
THE GATS DEBATE

*A response to common arguments used against the critics
of the General Agreement on Trade in Services*



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THE GATS DEBATE:

A response to common arguments used against the critics of the General Agreement on Trade in Services.

I. Introduction

The General Agreement on Trade in Services (GATS) was originally agreed at the World Trade Organisation (WTO) in 1994. New negotiations are now underway aimed at extending the scope of the agreement.¹

There is increasing concern about the impact of GATS, particularly on the development prospects of many developing countries, and on the provision of basic services worldwide. A wide range of organisations have expressed this concern across the world.

Perhaps because of this widespread concern, the WTO secretariat took the rather surprising move of issuing a paper entitled 'GATS: Fact and Fiction' in March 2001.² In the UK, the Department of Trade and Industry (DTI) has also issued a number of statements refuting criticisms of GATS. Many of the points made by defenders of GATS are similar, and are quoted throughout this paper.

Many of WDM's and others, fears about GATS relate to the proposals that are being made under the new current negotiations. Yet, the responses often focus on the agreement as it stands today, providing us with no reassurance that damaging new proposals will not be enforced.

A number of general points are made to try to denigrate arguments made by GATS critics. We are often characterised as anti-trade and anti-rules. WDM, like so many others, had made very clear in our literature that we are neither. We have explicitly called for strong rules governing both trade and investment. Our concern is that such rules should be democratically decided and enforced, and that they should ensure that the poorest, rather than the richest, benefit. Instead, the current WTO rules have increased, rather than reduced, the imbalance between rich and poor, and have restrained, rather than promoted, governments' ability to meet the needs of their citizens.

¹ Contact the World Development Movement for introductory briefings on GATS. Tel: 020 7737 6215 or look on our website (www.wdm.org.uk). See contact list at the end for details of other organisations working on this issue.

² Available on the WTO website: http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm
A point-by-point response by the international GATS campaign to the WTO's 'GATS: Fact and Fiction' document is available from <http://www.xs4all.nl/~ceo/gatswatch/rebuttal-intro.html>. Alternatively, contact WDM for a copy.

The responses made by the WTO and DTI can be divided into two groups. The first are based on the substance of the agreement: whether governments retain the right to regulate; whether service liberalisation is beneficial for developing countries; whether public services are covered. The second group of responses refer to the process of the agreement: is GATS sufficiently flexible; are decisions reversible; are the particular needs of developing countries catered for; how much influence do corporations have?

II. Does GATS guarantee governments' right to regulate?

There is a complicated debate taking place about the proper relative roles of governments and markets. WDM and others are concerned that GATS brings this debate to a premature end by restricting government's ability to regulate the market. In doing so, GATS restricts the ability of governments to meet the needs of their citizens and to promote sustainable, equitable development.

II.1 What they say:

"The claim that liberalisation means deregulation, or loss of governments' right to regulate, is simply false. The GATS explicitly recognises the right to regulate, and to introduce new regulations in order to meet national policy objectives, and all governments are fiercely attached to that principle."

Speech by David Hartridge, Director of Trade in Services Division, WTO Secretariat, 27/11/00³

"The right to regulate is one of the fundamental premises of the GATS. The objective of GATS is to liberalise services trade, not to deregulate services, many of which are closely regulated for very good reasons. The GATS specifically recognises 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objective...'"

'GATS: Fact and Fiction', WTO, March 2001⁴

"The GATS explicitly recognises the sovereign right of governments to regulate, and to introduce new regulations on the supply of services in their territories in order to meet national policy objectives."

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 30/01/01

II.2 WDM responds

II.2.i Liberalisation means reducing governments' ability to regulate

The purpose of GATS is quite clearly the progressive liberalisation of services, removing governments' ability to regulate. Service sectors as a whole are governed by complex regulatory regimes, often government imposed, and involve direct government intervention, by either directly delivering the service or setting conditions on companies operating in the sector. These are the so-called 'barriers to trade' in services, which GATS is designed to remove. Arguments that the 'right to regulate' are protected therefore seem odd.

The WTO has made the link between GATS and deregulation clear, "because the large share of trade in services takes place *inside* national economies...its

³ For full text see: http://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm

⁴ See footnote 2 for hyperlink.

requirement will, from the beginning, necessarily influence national domestic laws and regulation in a way that has been true of the GATT⁵ only in recent years.”⁶

In a confidential document, the WTO Secretariat has explicitly stated that there are “two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments.”⁷

In a 1998 consultation document, the then UK Secretary of State for Trade and Industry, Peter Mandelson remarked that “the main barriers to trade in services are found in national regulations... [EC] negotiating positions must reflect UK business priorities.”⁸

The UK Government’s Department for International Development (DfID) notes that, “[GATS] commitments stop members from changing their domestic law to introduce new barriers to entry into [these] specified markets or modes.”⁹

II.2.ii But don’t governments ultimately retain the ‘right to regulate’?

In its recent ‘GATS: Fact and Fiction’ document, the WTO Secretariat, attacking WDM’s campaign specifically, argued that the right to regulate is guaranteed, because when WTO members commit a sector to GATS, they can impose limitations on their commitments which stipulate the kind of regulations they want to uphold.

