic nature of the markets involved in these two sectors, and the complex rules and structures established to regulate them, make it imperative that the lead negotiators appointed for these two sectors not only have both technical and substantive mastery of their respective briefs, but also the trust and confidence of the different regulatory bureaucracies on whose behalf they are essentially negotiating.

3. Setting the right tone at the start

Various steps will usually need to be taken at the very outset of the negotiations (Feketekuty, 2008). These include deciding on some logistical and purely procedural issues, such as:

- (a) Deciding where negotiations will take place;
- (b) Setting the negotiating agenda (an important exercise that involves framing the topics to be discussed and, thus, to a certain extent the potential sectors of substantive coverage that negotiations will cover); and
- (c) The rules of conduct that will govern a negotiation, which may also extend to issues such as confidentiality, contacts with the media and even whether interpretation and translation services will be provided.

The start of negotiations could also be used to exchange as information, so that each of the negotiating sides can learn as much about their respective partners' expectations and constraints as possible. This can help avoid unpleasant surprises later on in the negotiations, and may also help to manage expectations on each side.

It is also worth mentioning that typically during the opening stages of negotiations the groundwork is laid for the personal relationships that play a centrally important part in the negotiations and can have a significant impact on outcomes. During the course of the negotiations, which can often take a year or more, it is the quality of the working relationships of the negotiators that drives progress as much as any other factor. This is even more so when discussing complex regulatory issues, where one side is trying to induce the other to make changes to its regulatory regime, and the other side is seeking ways to accommodate the requests while staying true to its own regulatory realities and constituents. Negotiations on behind-the-border measures often require some "out-of-the box" thinking, which can only be achieved in a negotiating environment where each side has confidence in the good faith of the other.

B. Negotiating rules and market access

Marconini and Sauvé (2010) distinguished between two distinct set of substantive negotiating issues when they discussed “Conducting services negotiations”, i.e., negotiating rules and market access. They pointed out that when services negotiations took place in a North-South context, the developed country would typically approach the negotiations with a specific and pre-established template, which would normally constitute its point of departure. Any explicit deviations from these rules, to the extent they are less trade liberalizing, will generally tend to be hard fought and paid for with the appropriate negotiating coin.¹⁵

The example of the 2006 Economic Partnership Agreement (EPA) between Japan and the Philippines¹⁶ is used here to discuss its constituent rules, before turning to the specific market access commitments that it embodies.

1. Rules

Under any North-South PTA, negotiations on rules are likely to be extensive and to go well beyond the relatively loose framework that GATS achieved; they may try to create “conditions on the ground” that could potentially pre-judge the outcome of still pending rules negotiations in the WTO context, such as on disciplines on mutual recognition, domestic regulation or emergency safeguards. Discussions currently underway on the negotiation of a Trans-Pacific Partnership (TPP) offer a good illustration of how PTAs can be rule-making trail blazers, creating new rules that can subsequently be taken up in other PTAs or ultimately at the WTO level. Examples from the TPP in the services realm involve possible new disciplines on digital trade, data privacy as well as state-owned enterprises. Here, developing and transition economies need to have a solid working understanding of the limitations of their own regulatory environments as well as to what extent they wish to harness rules negotiations to address those limitations.

Because most developed country negotiating partners will typically be negotiating on the basis of an established and proven template, the onus is on the developing country to do its due diligence and identify possible inconsistencies in its own regulatory regime. The choice then is whether to negotiate to keep such an inconsistency or to agree to remove it, preferably in exchange for some kind of concession and – where conducive to the development needs of the developing country – subject to a time-frame that allows regulatory authorities and market participants to adapt to the impending changes (through proper sequencing). This is particularly the case where rules negotiations focus on the adoption and implementation of pro-competitive regulatory policies, notably in network industries.

Box II.3 refers to the Japan-Philippines EPA and its Article 82, which addresses each country's right to enact measures to restrict trade in services in order to safeguard their respective balance of payments situations. Following the 1998 Asian financial crisis, this issue was very much front-and-centre in the minds of policymakers and central bankers. As explained below, it was also a final sticking point in the USSFTA that was ultimately only resolved at the highest level of the respective Governments. Article 82 of the Japan-Philippines EPA is examined here in order to gain a sense of the trade-offs made, and how the language that ultimately found its way into this Article likely reflects the concerns of either or both PTA partners.

¹⁵ The term “negotiating coin” is used here to mean those concessions that must be conceded in order to “pay for” what is being requested.

¹⁶ See www.mofa.go.jp/policy/economy/fta/philippines.html (accessed 2 July 2012).

Box II.3. Article 82 of the Japan-Philippines EPA – ‘Restrictions to safeguard the balance of payments’

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on trade in services, including on payments or transfers for transactions.
2. The restrictions referred to in paragraph 1 above:
 - (a) Shall ensure that the other Party is treated as favourably as any non-Party;
 - (b) Shall be consistent with the Articles of Agreement of the International Monetary Fund;
 - (c) Shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
 - (d) Shall not exceed those necessary to deal with the circumstances described in paragraph 1 above; and
 - (e) Shall be temporary and be phased out progressively as the situation specified in paragraph 1 above improves.
3. In determining the incidence of such restrictions, a Party may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purposes of protecting a particular service sector.
4. Any restrictions adopted or maintained under paragraph 1 above, or any changes therein, shall be promptly notified to the other Party.

Source: www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf (accessed 2 July 2012).

Note that the possible scenarios that can justify enacting such restrictions are formulated in broader terms than simply a run-of-the-mill balance-of-payments crisis. They include: (a) “serious BOP difficulties” as well as “external financial difficulties” (brought on by, for example, a rapid currency devaluation or a collapse in confidence in the country’s financial stability); or (b) the threat of one of these scenarios (triggered say, by a downgrade in the country’s credit rating by one or more ratings agencies, or the nationalization of a major industrial or business entity and the ensuing capital flight that this might provoke). In short, the way that paragraph 1 is formulated is likely to have been at the insistence of policymakers in the Philippines, where short-term financial stability and BOP difficulties are considerably more likely than is the case in Japan.

It should also be noted that the constraints to which such restrictive measures would be subject are relatively “soft”, particularly the requirements that they “shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party” and that they “shall not exceed those necessary to deal with the circumstances described in paragraph 1 above”. What is “necessary” in the context of both these provisions is likely to be largely at the discretion of the country imposing such restrictions, and it will be up to the other Party to effectively challenge the necessity or proportionality of those measures, based predominantly on counterfactual arguments. These provisions were thus generally formulated in terms that were favourable to the country seeking to have the required policy space to impose them, with relatively weak disciplines constraining their eventual use.

Finally, paragraph 3 of Article 82 confirms the suspicions expressed above as to whose interests it was predominantly adopted for, i.e., the developing country PTA partner. Thus, the Party imposing such measures can vary the incidence or intensity of those measures in line with what it perceives to be its own economic development needs, provided the restrictions in question are not imposed for purely protectionist purposes. Again, this last constraint will place the initial evidential burden (in the event of a

dispute) on the country challenging such restrictions, and it would likely have to prove protectionist intent, which may be difficult, depending on the circumstances under which such restrictions are imposed.

A final remark to be made on rules, and which will be taken up in more detail in chapter III (“Aid for Trade”) is the inherently development-friendly aspects of negotiating better rules for both regulators and market participants. Although these may be negotiated under a more mercantilist *quid pro quo* dynamic, it is important for negotiators to realize that better rules for foreign service suppliers will invariably translate into better rules and enhanced governance for domestic economic operators as well, improving the quality of the business environment more generally.¹⁷ This is particularly the case when it comes to negotiating rules on transparency and domestic regulation. Here, the “quid” asked in exchange for the “quo”, may simply consist of firm, quantifiable and actionable commitments from the developed country PTA partner on technical assistance, capacity-building or other aid to help the developing country overcome regulatory and institutional shortcomings and adopt (as well as effectively implement) international best regulatory practices in the services sectors concerned.

2. *Market access in general*

Market access negotiations in services are typically based on a so-called positive list approach – such as that found in GATS – or a negative list approach, which is more common among many (albeit not all) PTAs, where the level of ambition for liberalization arguably tends to be greater than when a GATS approach is pursued. Regardless of the approach taken, developing country negotiators need to have done their homework and be able to walk into negotiations with a clear idea of what their offensive and defensive interests are. Even where they may not currently be exporting services to their respective PTA partners, the fact that they might potentially do so, and the possible market access and national treatment impediments their services suppliers would then be likely to encounter, is something services negotiators need to understand in order to properly undertake their tasks and responsibilities. This is true across all modes of supply and all key exportable service sectors. An understanding of their own economy, the strength and weaknesses of their own services sectors is as important as detailed knowledge of the regulatory and other barriers that the PTA partner has in place.

3. *Market access: Positive or negative list*

Whether or not commitments are scheduled on a positive or negative list basis is one of the threshold issues that will need to be addressed even before negotiations begin. Developing countries tend to instinctively favour the policy flexibility inherent to the GATS-like positive (or hybrid-like) list approach (which is the reason why GATS is often referred to as the most “development friendly” of the Uruguay Round Agreements); however, this is not always a choice they will have, given that they may have opted to enter into preferential trade negotiations where the objective is intrinsically to achieve greater liberalization than has been agreed at the multilateral (WTO) level. Developing countries engaging in a North-South PTA negotiation should thus assume that services negotiations will be conducted on a negative list basis, especially if they are negotiating with a PTA partner that is a major exporter of services.¹⁸

¹⁷ For example, Article 82 of the Japan-Philippines EPA gives a great degree of discretion to monetary policy officials, but it does not achieve much in the way of legal certainty for foreign (Japanese) investors.

¹⁸ Despite the bias in favour of the negative-list approach, one still finds many examples of North-South PTAs that followed a positive list approach, such as the one between Japan and the Philippines. See also Fink and Molinuevo, 2007, for a discussion of this issue.

Commitments made under a positive list approach are typically scheduled in the format that many will already be familiar with under the GATS framework. Box II.4 contains an example of such commitments as entered into by the Philippines under its EPA with Japan.

Box II.4. Specific commitments by the Philippines in its EPA with Japan

Dentistry services (9312 ^a)	SS	(1) Unbound (2) None (3) Corporate practice is not allowed. (4) As indicated in the horizontal section for Professional Services.	(1) Unbound (2) None (3) and (4) Certificates of registration shall not be required from the following provided that a previous authority has been granted by the Board of Dentistry: A. Commissioned dental officers of foreign army/navy/air force whose operations in the Philippines are permitted by the Government. B. Foreign dentists/oral surgeons invited for consultations/ demonstrations. (4) As indicated in the horizontal section for Professional Services
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^a Indicates that the specific commitment for that code does not extend to the total range of services covered under that code.

SS – Any terms, limitations, conditions and qualifications on market access are limited to existing non-conforming measures.

Source: www.mofa.go.jp/region/asia-paci/philippine/epa0609/annex6.pdf (accessed 2 July 2012).

Market access negotiations on a negative list basis are inevitably an exercise in determining what the existing non-conforming measures are on a sector-by-sector and mode-by-mode basis as well as deciding whether these measures must be maintained or can be negotiated away. This only increases the need for the so-called trade-related regulatory audit (discussed above) as well as the burden on lead negotiators to understand the ins and outs of their respective regulatory regimes, and the “whys” and “what for” of any non-conforming measures. Only when negotiators understand the inherent policy rationales behind non-conforming measures can they hope to have an understanding of the importance of maintaining them or the value (in terms of negotiating coin) at which they can be traded.

The commitments made under a negative list approach are inevitably scheduled in the form of reservations lists to the respective PTA chapters on services and investment. Box II.5 provides an example of one of the reservations scheduled by Mexico in the context of its 2005 PTA with Japan.

Box II.5. Reservation of Mexico in its 2005 FTA with Japan

Sector:	Transportation.
Subsector:	Land transportation.
Industry classification:	CMAP 973101 Management services of passenger bus terminals and auxiliary services (bus terminals and stations for buses and trucks)
Type of reservation:	National treatment (Articles 58 and 98) Local Presence (Article 100).
Level of government:	State (Sonora).
Measures:	Law 120 of Transport of Sonora (Ley número 120 de Transporte para el Estado de Sonora), Chapter IV.
Description:	Investment and cross-border services. A concession is required for the establishment of passengers and freight bus terminals and stations, to exploit public transportation services. Concessions may be granted only to Mexican nationals by birth. Enterprises shall be wholly-owned by Mexican nationals by birth.
Phase-out:	None.

Source: www.mofa.go.jp/region/latin/mexico/agreement/joint0510.pdf (accessed 2 July 2012).

C. Red lines and negotiating impasses

In many cases, the internal consultation phase – particularly with other government agencies – will reveal what the limits of a negotiating mandate are likely to be. In other cases, the sheer immovability of an entrenched domestic political economy interest group is likely to make itself known long before any of its interests make their way to the negotiating table. Good preparation in the pre-negotiation and fact-finding stages will thus allow most negotiators to realize what their red lines are and to steer negotiations well away from them.

