



Dialogue on
Globalization

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The General Agreement on Trade in Services (GATS)

A Background Note



Dialogue on Globalization

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Preface

The liberalization of trade in goods has been promoted in the GATT over the past 50 years; it is seen as one of the major contributors to economic growth and the relief of poverty. Growth, however, in this period was not uniformly shared and many developing countries remained marginalized. For quite some time, “services” were regarded as not tradable and considered genuine domestic activities. When “trade in services” appeared for the first time on the multilateral agenda in 1982, many developing countries displayed little enthusiasm, as the notion that services were non-tradable still lingered. In the meantime, it became more and more obvious, that the overall economic development is largely connected with the growth of the service sectors: Services are an important input to all other production operations and determinant for the level of competitiveness. Higher developed countries have substantially larger service sectors and many studies project that developing countries stand to gain most from liberalization of trade in services. Services currently account for over 60% of global production and employment, but they represent no more than 20% of total trade.

The General Agreement in Trade in Services (GATS) came into force in January 1995 as result of negotiations during the Uruguay Round. The treaty negotiated between member state governments was incorporated into the newly established World Trade Organization (WTO). It is essentially inspired by the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): Creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic growth through guaranteed policy bindings; and promoting trade and development through progressive liberalization. Agriculture and services are the only areas where negotiations on further trade liberalization are mandated in the WTO Agreements themselves. The talks started on schedule in 2000, but with little progress until broader negotiations were launched in November 2001 at the 4th Ministerial Conference in Doha: By 30 June 2002, members were required to submit initial bilateral market access requests; by 31 March 2003 they must respond to requests with initial offers and by 1 January 2005, the mandated service negotiations are to conclude as part of the single undertaking agreed in Doha. The 5th Ministerial Conference in Cancun/Mexico (10-14 September) provides an opportunity for a “mid-term review” and the negotiation of a number of “outstanding issues”.

While the WTO secretariat and many members have hailed the agreement as “the most important single development in the multilateral trading systems since the GATT” and expect positive impacts on growth and equity by further “progressive liberalization”, many civil society groups and trade unions have been critical about the agreement and its possible future development in ongoing negotiations. They have voiced concern about the potential impact of the GATS on local, national and regional policies aimed at economic and social development, environmental pro-

tection and cultural objectives. At the centre of these concerns are questions about the extent to which GATS rule may affect the supply of “public services”, demand “privatization” and encourage “foreign domination” of essential services. There is concern that (1) GATS threatens the principle of universal access to basic services; (2) it threatens to reduce governments’ ability to regulate; (3) the negotiation process is heavily influenced by corporate interests but lacks parliamentary and public scrutiny; and (4) that the negotiation time-table is extremely tight and that there has not been an adequate impact assessment.

This study aims at providing basic background information to this debate. This paper is written from a position as “neutral” as possible, but based on a clear commitment to maintain and develop the multilateral trading system and on the assumption that further rule based liberalization is conducive to development and a broader and more equitable participation of all partners in the global market. It will certainly not be able to answer all questions and concerns, but it should contribute to a substantial and fact-based dialogue and discussion between different “stake holders”. The study maintains that liberalisation under GATS is actually not about “de-regulation” but about “regulation” and “emphasises governments’ right to regulate and preserve their domestic policy space”. “In filling the regulatory void at the international level revealed by the effect of globalization, the GATS provides rules to facilitate liberalisation of trade in services on the basis of the principles of non-discrimination underpinning the multilateral trading system. In doing so, it provides guidance and support in the reform efforts of WTO Members, in particular developing Members.” Observers of the WTO negotiations in Geneva get the impression that the GATS negotiations continue comparatively smoothly in contrast to the rather conflict-ridden negotiations on the Agreement on Agriculture: It is a continuous negotiation process that allows governments to decide what they want and to block what seems unacceptable; and in particular developing countries seem to make use of this opportunity.

As an additional contribution to the dialogue on GATS and the discussion of policy options a further study on “International Trade Unions’ Positions on GATS – A Synopsis and Analysis” has been commissioned from Professor Christoph Scherrer (University Kassel, Germany) and will be available soon.

Geneva, April 2003

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1 Executive Summary

The General Agreement on Trade in Services (GATS) was a major achievement of the Uruguay Round of Multilateral Trade Negotiations (1986-94). It entered into force with the creation of the World Trade Organisation (WTO) in January 1995. Services were thought to be non-tradable until privatisation and deregulation of public utilities from telecommunications to water supply on the wings of the information technology revolution in the last two decades of the 20th Century released a flood of service activities that rapidly supplanted trade in goods as a major source of GNP growth and welfare gains. The main goal to be achieved by the Uruguay Round was to set up a basic legal framework for liberalising trade in services and to secure initial commitments from the participants in order to lock in the countries' existing degree of openness and non-discriminatory policies, laws and regulations.

With the launch of the WTO's first negotiating round in Doha, Qatar, in November of 2001, the GATS negotiations gathered momentum. However, should the poor negotiating climate in other subject areas of the Doha Development Agenda prevail, notably in agriculture, there is little hope that the services negotiations can sustain that momentum and yield comprehensive requests and offers for liberalisation of services by the 5th WTO Ministerial Conference to be held in Cancun, Mexico, 10-14 September of this year.

The intangible nature of services, the arrival of electronic transport and communications and the fast integration of markets brought the real obstacles to trade in services into focus. They consist of government intervention, discriminatory and non-discriminatory laws and lack of transparency in domestic regulations and administrative procedures and requirements. In filling the regulatory void at the international level revealed by the effects of globalisation, the GATS provides rules to facilitate liberalisation of trade in services on the basis of the principles of non-discrimination underpinning the multilateral trading system. In doing so, it provides guidance and support in the reform efforts of WTO Members, in particular developing Members.

Its focus on domestic legislation has earned the GATS sharp criticism for its intrusive reach into sovereign policymaking and for encouraging privatisation and deregulation to the detriment of developing countries. Some NGOs perceive the GATS as a threat to democracy and to the ability of governments to provide essential social services, such as health, education and the supply of basic utilities, such as water and energy. The GATS as it currently stands, and countries' experience with scheduling specific commitments so far, does not lend itself to such an interpretation, but instead emphasises governments' right to regulate and preserve their domestic policy space.

There is a close link between liberalisation and regulation. Open markets encourage competition, efficiency and innovation among producers and service suppliers, and offer consumers a wider choice at better prices. Regulation can be designed to address market failure, including monopolies and social objectives, and improve the welfare of society, but private interests can also influence the decisions of policymakers on regulatory matters. Multilateral agreements like the GATS can be instrumental in supporting domestic regulatory reform by providing benchmarks and guidelines and preventing regulatory capture, while reducing the government's costs of designing and negotiating regulatory matters. The wave of privatisation and deregulation of public utility monopolies from the mid-1980s to the mid-1990s occurred to a large extent in countries where the regulatory framework was lacking or in need of reform. This accounts in part for some of the failed privatisation efforts; although statistically, the successes outweigh the failures.

The objectives of the GATS and the obligations of WTO Members are as follows: to achieve progressively higher levels of liberalisation; to promote the interests of all Members on a mutually advantageous basis; to maintain an overall balance of rights and obligations while respecting national policy objectives; to introduce new regulations on the supply of services; and to increase the participation of developing countries in world trade, according priority to the problems faced by least developed Members.

Trade in services is defined as the supply of a service through four modes, i.e., cross border supply (electronic transfer of diskettes); consumption abroad (tourism), commercial presence (investment) and presence of natural persons (manpower mobility). The definition of services explicitly excludes those supplied in the exercise of governmental authority, unless they are provided on a commercial basis. Members are not obliged to make commitments in public services sectors or indeed any sector of their choice. The built-in guarantee for retaining control over domestic policy objectives is the bottom-up approach of making specific market access commitments and imposing limitations as needed on that market access. In addition, Members can avail themselves of a number of general safeguard provisions to protect social and security interests.

Members are subject to general obligations and disciplines, some of which apply to all services sectors, such as MFN treatment and transparency provisions, some that apply only to scheduled commitments, and some that apply to specific negotiated commitments unique to each WTO Member. Specific commitments are negotiated market openings on the basis of services categories detailed in official classification lists (e.g., business services-professional services/medical and dental services).

These specific commitments, together with the modes of supply, and any limitations on market access or national treatment must be recorded in a Member's national schedule, which constitutes an integral part of the GATS, and makes those commitments legally binding. Specific commitments on market access can be restricted by limiting: the number of service suppliers (through licences and quotas); the total value of service transactions (foreign bank assets limited to fixed percentage of domestic assets); the number of operations or quantity of output (restricting

foreign broadcasting time); the number of natural persons employed (as a percentage of total foreign labour); foreign capital participation (equity ceilings); and specific types of legal entity or joint venture.