When a country commits a particular service sector for liberalisation it can, at that time, specify regulations it wants to allow. However, since it cannot add more regulations in the future, this requires a capacity and foresight simply not available to many developed countries, let alone highly overstretched developing country negotiators. There are already examples where countries are facing difficulty introducing legislation because of their GATS commitments. For example, this has already proved problematic for South Africa whose telecommunications legislation has been taken to task by the US Government. South Africa has been trying to enforce regulations on foreign capital for value-added network licenses, which is ultimately part of its broader black ownership policy. The US Government is arguing that the South African government did not schedule such a limitation on market access in its GATS telecommunications commitments. The legal case continues.

Even when countries make limitations on their commitments, and state the regulations they want to uphold, such provisions are not secure. As part of the negotiating process, other countries can, and do, request that these exceptions be revoked. Under GATS, members are obliged to “progressively liberalise.”¹⁰ This means committing more service sectors to GATS national treatment and market access rules *and* eliminating limitations on existing commitments.

The ‘right’ to regulate will be even less secure if proposals on Article VI on ‘Domestic Regulation’ move forward. These current negotiations aim to set specific GATS rules

⁵ General Agreement on Tariffs and Trade

⁶ WTO Secretariat, Trade in Services Division, ‘An Introduction to the GATS’, October 1999. [Emphasis in original]

Full text at: http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc (downloaded November 2000)

⁷ WTO Secretariat, Application of the Necessity Test: Issues for Consideration, 9 May 2000, Job No, 5929, para 2

⁸ Department of Trade and Industry, UK Government, in Foreword to ‘Liberalising Trade in Services – A Consultative Document on the GATS 2000’, 1998, pp3-4

⁹ Background Briefing Note, DfID, UK Government, February 2001. Available by contacting DfID Information Department, 94 Victoria Street, London SW1E 5JL, UK. Email: enquiry@dfid.gov.uk

¹⁰ General Agreement on Trade in Services – Part IV, Article XIX

on technical standards and licensing requirements in the services sector. Such rules could mean that the burden of proof would be on governments to show that such regulations are in pursuit of an objective, which the WTO considers 'legitimate', as well as the 'least trade restrictive' way of achieving this objective. Any government imposing such regulations will risk being challenged by another WTO member. It will then be up to the WTO disputes panel to adjudicate. For the developing countries, the risk of losing and facing sanctions may be too high a price to pay, rendering the 'right' little more than a possibility. It will be for the WTO, rather than elected governments, to decide which policy-making objectives are 'legitimate'.

Much is made by proponents of the GATS of the agreement's written recognition of "the right of Members to regulate, and to introduce new regulations on the supply of a services within their territories in order to meet national policy objectives."¹¹ What they do not tell us is that because this is only recognised in the 'preamble', it is the part of international treaties that is not legally binding.

And as WTO staff explain, "Members' right to regulate did not prevent the inclusion in the GATS of rules allowing for the minimalisation of trade restrictive effects of domestic regulation"¹² This is a key article in the agreement, which if concluded, will severely hamper members' ability to regulate in the services sector (as described above). Potentially, only regulations that achieve WTO 'legitimate' objectives will be allowed, and they must prove to be the 'least trade restrictive' way of achieving such objectives. WTO dispute settlement panels will be left to decide what government regulations in the services sector comply with these rules.

III. Is service liberalisation good for developing countries?

Underlying our concerns about GATS is the question about whether the widespread liberalisation of services is really a good thing for developing countries. The experience to date appears to be mixed. Much of the literature from the WTO and DTI is based on the assumption that service liberalisation is desirable, occasionally they have elaborated as to why they have made this assumption.

III.1 What they say:

"Services are potentially a significant source of economic growth for developing countries. The development of services domestically, particularly in the finance and telecommunications sectors can facilitate growth in other parts of the economy. Without such growth sustainable poverty reduction will not be achieved."

Department for International Development (DfID), UK Government, "Services and Developing Countries: Background Briefing Note," February 2001.

"Freeing up trade in commercial services - everything from telecoms and tourism to finance and freight transport - offers huge benefits for every part of the world. (...) For developing countries it also means access to vital technology and capital investment in underdeveloped infrastructure. An efficient service sector is also the backbone of a successful economy: without efficient finance, telecoms and transport, a country cannot competitively produce textiles, tomatoes or whatever."

Mike Moore, Director-General, WTO, The Guardian, 26/2/01

¹¹ 'Services: Agreement', General Agreement on Trade in Services, WTO
http://www.wto.org/english/tratop_e/serv_e/0-gats_e.htm

¹² 'Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services – Note by the Secretariat', Council for Trade in Services, WTO, 01/03/99 (WTO Document Symbol: S/C/W/96)

“Overall, we believe that further liberalisation under the GATS would be a positive step for developing countries. They would increase their economic growth and so contribute to the reduction of poverty. Income could be generated from individual service sectors where they have natural advantages, for example tourism, while increased competition in areas such as banking, transport and telecommunications would provide more efficient and effective services at home.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 30/01/01

“Opening domestic markets to foreign services suppliers increases competition, which brings many benefits. It tends to improve efficiency in the short and long term, lowering prices, improving service quality, increasing consumer choice and encouraging productivity gains. It is also often a more effective means of curbing monopoly power of dominant suppliers than regulation or break-up”

‘GATS: Fact and Fiction’, WTO, March 2001

III.2 WDM responds

III.2.i The effect on the domestic economy

It is striking the extent to which the defence of service liberalisation is based on very limited evidence. As there is yet to be an adequate assessment of the impact that services liberalisation has on economic growth or, more importantly, an assessment of its social and environmental implications, it seems strange that proponents of the agreement are so willing to make sweeping claims about the benefits of the service liberalisation that GATS promotes.

