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Negotiations on Trade in Services – The Position of the Trade Unions on GATS

Dialogue on Globalization

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Preface

At the latest since the street protests during the failed 3rd WTO Ministerial Conference in Seattle, in 1999, the World Trade Organization (WTO) is at the centre of criticism and perceived in public as a central pillar of “globalization”. Trade Unions in many countries form part or liaise with the “anti-globalization” movement and have become more active in recent years in following their government’s negotiation of trade agreements. In particular the international trade union movement represented by the International Confederation of Free Trade Unions (ICFTU) and the Global Union Federations (GUF, formerly: International Trade Secretariats) play an important role in expressing their concerns and positions in regard to the ongoing trade negotiations and especially on the GATS negotiations. In general, these organizations are demanding new “global governance” structures to cope with the “down-side to globalization” and express themselves in support of a multilateral system that addresses the growing imbalances and takes social, developmental and environmental concerns into account and against an unregulated global market economy. However, there are growing fears that the present negotiations under the General Agreement on Trade in Services (GATS) could jeopardize access to vital public services and to other services of general interest for a large part of the world’s population.

This publication “Negotiations on Trade in Services – The Trade Unions’ Position on GATS” is part of a series of studies aimed at contributing to an open and constructive dialogue on these issues. It corresponds to “Dialogue on Globalization” N° 4/April 2003 “The General Agreements on Trade in Services (GATS) – A Background Note” by Michaela Eglin. Both are intended to present and clarify facts, to give weight and recognition to the concerns expressed and to rationalize the debate in favour of solutions that could generate public support for the multilateral system. In addition, this publication contains the “Trade Union Statement on the Agenda for the 5th Ministerial Conference of the World Trade Organisation (WTO), Cancun, 10-14 September 2003, endorsed by the Global Union Group (including the International Confederation of Free Trade Unions (ICFTU), the Global Union Federations (GUFs) and the Trade Union Advisory Committee (TUAC) to the OECD), the World Confederation of Labour (WCL) and the European Trade Union Confederation (ETUC).

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1 Introduction

Since the so-called “Battle of Seattle”, when thousands of persons protested in the streets of Seattle against the liberalisation policy of the World Trade Organization (WTO), trade negotiations have started to attract public attention. In the organisation of this broad coalition of protesters – including trade unionists, environmentalists, farmers, and other concerned people – trade unions have been playing a crucial role. Since Seattle, unions have intensified their observation of WTO negotiations. They have called attention to the risks involved in further liberalisation, especially in regard to trade in services (GATS, General Agreement on Trade in Services). At the same time, they have been suggesting ways in which the GATS framework could be reformed in order to serve the interests of all.

At the moment, we are in the middle of a new WTO negotiation round that started in 2001. The official deadline for the submission of initial requests and offers from the different WTO Member States for trade in services has passed. With the next Ministerial Conference of the World Trade Organisation this September in Cancún, another important stage in the current WTO negotiations is approaching. We want to take this opportunity to have a closer look at the trade unions’ concerns in the current GATS round. Unions argue that due to the scope of the Agreement further liberalisation has the potential to jeopardise sustainable development by aggravating existing social disparities all over the world. The power imbalances of the negotiations, the lack of assessment, and the irreversibility of a commitment, that we discuss next, all foster the impression that the GATS regime favours disproportionately the interest of strong economies and global corporations. A crucial issue for trade unions is the question of whether public services fall under the scope of the GATS. Taking the European Union as an example, we will discuss this problem in more detail in the following section. The paper concludes with an overview of the different proposals for a WTO reform made by trade unions.

2. The Dynamics of Trade in Services

Trade in services is one of the most dynamic growth sectors. Today, services account for one fifth of the global trade. Considering the national importance of this sector (60-70% of the GDP in the OECD countries; OECD 2000), its share in the world trade is still relatively low. In the light of this economic development, proponents of the new GATS negotiations stress the potential of the global trade in services for national economies. They see the importance of this sector even more underlined by the fact that the general slowdown of the world economy in the last two years has not affected this sector as severely as the rest (WTO 2002).

A closer look at the country level reveals that the international trade in services is rather unequally dispersed over the world. Three quarters of service exports and nearly the same amount of imports are accounted by industrialized countries. In 2001, the major exporter and importer was the US (18.1% of world exports, 15.9% of world imports), followed by the United Kingdom (7.4% exports, 6.3% imports), France (5.5% exports, 4.3% imports), Germany (5.5% exports, 9.2% imports) and Japan (4.4% exports, 7.7% imports) (WTO 2002).

The remaining quarter of service exports is rather unequally shared by developing countries. The leading exporting countries are Hong Kong, China, South Korea, Singapore and India. However, all of them import more than they export, with the exception of Hong Kong. This deficit in the balance of trade in services can be observed in most developing countries.

Although many different kinds of services are traded internationally, two types of services are dominant – travel and transportation. Travel services account for one third and transportation services for around one quarter of all trade in services. In the supply of services, commercial presence plays a crucial role (mode 3 in GATS). 50% of foreign investment goes into the service sector (Hufbauer/Warren 1999). In contrast to the other WTO treaties, GATS is therefore an agreement for trade and for investment. Additionally, with the regulation of service supply through presence of natural persons (mode 4), the Agreement regulates cross-border labour supply. In other words, the GATS can be considered as a migration agreement as well.

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3. Special Concerns in the Supply of Services

Trade unions appreciate the potential of international trade and investment to contribute to further economic growth. The *International Confederation of Free Trade Unions (ICFTU)*, like many other trade unions, speaks out clearly in favour of world trade and against protectionism. The confederation also welcomes a regulatory framework for world trade. So that as many people as possible can reap the benefits of the advantages of trade in goods, and particularly so that the more powerful nations are not able to fix the rules for foreign trade as they see fit in the interest of their respective industries, there is a fundamental need for an international, multilaterally negotiated body of rules. A regulatory framework of this type is also welcomed for the cross-border supply of services. All the same, there are important differences between the production of goods and the supply of services which must be taken into consideration in an international code. In the case of trade in goods, a part of state rules traditionally had the expressed aim of discriminating against foreign providers, in particular through the imposition of duties. Taking the special protective needs of certain industries into account, it has been possible, step by step, to dismantle mutual trade barriers in the course of multilateral rounds of negotiations. By contrast, state rules for the supply of services are based on a quite different set of motives. These are intended to ensure that basic services are provided nation-wide, are universally accessible, that quality standards are maintained and, particularly in the case of infrastructure services, that democratic participation and control are assured. If it is now the case that all potential service providers in the WTO Member States are to be granted equal opportunities to the cross-border supply of a service (most-favored nation principle) and if they are to be accorded the same treatment as domestic providers upon crossing borders (national treatment principle), then wholly substantial changes to the previous regulation of services are required. These changes may come into conflict with the original reasons for the respective specific regulation, which are also still applicable.

Since the GATS comprises the application of these principles developed for trade in goods to the supply of services, it encroaches deeply into a body of rules that was and still is committed to other goals than hindering or facilitating cross-border economic activities.

4. Trade Unions' Assessment: Risks Outweigh Opportunities

In the light of the above mentioned differences between trade in goods and trade in services, trade unions highlight therefore the risk that the current framework of GATS might only intensify international trade without achieving its potential for the creation of decent employment and sustainable development. Trade unions view the current GATS negotiations more as a threat than an opportunity (UNISON 2003:6). The agreement runs the risk of serving only as an instrument for global corporations to lobby for a policy that will grant them world-wide access to markets, without taking other groups' interests into account. The dispute settlement procedure may provide a very effective instrument to ensure this access even if it is only used as a threat. There are therefore major concerns that a new negotiation round may deepen already existing inequalities within countries and between countries even further.

In addition, and this exacerbates the political explosiveness of the GATS negotiations, a liberalisation commitment once scheduled by a government can hardly be revoked even if a parliament has decided to do so. Only through compensation given to the other GATS members are governments allowed to withdraw or to renegotiate (see below "Irreversibility"). In other words, the current GATS framework contains undemocratic features.

In broad coalitions with social movements and non-governmental organisations, trade unions have opposed the GATS negotiation since the 1990s. On the eve of the Ministerial Meeting of the WTO members in Seattle, the *International Confederation of Free Trade Unions (ICFTU)* mobilised, together with *American Federation of Labour and Congress of Industrial Organizations (AFL-CIO)* and many other civil society groups, against a trade system that risks violating labour standards. At the beginning of 2001, civil society groups together with trade unions launched the appeal "Stop the GATS Attack". This campaign attracted a broad support. By April 2001, 420 organisations from 53 countries had signed the statement demanding a moratorium on the GATS negotiations. A similar statement was drafted by non-governmental organisations (NGOs) like Focus on the Global South, Third World Network and Via Campesina, together with trade unions, with the title "Our world is not for sale. WTO: shrink or sink". Both statements were widely supported by civil society groups of the South and North and praised as an important step towards overcoming frictions between trade unions and NGOs, especially from the South. This friction became visible during the protests in Seattle, where NGOs from the South criticised trade unions for their narrow focus on labour standards (PSI 2001). However, since then trade unions have taken on board the demands from the South to slow down the negotiations, while NGOs from the South have included core labour standards into their agenda. However, some differences remain (South Centre 2000b).

