

EUROPEAN PARLIAMENT



**COMMITTEE ON INDUSTRY, EXTERNAL TRADE,
RESEARCH AND ENERGY**

PUBLIC HEARING

ON

"GATS : THE FUTURE OF SERVICES"

Tuesday 26 November 2002
from 3 p.m. to 6.30 p.m.

Chaired by : Mr Carlos Westendorp y Cabeza
Chairman of the Committee on Industry,
External Trade, Research and Energy

Altiero Spinelli Building
Room ASP 1 G 3

BRUSSELS

OPENING OF THE PUBLIC HEARING

**MR. CARLOS WESTENDORP Y CABEZA,
COMMITTEE CHAIRMAN**

INTRODUCTION : EU OBJECTIVES

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**CONTRIBUTION BY MOGENS PETER CARL, EUROPEAN COMMISSION - TRADE
TO THE HEARINGS OF THE ITRE COMMITTEE, EUROPEAN PARLIAMENT,**

26 NOVEMBER 2002

The EU and Services negotiations in the WTO

1. WHAT IS THE EU AGENDA FOR SERVICES ?

The EU agenda is to seek better access for European services exporters in foreign markets and to secure a more transparent and predictable regulatory environment for services.

In July 2002, the EU presented its requests for improved market access to WTO members. These requests seek a reduction in restrictions and expansion of market access opportunities for the European services industry. The services sector is the single most important economic activity in the EU accounting for over two thirds of GDP and employment. The EU is home to some of the world's leading companies in many service sectors, such as the telecom, financial, business, and environmental services sectors.

The requests cover professional services, other business services, telecom, postal services, distribution, construction & related engineering services, financial services, environmental services, tourism, news agency services and energy services.

The requests do not seek to dismantle public services, nor to privatise state-owned companies. No requests are being made on health services or audiovisual services to any country, and only the US has received a request limited to privately funded higher education. If requests are being made on environmental services, they seek to capitalise on the experience and skills European environmental services in tackling environmental problems. EU requests do not touch on the issue of access to (water) resources and in no way undermine or reduce governments' ability to regulate pricing, availability and affordability of water supplies as they choose.

Services are important for the economy. The rapidly expanding services sector is contributing more to economic growth and job creation worldwide than any other sector. No country can prosper today without an efficient service infrastructure.

- It is the prerequisite for economic performance. Producers and exporters of textiles, cars or computers will not be competitive without access to efficient banking, insurance, accountancy, telecom or transport system.
- It is a prerequisite for development : access to world class services helps exporters and producers in developing countries to capitalise on their economic strength.
- It leads to consumer savings, faster innovation and technology transfer.
- It contributes to long term investment.

2. IS THERE A “ONE SIZE FITS ALL” APPROACH?

No, the GATS² is the most flexible agreement in the WTO system.

- First, **many public services are not subject to the GATS**: the services that are neither provided on a commercial basis nor in competition with one or more service suppliers.
- Second, **members retain under the Agreement the right to determine the list of activities for which they are prepared to open to competition** to foreign service providers.
- Monopoly suppliers, whether public or private, can for example be maintained and limitations of any other kind can be imposed on foreign suppliers if that is deemed necessary to safeguard a public service.
- Third, even **where members decide to make commitments, they are free to tailor the sector coverage and content** of such proposals in a way that is consistent with other legitimate policy objectives.
- Fourth, **GATS fully safeguards the ability of governments to enact domestic regulations, legislation and other measures to protect public interest**. For example, designing and implementing policies aimed at ensuring the availability, quality and affordability of essential public services, such as universal service obligations, is not restrained by the GATS.

The GATS leaves it entirely to its Members to decide whether they provide public services themselves, directly or indirectly (through public undertakings), whether they entrust their provision to a third party, or finally whether they rely entirely on private markets. Today there are a variety of ways in which the public and the private sectors interact to provide such services and experience has shown that there are ways to open sectors involved with the provision of a public service to competition while safeguarding and in many cases improving the availability, quality and affordability of such services. The typical example of this is the telecommunications sector in the EU where following liberalisation long-distance prices have fallen by 45%, availability of mobile phones have increased from 22% to 73% and internet penetration has increased from 8% to 36%.

GATS flexibility exists not only on paper but WTO members have made good use of it in practice. Look at the large variations between WTO members regarding sectors committed: one third of members have made commitments on less than 20 sectors (mainly very poor countries), one third between 20 and 80, and the rest between 80 and 145 (out of about 160 existing sectors). Unsurprisingly, tourism is the sector with the highest number of bindings; health and education have the lowest number of commitments. Of course there are also variations about the type of commitments, as commitments can be accompanied by a large number of limitations/qualifications. *In such a way, the GATS is respectful of the diversity of economic and social situations among its member countries.*

3. ARE ESSENTIAL PUBLIC SERVICES THREATENED BY THESE NEGOTIATIONS ?

No. Public services are an essential feature of the social model and of each country's cohesion. The EC fully shares the importance that citizens in Europe and elsewhere attach to maintaining and developing public services. Public services are at the heart of the European social model, and the European Commission is committed to ensuring that this remains so.

GATS negotiations are about opening up service trade, not about deregulating services many of which are closely regulated for very good reasons. In respect of public services, all WTO members remain free either:

- To maintain the service as a monopoly, public or private.
- To open the service to competing suppliers, but to restrict access to national companies.
- To open the service to national and foreign suppliers, but to make no GATS commitment on it.
- To make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers.
- In all these cases, governments remain free to set levels of quality, safety, price or any other policy objective they see fit. It is inconceivable that any WTO member would agree to surrender such a fundamental right.

4. DOES THE GATS NATIONAL TREATMENT RULE REQUIRE EUROPEAN COUNTRIES TO TREAT EVERY THIRD COUNTRY COMPANY WANTING TO OPERATE IN A GIVEN SECTOR EXACTLY AS IT TREATS EXISTING NATIONAL PROVIDERS OF PUBLIC SERVICES, INCLUDING ON SUBSIDIES?

No. Under the GATS, governments have the choice to grant full national treatment (NT)²(which applies only in sectors in which a WTO member chooses to open to foreign competition) if they so wish or to impose limitations and qualifications on national treatment, allowing them to discriminate in favour of nationals or not to grant national treatment at all. Unlike trade in goods where the national treatment rule applies once a product crosses the border, national treatment in the GATS is negotiable thus allowing sufficient flexibility to Members to tailor their commitments. The EU, like other WTO members, has made use of this possibility to qualify the NT rule, and will continue to do so where this is deemed necessary.

5. ARE SERVICES NEGOTIATIONS RELEVANT TO DEVELOPING COUNTRIES ?

Yes. Developing countries also have an important stake in the negotiations. Access to high-quality services, in particular infrastructure-related services such as telecommunications, transport, and financial services, benefit the whole economy by increasing productivity in all sectors and are crucial for economic development. By removing pervasive entry restrictions for service suppliers and thereby creating greater international competition, the GATS can push companies to strive for competitiveness and economic efficiency and can help to ensure consumers better choices in terms of quality and price of services.

² **National treatment** : A country grants foreign companies the treatments it applies to its own companies.

According to the World Bank³, liberalisation of services in developing countries could provide as much as \$6 trillion in additional income in the developing world by 2015, four times the gains that would come from trade in goods liberalisation.

The EU therefore seeks to facilitate increased participation of developing countries in world trade in services while duly taking into account national policy objectives and levels of development, both overall and in individual sectors. **The EC have thus modulated its requests so as to take account of the level of development of individual countries.** Consequently, the EC is seeking commitments in a more limited number of sectors and for fewer modes of supply in the case of developing countries.

6. THE EU UNDERTAKES WTO NEGOTIATIONS ON SERVICES IN A TRANSPARENT WAY.

Aware of the interest of public citizens for a sector, which concerns in many ways their daily life, and of the sensitivity of issues like public services, the Commission leads the negotiations in a transparent manner.

- The EU's negotiating objectives are based on a mandate given to the Commission by the Council and the European Parliament in October/November 1999. They were spelt out in the sectoral proposals that the EU submitted to the WTO in December 2000, setting out the negotiating objectives in twelve services sectors covered by the GATS, and in a communication on the EU's general objectives for the negotiations submitted in March 2001.
- These texts as well as the summary of the EU's initial requests for improved market access to third countries are systematically made available on the website of the Commission's Trade Directorate.
- The Commission keeps the EU Parliament constantly informed of the development of the negotiations whether in plenary, in the relevant Committee of the Parliament or through discussions in informal groups. The relevant Committee of the Parliament receives the full texts of the Commission's submissions.
- The Commission has a regular dialogue on these issues with the civil society and industry.

NEGOTIATING PROGRESS :
TIMETABLE, PROGRESS SO FAR

MR ABEL-HAMID MAMDOUH,
TRADE IN SERVICES DIRECTOR
WTO

**"WHY EU BUSINESSES WANT
OPEN MARKETS FOR SERVICES"**

**MR A. BUXTON,
BARCLAYS**

CONTRIBUTION BY A. BUXTON

**EUROPEAN PARLIAMENT COMMITTEE ON EXTERNAL TRADE
26 NOVEMBER 2002**

**GATS BRINGS BENEFITS TO THE EUROPEAN UNION AND INVESTMENT TO THE
DEVELOPING WORLD**

Banking is one of the most international industries in the European Union. It is also a significant part of the European Union services Sector, which represents between 65% and 70% of GDP in most of the countries of the EU. The service sectors share of GDP is rising throughout the world and has risen significantly in low income countries and middle income countries over the last 10 years.

The European Banking Federation represents 3,000 banks with assets of Euros 10,000billion and employs hundreds of thousands of people. Of course, many of those banks are conducting purely domestic business, but Europe has many banks which are operating internationally and has 38 banks in the top hundred in the world, from Belgium, Denmark, France, Germany, Italy, The Netherlands, Spain and the United Kingdom. Not all banks want to invest internationally because the risks are greater than in their own home market which they know better and more capital is required. However, a successful international business brings better corporate services and there are obvious business benefits from diversification.

I have already mentioned the importance of services to the domestic economies of the European Union. Services are also important to external trade and that trade will not flourish without open markets. The European Union is the world's largest exporter of commercial services accounting for 26% of total global services transactions and for more than 40% in terms of balance of payments. The European Union is also the world's largest importer of commercial services. European Union countries therefore have a key interest in playing a major part in the new round of multi-lateral negotiations.