Article XIX of the GATS actually mandates the WTO to carry out an assessment of trade in services. This was promised to developing countries when the agreement was signed in 1994, but is yet to be carried out.

Before the WTO’s meeting in Seattle in November 1999, UNCTAD prepared a series of papers entitled ‘Positive Agenda and future trade negotiations.’ In this, they note the lack of research assessing the impact of liberalised trade in services (as advocated by GATS) on the growth and transformation of developing countries.¹³

Back in 1987, during the Uruguay Round when initial GATS negotiations were beginning, the then EEC negotiators were frank enough to say that for the “foreseeable future they do not see any ‘comparative advantage’ for Third World Countries in any sector of services trade.”¹⁴

Even in the face of the very limited research that has been done using indicators chosen by the WTO (enhanced trade flows and economic growth statistics), there is not conclusive proof in favour of the open market trading regime advocated by GATS. For example, a recent submission to the WTO Council on Services from Argentina noted that since the signing of the GATS in 1994, developing countries “have failed to increase their share of global trade in services since the conclusion of the Uruguay Round in 1994.”¹⁵

The benefits of foreign investment on the domestic economy are also debatable. Evidence has suggested limited transfer of technology occurs, while there can be a

¹³ ‘Positive agenda and future trade negotiations’, UNCTAD, 2000

¹⁴ Chakravarthi Raghavan, ‘Recolonisation: GATT, the Uruguay Round & the Third World’, Third World Network, Penang, Malaysia, 1990, p.108.

¹⁵ Argentine submission, ‘Assessment of trade in services’, WTO website.
http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

negative impact on local business. The WTO Secretariat's own report in the retail sector says it is becoming 'more concentrated': "This is manifested both in terms of the emergence of a number of large operators, and in terms of closer links between manufacturers, wholesalers and retailers, particularly through the creation of networks. In retailing in particular traditional shops selling basic products are being replaced by larger chain stores."¹⁶

As the UK's House of Commons Library Research Paper on GATS notes, some developing countries continue to be cautious about the services agreement because of concern about the health of their infant industries.¹⁷

In a September 2000 presentation, Bhagirath Lal Das (an independent trade expert, who was formerly the chief of UNCTAD's Trade Division and also a former Ambassador of India to the GATT) goes further, suggesting that in order to address the imbalances in the services economy there should be an initial freeze on further developing country liberalisation under GATS, with negotiations focusing on developed countries opening up their economies in areas of export interest to developing country members.¹⁸

III.2.ii The provision of services to the poorest

UNCTAD also acknowledge, "the social dimension of services and the link between certain basic service sectors and sustainable development and public welfare needs to be recognised."¹⁹

There are an increasing number of case studies available, which indicate that the introduction of market mechanisms in sectors such as water delivery and telecommunications does not improve access for poorer communities.²⁰ State monopolies have often been replaced by private monopolies, with no financial incentive for multinationals to provide an adequate service to those unable to pay.

In its own report on liberalisation of the health sector, the WTO Secretariat openly acknowledges not everyone benefits from liberalisation:

"(A)dditional competition does not necessarily entail quality and/or efficiency gains for all population segments and interested groups. For example, private health insurers competing for members may engage in some form of 'cream skimming' leaving the basic public system, often funded through the general budget, with low-income and high-risk members. New private clinics may well be able to attract qualified staff from public hospitals without, however, offering the same range of services to the same population groups."²¹

There is an underlying truth when discussing market delivery that should be recognized when dealing with essential basic services – the market cannot meet the needs of the poorest people, especially those with no purchasing power.

¹⁶ 'Distribution Services - Background Note by the Secretariat', WTO (WTO Document Symbol: S/C/W/37) http://www.wto.org/english/tratop_e/serv_e/w37.doc

¹⁷ 'Background briefing 7', Trade in Services, Institute of Development Studies in House of Commons Library Research Paper, 00/91, Economic Indicators, 1/12/00

¹⁸ Paper presented at the seminar on "Current Developments in the WTO: Perspective of Developing Countries" organised by the Third World Network, Geneva, 14-15 September 2000

¹⁹ "Positive agenda and future trade negotiations", UNCTAD, 2000

²⁰ See www.psir.org

²¹ 'Health and Social Services – Background Note by the Secretariat', Council for Trade in Services, WTO, 18/09/98 (WTO Document Symbol: S/C/W/50)

In this context, GATS poses a direct threat to governments' ability to utilise policy mechanisms aimed at achieving quality, universal delivery of basic services. One such policy mechanism is cross-subsidisation. For example, in the water sector, wealthy urban consumers subsidise delivery into poorer areas, or in the postal sector, business-post subsidises rural domestic delivery. As services are broken down through the process of liberalization, governments lose their ability to cross-subsidise and therefore lose a policy mechanism for achieving universal service delivery.