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4.1 The Broad Scope of GATS

Trade unions criticise the broad scope of the GATS negotiations, that all governmental activities incidental to trade in services are potentially subject to GATS, and the disregard for the conditions under which services are provided.

The subject matter of the Agreement theoretically addresses all services. As Scott Sinclair and Jim Grieshaber-Otto (2002: iv) put it in their guide to the GATS debate, it includes services ranging from “[...] birth (midwifery) to death (burial); the trivial (shoe-shining) to the critical (heart surgery); the personal (haircutting) to the social (primary education); low-tech (household help) to high-tech (satellite communications); and from our wants (retail sales of toys) to our needs (water distribution).”

Excluded from the scope of the Agreement are only services „supplied in the exercise of governmental authority“ like the courts, central banking and defence.

Excluded from its scope are only services “supplied in the exercise of governmental authority”. The spectrum of these services is very narrowly defined. In the extreme they cover only the courts, central banking, and defence.

Not only do most services fall under the GATS, all governmental measures affecting trade in services are potentially subject to GATS scrutiny. If a country has committed a sector such as education to the disciplines of GATS, it is required to “[...] inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services.”(Article III.3)

Article VI.4 (b) requires that the respective country “shall not apply licensing and qualification requirements and technical standards that” are inter alia “more burdensome than necessary to ensure the quality of the service”. In contrast to the *General Agreement of Trade and Tariffs (GATT)* disciplines, which applied primarily to border measures affecting internationally traded goods, the scope of the GATS therefore affects all fields of national regulation (Fritz/Scherrer 2002a:20).

Furthermore, the GATS contains no reference to the conditions under which services are provided. Therefore, the doctrine of *likeness* applies which prevails in the decisions of the Dispute Settlement Board for trade in goods and which was espoused explicitly for services in a decision of the Panel on European Communities – Regime for the Importation, Sale and Distribution of Bananas. This panel stated that “to the extent that entities provide like service they are like service suppliers” (WTO cited in Krajewski 2002a:17, see also WTO 1999:99). In other words, if services are comparable then the differences between the service providers are of no importance. Such a definition with a single focus on the content of the service and on the mode of its delivery involves many ambiguities. For instance, is the delivery of energy produced by solar power comparable with the delivery of energy from nuclear power stations? Is the service delivered by a company that respects fundamental rights at work comparable to a company that violates them? Can the service provided by a mutual savings bank be equated with the one of a profit-oriented private bank, in spite of their very different objectives? Can a public university that provides a broad spectrum of courses be compared with a private supplier that only offers programs for which there is high demand and which, moreover, do not depend on high investment in research?

The panel on the EC-bananas regime can be taken as an indicator that the prevailing definition of GATS would answer these questions affirmatively. Many opponents and scholars have pointed out that its potentially far-reaching implications cannot be overestimated (see e.g. Zdouc 1999:333).

4.2 Progressive Liberalisation

Proponents of the GATS negotiation assert that, notwithstanding its broad scope, its flexible approach ensures the ability of each member state to tailor the liberalisation process according to their own needs and interests. The agreement features a series of provisions by which countries can, if and when they choose, exempt specific sectors from liberalisation and set conditions or limits on the nature and pace of any domestically determined liberalisation. The bargaining process is organised according to a request-offer principle. Up to a certain deadline member governments have to present their requests to other members; in the current round this was by 31 June 2002. In a second round, until 31 March 2003, member governments had to respond with their offers. Thereafter negotiations have started. This so-called bottom-up feature ensures, so proponents argue, that no individual government is forced to liberalise. It is of particular importance for less developed countries. While the framework for trade in goods, the GATT, provides the possibility for special treatment of developing countries, this option does not exist in the GATS agreement. Instead, developing countries can make use of this flexible “bottom-up process” in GATS. So proponents are technically correct when they point to this feature.

But trade unions criticise them for under-estimating the underlying dynamics of the Agreement (see Education International 2001, Sinclair/Grieshaber-Otto 2002:29). As stated in the introduction and spelled out in detail in Part IV of the agreement, GATS aims at achieving a progressively higher level of liberalisation of trade in services through multilateral negotiation. Any limitations of commitments are subject to demand for further liberalisation. The Negotiating Guidelines of March 2001 underscore this dynamic by stating that no sector shall be excluded *a priori* from the scope of negotiations (WTOb). The actual power relations among and within WTO members make it likely that the intended progressive liberalisation will take place.

4.3 Power Imbalances

Voting is based on the principal of ‘one member – one vote’, thus, in a formal sense, the WTO is more democratic than most other international economic organisations, where weighted voting is extensively used. Voting, however, has not yet taken place. Instead, decision-making in the WTO follows GATT practice and is based on negotiation and consensus. Nevertheless, the WTO is dominated by the large trading powers. The reasons are twofold. First, the markets of the large advanced industrial countries are considerably more attractive than those of small developing countries. Since the main currency in WTO bargaining is market access, large industrial countries are in a stronger position. A country’s influence in the WTO system is therefore largely determined by its share of world trade, its trade dependence and the absolute size of its market. Second, smaller developing countries lack the resources to be present at all bargaining sites and to hire top

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trade lawyers for the complex details of international trade law. Furthermore, developed countries, especially the so-called QUAD countries (USA, Canada, Japan and the EU), repeatedly have made key decisions in closed meetings (called 'green room' process), excluding other WTO nations (South Centre 2001).

In the current round the power imbalances are aggravated by the fact that developing countries have already liberalised considerable parts of their economies. These liberalisations outside of GATS were often part of the structural adjustment packages enforced by the International Monetary Fund and the World Bank. The flexible bottom-up approach of GATS now works to the disadvantage of developing countries (Jordan 1999). Thus, when it comes to the negotiation they can make few liberalisation offers in exchange for their requests. In other words, IMF and World Bank policies have further weakened the bargaining position of developing countries. The WTO tries to address this problem by establishing criteria for granting credit for autonomous liberalisation. Countries can seek recognition from their trading partners in the ongoing Doha Round talks for their prior liberalisation moves. However, the agreed-upon guidelines are voluntary. Thus, their application will become a matter of bilateral negotiations (see Pruzin 2003, WTO 2003).

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Within the powerful trading countries the secrecy in which the negotiations are enshrouded (see ICFTU 2003) excludes civil society groups from participation. While unions and non-governmental organisations have stayed on the margins, trade negotiators went out of their way to receive input from industry lobbyists. Lobbying for a multilateral services agreement began in the USA, when the companies who had joined forces in the Coalition of Services Industries (CSI) were able to put the services on the agenda of the Uruguay round. The European Commission was advised by the European Round Table of Industrialists (ERT) and UNICE, the European employers' union. At the beginning of 1999, the European Services Forum (ESF) was founded with the help of the EU Commission for the specific purpose of renegotiating the GATS. The consistency of US and European industry representatives' general demands in the service sector is conspicuous. The Transatlantic Business Dialogue (TABD) provides a platform where they can co-ordinate directly with one another (see Wesselius 2002, Fritz/Scherrer 2002a:90).

The Most-Favoured-Nation Treatment (MFN) rule of GATS requires that trade privileges given to one WTO member have to be extended to all the other members.

The Most-Favoured-Nation Treatment (MFN) rule of GATS promotes such alliances between foreign providers. The rule requires that trade privileges given to one WTO member have to be extended to all the other members. Thus, any advantage given to one provider will become an advantage for all. If a government intends to reverse commercialisation it would no longer face opposition from just one single foreign service provider but instead from a politically powerful bloc (see Wesselius 2002, Kwa 2003).

4.4 Lack of Assessment

A literature study commissioned by the Secretariat of the World Trade Organization on the economic impacts of liberalisation in trade in services gave on the one hand a very mixed picture of the impacts and, on the other, showed that research

on these impacts is still in its infancy (WTO 1998). In particular, the impacts on the economy as a whole are “very difficult to capture empirically” (WTO 1998:5).