National treatment must be accorded to all foreign services and suppliers in sectors where specific commitments are scheduled by providing equally favourable conditions of competition to those enjoyed by a Member's own like service suppliers. Members can place conditions or limitations on such national treatment provided they are inscribed in their schedule, together with any limitation on the mode of supply. MFN treatment is a general or horizontal provision requiring the most favourable treatment actually granted in all sectors, whether subject of a commitment or not, to be extended to all Members. MFN exemptions permitted at the outset for a limited period of time must be renegotiated.

A special feature of the GATS are its development-oriented provisions, both in substantive terms and in the technical aspects of scheduling, giving developing countries a lot of leeway to pace their liberalisation of trade in services. Unlike trade in goods, trade in services brings many more ancillary benefits. Liberalisation can improve the efficiency of domestic service suppliers through the interaction of service activities, for example, in the computer, environmental, health and tourism sectors. It also attracts capital, investment and technology. Developing countries tend to gain from this process.

The Doha Development Agenda in services is dominated at the moment by the initial request and offer phase, which is scheduled to finish by the end of March 2003. Pressure will mount on individual Members to make more commitments, or remove some restrictions on market access. Agreement was also reached in early March on modalities for the treatment of autonomous liberalisation, an issue close to the heart of developing countries. Work is progressing under provisions covering domestic regulation to elaborate disciplines for qualification and licensing requirements, including transparency and the necessity test.

None of the three mandated rulemaking negotiations (emergency safeguard measures, government procurement and trade-distorting subsidies) have produced agreement on scope, concept or substance; all have missed multiple deadlines. In-depth study and discussion on the emergency safeguard have revealed an extremely complex issue. Developing countries must consider carefully the usefulness of such a highly protectionist instrument, where the cure is certain to kill the patient.

In conclusion, the GATS does not oblige Members to privatise any public sector activity or service, nor does it prevent Members to regulate in their own interest to attain national policy goals. Conversely, developing countries stand to lose from insisting on a different set of rules than those designed to keep up the pressure for liberalisation and the furthering of economic growth. The WTO's 5th Ministerial Conference in Cancun in September will provide an opportunity for evaluating the quality and breadth of requests and offers for services liberalisation and the need for further rule making in certain areas of mandated rule making.

2. Introduction

The multilateral trading system was created in 1948 by a group of 23 industrialised and developing countries under the leadership of the US and the UK to liberalise trade in goods and to pre-empt a recurrence of inter-war protectionism. Under the General Agreement on Tariffs and Trade (GATT), eight successive rounds of negotiations substantially lowered tariffs and quantitative restrictions on trade in goods. It was not until the last of these, the Uruguay Round of Multilateral Trade Negotiations conducted between 1986 and 1994, that trade in services was brought under multilateral rules and disciplines through the General Agreement on Trade in Services (GATS). Negotiations on services are again under way in the World Trade Organization (WTO), which replaced the GATT in 1995. The first round of negotiations under WTO auspices was launched in Doha, Qatar, in November 2001. The mid-term review is scheduled to take place during the WTO's 5th Ministerial Conference in September of this year in Cancun, Mexico.

Controversial from the beginning, the GATS continues to attract criticism for being the instrument of multinationals to deregulate essential public services.

Controversial from the beginning, the GATS continues to attract criticism for being the instrument of multinationals to deregulate essential public services (notably in health, education, and water management and distribution) and imposing liberalisation on developing countries, de facto depriving them of their ability to govern. Much of this criticism stems from insufficient knowledge of the functioning of the multilateral trading system, in general, and of the nature and objectives of the GATS, in particular. Often such criticism is triggered by spectacular failures of private projects in basic needs sectors caused by factors that have nothing to do with the WTO or the GATS. Evaluation and assessments reveal more mundane factors to be at fault, such as lack of transparency in awarding contracts, half-hearted regulatory initiatives or lack of appropriate domestic regulation, non-enforcement of existing laws, public and private sector cronyism and misappropriation of funds, to name a few. Other times, special interest groups willy-nilly pick a scapegoat for the problems besetting the global economy. Multilateral trade liberalisation has been achieved over the past 54 years through a deliberate, plodding elaboration of rules by governments who believe in the benefits of open economies. But it is not an end in itself or the key to solving any country's problems. It is an important means to promote growth and development, but must be framed by transparent rules and procedures according to which producers and traders can operate efficiently. The GATS is largely about that.

This paper (a) provides a historical backdrop; (b) discusses the underlying principles and structure of the GATS; (c) highlights main problems in rule-making and further liberalisation of different services sectors; (d) sheds light on recurrent criticism of the regulatory implications of the GATS, and (e) looks at the role of GATS in the ongoing Doha Development Agenda (DDA), which was launched at the 4th WTO Ministerial Conference in November 2001.

3. Pinning Down the Invisibles

Trade in services appeared for the first time on the multilateral agenda in a 1982 GATT Ministerial Decision¹ which contained a modest mandate for governments to study the role of services in their economy as an early preparatory exercise to considering the inclusion of trade in services in a future trade round – in the event, the Uruguay Round four years later. Developing countries displayed little enthusiasm at that time, as the notion that services were non-tradable lingered, and insisted on the availability of such studies from a ‘representative’ number of GATT contracting parties before any further discussions could proceed.² Behind their resistance lay concerns that ring familiar today: an agenda overloaded with unresolved traditional trade issues, lack of regulatory and institutional capacity; and unwillingness to make more concessions in general. By the mid-1980s there were unmistakable indicators that trade in services, traditionally captured as “invisibles” in balance of payments statistics, was rapidly supplanting trade in goods as a major source of GNP growth and welfare gains for both developed and developing countries. This was a wakeup call for many developing countries to start considering the implications of trade in services.

In the run-up to the Uruguay Round, services, together with intellectual property rights or the human knowledge embodied in products and processes, and trade-related investment measures, were called “the new issues.” Trade in services was among the contentious North-South issues throughout the negotiations.³ Then, as is the case with today’s “new” issues stemming from the 1996 Ministerial Declaration in Singapore,⁴ many governments did not want to submit trade in services to multilateral rules and disciplines. Dissatisfaction with the inherent imbalance in the multilateral trading system was rife among developing countries. Agriculture and textiles, excluded from the purview of the GATT at the time, were heavily subsidised and protected by industrialised countries. The argument then, as now, was: why take on new obligations and commitments when existing ones prove too burdensome for developing countries, and industrialised countries do not apply the existing rules in a fair and equitable manner? Conversely, the industrialised countries had grown weary of long-standing protectionist tariffs and import-substitution policies by developing countries amidst mounting demands for yet more special and differential treatment.⁵

Dissatisfaction with the inherent imbalance in the multilateral trading system was rife among developing countries.

1 The US Congress had granted negotiating authority for the liberalisation of trade in goods and services for the Tokyo Round (1973-79) under US Trade Act of 1974, but the issue was not pursued until then, except in bilateral agreements. See Trading Free, Low, P. 1993.

2 This issue continues to haunt the services negotiations to this day, as the assessment of trade in services found its way into the GATS Article XIX as a prerequisite for each new round of services negotiations.

3 The most contentious one was trade-related intellectual property rights (TRIPS).

4 They are trade and competition, trade and investment, trade facilitation and transparency in government procurement. At the Cancun WTO Ministerial Conference in September, decisions relating to the launch of negotiations on these issues need to be taken.

5 One of the important results of the Tokyo Round, which ended in 1979, had been the legal exemption from the MFN principle to authorize governments to extend preferential treatment to developing countries through the General System of Preferences (GSP). The Decision on Differential and more Favourable Treatment, Reciprocity and Further Participation of Developing Countries, also known as the “Enabling Clause” of the Tokyo Round introduced the concept of graduation, by which developing countries were expected to open their markets to imports over time in order to promote their integration into the multilateral trading system.

Some of the main principles underlying the GATT could not simply be transposed to trade in services.

An important factor behind developing countries' reluctance was the novelty and complexity of the subject matter, conceptually and in practical terms. The emerging characteristics of trade in services underlined the importance of means and modes of supply; the sectoral nature of services; domestic regulation and its impact on market access; and anti-competitive conditions faced by service suppliers. It was becoming apparent that the GATT might be unsuitable as an instrument for liberalisation of services trade, adding another unsettling prospect to the exercise. Given the intangible nature of services, it was and still is difficult to quantify the actual flow of international trade in services. Services do not lend themselves easily to control at the border through tariffs, which under GATT is a legitimate way to afford some protection to the domestic economy. Therefore, some of the main principles underlying the GATT could not simply be transposed to trade in services.