Advocates of the GATS argue that even once liberalized, governments can demand that companies make universal access a key tenant of their delivery contract. However, in reality, companies are not known for their 'philanthropy' and are reluctant to engage in contracts that compromise maximum returns. In December 1999, UK water company Biwater pulled out of a major water supply project in Zimbabwe, because the project could not deliver the rate of return now demanded by private investors. The company manager said, "Investors need to be convinced that they will get reasonable returns. The issues we consider include who the end users are and whether they are able to afford the water tariffs. From a social point of view, these kinds of projects are viable but unfortunately from a private sector point of view they are not"²²

III.2.iii The absence of real assessment

So far there has not been an assessment of the economic, environmental or social impacts of expanding global trade in services. The WTO is mandated to carry out an assessment, but even this has not happened properly. This is of concern to developing country negotiators, who pushed for a commitment to assessment to be included in the recently agreed negotiating guidelines.²³

This lack of assessment is widely recognised as a problem. However, in its March 2001 'Briefing Note on the GATS', the UK DTI is severely misleading on this issue.²⁴ In this question and answer briefing, they respond to the rhetorical question '(a)ssessment of trade not carried out?' by simply answering 'Wrong'. Given the fact that no assessment has yet taken place, this is a surprising response. The briefing goes on to mention the mandated GATS assessment (Article XIX) to be carried out by the WTO Secretariat following member submissions, and highlights DfID's contribution to World Bank work in this area. These are both 'work in progress', with very little work done so far on the WTO's part.

Before further commitments are made to the GATS, WDM is calling for an assessment of the impact of service liberalisation, which should:

- be a precondition to future negotiations, and until this is carried out, there must be a moratorium on negotiations.
- be both independent (outside of bodies such as the WTO and World Bank) and thorough.
- go beyond the impact of service liberalisation on trade flows and economic growth, and extend analysis to look at the social and environmental consequences of service liberalisation.

²² Zimbabwe Independent, 10/12/99.

²³ The 'map' for current negotiations agreed in March 2001, available at http://www.wto.org/english/news_e/pres01_e/pr217_e.htm

²⁴ See footnote 9

IV. Are public services covered by GATS?

Ensuring affordable access to those services that are basic to human needs and rights is a core duty and responsibility of governments. Market mechanisms are not designed to ensure that the poorest have adequate access to these services, such as the provision of water or energy, or basic health and educational services. Organisations working primarily on health and education issues have been particularly concerned that the provisions under GATS should not apply to these sectors.

IV.1 What they say:

“Services supplied in the exercise of governmental authority are explicitly excluded from the Agreement and there has never been the slightest sign that any government wants to reopen that...We also have to be clear that public sector services, in health and education for example, can and almost invariably do coexist in the same jurisdiction with private suppliers without being in competition with them and therefore without losing the status of governmental services.”

Speech by David Hartridge, Director of Trade in Services Division, WTO Secretariat, to the European Services Forum, 27/11/00²⁵

“GATS explicitly excludes services supplied by governments. True, governments can agree to allow foreign suppliers to provide private healthcare or education. But that is not the same as privatising public services. Nor does that imply compromising standards - governments can enforce the same standards on foreign suppliers as on nationals. They can even impose additional requirements on foreigners if they wish.”

Mike Moore, Director-General, WTO, The Guardian, 26/2/01

“...we are clear that the GATS does not apply to services provided by central and local governments, or to services supplied in the exercise of government authority. Consequently the Agreement plays no part in encouraging or discouraging privatisation of public services. The GATS excludes from its coverage any service supplied in the exercise of governmental authority. Such services are defined as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”.

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 24/11/00

“This [the exemption in Article I.3] is intended to exclude public services such as health and education services (although private services are covered by the GATS). Such services clearly are not supplied for profit, nor do they compete with privately supplied services (which clearly are covered by the GATS). There is no evidence that any member government of the WTO is seeking a different interpretation. These terms, like most of the GATS, have not, however, been tested in WTO jurisprudence. This has led some commentators to suggest that the GATS poses a risk to state provision of these services. We simply do not believe such fears are justified. Our ability to maintain public health and education services is reinforced by the way in which governments make commitments to liberalise under the GATS.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 3/4/01

IV.2 WDM responds

It was the claims made by service industry lobbyists themselves about the role of GATS in basic service privatisation that first raised the alarm bells of campaigners

²⁵ Available at: www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm

worldwide, “GATS can encourage more privatisation particularly in the field of health care.”²⁶

GATS defenders argue that health and education services are covered by the exemption in GATS Article I.3, which states that all services are covered except those “supplied in the exercise of governmental authority, [i.e. those] supplied neither on a commercial basis, nor in competition with one or more service suppliers.”²⁷ This means that even the general obligation rules which are supposed to apply to all services, irrespective of members commitments, would not apply in these cases.

In the WTO’s ‘Introduction to GATS’²⁸ examples of services that could be covered by this exemption are central banking and social security. However, when faced with the charge that GATS rules apply to public services, such as health and education, proponents of GATS argue that these services are also covered by this exemption.