Accordingly, most studies concentrate on the consequences of trade liberalisation and/or deregulation within the individual sectors. Liberalisation in the financial sector led in many countries to a lasting fall in the profits of the banking industry. The financial institutions affected by this frequently reacted with risky investment and lending strategies, which led to serious financial crises where banking supervision was insufficient. The crisis among US savings and loan banks shows that even in developed economies, banking supervision in the deregulation process can turn out to be insufficient (Woerz 1994; the same applies for Norway, see Llewellyn 1992). Moreover, contrary to original expectations the increased risk led to an increase in interest margins and consequently in the costs of financial inter-mediation. Together with the increased risk of macro-economic instability, the widened interest margins may explain why not all studies were able to report a positive relationship between financial market deregulation on the one hand and macro-economic indicators such as aggregate savings, investment and growth on the other (WTO 1998b:6). Moreover, a premature liberalisation of capital movements, as was clearly demonstrated by the Asian crisis (Dieter 1998), may intensify exchange volatility and trigger capital flight (WTO 1998b:6). A country such as Malaysia, which owing to its trade restrictions for financial services was found in a comparative study to have the highest interest margins in the banking system and therefore the greatest restrictions (Kalirajan et al. 1999), accordingly survived the Asian crisis relatively well (Dieter 1999).

For the telecommunications industry, the WTO literature study discovered a general consensus in respect of the extraordinary price reductions and fanning-out of the services offered, yet the impacts of technological innovations could not be clearly separated from the impacts of deregulation and opening the market for foreign providers (WTO 1998:7).

The impacts on *employees* are less positively assessed, including by proponents of further liberalisation of the provision of services. Typically, to safeguard the competitiveness of German services Dietrich Barth recommended a flexibilisation of the job market and reductions in wage and additional costs, taxes and levies. He justified this by pointing out that worldwide in the year 2000, owing to the opening of the markets of China, India and the countries of the former Soviet Union, substantially more gainfully employed persons on low and middle incomes will be integrated into the global economy than there were a decade previously (Barth 1998:126). The prominent foreign trade expert Gary Hufbauer gave an even sharper formulation of the impacts of further liberalisation. He prophesies: “A worker will earn what she produces – evaluated at a single world price” (Hufbauer/Warren 1999:16). Put plainly, this means that the wage for low-qualified workers in current high-wage countries will come into line with the wage of the large mass of low-qualified persons world-wide. However, no systematic assessment of the implications for labour conditions and access for all to basic services has been made so far that involves the relevant specialised agencies of the United Nations, including the *International Labour Organization*, as well as trade unions and other representative organisation (Global Unions/ETUC/WCL). In the eve of

In the eve of the Doha meeting many countries of the South have called for a suspension or at least a slowdown of the negotiations until an adequate assessment has been carried out.

the Doha meeting many countries of the South have called for a suspension or at least a slowdown of the negotiations until an adequate assessment has been carried out. This demand has not prevented the driving forces from pressing successfully for a new round.

4.5 Irreversibility

Even if the fears and concerns of trade unions prove justified, the commitments a country has already made cannot easily be nullified. Once a commitment is undertaken, a standstill requirement ensures that it cannot be revoked, even if there is a political majority in the country in favour of such a step. Any new government has to take over the commitments made by the previous one even if this was a dictatorship.

Commitments in the schedule can only be modified after three years have elapsed from the date when the commitment entered into force. In addition, the modifying Member has to offer compensation to the other Members. In other words, any withdrawal from liberalisation in one sector usually leads to the liberalisation of another sector or another mode of service supply. For example, if the government of New Zealand takes up the request of the New Zealand Council of Trade Unions (CTU 2003) to remove some existing commitments, in particular in relation to education and cultural services, then the government would have to compensate this withdrawal.

Foreign service providers fear that an emergency clause might lead to an expropriation of their subsidiaries.

The GATS agreement does not contain an emergency clause. It only stipulates that “[t]here shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination” (Article X). A working group with the task of setting up regulation and a procedure has yet to reach a consensus. Developing countries are very interested in such a clause, whereas developed countries tend to block any regulation going in this direction. According to the latter, the bottom-up feature provides enough flexibility to countries to avoid any risk for their economy. One reason for their reservation is closely linked to the commercial presence regulated in mode 3 of the GATS. Foreign service providers fear that an emergency clause might lead to an expropriation of their subsidiaries (Fritz/Scherrer 2002b:96).

4.6 Imperilled Public Services

In Article I:3(b) the Agreement states that all services are excluded from its scope when they are “supplied in the exercise of governmental authority”. The following paragraph 1:3(c) specifies this service as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.”

In reference to this paragraph, the defenders of the benefits of GATS emphasise that WTO negotiations are no threat to public services, as they are in fact excluded from the negotiations (see e.g. WTO 2002a). In opposition to this perception, critical analyses point to the ambiguity of the definition. Confusion about the interpretation of Article I:3(c) is even present inside the WTO. In the case of social services and hospital services, the WTO Secretariat itself doubted in a background paper that these fall under the exception of GATS Art. I:3. According to this WTO paper, in

most countries the hospitals sector consists of “government- and privately owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided” (WTO 1998:11). Thus it would be unrealistic to argue for application of Art. I:3. The WTO concludes: “In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation...” (ibid.). It can be seen from the minutes of a meeting of the Council for Trade in Services that during a discussion of this subject, the Members present spoke in favour of a narrow interpretation of Art. I:3 (WTO 1998a). According to this interpretation, non-domestic hospital services providers are to be granted full access to all state assistance that is otherwise granted only to hospital services providers that are public or acting on behalf of public authorities. In charging fees, providers of public health services are at risk of being interpreted as private providers and thus coming under the GATS rules (PSI/Waghorne 2000a: Annex 4). Responding to public criticism, the WTO Secretariat has recently reversed its stance and now states “it seems clear that the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as ‘governmental services’” (WTO 2001d: 124).¹

Markus Krajewski concludes, in an analysis of the legal framework, that the GATS implies a very narrow definition of the public service sector. It is not considered “special” compared to other services. Again, the notion of likeness of service comes in here. The likeness of the delivery makes the entities alike regardless of whether they are of public or private nature. This conception of public service departs from the definition of public service as a function of general interests, as common goods, a notion that underlies for instance the French public law doctrine. The WTO notion is based on an economic concept of public goods that means only services which cannot efficiently be provided through the market, because of their non-rival and non-excludable characteristics. Public services are therefore not defined by the nature of service or by the characteristics of the service supplier, but by the mode of delivery. Krajewski’s analysis supports the fears of trade unions and other critics that many public services will fall within the scope of the Agreement (see e.g. Global Unions/ETUC/WLC).

This risk is aggravated by recent state reforms, as critics point out (see Grieshaber-Otto/Sanger:45). Because of the already existing overburdening of the public system due to budget constraints, governments have started increasingly to “commercialise” public services to make them “profit-oriented”. Sometimes the same provider can provide service on a commercial and a non-commercial level. Hybrid forms of financing such as public-private partnership or private party funding have become increasingly common in recent years. Introducing elements of profitability and competitiveness into sectors previously operated as public non-profit monopolies deprives these services of their status as governmental services according to the GATS (Krajewski 2002).

In some countries governments have pushed these reforms further. Especially affected are developing countries. Under the structural adjustment programs that

The WTO definition of public services is based on an economic concept of public goods that means only services which cannot efficiently be provided through the market, because of their non-rival and non-excludable characteristics.

¹ On the unclear definition of governmental authority, see also Colas and Gottlieb 2001: 10-13.

accompany loans from the World Bank and the IMF, governments are urged to cut public expenditure so that many services have become commercialised and privatised.

In such a case the government is obliged to grant market access (Article XVI) and national treatment (Article XVII) in all the sectors that are already listed in the schedule for specific commitments.

Opponents fear that the Agreement leads to “cream skimming” by private entities that only compete with public entities in areas of high profit, while the provision of services to the poor or to remote areas would be left to the government.

The right of the government to regulate the provision of public service by limiting the number of providers, an important instrument in the education and health sector, will be endangered in such a situation (PSI/EI 1999). Furthermore, the provision of subsidies and possibly governmental procurement would be affected as they are supposed not to produce any distortive effects.² Governments would have to end subsidies or to provide them equally to all. When it comes to government procurement, private and public entities may compete with each other regardless of whether the private entities provide the same universal supply. Opponents fear that this leads to “cream skimming” by private entities that only compete with public entities in areas of high profit, while the provision of services to the poor or to remote areas would be left to the government (UNISON 2003). An overburdened public system is likely to be the consequence, and may result in further privatisation due to the financial constraints of the public budget. The prohibition of cross-subsidy due to its “distortive effect” may exacerbate the financial situation. The *Canadian Union of Postal Workers* points in this context to the lesson learnt from NAFTA, where *United Parcel Service of America (UPS)* filed a lawsuit against the cross-financing of Canada Post. UPS argued that this was unfair competition while *Canada Post* stressed the importance of cross-financing for serving remote areas (CUPW 2003).