International banks bring considerable financial benefits to their home countries. In the United Kingdom the banking sector has been a huge contributor to the balance of payments for many years and accounted for 3.3% of GDP in the year 2000 with net exports reaching £3.2billion in 2001 - 75% up on the level in 1996. Although the surpluses in Germany and France are lower, both countries have a favourable trade balance from financial services.

What do we mean by "open markets"? Firstly, the ability to establish a presence in a country through a wholly owned presence or other form of business ownership and to operate competitively through established vehicles available to national businesses. Secondly, the ability to compete with the same access to domestic and international markets as domestic companies with a structure of domestic regulation that is transparent, fair, and encourages competition. Thirdly, the ability to bring skilled staff into the country without restriction on a temporary basis in order to be able to establish the business. All three of those needs, incidentally, are common to service industries generally where skilled people are more important than machines and a proper regulatory structure is more important than a tariff. There is a tendency to think that these barriers are more common in the developing world, however, they exist throughout the developed world and the developing world. Even the United States,

which looks upon itself as the most open market in the world, has barriers to services trade throughout its economy.

The liberalisation of financial services has considerable potential to generate growth and improve services to business and the consumer. It is important, however, that liberalisation is undertaken as part of a broad policy that is carefully managed and sequenced. The European Union has a role to play in assisting developing countries to manage the process of liberalisation, which can bring them great benefits.

There is considerable evidence by academics that shows that investment by financial institutions brings benefits. A study by Mattoo Rathindran and Subramanian in 2001 showed that liberalisation of financial services has generated stronger economic growth, particularly in developing countries based on a measure of openness for financial services and telecommunications in 60 countries. Those countries that fully liberalised their financial and telecom sectors tended to have GNP growth up to 1.5% a year faster in the 1990s. The impact of liberalisation was strongest for the 37 developing countries in the sample. A study by McGuire and Schuele in 2000 associated less restricted banking sectors in countries with higher GNP per capita. They constructed an index of foreign restrictiveness of 23 middle and high income economies and the EU as a whole. The model showed that countries with a less restricted banking service sector tended to have higher GNP per capita than those countries where banking was more restricted.

My personal experience in banking in the developing world over the past 20 years covers the Middle East and Africa where Barclays has had a presence for over 75 years. Barclays has 236 branches in Africa in 11 countries, employing 7,500 staff, and is a leading bank in several of those countries. In the Middle East the main barriers to investment by European Union banks are a prohibition on establishing a banking presence and domestic regulation, which forbids foreign banks from undertaking certain transactions and effectively excludes them from certain markets. In Africa the problems are much more associated with weak regulation and weak infrastructure in the country. It is very noticeable that countries like Mauritius and Tanzania which have adopted policies promoting investment and countries like Ghana and Botswana which have had successful reform programmes and a stable economic climate attract more investment and are more successful than countries like Kenya and Zimbabwe where corruption, political instability and weak regulation are deterrents. The foreign banks in those countries bring high standards of regulation, as well as better products, and whenever there is a domestic financial crisis the flight of money to the quality of the foreign banks is very noticeable.

At the Doha Ministerial Conference earlier this year the services negotiations proved the least controversial of any negotiations because it is so obvious that progress in the liberalisation of services encourages investment, which is needed throughout the world. Services only account for around 25% of world trade, but they dominate the domestic economies of most countries of the world. Investment in financial services telecommunications and power distribution are essential for the developing world. The difference between the developed countries and the developing countries is usually in the agricultural sector because agriculture, which accounts for less than 5% of GDP in most countries of the developed world, is much more important in terms of GDP and employment in the developing world. It is interesting, however, that even Australia and Argentina, leading members of Cairns Group appreciate that services are very important to their domestic economies and realise that a hardline on agriculture should not hold back the services negotiations.

**"WHY EU BUSINESSES WANT
OPEN MARKETS FOR SERVICES"**

**MR PASCAL KERNEIS,
EUROPEAN SERVICES FORUM**



EUROPEAN PARLIAMENT
Committee on Industry, External Trade, Research and Energy
Public Hearing on “GATS: the Future of Services”
Brussels, Tuesday, 26 November 2002
15.00 – 18.30 – Room ASP 1G-3

1. Why EU Businesses want open markets for services

“THE GATS PRIORITIES FOR THE EUROPEAN SERVICES INDUSTRY”

PASCAL KERNEIS, ESF (EUROPEAN SERVICES FORUM)

- A. A Brief Introduction of ESF**
- B. The Importance of the Services Economy and of the Services Liberalisation**
- C. The Priorities of the European services business in the GATS negotiations**
 - 1. The Sector Specific Issues**
 - 2. The Cross-sectoral Issues**
 - 3. The Horizontal Issues**
- D. Services liberalisation and “Sustainable” Development**

EUROPEAN PARLIAMENT

Committee on Industry, External Trade, Research and Energy

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2. Why EU Businesses want open markets for services

“THE GATS PRIORITIES FOR THE EUROPEAN SERVICES INDUSTRY”

PASCAL KERNEIS, ESF (EUROPEAN SERVICES FORUM)

A Brief Introduction to ESF

The European Services Forum is an organisation representing service industries across the European Union. Its membership is comprised of forty European trade federations and over forty international services companies, all of which are based in countries that are members of the European Union. The trade sector-specific associations ensure a global representation of the sectors, the companies, represented at the CEO level, ensure political commitment at the highest level of the service industries.

ESF company members, employ more than 3.5 million workers, in more than 200 countries, generating consolidated revenues of more than € 500 Billion in the year 2000. The service sector specific European Trade Federations, members of ESF, represent the interests of more than 600 National Trade Associations, the company members of which employ more than 30 million workers. They provide services to hundreds of millions of consumers in Europe and worldwide.

Membership covers all member countries of the European Union and a wide range of service industries including banking, insurance, telecommunications, postal and delivery services, aviation, shipping, tourism and hotels, retail distribution, legal services, accountancy, management consultancy, architects, engineers, IT and computer related services, publishing, audio-visual, energy services and environmental services. You will note that there are no members in healthcare services, or in education services. ESF represents more than 80% of the European exporters of services in more than twenty services sectors. The European Services Forum was a registered NGO at the Ministerial Conference in Seattle in December 1999 and in Doha in 2001, and was also an official member of the European Union delegation at these two conferences.

B. The Importance of the Services Economy and of the Services Liberalisation

World trade in commercial services accounts for about 25% of world exports, but services account for 60% of annual flows of foreign direct investment (FDI). Domestically, the service

sector dominates most developed economies in the world (from 60 up to 70% GDP) and is the largest sector in the economies of the developing world (more than 50% GDP in most countries). The lack of reliable statistics and the fact that the activities of joint ventures and subsidiaries of foreign services suppliers are part of the domestic economy has to be taken into consideration when we want to assess services liberalisation. The UN is now working on a possible new statistical standard that would be a great deal of help in that exercise: the so-called FATS (Foreign Affiliates Trade in Services), i.e. the importance of the presence of foreign services suppliers in the domestic economies. Indeed, so far, only the benefits effectively repatriated to the headquarters enter in the balance of payment's statistics. This means that only a large part of the investments of foreign companies in the other markets are not included in the "world trade" and that their important role in the world development is not reflected in the figures.

The European Union is the world's largest exporter of commercial services accounting for 26% of total global services transactions and for more than 40% in terms of balance of payments. The European Union is also the world's largest importer of commercial services, to the benefit of the whole of European industry and consumers at large.

More importantly, services account for over 60% of employment in the EU, and up to 75% in some EU countries, taking into consideration here only the private sector.

European service industries therefore have a key interest in seeing GATS negotiations playing a major part in the new round of multilateral negotiations and to have success in these negotiations. Services are characterised by high productivity growth. Our companies need further trade liberalisation across a wide range of services in order to continue to expand their overseas markets and create new European jobs.

The importance of services in the world economy as described above should be kept in mind by the trade negotiators up to the end of the Doha Development Agenda. In particular, two-thirds of the world economy should not be taken hostage by the negotiations on agriculture.

C. The Priorities of the European services business in the GATS negotiations

ESF would like to be reflected in the commitments to be made in national schedules of the WTO countries at the end of the GATS negotiations, the following important principles:

- a) The right to establish and operate competitively;
- b) Foreign investors should have the same access to domestic markets as local companies;
- c) Promotion of an appropriate framework for an open-trade regime for electronic commerce and concrete commitments to provide cross-border services (i.e. Mode 1 of the GATS) in highly international-oriented sectors;
- d) Removal of barriers to the posting of key business personnel (Mode 4 of the GATS – ex: nationality, residence requirements, etc. and long visa procedures);
- e) Existing investments should be guaranteed (or "grand-fathered");
- f) Adoption of appropriate disciplines to ensure fair and transparent domestic regulations and right conditions to transparent market access to public procurement in services;
- g) Exceptions to commitments should be precise, transparent, temporary and limited to the minimum required for their purpose. ESF agrees that a transitional period might be

necessary. Liberalisation should be a managed process, which takes into account the social and cultural background of the liberalising country.

1. The Sector Specific Issues

I have no time to go into details of the sector specific issues, and I should also say that it is not my real area of expertise. The ESF member companies and sector-specific trade associations would be happy to provide you with specific information. However, it is clearly one of the main aspects of the GATS negotiations, i.e. to obtain further possibilities to market access for all internationally tradable services in the largest number of countries in transparent and non-discriminatory conditions.

2. The Cross-sectoral Issues

By gathering within the ESF forum and sharing views on sector specific subjects, ESF members have identified some cross-sectoral issues, i.e. that are common to many sectors but that so far are dealt with at sectoral level, when some possible joint action might be more efficient. The main cross-sectoral subjects are: a willingness to look at the possibility of achieving majority ownership of capital, the relationship with a local partner (joint ventures), and the restrictions to real estate access, etc.

3. The Horizontal Issues

ESF has produced a series of papers covering important horizontal issues for service industries. Subjects covered include:

- a) **Emergency Safeguards Measures in services:** we believe that such measures are not a desirable tool in the services area because they would be against the GATS principles, they would be counter-productive in the countries that would call for them and they would in any case be impossible to implement properly. Contrary to safeguards in the goods sectors, implementing safeguards in the services sectors means kicking out the investment out of the market, which will have a dramatic impact on the investors' attraction to that country for a long period of time.
- b) **Public procurement in Services:** We favour not only more transparency rules as a first step, but also market access to Public Procurement in services like construction and related services, which represent 60% of the construction market. This will bring to our companies the possibility to offer quality services, for the better use of public money in the interest of all citizens, as taxpayers and consumers of public services.
- c) Although some of our companies suffer from subsidies to domestic services suppliers, our stakeholders do not consider this as a major trade barrier.
- d) **Temporary movement of key business personnel:** This is the famous Mode 4 issue, where all European service companies would like to see real progress in the current negotiations, so that they can move their staff quickly to their branches or clients. This is not related to illegal immigration. ESF suggested a "GATS permit" to allow a safe and speedy visa procedure. Developing countries are also looking for commitments from the EU and other developed countries on this issue.