However, even with thorough preparation and an approximation in the level of ambition that both Parties bring to negotiations on trade in services, the request/offer process of market access negotiations as well as those on rules can run up against red lines; this will, more often than not, will lead to a negotiating impasse, depending on how important the issue is to the requesting Party. The issue of red lines is discussed below before considering how to overcome a negotiating impasse.

1. *Boundaries of consensus*

Red lines are typically concessions that a Party is unwilling or unable to make, and these should be fairly well understood by lead negotiators before they embark upon negotiations. By the same token, well-prepared negotiators will have a sound enough knowledge of the politico-economic or institutional constraints under which their counterpart is operating in order to be able to steer negotiations away from issues where compromise seems unlikely. One well-known example of this was experienced during the now abandoned FTA negotiations that took place between the United States and Malaysia from 2006 until their suspension in 2008. The major stumbling block appears to have been a core policy of the Government of Malaysia that favours ethnic

Malays over other ethnic groups when awarding government contracts. The United States insisted that this market be opened so that its companies could compete against local firms on the public procurement market, but this was a red-line for Malaysian negotiators, who could not be seen domestically to be compromising on this issue with the United States.

At the same time, this was a red line for the United States, i.e., a request that country was not willing to walk away from. The result was the suspension of the talks, which were subsequently subsumed under the plurilateral TPP negotiations currently underway. It is interesting to note that under the TPP, Malaysia has gone on record as saying that it is willing to revise its public procurement policies as part of any final package that results from these talks. This begs the question as to what has changed, and a number of answers suggest themselves, including one that policymakers have become aware how costly these government procurement policies have become (in terms of negotiating coin as well as on economic efficiency grounds) as well as a greater willingness by Malaysian negotiators to make such a commitment in the very different dynamics of the TPP negotiations as opposed to those Malaysia felt subjected to while negotiating bilaterally with the United States.

Box II.6 contains various excerpts from the media documenting the troubles experienced by both countries in dealing with this red-line issue during the course of their PTA negotiations, and how it was last addressed under the TPP.

Box II.6. Media coverage of the United States-Malaysia FTA

Malaysia won't budge on procurement policy as fifth round of trade talks with US ends

By Eileen Ng, Associated Press, 2007-02-09

Malaysia's trade minister reiterated the country would not compromise on its procurement policy that favours ethnic Malay-owned companies at the end of the fifth round of free trade talks Friday with the United States.

Rafidah Aziz reported some progress in the week-long talks, which aim to forge a free trade agreement between the two countries by the end of March, but said several hurdles remain.

The key obstacle is Malaysia's affirmative action program that awards government tenders to Malay-owned companies to give them an advantage to compete with the wealthier minority Chinese. While some government contracts are open to bids from foreign firms, Washington wants more clarity and transparency in the bidding process.

But Rafidah said Malaysian authorities would not alter the programme and suggested that the issue could scuttle any sort of trade agreement.

"We will not move (on government procurement)," she said. "If that's a deal breaker, so be it, but fortunately now, it's not."

Other sticking points in the negotiations are differences over liberalizing Malaysia's services sector and highly protected car industry, its ban on majority foreign ownership of banks, poor intellectual property rights, labour and environmental issues.

Source: www.taiwannews.com.tw/etn/news_content.php?id=386075&lang=eng_news&cate_img=83.jpg&cate_rss=news_Politics (accessed 2 July 2012).

Box II.6. Media coverage of the United States-Malaysia FTA *(continued)*

Malaysia says US will abandon trade pact negotiations

Channel News Asia 19 November 2009

KUALA LUMPUR: Malaysia said Wednesday that Washington had indicated it will abandon a bilateral free-trade deal under negotiation since 2006, and will instead work towards a regional trade pact.

"It was made very clear to us that bilateral FTAs are not a priority for the US," Trade Minister Mustapa Mohamed told reporters. "Their focus is now on a regional approach."

US-Malaysia trade talks which began in March 2006 have dragged on for eight rounds, bogged down in sensitive areas including Malaysia's system of affirmative action for Muslim Malays who dominate the multi-racial population.

In particular, the US had sought access to lucrative Malaysian state contracts that favour Malays and indigenous groups, or "bumiputras" as they are known.

Mustapa said US Trade Representative Ron Kirk informed him of the US thinking on the sidelines of the Asia-Pacific Economic Cooperation (APEC) forum in Singapore last week.

Agreement with the US by November possible, says Muhyiddin

By Paul Gabriel, *The Star Online*, 1 July 2011

WASHINGTON: The Trans-Pacific Partnership (TPP) negotiations between Malaysia and the United States are on schedule. Deputy Prime Minister Tan Sri Muhyiddin Yassin said much progress had been achieved and the target of reaching a broad outline by November was possible. He said the latest round of talks held in Viet Nam had shown promise. "There has been marked progress achieved and it is now a matter of the timeline (set). Labour, environment and intellectual property issues are being negotiated, together with government procurement," he said at the end of his three-day working visit to Washington, D.C. Malaysia joined the TPP fold last November following the collapse of bilateral Malaysia-US FTA talks. Muhyiddin said good progress had been made over access to markets for industrial goods, agriculture, textiles, services, investment and government procurement, adding that the next round of talks would be held here in September.

Source: <http://thestar.com.my/news/story.asp?file=/2011/7/1/nation/9006797&sec=nation> (accessed 2 July 2012).

2. Overcoming negotiating impasses

Issues on which consensus is reached in trade negotiations relatively rapidly and with a minimum of effort are referred to as "low-hanging fruit" (because it is the first to be picked). Sooner or later, however, most trade negotiations run into difficulties in achieving consensus over issues to which no quick or easy solution appears to suggest itself, at least not within the negotiating mandates originally foreseen. In order to maintain momentum and not let negotiations as a whole falter or become unduly bogged down, these issues are often set aside in order to be dealt at a later stage, perhaps even being put off until the very last round of meetings – "kicked upstairs" to higher-level political leaders who have the authority to decide issues that are likely to be perceived as more contentious politically or to come at a greater cost in terms of their domestic political economy implications.

Ultimately, such issues may also be addressed as part of the built-in agenda of future negotiations between the Parties.

Other times, depending on the strength of the relationship that negotiators from both sides have been able to form over the course of negotiations, they may feel comfortable working together to brainstorm solutions to these issues that allow both sides to achieve their core negotiating objectives. Two case-studies are presented below, each drawn from different issue areas of the United States-Singapore PTA negotiations discussed earlier. The first issue revolved around the desire of the United States to introduce language in the agreement that would heavily curtail the activities of state-owned enterprises (SOEs) in the economy. This was anathema to Singapore, which has a long history of relying on SOEs to implement the city-State's economic development plans. Box II.7 refers to the case-study on SOEs, or "Government-Linked Companies" (GLCs) as Singapore refers to them.

The second case study, drawn from the United States-Singapore FTA negotiations, involved the contentious issue of using trade agreements to discipline capital controls, where the Government of Singapore affirmed a clear desire to maintain the policy space it felt it needed in order to intervene in the unexpected event of massive, sudden and destabilizing capital outflows. As discussed

Box II.7 Getting to yes: Reaching a mutually acceptable agreement

"Let me cite an issue which I thought both sides negotiated particularly well. The issue relates to the Government-Linked Companies (GLCs) of Singapore. We started off badly with wide ideological differences. The US's position was that governments should not be in the business of owning and running commercial enterprises.

[...]

Singapore's starting point was that GLCs were part of our historical legacy.

[...]

Many started off as government departments, which were later corporatized and privatized. Further, GLCs operate commercially and had to compete in the market place. There is nothing wrong with government ownership.

If we had persisted with negotiations along the two different ideologies, never the twain would have met. Fortunately, both sides were able to set aside the ideological differences and focus on our interests. The US's real interest is not to advance their ideology, but to ensure that GLCs do not become anti-competitive or monopolistic companies and hurt their business interests. The US was also concerned that GLCs may become vehicles for the Government of Singapore to implement discriminatory policies. Having learnt that, the Singapore side concluded that it was, in fact, in our interest to address the US's concerns. Having our GLCs that operate commercially and on a level playing field with other market players is a key differentiating factor between them and other state-owned enterprises around the world, and explains why GLCs are viable companies that are not a drain on national resources. Hence, in the USSFTA, we have committed to maintain Singapore's current regime on GLCs but have given the US the assurance that GLCs act in accordance with commercial considerations; do not discriminate against US goods, services and investments; and do not engage in anti-competitive practices.

At the first round we were literally debating Adam Smith's theory, but by the time we reached the last round, we were quibbling over drafting format and choice of words."

Source: Koh and Chang, 2004.

Box II.8. Financial services and capital controls in USSFTA

Impasse over capital controls

[...] [O]ne important issue remained unresolved – the free transfer of capital. This had been an unresolved issue throughout the two years of negotiations, but never attracted much attention. Each side assumed that the other would agree when the rest of the FTA fell into place. But it was not to be. Despite two telephone conversations between Chairman MAS Deputy Minister Lee Hsien Loong and US Treasury Under-Secretary John Taylor in the last couple of days of the negotiations, there was no agreement. The gap in positions was not tactical but fundamental.

The US wanted clauses in the FTA requiring both countries to freely allow payments and transfers of capital into and out of their territories. The “free transfer” clause was a feature of all bilateral trade and investment agreements that the US had concluded to date. Making an exception for Singapore would set a bad precedent for all of the US’s future agreements. The free flow of capital was a central tenet of US international economic policy and strongly subscribed to by the US Treasury in particular.

[...] It was only natural that the US would want to protect the ability of its investors to freely move their assets out of the jurisdictions in which they are held.

Singapore shared the US’s strong commitment to the free and unfettered flow of capital. An open capital account regime had been and remained a critical factor underpinning Singapore’s economic growth. We had consistently eschewed capital controls of any kind – even at the height of the Asian financial crisis. However, in an exchange rate crisis that threatened to severely destabilize the economy, Singapore needed the flexibility to take all appropriate measures, including, as a last resort, restrictions on capital flows when conventional monetary policy tools might be inadequate. We were not opposed to a “free transfer” clause but wanted to include an exception similar to that in multilateral trade agreements, such as GATS, which provided flexibility to impose restrictions on capital flows in the event of serious balance of payments difficulties.

Breaking the deadlock

The two months of negotiations that followed were unique. There were no face-to-face meetings. The negotiations were conducted entirely through a series of telephone conversations and video-conferences, punctuated by exchanges of letters formalizing the evolution of our respective positions. Our embassy in Washington played a key role in building support for our position.

The breakthrough came when both sides agreed to set aside the contentious issue of whether capital controls were a legitimate macroeconomic policy tool, and focus on the extent to which Singapore should be subject to claims for damages by affected investors in the event that Singapore imposed capital controls. This meant that there would be a “free transfers” clause without exception (reflecting the US position), but the scope of Singapore’s liability in the event we imposed capital controls was significantly reduced (largely meeting Singapore’s need for flexibility of action in a crisis).

Source: Koh and Chang, 2004.

above in the case of the Japan-Philippines FTA, the legacy of the 1998 Asian financial crisis provided a context for Singapore's insistence on this issue, even though it had experienced net financial inflows during the crisis (as it was widely perceived as a stable economic and monetary haven within an otherwise destabilized region).

The case study is interesting since it shows how despite interventions from officials at the very highest echelons of the Government of Singapore (the Minister referred to in the case study is Lee Hsien Loong, who would shortly thereafter become Prime Minister), it was only possible for both sides to overcome the impasse once they moved away from their hitherto entrenched ideological positions and delved into the finer and more technical details of how to achieve the outcome that both Parties ultimately sought. Box II.8 describes this in the words of Singapore's then lead negotiator for financial services.

The two sides ended up solving this impasse by ultimately giving USSFTA the clause it needed, while at the same time defining the ability of Singapore to impose controls on what it considered the most potentially destabilizing monetary flows, i.e., short-term capital flows (so-called "hot money") driven more by speculation impulses than by a desire to finance productive activity. The United States, for its part, agreed to limits on Singapore's liability towards investors on whom any controls that Singapore decided to impose would have a negative impact.

CHAPTER III

AID FOR TRADE IN SERVICES AND INCREASING THE CAPACITY FOR EXPORTING SERVICES

Aid for Trade and services has become a focus for increased attention by policymakers and development organizations only recently.¹⁹ The three most operationally urgent needs for either developing or transition economies in the context of trade in services negotiations are: (a) the ability to negotiate from a more informed position; (b) the capacity to better manage the process of market opening; and (c) the ability to supply newly opened foreign markets (Sauvé, 2007). However, the scope for extracting commensurate binding commitments from negotiating partners (particularly developed country partners) in the context of any given PTA negotiation may be limited. In practice, such commitments – if they are at all forthcoming – will almost inevitably break down into: (a) financial and institutional support to build domestic regulatory capacity; and/or (b) commitments to aid or facilitate in the development of export capacity in a few hand-picked service sectors. This chapter discusses these and other options that have been raised by development experts as part of the Aid for Trade debate.²⁰ In addition, some case studies are highlighted from existing PTAs that have attempted to explicitly incorporate pro-development commitments.