Further privatisation of the public services may increase the cost through fragmentation of purchasing arrangements, an argument that UNISON stresses in the light of British experience.

All in all, the liberalisation of public services implies the risk of a decline in quality of public services and could increase disparities of access to essential social service, like health or education, between population segments (see e.g. PSI/EI 1999).

An instructive example for how the public sector can be protected from GATS disciplines provides the European Union’s schedules of specific commitments.³ It is furthermore a good example to show that such a solution is never permanent, as each Member State is asked to broaden its schedule of specific commitments in each round so that progressively more liberalisation can take place.

² The WTO considers subsidies, like dumping to be unfair competition. Article XV call upon the WTO members to “enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade such trade-distortive effects.”

³ All the EU Member States count as one WTO member.

5 The EU's "Horizontal" Exceptions for the Protection of Public Services

It was mentioned above that once private operators are active in a service segment alongside public operators, then this segment may not be excepted by appealing to the sovereignty clause of the GATS regulations. But so that public services nevertheless remain protected, the EU had listed a number of specifications and exceptions in its GATS country schedule:

- Restriction to privately financed services
- Broad and non-exhaustive definition of the public sector
- Unequal treatment of subsidiary companies from third-party countries
- Reserved right to subsidisation

Together, these exceptions result in secure protection of public services from the application of the general principles of the GATS. In the current round of negotiations, the EU is under pressure to give up these exceptions. In the following, we shall briefly outline the way in which these exceptions operate.

5.1 Restriction to Privately Financed Services

With the signing of the GATS treaty, the European Community and its Member States have made substantial commitments towards non-domestic educational service providers. To protect its large public education sector, however, the EU limited its commitments to *privately financed* educational services.

In the current round of negotiations, the USA and Japan, among others, are calling on the EU to abandon this restriction (Enders et al. 2003). Yet even now it provides only limited protection for public education, as it was not specified in more detail. It is currently unclear what level of private involvement there has to be for an education service to be considered a privately financed education service. This question is not academic, for one thing since to an increasing extent private sponsors are being won for the equipment of educational institutions and public educational institutions are expanding the range of fee-paying courses they offer, in particular business management courses. Theoretically, a purely private provider, referring to the GATS, could take legal action against such private but ultimately still in part publicly subsidised courses (Kelk/Worth 2002:31). Should the EU comply with the call to give up the limitation to privately financed education services, then the probability will increase that a study course of this type will be viewed as a subsidised and therefore unfair offer with respect to purely private foreign providers which violates the principle of equal national treatment. In this case, only the EU's horizontal exceptions would offer protection.

With the signing of the GATS treaty, the European Community and its Member States have made substantial commitments towards non-domestic educational service providers.

5.2 Broad and Non-exhaustive Definition of the Public Sector

The EU reserves the right to restrict market access in the public utilities sector. At the same time the EU paints a truly broad definition of public utilities.

The EU entered in the countries schedule under the “horizontal obligations” rubric that in all EU 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” (WTO 1994:2). In other words, the EU reserves the right to restrict market access in the public utilities sector. At the same time the EU paints a truly broad definition of public utilities. These exist, it says, in sectors “[...] such as related scientific and technical consulting services, [...] Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific scheduling is not practical” (WTO 1994:2, footnote 1, italics added). However, many public activities, such as teaching for example, are not explicitly included in this list of exceptions; but they are not explicitly excluded either. If, according to the wish of the United States, it came to a more precise specification of the services that are considered public utilities, then it would seem most reasonable to suppose that this definition will be restricted to the previous list of examples, with the result that teaching would fall out of the public utilities and into the GATS.

5.3 Unequal Treatment of Subsidiary Companies from Third-party Countries

The EU did still additionally reserve the right to exclude subsidiaries of companies from non-EU states that have not been established in accordance with the law of a Member State from the principle of national treatment. But also those subsidiaries formed in accordance with the law of a Member State but which have only their registered office in the territory of the Communities, can be treated less favorably “unless it can be shown that they possess an effective and continuous link with the economy of one of the Member States” (WTO 1994:5).

Consequently, it is possible to discriminate against such local branches for example in the allocation of licenses or in approvals. In order to prevent discrimination, businesses from outside the EU currently have to perform the expensive act of establishing a subsidiary according to the law of an EU Member State and provide proof that this subsidiary is economically active within Europe in the long term. Therefore in accordance with this, for example, a foreign hospital group would need to be already present in the EU with a subsidiary in order to avoid discrimination for an approval; yet without the prospect of approval, this foreign hospital group is hardly likely to want to establish a subsidiary.

Some countries, particularly the USA, are now asking the EU to remove restrictions for subsidiaries and representations of third-country companies. Should the EU comply with the requests of its trading partners, then the entry of foreign businesses into sectors such as the hospital sector, in which, to date, national public or private institutions have prevailed, would be greatly facilitated as they would obtain a legal entitlement to equal treatment, for example in the case of approval.

5.4 Reserved Right to Subsidisation

The EU ultimately refuses businesses and natural persons from third countries the right to national treatment in the case of subsidies (WTO 1994:5). In addition it is expressly emphasized that “the supply of a service, or its subsidisation, within the public sector is not in breach of this commitment” (WTO 1994:7). Consequently, education services can be supplied in the EU by the state despite GATS. It may well be that this carve-out can be circumvented by foreign suppliers setting up subsidiaries in accordance with the laws of a Member State. However, this has not been tested so far (Krajewski 2002b).

Now some countries, e.g. Brazil, are demanding the abandonment of the right to subsidization in mode of supply 3 (commercial presence) and 4 (presence of natural persons). Giving up the right to subsidization would have the sharpest of impacts on the education system.

If the reserved right to subsidization were deleted, then educational institutions from third countries that want to offer programs in the EU could describe the public support of universities as a violation of the GATS principle of national treatment and hence as improper. Their respective home country could then bring in the dispute settlement machinery against the EU. Even without a planned presence in the EU, proceedings of this kind could be instituted – for instance if a commercial offer in a third country aimed primarily at international students has a comparable but publicly financed counterpart in the EU. In other words, giving up the right to subsidization would have serious consequences for the financing of the still predominantly public university system in the EU.

If the right to subsidization ceases to exist, several options are open for creating GATS conformity. Firstly, state payments could be completely stopped. Secondly, all universities could be directly subsidized. The allocation of funds could take place via a tendering procedure and could be implemented in a non-discriminatory way. The option most truly consistent with GATS would be a reorganization of the financing of the university system from a subsidization of the educational facilities to a subsidization of students. These could then visit a university of their choice, which would then be managed either as a commercial enterprise or as a non-profit foundation (cf. Kelk/Worth 2002:29).

5.5 Additional Pressure on the EU's Exceptions

In the current round of negotiations, the EU will be under pressure to justify itself if it wishes to maintain these exceptions. Art. XV of the GATS agreement names subsidies as potential causes of distortion in trade in services and provides for the opening of negotiations to decide on the necessary multilateral disciplines. However, GATS prescribes no deadlines for these negotiations, with the result that although negotiations opened in March 1996, they have not yet led to any concrete results. Yet the possibility cannot be excluded that in the course of the extensive trade round now underway, agreements will be reached to limit state subsidy activity in the services sector.

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6. Proposals for a GATS Reform

Trade unions and other civil society groups are calling upon governments for an urgent reform of the WTO. They underscore the importance of addressing the free trade and investment regime as a whole, not by tackling its individual parts in isolation but by building a strategy that fundamentally challenges the regime and the corporate interests that lie behind it. In the following, the different reform proposals will be discussed. Together they outline what an alternative regulatory framework for international trade in services might look like.

6.1 Better Assessment

The request for a systematic assessment of the impact of liberalisation policies is at the forefront of all reform proposals.

In the light of the potential negative impact of the current GATS framework, trade unions are pushing urgently for a broad assessment that takes into account input from civil society (see e.g. EI 2001, UNI 2002). Their request for a systematic assessment of the impact of liberalisation policies is thus at the forefront of all reform proposals. It is argued that until a broad and systematic assessment has been carried out that involves the relevant specialised UN agencies as well as trade unions and other representative organisations, all new negotiations should be stopped (Global Unions/ETUC/WCL). New funding mechanisms should ensure the quality of the assessment and the independence of the investigating organisations from economically strong donor countries. One income resource could be a kind of Tobin Tax, or a global tax on the use of a global common good such as the seafloor used by trans-oceanic communication cables, to name but one example (see PSI/Engelberts 2001).