The real barriers to trade in services manifest themselves in most cases in the restrictive and discriminatory nature of domestic laws, and non-transparent administrative measures and procedures foreign suppliers face in the importing market. The root of concerns over the loss of sovereignty in policy making lies there, even though since 1948 the GATT has clearly applied to domestic measures unlike the GATS, the GATT was not known to many and regulation concerning tariffs and other charges on goods.⁶ But, and was able to go quietly about its business of reducing tariff and non-tariff barriers quite effectively. Globalisation had not made the headlines and civil society was absent. Interestingly, during the Uruguay Round, loss of sovereignty was not so much feared by developing countries as by developed ones, most of all the US. As a result, the WTO has built-in protection of national sovereignty as negotiators took great care to circumscribe the WTO's decision-making powers by placing emphasis on the consensus rule, as opposed to some weighted voting mechanism.⁷

The break up of inefficient state monopolies unleashed a flood of service activities that had languished in the sheltered obscurity of inefficient bureaucracies.

Ultimately, the GATS clarified the conceptual differences between trade in services and trade in goods and, in doing so, shed light on the new economic activities emanating from the information technology revolution and the deregulation of public sector enterprises in the wake of the oil crises of the 1970s, high inflation, fiscal deficits and heavy debt burdens. This was occurring in developed and developing countries. The break up of inefficient state monopolies unleashed a flood of service activities that had languished in the sheltered obscurity of inefficient bureaucracies.

⁶ GATT, Article III – National Treatment on Internal Taxation and Regulation. See “The Legal Texts,” GATT1994, p.490.

⁷ See JH Jackson, *The Uruguay Round and National Sovereignty* in “The Uruguay Round and Beyond – Essays in Honour of Arthur Dunkel. Springer Verlag, 1998, p 293.

4. The Uruguay Round (UR) 1986-94

The main objective during the UR negotiations was to provide the multilateral legal framework for the liberalisation of services trade and to secure initial commitments from the participants so as to preserve the degree of openness and non-discriminatory policies, laws and regulations in place at the time, also known as “standstill.” That was considered to be important, as trade in information-based business services had been relatively free of restrictive regulations. Standstill was to be achieved through legally binding existing domestic laws and regulations affecting trade services in the form of commitments listed in national schedules of each participant. Most negotiators and experts never expected the first round to yield a massive dismantling of restrictive domestic regulations knowing that substantial liberalisation called for major reforms of domestic regulatory laws and institutions.⁸ Attention focused, few countries recognised the obsolete nature of some long-standing regulations. Others had instituted autonomous domestic reforms in the course of the 1980s, and agreed to incorporate them as commitments in their national schedules. If developing countries heretofore had viewed the services sector as an employer of surplus labour, they were coming to the realisation that inefficiency and lack of productivity in the services sector stymied economic growth. Still, the paucity of standstill commitments and hence the limited coverage of services sectors provided by the more advanced developing countries caused some consternation in view of the fact that many of these countries had unilaterally liberalised their policies in order to attract foreign domestic investment (FDI) and improve economic performance. The rulemaking aspect of the UR negotiations was notably more successful than the actual opening up of services sectors to trade.

Towards the end of the Uruguay Round, participants had to grapple with the problem of how to incorporate GATS (and other new subjects like TRIPS) into the GATT, and how to ensure its multilateral nature. Creating a new organisation, the WTO, which subsumed the GATT and incorporated GATS as Annex 1B to the WTO Agreement, and opting for a tailor-made, piecemeal approach both to rule making and liberalisation was the answer. It left WTO Members much leeway as to which sectors they liberalised and the extent of market access they granted to their trading partners. For that reason, the GATS can be seen as the first truly development-friendly treaty, and a harbinger of fundamental changes in the way the multilateral trading system would evolve. In the words of the Indian representative to the GATT, B.K. Zutshi: “It is useful to recall here that in the preparatory process for the launch of the Round, inclusion of services for multilateral rule-making proved a highly contentious and controversial issue between the North and the South, but by the time of the close of the negotiations, developing countries were a lot more enthusiastic about the services agreement than even the United

The main objective during the UR negotiations was to provide the multilateral legal framework for the liberalisation of services trade

The rulemaking aspect of the UR negotiations was notably more successful than the actual opening up of services sectors to trade.

⁸ See Geza Feketekuty, *Bringing Services into the Multilateral Trading System*, in “The Uruguay Round and Beyond. Essays in Honour of Arthur Dunkel”, Springer Verlag, 1998, p 79.

States and the European Union.”⁹ This warrants a pause for thought in times when developing countries are painted as hapless victims of trade negotiations at the mercy of developed countries’ pressure tactics.

The GATS entered into force in January 1995 together with other WTO agreements and decisions. It was a timely, albeit skeletal, agreement. It laid down some essential rules and disciplines for trade in services, and in the process introduced other trade-related issues, such as investment and competition, and the quasi-continuous process of negotiations. It also contains mandates for further work on rule making and broadening the sectoral coverage of the GATS no later than five years from its date of effectiveness.

The GATS mandate for conducting progressive liberalisation through successive rounds of negotiations, starting in 2000, is embodied in Article XIX, in what is known as the built-in agenda. Other GATS mandates include three reviews by the Council for Trade in Services: MFN exemptions, the Air Transport Services Annex and the Understanding on Accounting Rates to be undertaken by the year 2000. In addition, the built-in agenda mandates the continuation of work on the development of multilateral rules under the current provisions of the GATS covering domestic regulation, safeguards, government procurement and subsidies.

Extended negotiations

Negotiations on financial services, basic telecommunications, maritime transport and movement of natural persons could not be completed mainly because of insufficient specific commitments, particularly from developing countries.

Negotiations on financial services, basic telecommunications (covering telecommunications transport networks and services), maritime transport and movement of natural persons could not be completed by the end of the Uruguay Round, mainly because of insufficient specific commitments, particularly from developing countries. The US and other governments maintained broad exemptions on most-favoured nation (MFN) treatment based on reciprocity. Consequently, the second annex to the GATS on financial services and the Decision on Financial Services¹⁰ at the end of the UR round provided for extended negotiations in that sector. The Decision on Negotiations on Basic Telecommunications set up a negotiating group, which was to conclude negotiations by April 1996. Similar arrangements were foreseen for maritime transport services and movement of natural persons. However, even the extended negotiation mandates had to be renewed, as not enough commitments were forthcoming. Financial services were an exception; upon entry of the 5th Protocol to the GATS in March 1999, 104 Members had made commitments, of which five for the first time, compared to 76 governments having scheduled commitments by the end of the Uruguay Round. The US, Thailand and India dropped their broad MFN exemptions and Hungary, Philippines, Mauritius and Venezuela reduced the scope of theirs.¹¹ Since the UR, changes to schedules

⁹ Presentation by Mr. Zutshi on the occasion of the European Services Forum, Workshop 4: Temporary mobility of Natural Persons, Brussels 27th November 2000, Hotel Sheraton Airport. From 1989 to 1993, Mr. Zutshi was Ambassador and Permanent Representative to the GATT, and Chair of the General Council in 1992.

¹⁰ See The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts, pp 358 and 459, respectively.

¹¹ By that time, negotiations on basic telecommunication services had also been completed, as well as two Information Technology Agreements (ITA I and II in 1996 and 1999, respectively), providing for the reduction of most tariffs to zero on products vital for the telecommunications and information transfer (printed circuit boards, special production equipment for IT, semi-conductors).

due to the extended negotiations, including withdrawals of commitments authorized by GATS instruments, have been incorporated into Members' schedules through Protocols or notifications.

GATS 2000

In preparation of the mandated round of services negotiations, the Council for Trade in Services (CTS) started work in 1998 on an information exchange covering some 15 sectors and on assessment of trade in services. Hopes were high that this work would feed into the new launch of a comprehensive round at the third WTO Ministerial Conference in Seattle in 1999. However, the emergence of developing countries' problems to implement the Uruguay Round results,¹² causing *inter alia* the dismal failure of the Seattle Conference, left the services negotiations as a freestanding exercise. Consequently, although services negotiations were officially launched in February 2000 (together with agriculture negotiations), important deadlines had slipped and crucial momentum had been lost. One of the prerequisites for the built-in agenda in services was fulfilled only at the end of March 2001, with the completion of the "Guidelines and Procedures for the Negotiations on Trade and Services," while the modalities for the treatment of autonomous liberalisation were agreed on 6 March 2003, some three years past the due date. A third legal obligation was to draw up modalities for the special treatment of least developed countries in view of their difficulties of accepting negotiated specific commitments – an exercise still to be completed. The Doha Ministerial Declaration breathed new life into the services negotiations by reaffirming the March 2001 Guidelines and Procedures for the Negotiations and setting end of June 2002 as the date for submission of initial requests for specific commitments and end of March 2003 for initial offers.