A. Aid for Trade to improve negotiating capacity

Negotiating capacity has both an institutional and a process-oriented side to it, meaning that the institutions that conduct and provide input into services trade negotiations can and should be the direct recipients of any Aid for Trade commitments extracted from a developed country negotiating partner (particularly when such aid is intended to improve a country's negotiating capacity). These areas are discussed in more detail in subsection 1. In addition to the institutional aspects, however, processes can also be improved in manners that can have a perceivable effect on outcomes. Securing operational Aid for Trade commitments that can improve these processes is almost as important as commitments directed towards improving institutional capacity. These are discussed in subsection 2.

¹⁹ See, for example, the materials produced in the context of a WTO workshop on Aid for Trade in Services, which took place on 11 July 2012 (available at www.wto.org/english/tratop_e/devel_e/a4t_e/wkshop_july12_e/wkshop_july12_e.htm; accessed 6 August 2012).

²⁰ The term “Aid for Trade” is used here to encompass not just development assistance aimed at addressing supply-side constraints to boosting export capacity in developing countries but also donor initiatives that provide trade-related technical assistance and capacity-building as have long been provided under various programmes and frameworks. The authors posit that this broader definition is not inconsistent with those used by various international organizations. See for example, www.imf.org/external/pubs/ft/survey/so/2007/POL0523A.htm (accessed 6 July 2012), which states “Aid for Trade refers both to a subset of development assistance that is seen as promoting international trade and a number of international initiatives to promote trade-related development assistance. As generally defined, Aid for Trade comprises aid that finances trade-related technical assistance, trade-related infrastructure and aid to develop productive capacity”.

1. *Aid for Trade and institutional negotiating capacity*

The first two chapters of this training manual address the various aspects of preparing for negotiations resolutely and conducting them with the proper focus. The reader should by now have an understanding of the scope of institutional backstopping that these two activities require. Put simply, negotiating on trade in services requires well-educated and professionally skilled human resources, who themselves have access to the type of basic infrastructure required to conduct targeted policy research. The actual physical task of conducting negotiations also comes with a price-tag attached, since negotiating teams need to travel (and subsist) and afford available adequate facilities in which to conduct negotiations.

The type of Aid for Trade commitments that can be imagined here might include some upfront capacity-building aimed at building and supporting national or regional negotiating capacity. This could be extracted from developed country partners at the time that official announcements are made that PTA negotiations are to be launched, but some months prior to actual negotiations starting. A good example of this was the European Union-funded Hub-and-Spokes Programme, which was implemented by the Commonwealth Secretariat (ComSec) and the Organisation Internationale de la Francophonie (OIF) in the run up to, and during the Economic Partnership Agreement (EPA) negotiations between the European Union and the Asia-Caribbean-Pacific (ACP) countries that were intended to usher in a new generation of trading arrangements to replace the Cotonou Agreement as its WTO waiver was set to expire on 31 December 2007. Boxes III.1 and III.2 document the Hub and Spokes Programme as an example of Aid for Trade targeted specifically to building institutional negotiating capacity.

Although the Hub and Spokes programme was admittedly a very large project, providing trade-related technical assistance (TRTA) and capacity-building to more than two dozen developing countries in different regions, any developed country anticipating the launch of PTA negotiations with a developing country might be convinced to either launch its own similar, albeit smaller and more targeted, TRTA programme, or to contribute financially to existing TRTA efforts in order to avoid duplication. Many multilateral donor agencies already have ongoing TRTA programmes in developing countries. There is no reason why an agreement to launch

Box III.1. Building trade policy capacity: Hub and Spokes Project

What is Hub and Spokes?

The Building the Capacity of ACP Countries in Trade Policy Formulation, Negotiations and Implementation ("Hub and Spokes") Project is a joint initiative concluded by the European Commission (EC), the Commonwealth Secretariat (ComSec) and OIF with the support of the ACP Secretariat. The project, which forms part of the European Commission's TradeCom Facility, will seek to promote the effective participation of ACP countries in international trade negotiations and to strengthen their capacity to formulate and implement trade policies.

The project has three main components:

- The establishment of trade negotiation networks at the and regional levels to be actively used to define trade policy and negotiation positions;
- The establishment of national and regional participatory mechanisms for improved stakeholder consultation and involvement in trade policy formulation;
- The establishment of appropriate mechanisms for notification of trade policy measures to WTO.

Box III.1. Building trade policy capacity: Hub and Spokes Project *(continued)*

To achieve these aims, the Project will place Regional Trade Policy Advisers (RTAs) in the following regional bodies:

- African Union (AU);
- Common Market for Eastern and Southern Africa (COMESA);
- Economic Community of West African States (ECOWAS);
- Economic and Monetary Community of Central Africa (CEMAC);
- West African Economic and Monetary Union (UEMOA);
- Caribbean Community (CARICOM);
- Southern Africa Development Community (SADC);
- Organisation of Eastern Caribbean States (OECS);
- Pacific Islands Forum (PIF); and
- East African Community (EAC)

The services of up to 48 Trade Policy Analysts (TPAs) will be made available at both the regional and the national levels. ComSec will be responsible for the implementation of the Project in ACP member States of the Caribbean, Pacific, Eastern and Southern Africa regions and the African Union (AU). AIF will be responsible for the implementation of the project in West and Central Africa.

Source: www.thecommonwealth.org/Internal/191502/159353/what_is_hub_spokes/ (visited on 6 July 2012).

Box III.2. Jamaica: Aid for Trade case study

Commonwealth Hubs and Spokes Project: Building the capacity of ACP countries in trade attachment of a trade policy analyst in Jamaica

2. Appointment and activities of the Trade Policy Analyst

A Trade Policy Analyst was assigned to the Ministry of Foreign Affairs and Foreign Trade in Jamaica in April 2006 in accordance with the project specific Memorandum of Understanding concluded between the Commonwealth Secretariat and the Government of Jamaica in March 2006. The contract of the Analyst would be extended for a further two years in 2008.

The guiding principle in the deployment of TPAs was that they had to be non-citizens of the host country and preferably of the region. Hence, the Spoke for Jamaica was a national of Zimbabwe, living in South Africa, whose qualifications included a Masters Degree in International Law and Economics from the World Trade Institute in Bern, Switzerland. The Commonwealth Hubs and Spokes Project thus allowed for cultural exchanges between regions – where Caribbean nationals were posted to Africa and vice-versa; and Africans posted to the Pacific. It also underpinned South-to-South cooperation.

This project involved counterpart training and thus Foreign Service Officers in the Ministry were assigned to work with the TPA. Equipment was also provided in the form of a laptop computer and printer/scanners.

Box III.2. Jamaica: Aid for Trade case study *(continued)*

During the four- year assignment, the TPA, who was found to have a keen interest in trade in services, assisted the Ministry in ongoing work for the negotiation of the CARIFORUM/EU Economic Partnership Agreement (EPA), which concluded in December 2007, and with the preparations for the negotiations for the Canada/CARICOM Trade and Development Agreement, which commenced in November 2009. He also assisted with the WTO Services negotiations and Services implementation in the context of the Caribbean Single Market and Economy (CSME).

This work included organizing trade in services consultations with stakeholders utilizing the Ministry's existing consultative mechanism which includes representatives of the public and private sectors and civil society. The TPA improved the working relationship with the services stakeholders.

The TPA was actively engaged in organizing seminars and workshops on trade policy issues such as trade in services, rules of origin and analysis of trade with trading partners. A major training activity was undertaken in collaboration with the University of the West Indies at Mona and the Overseas Development Institute (ODI) of the United Kingdom in 2010 to train 29 government officials in conducting sustainability impact assessments.

5. Assessment of the project

The legacy of this project is assessed, among other things, as the equipment received, the training provided, the strengthening of the services outreach and network, and the contribution to services negotiations.

Conclusion

Overall, the assignment of the TPA to Jamaica has generally been evaluated as a success. As shown, the TPA made it possible for the Ministry of Foreign Affairs and Foreign Trade to continue to: (a) participate effectively in trade in services negotiations with the involvement of all stakeholders; (b) undertake a number of training initiatives to further build capacity not only in the Ministry, but also in the wider public service; and (c) improve trade policy analysis. The Analyst TPA positively contributed to work on the CARIFORUM/ EU EPA.

Source: www.oecd.org/dataoecd/7/62/47803894.pdf (accessed 6 July 2012).

trade negotiations with a view to concluding a PTA between a developing and a developed country should not be accompanied by financial commitments on the part of the latter to help the former prepare for and conduct these negotiations. Doing so could well be interpreted as a sign of the developed country's good faith in achieving a balanced and development friendly agreement.

The institutional capacity of a government to prepare for, and conduct negotiations on trade in services will also depend heavily on the type of budgetary resources it is able and willing to allocate to this issue. This factor determines the quantity of human resources that can be dedicated to such negotiations as well as the quality of physical infrastructure they have to work with. As the Jamaican case study makes clear, assigning a foreign expert to assist in the building of domestic capacity may represent a welcome starting point. However, it was only when the Ministry of Foreign Affairs and Foreign Trade started recruiting its own trade policy experts who were themselves graduates of specialized programmes set up at a regional university (the University of the West Indies), that the country was able to avail itself of effective in-house capacity and more fully appropriate the conduct of its services negotiations.

2. Aid for Trade and process-related aspects of improving negotiating capacity

The processes involved in preparing for, and conducting services negotiations have been discussed in some detail in previous sections of this manual. The focus here is now on how Aid for Trade can be harnessed to help developing countries improve these processes. An important aspect of preparing for negotiations is determining the potential benefits of a PTA as well as examining in what sectors the negotiating partner economies share complementarities. Once identified, such complementarities could be exploited as an outcome of the PTA under discussion. In this context, one Aid for Trade commitment that developing countries could reasonably be expected to request, even before any announcement to launch negotiations has been formally made (i.e., in the purely exploratory phase of talks), is that the developed country partner assist in performing a joint feasibility

Box III.3 Australia-India Joint Free Trade Agreement feasibility study

1.1 Background and objectives of study

The economic relationship between Australia and India has developed rapidly in recent years, particularly under the impetus of India's far-reaching process of economic reform and the resulting rapid globalization of the Indian economy. In recognition of the growing synergies between the two economies, and the commitment on both sides to further enhance the economic partnership, Australia and India agreed in April 2008 to undertake a feasibility study for a possible bilateral FTA. This would help inform a subsequent decision by the two Governments about whether to proceed to FTA negotiations. In doing so, the study is without prejudice to whether possible future FTA negotiations between Australia and India would take up all issues in the forms considered in the study.

The terms of reference (TOR) for the study were developed and [...] key elements of the TOR were to:

- Identify the benefits that India and Australia would derive from a WTO-consistent FTA;
- Assess the feasibility of a comprehensive FTA covering goods, services and investment as well as other cross-cutting issues such as intellectual property, sanitary and phytosanitary issues, technical barriers to trade, competition policy and government procurement;
- Assess prospects for expansion of trade in goods through liberalisation of tariffs and non-tariff measures;
- Explore how to create a favourable environment for investment in both directions;
- Produce a report for consideration by the Governments in the first half of 2009 or earlier;
- Assess prospects for expansion of trade in services across a substantial range of sectors, including through labour mobility and encouragement of mutual recognition arrangements.

1.2. Approach of the study

The feasibility study was undertaken by the Joint Study Group (JSG) which held its meetings, with co-chairs from the Indian Department of Commerce and the Australian Department of Foreign Affairs and Trade. The JSG met four times between April 2008 and September 2009. It conducted much of its work through inter-sessional contacts and exchanges of material between the two departments. Both sides undertook consultations with business and other stakeholders. Written submissions were invited and received. Economic modelling was conducted by both India and Australia, with details provided in Annexes B and C.

Source: www.dfat.gov.au/fta/aifta/Australia-India-Joint-FTA-Feasibility-Study.pdf (accessed 9 July 2012).

study of a future PTA. Such studies can be of enormous benefit for developing countries in their efforts to assess the potential costs and benefits of a future PTA as well as in helping them identify potential offensive and defensive interests. In short, such studies can provide a jump-start to the extensive homework and research that is inevitably required in the run up to formally starting trade negotiations.

Box III.3 provides excerpts from such a joint feasibility study performed in the context of Australia's current ongoing negotiations with India towards the conclusion of a Comprehensive Economic Cooperation Agreement (CECA).

Of course, there are various other ways in which Aid for Trade commitments may be harnessed to help the actual process of preparing for, and conducting services trade negotiations. Recalling that an essential element to these dual processes is stakeholder consultation, developed country negotiating partners could be prevailed upon to provide funding to assist and support in various consultation activities since this is usually something that developing country governments often do not have the experience, proper institutional architectures or the budgetary scope for carrying them out. Again, these are typically commitments that will be obtained before negotiations actually start, so developing country negotiators should ideally have a fairly well-defined concept of what type of specific assistance they are requesting as well as the specific activities for which such assistance should be used.