IV.2.i What is actually exempted from GATS under Article I.3?

The dilemma is whether the wording of this Article is secure enough, particularly given that in many countries private and public provision exist side by side in both health and education services.

The Financial Times referred to the Article as “a piece of clumsy drafting” and went on to say that WTO staff, “concede a clarifying declaration by members would be helpful”.²⁹

While David Hartridge (quoted above) asserts that private and public service provision can coexist *without competition*, Keith Rockwell, Director of Information and Media Relations Division at the WTO, paints a different picture, stating that ‘...competition between private and public service providers already exists...’³⁰

There even seems to be doubt in papers prepared by WTO Secretariat itself, “The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and applicability of the GATS: in particular, can public hospitals nevertheless be deemed to fall under Article I.3?”³¹

However, the key point is not the way individual governments interpret the exemption in Article 1.3, but the way a WTO dispute panel will adjudicate over any dispute. The minutes of a WTO Council for Trade in Services meeting, talk about a narrow interpretation of Article I.3:

‘Members drew attention to the variety of policy objectives governing the provision of health and social services, including basic welfare and equity considerations. Such considerations had led to a very substantial degree of government involvement, both as a direct provider of such services and as a regulator. However, this did not mean that that the whole sector was outside

²⁶ Dean O’Hare, Chair of the Coalition of Service Industries, to the House Committee on Ways and Means, ‘Hearing on the United States Negotiating Objectives for the WTO Seattle Ministerial Meeting’, August 5, 1999

²⁷ See WTO’s website (www.wto.org) for text of the GATS Agreement

²⁸ See: http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc

²⁹ ‘WTO foresees tough talks on opening up of services provision’, The Financial Times, 16/3/01

³⁰ Keith Rockwell, Director, Information and Media Relations Division, WTO, 19/3/01, www.wto.org/english/news_e/news01_e/observerlet_march01_e.htm

³¹ ‘Health and Social Services – Background Note by the Secretariat’, Council for Trade in Services, WTO, 18/09/98 (WTO Document Symbol: S/C/W/50)

*the remit of the GATS; the exception provided for in article 1.3 of the agreement needed to be interpreted narrowly.*³²

No WTO-member has raised objections to this. In the absence of a collective membership interpretation of a broad exemption, a dispute panel's only reference point is the 'clumsily drafted' Article 1.3. Based on this wording, the panel could reach a narrow exemption clause of GATS, leaving most public services at the threat of inclusion.³³

IV.2.ii Governments can decide not to put forward public services under GATS

There are GATS rules covering all services (general obligations) irrespective of whether specific commitments have been made.

As a second line of defence, the WTO and the UK Government argue that governments can choose not to commit public service sectors to be covered under GATS. This fails to acknowledge the fact that as part of the negotiating process, members make requests of each other. Then the 'requested' government has to decide how to respond and make its offers. For example, the US, in their December 2000 request proposals, made it clear that it wants to see further liberalisation in the European Higher Education sector.³⁴

Concerns about how European Governments will respond to such requests were exacerbated by the remarks of Pascal Lamy, the European Commissioner for Trade:

*"If we want to improve our own access to foreign markets then we can't keep our protected sectors out of the sunlight. We have to be open about negotiating them all if we are going to have the material for a big deal. In the US and the EU, that means some pain in some sectors but gain in many others, and I think we know that we are going to have to bite the bullet to get what we want."*³⁵

The recently agreed Negotiating Guidelines make it clear that all services are on the table, "There shall be no *a priori* exclusion of any service sector or mode of supply."³⁶

Many EC countries (including the UK) have already made commitments in the health and education sectors.³⁷ In current negotiations, the EC is seeking to open up markets, which will include health markets in 'third countries', and will focus on emerging markets in key developing countries. In his speech at the European Services Forum (ESF) conference in November 2000, EC Trade Commissioner, Pascal Lamy made a point of noting that EU negotiators are seeking greater market access in 'third' countries. When stating that, EC GATS negotiators are seeking to:

³² 'Report of the meeting held on 14 October 1998 – Note by the Secretariat', Council for Trade in Services, WTO, 12/11/98 (WTO Document Symbol: S/C/M/30)

³³ For more information about this debate see Centre for International Environment Law (CIEL), 'Public Services and the Scope of the General Agreement on Trade in Services', a research paper by M. Krajewski. www.ciel.org

³⁴ See http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm for current proposals in all sectors.

³⁵ Speech by Pascal Lamy, the European Commissioner for Trade to the US Council for International Business, New York, 8 June 2000.

Available at http://europa.eu.int/comm/trade/speeches_articles/spla23_en.htm

³⁶ See http://www.wto.org/english/news_e/pres01_e/pr217_e.htm

³⁷ For EC post-Uruguay Round commitments, see http://www.wto.org/english/tratop_e/serv_e/sc31.wpf

“preserve legislative priorities... in areas linked to state provision, such as energy, postal services, education, culture and health”, he added that, “(A)t the same time we are seeking fair and negotiated access for our service providers to such sectors in third countries, where market-based, and there is no contradiction in this.”³⁸

V. What flexibility do governments have under GATS?

A frequent response to specific concerns about GATS is that governments can choose whether or not to liberalise, so we therefore need to be less worried about what the details of the agreement actually include. However, one of our concerns is that the limited flexibility that now exists is under attack in the current negotiations.