¹² The WTO agreements accorded five and seven years as transitional periods, respectively, for developing and least developed countries to bring their foreign trade regimes in alignment with WTO requirements.

5. Important Rules and Disciplines of the GATS¹³

The GATS is the first legal multilateral framework to help countries liberalise their services sectors.

The GATS is the first legal multilateral framework to help countries liberalise their services sectors. It was conceived as a basis for Members to start removing barriers to trade in services and to achieve progressively higher levels of liberalisation. Structurally, the GATS comprises six parts and eight annexes.

The *chapeau* of the GATS emphasises that the early achievement of progressively higher levels of liberalisation should promote the interests of all Members on a mutually advantageous basis while maintaining an overall balance of rights and obligations and respecting national policy objectives. In particular, it recognises the right of Members to regulate, and to introduce new regulations on the supply of services to achieve national policy objectives. Developing countries are encouraged to exercise this right in view of the varying degree of completeness of services regulations they may have in place.

Scope and definition

The obligation for member governments to ensure the uniform application of the trade measures throughout their territory is a longstanding and central obligation under the GATT.

Part I covers the scope and definition. The GATS applies to measures by Members affecting trade in services (Article I). Such measures comprise any domestic laws, regulations, and administrative decisions including those taken by central, regional and local governments or delegated to other bodies or authorities. The obligation for member governments to ensure the uniform application of the trade measures throughout their territory is also a longstanding and central obligation under the GATT. For trade rules to be meaningful and to provide the intended security and reliability for producers, investors and exporters, it is essential that sub-national bodies not subvert the rules. This is why a state or local government must apply a domestic trade measure in the same spirit as the central government.

The GATS does not define services per se but focuses on the supply aspects of a service product, which includes the production, distribution, marketing, sale and delivery. The service may be an international telephone call, an architectural design delivered via the internet, construction or medical workers operating abroad, a company producing services in another Member's territory, a study on how to improve waste management, or the provision of environmental clean up services through contractors.

The definition of services explicitly excludes those services "supplied in the exercise of governmental authority" provided that such services are not rendered on a

¹³ See The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts, Annex 1B – General Agreement on Trade in Services. GATT Secretariat, Geneva, Switzerland, June 1994, pp 325-364.

commercial basis or in competition with other suppliers. In other words, Members are not obliged to make commitments on governmental services in the social, health, education and other basics needs sectors. Indeed, governments are at liberty to hold back on the liberalisation of any service sector or activity of their choice.

Members are not obliged to make commitments on governmental services in the social, health, education and other basics needs sectors.

Trade in services is defined as the *supply of a service* through four modes as follows:

- *Mode 1* – across borders from one Member country to another, e.g., through international transport, telecommunications or mail, and services embodied in exported goods, such as diskettes or drawings. The service supplier and the service consumer are in different Member territories. This mode is also referred to as cross-border supply.
- *Mode 2* – in the territory of one Member country to the consumer of another. Here the important difference is that the service is delivered outside the territory of the Member making the commitment. The consumer or his property move, e.g., tourism or ship repairs, respectively. This is called consumption abroad.
- *Mode 3* – from one Member country through a commercial establishment (in the form of juridical persons, legal entity, corporations, partnerships, joint ventures, branch offices etc.) in the territory of another. This is known as commercial presence, or the investment mode.
- *Mode 4* – from one Member country through the presence of a natural person in the territory of another. Here the natural persons can be the suppliers themselves and their employees. This mode is often referred to as the temporary movement of natural persons. An annex to the GATS on this subject clarifies that mode 4 does not apply to measures affecting natural persons seeking employment, immigration, permanent residency or citizenship.

Mode 1 encapsulates the technology element of trade in services and the lingering controversy within the WTO over where lies the borderline between a service and a good, especially in the context of e-commerce. A market access commitment undertaken under this mode when the transfer of capital is an intrinsic feature (financial services e.g.), must allow for such capital movements as well. Mode 2 is potentially of great interest to developing countries in the area of tourism, for example, provided that the anticompetitive behaviour displayed by monopolistic tour operators in developed countries is regulated, and related services including aviation and maritime transport services are liberalised.

Modes 3 and 4 represent developed and developing country interests, respectively. Both involve the movement of persons. Under Mode 3, capital transfers related to the establishment must be permitted. Foreign domestic investment in developing countries has resulted in the overwhelming commercial presence (in the nature of businesses, professional establishments, branches, representative offices) of developed countries there. Hence, the latter use Mode 3 to facilitate intra-corporate personnel movements (transferees) into developing countries, involving mainly top management and specialist staff. Conversely, developing countries seeking to supply lower level services (in construction) and increasingly specialised services (in the computer technology and information management sectors) find that

temporary movement of their natural persons is severely restricted under Mode 4, and most often conditioned upon the existence of commercial presence, i.e., Mode 3.

Even extended negotiations after the Uruguay Round on the movement of natural persons yielded paltry results – six Members made four commitments for selected sectors or professions. These were confined to general commitments in respect of intra-corporate transferees at senior levels and business visitors to facilitate establishment under Mode 3. The usefulness of the commitments in terms of market access is further limited by highly restrictive and non-transparent labour and immigration laws and regulations, as expressed in limitations on market access and national treatment, including economic needs tests, management needs tests or prior employment requirements. Modes 3 and 4 have until now been of relatively little use for developing countries. Improvements in this area should be a major target of developing country requests. Existing horizontal commitments on the duration of stay of business executives under Mode 3 and largely unbound Mode 4 commitments do not meet the sectoral needs of developing countries.

One of the overriding concerns of developed countries was that GATS would open the floodgates of immigration bringing a lot of skilled and unskilled foreign labour into their markets.

One of the overriding concerns of developed countries was that Mode 4 would open the floodgates of immigration bringing a lot of skilled and unskilled foreign labour into their markets. These fears have been largely allayed in the past couple of years, and the concept of a specially expedited GATS permit or visa has gained much ground and acceptance among WTO Members. Developing countries have always rejected the supposition that Mode 4 was a hidden conduit for immigration. Their interest lies not in promoting their own brain drain but in promoting their service industry and increasing their share in the international trade in services. Regulatory and procedural transparency is indispensable for facilitating the movement of temporary personnel or service suppliers and for making meaningful sector-specific commitments relevant to both modes. As mandated by provisions for domestic regulation, disciplines are being elaborated concerning qualification requirements and verification procedures for professional competence as well as recognition of educational requirements, aim to address these problems.

General obligations and disciplines

Part II contains the general obligations and disciplines that Members have agreed to meet or to elaborate in the future. These fall into two main categories:

- (1) provisions that apply to all services sectors, such as MFN treatment and transparency obligations, i.e. general provisions, and those that apply only to scheduled commitments, such as provisions regulating international transfers and payments (Article XI); and
- (2) provisions that apply to specific negotiated commitments that are unique to each WTO Member.

Apart from the staple obligation contained in trade treaties of the most-favoured nation principle, by which Members must not discriminate amongst each other, the transparency obligations in Article III are of great importance. Inter alia, they call for prompt publication and notification of measures affecting services and the establishment of enquiry points to provide specific information to Members upon request.

There are detailed provisions on how to increase the participation of developing countries in services trade through affording easy access to technology, albeit on a commercial basis, distribution channels and information networks, and liberalising market access in sectors and modes of supply of interest to them. Developed country Members had to set up contact points by 1997 to provide relevant information on commercial and technical aspects of trade in services, professional qualifications (registration, recognition and obtaining of), and the availability of services technology. In all these areas special consideration is to be given to least developed countries (Article IV).

Articles VI and VII deal with domestic regulation and recognition, respectively. In sectors where specific commitments are made, measures affecting trade in services must be administered reasonably, objectively, and impartially. Provisions extend to judicial review, and qualification and licensing requirements, as well as procedures on recognition and verification of qualifications of service suppliers through harmonisation or international standards agreements. Disciplines for these provisions are to ensure that they not constitute unnecessary barriers to trade.

General safeguard provisions allow Members to suspend obligations to deal with domestic financial problems and social prerogatives: Articles XI and XII stipulate that any restrictions on current or capital account of a Member's balance of payments must be in conformity with specific commitments undertaken, non-discriminatory and temporary, and consistent with the Articles of Agreement of the IMF. Articles XIV and XIVbis provide for the protection of public morals, human, animal or plant life or health, the privacy of individuals as well as domestic and international security interests.