6.2 Improved Consultation Process

A second high priority reform proposal concerns transparency. Transparency is even for official trade delegations not guaranteed. Many discussions at the ministerial meetings have so far taken place informally, in the so-called “Green Room” where only a fraction of all WTO member states’ representatives have been invited to participate.⁴ In its assessment of the Doha Meeting in 2001, the ICFTU sees a slight improvement, at least when it comes to the participation of governments of developing countries. Despite more participation by developing countries, the final declaration from Doha showed no improvement compared to its earlier drafts. References to other intergovernmental organisations were omitted, with the exception of the Bretton Woods institutions (ICFTU 2002). The trade unions’ demand for a more democratic consultative process and improved participation by developing countries was not addressed at all in Doha.

Whereas business associations have been involved in the negotiation process from the beginning (see above), only very recently have some governments like the UK,

⁴ For the assessment of the decision making process at the Ministerial Meeting in Doha, see ICFTU 2002; for an analysis in more general terms, see South Centre 2001, especially p.9.

New Zealand and the European Commission started to broaden the consultation process. Yet, only a very short summary of the requests of the EU to 109 countries was made publicly available after the deadline for the official request round last summer (2002). Time and again, the EU and its Member States have refused to release the full list of requests.⁵

To improve consultation, Philip Jennings, the General Secretary of the UNI, has recommended in a letter to the affiliated organisations that they should refer to the WTO “Guidelines for Arrangements on Relations with Non-Governmental Organizations” (UNI/Jennings 2003). In these guidelines the WTO clearly recognise the responsibility of governments to take into account the different elements of public interest.⁶

The ILO provides another good framework. The ILO Consultation (Industrial and National Level) Recommendation No.113 calls for effective consultation and co-operation at the national level between public authorities and employers’ and workers’ organisations. Such a consultation and co-operation process should ensure, so the Recommendation, that competent authorities seeks the view, advice and assistance of employers’ and workers’ organisations in respect of such matters as the preparation and implementation of laws and regulations affecting their interests, and the elaboration and implementation of plans for economic and social development. The GATS involves undeniably such matters as described in this Recommendation.

The ILO Tripartite Consultation Convention No. 144 and Tripartite Consultation Recommendation No. 152 could serve as further points of reference. Convention No.144 requires governments to ensure effective consultation of employers’ and workers’ representatives on measures to give effect to ratified ILO Conventions. GATS and measures taken under GATT can affect, directly or indirectly, the implementation of Conventions such as for instance Convention No. 87 and 98 concerning the right to organise and bargain collectively. Recommendation No. 152 encourages the competent authorities to also use the required tripartite procedures to hold consultations on other matters, including actions to be taken in respect of resolutions and conclusions adopted by the International Labour Conference and other meetings convened by the ILO. Many of these resolutions deal with matters related to the liberalisation of services.⁷

Concerning the WTO itself, trade unions call for an consultation process that allows specialised UN agencies like the ILO, the World Health Organization (WHO), the International Telecommunication Union (ITU), the Universal Postal Union (UPU) and the UN Educational, Scientific and Cultural Organization (UNESCO), as well as trade unions and other representative organisations, to participate in all WTO activities and procedures, including its disputes settlement procedure. The executive board of the *Union Network International (UNI)* has called for the establishment

Concerning the WTO itself, trade unions call for a consultation process that allows specialised UN agencies as well as trade unions and other representative organisations, to participate in all WTO activities and procedures, including its disputes settlement procedure.

5 For more information see <http://www.gatwatch.org/requests-offers.html>.

6 The guidelines state: “Closer consultation and co-operation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.”

7 For instance the resolution of tripartism and social dialogue adopted by the 2002 session of the ILC.

of a parliamentary assembly at the WTO, as well as for an economic and social committee composed of trade unions and other civil society groups (UNI 2001a, see also ICFTU 2003).

6.3 Emergency Safeguards

Trade unions and many civil society groups demand more regulations that allow non-compliance with WTO rules. More exception clauses have to be formulated. Modification or withdrawal of market-opening commitments should be made more flexible, especially for lower-income countries (UNI 2002). The WTO principles need to respect the protection of human rights, of environment, health and safety and of the right for a sustainable development that decreases the disparities within countries and between countries (EI 2003).

6.4 Core Labour Standards and Environmental Issues

In analogy to the already existing Committee on Trade and Environment, the ICFTU calls for the establishment of a formal permanent working group that is directly accountable to the WTO General Council. This working group should draw up proposals and recommendations on how to integrate practically enforceable core labour standards into the procedures, mechanisms and regulations of the WTO.⁸

So far this demand has met stiff resistance. At Doha trade union representatives had to lobby hard in order to prevent the final declaration to fall behind the one at Singapore in 1996. In the end they succeeded in having a reference included to the work of the International Labour Organisation (ILO) (ICFTU 2002).

The ILO set up a tripartite *World Commission on the Social Dimension of Globalisation* in February 2002.⁹ At a meeting with representatives of the ILO World Commission in 2002 the ICFTU proposed to the Commission to “recommend that the ILO systematically examine the employment and social implications of decisions and policies advocated by the IFIs [International Finance Institutes] and WTO” (ILO 2003).

The recommendation has been made not to give the authority to identify violation of labour standards to the WTO but rather to the ILO.

In line with this proposal, the recommendation has been made not to give the authority to identify violation of labour standards to the WTO but rather to the ILO. The ILO could use its own instruments to identify the violation. After the identification of such a violation the country concerned must be given a certain time to overcome them. If there is no improvement within this period of time then there should be – as ultimo ratio – the possibility to sanction the country within the WTO sanction mechanism. Such a linkage to the WTO would improve the ability of the ILO to enforce the compliance with its conventions (Friedrich-Ebert-Stiftung/Schweisshelm 2000).

⁸ The five core labour standards of the ILO are Protection of the freedom of association (No. 87), Right to collective bargaining (No. 98), Ban on discrimination at the place of work (No. 100 and No 111), Abolition of child labour, in particular in its worst form (No. 138, 182), Ban on bonded labour (No. 29 and No 105).

The *Confederation of German Trade Unions* (Deutsche Gewerkschaftsbund – DGB), like many others, wants to see a strong linkage between core labour standards and public procurement. This is of very topical importance, as the EU has given a clear signal in its offer that it will liberalise further government procurements. In such a case liberalisation should only take place if and when the Labour Clauses (Public Contracts) Convention, the Protection of Wages Convention, and the Right to Organize and Collective Bargaining Convention are observed. Furthermore, any negotiations with regard to “Mode 4” (i.e. temporary cross-border movement of natural persons) should ensure the protection of migrant workers against all discrimination as stipulated in the ILO Migrant Workers Convention and the UN International Convention on the Protection of the Rights of all Migrant Workers and Member of their Families (UNI 2001a). In relation to „commercial presence“ (mode 3), unions ask for guarantees that foreign companies have to respect core labour standards (e.g. DGB 2001).

Furthermore, many unions want the *Multilateral Environmental Agreements* (MEAs) to have precedence to trade rules (see e.g. VENRO/DGB/ATTAC, ICFTU 2001).

6.5 Strengthening the Regulatory Powers of Governments

The most far-reaching proposal has been made by the campaign “Stop the GATS Attack”, which is widely supported by unions. The campaign calls for the removal of Article VI on domestic regulation and the associated Working Party. Other proposals call at least for the non-application of this rule in the area of public interest.

WTO member states have to ensure the ability of governments to enact domestic regulations, legislation and other measures to safeguard public interests. *Education International*, for instance, emphasises the importance of the national government’s right to regulate the provision of education, such as culturally appropriate content for courses and qualifications, the licensing of schools and universities, and the supply of tertiary places in particular discipline areas and the number of corresponding schools or faculties where viability is a consideration. The health area is considered as another vital area where the regulatory competencies of governments have to be maintained and ensured.

Some trade unions, like the New Zealand Council of Trade Unions, call upon their governments to ensure the protection of the production and distribution of cultural works as well as the right to special treatment for minority groups (see also UNI 2002).

In regard to the “Mode 3” of the GATS on “commercial presence”, trade unions call for respect for the provisions of the ILO Tripartite Declaration on Multinational Enterprises and Social Policies, and of the OECD Guidelines for Multinational Enterprises, where multinational enterprises should take fully into account the established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate (UNI/Jennings 2003).

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Many trade unions consequently reject any attempt to integrate public procurement into the new negotiation round.

Government procurement is perceived as an important instrument for state regulations. Many trade unions consequently reject any attempt to integrate public procurement into the new negotiation round – unsuccessfully, as the current offers of the EU shows. Any discussion on further liberalisation in this area has to be open to all interested groups, and linked with social and environmental aspects and the protection of workers employed on government contracts, including migrant workers. In addition, the right of public authorities to engage in ethical purchasing policies has to be guaranteed (ICFTU 2001).