- e) **Domestic regulation:** Liberalisation of internationally traded services entails regulatory adaptation reaching deep into the internal legal systems of all Members of the WTO. Key issues concern how to guarantee that services markets are effectively liberalised, by ensuring that regulation is necessary, reasonable, proportionate, transparent, and neutral. Contrary to many critics, service companies are not in favour of blind deregulation but in favour of good and fair regulation, which is often the key to proper liberalisation.
- f) **Electronic Commerce:** The cross-border delivery of services in electronic form is of growing importance for many services sectors. Therefore, specific attention needs to be paid in the GATS negotiations to improving commitments that facilitate the use of electronic commerce for all services sectors.
- g) **“Singapore Issues”:** ESF is in favour of effective negotiations to be launched in Cancun in the four Singapore Issues, namely trade & investment, trade & competition, transparency in public procurement (as a first step) and trade facilitation, given that it is services companies which mostly eventually deal with custom procedures (airlines, shipping, road transport, express delivery, distribution, etc.).

D. Services liberalisation and “Sustainable” Development

DDA stands for Doha Development Agenda. This WTO round is bound to bring concrete results for developing countries. It should be repeated here that improvement of trade and flow of private foreign direct investment is the main key to development. Overseas Development Assistance (ODA), although important, is having an ever-smaller impact on sustainable development. James Wolfenson, Chairman of the World Bank, said recently that in 1990, the amount of ODA was 60 Bio US \$/year, when the private FDI in developing countries was up to 150 Bio \$/year. In 2000, the ODA was down to 50 Bio \$/year when private FDI was up to 300 Bio \$/year.

We believe the many studies ascertaining that sound and fair liberalisation in the services will contribute strongly to sustainable development around the world, including in the emerging economies where services account already for more than 50% of their GDP. These countries need investment in infrastructure services, which will improve the internal economy; they need access to high quality services such as financial services, good telecommunications and energy services to ensure their own development, not least in the export sector. For instance, they need good transport services, good port services, etc. to help them to improve their own agricultural economy, which will help them to compete and export.

The group of developing countries covers a wide range of countries, with big differences between them. Some of them are emerging countries with strong economies or countries on track for development, like Brazil, China, India, the South East Asian countries, etc. They are the ones that will be able to benefit the most from the services liberalisation. The so-called “Least Developed Countries”, like the sub-Saharan African countries, who still have often first to deal with Aids, corruption and civil war should benefit from a special differential treatment. In general, ESF favours a transitional period so as to give time to implement liberalising measures and realise that foreign-service suppliers, instead of taking over the economy, are indeed contributing to its development.

"GATS & PUBLIC SERVICES"

**MRS SUSAN GEORGE
ATTAC**

**CONTRIBUTION BY SUSAN GEORGE TO THE HEARINGS
OF THE ITRE COMMITTEE, EUROPEAN PARLIAMENT,**

26 NOVEMBER 2002

SUSAN GEORGE IS VICE-PRESIDENT OF ATTAC-FRANCE AND AUTHOR OF "REMETTRE L'OMC A SA PLACE", OR "PUT THE WTO IN ITS PLACE", 1001 NUITS, PARIS 2001; ALSO AVAILABLE IN SPANISH, ITALIAN, SWEDISH, GERMAN AND JAPANESE.

QUOTATIONS IN THE FOLLOWING CONTRIBUTION ARE FULLY REFERENCED IN THIS SMALLBOOK.

As David Hartridge, one of the expert witnesses present today, put it publicly in 1997, "Without the enormous pressures exerted by the American financial sector, particularly companies like American Express and Citicorp, there would have been no GATS and therefore perhaps no Uruguay Round and no WTO. The US fought to get services on the agenda and they were right". Hartridge's new employers, the White & Case global law firm, proudly announced last June that he is "uniquely qualified to advise services companies on how to use the new trade rules as business tools to gain access to new markets and to advance their competitive interests around the world". That is exactly the point.

Like the United States, the European Union also fights for its transnational corporations and proclaims on its website that "An active services industry involvement in the negotiations is crucial to target the EU negotiating objectives towards the priorities of business. The GATS is not just something that exists between Governments. It is first and foremost an instrument for the benefit of business". This is undoubtedly seen as normal, given the importance of services in total European exports. What is less normal is the lack of attention paid to citizens' concerns. "Chats" on the web with the Commissioner and the occasional "civil society" meeting where the participants overwhelmingly represent business interests are no substitute.

As Baron Daniel Janssen explained to the Trilateral Commission, "when businessmen like me face an issue that needs political input, we have access to excellent Commissioners such as ... Lamy for world trade".

The EU lacked a body like the powerful American services lobby, the US Coalition for Service Industries, which regularly contributes to, some say defines the US negotiating position. Thus Commissioner Brittan created the European Services Forum to play the same role. It now enjoys privileged access and private policy-defining sessions with DG1 officials.

Fewer and fewer European citizens accept the Commission's approach to the GATS precisely because it is doing what it said it would do, i.e. take care above all, of the interests of business to the exclusion of all others. And should EU member-State citizens not agree that European service transnationals should be in the driver's seat, the GATS is there, as the WTO has itself declared, to help member countries "overcome domestic resistance to change".

We are well aware of the contributions of services to European GDP, trade and employment. It is not a matter of denying the value of markets nor of business but of determining what services should be in the market, under what conditions, and who should decide.

Our complaints are of several orders and they are increasingly shared by national and European parliamentarians.

First is the lack of transparency. As members of the ITRE Committee are well aware, the GATS negotiations received additional impetus at the Doha Ministerial. The new round began with the "request" phase, which ended on 30 June of this year. Unfortunately, the only access citizens had to the requests the EU was making of partner countries was through leaks. These were, however, revealing. If Europe were to open ["offer"] all the sectors it is requesting from partners, Europeans have cause for alarm. Or should we assume that what we consider "good" for our partners is not good for us?

Commissioner Lamy has argued that the requests, like the offers, must remain secret as [1] partner governments insist on secrecy and [2] this secrecy concerning negotiating positions is "traditional". We would reply that *our* partners--the NGOs, the trade unions, the environmentalists, etc. very much want to know what is on the table, just as we do. Commissioner Lamy suggests they should ask their governments to let them in on the secret, knowing full well he is in no danger. As for "tradition", it is also traditional in some societies to electrocute criminals, mutilate the genitalia of small girls, or stone women for adultery. Tradition in and of itself is no argument, particularly in societies claiming to be democratic.

The Commissioner has also claimed that certain selected parliamentarians have had access to the requests so he has "consulted" with the Euro-Parliament. This is also a bad joke. The few MEPs who have seen the final requests have been obliged to sign a promise not to share the contents with anyone, not even with the members of their own groups. So much for parliamentary democracy. Our elected representatives will be given the opportunity to say Yes or No in 2005, once the negotiations are over. We are grateful to those MEPs who have protested against such contempt for their office and astonished at those who have not: what, exactly, do they think is their job ?

The Commissioner has also issued a summary of the requests received by the EU from other WTO members. This document is of little use since one doesn't know from which countries the requests emanate, nor how many have made the same request. One has to assume that a request from, say, the United States carries more weight than one from a poor, weak country.

We are now in the "offers" phase until 31 March 2003. We have already been officially told that these documents "cannot and will not be made public". The 133 Committee of unelected officials will continue to make all the decisions on behalf of governments. We have learned that in the various European ministries, civil servants have been given the task of justifying every restriction initially inscribed in the GATS "schedules" of the various countries, with a view, we must assume, to removing them.

The citizens' movement does not believe that public services can emerge unscathed from the GATS. First of all, it is a framework agreement, not a finished treaty; there will be a series of negotiations which must always move in the direction of "progressive liberalisation", so what is not given up today will be sacrificed tomorrow. Article I,3,c provides, perhaps, protection for military and judicial "services" or for the births and deaths register, but every other public service we can think of is supplied "either on a commercial basis or in competition with one or

more service suppliers". Under the terms of this Article, they are open to challenge and this is also the opinion of leading international law firms. Many declarations and documents of the WTO Secretariat, although they do not carry the weight of those emanating from States, show that the GATS is conceived to bring every human activity, sooner or later, into the marketplace. This is what business naturally wants and business is the objective. In the South, where public services do not exist or are embryonic, they will not be given a chance to develop.

One area in particular is not discussed and deserves clarification. In past negotiations, many trade offs have occurred inside the WTO framework. We want to know as well what are the frontiers between services and, say, agriculture because we suspect that when push comes to shove, there will be none. To continue to protect harmful agricultural export subsidies and policies which contribute to the destruction of European small farms, the public services of Europe could be sacrificed. This is a moot point, it does not appear in black and white in any text but those who have followed closely the negotiations in Doha or elsewhere will continue to harbour doubts.

We want transparency; we want to know what is on the table for discussion. We want our elected representatives to be able to follow the negotiations in detail. We want to get rid of Article I,3,c and Article VI,4 which allows unwarranted interference in government regulation. We want questions concerning subsidies to be clarified and subsidies granted to certain activities viewed as normal. We want a full review and assessment of the GATS carried out, as mandated in the text but subsequently ignored.

The GATS as it stands is a serious threat to democracy and to what remains of the "European model". The intransigence of the Commission [actually leading the process of liberalisation while placing all the blame on member States] leaves citizens little choice but to attempt to build the strength of their campaign, even though the GATS is extremely complex and difficult to explain to ordinary citizens. We have the precedent of the MAI, but it is easier to prevent a disaster than to correct one which has already occurred. We shall nonetheless do our best, and I wish to thank profoundly the ITRE Committee for giving me the opportunity to speak here on behalf of the citizens' movement opposition.

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"GATS & PUBLIC SERVICES"

**MR DAVID HARTRIDGE
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CONTRIBUTION BY DAVID HARTRIDGE, WCI LTD

**EUROPEAN PARLIAMENT COMMITTEE ON EXTERNAL TRADE
26 NOVEMBER 2002**

The treatment of public services under the GATS was recognized as an important issue very early in the drafting of the Agreement. It was in fact the negotiator for the European community, Jonathan Scheele, who first proposed, in 1989 or 1990, that it should be made clear that governmental services were not covered by the GATS. He had no difficulty in persuading others to agree that services supplied in the exercise of governmental authority, neither on a commercial basis nor in competition, should be excluded. There was never any disagreement about the principle of excluding governmental services and it has never since been questioned by any Member of the WTO.