Provisions for further negotiations on rulemaking relate to emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV). Article XIII says any measures applying to the procurement by government agencies of government services are not subject to MFN treatment, scheduling specific commitments and national treatment provided that they are not resold or used for commercial ends. Negotiations were scheduled to start in 1997, and a work programme was finally adopted in July 2002. The scope of the mandate is still under discussion. Some countries want to restrict the scope of negotiations to transparency issues, as is the case for proposed negotiations of the plurilateral agreement on government procurement applying to goods (one of the Singapore subjects). Government procurement represents over one half of activity in some service sectors. International tendering would bring efficiency, technology and transparency to the tendering process, and lower prices. This would constitute substantial savings for governments and sharply reduce the scope for corruption and faulty projects.

Similarly, a work programme was adopted on subsidies in 2002; the gathering of information on existing services subsidies is under way. It mainly seeks to address trade distorting services subsidies and implications for developing countries.

Other important provisions enjoin monopolies and exclusive service suppliers from engaging in anti-competitive and discriminatory practices (Articles VIII and IX).

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Importantly, a Member may revert to granting monopoly rights on the supply of a service covered by its specific commitments, subject to notifying the Services Council.

Specific commitments

Specific commitments are negotiated market openings on the basis of official classification lists.

Part III on specific commitments underscores the sectoral nature of the GATS with respect to market access (Article XVI), national treatment (Article XVII) and additional commitments (Article XVIII). Specific commitments are negotiated market openings on the basis of official classification lists, preferably the WTO's Services Sectoral Classification List (W/120) or the UN Provisional Central Product Classification (CPC), but can be complemented by other internationally recognised classification systems. Concordance must be assured through appropriate cross-referencing. The objective is to achieve a concise description of sectors or sub-sectors and to avoid ambiguity as to the scope of the commitment. Sectoral and horizontal commitments and any limitations, including on national treatment, inscribed in a Member's schedule constitute legally binding obligations.

The supply of uncommitted services that are inputs into a scheduled commitment is not permitted. Similarly, a cross-border supply commitment in telemedicine would not extend to the presence of natural persons, i.e. the doctor; a separate commitment under Mode 4 would be required. The schedules of commitments are an integral part of the GATS. The binding of commitments and concessions under WTO agreements ensures the stability and reliability of commercial transactions backed up by dispute settlement provisions in the case of violation of agreed trade rules.

Market access limitations are in the nature of quantitative restrictions or maximum ceilings, such as:

- limits on the number of service suppliers through licenses or quotas. Granting licences for new leisure establishments may be tied to an economic needs test (ENT), or foreign medical personnel may be subjected to an annual quota.
- limits on the total value of service transactions or assets. For example, the total assets of foreign bank subsidiaries cannot exceed a fixed percentage of domestic bank assets.
- limits on the number of operations or the quantity of output. For example, broadcasting time for foreign programs may be restricted.
- limits on the number of natural persons employed in the services sector as a percentage of total foreign labour or wages.
- limits on foreign capital participation and shareholding through stipulating equity ceilings, or on total value of individual or aggregate FDI
- measures that restrict or stipulate specific types of legal entity or joint venture through which a supplier may render the service

Full national treatment in a sector and mode of supply indicates accordance of equally favourable conditions of competition to foreign services and service suppliers as those accorded to a Member's own like services and services suppliers. Members may limit their national treatment in many ways as long as these

limitations are inscribed in their schedules, along with their market access limitations. The method applied for listing exceptions to market access and national treatment limitations is called the bottom-up approach or positive listing, based on the assumption of the absence of obligations unless a country schedules a positive commitment. This contrasts with MFN exemptions, which illustrate the case of the top-down approach or negative listing.

Additional commitments not subject to scheduling under Articles XVI and XVII, such as on licensing requirements and procedures, can be negotiated under Article XVIII and inscribed in the Schedule in the form of undertakings. Notably, a Member could make commitments on regulatory principles listed in a reference paper (for example, on Basic Telecommunications Services) under Article XVIII.

Progressive Liberalization

Part IV on Progressive Liberalization sets out future objectives and the time frame for periodic negotiations on the basis of guidelines and economic and sectoral assessment of the impact of trade in services. Article XIX provides the mandate for successive rounds of liberalisation to start in the year 2000 so as *to achieve a progressively higher level of liberalisation*, while promoting the interests of all participants on a mutually advantageous basis, taking into account the special situation of individual developing country Members, and securing an overall balance of rights and obligations. For each new round, negotiating guidelines and procedures must be drawn up, including modalities for the treatment of any liberalisation undertaken autonomously by Members in between negotiations as well as for special treatment of least developed countries in view of their difficulties in accepting specific commitments. These prerequisites were reiterated in the Doha Ministerial Declaration.

According to Article XXI, Members can modify their schedules of specific commitments or withdraw any commitment three years after the commitment entered into force, an example of the high degree of *de jure* flexibility that the GATS accords governments in the conduct of their national policies. Any Member may ask for compensation in such instances, which, if agreed upon, must be extended to all Members, an example of the MFN nature of GATS obligations.

Institutional provisions

Part V contains institutional provisions for consultation in case of a possible conflict between Members and assigns the WTO's Dispute Settlement Understanding as the appropriate instrument to resolve and enforce a decision should Members be unable to agree amongst themselves. It further appoints the Council for Trade in Services and any subsidiary bodies it may set up to oversee the operation and evolution of the GATS. Besides ensuring the provision of technical assistance for developing countries in need through the WTO Secretariat, that part also calls for the General Council to make arrangements for consultation and cooperation with other multilateral institutions, such as the UN and its specialized agencies and other intergovernmental organizations, notably the IMF and the Worldbank, concerned with services.

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Final provisions

Part VI contains the final provisions, including conditions under which a Member may deny benefits to another Member; and definitions of concepts used in the GATS, such as what constitutes a measure, a juridical person and the meaning of “owned”, “controlled” or “affiliated.” Finally, Article XXIX groups the eight Annexes to the GATS as an integral part thereof. They deal with MFN exemptions, movement of natural persons, air transport services, financial services (2 annexes), maritime transport services, telecommunications, and negotiations on basic telecommunications.

Non-discrimination in the GATS

The multilateral trading system is founded on the principle of non-discrimination.

The multilateral trading system is founded on the principle of non-discrimination, which ensures WTO Members that the goods and services they trade amongst each other receive the same treatment. Special waivers in the past have authorised the granting of preferential treatment to developing countries.¹⁴ All WTO agreements contain provisions for special and differential treatment (S&D) for developing and least developed countries. These countries also were accorded transitional periods of five and seven years, respectively, in order to bring their domestic trade regimes in compliance with WTO agreements. The inability of many countries to meet the implementation requirements continues to hold up progress in the Doha Development Agenda.

Ongoing negotiations mandated in Doha in 2001 are seeking to make S&D treatment provisions legally binding, but developed countries are concerned that doing so would alter the negotiated balance of rights and obligations among WTO Members. The special nature of trade in services and the reluctance of developing countries to take on board new and obligations resulted in a multilateral agreement that is user-friendly, allowing Members to pick and choose services sectors and circumscribe the breadth and depth of their commitments. By the same token, certain basic principles underpinning multilateral trade since 1948 were compromised in order to guarantee the GATS’ standing as a multilateral agreement rather than a plurilateral one.

Most-Favoured Nation Treatment (MFN)

Under the GATS, the most favourable treatment that is actually granted in all sectors must be extended to all other Members.

Under the GATS, the most favourable treatment that is actually granted in all sectors must be extended to all other Members. It is a general obligation applying to all services sectors. When the GATS entered into force, Members could seek exemptions to their MFN obligation for a limited period of time, as long as such exemptions were listed together with the date of termination of such exemptions.¹⁵ In that situation, MFN treatment could also be suspended. Exemptions were subject to review after five years, and limited to a period of ten. MFN exemptions are subject to negotiations in the ongoing round.

¹⁴ Certain discriminatory elements have always been part of the GATT/WTO, such as preferences in place when the GATT entered into force, special and differential treatment for developing and least developed countries. Regional trade agreements are discriminatory by definition because they accord tariff or other trade preferences to their members. Article XXIV authorises the formation of free trade or customs unions subject to certain disciplines.

¹⁵ Some 400 MFN exemptions were recorded. See *WTO Agreements and Public Health, WTO/WHO* Geneva, 2002, p. 49.

National Treatment (NT)

Domestic laws and regulations affecting services can apply no less favourably to other Members' services and service suppliers. However, in a clear departure from the GATT,¹⁶ Members can impose conditions and restrictions on national treatment under the GATS, provided they are inscribed in their schedule. This transforms national treatment from a principle into an objective. It is the main tool for discrimination against foreign suppliers of services. National treatment of foreign service suppliers can be formally identical to or different from measures applying to domestic like services and services suppliers. Limitations can thus cover both *de jure* and *de facto* limitations. A discriminatory measure on the basis of the origin of the service supplier would be an example of the former. A prior residency requirement without reference to national origin, a condition more easily fulfilled by a national than a foreign supplier, constitutes a *de facto* discriminatory limitation. This is one way to protect acquired rights of service suppliers.