3. Other considerations on improving negotiating capacity and Aid for Trade

As noted above, the act of engaging in negotiations not only imposes its own (non-negligible) costs in terms of the time and energy it requires of negotiators, but also the financial costs of fielding a suitably sized and competent team, and paying their travel and subsistence over the course of several negotiating rounds. Although it is probably not a good idea to request that a future PTA partner contribute directly to bearing the burden of the above costs (since it may be perceived as reducing the recipient country's independence in negotiations), it is not unreasonable to seek such assistance from third-party or multilateral development agencies. Although this may not result in any commitments from a potential PTA partner, it should nevertheless be part of a developing country's contingency planning in the lead up to negotiations. An example of such assistance has been repeatedly seen in donor assistance to least developed countries to attend working party meetings and bilateral market access negotiations in Geneva in the context of their WTO accession talks. For example, Cambodian negotiators were not in a position to fully fund their own travel and accommodation costs during their relatively frequent accession-related missions to Geneva, so third-party donors provided assistance in this regard. Such assistance from third-party donors has also been a common feature at WTO accession negotiations for a number of small Pacific Island nations.

Box III.4 offers another excerpt from the case study produced by Professors T. Koh and C. L. Lin (2004) of the United States-Singapore FTA. Although its rightful place is in the context of inter-ministerial cooperation, this excerpt also shows the type of funding mechanisms that can and should be set up to pay for the actual cost of assigning negotiators as well as covering their travel and accommodation expenses.

There is no reason why the establishment of a fund similar to the one the Government of Singapore set up for itself should not be done with budgetary support from various regional or multilateral development agencies or specialized United Nations agencies that are tasked with assisting developing and transition economies in their efforts to better integrate into the global economy. Indeed, ESCAP's commissioning of this manual offers a case in point. There is, similarly, no valid reason why a future PTA partner that is a developed country should not be asked to contribute to such a fund as part of an initial commitment to launching

Box III.4. Funding participation in FTA negotiations

"[...] One small idea which helped a great deal was the FTA Fund. It is a S\$ 5 million one-off fund granted by the Ministry of Finance and administered by MTI [Ministry of Trade and Industry]. Through this fund, MTI paid for all the travelling and hotel expenses of all members of the negotiating team, and reimbursed various agencies the salaries of their offices involved in the negotiations (since it was almost a full-time assignment for many members)."

Source: Koh and Chang, 2004.

negotiations with a developing or transition economy partner. Such a contribution could even be considered a "down payment" on the development-friendly outcomes of the future PTA.

B. Aid for Trade to improve the management of market opening

As several commentators have pointed out, the incremental, progressive liberalization often inherent to successful service sector reforms is something that trade agreements are uniquely well-placed to promote.²¹ In addition, services liberalization in the context of multilateral or preferential trade negotiations can form a political economy framework in which developing countries are essentially "given something" in exchange for undertaking far-reaching economic reforms, which are more often than not in their own interests.²² It is assumed here that coupling engagement in services trade negotiations with the opening of services markets is not the primary challenge negotiators need to prepare for when facing the prospect of upcoming PTA negotiations. Rather, opening domestic services markets in a way that is conducive to and supportive of pro-competitive reforms, and thus development-friendly outcomes, is in fact the most difficult challenge. The increasingly accepted understanding in this context appears to be that opening services markets, particularly by focusing attention on barriers to new entry, is most likely to lead to greater competition, increased choice for consumers and, consequently, net welfare gains for the economy as a whole if such liberalization is properly sequenced.

Another equally accepted perception in this context is that the key to effective competition is making sure that liberalization is accompanied by effective regulation, and that the private sector should ideally be invited to play a leading role. However, in order for this to occur requires that proper frameworks are in place to prevent negative externalities such as market capture or information asymmetries from undermining the pro-competitive change that privatization and market liberalization can otherwise induce. Therefore, the focus of the discussion here is on the issue of sequencing – i.e., liberalizing in accordance with an agreed timetable, as well as the interplay between good regulation and pro-competitive market opening. The discussion also deals with the role of adjustment assistance in services liberalization and how Aid for Trade commitments might be harnessed to facilitate and promote such assistance.

1. Sequencing of market opening and Aid for Trade

Research directed to studying the policy implications of opening services markets in the context of a PTA rather than on an MFN basis has indicated that the benefits of incumbency may result in inferior foreign service suppliers being able to entrench

²¹ Marconini and Sauvé, 2010 and Sauvé, Pasadilla and Mikic, 2012.

²² Discussing this in a related context, Mattoo and Subramanian (2008) referred to this dynamic as "[the] genius of the GATT".

themselves in a given services market in a way that could ultimately prove self-defeating for policymakers if and when multilateral liberalization is eventually undertaken (Mattoo and Fink, 2002). Thus, sequencing can be important, and the risks of preferential liberalization of services markets needs to be weighed against its benefits. Ultimately, the “right” approach to this problem will depend on the efficiency – in global terms – of the services providers of the PTA partner economy as well as the urgency of increasing efficiency in domestic service markets.

In services markets that play an important supporting (or infrastructural) role for all other areas of economic activity, such as financial services, telecommunications and logistics, the urgency to improve efficiency will likely be greater, depending on how poor or inefficient the domestic markets currently are for these services. In other sectors that predominantly affect consumer choice and utility, the urgency to improve the efficiency of these services markets might still be present, but not felt as strongly in terms of policymakers’ desire to achieve relatively rapid and tangible improvements to national economic welfare.

In any event, the Aid for Trade dimension in sequencing the opening of services markets by developing country negotiating partners generally does not manifest itself in the form of explicit and actionable commitments from the developed country negotiating partner, but rather in the latter’s willingness to exercise restraint in pushing for too rapid or pervasive liberalization. The Aid for Trade dimension in this context also manifests itself in the degree to which developed and developing country negotiating partners are willing to work together to achieve an economically viable consensus on how quickly and extensively the developing country partner should open its services markets in a manner that allows:

- (a) Domestic service suppliers to gear up for the coming wave of competition; and
- (b) Regulators to put domestic legal and institutional frameworks in place that will enhance, promote and enforce competition.

Box III.5 contains an excerpt from the PTA concluded between Australia and Thailand. The provision featured is Article 812, which is found under Part V of the Agreement, “Progressive Liberalisation and Development of Rules”. Box III.5 also includes language from a side-letter to the FTA in which the two Governments agreed to meet at a subsequent date in order to commence negotiations on the liberalization of financial and telecommunications services.

Box III.5. Australia-Thailand FTA – Chapter 8 and Side Letter on Services

Part V. Progressive Liberalisation and Development of Rules

Art. 812 – Review of Commitments

1. In pursuance of the objectives of this Chapter, the Parties shall enter into further negotiations on trade in services within three years from the date of entry into force of this Agreement with the aim of enhancing the overall commitments undertaken by the Parties under this Agreement.

Side Letter on Services

Thailand and Australia shall enter into negotiations on financial services and telecommunication services as part of the review of commitments provided for in Article 812 (1).

Source: www.dfat.gov.au/fta/tafta/tafta_annexes_sideletters_index.htm (accessed 9 July 2012).

The language cited in box III.5, in the context of the Australia-Thailand FTA, demonstrates that Australia showed itself to be a willing development partner of Thailand, exercising restraint in demands for immediate liberalization in two key services sectors and agreeing to postpone negotiations in these sensitive sectors to a specified future date. Many such examples abound. The Bilateral Trade Agreement between the United States and Viet Nam, which preceded the latter's entry into WTO by several years, featured a detailed timetable for progressive liberalization of various service sectors. Some commentators from the Government of Viet Nam have pointed out privately that it was the successful implementation of these preferential commitments that emboldened the Vietnamese leadership to finally complete their WTO accession negotiations. Likewise, many WTO accession schedules of specific commitments in services feature staggered liberalization of specific service sectors, opening them up gradually and on a city-by-city or region-by-region basis.²³

2. Aid for Trade, market opening and adjustment assistance

Aid for Trade commitments can also manifest themselves in a developed country's willingness to provide commercially meaningful market opening opportunities to service suppliers of the developing country partner, particularly in modes of supply of priority interest to the latter. This may notably be the case of Mode 4 (temporary movement of natural persons). Because Mode 4 commitments brokered in trade agreements typically focus on high-skilled labor movement, this often entails a commensurate willingness to negotiate mutual recognition agreements with regard to qualifications and licensing procedures for professionals and other skilled worker categories. We revert to this particular development-friendly outcome in Section III below.

Yet another area where meaningful Aid for Trade commitments can be requested and offered relates to adjustment assistance. Trade liberalization being inherently redistributive in nature, it is likely to create both winners and losers. The issue of adjustment assistance addresses government initiatives to soften the potentially adverse impact of trade and investment liberalization for workers and firms in import competing sectors. Despite the reservations expressed by some about the predominance of *status quo* commitments in PTAs (and even less than *status quo* commitments when negotiations proceed on a GATS hybrid list approach) in services trade (Sauvé, 2007), there can nevertheless still be a very clear services dimension to preferential liberalization, as was discussed above in the context of NAFTA's impact on the US nursing sector (see Box I.9), as well as for any service sector that competes with service suppliers from the PTA partner economy.

A WTO study (Bacchetta and Jensen, 2003) discussed many of the options available to policymakers in the context of adjustment assistance, including improving credit markets and social safety nets, labour market reform, improving access to education and training, reducing transaction and information costs (particularly for firms), improving the quality and availability of information on prices and market opportunities for individuals and firms, and coordinating domestic macroeconomic policy with trade liberalization. There are many ways in which Aid for Trade commitments might conceivably be requested and offered in terms of preparing domestic institutions and policies for the demands that are likely to place on an economy by adjusting to impending trade liberalization.

Box 3.6 refers to the above-mentioned WTO study and provides a brief overview of three adjustment assistance schemes in different developing countries, i.e., Chile, Costa Rica and Mauritius. It is not difficult to conceive of various Aid for Trade commitments that might be requested and offered in the broad set of policy and institutional frameworks that governments

²³ See, for example, China's commitments in the mobile telephony sector as contained in document WT/MIN(01)/3/Add.2, available at www.mac.doc.gov/China/servicesschedule.pdf (accessed 11 July 2012).

use to assist displaced workers and firms to move into more competitive sectors of the economy in the wake or in anticipation of trade liberalization. Developing country and transition economy governments need to think very carefully about what type of adjustment assistance policies they wish to adopt as well as how Aid for Trade commitments could best be harnessed to respond to these needs. This is yet another aspect of “doing one’s homework” in the run-up to impending trade negotiations, and using economic modelling to better understand the likely displacement effects of any possible liberalization outcomes on various service sectors.

Once policymakers have a better grasp of the likely or possible displacement effects, and provided they have the political courage to confront these effects pro-actively, they can start formulating adjustment strategies to soften the impact of these effects, and tie these strategies into possible Aid for Trade requests. An interesting paradox of service sector reforms is the predominant tendency for countries to enact them unilaterally rather than in the context of trade negotiations, which more often than not serve as periodic harvesting chambers as the World Bank’s Aaditya Mattoo once remarked. Decoupling pro-competitive reforms from the trade negotiating sphere arguably deprives developing countries of the technical assistance that is now routinely embedded in services negotiations.

Box III.6. Adjustment assistance in Chile, Costa Rica and Mauritius

Chile

Chile’s National training and Employment Service has implemented two programmes to support the movement of labour. One programme began in 1990 to assist displaced labour throughout the country and is managed by the municipalities. The second programme, begun in 1995, assists workers in the coal, textiles and clothing sectors. Chile also has special programmes, such as the Technical Assistance Fund and Development Projects to assist small and medium-sized enterprises. These programmes are intended to assist such enterprises, in all sectors of the economy, to adopt more efficient managerial and marketing techniques, and more up-to-date technology.

Costa Rica

Credit programmes operated exclusively by state-owned banks provide loans with alleviated guarantee, documentation and procedural conditions for small manufacturing firms. These loans are directed to companies presenting proposals aimed at raising their productivity, quality and competitiveness. In 1993, loans amounting to some US\$ 30 million (about 27 per cent less than requested) were approved for 54 firms, located mainly in the San José Greater Metropolitan Area. These firms were involved in the production of foodstuffs, beverages, chemicals, clothing, paper and leather articles, and the processing of wood, minerals and metals.

Mauritius

A Technology Diffusion Scheme was introduced in Mauritius in 1994. The programme, managed by a private contractor, is designed to offset the initial costs to the private sector of acquiring technology support services to improve productivity, product quality, design or manufacturing response time. Costs are to be shared equally by the Government and the private sector.

Source: Bacchetta and Jensen, 2003.