It may be that agreement was reached too easily, in the sense that the definition in Article 1 of services supplied in the exercise of governmental authority might perhaps have been developed further, to make it clear what it meant by "on a commercial basis" and "in competition". I will come back to the question of definition in a moment, but the essential point is that the negotiators saw this carve-out as such an obvious necessity that they spent little time debating it. This has continued to be the position : in hundreds of meetings on services in the WTO and in liberally thousands of conversations with delegates of Member countries, I have never heard anyone express the fears about the GATS as a threat to public services which Susan George has expressed today. Of course, they are all familiar with the views which have been expressed by Attac and other NGOs, but as far as I know not one of the WTO's 145 Member governments agrees with them.

This is not because they don't care, or because they fail to understand what the GATS means. The preservation and the quality of public services is an important political issue for all Members. Take my own country, the UK, as an example. The UK is the second or third largest exporter of services in the world, depending on the year : in some years France is second and in some the UK. But the UK is probably more dependent on exports of services than any other of the large economies. Naturally, it has always been a strong supporter of the GATS. And it has made the GATS commitments on health services, like all other EU members. But as a political priority, the GATS is simply insignificant by comparison with maintenance of public health services, which is often said to be the Government's highest priority of all; the major theme of this year's budget was the maintenance and funding of the tax-based National Health Service. If you tried to tell a UK Health Minister that he could not do something he thought important because of the GATS, you would get a very short answer.

There is an ongoing debate in the UK about the extent to which the National Health Service should buy in private medical services? but the GATS is irrelevant to that debate. The National Health Service buys services of every kind from private suppliers, but that is a matter of government procurement, on which at present there are no disciplines in the GATS. The UK's GATS commitments on health services apply to the private sector, not to the National Health Service. The same is true of education, where all EU members have made commitments but all maintain public education services open to the entire population. The United States, when they made proposals on education in the current round of GATS negotiations, explicitly recognized that education is to a large extent a government function and that private education will continue to supplement, not displace, private education systems. Their proposal is therefore concerned only with the private sector.

Services provided by governments on a commercial or competitive basis are covered by the GATS but there is no obligation to allow foreign supply of them, and nothing in the GATS requires privatisation of any services.

I mentioned earlier the possibility that the definition of governmental services in the GATS might be clarified. In fact, I suggested that two years ago, when I was still working for the WTO. But I am not now sure that it was a clever suggestion, for two reasons. First, the way in which public services are financed and organized varies a great deal between countries, even countries so similar as the members of the EU, so that drafting a detailed definition that would cover the situation in all countries is difficult. And second, the definition has no importance in the normal operation of the GATS. every WTO Members is free to take its own view and maintain its own policy on what it treats as governmental services. There is no obligation in the WTO to notify them, still less to explain or justify them.

There is only one circumstance in which the definition of governmental services could become an issue. if a measure taken by one country was challenged by another as being inconsistent with the GATS, and if the defending country claimed that the measure was outside the scope of the GATS because it only affected governmental services than a dispute settlement panel might have to consider whether any of the services affected were covered by the GATS. Since by definition governments do not make commitments on what they regard as governmental services, the issue would be the effect of the disputed measure on services on which commitments had been made. The question before the panel would most probably be whether a service supplied in the exercise of governmental authority was in competition with services on which commitments had been made. If the panel found that covered services were adversely affected, it would recommend that the measure should be brought into conformity with the GATS. But given that all members have the same sensitivities about public service I think it extremely unlikely that any such case would be brought.

It has been pointed out that if a government decided to privatise a public service and made GATS commitments to allow supply buy foreigners, the existence of these commitments would make it difficult to reverse the policy and go back to public monopoly. It is true that GATS commitments are intended to be permanent, like tariff bindings under the GATT, but they can be withdrawn. Article XXI of the GATS provides for withdraw and to negotiate compensation - meaning replacement of the commitment withdrawn by one of equivalent value - with countries whose trade is most affected by the withdrawal. If agreement cannot be reached on the appropriate level of compensation the matter will go to arbitration. Broadly similar for 50 years;

Attac is right to be concerned about the public services. We all share that concern. But there is nothing in the GATS that could force the privatisation of public services of undermine the right of governments to maintain them.

"GATS AND DEVELOPING COUNTRIES"

**HIS EXCELLENCY TOUFIQ ALI,
AMBASSADOR OF BANGLADESH**

CONTRIBUTION BY HIS EXCELLENCY DR. TOUFIQ ALI
TO THE HEARINGS OF THE ITRE COMMITTEE, EUROPEAN PARLIAMENT,

26 NOVEMBER 2002

GATS: Interests of Developing Countries¹

1. Until a couple of decades ago, economists in the developing countries considered “services” as not tradable. Academic studies had concentrated on employment patters in services or on services as support to manufacturing, ignoring the direct contributions services industries made to domestic production and foreign exchange earnings. Export development planning targeted on specific goods. While services (especially, transportation, travel and international finance) were considered an important part of the trade environment, it was generally felt that the trade in services was too small to be considered significant.
2. With the commencement of the Uruguay Round of trade negotiations, and the emphasis on trade in services, many developing countries began to look at this area in a new light. When the four modes of supply were distinguished (Mode 1 – cross border; Mode 2 – consumption abroad; Mode 3 – commercial presence; and, Mode 4 – movement of natural persons), many developing countries were able to associate their individual circumstances with the conceptual framework. In course of time, with improvement of statistical data, the importance of services to the economies of the developing countries was also apparent. Many developing countries now have their individual countries’ interests in the negotiations clearly identified, and are pursuing their objectives.
3. The GATS provides for successive rounds of negotiations, the first beginning within five years of the entry into force of the WTO Agreements. This began in March 2000. The Ministerial Declaration adopted at the Fourth WTO Ministerial Conference on 14 November 2001 reinforced this. In paragraph 15, provides that the negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries.
4. This presentation will concentrate on presenting perspectives, from the viewpoint of *some* developin g countries, on issues in the current round. It will initially describe the underpinnings of the current negotiations, followed by a macro view of the main developments in the negotiations. It refers to elements of the current negotiating proposals, then looks at mechanisms for progressive liberalization, and enhancing the participation of developing countries. The issue of assessment of trade in services is taken up next, followed by the treatment of the concept of autonomous liberalization. Crosscutting and horizontal

¹ Presentation of H.E. Dr. Toufiq Ali, Ambassador of Bangladesh to the WTO and the UN in Geneva, to the EU Parliamentary Committee on Trade, Industry and Services on 26 November, 2002. This presentation is made in his personal capacity. This paper draws on the work done in the WTO, ITC, UNCTAD, South Center, and other organizations.

matters are looked at, along with the definitional problems. Before concluding, some selected sectors are referred to.

Conceptual Underpinnings

5. The aim of the services negotiations is outlined in the provisions of Article XIX of GATS. In Para 1, the objective is to achieve progressively higher level of liberalization of trade in services through the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. Para 2 states clearly that there should be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available, attaching to such access conditions aimed at achieving the objectives referred to in Article IV (Increasing Participation of Developing Countries). *The reference to Article IV is significant for Least Developed Countries (LDCs) as it provides for special measures for them.*
6. The negotiations on services are somewhat analogous to that in agriculture, as both the subjects were part of the built-in agenda for negotiations contained in WTO Agreements. We, also, cannot divorce this from efforts to strengthen special and differential treatment contained in WTO Agreements, the broader context of efforts to launch negotiations on trade and investment, trade and competition, transparency and government procurement, and trade facilitation. Clearly, *negotiations in services would be affected by movements elsewhere, just as those areas would be affected by developments here.*
7. Developed countries argue that liberalization of trade in services can be beneficial for developing countries particularly through foreign direct investment and access to import of services. While developing countries are in the process of pro-competitive regulatory reforms and autonomous liberalization, they are skeptical as to benefits that may accrue to them. *The process of progressive liberalization would need to be carefully designed as to ensure that the benefits are equitably distributed.* However, the negotiations do provide an opportunity for developing countries to achieve commercially meaningful market access commitments in sectors, and modes of interest to them, particularly labour intensive services and to devise effective benchmarks for the implementation of Article IV.
8. Developing countries want to optimize the flow of trade in services, so that it is able to contribute to building a competitive services sector and maximization of overall level of development at the national level. All countries are approaching the negotiations in a positive manner. To maintain this momentum developed countries would need to ensure that in this round meaningful market opening opportunities are offered particularly in respect of Mode 4, computer-related services, construction, tourism and transport, and credit for autonomous liberalization. An emergency safeguard mechanism, and specific mechanisms for building supply capacity in the developing countries that require them need to be established. *In terms of meaningful incentives for liberalization, for some developing countries reciprocal benefits would need to be offered in other sectors such as textiles, agriculture or implementation issues.*

Negotiating proposals

9. Developed countries, in their hundred and fifty proposals, have ambitious objectives of market openings. Sectoral proposals relate to business and professional (separate proposals on legal, architectural, accountancy, computer-related services), financial, telecommunication, tourism, distribution, construction and engineering, postal/courier/express delivery, logistics, energy, education, air, land transport, maritime transport, sporting audiovisual and environmental services, movement of natural persons. *Developing countries, with less than fifty proposals, are being modest.* Their proposals cover tourism, construction, telecommunication, financial services, distribution, audiovisual, energy, environment, computer-related services, and movement of natural persons.