V.1 What they say:

“(T)he Agreement and the negotiations taking place under it are one of the least controversial areas of current work in the WTO. This is because of its remarkable flexibility, which allows Governments, to a very great extent, to determine the level of obligations they will assume.”

‘GATS: Fact and Fiction’, WTO, March 2001³⁹

“The GATS operates on the basis of a “bottom up approach”, that is to say each and every WTO member country (most of which are developing countries) is able to choose both the sectors in which, and the extent to which, they are able to liberalise further. Thus, every single member is free to decide for themselves whether or not opening a particular service to external trade is appropriate and advantageous to them.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 07/01/01

“This is another area of mythical campaigning. What the General Agreement on Trade in Services provides, which was negotiated during the Uruguay Round, is that countries will open up which ever services they choose at whatever pace they choose, bottom-up approach. In fact the WDM is totally misleading and totally misinformed. It is not just here, it is across the international system.”

Clare Short, Secretary of State for International Development, in Examination of Witnesses, Select Committee on International Development, 29/1/01

“The GATS operates on the basis of a “bottom up approach”. This means that:

- each WTO member country may choose both the sectors in which and the extent to which they liberalise further.*
- every member is free to decide for themselves whether or not opening a particular service to external trade is appropriate and advantageous to them.*
- agreement to open up service sectors is not reached until all participating members - including developing countries - are satisfied with the total package being offered.”*

Alistair Darling, Secretary of State for Social Security, Written reply to WDM supporter, 21/03/01

“GATS does not oblige countries to open their markets... In what is termed the “bottom-up” approach to liberalisation, governments can choose which services they open up (which can be very narrowly defined) and to what degree. For many critics

³⁸ See <http://www.esf.be/docs/plamy.doc>

³⁹ See footnote 2 for hyperlink.

this defence may cut little ice, arguing that weaker countries will come under pressure from the US and Europe in the negotiations to privatise services."
Financial Times, 16/3/01⁴⁰

"WTO members are allowed 'complete freedom' in making GATS commitments. Each WTO member lists in its national schedule those services for which it wishes to guarantee access to foreign suppliers... There is complete freedom to chose which services to commit."

'GATS: Fact and Fiction', WTO, March 2001⁴¹

V.2 WDM responds

V.2.i Only partial flexibility

The bottom-up negotiating structure of GATS should indeed be emphasised. During the Uruguay Round of GATT negotiations (where GATS was initially negotiated), developing country negotiators fought hard to ensure that the agreement was bottom-up. Throughout the Uruguay Round, there was deep concern about bringing services into the GATT (which became the WTO), and developing a bottom-up approach to negotiations was a key way of dealing with this concern. Without this, it is highly unlikely developing countries would have agreed to its inclusion in the WTO.

However, this is not the only way the agreement works. Undeniably, GATS features a hybrid of both a 'top-down' agreement (where all sectors are covered unless specifically excluded) and a 'bottom-up' agreement (where only sectors and measures which governments explicitly commit to are covered). Referring only to its 'bottom-up' provisions gives a misleading impression of the way the agreement works.

This defence also lacks political realism. Reliance on the agreement's structure paints a naïve, if not deliberately misleading, representation of the way GATS works in practice. EC officials have acknowledged that pressure from the EU and US on developing countries is a fact of life. This is the political context in which the GATS rules operate.

After all, the purpose of GATS is for WTO members to 'progressively liberalise' service sectors. Under Article XIX, governments "enter into successive rounds of negotiations... with a view to achieving a progressively higher level of liberalisation.... directed towards increasing the general level of specific commitments undertaken by Members under this Agreement."⁴²

V.2.ii Trying to change the rules

In current negotiations, there are several ways in which this 'bottom up' structure is under threat. In the guidelines for negotiations approved in March 2001, it states, "the *main* method of negotiation shall be the request-offer approach".⁴³ This has led to concern that this leaves the way open for other negotiating approaches to be used, which compromise the 'bottom-up' approach. In fact, since negotiations began, there have been several proposals on the table, which would challenge the benefits of the bottom-up negotiating structure by making it harder for members to exercise flexibility when participating in negotiations. For example:

⁴⁰ 'WTO foresees tough talks on opening up of services provision', Financial Times, 16/03/01

⁴¹ See footnote 2 for hyperlink.

⁴² See http://www.wto.org/english/docs_e/legal_e/26-gats.pdf

⁴³ Available at http://www.wto.org/english/news_e/pres01_e/pr217_e.htm [emphasis added]

Clusters

The EC has been developing a proposal based around a cluster approach, which would mean countries commit, in one package, all services that are interrelated. The EC is interested in using GATS to liberalise water supply services. In order to get countries to make commitments in this area (for the first time), they have made a proposal that water supply should be considered part of an 'environmental services' cluster to be negotiated in one package rather than individually. The cluster proposals are a direct challenge to the current bottom-up structure of the GATS.⁴⁴

Model schedules

Model schedules would create a sample way of making commitments, with countries presumably having to give justification when wanting to deviate from this model. This will compromise the much-flaunted flexibility that proponents claim members can exercise (using limitations and stated exemptions) when writing their schedule for services subject to specific commitments. When challenged on this, the UK Government admitted that model schedules were being considered, however they would be used on a bilateral basis, i.e. between the EC and US as agreed beforehand.⁴⁵ Yet this fails to take into account the fact that once the major WTO players begin to alter the rules of the game between themselves, this all too often becomes the way the whole game gets played.