There is a self-correcting mechanism at work as NT applies automatically to any sector in which a country schedules a commitment, and is binding unless the Member enters a reservation in its national schedules. Over time, there is hope that NT and MFN treatment will achieve universal coverage as more and more sectors are liberalised.

¹⁶ GATT Article III – “National Treatment on Internal Taxation and Regulation”. It states that foreign products must be accorded the same treatment as domestic and like products in respect of internal taxes, laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of product.

6 Issues under the Doha Development Agenda

Although progress in negotiations has been uneven, often due to problems in other negotiating areas, such as agriculture or TRIPS, the services negotiations have made headway.

Since the UR negotiations, developing countries have been instrumental in shaping the services agenda. Although progress in negotiations has been uneven, often due to problems in other negotiating areas, such as agriculture or TRIPS, the services negotiations have made headway. The request and offer phase is under way; modalities for the treatment of autonomous liberalisation have been agreed; the issue of emergency safeguard measures has received in-depth consideration; disciplines on domestic regulations are being elaborated. But discussions of trade-distorting subsidies and government procurement, admittedly, have enjoyed less success. Some of these subjects are discussed below.

Work on classification issues touches on the need to bring certain services sectors and activities in line with market realities, especially in the new technology, energy, business and legal services in order to increase the number and quality of specific commitments. The WTO Secretariat is preparing a compendium of existing classification proposals. The technicalities of how to incorporate new commitments into existing schedules are being resolved, as there is near-agreement on consolidating old and new commitments in new draft schedules. The classification exercise is likely to help improve the quality, quantity and predictability of commitments and reduce the scope for discretionary action. More precise classification of service activities, on the one hand, and cross-sectoral clustering of related services (for example, health/insurance and energy/transport/distribution), on the other, will be instructive for developing countries in raising awareness of their own barriers to market access for needed services. Many developing countries have become highly competitive in the software, high technology and data management sectors or in the health sector (doctors and nurses). But existing entry regulations, qualification requirements, procedures to verify competence of professional, and absence of norms on the recognition of equivalence of work-related academic qualifications severely hamper their ability to exploit provisions under the GATS. Work in this area is under way in the context of developing disciplines under the GATS obligation concerning domestic regulation (Article VI, see below). Redressing the imbalance between commitments on modes of supply and commitments in specific services sectors would go some way towards meeting developing country interests.

Request and Offer – Muscle Flexing

Dates for submission of initial requests and offers in the context of negotiations have been set for 30 June 2002 and 31 March 2003, respectively. Initial submissions can be indicative or exhaustive and in any case can be complemented at a later date or replaced altogether. Requests are submitted in the form of a letter asking a Member, for example, to add a sector in its schedule, to remove a limitation or an MFN exemption, or to make an additional commitment under Article XVIII (relating to the Reference Paper on regulatory principles in basic telecommunications services, for example, such as the establishment of an independent

regulator). Requests for an undertaking that is not defined in the GATS need to be accurately defined and described. The request process is purely bilateral.

Offers require considerable technical preparation, which can be taxing on the administrative and substantive resources of some developing countries. Offers can respond to some or all of the requests in the form of a draft schedule of commitments. They are circulated to Members and are subject to consultations and negotiations with all trading partners, not only those who have made requests. Issues of substance are dealt with multilaterally. The submission of offers constitutes a multilateral process. In turn it can trigger more requests and the process becomes a succession of requests and offers. This stage signals that real negotiations are under way. Not all countries make requests or submit offers. The extent of their involvement may be an indication of their level of development or their level of commitment to the WTO, or their willingness to hold out in the bargaining phase of negotiations.

The sole aim of trade negotiations is for Members to obtain commitments and concessions from each other in areas in which they have a comparative advantage and which is of importance to their economy, industry and consumers. So the initial requests (which recently have attracted much criticism in the case of the EC for their non-transparent and secret nature) will be comprehensive and aggressive – basically a shopping list. Negotiators know that only a fraction of their demands will be met. The GATS by itself offers a great variety of opportunities for trade offs, in the rule making area, on market access, national treatment and MFN treatment, all of which can be broadened, and existing limitations lifted or bound. Bindings and new commitments on modes of supply are particularly important. When the negotiating chips are down, Members will hold out for concessions in other negotiating areas of the Doha Development Agenda, be they in agriculture, market access for non-industrial goods or TRIPS. This is where the *de jure* flexibility of the GATS is put to the test. Underneath the cloak of diplomacy, steeled negotiators are bargaining for their country's advantage. After years of studying the issues at stake on the basis of agreed work programmes during which all Members receive a thorough education on all the perspectives and ramifications of the subjects at hand, the process must get down to brass tacks. These built-in pressures are designed to move governments along the road of liberalisation.

The request and offer process will be a permanent feature until the last moments of the ongoing negotiating round, as this process will be affected *pari passu* by developments in other negotiating areas of the Doha Development Agenda.

Autonomous Liberalisation

Liberalisation of trade in services refers to the removal of obstacles to the supply of services in the form of regulations or arbitrary administrative measures, discriminatory application of existing laws and anticompetitive conditions. In the context of the GATS, the removal of such obstacles only becomes a liberalisation measure of interest to Members once a government makes a positive market access scheduling commitment, listed in its national schedule, thus making it legally binding in an MFN context.

The mandate for establishing modalities for the treatment of autonomous liberalisation is contained in GATS Article XIX.3, the Negotiating Guidelines and

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Autonomous liberalisation refers to domestic reforms undertaken unilaterally by countries on their own initiatives to facilitate trade in services.

Procedures of 2001 and the Doha Ministerial Declaration (para 15). These modalities were agreed on 6 March 2003, containing an illustrative list of criteria for the evaluation of autonomous liberalisation measures undertaken since the last negotiations, and setting out procedures for granting credit. These modalities are also designed to promote the increasing participation of developing countries in trade in services, in line with the obligation under the GATS Article IV.

Autonomous liberalisation refers to domestic reforms undertaken unilaterally by countries on their own initiatives to facilitate trade in services. Such reforms have been undertaken in the context of World Bank and IMF adjustment programmes in support of lending operations to promote economic growth and development. Countries that have acceded to the WTO in the past few years and consider to have made extensive commitments in services, argue that the adjustment-related cost and effort should be credited against further liberalisation requests in the ongoing Round.¹⁷ Although the question of how to treat autonomous liberalisation clearly concerns all Members (“...undertaken autonomously by Members...”), it has become a developing country issue. Assigning credit for autonomous liberalisation is expected to increase the bargaining power for more offers from developed countries, and will pre-empt the tactic of postponing reform measures in anticipation of reciprocal trade concessions in the course of negotiations.

However, the difficulties for negotiators still lie ahead as it is up to the “liberalising” Member and the trading partner to assess the value of measures, for example, through formulae, improvement indices or ranking methods, and to grant credit on a bilateral basis. The credit being sought may be in the form of a liberalisation measure by a trading partner of interest to the credit seeker, or the annulment of a previous request addressed to the credit seeker, or any other form to be agreed upon. Assigning value to measures undertaken will be a tricky and time-consuming task for developing countries. In the case of a quantitative approach, it might involve capturing regulatory changes and their various effects on trade and the economy, and assigning weights to the different modes of supply with some being economically more significant than others. Lastly, bilateral negotiations on granting credit might place the developing country at a disadvantage. For this and other reasons, some NGOs have called for a multilateral framework for credit based on agreed rankings. This might seriously delay progress in services.

Emergency Safeguard Mechanism (ESM)

Negotiations on the “question” of emergency safeguard measures based on the principle of non-discrimination were mandated to begin in 1998. Since then, several deadlines have been missed, the last in 15 March 2002. The latest benchmark has been set for 15 March 2004 with a work programme to identify, elaborate and consolidate elements of a possible safeguard agreement. Stocktaking on the issue might take place at the Cancun Ministerial Conference in September.

¹⁷ Central to accession proceedings is the idea of the “entry ticket”, which is that governments must bring their foreign trade regime in line with WTO norms and must negotiate the price of entry in terms of trade concessions and market access opportunities with existing WTO Members in return for acquiring the accumulated trade benefits under the GATT/WTO. Some might consider using the entry ticket to stave off further liberalisation as double dribble.