3. *Aid for Trade and sound regulatory practices*

Much of the trade-related technical assistance and capacity-building that is offered by the multilateral development institutions, specialized United Nations agencies and bilateral donor agencies is directed specifically towards improving institutional and regulatory frameworks in developing and transition economies. In fact, because many of these countries receive so much TRTA and capacity-building help from so many multilateral and bilateral donors the problem is often not getting it, but absorbing it in a way that leads to genuine improvements in trade policy formulation and attendant organizational structures. To give just one example, in the three years immediately preceding Viet Nam's accession to WTO in 2006, there were reportedly more than 30 different donor organizations providing TRTA and capacity-building help to various parts of the Government of Viet Nam in Hanoi as well as to various government agencies and private-sector groups throughout the country. Indonesia offers another prominent example, as no less than five development agencies were maintaining permanent offices and full-time staff within the country's Ministry of Trade premises itself in 2006.²⁴

Because of the ubiquitous nature of TRTA, the focus here is on (a) the potential for PTAs to specifically address the goal of achieving improvements in the regulatory environment of the developing country partner and (b) discussing ways in which such treaty commitments might be implemented by using Aid for Trade as a vehicle to improve underlying institutional and regulatory frameworks.

Trade rules that address issues such as transparency, judicial review and due process, and which generally seek to enhance predictability in the trading environment for foreign economic operators, are nothing new. Even GATT 1947 contained Article X entitled "Publication and Administration of Trade Regulations". GATS itself has provisions on transparency that require the establishment of so-called enquiry points (Article III) as well as setting out detailed minimum standards of regulatory conduct (Article VI). By the same token, many PTAs also feature GATS-plus provisions on important regulatory issues such as transparency, reviews of laws and regulations, administrative procedures, and even measures against corruption and improvement of the business environment. Supporting such commitments is generally a separate chapter or side-agreement setting out a loose institutional framework for development cooperation between the developed and developing country negotiating partners. Although some of these provisions relate to trade in general between the two partners (rather than just trade in services), others are specifically tailored to address perceived regulatory shortcomings and to strengthening the competitive environment on specific services markets.

Box III.7 contains a summary of the development cooperation provisions of the EPA between Japan and the Philippines, both in general as well as those pertaining to financial services in particular. This PTA, signed in September 2006, contains a number of the provisions referred to above that are intended to strengthen and improve the efficiency and predictability of the prevailing legal and regulatory regimes. In particular, the EPA has a dedicated chapter, "Improvement of the Business Environment", that – together with the provisions contained in the Implementation Agreement to the EPA – sets out a detailed institutional structure for the two Parties to consult extensively and in-depth on ways to improve the business climate in both countries. (However, in this context, it was arguably the business environment in the Philippines that was intended to be addressed). The Japan-Philippines EPA also contains numerous provisions on regulatory cooperation in various spheres, including – for the purposes of this publication – financial services. Even the casual reader will notice that the commitments in this part of the agreement are

²⁴ These were projects commissioned and funded by the following donors (in alphabetical order): AusAid; EuropeAid; Japanese International Cooperation Agency (JICA), USAID and the World Bank.

Box III.7. Development cooperation provisions in the Japan-Philippines EPA

Cooperation in general

Chapter 14 of the EPA, titled “Cooperation”, comprises some six articles that are themselves fleshed out in greater detail in Chapter 5 of the Implementation Agreement to the EPA. The EPA identified 10 sectors in which cooperation was to take place, with the goal of facilitating and liberalizing trade and investment in order to assist in the achievement of development goals, and promote the well-being of the peoples of both Parties. The 10 areas for cooperation (Article 114) are:

- (a) Human resource development;
- (b) Financial services;
- (c) Information and communications technology;
- (d) Energy and environment;
- (e) Science and technology;
- (f) Trade and investment promotion;
- (g) Small and medium-sized enterprises;
- (h) Tourism;
- (i) Transportation;
- (j) Road development.

The EPA established a sub-committee to oversee the implementation of this chapter (Article. 147), something that it also does for other work programmes set up under the Agreement (such as on “Improvement of the Business Environment”), but also requires that the sub-committee respect existing consultation mechanisms between the Parties for Official Development Assistance. The EPA explicitly provides that any cooperation conducted under the terms of Chapter 14 is to be subject to the availability of appropriated funds (Article 146).

Cooperation with regard to financial services

Chapter 6 of the Implementation Agreement to the EPA addresses cooperation in the field of financial services, and sets out several areas for cooperation, including regulatory cooperation, the development of financial markets and improving financial market infrastructure (Article 25). Regulatory cooperation, in particular, is to be aimed at the implementation of sound prudential policies and enhancing the effective supervision of financial institutions (Article 26.1 [a]). The Implementation Agreement provides for the establishment of a Working Group on Financial Services, which is to be a forum for exchanging views and information, identifying ways to cooperate further, and to monitor, review and discuss issues concerning the implementation of the chapter on cooperation in financial services.

Source: Authors’ notes on the text of the EPA and the Implementing Agreement to the EPA.

loosely formulated and non-binding, and subordinate any provision of assistance to the availability of donor funds and existing mechanisms on official development aid. Therefore these are the softest of soft commitments, but nevertheless represent a suitable framework for the two Parties to begin to work together on improving regulatory frameworks, oversight, and enforcement of institutions and rules in the financial services sector, the improvement of which will be central to the Philippines continuing along its so-far modest but steady path of economic growth.

Many other examples of this type of Aid for Trade cooperation exist in other North-South PTAs and have been discussed in depth elsewhere.²⁵ Suffice it to say here that as was discussed above in the context of Aid for Trade and adjustment assistance, the onus will again tend to be on a developing country government to have a fairly well-thought out and clearly formulated set of objectives in terms of (a) the desired improvements to its domestic regulatory frameworks that it wishes to achieve, and (b) how it intends to use both the upcoming PTA negotiations and commitments in the context of Aid for Trade to support it in achieving these outcomes.

C. Aid for Trade to boost export capacity

Exporters of services from developing countries face many impediments. These include: (a) lack of access to financing for export or business development; (b) difficulty in establishing credibility with international suppliers; (c) lack of access to reliable and inexpensive infrastructure; (d) lack of access to a range of formal and informal networks, and institutional facilities necessary for trade; and (e) the financing constraints that flow from the lack of collateral that, typically, smaller service firms can put up given the intangible nature of their output (Sauvé, 2007). Some specific proposals (discussed immediately below) have been made in the context of Caribbean services exporters, which could improve market access to industrialized (OECD) economies (Chaitoo, 2008). Many of these proposals are likely to be equally applicable to developing countries as a whole.

Similarly, more recent research has been published by the World Bank summarizing several of the constraints that developing countries face in exporting services as well as the policies needed to remedy such constraints and boost exports of services (Goswami, Mattoo and Sáez, 2012).²⁶ Each of these are discussed in turn as well as highlighting the extent to which Aid for Trade commitments may be harnessed to address these issues. Also discussed here is the importance, for developing countries, of securing Mode 4 access from their developed country PTA partners as a specific and tangible development-friendly outcome to preferential services' liberalization. Finally, how Aid for Trade has been, and might be used in future, to address specific supply-side constraints to exporting services is discussed, particularly as such constraints relate to critical infrastructure and human capital (education and training).

1. Aid for Trade and market access

Despite the fact that PTAs tend to be used by developing countries more to bind the status quo rather than to achieve genuine (i.e., *de novo*) additional liberalization of services markets, it is equally true that many developed-country PTA partners will be looking for at least some improvements in market access for their service exporters, particularly in Mode 3 (Commercial Presence). This is usually handled under the investment chapter of a PTA and is normally, albeit not exclusively, an issue that affects the defensive interests of developing countries more than their offensive (export) interests. Nevertheless, there are always two sides to market

²⁵ See, for example, Marconini and Sauvé (2010) and Chaitoo (2008), who discuss primarily the CARIFORUM-EU EPA and the Aid for Trade initiatives taken in the context of trade in services under this agreement.

²⁶ See subsection 2 below.

access negotiations (that which is given and that which is obtained), and there is ample scope for trade-offs and the exchange of mutual liberalization commitments across different modes of supply. Thus, commitments offered by developing countries in Mode 3 can be paid for by the developed country PTA partner in that it grants commensurate improvements in Mode 4 market access. Policymakers in developing countries need to be cognizant of the important contribution that FDI can make, not only in promoting market contestability but also in terms of employment and other welfare gains in their domestic economies, and how conditions can be improved to increase inbound FDI. Trade agreements are well placed to facilitate an increase in inbound FDI, provided that they can be credibly linked with reform efforts in domestic labour and product markets.

Some of these policy constraints are addressed in subsection 2 while other constraints are dealt with in subsection 3. In focusing on improving market access and, thus, the terms and conditions of entry of service suppliers in foreign (predominantly developed-country) markets, a number of specific suggestions have been proposed on how to boost exports from Caribbean services suppliers looking to enter or increase their presence in developed country markets. Box III.8 lists these proposals.

It is not hard to imagine how some of the proposals outlined above might be turned into specific commitments in the context of bilateral PTA negotiations. As shown below in subsection 3, commitments very similar to those outlined above were part of the EPA between Japan and the Philippines. Otherwise, it is essentially up to negotiators to do their homework and identify what services they are already exporting and in what modes, as well as what barriers to market entry and other competitive disadvantages foreign providers of these services face in the domestic market of their PTA negotiating partner. Once this analysis is complete, negotiators must then make sure that this knowledge translates into actual market access, national treatment, or other market entry or regulatory requests.

Another proposal put forward in this context but not listed above, is that developed countries go beyond the establishment of mere enquiry points (already an obligation under GATS) to setting up formal institutional structures that are specifically tasked

Box III.8. Market access-related Aid for Trade requirements for services

The following are some key elements, in terms of tangible market access concessions, that are needed by Caribbean service suppliers in order to take advantage of opportunities in developed country markets:

- Developed countries should remove all economic needs tests for service suppliers from Caribbean States, since they are all small, vulnerable economies and their services trade is so miniscule that it has a negligible impact on any OECD economy;
- Due to their very limited human, financial and marketing resources, small services firms are unable to service markets through commercial presence. Temporary entry (Mode 4) for Caribbean service suppliers should be de-linked from the requirement to have commercial presence. In other words, service suppliers should be granted entry as individuals. There should also be further expansion of the scope of categories covered by horizontal commitments in developed WTO members' schedules to include middle and lower level professionals (i.e., persons without university degrees), in the definition of "other persons" and "specialists";
- Developed countries such as Canada, Japan, the United States and those in the European Union should grant market access to Caribbean countries in sectors and modes of supply in which they have particular market access interests and are competitive. Some broad indicative areas are: culture and entertainment; professional services; health tourism; tour operators; building cleaning and maintenance services; ship repair and maintenance; landscaping; and finishing work for buildings.

Source: Chaitoo, 2008.

with promoting and assisting service suppliers from the developing country PTA partners to identify and exploit commercial opportunities in the services markets of the developed country partner (Chaitoo, 2008). This is already something being done by some countries for trade in goods, but such programmes could and should be extended to services trade, and should also figure among tangible and actionable Aid for Trade commitments in North-South PTAs.

2. Policy frameworks for foreign direct investment and promoting services exports

Research published recently by the World Bank groups the determinants of services trade into three broad categories (Goswami, Mattoo and Saez, 2012). The first of these – referred to as the “fundamentals” – is what would normally be expected to influence trade flows under classic trade theory, including a given country’s (a) factor endowments, particularly the quantity and quality of its human capital (since services are primarily performed by humans); (b) natural resources and cultural endowments (important for tourism services); (c) infrastructure; and (d) the quality of existing institutional structures (the regulatory environment). The second category of determinants of services trade identified is “policies affecting trade, investment and labour mobility of services”. The third category is referred to as “proactive policies in services”²⁷. The other two categories are discussed in this subsection. The first category is discussed to a limited extent in chapter I, (section D).

Many of the policies affecting trade, investment and labour mobility of services are more likely than not to be embedded in behind-the-border legal and regulatory frameworks that are far removed from any immediate institutional link to those policymakers directly concerned with a country’s trade performance. This is where the need for strategic and visionary leadership comes into play, with the very upper echelons of government needing to lay out the preferred development course and subordinate all other policy areas to this vision. Inbound FDI can be harnessed to act as the precursor to services exports, but first the investment regime in the targeted service sectors has to be liberalized. The example of the business process outsourcing sector in the Philippines can be cited here, in which more than 90 per cent of the initial total equity investment of US\$ 2 billion consists of foreign equity participations. Business process outsourcing is now one of the country’s biggest services exports and a source of thousands of well-paid and safe jobs in the formal sector.²⁸

Here the role of Aid for Trade is clear enough, and should comprise assistance to the developing country PTA partner in adopting regulatory best practices for the concerned institutional and policy frameworks. This could manifest itself in terms of binding commitments to dedicate commensurate monetary and other resources to this task as well as setting up institutional structures for the exchange of information and the transfer of knowledge.