The removal or weakening of the “lock-in” principle that makes any commitment basically irreversible is another important issue in the reform platform. The modification or withdrawal of market-opening commitments should be handled more flexibly, so that a government can react in case of severe adverse socio-economic effects on the country and its population (Global Unions/ETUC/WCL). One way could be through strengthening the emergency safeguard clause (UNI 2002). The Austrian Chamber of Workers and Employees calls for such a clause in case of an imminent high unemployment rate or in case of dumping. Such a clause should include an early warning system for employment trends (Austrian Federal Chamber of Labour/Dessewffy 1999).

All the proposals stress that the safeguarding of the regulatory power of governments is paramount for developing countries. Special and differential rights for third world countries must be recognised, expanded and operationalised in the world trading system (ICFTU 2003). An important aspect will be to ensure that the welfare system in the sending country and the receiving country is not put at risk (see e.g. Global Unions/ETUC/WCL, DGB 2001).

Concerning the “commercial presence” regulated as Mode 3, adequate provision for developing countries’ interests has to be ensured that includes technology transfer, omitting any provisions that give investors the right to challenge public actions including tax and regulatory measures. Such measures should exclude investor-to-state disputes provisions but include company taxation and allow the imposition of performance requirement, especially as regards labour market provisions (see e.g. Global Unions/ETUC/WCL).

A protection clause should allow developing countries time and space for their own national companies before the latter are fully exposed to competition from large multinational companies.

Additionally, a protection clause should allow developing countries time and space for their own national companies before the latter are fully exposed to competition from large multinational companies, so a broadly supported demand. An important way of ensuring the regulatory power of governments is to exclude the public services from GATS, a demand that is widely shared.

6.6 Excluding Public Services

An ironclad government service exemption should thus ensure that health, education, energy distribution, water and other basic human services must not fall under the scope of GATS. Furthermore, the right of countries to increase the public sector role in their service sectors without facing a WTO dispute has to be guaranteed (see e.g. Global Unions/ETUC/WCL).

In Focus Magazine, the publication of *Public Service International* Markus Krajewski presents a couple of options to carve out some if not all public services from the application of GATS (Krajewski 2002a). In a first option, WTO members can design the regulatory regimes of their public services in such a way that these services are neither supplied on a commercial basis nor in competition with one or more suppliers. In order to set up such a regime, all the current attempts to commercialise and commodify public services would have to be stopped. In the light of the ongoing state reforms described in this paper earlier, the success of such a strategy is not very likely. A second solution could be the scheduling of limitations, as they are possible through the bottom-up feature. Many governments go for this option. But as we have seen in the last section with the EU as an example, such limitations run the risk of being challenged by other WTO members. Unions do not have much faith therefore in the permanency of such a solution. They support the third option that Krajewski proposes. This is the request that WTO members may collectively take steps to narrow the scope of GATS by creating additional treaty instruments or by changing the agreement. The title “shrink or sink” of the broadly supported campaign is a direct allusion to this option. One way to narrow the scope could be, proposes Krajewski, through the inclusion of an amendment to the Agreement itself or of a separate interpretative understanding. An amendment could eliminate Article I:3(c), and clarify Article I:3(b) to explicitly state that it is up to the individual WTO member to decide whether a service is supplied in the exercise of governmental authority. A new Article I:3(b) could then read:

(...)“services’ includes any service in any sector except services supplied in the exercise of governmental authority as determined by the national laws and regulations of each Member.” (ibid.)

However, Krajewski considers this approach rather unrealistic, as the scope of GATS would differ among members. Instead of homogenisation, such a solution would enhance heterogeneity. Strong resistance from all the forces interested in further liberalisation has to be expected in such a case. As an alternative approach, a specification of the meaning “on a commercial basis” and “in competition” would have a better chance of success. Members could realise this narrower option by adding another sub-paragraph (d) to Article I:3, which could read:

“(d) ‘a service supplied on a commercial basis’ means any service supplied in exchange for a market price (a price covering the actual costs of supplying the service) and ‘a service supplied in competition with one or more service suppliers’ means any service supplied under the same conditions, especially with respect to the fulfilment of a universal supply obligation, as the competitors.” (ibid.)

Such an Article would ensure furthermore that no provider would risk discrimination because of its universal supply obligation or its obligation to fulfil certain standards. “Cream skimming” by not fulfilling a universal supply obligation or by lowering the standards would be prevented by such a formulation.

Nevertheless, since the negotiation of new agreements or changes in current agreements faces many obstacles and might take a long time, it is not very likely that

this option will quickly deliver the desired results. In the light of the difficulties of such an undertaking, Krajewski suggests that the Ministerial Conference or the General Council of the WTO should adopt such an interpretation based on a recommendation by the Council for Trade in Services. It could have the same or a similar wording as the suggested sub-paragraph above. The advantage of such an approach would be that it may be easier and would have the same binding effect for WTO dispute settlement procedures.

In case all the other options meet too much resistance, a final alternative could be that WTO members resort to a non-binding decision of the Council on Trade in Services or the General Council. Since it would not amount to an authoritative interpretation, this decision would not be legally binding and WTO tribunals would not be required to adopt the approach. However, it is unlikely in Krajewski's view that in a dispute the relevant bodies would ignore such a statement, since both the Appellate Body and panels have proven to be receptive to the collective will of the WTO members.

7

New Items in the Negotiations

Trade unions agree on the need for multilateral investment rules as they see currently an international regime emerging that is based on bilateral and regional investment agreements. The statement of the ICFTU on the Agenda for the 5th Ministerial Conference of the WTO, released on behalf of the Global Union, the ETUC and the WCL, criticise this bilateralism for favouring disproportionately investors, entrenching their rights with no countervailing binding mechanisms that call on their responsibilities. They are concerned about the domestic deregulation and liberalisation leading to an increasing number of export processing zones that exempt foreign investors from compliance with labour and environmental protection. Unions see the potentiality of multilateral investment rules to avoid such destructive competition for scarce foreign direct investment. Such a multilateral framework on investment, however, should govern foreign direct investments only and exclude financial flows and portfolio investment. Such investment rules must facilitate sustainable development and the promotion and protection of social policies, through binding and enforceable investor obligations that respect core labour standards. Furthermore it must respect the right of government to regulate in all areas of public interest including investment, and the value of public services and state ownership. This right has to be guaranteed especially for developing countries taking into account their special needs.

To sum up, all statements of Trade Unions are calling for an urgent reform of the WTO including the GATS. Any further negotiations have to ensure that the protection of human rights, of the environment, health and safety, as well as the right to sustainable development is given priority. Full access to the agricultural market of industrialised countries must be provided to developing countries (ICFTU 2001). To ensure a faire international trade system that takes on board the situation of developing countries, a reform has to go beyond WTO regulation. The initiative for debt relief of the Highly Indebted Poor Countries (HIPC) has to be improved (VENRO/DGB/ATTAC). Trade unions call furthermore for substantial increase in development assistance as well as for a reform of the IMF/World Bank economic adjustment policies (ICFTU 2003).

All statements of Trade Unions are calling for an urgent reform of the WTO including the GATS. Any further negotiations have to ensure that the protection of human rights, of the environment, health and safety, as well as the right to sustainable development is given priority.

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9 Appendix

TRADE UNION¹ STATEMENT ON THE AGENDA FOR THE 5TH MINISTERIAL CONFERENCE OF THE WORLD TRADE ORGANISATION (WTO)

(Cancún, 10-14 September 2003)

Introduction

1. Hopes that the 4th WTO Ministerial Conference in Doha had set the agenda for a genuine Development Round are being disappointed as one deadline after another is missed, against a context of slowing economic growth world-wide. All the while, the impact of China's WTO accession on other developing countries, in terms of continual pressure to reduce core labour standards² and, all too often, to increase misery and exploitation (particularly of women workers) often in export processing zones, is continuing to worsen. The rights to food security and to adequate health care in developing countries are increasingly far from being realised, particularly for the world's poorest and again with the worst impact on women.
2. If the current WTO negotiations are to produce an outcome that could benefit working people, particularly in developing countries, the broken promises from Doha must be resolved and developing countries' concerns dealt with first, before discussion gets underway on the rest of the Doha agenda. WTO members must recognize that trade is only one of the elements in the three pillars of sustainable development endorsed at the World Summit on Sustainable Development in 2002. Debt relief, democracy, environmental protection, poverty eradication and decent employment (including the respect of fundamental workers' rights) must simultaneously be achieved as part of a wider, far-reaching agenda to achieve development and higher living standards for all people, in accordance with the objectives outlined in the preamble of the WTO Agreement. In addition, WTO agreements must not undermine the rights of democratic governments to conduct their own education, social welfare and public investment policies.