Mechanisms to achieve progressive liberalization

10. Coverage and objectives of the Negotiations: Proposals by some developed countries contain provisions on commitments to status quo and standstill at the initial phase of the round. It has been proposed that the starting point for requests in the negotiations should be current restrictions sector by sector. Commitment to status quo in respect to Mode 4 would be a positive contribution by developed countries in building confidence in GATS and would improve the imbalance in the commitments. It is clear from the Preamble, Article IV and Article XIX that binding of status quo can be seen as an objective to be achieved at the end of the negotiations if sufficient reciprocal concessions are obtained. Article XIX makes it clear that the starting point for the next round is the conclusion of the last round in that the binding of autonomous liberalization would be a concession in the next round. This approach is now reflected clearly in the Guidelines to the negotiations (Para 10).
11. Requests for commitments to status quo or to remove all limitations and full binding of market access and national treatment changes the main features of GATS architecture by ignoring the principles of gradualism, and relative reciprocity and the need for developing countries to sequence their liberalization of trade in services to allow them to develop the appropriate policy, regulatory and institutional framework. Status quo commitments or full commitments cannot reasonably be expected from most developing countries, particularly because of the lack of competitive capacity to supply and export in many countries the appropriate and regulatory framework for developing supply and export capacity is not in place. In many cases also no experience with recently adopted regulatory reform has been accumulated and social and economic cost of liberalization have not been properly analyzed and determined. *It should be noted also that given that services play a key role in economic and social development their liberalization could impact directly on national welfare. Liberalization under GATS therefore can only reflect national policy priorities and cannot go further than what the national regulatory / policy framework provide.*

Increasing Participation of Developing Countries

12. The negotiations would need to aim at the effective achievement of the objectives of GATS Article IV and to reduce the current imbalance in commitments by focusing on the liberalization of market access in sectors and modes of supply of export interest to developing countries. Mechanisms need to be developed to ensure the effectiveness of Article IV as well as obtaining authoritative interpretation of the provisions relating to developing countries, including the Annex on Movement of Natural Persons. A monitoring

and notification mechanism would need to be established to ensure implementation of Article IV obligation. Article IV provides that developed country Members shall undertake specific commitments to strengthen developing countries' domestic services capacity and its efficiency and competitiveness, inter alia, through greater access to technology and improved access to distribution channels and information networks which would be particularly important to developing countries. *Developed countries could take measures to implement Article IV, particularly through encouraging investment in services sectors in developing countries, transfer of technology and access to distribution channels and information networks by providing incentives such as fiscal advantages for enterprises which undertake investment and facilitate access to technology and distribution channels and information network in developing countries.*

13. A number of barriers prevent developing countries from benefiting from trading opportunities particularly in respect of labour-intensive services. These barriers prevent technicians and businesspersons from developing countries' from participating in a variety of activities that are essential to the penetration of world markets for services. The commitments on movement of natural persons are made in the horizontal section of the commitments, which do not refer to the movement of natural persons in all categories and occupations. The main categories scheduled are limited to (i) intra-corporate transferees, (ii) business visitors, (iii) independent professionals including those providing services under a service contract. Therefore, developed countries who have a greater number of higher level personnel linked to mode 3 on commercial presence have largely benefited from the GATS commitments on movement of natural persons. *It is important that Members take steps so that administrative practices do not impede the full and effective implementation of their commitments under GATS in Mode 4.*

Barriers to Movement of Natural Persons

14. Barriers to this mode relate to the horizontal nature of the commitments (limiting access to intra-corporate transferees), strict and discretionary visa and licensing requirements, lack of recognition of qualifications and economic needs tests. Owing to their discretionary nature (especially where criteria are not clearly specified), *economic needs tests represent a major barrier to trade in services*, particularly with respect to the movement of natural persons, and are a source of considerable uncertainty as to the level of a country's commitment under market access.
15. The measures affecting the presence of natural persons which need to be targeted in the new round of services negotiations, both through negotiations and specific commitments and work on domestic regulation, relate to (i) general immigration legislation (entry and stay requirements do not distinguish between temporary and permanent labour movement), (ii) labour market regulations governing the issuance of work permits including wage parity requirements, (iii) regulations defining foreigners ability to work in individual activities i.e. recognition of qualifications, work experience and training as well as nationality and residency requirement, and (iv) differential treatment in context of social security taxes and benefits and government subsidies which treat domestic and foreign service providers differently. Transparency with respect to measures affecting the movement of natural persons is critical for increasing the participation of developing countries in international trade. The movement of service providers could also be facilitated by the use of "GATS visas" that would allow them to move in and out of markets for the purposes of business development and service delivery without time-consuming visa requirements. Given that

trade conditions for Mode 4 are far more restrictive than for any other mode of supply, a substantially higher-level liberalization would need to be achieved in this mode of supply. *There should be a revision of the Annex on Movement of Natural Persons to ensure effective market access through mode 4.*

Assessment of Trade in Services

16. Article XIX of GATS required an assessment of trade in services in overall terms and on a sectoral basis, with reference to the objectives of the Agreement, including those set out in Article IV. The Council for the Trade in Services of the WTO has not come to clear conclusions in respect of contribution of GATS to increasing the participation of developing countries. Some key issues of concern were indeed identified during the assessment of trade in services.
17. An overview of information and statistics on services raises a number of important points. The overview of information indicates, inter alia the limitations of global data on trade in services, for the purposes of comparison; the contribution of services to the growth and transformation of developing countries, and the important role of services in employment creation. *Developing countries have made substantial commitments under GATS with respect to many service industries, often binding through recently adopted legislation or pre-committing future policies without having had much experience in their implementation, and have undertaken a higher share of full binding in market access under the cross-border and commercial-presence mode of supply. In contrast, they have not received concessions of any meaningful economic value under the movement -of-natural persons mode of supply.*
18. Most developing countries also face major supply constraints, and do not satisfy the preconditions for building a competitive service sector. Niche opportunities change rapidly, driven in part by technological change. This requires a capacity to adapt promptly, and rapidly, to new market circumstances. *Given their supply constraints and lack of market access, the implementation of Article IV on increasing participation of developing countries and its strengthening based on specific benchmarks and a monitoring mechanism would require particular attention.*
19. The lack of commercially meaningful commitments in sectors and mode of supply of natural persons (except on intra-corporate transferees), which is essential for the supply of a service by developing countries, is critical. This lack of access creates a major imbalance in trade. The new round of negotiations, would need to deliver concrete market access openings in relation to labour intensive services, particularly to semi skilled and lower skilled persons. *Service suppliers from developing countries face a number of barriers that need to be given priority attention in the new round of services negotiations such as:*
 - Prohibition of foreign access to service markets that are reserved for domestic suppliers: nationality, residency or visa requirements can prohibit or limit the movement of natural persons;
 - Price –based measures: entry and exit taxes and visa fees for movement of natural persons; discriminatory airline landing fees and port taxes, licensing fees; tariffs on goods in which services are embodied or for goods that are necessary inputs in the productions of services.

- Subsidies granted in developed countries (e.g. for construction, communications, transport, health or education), including for high-technology sectors, as well as horizontal subsidies and investment incentives that can have a trade distortion impact on exports from developing countries.
- Technical standards and licensing: In certain profession business services, the licensing and standard setting have been used to restrict entry into the industry. Mutual recognition agreements are particularly important in facilitating trade.
- Discriminatory access to information channels and distribution networks: for example, suppliers of the telecommunications network may discriminate by excluding certain users, charging higher fees or imposing restrictions on attaching equipment.
- Lack of transparency in government measures (e.g. immigration legislation and procedures) and practices of large TNCs are another major barrier to market access for developing countries;

Treatment of Autonomous Liberalization

20. GATS Article XIX.3 provides that the negotiating guidelines should establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations. Autonomous liberalization is unilateral liberalization that countries have undertaken independent of rounds of negotiations. Paragraph 13 of the Guidelines provides that based on multilaterally agreed criteria, account should be taken and credit should be given in the negotiations to members since previous negotiations and not recognition only. Work is progressing on the drafting of the modalities.
21. *Developing countries have undertaken important liberalization since the Uruguay Round. They did not receive reciprocal benefits for the commitments they made, such as in financial and telecommunications services negotiations.*

Cross-Cutting and Horizontal Issues

22. MFN Exemptions: The unconditional MFN principle, which is the main pillar of the GATS, would ensure that the benefits of any agreement negotiated elsewhere on services would be granted to WTO Members. At the beginning of the Uruguay Round, developing countries opposed the idea of introducing “conditional MFN” into the Agreement. About 70 countries, for some 380 measures, have sought MFN exemptions. The coverage, content and time frame for such measures are not clearly defined. The negotiations under GATS needs to give particular focus to removal or narrowing of the scope of these exemptions and developing criteria for maintenance of the remaining exemptions for a defined period e.g. an additional 5 years. According to an analysis by the OECD (TD/TC/WP(2001)25) 92% of the exemptions relate to reciprocity and international agreements. The study identifies different categories of MFN exemptions such as foreign policy and security considerations, social objectives and environment and conservation.
23. There is a need to ensure that the MFN principle is not abused or weakened as it would weaken the benefits of a multilateral trading system. The negotiation on elimination of MFN exemptions will take place during the round. The Guidelines specifically provide that

MFN exemptions are subject to negotiation, according to paragraph 6 of the Annex on Article II (MFN) Exemptions. In such negotiations, appropriate flexibility should be accorded to individual developing countries.

24. Domestic Regulation, Recognition and Transparency: The focus in this area should be on discriminatory measures with protectionist intention, and not beyond. Pursuit of public policy objectives, redistribution concerns, and equity need to be given primacy. Given sensitivities relating to social objectives of services regulations, trade negotiators alone would not be able to negotiate multilateral liberalization and develop discipline on domestic regulation in the area of services. *The involvement of regulators would be key to obtaining implementable and practical results, keeping in mind that there are no authoritative international standard setting organizations in services and that developing countries are not participating effectively in bodies dealing with standards in specific sectors e.g., accountancy.*
25. One of the negotiating objectives of major trading partners is to ensure major progress under Article VI. Their proposals in relation to necessity test and concepts of proportionality could achieve the results of a negative list approach. Criteria built only on notions of economic efficiency could have a negative impact on developing countries' need for flexibility to undertake policy/regulatory reform meeting public policy objectives, or lead to harmonization of policies based on developed countries' policies.
26. *The establishment of a monitoring and coordination mechanism for ensuring effective access to mutual recognition agreement (MFA) would also be important. A more proactive approach needs to be taken by those members that have formed such agreements to ensure effective access of developing countries to mutual recognition agreements through inviting them to join such agreements and actively pursuing mutual acceptance of equivalence.*
27. GATS Rules: Work programmes are being developed on the three areas of GATS Rules i.e. subsidies, government procurement and emergency safeguards. Negotiations on emergency safeguard mechanism (SM) were supposed to be completed by March 2002. Progress was not sufficient and the deadline has now been set for 2004.
28. The Guideline provides that the negotiations on subsidies and government procurement should be concluded prior to the conclusion of negotiations on specific commitments. *Negotiations on subsidies would need to take into particular account the trade distorting impact of subsidies granted by developed countries, on developing countries' services exports. To assist developing countries in building competitive services sectors, and meeting social objectives, subsidies granted by them need to be excluded for specified periods.* Technology related subsidies as well as investment incentives granted by developed countries could have major negative impact on developing countries' competitiveness. Information on subsidies including in WTO Trade Policy Reviews demonstrates that there is a concentration of subsidies in some services sectors e.g. air and maritime transport, tourism, financial services, audiovisual, software and information technology services, telecommunications, research and development, construction, education and health. Whereas developed countries generally provide direct cash grants, developing countries provide fiscal incentives, duty free inputs and free zones.