Proactive policies to promote services would necessarily include those that are intended to promote exports and/or investment. Here, the age-old and well-used tool of Special Economic Zones (SEZs) or (in India) Software Technology Parks (STPs) serve as examples of this type of industrial and development policy that favours services trade. Other policy examples in this category include tax holidays or other preferential fiscal treatment as well as waiving otherwise prevalent restrictions on land use, zoning regulations and labour laws. Such treatment can be linked to requirements to meet minimum export thresholds or employ targeted quantities of local labour; however, governments might also find that such restrictions go a long way to curtailing economic operators in terms of their discretion in making the necessary business decisions, and might thus be ultimately self-defeating. Because they relate to services trade, such performance requirements are not constrained by the WTO Agreement

²⁷ Ibid.

²⁸ Ibid, p.12.

on Trade-Related Investment Measures (TRIMs), although the investment chapters of many PTAs do extend the reach of TRIMs disciplines to services trade.

Box III.9 contains an excerpt from a case study of technology parks in India. It shows the kind of policies pursued in order to ensure the success of the parks and how they became so successful that they were copied by literally dozens of countries across the developing world.

Box III.9 provides some useful insights into the sweeping nature of the pro-active policy approach that a government must take in the event that it is serious about starting or promoting a given services sector. It also gives some idea of the positive economic spillover effects and virtuous development cycles that the successful implementation of such an approach can have. Interestingly, the literature appears to point to two converging forces that made the take-off of this particular economic sector possible. One was a boom in the software industry (including the dot-com boom) of the 1990s in the United States, which saw a massive demand for software programmers. The other factor was the decision, starting in 1991 to privatize, deregulate and liberalize the telecommunications sector in India, thereby addressing severe bandwidth bottlenecks that would otherwise have inhibited the possibility of software programmers in India being able to trade across borders with their customers overseas. Finally, and equally important, is the fact that India was well-placed to meet this demand, due to several long-standing endowments it enjoyed in terms of a working population that was proficient in English as well as the fruits of a secondary and tertiary education system that rightfully placed a heavy emphasis on mathematics and science. Because services are primarily human-intensive, it also tends to be true that those countries with more rigorous education systems tend to be able to become competitive on many services markets to the point that they are ready to export.

It is here that the Aid for Trade angle is immediately obvious, in that the developed country PTA partner could be asked to make monetary or other material commitments to assist in the establishment of such SEZs or STPs, or to provide technical assistance to policymakers on how to best go about conceptualizing and implementing such policies. By the same token, the developing country PTA partner has to be prepared to undertake regulatory reforms that may not prove easy or even popular, and which may require it to overcome entrenched bureaucratic or market-based opposition. However, more than simply being a matter for finding the right configuration of assistance under the Aid for Trade banner, this is essentially a question of visionary and strategically capable political leadership, supported by sufficient technical expertise at the policymaker level. If these two fundamentals are not a given, or are in chronically short supply, no amount of Aid for Trade is likely to produce or promote a services industry that is ready to export regionally or globally.

Box III.9. Software Technology Parks of India

Software technology parks were first established in 1990 in Bangalore, Pune and Bhubaneswar as separate autonomous societies. The establishment of STPI, a society that was set up by the Department of Communication and Information Technology in 1991 by the Government of India, merged these three societies.

STPI plays an entrepreneur role working directly with software companies. It is an export-oriented scheme integrating the concept of 100 per cent Export Oriented Units (EOU) and Export Processing Zones (EPZs) of the Government of India within the concept of technology parks. The main function of STPI is to provide an environment for developing and exporting computer software as well as professional services.

Box III.9. Software Technology Parks of India *(continued)*

The objectives of STPI are to:

- Promote development of software and software services;
- Provide statutory services to the exporters by implementing STP/EHTP Scheme;
- Provide data communication services including various value-added services, both to IT industries and corporate houses;
- Provide project management and consultancy services at the national and the international levels;
- Promote small and medium-sized enterprises by creating a conducive environment in the field of information technology;
- Promote bio-informatics/bio-technology industries by providing infrastructural statutory support.

STPI provides services that range from statutory assistance to incubation services for startups. The STPI website also lists the following as the main highlights of the STPI scheme:

- Permits only new undertakings;
- Allows only development and exports of computer software, data processing, data management etc.;
- Approval under the single window clearance mechanism;
- Permits up to 100 per cent foreign equity;
- No duty on goods imported/procured domestically by the STP units;
- Permits imports of second-hand capital goods;
- Export proceeds to be realized within six months from the date of exports;
- A 100 per cent tax holiday for export profits until 2009-2010;
- Transfer of 100 per cent of export proceeds to an Exchange Earnings Foreign Currency bank account;
- Permits sales in the domestic market up to 50 per cent of the exports.

Incubation facilities, popularly known as “plug-and-play” facilities, are made available in many centres so that firms can begin immediate operations. The incubation facilities provide ready-to-use modules, back-up power supply, telephone and fax facilities, conference rooms, training facilities and, most importantly, high-speed communication lines, and Internet and video conferencing facilities. STPI has promoted FDI and software exports since its inception. The STPI model has been considered so successful that other developing countries such as Mauritius, Myanmar, Nepal, Ivory Coast and Cyprus are using it to set up technology parks. For example, STPI played a major role in the Ebene CyberCity Project in Mauritius, and is providing consulting services for similar parks in Cyprus, Ivory Coast, Myanmar (STPI) and Nepal.

Source: Vaidyanathan, 2007.

3. *Commitments on the movement of natural persons*

This is clearly an important area for developing countries, which tend to favour Mode 4 exports over those achieved via Mode 3 (because presence abroad is capital-intensive), but which may lack the infrastructure or natural endowments to attract Mode 2 (consumption abroad) across certain sectors (e.g., education or health care). When it comes to scheduling commitments to open services markets to Mode 4 in the context of preferential liberalization, the evidence appears to point relatively convincingly towards a tendency for developed and developing countries to be slightly more forthcoming than was the case during the Uruguay Round or as has so far been displayed in the offers and request process under the WTO Doha Development Agenda. PTAs therefore appear to be the best way for developing countries to secure market access for their highly-skilled independent professionals, contract-based suppliers and business visitors.

Securing GATS-plus market access commitments on Mode 4 in North-South PTAs with both the United States and the European Union has so far proved elusive (and significantly more so in the case of the United States), but the Philippines and Thailand both appear to have recorded a certain measure of success for certain categories of workers in their respective EPAs with Japan. Both these EPAs include a separate chapter on the movement of natural persons, with the Philippines obtaining commitments from Japan concerning Mode 4 access for “personal contract suppliers” who simultaneously meet the definition of being “specialists in humanities/international services” as well as for nurses and caregivers – two categories under which the Philippines exports thousands of natural persons annually and which are preceded in importance only by the category of household service workers. Thailand obtained similar concessions except that rather than obtaining commitments with regard to nurses and caregivers, these were given for “instructors” (of certain art forms unique to Thai culture, such as dancing, music, cuisine, martial arts, language and spa services) as well as “personal contract suppliers” of Thai cuisine (Carzaniga, 2009). Likewise, the PTAs of Australia, Canada and New Zealand have registered novel forward movement in the area of Mode 4 trade.

The Aid for Trade implications of this are once again fairly obvious, in that binding market access commitments under Mode 4 can reasonably be expected to have direct and tangible economic benefits on developing country beneficiaries of such commitments, provided they are tailored to the specific export capacities of the developing country in question. These types of commitments can be tabled in the normal request-offer process of PTA negotiations, with the Aid for Trade dynamic theoretically obviating any need for direct and commensurate reciprocity.

To summarize, there are many and yet largely underexploited ways in which Aid for Trade commitments might be better harnessed to support and promote the export interests of developing countries in order to make their service suppliers better able to contest international markets and begin exporting or expand existing export flows. However, developing country policymakers must focus on two key considerations: (a) the need for a certain amount of strategic thinking to go into the formulation of Aid for Trade requests; and (b) Aid for Trade, like the decades of official development aid that has preceded it, is by no means a panacea. It is also certainly no substitute for sound and informed policy-making by accountable governments genuinely interested in promoting the economic welfare of the nation as a whole rather than the narrow interests of a privileged few.

CHAPTER IV

IMPLEMENTATION, MONITORING AND ENFORCEMENT

Many policymakers make the mistake of thinking that the really hard part to concluding a PTA consists of being well-prepared and bringing often long and wearisome negotiations to a successful conclusion. Although performing these tasks properly and effectively is difficult, time- and resource-consuming, and obviously centrally important, most seasoned negotiators will agree that the really hard part of any PTA negotiation comes after it has been signed. This is not only because there are a number of legal steps that need to be completed before a negotiated PTA can enter into force (adoption or ratification), but also because the actual task of implementing a PTA and “making good” on the commitments entered into can often be as problematic as the negotiations themselves. This chapter provides a brief look at a number of steps required to implement a PTA per se, including ratification and enacting implementing legislation as well as amending existing laws or passing new ones. Finally, a few of the issues that inevitably arise in the context of monitoring implementation and enforcing the application of a PTA are examined, such as asserting a country’s rights under a PTA. As in the previous chapters of this manual, the emphasis is very much, albeit not exclusively, on trade in services and investment.

A. Implementing preferential trade agreements

The brief examination here of the more informal task of getting domestic consensus mobilized in favour of ratifying a recently concluded PTA shows that negotiators cannot afford to be complacent once the signing ceremony is over. Indeed, getting a signed FTA ratified without any deal-breaking hiccups can be a very challenging task. The formal and legal processes by which ratification must take place, if a PTA is ever to become law, and the final diplomatic conventions to be observed prior to a treaty entering into force are also considered.

1. Domestic consensus and implementation of preferential trade agreements

It is not uncommon for trade negotiators to conclude negotiations with their PTA partners and come home with a deal, only to learn that what they have agreed upon in some way either exceeds their negotiating mandate or otherwise attracts political opposition, forcing them to re-open negotiations and/or retract concessions they have already made. There are numerous examples of this, dating back to the former International Trade Organization negotiations in 1947, when the Truman administration decided not to press for ratification of the International Trade Organization treaty due to a lack of support in Congress. A similar situation prevailed two decades later when United States negotiators came home from the Kennedy Round (1964-1967) with a signed agreement on anti-dumping, only to be told by Congress that they had no mandate to negotiate on non-tariff measures. More recently, both the Australia-United States FTA and the Republic of Korea-United States FTA ran into trouble when the time

Box IV.1. Australian opposition to the United States FTA

Labour has set up a parliamentary showdown with the Federal Government over the passage of the United States trade deal, setting an onerous three-part test the deal must pass or risk being blocked in the Senate.

On the eve of the release of the full 900-page text of the agreement, the shadow trade minister, Stephen Conroy, said yesterday that Labour would block the deal if it added any costs to consumers or taxpayers in relation to the pharmaceutical benefits scheme.

The likelihood of such costs could swing on the finer details of the trade deal's appeals process for companies wanting their drugs listed on the PBS as well as complex new intellectual property protection for patents.

The Office of the United States Trade Representative said that under the agreement Australia would adopt "higher standards" for all forms of intellectual property, including patents.

A 1996 Industry Commission report found that extending patents by five years would largely benefit American companies and cost Australian consumers up to A\$ 7.4 billion. Pharmaceutical buyers would be particularly affected by such an extension, the report found.

The Trade Minister, Mark Vaile, said yesterday that the final text of the trade deal would not please everyone, but would gain broad community support.

Source: www.smh.com.au/articles/2004/03/01/1078117369335.html (accessed 13 July 2012).

came for the Australian Parliament and Korean Diet, respectively, to ratify the agreements. Box IV.1 documents the rickety course the Australia-United States FTA had when it went before the Australian Parliament, which perceived a potential conflict with one of Australia's key health-care policies – the Pharmaceutical Benefits Scheme (PBS).

Although it is true that even the most carefully negotiated agreements can often come unstuck by what may only be fractious Party politics, the best way for negotiators to minimize such risks is to consult as widely as possible before and during negotiations, and to inform policymakers from different parts of the Government (who will ultimately be asked to implement any commitments made) as well as stakeholders in civil society (including the private sector, both potential winners and losers) who will ultimately be the beneficiaries or have to pay the price of any upcoming liberalization. This reiterates a point made in chapter 1 of this manual on the need to consult as broadly as possible.

When it comes to consulting stakeholders during the course of ongoing negotiations, policymakers will have to weigh up the benefits of doing so against the inevitable need for a certain degree of confidentiality. Trade negotiations must, by their very nature, be subject to a certain degree of secrecy; however, if negotiators shroud their activities in too much secrecy, this is likely to create a sense of unease on the part of those who fear they will have to bear the brunt of any liberalization and they are likely to make their unease felt to their own parliamentary representatives.

2. Legal verification and parliamentary ratification

The ease with which a PTA is ratified will be a function of the underlying political realities and the legal system of the implementing State, i.e., whether its legal system is monist, dualist or a mix of the two. It may also depend on the scope that the State's laws

grants to private actors to challenge the constitutionality of international treaties or implementing legislation. All of these factors will influence the speed with which a PTA may enter into force. An election between the date on which a PTA is signed and the date on which it is submitted to Parliament for ratification can also spell trouble for the agreement's eventual passage into law. Electoral politics and legal challenges are something that negotiators will not typically be able to take into account when preparing for, and conducting, negotiations, although they must clearly have a sophisticated understanding of the prevailing domestic political constraints and the constitutional framework that underlies their negotiating mandate.