1 This statement has been endorsed by the GLOBAL UNIONS GROUP – including the International Confederation of Free Trade Unions (ICFTU), the Global Union Federations (GUFs) and the Trade Union Advisory Committee (TUAC) to the OECD; – the WORLD CONFEDERATION OF LABOUR (WCL); – and the EUROPEAN TRADE UNION CONFEDERATION (ETUC). The Global Union Federations comprise UNI, IFBWW, IUF, IMF, PSI, EI, ITGLWF, IFJ, ITF and ICEM.

2 Core labour standards are fundamental human rights for all workers, irrespective of countries' level of development, that cover freedom of association and the right to collective bargaining; the elimination of discrimination in respect of employment and occupation; the elimination of all forms of forced or compulsory labour; and the effective abolition of child labour, including its worst forms. Minimum wages have never been part of the proposal to protect core labour standards at the WTO.

Democracy, Transparency, Consultation and Reform of the WTO

3. The WTO needs urgently to be reformed and made more transparent and democratic, in order to redress the power imbalances evident in recent WTO Ministerial Conferences and to achieve coherence and consistency with the goals agreed through the UN system, as enshrined in the Universal Declaration of Human Rights and other multilaterally agreed instruments such as the ILO Declaration on Fundamental Principles and Rights at Work. The weight of the UN and its specialized agencies, including the ILO, needs to be increased relative to that of the WTO. A closer link and coordination between the WTO and other international institutions, including the ILO, with reciprocal observer status, must be agreed before or at the 5th WTO Ministerial Conference.
4. WTO negotiations must progress with due regard to the capacities of smaller and poorer countries, and developing country WTO members must enhance their cooperation and coordination. Increased transparency and financial assistance are needed to ensure that all WTO members (particularly the least developed) are able to take part fully in the current negotiations as well as all WTO activities and procedures. Formal commitments to provide such assistance must be made at latest at the 5th WTO Ministerial Conference. The internal negotiation processes of the WTO must be fair, transparent and predictable so as to ensure the effective participation of all its members.
5. The WTO must also be opened up to outside participation and to relevant social issues. A WTO Parliamentary Assembly is needed, to provide direct contact with elected representatives. A formal consultative process should be established to ensure that trade unions, non-governmental organisations and other representative elements of civil society can present their views to WTO committees and discuss issues of mutual concern with trade ministers, and with the WTO General Council, as well as at national level. Environmental and social concerns must be incorporated fully throughout WTO mechanisms and structures, and the scope of the Trade Policy Review Mechanism (TPRM) expanded to include relevant environmental, gender and social concerns, including the right of all to food security and respect for core labour standards, with the full involvement of the ILO. WTO members should already begin to include such concerns in the reports they submit to the TPRM meetings of the WTO.
6. In view of its unprecedented powers, the dispute settlement procedure must be opened up for public information and involvement. In relevant cases, such as those with health, labour and environmental implications, the WTO must involve the UN agencies competent in the areas concerned. Trade unions and other civil society groups concerned by any dispute settlement process should be able to participate directly in the procedures with a right to submit *amicus curiae* briefs. The experts judging any disputes case must not merely be trade specialists but must include people with varied backgrounds representing labour, environment and development organisations. There should be a swift public release of the findings and conclusions of disputes settlement procedures.

Advancing Development Priorities

7. The missed deadlines from Doha are compromising the credibility of the multilateral trading system. A major effort to boost the sustainable development of developing countries is needed in every area of the multilateral system, including greatly enhanced debt relief, a substantial increase in development assistance (including technical assistance and capacity building on trade issues), and fundamental reform of IMF/World Bank economic adjustment policies.
8. In the WTO negotiations, urgent agreement is needed on a range of issues where developing countries require action, as follows:
 - A decision in the TRIPS discussions to define health problems broadly enough for all developing countries to be able to achieve access to low-cost medicines in case of health need;
 - Decisions on special and differential treatment to enable developing countries to have increased flexibility in their implementation and interpretation of the various WTO agreements when favourable to their economic and social development, and so that the Uruguay Round implementation deadlines are extended for all developing countries on a multilateral basis;
 - Evaluation of non-tariff barriers to developing country exports to ensure they are reasonable requirements for consumer and environmental protection, with the involvement of the specialized UN agencies as well as trade unions and other civil society groups concerned, and provision of technical assistance so developing countries can attain such standards;
 - Provision of international funding to support employment adjustment assistance, especially if jobs are lost as a result of trade liberalisation;
 - Progress in the industrial tariffs negotiations to provide improved market access for developing countries (addressing tariff peaks and tariff escalation in their areas of interest), particularly for least developed countries, and continued commitment by the industrialised countries to their own implementation requirements under the Uruguay Round, parallel with progress on respect for core labour standards so that workers in developing countries benefit from improved market access.

Making Progress on Workers' Rights at the WTO

9. It is a priority to protect the fundamental rights of workers against unscrupulous governments or companies which seek to gain an unfair advantage in international trade through the violation of core labour standards. Furthermore, respect of core labour standards is crucial to achieving sustainable, equitable, democratic economic development.
10. Before or at the 5th Cancún, therefore, the following measures need to be taken:
 - All WTO members must renew and demonstrate their commitment to uphold core labour standards;
 - A first-ever meeting of Trade and Labour Ministers must be organised, with the participation of trade unions and employers' organizations;
 - WTO members must agree that UN treaties have primacy over trade rules, and must therefore update the WTO agreements (including GATT Article

XX and GATS Article XIV) to incorporate human rights standards including the core labour standards;

- To enable a full examination of the relationship between trade, employment and core labour standards, the WTO together with the full and equal participation of the ILO, must establish a formal structure to address trade and core labour standards. Such a body should also address wider traderelated social issues, such as the impact of trade policies on women, and the provision of adjustment assistance for workers displaced by trade. Clearly, such discussions must not result in any arbitrary or unjustified discrimination;
- As noted in para. 5 above, core labour standards should be included in WTO trade policy reviews;
- Agreement that the WTO General Council will give serious consideration to the recommendations, once they are published, of the ILO World Commission on the Social Dimensions of Globalisation;
- A clarifying statement is needed to the effect that the weakening of internationally-recognised core labour standards in order to increase exports, as in export processing zones (EPZs), is an illegitimate trade-distorting export incentive that is not permissible under WTO rules.

Safeguarding Services

11. Public services and other services of general interest reflect democratically-determined public policy objectives, and it is essential that these not be undermined by private sector competition under WTO disciplines. Governments need to preserve full responsibility and accountability in the area of such services.

12. The Cancún Ministerial should adopt the following measures:

- Building on recent statements by WTO members like the European Union, the 5th WTO Conference should amend the terms of the GATS agreement to exclude formally public services (above all, education, health and essential public utilities) including at sub-national levels of government, and socially beneficial service sector activities from all further GATS negotiations;
- A timetable and deadline should be established for completion, in conformity with Article XIX of the GATS, of a full assessment of trade in services in overall terms and on a sectoral basis, which should be conducted before the completion of the current negotiating round;
- To protect effectively the ability of governments to regulate and to enact domestic regulatory measures (in accordance with the preamble of the GATS) without possibility of legal challenge, GATS Article VI.4 should be deleted or revised and a clarifying statement adopted that social and environmental concerns have primacy over the principle of ‘free trade’ and that such regulations will not be subject to any ‘necessity test’ through the WTO dispute settlement mechanism;
- Attempts to limit regulations (even when completely non-discriminatory) involving qualifications, standards, and licensing requirements, as is discussed in the GATS Working Party on Domestic Regulation, pose a serious threat to government regulation and it is essential that the Cancún Ministerial eliminate the principle of “no more burdensome than necessary”, such that government regulations cannot be subject to any potential challenge by the GATS negotiations;

- Article XXI of the GATS agreement should be amended to include an explicit clause to enable governments to withdraw or diminish their GATS commitments so that they can improve their public services without any risk of challenge under WTO rules (so preventing foreign service suppliers from using the WTO as a tool to maintain market access);
- Article I.3 (b) of GATS should be clarified to make it absolutely clear that ‘the exercise of governmental authority’ allows, without threat of legal challenge, WTO members to exclude competition from public services and services of general interest;
- Regarding “Mode 3” of the GATS on ‘commercial presence’ (i.e. investment), GATS negotiations and GATS commitments should incorporate the factors indicated in the section on investment below;
- With regard to “Mode 4” (i.e. temporary cross-border movement of natural persons), GATS negotiations and commitments must ensure: observance of core labour standards, national labour law (incorporating those standards) and existing collective agreements by all parties, with regard to all workers concerned; protection of migrant workers against all forms of discrimination, and of the remittance of their contributions to social security and insurance schemes; and the full involvement of the ILO;
- In media, the GATS negotiations and GATS commitments must not jeopardise domestic measures to protect the cultural diversity and cultural identity of WTO member countries;
- Desirable regulations that are necessary to ensure the continued availability of quality retail trade services and support smaller companies that would be unable to compete with large enterprises in a deregulated environment, must not be dismantled through the GATS negotiations;
- Negotiations in sectors such as post and telecommunications must not jeopardise the provision of universal services at uniform and affordable prices;
- the Cancún Ministerial should take a decision to end the conditions of secrecy under which the GATS negotiations have been taking place, with publication of the details of the access “requests” and “offers” under negotiation.