'Across the board' (horizontal) negotiating approaches

Certain members have also been discussing horizontal negotiating approaches, which means making a commitment, such as allowing complete foreign ownership – and applying it across the board to all services without exception.

VI. Can commitments under GATS be reversed?

One of our major concerns has been that decisions taken by governments now are effectively irreversible, severely restricting the choices of future governments.

VI.1 What they say:

"GATS commitments, like tariff bindings, are not irreversible."

'GATS: Fact and Fiction', WTO, March 2001⁴⁶

"Where GATS commitments have been made, a Government cannot immediately change its policy. To do so would undermine the whole process of negotiation and of creating a predictable and stable environment for economic operators. However, under the terms of the GATS a member may notify its intention to modify or withdraw any commitment entered into force. But, any member whose benefits under the agreement may as a result be affected can in return request negotiations with a view to agreeing compensatory adjustments or failing that arbitration."

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 27/01/01

"...governments can take any measures necessary to protect human, animal or plant life or health, so long as it does not constitute unjustifiable discrimination or disguised protectionism. This overrides any other provision in GATS."

Mike Moore, Director-General, WTO, The Guardian, 26/2/01

⁴⁴ See the EC submission under the *negotiations, guidelines etc* heading at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

⁴⁵ Meeting with UK DTI, 27/04/01

⁴⁶ See footnote 2 for hyperlink.

VI.2 WDM responds

GATS is designed to ensure a predictable environment for investors, and thus to make liberalisation commitments secure. This ultimately means that commitments are irreversible. As the UK Government itself has said, “GATS commitments are not made lightly by any government. Commitments are intended to be binding and ensure predictability for companies.”⁴⁷

VI.2.i The difficulty of reversing a decision in the context of ‘progressive liberalisation’

Proponents of the GATS point to the reversibility procedure set out in Article XXI, ‘Modification of Schedules’. In theory, countries can withdraw a commitment “after three years have elapsed from the date on which that commitment entered into force.”⁴⁸

This three-year time lag is a significant problem to countries that have made errors in their schedules, or to others who face emergency situations they cannot resolve because of GATS commitments. In addition, there is no agreement on what is meant by the date that a commitment ‘entered into force’, particularly given that some commitments are phased in over time. This is especially true for developing country commitments.

More importantly, even once this three-year time period has elapsed, reversing a commitment appears to be almost impossible. After the three-year period, a government wanting to reverse a commitment must give at least three months notice of its intention. Then begins a potentially protracted period of negotiations in which the government must come up with substitute commitments that compensate for the reversal and are satisfactory to all WTO members. Governments opposing the reversal can use the GATS arbitration process to its fullest extent, and can argue that substitute commitments offered to compensate for the reversal are not acceptable.

In its ‘Introduction to the GATS’, the WTO adds, “circumstances may well arise in which a government may wish to take back something it has given in past negotiations. It can do so, *but only at a price*, and after due notice.”⁴⁹

VI.2.ii Reversing GATS commitments to protect ‘human, plant or animal life or health’

When arguing that members can reverse commitments, proponents point out that, “in case of need, the General Exceptions in Article XIV of the GATS can be invoked.” The WTO argues that this article can be used “where it is necessary to act to protect major public interests, including safety, human, plant or animal life or health, national security or public morals. These exceptions override all other provisions in the Agreement, entitling a Government to violate or withdraw its own commitments if necessary.”⁵⁰

⁴⁷ Department of Trade and Industry, ‘Frequently asked questions about the GATS: Briefing Note on the General Agreement on Trade in Services (GATS)’, March 2001, UK

⁴⁸ General Agreement on Trade in Services, Part IV – Progressive Liberalisation, Article XXI (1a)

⁴⁹ See http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc [emphasis added]

⁵⁰ ‘GATS: Fact and Fiction’, WTO, March 2001⁵⁰

However, in order to alter a commitment, members must apply 'the necessity test' to any proposed action. The necessity test determines whether or not the proposed action will be acceptable, and is judged on the following criteria:

- Firstly, the exception must be in pursuit of a legitimate objective as defined in the quote above. (ie. Such as the protection of human, plant or animal life or health);
- Secondly, the exception must be based on science. (So, if a government takes action, they must be able to prove that the threat posed, for example to human health, by an activity relating to a GATS commitment, is scientifically proven);
- Thirdly, the exception must be the 'least trade restrictive' option available for the government to take. (ie. Governments must ensure that the action taken in order to protect the above interferes with trade the least); and,
- Fourthly, the exception must not discriminate against 'like' foreign services or service suppliers.