29 Definitional Issues: It is important that definitions be considered carefully. Some specific issues are being highlighted.

- Modes of Supply: Definition of modes of supply has given rise to difficulties relating to overlap between modes of supply. For instance, several approaches to modes 1 and 2 distinction have been discussed, such as distinction on the basis of on whom the measure impinges, or on the basis of presence of supplier or consumer in the relevant market, whether there has been solicitation (mode 1, or solicitation has also been equated with commercial presence) or not (mode 2), or where the final consumption takes place. It seems that distinction on the basis of where the final consumption takes place would be a preferable approach. Mode 1 would cover cases where there is no physical movement of the consumer and supplier and final consumption takes place in the territory of the member making commitments, and Mode 2 would take place where there is physical movement of the consumer and final consumption takes place in the territory of the member supplying/exporting services. Issues of jurisdiction are also related to modal distinctions.
- Economic Needs Test (ENT): Because of their discriminatory nature, ENTs render market access unpredictable; on the other hand, they could be considered as a means to regulate trade flows. ENTs have been scheduled both horizontally and sectorally. Article XVI does not provide for a definition of ENT, and most countries have not scheduled specific criteria for its application. Although some members have not scheduled their ENTs, they do not use such measures for limiting market access. For example, the “convenience and needs of the community to be served” feature in various parts of United States banking law and, in Canada, incorporation of the subsidiary of a foreign bank is subject to its ability to demonstrate its potential to make a contribution to competitive banking. Developing countries may need to be able to continue the use of such limitation for some time. Many of the requests by developed countries to developing countries propose the removal of ENT e.g. in Mode 4 and financial services.
- Competition-related Issues: In view of difficulties resulting from abuse of dominant position of major service suppliers, Article IX would need to be strengthened to ensure control of abuse of dominant position through addressing specific private sector restrictive practices and establishing a notification requirement for restrictive business practices. Moreover, to tackle the abuse of dominant position of service suppliers from developed countries, as well as the operators of distribution channel and information networks, provision needs to be made to ensure effective access for developing countries suppliers to such facilities. Pro-competitive principles would need to be developed to control restrictive business practices and abuse of dominant position of services suppliers.
- Competition: Relatively few large firms from developed countries and a number of small players, however, dominate many markets for services. This tends to lead in most service sectors to a position where the larger operators face little effective competition because the size of the next tier of competitors is so small. (For example, in tourism, 80 per cent of the market belongs to Thomson, Air tours, first Choice and Thomas Cook). Developing countries service providers, most of whom are SMEs, face competition from large service multinationals with massive financial strength, access to the latest technology, worldwide networks and a sophisticated information technology infrastructure. This high degree of concentration is often a consequence of the enormous volume of capital and the

complex networks of interdependent organizations needed to maintain technological advantage, to exploit several products simultaneously and to maintain economies of scale. For example, in advertising, auditing and management consulting, relations with customers are established on a worldwide basis, making it difficult for enterprises from developing countries to gain access to world markets. The trend in mergers and acquisitions and strategic alliances has exacerbated this situation.

Sectoral Issues

30. Infrastructure Services: The traditional role of services related to the provision of infrastructure such as transport, telecommunications, as well as the availability of financial services. These also formed an integral part of national development strategies. Policies with respect to these sectors have been influenced by legitimate considerations of national security, attainment of particular strategic objectives, ensuring the widest infrastructure for various economic activities and consumer protection. The social dimension of services and universal provision of essential services is part of particular importance in relation to sectors such as health, education, transport, cultural and telecommunications services. These considerations have led Governments to assume a major role in services provision as well as in regulating it. *The need to reconcile this complex set of objectives with that of economic efficiency and international competitiveness raises a dilemma for developing countries.*
31. Air Transport Review: The structure of the market has changed as a result of open sky agreements and alliances, and increasing privatization of what were previously nationally-owned airlines. There is a need to clarify the scope of services directly related to the exercise of traffic rights, and to examine the commercial and regulatory effects of the ambiguity of the coverage of the annex for services providers in terms of commitments, MFN and other disciplines of the GATS. For instance, the EU seems to be of the opinion that the developments in the sector have clearly shown that the coverage of the GATS needs to be expanded. This is clearly the case with ground handling and airport management, which are activities that facilitate air transport services. Some other countries, whilst not supporting the expansion of coverage to include traffic rights, do support liberalization of ancillary services such as ground handling, rental and leasing, catering services, cleaning and disinfecting. *The coverage of traffic rights is important to some developing countries' airlines that do not have bargaining power in dealing with major airlines.*
32. Telecommunications Telecommunications form a significant part of the “comparative advantage” of developed countries, with their access to technology and capital. Yet, with increasing recognition of the role that they play as a medium for export of other services, and their contribution to infrastructure development, the stakes in this sector have become even higher. The “services revolution”, in many ways, has been borne on the wings of telecommunications and information technology.
33. The telecommunications sector was traditionally regarded as intrinsically a state monopoly, because of its strategic political and military importance, its infrastructure role for all other economic activities, and the vast investments that were needed to ensure its reasonably board coverage. The growing importance of telecommunications as a channel for trade, in an increasingly internationalized economy, introduced a new element of competitiveness in the sector, and a new demand to obtain better and more varied and cheaper services. This created a pressure for liberalization. This process was heightened by technological change,

which increased the importance of information technology, and knowledge became the source of economic power. The recognition that a developed telecommunications sector would allow the development and export competitiveness of other goods and services, gradually led to the recognition by developing countries of the relevance of this sector for them, irrespective of their location in the product cycle model. The beginning of liberalization has heightened this role of telecommunications further, as countries combat price erosion that results from the liberalization by upgrading the product and translating benefits derived into other sectors.

34. Financial Services: When the Uruguay Round negotiations on trade in services began, it was generally expected that the negotiations on financial services would be particularly difficult owing to the pervasive relations between financing, payments and economic activity and the need to ensure the integrity and stability of the financial system. These relations are central to both monetary policies designed to influence the allocation of credit. Financial services are the backbone of virtually every economic activity. They represent, after tourism, one of the sectors with highest coverage in schedules of commitments of GATS (106 countries have included financial services in their schedules). Due to the process of globalization and developments of information technology, the world financial markets operate very differently than in the past. The quantum of financial flows, nature of savings and investment, and the way resources are allocated have all changed.
35. Serious weakness in the regimes of prudential supervision for banks at national and international levels has been revealed by the recurrent financial failures. There has been widespread moves in many parts of the world towards stricter, prudential policies. Indeed, as a result of this shift in emphasis in comparison with the 1980s, the cause of prudential regulation is now be more likely to prevail over that of liberalization or deregulation, when there is a conflict between them. Several official bodies, including the Basle Committee on Banking Supervision, the Bank for International Settlements, the International Monetary Fund and the World Bank have been examining ways to strengthen financial stability throughout the world.
36. One of the manifestations of the new thrust of policy is increase insistence on adequate supervision in foreign banks' parent countries as condition for granting them market access. The GATT includes the Annex on Financial Services, which provides for the right of a Member to take measures for prudential reasons, including protection of investors, depositors, policyholders, or to ensure the integrity of the financial system. Although this was done with a desire to ensure a minimum level of liberalization and a degree of uniformity, the experience over the last few years will provide useful guidelines for the future. *Developing countries have repeatedly pointed out the need to pay attention to the absorptive capacity of the economy and the interests of domestic operators who would not be able to benefit, in the short and medium run, from the commitments by developed countries.* Hastened liberalization leading to bankruptcies in the banking sector should be avoided and therefore safeguards need to be developed to tackle other matters, inter alia, the problem of volatile capital. *Developing countries have found it very difficult to strike a balance between commitment to liberalization and competitive allocation of resources, and the preservation of macro-economic stability and exercise of prudential and supervisory regulations.*

37. Electronic Commerce: The liberalization of electronic commerce would need to be linked with effective market access for developing countries' SMEs and the possibilities for them to develop local content as well access to ensure access to technology, distribution networks and information channels as provided for in Article IV of the GATS. The issues of access to latest technology as well as costing of internet access services are particularly important. Ensuring technical and financial support through international financial institutions to fast-track improvements to the telecommunications and internet infrastructure in developing countries and strengthening of education/training in discipline related to electronic commerce need to be taken up jointly with issues related to market access. This liberalization would also require, as a precondition, competition policy related provisions. *Developing countries need to examine carefully the implications of initiatives on distinction between modes 1 and 2, as well as technological neutrality and custom-free cyberspace in relation to electronic commerce.*

CONCLUSIONS

38. Given the critical role that services play as intermediate processes in the production of goods, in their contribution to value-added and in the attraction that they provide to FDI, specific policy initiatives are required to improve the efficiency and competitiveness of the services sector. These policies are preconditions for benefiting from liberalization of trade in services. These relate to: (i) human resource and technology capacity building to ensure that professional and quality standards are met; (ii) upgrading of telecommunications infrastructure, which would allow the export of labour-intensive services through the cross-border mode of supply; (iii) incentives and financing for service firms to enhance their competitiveness; (iii) pro-competitive policies e.g. abolishing traditional monopoly or exclusive rights and adopting measures to discipline anti-competitive behaviour; (iv) coherent regulatory framework for goods and services and trade investment, including prudential rules to protect public interests; (v) progressive external market opening and encouraging FDI through grant of incentives to confront domestic industries with best international practices, management techniques and high technology; (vi) improving access to market information and presence in major markets; (vii) institutional reforms providing for independent regulatory supervision (viii) establish service industry associations to put their members in touch with potential partners in target markets, and to voice the needs of the service industry they represent.
39. The major achievement of the Uruguay Round was to formulate an agreement on trade in services that provided for the following:
- Recognition of the basic asymmetry in the services capacity and regulatory framework and trade in services of developed and developing countries;
 - Need to respect national policy objectives and level of development;
 - Obligation that developed countries will take concrete measures aimed at strengthening the domestic services sectors of developing countries, access to technology distribution channels and information networks and market information;
 - Obligation to grant effective market access in sectors and modes of export interest to developing countries;

- A mechanism for progressive liberalization of market access and national treatment in line with their development situation providing flexibility for developing countries to open fewer sectors, liberalize fewer types of transactions and, when making access to their markets available to foreign service suppliers attaching to such access conditions aimed at achieving the objectives increasing participation in trade services.

We should now build upon these basic principles, while considering the future of Services within GATS.