Investment at the WTO

13. Discussions are on the agenda for Cancún that some governments hope will lead to the opening of WTO negotiations to create a multilateral framework on investment. The status quo concerning foreign direct investment (FDI) is a barrier to sustainable development. An international regime is emerging based on bilateral and regional investment agreements that disproportionately favour investors, entrenching their rights with no countervailing binding mechanism governing their responsibilities. Meanwhile, domestic economic deregulation and liberalisation has led to the explosive growth of export processing zones that exempt foreign investors from compliance with labour and environmental protection, and often offer tax breaks or regulatory loopholes. Multilateral investment rules could in principle help governments avoid engaging in such destructive competition for scarce FDI.
14. The international union movement therefore agrees on the need for multilateral investment rules, that would govern only foreign direct investment, and which would promote, not hinder, sustainable development, in conjunction with the

implementation of revisions to the IMF Articles of Agreement to bring order and stability to international capital markets and short-term capital flows. Such investment rules must be built around the promotion and protection of social policies, through binding and enforceable investor obligations covering core labour standards and observance of the provisions of the ILO Tripartite Declaration on Multinational Enterprises and Social Policies, and the OECD Guidelines for Multinational Enterprises, and environmental norms, as well as commitments not to lower domestic labour standards or violate core labour standards in order to attract investment. Any multilateral investment regime must be compatible with the right of governments to regulate in all areas of public interest including investment, and must respect the value of public services and state ownership. Governments must have the leeway to implement legitimate domestically-based economic development strategies, especially to promote decent employment and strong communities, so that they can support domestic industries and investment, and encourage the emergence of new and infant industries. Investment agreements should exclude provisions on expropriation, or National Treatment provisions (whether pre – or post-establishment) that limit the scope to pursue local, regional and national economic and social development strategies, in particular social priorities. Disputes must be solved only through transparent government-to-government procedures that promote the full and active participation of the social partners, and wider civil society groups.

15. Set against these criteria, the current proposals tabled at the WTO fall far short. The international union movement will review its position should new proposals emerge in favour of our vision of a multilateral investment regime. However, as things stand, we cannot support Trade Ministers at Cancún giving a green light to the commencement of negotiations on investment at the WTO. Trade and Competition Policy
16. The global union movement is extremely concerned by the vast increase in mergers and acquisitions taking place worldwide, frequently under a definition of foreign investment flows, which stand to further increase the concentration of capital at global level. A multilateral negotiation to monitor international mergers (with particular regard to employment, working conditions and respect for core labour standards) and to increase control over them would be welcome, as would increased regulation of hard-core cartels and restrictive business practices of multinational companies (particularly with regard to the trade in primary commodities that is frequently concentrated among a handful of companies).
17. However, any WTO negotiation on trade and competition policy must allow developing countries to continue to apply different treatment to domestic companies (both state monopolies and private companies) as far as market share is concerned, and must allow developing country WTO members to preserve the ability to decide whether or not to legislate a competition policy. Any negotiation must not affect the right of governments to regulate or restrict economic competition, nor include any provision for investor-to-state disputes mechanisms.
18. In view of the above considerations, and in the light of current proposals, we do not believe that the current discussions of competition policy at the WTO are on the right track. While there is a case for international co-operation on competition

policy and a need to prevent market abuses by multinational companies, the case has not been made for negotiating a competition policy agreement at the WTO, with its focus on trade liberalisation.

Government Procurement

19. Negotiations on transparency in government procurement have a positive role to play in eliminating corruption. Such negotiations must cover the protection of workers employed on government contracts, including migrant workers, on the basis of the relevant international standards such as the core labour standards as well as ILO Convention No. 94 on Labour Clauses (Public Contracts), the aim of which is to ensure that acceptable labour standards are observed in public contracts.
20. Negotiations should also commence on remedying the flaws in the existing Government Procurement Agreement (GPA). Specifically, the ban in the GPA on the use of “non-economic” criteria should be removed, in order to authorize public authorities to include development, ethical, social, regional and local objectives in their purchasing policies. In addition the GPA must include reference to the application of labour standards when workers are employed on government contracts. There must be no consideration of expansion of the GPA on a multilateral basis until such problems have been addressed fully.

Trade Facilitation

21. The objectives of the trade facilitation debate on minimising unnecessary customs procedures and speeding up movement of goods are worthy of support. At the same time, investing in modern customs equipment and information technology stands to be extremely costly for developing countries. The use of WTO procedures which would leave a choice between paying those costs or facing penalties for non-compliance would be wholly inappropriate in this area. Furthermore, WTO principles such as “least trade restrictive measures” are inappropriate in the context of trade facilitation, which is an issue linked intrinsically to safety and security in the cross-border transit of goods. Attention is needed to ensure that the existing competences of UN specialised agencies such as the IMO and the ICAO, which deal with trade facilitation under the same roof as the regulation of safety and security, are not undermined by WTO negotiations.
22. Given the above, it would be more appropriate for WTO measures to promote trade facilitation to remain of a non-enforceable nature. Large-scale technical assistance should be provided to help developing countries upgrade their trade facilities, rather than negotiations which would introduce WTO disciplines into this complex and costly area. Discussions should instead continue in the WTO working group on trade facilitation.

Sustainable Development at the WTO

23. Sustainable development needs to be incorporated effectively into every aspect of WTO work. This could be facilitated by the following specific measures:
- Agreement on large-scale assistance for developing countries to improve their environmental standards;
 - Achieving a clarification in the negotiations on Multilateral Environmental Agreements (MEAs) that MEAs, such as the Biodiversity Protocol, take precedence over WTO rules;
 - The implementation of sustainability impact assessments (SIAs) at a multilateral as well as national level, covering both environmental and developmental sustainability and social concerns including core labour standards and the effect of trade on women;
 - Strengthening of the precautionary principle to ensure that consumers' or workers' health and safety can under no circumstances be threatened by WTO rulings;
 - The reorientation of harmful fisheries subsidies to those areas which would promote sustainable and responsible fisheries practices, address the social aspects of restructuring and improve the life and working conditions of fishers;
 - Clarification that eco-labelling schemes such as forestry certification should not be subject to challenge at the WTO.

Agriculture

24. The present levels of agricultural subsidies in many industrialised countries impose heavy costs, often failing to target subsidies on the poorest farmers and boosting the incomes of large wealthy agro-businesses instead. Furthermore, the subsidisation of agricultural exports has artificially depressed prices in many developing countries, leading to the destruction of farms, plantations and rural employment.
25. Therefore, the trade union movement proposes:
- the elimination of all forms of agricultural export subsidies;
 - the reduction and reorientation of other agricultural subsidies towards sound rural development through the eradication of rural poverty, the improvement of employment conditions and the promotion of animal welfare and ecological sustainability;
 - increased stable and predictable market access for developing countries to industrialised country agricultural markets;
 - strong rights for special and differential treatment concerning developing countries so that they have the requisite flexibility to enhance domestic agricultural production, in particular for domestic consumption, poverty eradication, land reform and food security, and to take other measures as necessary to improve the livelihood of farmers, particularly low-income and resource-poor farmers;
 - provision of technical assistance to weaker developing countries to ensure their agricultural production for domestic consumption as well as exports can benefit.

Conclusions

26. The Cancún Ministerial finds the WTO at a watershed. The failure so far to meet many commitments in the Doha Round is creating a crisis of trust between the WTO's industrialised and developing country members. At the same time, the WTO's credibility and legitimacy among the general public, including the trade union movement, continue to be widely questioned. The global union movement calls on WTO members to take decisive actions at the Cancún Ministerial and in its preparatory period, in order to reform the WTO to fulfil its commitments to developing countries, to address fundamental social and labour priorities and to achieve a fair world trading system that can provide a balance between the strong and the weak in the globalisation process, help lead to an expansion in world trade, and promote better living standards in both the developing and the industrialised countries.

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