The pros and cons of an ESM have been discussed since 1996 in the WTO in preparation for the GATS 2000 negotiations. Developing and developed country members have discussed the issue in great detail, revealing the enormous complexity of the subject at hand. In the area of goods, Members can apply a safeguard measure, i.e., withdraw part or all of a concession/tariff, under the GATT and the WTO Agreement on Safeguards, in situations when a sudden rise in imports causes or threatens injury to the domestic industry. An appropriate safeguard mechanism under the GATS has yet to be found. Initially sought by Southeast Asian countries, many developing countries support an ESM in principle. The EU and the US advise against adopting such a mechanism for a variety of reasons. The US questions the very desirability and feasibility of a services safeguard. Developing countries argue that the availability of a safeguard mechanism would provide the needed security for making more extensive liberalisation commitments.

There is general agreement among developing countries that the different nature of services calls for a different type of ESM than that available under GATT, but the discussion of exactly what type and how it can be applied has not moved much beyond the conceptual stage. Many consider that an emergency safeguard should be adopted in the case of unforeseen developments to remedy any situation that arose as a result of a Member's commitments under the GATS. It should cover situations above and beyond those dealt with in other Articles (balance of payments difficulties, public order, security, public health etc.) It should be broad and not restricted to covering the case of "injury or threat of injury due to an unforeseen increase in imports." For services this could theoretically only apply to cross-border supply, or Mode 1. Moreover, criteria for assessing injury, for example, effect on sales volumes, market share, employment levels would need to be established. Several alternative forms have been discussed ranging from one modelled on goods, based on "injury" and using quantitative criteria, to one available under the Agreement on Agriculture, which is based on a trigger mechanism at lower import prices or higher volumes to activate additional duties. However, the discussion always comes back to the difficulty of quantifying and controlling services flows, lack of services data, the diversity of services sectors and the different modes of supply. Mode-specific safeguards are likely to cause economic and trade distortions, for example. In the case of Mode 3, where commercial presence of a foreign corporation or bank supplying services involves substantial investment, the existence of a safeguard might effectively discourage such investment. Other issues focus on who would apply the safeguard? Would it be the government, central banks, and professional associations? To whom would it be applied? The country, an industry or a specific company? Yet another focus of discussion has been whether the ESM should be sector specific or horizontal. A sector specific safeguard could be negotiated case-by-case and included in schedules. But it would be difficult to devise disciplines for a general safeguard. A broadly defined ESM that a Member could apply over an extended period of time has all the makings of a cure that kills the patient.

The longer the question of an ESM is studied, the more its complexity is revealed. Whatever precise shape and form it would ultimately (if ever) assume, the investigation, administration and surveillance of safeguard measures would be complicated, time-consuming and costly. The negative spillover effect on the domestic economy, in the case of departure of skilled personnel, or cancelled investment

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A broadly defined ESM that a Member could apply over an extended period of time has all the makings of a cure that kills the patient.

plans, might neutralise any expected benefit from the emergency safeguard measure. A safeguard in any mode of supply would be a deterrent to trade in services. The GATS' built-in protection in the form of its flexible scheduling approach based on positive listing of commitments, its general safeguard measures, and provisions for modifying and withdrawing commitments should suffice in reassuring Members.

Domestic Regulation

It is in the interest of developing countries to create a favourable environment for domestic and foreign service suppliers by setting up a transparent regulatory framework that ensures fair competitive conditions for service suppliers and operators.

It is in the interest of developing countries to create a favourable environment for domestic and foreign service suppliers by setting up a transparent regulatory framework that ensures fair competitive conditions for service suppliers and operators, especially in sectors of importance to their own development. A serious challenge for the GATS and for the service economies of WTO Members is to remove non-discriminatory regulation that distorts trade in services and hampers the development of domestic suppliers and activities. Improving the transparency of procedures and disciplines goes a long way towards rectifying such regulation. Existing GATS obligations on transparency are weaker than those in other WTO agreements (notably on Technical Barriers to Trade and on The Application of Sanitary and Phytosanitary Measures).

Article VI of the GATS requires Members to develop disciplines on domestic regulation. The article covers measures relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures. It requires that such regulations be:

- based on objective criteria
- transparent
- not more burdensome than necessary to ensure the quality of the service (the so-called necessity test),
- and in the case of licensing, not in themselves a restriction on the supply of the service.

There are two exceptions to the general transparency obligations of the GATS: 1) confidential information relating to law enforcement, public interest and legitimate public and private commercial interest (Article IIIbis), and 2) disclosure of essential security interests (Article XIVbis).

Work under way focuses on actual barriers faced by suppliers. Developed countries tend to argue that the disciplines should not be limited to services on which specific commitments were undertaken, but should apply to all services, that is, they should be general disciplines. A set of disciplines has been negotiated for the accounting sector in 1998, which is serving as a model for developing professional disciplines in other services sectors, and which is work in progress. A necessity test, which would ensure that services regulations are no more trade restrictive than necessary or, expressed differently 'are necessary to meet the required regulatory objective', is often the target of criticism from civil society for being too weak and for undermining governments ability to pursue environmental objectives, for example. Other requests on Article VI. 4 call for transparency and prior comment before enactment of regulations. For developing countries this implies new obligations without the capacity to implement. Only very few developed countries have prior

review mechanisms. Detailed licensing requirements, such as obligations to inform Members of reasons for denial of licences, and the right to appeal, also go beyond the implementing capacity of some developing countries.

A different approach to establishing regulatory disciplines was taken in the context of basic telecommunications services. To ensure that commitments to remove discriminatory treatment of foreign telecoms services suppliers was supported by regulatory discipline, a reference paper containing standard domestic regulatory obligations, including for example the establishment of an independent regulator, was taken on by 75 WTO Members as additional commitments under Article XVIII of the GATS.

A similar exercise is under way in financial services, where the US is proposing an annex on regulatory issues. It is requesting transparency obligations across all sectors (horizontal provisions) in the GATS working group, but at the same time is trying through the annex and bilaterally to achieve regulatory disciplines since in the working group such horizontal requests are likely to get watered down by developing countries. While this approach has proved to be successful in the case of basic telecoms, and has its merits, it undermines the WTO's decision-making by consensus, and more generally the multilateral process. Taken to the extreme, it may deprive the majority of WTO membership of the benefits of liberalisation in the services sectors. However, general principles on domestic regulation will not work for all sectors. The prudential carve out in the GATS financial services annex allows members to enact GATS inconsistent measures (surgical approach). Article XVIII undertakings would be suitable alternatives.

An essential corollary of effective domestic regulation of services and foreign suppliers in particular for the benefit of the domestic industry is the existence of competition law policy. Many regulatory problems concerning the services sector could be suitably addressed within a multilateral framework for trade and competition. Negotiations on the latter might be launched at the 5th Ministerial Conference in Cancun. Some services sectors are dominated by few and large companies, such as in telecommunications, postal services, distribution or air transport. In telecommunications, this problem was dealt with at the GATS level through the Reference Paper on basic telecommunications services to which some 75 countries have signed on so far. Anti-competitive practices, such as restrictive transport policies and price-fixing arrangements, carry a heavy price for consumers in terms high mark-ups. A combination of competition policy, transparency in domestic regulation and liberalisation of services, i.e., market access commitments, generally leads to more competition, more efficiency and lower prices in the services sector. Many studies have shown the high costs to an economy associated with barriers to trade in services.¹⁸ In this context, the linkage effect between services and goods sectors can be significant. For example, benefits from a high level of competitiveness in data processing or analysis will be mitigated if the associated hardware is expensive because of high tariffs. Conversely, removing trade barriers to goods is of little value if market access limitations are placed on the distribution system or if a single supplier dominates the latter. The interconnectedness of the goods and services sectors makes coherent and transparent trade policies and regulations all the more important.

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¹⁸ Price effects of trade barriers can range from 5 to 55 per cent the banking sector and up to 138 per cent in telecommunications. UNCTAD 2001, p.10.

7. The Link between Services Liberalisation and Regulation

Until the creation of the GATS, services were mostly considered to be non-tradable.

The economic rationale for liberalising goods and services is that open markets encourage competition, efficiency, and innovation among producers and service suppliers, and offer consumers a wider choice at better prices. Until the creation of the GATS, services were mostly considered to be non-tradable.

When the subject of trade in services first gained prominence in the late 1970s and early eighties, it was in a general macroeconomic environment of high inflation, fiscal deficits and government debt. Public monopolies predominated in basic infrastructure and services, such as transport, energy, telecommunications and postal services, while government intervention was pervasive. Typically, state-owned utility providers and heavily subsidised industries enjoyed in-house control of any services related to production and distribution and to those services embodied in the goods. Without competitive pressures, transparency or regulatory scrutiny, these monopoly suppliers were laws unto themselves.