Even before a PTA or enacting legislation is submitted to Parliament for ratification or adoption, the text of the agreement must be submitted in full for review by government lawyers, usually at the Ministry of Justice or its equivalent, who are ultimately charged with representing the country if it becomes liable under international law. This is a process commonly referred to as “legal scrubbing” and can take several months if it is to be done properly. This timeframe can be shortened considerably if the lawyers are constantly given updated negotiating texts as they are concluded, or if they are themselves embedded in the negotiating team and attached to each negotiating group. In any event, once the lawyers have given the green light, it is up to legislative affairs experts to draft the ratifying bill or enacting legislation for submission to parliament. This is again likely to be someone from the Ministry of Justice, but the Office of the President or Prime Minister might have its own lawyers that produce drafts of this type of legislation. Box IV.2 contains an excerpt, from a training manual produced by the Government of Australia on FTA negotiations, where the process by which international treaties become law in Australia is discussed.

What is interesting to note in the example of the Australian procedures cited in box IV.2 is that even after the agreement has been signed, there is still a large amount of analytical work to be done, i.e., an examination of whether the agreement is in the national interest as well as a study of the agreement's likely impact on various stakeholders and the community as a whole. Some might argue that such an analysis essentially provides an opportunity for Parliament (for whose benefit these studies are conducted) to second-guess the executive, which will have done its own analysis on the term of the PTA it ultimately signed.

Box IV.2. Australia's treaty approval process under domestic law

The Australian treaty approvals process includes the following main steps for all treaty actions, i.e., creating a new treaty, amending an existing one or abrogating a treaty:

- Preparation of a National Interest Analysis that sets out the advantages and disadvantages to Australia of becoming, or not becoming, a party to the treaty, including significant quantifiable and foreseeable economic and/or environmental effects of the treaty. Among several other points, the National Interest Analysis must detail what consultations have taken place with the States and Territories, and with community and other interested partners;
- Preparation of a Regulatory Impact Statement that includes an assessment of the impact of the proposed regulation (i.e., the treaty) and alternatives on different groups and the community as a whole;
- Tabling the treaty before Parliament for 20 sitting days and consideration of the proposed treaty action by the Joint Standing Committee on Treaties. If Parliament is in recess, several weeks or even months may elapse before this criterion has been met;
- Preparation and passage of the enabling legislation. The timing of this depends on the complexity of the proposed legislation, the timetable of parliamentary sittings and the demands of other business before Parliament.

Source: Goode, 2005.

Nevertheless, conducting a subsequent analysis of the type mentioned allows policymakers and legislators to thoroughly assess the implications of signing the proposed PTA; from this perspective, this is likely to prove beneficial and raises the legitimacy of the negotiated agreement once it enters into force.

3. *Services trade-related aspects of implementation in particular sectors*

There are various services-specific aspects of implementing negotiated outcomes. Similar to several other agreements that formed part of the Uruguay Round Single Undertaking, GATS imposed its own burden on countries in terms of amending existing domestic laws or enacting new legislation as well as establishing the proper institutional structures required to implement the agreement properly (Marconini and Sauvé, 2010). Particularly in some sectors such as telecommunications, some important additional commitments contained in the Telecoms Reference Paper (not part of the Single Undertaking, but adopted nonetheless in one form or another by almost all WTO accession countries since 1995) imposed a heavy burden. Because only a limited number of developing countries participated in the so-called “overtime negotiations” – which culminated in 1997 in additional market opening rules and commitments in the basic telecommunications sector (as well as financial services) – a number of North-South PTAs have seen the developing country partner making commitments that are very close, or even identical, to those set out in the Telecoms Reference Paper. This is by no means a worrisome development, since the Reference Paper contains what are widely perceived as sound pro-competitive regulatory principles designed to effectively foster competition in the wake of trade and investment liberalization. The only questionable angle to this trend (if any) is the extent to which developing countries have truly implemented these additional commitments.²⁹

Other examples abound in other sectors. In distribution services, for example, many countries have zoning or other regulations that effectively impede market access for global retailers, whose business model is often predicated on the establishment and operation of large outlets close to residential areas. Any meaningful market access commitments to open up the retail distribution sector would necessarily have to be accompanied by changes to restrictive zoning laws or any other laws that prevent or impede the construction and operation of these stores, or the entry into retailing services by foreign suppliers.

Competition policy is another good example of a regulatory implementation issue that affects many sectors, but services more acutely (due to the imbalances in market power and information asymmetries that are prevalent on many services markets). Many developing countries have resisted multilateral trade rules on competition policy, but have then agreed to them in PTAs with developed country partners. In fact, many developing countries entered into PTA commitments to enforce competition rules before they had even set up commensurate legal frameworks (i.e., adopted a competition law) or established proper and effective institutional structures (i.e., a competition regulator). An excerpt from the competition provisions of the 2005 Closer Economic Partnership Agreement between New Zealand and Thailand is given in box IV.3.

Even a casual reading of the above provisions leads to the conclusion that the Parties to this PTA have entered into relatively broad commitments on competition policy – although Article 11.10 carves these provisions out from the agreement’s dispute settlement chapter.

²⁹ To name just one example of this, under the 2011 Trade Promotion Agreement between Panama and the United States (which has been signed but not yet implemented), Panama has agreed “to a pro-competitive regulatory framework that builds upon the WTO Basic Telecommunications Reference Paper. This is a significant achievement given that Panama took no specific telecommunications commitments at the WTO and therefore never adopted the Reference Paper”. See www.ustr.gov/about-us/press-office/fact-sheets/2011/may/telecommunications-us-%E2%80%93-panama-trade-promotion-agreement (accessed 13 July 2012).

Box IV.3. Competition provisions of the 2005 New Zealand-Thailand CEPA

Chapter 11: Competition Policy

Article 11.1 Objectives and Definitions

1. The aim of this Chapter is to contribute to the fulfilment of the objectives of this Agreement through the promotion of:
 - (a) Fair competition;
 - (b) The APEC principles of non-discrimination, comprehensiveness, transparency and accountability as contained in the 1999 APEC Economic Leaders Declaration (the APEC Principles); and
 - (c) The curtailment of anti-competitive practices.
2. For the purposes of this Chapter, "anti-competitive practices" means conducting of business or transactions that adversely affect competition, such as:
 - (a) Anti-competitive horizontal arrangements between competitors;
 - (b) Misuse of market power, including predatory pricing;
 - (c) Anti-competitive vertical arrangements; and
 - (d) Anti-competitive mergers and acquisitions.

[...]

Article 11.3 Promotion of Competition

Each Party shall promote competition by:

- (a) Addressing anti-competitive practices in its territory and by adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices;
- (b) Using its best efforts to reduce transaction costs and compliance costs for business;
- (c) Applying the APEC Principles to all forms of commercial activity in a manner that does not discriminate between or among economic entities in like circumstances; and
- (d) Promoting effective coordination on competition policy and law between the Parties.

Source: www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/0-cepa-chapter11.php (accessed 13 July 2013).

B. Monitoring and enforcing implementation of preferential trade agreements

Most PTAs establish some form of institutional mechanism, the job of which is to meet regularly and discuss implementation issues. In addition to such official channels, private sector interests will normally alert policymakers relatively quickly if they think their interests are being prejudiced in a manner that does not conform to the PTA partner's treaty commitments. The task of any negotiator is to ensure that these consultative mechanisms meet often enough and/or are easy enough to convene that any

implementation issue may be brought to the PTA partner's attention with sufficient timelines, and can be discussed and dealt with by counterparts who have both sufficient technical knowledge as well as the requisite authority to be able to instigate change where it is required. Subsection 1 below examines how some of these mechanisms relate to trade in services. Subsection 2 examines dispute settlement provisions in PTAs and how they relate to trade in services

Whether or not a PTA has genuinely effective provisions allowing for the resolution of trade disputes tends to be a variable of the operability of these provisions, which is itself more a question of political will and legal drafting than any other factor. In general, US PTAs tend to feature more detailed rules on enforcement than those with other developed country partners (Horn, Mavroidis and Sapir, 2009). In terms of their procedural specifics and the language in which such provisions are couched, many PTAs rely heavily on the *acquis* that has evolved over the course of more than 60 years of multilateral dispute settlement in the GATT and the WTO, and thus follow the latter's Dispute Settlement Understanding to various degrees (Porges, 2011).

1. Monitoring mechanism for preferential trade agreements

Some PTAs set out institutional provisions in a dedicated chapter, section or even a single article.³⁰ Others establish different monitoring mechanisms on a chapter-by-chapter basis or in the context of the relevant substantive provisions such mechanisms are designed to oversee. The Japanese PTA template is one example of a set of agreements containing relatively detailed institutional provisions, with articles governing their establishment and operation in both the main agreement text and the implementation agreements that typically accompany Japanese PTAs.

Box IV.4 contains two general institutional provisions establishing bodies to monitor implementation of various substantive aspects of the 2007 Economic Partnership Agreement between Japan and Indonesia. Box IV.5 contains the specific institutional provisions of the same EPA as set out in the services chapter.

Comparing the texts from the two articles on the establishment of a sub-committee (the general institutional provision and that from the services chapter), the latter seems to be, by and large, a restatement of the former. It is worth noting that although the provisions in the Japanese FTA/EPA template seem to set out what appear to be quite detailed institutional and monitoring provisions (as cited here), it is not immediately clear from the text of the agreement how easy it is to convene a meeting of the various bodies. As noted above in chapter III, the Japan-Philippines EPA had quite detailed provisions setting out consultation mechanisms for the implementation and exchange of information between various sectors singled out for heightened cooperation between the two partners. These arrangements will certainly double as a form of implementation mechanism, but their utility is limited to the substantive sectors that form their focus.

In practice, any perceived lack of implementation that harms the export interests of one Party will be brought to the attention of the other Party by the usual diplomatic channels. The chances of obtaining the desired outcome when exchanges are being handled by the Ministry of Foreign Affairs is usually limited, since that Ministry has little or no authority to coerce other regulatory agencies to comply with international treaty obligations. More often than not, the only effective way to get the other Party to respond with the desired vigour and urgency to any perceived failure to implement its obligations under a PTA is to initiate formal dispute settlement proceedings, a topic dealt with in the next subsection.

³⁰ See, for example, the 2002 FTA between Singapore and the European Free Trade Association, where the majority of the institutional provisions are contained in Part VIII, in a single article (Article 55).

Box IV.4. General institutional provisions of the 2007 Japan-Indonesia EPA

Article 14: Joint Committee

1. A joint committee (hereinafter referred to as “the Joint Committee”) shall be hereby established.
2. The functions of the Joint Committee shall be:
 - (a) Reviewing and monitoring the implementation and operation of this Agreement;
 - (b) Considering and recommending to the Parties any amendments to this Agreement;
 - (c) Supervising and coordinating the work of all sub-committees established under this Agreement;
 - (d) Adopting:
 - (i) The Operational Procedures for Trade in Goods and the Operational Procedures for Rules of Origin, referred to in Article 27 and Article 50, respectively; and
 - (ii) Any necessary decisions;
 - (e) Carrying out other functions as the Parties may agree.
3. The Joint Committee:
 - (a) Shall be composed of representatives of the Governments of the Parties; and
 - (b) May establish and delegate its responsibilities to sub-committees.
4. The Joint Committee shall establish its rules and procedures.
5. The Joint Committee shall meet as such times as may be agreed by the Parties. The venue of the meeting shall be alternately in Japan and Indonesia, unless the Parties agree otherwise.

Article 15: Sub-Committees

1. The following sub-committees shall be hereby established:
 - (a) Sub-Committee on Trade in Goods;
 - (b) Sub-Committee on Rules of Origin;
 - (c) Sub-Committee on Customs Procedures;
 - (d) Sub-Committee on Investment;
 - (e) Sub-Committee on Trade in Services;
 - (f) Sub-Committee on Movement of Natural Persons;
 - (g) Sub-Committee on Energy and Mineral Resources;
 - (h) Sub-Committee on Intellectual Property;

Box IV.4. General institutional provisions of the 2007 Japan-Indonesia EPA *(continued)*

- (i) Sub-Committee on Government Procurement;
 - (j) Sub-Committee on Improvement of Business Environment and Promotion of Business Confidence;
 - (k) Sub-Committee on Cooperation.
2. A sub-committee shall:
- (a) Be composed of representatives of the Governments of the Parties and may, by mutual consent of the Parties, invite representatives of relevant entities other than the Governments of the Parties with the necessary expertise relevant to the issues to be discussed;
 - (b) Be co-chaired by officials of the Governments of the Parties.
3. A sub-committee shall meet at such times and venues as may be agreed upon by the Parties.
4. A sub-committee may, as necessary, establish its rules and procedures.
5. A sub-committee may establish and delegate its responsibilities to working groups.