"GATS AND DEVELOPING COUNTRIES"

**MR PETER HARDSTAFF,
WORLD DEVELOPMENT MOVEMENT**

The GATS: Implications for Development

Paper to MEP's Hearing ("*GATS: the future of services*"), November 26th 2002, Peter Hardstaff, Head of Policy, WDM



Introduction

The World Development Movement (WDM) is a UK-based organisation with some 13,000 supporters campaigning to change UK, European and International policies to tackle the root causes of poverty. WDM has been working on the development implications of the General Agreement on Trade in Services for the past three years as part of its broader and longer term work on reforming international trade rules.

The last couple of years of debate on the General Agreement on Trade in Services (GATS) have sometimes veered towards a superficial exchange of media sound-bites. On one side of the argument, the GATS is said to be forcing privatisation of basic services and on the other, the GATS is said to allow complete freedom of choice and right to regulate so is nothing to worry about. Such simplification - coupled with the periodic misrepresentation of WDM's concerns - has created some confusion over exactly what the problem is with the GATS.

This paper is intended to address any confusion by explaining why WDM believes the GATS is not 'development friendly', will not help meet the needs of the poor and will not serve the interests of democracy. Many of the concerns WDM raises apply equally to industrialised countries and this paper draws on examples from both developing and industrialised countries.

Of course WDM is concerned about whether liberalisation benefits the poor and, based on numerous case studies of failed commercialisation of basic services, takes a sceptical view of the purported ability of commercial operators to meet the needs of the poorest. However, it is not WDM's intention here to argue over the details of liberalisation case studies. It is our intention to explain our problems with the GATS.

The key point that we want to make is that the GATS limits the policy options open to governments to achieve development. Any look at the history of how the industrialised world has developed shows that we did it through a wide range of government interventions. No country is like another. No development process is exactly the same as another. Developing countries need the flexibility to use the kinds of policies that we used during our development. Fundamentally, developing countries should have the ability to implement policies that favour their domestic businesses, build-up the effective provision of public services and effectively regulate private operators.

The GATS – both in its current form and in its planned expansion - is hindering rather than helping this process by steadily reducing developing countries' ability to promote domestic businesses, regulate in the public interest and change policies in light of experience.

Our arguments are, of course, in stark contrast to the proponents of the GATS, who tend to claim that the GATS is not a problem because it is a flexible agreement. It allows developing countries to pick and choose what to liberalise and when, and it allows them to place conditions on their commitments.

There are several problems with the argument that the GATS is flexible and poor countries can choose what they want to do. This paper is structured around debunking this myth.

Flexibility ? Yes, but for the economically powerful

The flexibility that governments can exercise in the GATS, and their ability to choose exactly when and how to liberalise, is dependent on a fair process conducted amongst equals. This is not currently the case in the WTO.

The rich and powerful countries have a great deal of leverage in trade talks, and act in the interests of their companies rather than in the interests of the poor. Time and again, anecdotal reports from developing country officials at the WTO – and in capitals – expose how EU and other industrialised country officials put pressure on poor countries to liberalise and deregulate.

Rich countries can and do wield the big stick of aid. As one African trade delegate has said: *“Aid for some countries makes up 40 or 50 per cent of their budget, so that the threat that aid is cut is extremely serious. Therefore, while I might brush this threat aside, my Finance Minister would not. As long as we are dependent on aid support, it makes us very vulnerable.”*¹

It is often said that negotiations in the WTO are fairer for developing countries because they can take joint positions that will increase their bargaining power. This, it is said, is preferable to doing deals with industrialised countries on a bilateral basis. What proponents of the GATS rarely mention is that GATS negotiations themselves are bilateral. The so-called ‘request-offer’ process is conducted on an individual government to government basis, increasing the opportunities for rich countries to apply political pressure on poor ones. Where the GATS differs from a bilateral negotiation is that any commitments made are multilateral (i.e. apply to all countries) so are more far reaching. The bilateral nature of the GATS talks exacerbates the already acute capacity problems many countries are facing in attempting to deal with a wide ranging and complex round of negotiations.

As for the ‘grand bargain’, developing countries are once again being told to open their markets to rich-country service multinationals otherwise the long promised (and never delivered) agricultural reform will not materialise. Even if the European Union significantly reforms the Common Agricultural Policy (CAP) – and recent statements suggest this is highly unlikely - such a trade-off (more market access in return for fewer domestic policy options) still constitutes a bad deal for the poor as it undermines the ability of governments to intervene in the market to promote development.

Given the influence that powerful WTO members like the EU, have over poor countries, it is even more important to develop trade policies that take into account the broader interests of the developing world. Although the EU claims to be doing this and claims to be promoting a ‘development agenda’, the evidence suggests the opposite. The EU’s GATS position seems to be defined largely by EU corporate interests.

For example, the EU is blatantly pushing for liberalisation in sectors it seeks to defend at home. Earlier in the negotiating process, Pascal Lamy, Trade Commissioner, stated that: “[The EU is seeking to] *preserve legislative priorities...in areas linked to state provision, such as energy, postal services, education, culture and health* [but at] *the same time we are seeking fair and negotiated access for our service providers to such sectors in third countries, where market-based, and there is no contradiction in this.*”

This last part, about only targeting sectors that are already ‘market based’ may in fact be pretty meaningless. First, the range of ambiguities in government GATS commitments and limitations, government public statements and the GATS text itself suggest that the concept of what is, or what is not, ‘market based’ is highly subjective. Second, in the 29 draft requests leaked to the public, the EU demanded liberalisation in service sectors currently under public control in, for example, Colombia. In such cases, market access for EU companies would seem to entail some form of commercialisation.

It is worth remembering that the EU is one of the most vociferous proponents of bringing water and energy distribution into the GATS. Water and energy are currently not listed as specific sub-sectors under the GATS. So the EU wants to add them to the list, and then get market access for EU companies in other countries. You may want to reflect on the fact that national parliaments and the European Parliament were not involved in such an important and potentially far reaching decision.

A typical example of European double-speak when it comes to the GATS and development is the European attitude towards ‘culture’. While the French Government will be looking to expand market access for its big companies - like Carrefour in retail and Suez in water - it is also keen to carve out what it calls a ‘cultural exception’ for its film and TV industry. This has been obvious both in the EU approach to the GATS and in its approach to the negotiation of Economic Partnership Agreements with the ACP countries.

Now WDM does not have a problem with the French not wanting to liberalise for cultural reasons, but why is film and TV any more culturally important than the way we provide water or the way we buy and sell food? We all buy food and consume water a great deal more than we go to watch art-house films at the cinema. The European understanding of culture and development seems only to extend as far its own corporate interest.

Flexibility? Not in the general obligations

The second problem with the so-called flexibility of the GATS is that the GATS has general provisions that relate to *all* sectors – and these are not a matter of choice.

For example, during their development process, rich countries used government procurement to favour domestic businesses. Yet, the kind of rules that are likely to be developed in the GATS on government procurement will stop developing countries from doing the same – regardless of the specific commitments they have made.

The GATS is reaching deeper into the regulatory territory of Government than any previous trade agreement. This is particularly evident in Article VI on domestic regulation. Paragraph 4 of this article requires governments to develop rules to ensure that regulations (i.e. technical standards, qualification requirements, licensing agreements) do not constitute “*unnecessary barriers to trade*” and are “*not more burdensome than necessary.*” This means that regulations

affecting all service sectors covered by the GATS will be subject to WTO Dispute Panel adjudication on whether or not they are ‘burdensome’ (on service companies) and whether or not they are ‘necessary’.

The European Union is keen to further ‘clarify’ and ‘develop’ Article VI.4 with what is called a ‘necessity test’. Under this, WTO Member States would first have to prove that their regulations were ‘necessary’ in order to achieve a ‘legitimate objective’. Second, they would have to show that no alternative measure was available which would achieve the same objective and be less ‘burdensome’. So even if a goal such as environmental protection is considered a ‘legitimate objective’, technical standards on those trading in that sector may not be considered the least ‘burdensome’ way of achieving that objective, and would therefore fall foul of the necessity test.

The necessity test is deeply problematic, for a number of reasons. First, it makes a WTO Dispute Panel the final arbiter over the extremely subjective question of what is, or what is not, a ‘legitimate objective’. Second, it makes a WTO Panel the final arbiter over the subjective question of what is, or what is not, ‘necessary’. Third, it makes a WTO Panel the final arbiter over the subjective question of what is the least ‘burdensome’ measure available.

Such questions should be dealt with by local and national governments and by parliaments, not by a small group of trade lawyers in Geneva.

Flexibility? Not if we don’t know what the rules mean

The third problem with the flexibility argument is that it is hard to be flexible when we don’t know what the rules mean.

Article I.3

The GATS covers all provision of services in the listed sectors except, as stated in GATS Article I.3, “*services supplied in the exercise of governmental authority.*” These are defined as services “*supplied neither on a commercial basis, nor in competition with one or more service suppliers.*” This Article is perceived as exempting from GATS rules the provision of public services by governments.

Until recently we have seen a robust defence of the clarity of this Article by governments. However, their current and previous actions point to a great deal of confusion over what Article I.3 actually means.

First, the EU has listed a ‘horizontal limitation’ relating to the provision of public services. This is essentially an ‘exemption’ from the rules that applies across all sectors. The limitation reads as follows: “*In all EC Member States, services considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators.*”

Yet if the EU is so confident about the clarity of Article I.3 in exempting provision of public utilities from GATS rules, why did it go to the trouble of listing its horizontal limitation? It is worth bearing in mind that the EU has been asked to remove this limitation in the current negotiations.

Second, although the UK – and perhaps most/all other EU countries - have made full commitments in Modes 1, 2 and 3 of GATS across the four main sub-sectors in ‘education services’, the EU’s initial Schedule of Specific Commitments makes clear that this applies only to “*Privately funded educational services.*”

Putting aside for one moment what the exact implications of this wording are, the very fact that the EU felt the need to include this clarification suggests again that they lack faith in the ability of Article I.3 to protect public services. It also begs the question, why did the EU not use the same clarification that its ‘health sector’ commitments only apply to privately funded health services?

Third, and perhaps even more striking, is the reticence of EU countries in making commitments in ‘recreational, sporting and cultural services’. In its recent GATS consultation document, the UK Government states, “*In relation to libraries, archives, museums and other cultural services, none of the EC Member States has taken commitments. This reflects the cautious approach of the EC to GATS commitments in the cultural area, and of the need to ensure continued provision of public library and museum services.*”² One can only wonder why, if the UK/EU believes that the best way to ensure continued provision of public library and museum services is by *not* making GATS commitments, they have done the opposite in the health and education sectors?