Most private sector projects in infrastructure, transport, energy and water sectors are successful, resulting in higher government revenues, expanded utility coverage and more efficient operational and financial business performance.

In the 1980s and 1990s, many developing and transitional economies decided to privatise their public utilities and state enterprises. Privatisation is perceived to harm the poor, causing job losses, price rises and a decline in the quality and extent of coverage, while private owners reap huge and immediate benefits. Some of these perceptions may correspond to reality, but not their underlying causes. Most private sector projects in infrastructure, transport, energy and water sectors are successful, resulting in higher government revenues, expanded utility coverage and more efficient operational and financial business performance. Privatisation has failed in countries because of lack of regulation, faulty project design, inadequate user projections, and lack of financial oversight, leading to higher prices, protests and ultimate cancellation of the project.

In 1990-2001, some 2,500 infrastructure projects involved private participation with investment amounting to US \$ 750 billion. With the steady decline in investment flows since 1997, highly publicised cancellations of projects took place. Still, these cancellations represented only 1.9 per cent of total infrastructure projects. Toll roads had the highest cancellation rate, followed by the water and electricity sectors. Previous government policy in these sectors usually subsidised tariffs, which made enforcement and maintenance of cost recovery pricing policies almost impossible after privatisation. In the Cochabamba water concession in Bolivia, for example, the local government chose an expensive bulk water source leading to a price rise of 35 per cent and fierce political opposition and civil unrest linked to irrigation reforms and the government's coca eradication policy. More than half of the cancelled projects were not tendered competitively. In future, more cancellations are likely to occur in view of the dire macroeconomic conditions affecting developing countries. In Argentina, which pioneered private participation in infrastructure, many of its arrangements are under great stress due to the recent social upheaval triggered by macroeconomic and debt mismanagement.

Privatisation of infrastructure and utility projects has proven to be difficult and complex, but many governments still consider that the private sector is more effective and efficient in providing services than the public sector, and prefer to renegotiate contracts on key terms to ensure service continuity and avoid costly compensation rather than to terminate projects. Reversing privatisation is a highly unrealistic proposition, especially in poor countries with debt-ridden governments. However, the evidence shows that there are few failures and many more successes.¹⁹

The regulation of services is one way that governments can address market failures, such as lack of information, monopolies, and social objectives, including income distribution and the quality of services. The main purpose of regulation is to improve the welfare of society as a whole. Policymakers therefore need to assess the effects of services regulation on all segments of society. Private interests do influence regulatory arrangements and can cause government to make inappropriate decisions. International trade and investment decisions have very important welfare implications for the domestic economy that must be taken into consideration.

The role of multilateral agreements like the GATS can be instrumental in supporting domestic reform by serving as a benchmark for regulation and reducing the government's costs of designing and negotiating regulatory measures. Meeting international obligations, such as adopting international standards can help neutralise special private sector interests. GATS provisions on domestic regulation are a case in point, although up to now the regulatory implications of the GATS have been weak. Horizontal provisions that cover some or all services sectors also have advantage of avoiding capture by sectoral interests. Biased choices in regulatory reform can favour protectionist interest. Therefore, the principles contained in the GATS are a valuable guide for domestic reform. China, for example, has used the GATT/WTO accession process to sustain political support at home and maintain the momentum and the credibility of its domestic reform.

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The main purpose of regulation is to improve the welfare of society as a whole.

¹⁹ See Public Policy for the Private Sector. Infrastructure Projects, Note Number 252, The World Bank Group, January 2003.

8 Conclusions

The GATS does not oblige Members to privatise any public sector service, nor does it prevent governments to regulate in their own interests for the attainment of national policy goals.

The GATS does not oblige Members to privatise any public sector service, nor does it prevent governments to regulate in their own interests for the attainment of national policy goals. However, many governments are party to bilateral treaties in which they make concessions they might not make in a multilateral context. Developing countries are particularly vulnerable in bilateral negotiations. Consensus decision-making in the WTO offers both shelter from bilateral pressures and a platform for making demands that are legally binding under the purview of multilateral dispute settlement provisions. Services negotiations might indeed be the main venue for equitable integration of developing countries into the multilateral trading system. At the same time, delaying liberalisation of the services sector today carries the risk of being bypassed by technological and institutional innovation to the detriment of economic growth and welfare. Maintaining a balance between devising trade rules based on sound economic principles and recognising the difficulties of developing countries to follow those rules is the greatest challenge facing the WTO.

The current recalcitrant stance of developing countries, as exemplified by their insistence on legally binding special and differential treatment in the WTO does not help the process. As a bargaining device it is an excellent strategy to counter the developed countries' persistence in protecting their own economies and people from having to make tough but necessary adjustments in order to address the real problems of developing countries. However, institutionalising discriminatory trade rules flies in the face of economic sense and of the idea of the universality of the WTO.

At the WTO, sovereign governments agree to negotiate trade concessions and commitments. Developing countries have much to gain from reforming their regulatory framework and liberalising their services sectors.²⁰ The issue is no longer whether or not liberalisation is good for a country, but rather how can developing countries open their economies more and reap more benefits from their participation in the multilateral trading system. Since the GATS has been in force, the developing countries' share in world services exports has only risen by 6 per cent, while developed countries still make up 75 per cent of world services exports. At the same time, an index of the average foreign trade restrictiveness in services shows that it is highest in developing countries with low per capita GNP.²¹ The potential is great and some least developed countries have established themselves in highly specialised services through the modes of movement of natural persons and consumption abroad.

Still there is considerable resistance on the part of developing countries to broaden their sectoral commitments or to make their laws more conducive to trade in services from the perspective of both the domestic and the foreign suppliers. There are legitimate reasons, usually related to lack of institutional capacity and human resources, why developing countries do not take on commitments as readily as developed countries. Import substitution behind protective tariff barriers may have

²⁰ Some obvious sectors are software programming, data base management and repair, translation services, inventory management, website design, medical transcription as examples of cross-border trade.

²¹ World Bank 2001. World Development Indicators Database. Worldbank, Washington, DC.

been an acceptable policy choice some 30 years ago. However, when considering today's fast pace of changing conditions underlying business and trade, protection may imply a heavier burden of adjustment and much greater costs and strife than liberalisation. The opportunity cost is too great.

Unlike trade in goods, trade in services contains many more immediate ancillary benefits. Gaining access to other service consumers will come about through open domestic services markets. Liberalisation can improve the efficiency of service suppliers through the interaction of service activities, for example, in the computer, environmental; health and tourism services. It also attracts capital, investment and technology, as well as managerial know-how. The bundling and scope of certain service activities is receiving much attention in the context of classification of services and specific commitments that Members are prepared to make.

The first wave of public divestiture and the autonomous reforms in developing countries occurred long before the GATS became effective, so it cannot accept the blame for the ills of globalisation. The Uruguay Round negotiations on trade in services focussed primarily on creating the legal framework and some disciplines for liberalisation, and proceeded with a minimal amount of initial liberalisation commitments. In doing so, the GATS filled a regulatory void at the international level. While privatisation and deregulation has not always been successful, liberalisation cum regulation might be.

However, it must be remembered that in any multilateral round of trade negotiations conducted as a single undertaking, whereby nothing is agreed until everything is agreed, all governments must make concessions and commitments if the process is to move ahead in a credible fashion. History tells us that this is a fitful process, marked by often aggressive posturing. As to the tendency today, especially of some non-governmental organisations, to criticise the GATS for its intrusive reach into sovereign policymaking to the detriment of developing countries, it is difficult to find evidence to that effect. Ultimately, governments join and remain in the WTO in order to benefit from multilateral rules and trade. As long as countries believe that benefits of adherence outweigh the costs, the multilateral trading system is proving its value. What complicates matters is the fast pace of change and integration of the world economy and the lagging global macroeconomic policy coordination to support the new world order, in the area of exchange rate systems, for example. The *raison d'être* of GATS is simply to liberalise trade in services so that countries can reap the economic and welfare benefits. Governments drew up and negotiated GATT/WTO rules on a consensus basis over many years. To imply that they have done so under the cloak of ignorance and conspiracy and against their better judgement would be doing them a great injustice.

In principle, GATS negotiations are proceeding well judging from the successful initial request/offer phase. In view of the current stalemate in a number of negotiating subjects of the Doha Development Agenda, notably in agriculture and TRIPS, and in view of the uncertainties created by the ongoing war in Iraq, it is difficult to predict what to expect from the mid-term review planned for the 5th Ministerial Conference of the WTO in Cancun, Mexico. If flagging talks in agriculture and unyielding positions persist on access to medicine, there is a likelihood that Members start holding their offers in the services sector in abeyance. A stocktaking exercise may well be the best that the next Ministerial can muster.

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