Source: www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf (accessed 13 July 2012).

Box IV.5. Specific institutional provisions of the 2007 Japan-Indonesia EPA

Economic Partnership Agreement

Chapter 6: Trade in Services

Article 91: Sub-Committee on Trade in Services

For the purposes of effective implementation and operation of this Chapter, the functions of the Sub-Committee on Trade in Services (hereinafter referred to in this Article as “the Sub-Committee”) established in accordance with Article 15 shall be:

- (a) Reviewing and monitoring the implementation and operation of this Chapter;
- (b) Discussing any issues related to this Chapter;
- (c) Reporting the findings of the Sub-Committee to the Joint Committee; and;
- (d) Carrying out other functions as may be delegated by the Joint Committee in accordance with Article 14.

Source: www.mofa.go.jp/region/asia-paci/indonesia/epa0708/agreement.pdf (accessed 13 July 2012).

2. *Dispute settlement and preferential trade agreements*

Dispute settlement provisions in PTAs generally tend to fall into one of three broad categories, i.e., “diplomatic dispute settlement; systems based on a standing tribunal; and referral to an ad hoc arbitral panel, as in the WTO” (Porges, 2011). Although there is still some preference for purely diplomatic resolution procedures (since these give the greatest degree of policy space and flexibility to policymakers), most North-South PTAs will ideally seek to incorporate rules that allow for referral to an ad hoc arbitral panel. This is due mainly to the naturally inherent economic power asymmetries and the fact that the use of this form of dispute settlement is perceived to have overwhelmingly proven its effectiveness in the WTO context. In addition, most negotiators will have at least passing familiarity with the WTO dispute settlement procedures, and will thus feel a certain degree of ease in adopting rules in the context of a PTA that are based on those procedures. Some regional economic integration initiatives, including the European Union, have opted for the establishment of permanent dispute resolution institutions; however, the cost of doing so can be significant and – aside from the European Union experience – has not always proven to be a sound and economically efficient use of scarce financial and other resources.

Negotiators must also be conscious of the fact that – regardless of the system that is chosen for resolving disputes (political/diplomatic versus adjudication) – because trade disputes concern the actions of sovereign States (or at least separate customs territories possessing full autonomy in conducting their external commercial relations), forcing the “losing” Party (or the Party deemed to have committed a breach of its treaty obligations) to comply with a ruling is more often than not a negotiated outcome rather than an act of explicit coercion.³¹ For this reason, there are other factors that are likely to affect just how binding and rigorous a given PTA’s dispute settlement provisions are, and how effective a remedy they represent in any grievances that may arise. These factors include how much control each Party to a PTA exercises over the different stages of an eventual dispute, and the possibilities afforded either Party for blocking progress of the dispute resolution procedures.

Another important factor is the mechanism by which any findings of compliance or non-compliance are to be adopted, and whether the adoption of such findings can effectively be vetoed by the losing Party. Finally, and perhaps most importantly, negotiators much consider the possible remedies that dispute settlement rules under a PTA may afford an aggrieved Party who has effectively “won” its case (i.e., obtained a ruling in its favour). A suspension of concessions or even payments of monetary awards are two of several options to be considered.

Negotiators also need to be aware of the possibility of carving out certain PTA provisions from the scope of dispute settlement rules as well of the costs and benefits of doing so. Some PTAs carve out contingency protection measures from the applicability of dispute settlement rules – a questionable practice because it effectively denies exporters any remedy if they feel their goods are being unfairly targeted by such measures. In other PTAs, Aid for Trade, competition policy and selected aspects of investment disciplines may be expressly excluded from the chapter on dispute settlement. This may yet again have unfortunate consequence of denying the developing country partner any remedy if it feels the developed country partner is not living up to its commitments.

Another issue that negotiators must consciously take a position on when developing dispute settlement rules is the scope of possible complaints, i.e., the grounds for invoking these procedures. Will they also be applicable to disagreements on interpretations of certain provisions? Will they be limited to allegations of a specific violation, or will dispute settlement also be

³¹ Whereas it may be true that overwhelming economic power asymmetries may make coercion a possibility for the more powerful PTA party, exercising such power is likely to undermine the cooperative spirit that the PTA is intended to embody.

available for so-called non-violation or even situational complaints? Most PTAs opt for some variation on the terms “nullification or impairment of concessions” or “denial of benefits”. Another issue that negotiators must take into account in this context is that of delimiting the application of dispute settlement procedures under a PTA and those of WTO. This involves the question of when must Parties seek recourse under a PTA and when are they allowed to bring a dispute before WTO. This may be especially relevant in the case of overlapping commitments, i.e., commitments made by a Party in a PTA that mirror or are identical to those it has made under WTO. Such occurrences are far from uncommon in services trade. Therefore, negotiators need to be wary of any commitment that would close off the option of initiating dispute settlement in one forum or another.

Box IV.6 contains text from the dispute settlement provisions of PACER. The attentive reader will notice that, in reality, these provisions constitute little more than a consultative mechanism. This is strongly in keeping with the political/diplomatic route for resolving disputes. In the PACER context, such a choice is probably more than adequate, given the very limited ambitions this agreement represents. PACER is, in effect, little more than an agreement to conduct future negotiations towards closer economic integration, and it merely aims to set some ground rules for such future negotiations.

Other agreements contain much more detailed rules and procedures, modelled on those developed for WTO during the Uruguay Round. Box IV.7 summarizes the relevant institutional and dispute settlement provisions of the 2000 PTA between Mexico and Israel.

Box IV.6. Dispute settlement in the Pacific Agreement on Closer Economic Relations

Article 15 consultations

If a Party considers that:

- (a) An obligation under this Agreement has not been, or is not being, fulfilled;
- (b) Any benefit conferred upon it by this Agreement is being, or may be, denied;
- (c) The achievement of any objective of this Agreement is being, or may be, frustrated;
- (d) A change in circumstance necessitates, or might necessitate, an amendment to this Agreement;

it may notify any other Party, through the Forum Secretariat, of its wish to enter into consultations. The Party so requested shall enter into consultations in good faith and as soon as possible, with a view to seeking a mutually satisfactory solution.

Source: www.forumsec.org.fj/resources/uploads/attachments/documents/PACER.pdf (accessed 17 July 2012).

In summary, there are many questions that negotiators need to consider when drafting dispute settlement rules, and these will ultimately be influenced by the Parties' ambitions, the intensity and nature of economic integration that the PTA aims to achieve as well as the prevailing economic power asymmetries between PTA partners. There are no strictly right or wrong choices here per se, merely those that best meet the mutual objectives of the Parties concerned.

Box IV.7. Institutional and dispute settlement provisions in the 2000 Mexico-Israel FTA

Chapter 10 of the FTA contains the relevant institutional and dispute settlement provisions. A Free Trade Commission is established to administer implementation of the agreement, and assumes the roles played by the WTO's Ministerial Conference, General Council and Dispute Settlement Body (Article 10-01).

Recourse to the agreement's dispute settlement mechanisms is provided on several grounds, including with regard to the interpretation and application of the agreement in addition to violations of the agreement and nullification and impairment (Article 10-03).

The FTA contains some guiding principles for a situation in which a Party has the option of initiating a dispute settlement procedure under both the WTO and the FTA. Although the agreement seems to have a bias towards settling disputes under its own rules, it does not preclude doing so under the WTO where this option is available, and merely requires the Parties to notify and consult with each other before resorting requesting the establishment of a panel under Article 6 of the WTO Dispute Settlement Understanding (Article 10-04).

Consultations and the initiation of procedures are set up largely in accordance with existing practice at the WTO, with the above mentioned Free Trade Commission playing the role of the WTO's Dispute Settlement Body. But if the aggrieved Party is not satisfied, it may escalate the matter and request the establishment of an arbitral panel (Articles 10-05, 10-07, 10-08).

The panel works under similar time limits as WTO panels, and has up to 90 days to issue an initial report (similar to the WTO's interim report), after which it has a further 60 days to issue a final report (Articles 10-12 and 10-13). After the final report has been issued, the onus is on the Parties to agree on how to implement its findings (Article 10-14). If this is not achieved, the agreement provides that the aggrieved Party may suspend benefits under the FTA in much the same way as this is foreseen under the DSU Article 10-15).

Source: Notes by the authors based on www.worldtradelaw.net/fta/agreements/isrmexfta.pdf (accessed 17 July 2012).

SUMMARY AND CONCLUSION

The range of issues that policymakers and negotiators must deal with in the run-up to, and during, services negotiations can be overwhelming. As in all matters of such complexity, the onus should be on the proper delegation of responsibilities, equally proper inter-agency coordination in order to create whole-of-government positions, wide-spread consultation of all pertinent stakeholders and adequate preparation through studying the export and defensive interests of the PTA partner. Developing countries and transition economies must have a clearly formulated vision of where they want to go in the future and how the contemplated PTA negotiations may help to get them there. Equally important is the need to have a clearly formulated set of objectives, both offensive and defensive, with regard to one's own services markets as well as a strategic game plan for achieving them, a sense of what should be assigned to the trade negotiating process and what is more properly in the domain of (unilateral) domestic reform efforts. Negotiators must understand the uses and limits of Aid for Trade commitments, and approach negotiations with a set of clearly formulated demands with well-developed arguments on why the demanded commitments are necessary to achieving the country's economic development or other goals.

Conducting thorough research on previous PTAs entered into with other Parties by a future PTA partner will give policymakers valuable insights into what they can expect in terms of the scope and depth of market opening and rule-making demands. Study of other PTAs entered into by third parties will give policymakers and negotiators an understanding of all the possibilities available to them in negotiating and configuring rules under such treaty frameworks, both under North-South and South-South agreements. Conducting a thorough cost-benefit analysis of the likely implications of the planned PTA, and sharing these results as widely as possible with stakeholders, will also assist negotiators to better articulate offensive and defensive interests as well as informing those interest groups most likely to be affected, thereby raising the legitimacy of the eventually negotiated outcome.

Finally, any agreement is only as good as the degree to which it is adhered to and implemented by the contracting Parties. Preferential trade agreements must therefore be backed up with appropriate institutional structures for monitoring implementation as well as operationally effective rules on enforcing compliance in the event of a perceived breach by one or both Parties. Policymakers and negotiators must therefore familiarize themselves with the various options available to them for drafting such institutional and dispute settlement provisions, and be wary of any attempts by their PTA partner to remove certain clauses from their application.

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ANNEX

Websites relevant to research on trade in services

International organizations

- OECD – www.oecd.org/trade/
- OAS – www.oas.org; www.sice.oas.org/
- INTAL – www.iadb.org/intal/
- IADB – www.iadb.org/ and www.iadb.org/en/topics/trade/trade,1264.html
- ADBI – www.adbi.org/
- World Bank – econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTPROGRAMS/EXTTRADERESEARCH/
- ITC – www.intracen.org
- UNCTAD – www.unctad.org

Think tanks

- Peterson Institute for International Economics – www.iie.com/
- Centre for Global Development – www.cgdev.org/
- Brookings Institution – www.brookings.edu/economics.aspx
- AEI Trade Programme – www.aei.org/ra/8
- Trade Law Centre for Southern Africa (TRALAC) – www.tralac.org/cgi-bin/giga.cgi?c=1694
- Centre for Trade Policy and Law at Ottawa/Carleton University (CTPL) – www.ctpl.ca
- Overseas Development Institute (ODI) – www.odi.org.uk/
- European Centre for International Political Economy (ECIPE) – www.ecipe.org/
- Sussex CARIS – www.sussex.ac.uk/Units/caris/

- WTI-NCCR-Trade – www.nccr-trade.org; www.wti.org
- International Centre for Trade and Sustainable Development (ICTSD) – www.ictsd.org
- Institute for Agricultural Trade and Policy – www.iatp.org
- ECDPM – www.ecdpm.org (Weekly Compass) and acp-eu-trade.org newsletter

Trading partners

- Australia – www.dfat.gov.au/trade/index.html
- Canada (DFAIT) – www.international.gc.ca/commerce/index.aspx
- European Union – www.trade.ec.europa.eu/ ; ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific/index_en.htm
- Japan - www.mofa.go.jp/policy/economy/fta/index.html; www.meti.go.jp/english/index.html
- New Zealand – www.mfat.govt.nz/Trade-and-Economic-Relations/index.php
- United States Trade Representative (USTR) – www.ustr.gov/
- United States National Trade Estimate – www.ustr.gov/about-us/press-office/reports-and-publications/2012-1

Other sources

- Services coalitions – www.esf.org; www.uscsi.org
- DFID – www.dfid.gov.uk/Global-Issues/
- Inside US Trade – insidetrade.com/
- Bilaterals.org – www.bilaterals.org
- Global Trade Alert – www.Globaltradealert.org
- Office of Trade Negotiations (OTN) of Caricom (formerly Caribbean Regional Negotiating Machinery) – www.crnw.org

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