The confusion over Article I.3 evident in the commitments made by EU member states is also reflected in comments by the WTO Secretariat itself. In a background paper on health services, the Secretariat states, “*The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article I.3?*”³

The Financial Times referred to the Article as “*a piece of clumsy drafting*” and went on to say that WTO staff, “*concede a clarifying declaration by members would be helpful.*”⁴ Since its initial robust defence of Article I.3, the UK Government has also accepted that it “*is not clear*” and that they “*would like to see further clarity.*”⁵

In the absence of such clarity, the EU does at least still have its ‘horizontal limitation’ that could act as an insurance policy – if it does not trade it away as part of the current negotiations. While this may provide some protection for EU public services, the fact that the EU has this limitation is as good as an admission that Article I.3 of the GATS is lacking. The question this raises is, what does this mean for public services in the rest of the world?

Subsidies

The GATS recognizes that subsidies can have “*distortive effects on trade in services*” and commits Member countries to enter into multilateral negotiations to “*develop further disciplines on subsidies*”.

Although this seems to suggest that subsidies are not covered by the GATS until further rules have been developed, this is not the case. Subsidies come within the GATS definition of government ‘measures’ so the MFN principle applies to subsidies in all sectors covered by the GATS and national treatment applies to subsidies in which specific commitments have been made.

However, the way in which these rules apply to subsidies is extremely complex and riddled with uncertainty. For example, do the MFN and national treatment rules require governments to extend those subsidies provided to companies within national boundaries, to all companies outside their territories as well? Would higher grants to students attending national universities than for those students going abroad constitute discrimination against foreign universities? How do these GATS rules apply to one-off bail-outs or to financial assistance to attract investment?

Submissions to the WTO suggest even governments are not clear what the rules mean. A useful analysis of the subsidies issue is provided in a book by Scott Sinclair of the Canadian Centre for Policy Alternatives who sums up on the issue, *“covering subsidies under the GATS is yet another instance where Uruguay Round negotiators, keen to gratify corporate lobbyists, recklessly pressed ahead with binding international treaty commitments – leaving their governments and citizens to cope with the difficult, practical policy fallout on their own.”*⁶

Economic Needs Tests

‘Economic needs tests’ allow a government or local authority to ascertain whether or not new developments are necessary and/or beneficial. In retail for example, they include criteria such as the number of, and impact on, existing stores; population density; geographic spread; impact on traffic conditions; and the creation of new employment.

Article XVI (market access) clearly prohibits the use of economic needs tests to place limits on service supply – which is why some European countries felt the need to seek specific exemptions allowing their continued use (e.g. in retail). Other EU member states – and many developing countries – have not reserved their right to undertake such tests. What is not clear, is whether the constituent parts of economic needs tests - such as limits on retail expansion on the basis of traffic impacts – are prohibited, or whether you can still assess, weigh-up and take decisions based on all these different considerations individually just so long as you don’t call it an ‘economic needs test’.

De facto discrimination

Article XVII (national treatment) critically enshrines - although does not specifically state as such – the concept of ‘de-facto discrimination’. In other words, regardless of the ‘intention’ of a government intervention, *“if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member”* it will be deemed discriminatory and thus incompatible with the GATS. Many government interventions are designed to modify the conditions of competition and it seems incredible that the power has been given to WTO Dispute Panels to decide whether or not such measures should be prohibited because they may accidentally be more difficult for foreign companies to implement. This clause constitutes a dangerous and untested expansion of the concept of discrimination and increases the uncertainty for local and national governments over what is, and what is not, compatible with the GATS.

Flexibility ? Yes, but only if you are blessed with magic powers

The fourth problem with the “GATS is flexible” argument, is what we call the ‘Nostradamus rule’ of the GATS.

It is true that the GATS allows governments to list what are called ‘limitations’ or conditions on their specific commitments. For example, Italy, Spain, Portugal, and Greece have all listed a limitation which ensures that they can regulate the establishment of hotels and restaurants, “*in order to protect areas of particular historic and artistic interest.*” Interestingly, the UK has asked for no such exemptions in its tourism commitments.

This all sounds fine. But the problem – especially for developing countries – is that you are supposed to come up with a list of all the possible regulations that you might want to use in the future at the time you make the commitment. How can any government official, not least one from a poor country, know in advance all the possible regulations that future governments might want to use?

Oddly enough, one of the reasons the USA was able to win the infamous Banana dispute is because the EU ‘failed’ to list its banana trade deal with former colonies as a limitation under the GATS. If the EU – with its battalions of trade lawyers – has trouble, what hope for the likes of Burkino Faso?

Regardless of a government’s administrative capability, this crazy restriction denies the opportunity for an iterative process when it comes to regulation. No government gets it right first time all the time. Yet in the fantasy world of the GATS, government officials are seemingly blessed with omniscience.

On this issue of ‘foresight’, it is worth bearing in mind a case from Thailand. In its recent submission to the WTO, Thailand describes how it liberalised its retail sector, attracting investment from European retail chains. This has had both benefits and drawbacks. Over time, the Thai Government has realised that it needs to intervene in the market to address the adverse impacts on its domestic retailers.⁷ Critically, it has not made any GATS commitments in retail so it is relatively free to develop whatever mechanisms are appropriate.

The lessons from this case are twofold. First, it is clearly possible to attract investment without making GATS commitments. Second, all governments make mistakes and it is much easier to go through an iterative regulatory process if you have not made GATS commitments.

Flexibility ? Not for future governments

A fifth problem with the mythical GATS flexibility is what we call ‘lock-in’ – in other words, the difficulty of reversing or changing commitments.

The GATS does have a procedure (Article XXI) for governments to withdraw commitments but this can only be initiated three years after the commitment was made and requires compensation, normally in the form of some other kind of liberalisation, which then requires the consent of all other WTO members that may be affected. This makes it extremely difficult, and perhaps impossible, for governments to withdraw commitments. The former Director of the WTO Services Division, David Hartridge, noted that these provisions make GATS commitments “*effectively irreversible.*”⁸

Therefore, once you make a GATS commitment, there’s effectively no turning back. For developing countries, it’s part of a pincer movement. On one side they face IMF and World Bank loan conditionalities stipulating privatisation of basic services, and on the other they face pressure to sign up to the GATS in order to lock-in these policies. This has massive implications

for democracy and the right of future governments to change the direction of economic and social policy.

Such problems are not limited to developing countries. For example, in light of the Potters Bar rail disaster in the UK and the questions this raised over rail safety, the focus naturally turned to the wisdom or desirability of ‘contracting out’ rail maintenance to private companies with tight profit margins. Many would see some form of public ownership or control of the companies carrying out rail maintenance as an important option to consider. Yet the present UK Government is effectively prohibited⁴ from doing this because the last Conservative Government made full, unlimited market access commitments in ‘rail maintenance and repair’ and these commitments are as good as irreversible. Although the Government has recently put ownership of UK railways into a form of non-profit-making company (Network Rail), this company is obliged, by the UK’s GATS commitments, to contract out rail maintenance to private operators. Companies – both foreign and domestic – now have a ‘right’ to supply the service of rail maintenance and any attempt to curtail this ‘right’ could be challenged by another WTO member.

Flexibility ? How flexible is a train that can’t stop?

The sixth problem with the ‘flexibility’ argument is what we call the ‘eternity clause’

The GATS enshrines a commitment to keep on liberalising. Article XIX includes a commitment to *“successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization.”*

This exerts a long-term deregulatory pressure on governments. In particular, the regulatory ‘exemptions’ that governments list in one round of negotiations are targeted for removal in the next round. It is clear that just such a ‘tit-for-tat’ bargaining process is going on in the current negotiations. A leak of the EU’s requests demonstrated they are trying to remove the conditions listed by other countries and the recent UK consultation document shows others are trying to remove those listed by the EU. The whole process of GATS negotiations is therefore, over time, aimed at continually reducing what little flexibility governments started out with.

This begs the question, where will it end ??

Conclusions

In summary then, WDM believes that the GATS is undermining the ability of countries, particularly in the developing world, to use appropriate policies to achieve development. In particular, the arguments over the ‘flexibility’ of the GATS are massively flawed because:

- The GATS is an extremely complex agreement involving bilateral negotiations and multilateral commitments, providing opportunities for political and economic pressure to be exerted on poor countries.

⁴ Note: The rules cannot physically stop a government from enacting regulations. ‘Effectively prohibited’ means, in WDM’s view, the Government would most likely lose a case if a complaint was lodged at the WTO, and be subject to sanctions if it did not alter or abolish the regulation.

- Its coverage is very broad and it reaches deeper into domestic policy-making than any other trade agreement. Its general obligations (e.g. on domestic regulation) apply to all sectors so are not a matter of ‘choice’ or ‘flexibility’.
- Its rules (e.g. on public services, de facto discrimination, economic needs tests, subsidies) are riddled with uncertainty, encouraging a lowest common denominator approach by regulators.
- It has a ridiculous requirement that governments should be omniscient and know, in advance, all the possible regulations they might want to use in future in order to list exemptions at the time of making commitments.
- It effectively ‘locks-in’ policy, making it extremely difficult, if not impossible, to alter commitments. This denies future governments the option to change economic course, roll-back liberalisation, increase regulation or list extra exemptions.
- It has no end-point.

According to GATS proponents, because there has not yet been a WTO challenge on many of these issues, no problem exists. But, just because nobody has yet indicated a desire to start challenging public services under the badly worded Article I.3, does not mean it will not happen. Just because nobody has yet used the rules relating to ‘de-facto’ discrimination to undermine legitimate government intervention does not mean it can’t be done. Just because the nebulous concept of regulations needing to be ‘no more burdensome than necessary’ has not been tested in a WTO dispute, does not mean this is a well thought out and desirable piece of international law.

WDM thinks that these problems amount to a compelling case for halting the onward march of liberalisation and assessing the impacts of services liberalisation in different sectors and in different countries. If the debate is to move on, it is also critical that we develop a better understanding of the exact meaning of the rules and their impacts on governments’ ability to regulate in the public interest. It is particularly important to do this in a multi-disciplinary way. In other words, it is not good enough just to get a trade lawyer’s abstract interpretation of, for example, Article VI.4 (domestic regulation). This needs to be done on a sector-by-sector basis and involve regulatory experts from the relevant fields. It also needs to be independent.

Only then can the GATS rules be properly analysed in a real context and the results have the necessary credibility to inform public and parliamentary debate on how these rules should change or indeed whether they are needed at all.

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CONCLUSION

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