In order to enact the Article XIV exception, members must go through a dispute settlement procedure, which is a long, expensive and politically difficult process, particularly for developing countries. Furthermore, WTO dispute settlement cases on exceptions taken under GATT have shown how difficult it is for members to meet the requirements of the above necessity test in order to take an action that goes against WTO rules.

Action, in order to protect human life or health, is considered an exception rather than a rule. The burden of proof is on governments to show why they need to take such action, rather than on investors or trading partners to act in a socially responsibly manner.

Finally, the above exception clause in GATS is much narrower than the respective provision in the GATT, which contains more 'legitimate objectives' for altering WTO obligations. In particular, the GATS does not contain a provision similar to Article XX(g) in GATT, which allows exceptions for measures "relating to the conservation of exhaustible natural resources." This GATT article, when used in dispute cases to date has provided reprieve for members wishing to take action against their WTO commitments.

VII. Does GATS recognise the particular problems of developing countries?

WDM, and others, argue that GATS poses particular problems for developing countries who are at a different stage of development from the richer Quad (US, Canada, EC, Japan) countries and who have less negotiating power.

VII.1 What they say

"Indeed, the GATS recognises that in the area of services the process of liberalisation is to take place with due respect for national policy objectives and the level of development of individual Members, including appropriate flexibility for individual developing country Members."

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 21/01/01

“There are special provisions reflecting the interests of developing countries. In considering progressive liberalisation, the GATS provides that there shall be appropriate flexibility for individual developing country Members (especially least-developed countries) for opening fewer sectors, liberalising fewer kinds of transactions, only progressively extending market access in line with their development situation and, when they chose to make access to their markets available to foreign suppliers, attaching conditions aimed at:

- (a) strengthening their domestic services capacity and its efficiency and competitiveness inter alia through access to technology on a commercial basis;*
- (b) improving their access to distribution channels and information networks; and*
- (c) liberalising market access in areas of export interest to them”*

Department of Trade and Industry, ‘Frequently asked questions about the GATS: Briefing Note on the General Agreement on Trade in Services (GATS)’, March 2001, UK

“WTO Members are also discussing the possible introduction of a safeguard mechanism into the GATS to deal with the temporary suspension of commitments in emergency circumstances.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 27/01/01

VII.2 WDM responds

VII.2.i Specific provisions for developing countries

The GATS makes reference to the special circumstances of developing countries in two places, in Articles IV ‘Increasing Participation of Developing Countries’ and XIX/2 ‘Negotiation of Specific Commitments’, where it talks about ‘appropriate flexibility for individual developing country Members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation.’ Indeed, given that it was obvious from the start that the main beneficiaries of more open trade in the service sector would be multinational companies, such language was crucial in order to get key developing countries to sign onto the original agreement.

So far, this language has amounted to nothing more than rhetoric. What Article IV actually means in practice is yet to be seen. Indeed, caution should be exercised when implying that it does mean something in practice. EEC negotiators stated in 1987 that while development friendly language was crucial given the imbalances in the international services economy, actually enforcing such obligations on companies operating in service sectors would be impossible. They “rule[d] out the home countries of TNCs assuming any duties to ensure their TNCs abide by these obligations, nor any other enforcement measures for enforcement of such obligations – a ‘right’ that weaker Third World trading partners can never exercise.”⁵¹

Furthermore, language like this is not sufficient to deal with the massive inequalities in the current international services economy. It offers developing countries little reprieve, as it demands they ultimately are on board the GATS ship, albeit at a slightly slower pace. Given concern about the services liberalisation agenda pursued by the GATS, such provisions offer little solace to citizens demanding that foreign investment actually benefit people.

⁵¹ Chakravarthi Raghavan, ‘Recolonisation: GATT, the Uruguay Round & the Third World’, Third World Network, Penang, Malaysia, 1990, p.108.

VII.2.ii Emergency safeguards for developing countries

Discussions around emergency safeguard measures (Article X) are offered as an example of the 'development friendly' language in the GATS. If completed, this article would allow governments to temporarily reverse commitments that have produced catastrophic consequences. However, it looks unlikely that an agreement will actually be reached in the near future.

The Quad group of countries (US, Canada, EC and Japan) is vigorously blocking developing countries' attempts to use the ready-made model for a safeguard measure that already exists in other WTO agreements, and negotiate a parallel one in the GATS in Article X. The latest date for completion of Article X is 15 March 2002 (as agreed in the Negotiating Guidelines on 28 March 2001),⁵² but this is a deadline that continues to slip.

It must also be noted that if concluded, this Article is unlikely to offer reprieve from GATS commitments to countries facing social or political problems ignited by inadequate service delivery linked to liberalisation. It will most likely focus on economic difficulties caused by market saturation once a service sector is opened-up under the GATS.

VII.2.iii Lack of developing country negotiating power

Some developing countries have played a vital role in ensuring that the GATS included provisions aimed at encouraging more fair participation by all WTO members (such as the bottom-up negotiating procedure). However, throughout the GATS negotiations a constant problem has been the inability of developing countries to engage in extremely complex negotiations in an economic sphere so heavily dominated by Northern multinationals. They do not know what to 'request' from developed countries, nor how to respond to requests made of them.

Speaking about GATS negotiations during the Uruguay Round, K. Balasubramaniam (Health and Pharmaceuticals Advisor for Consumers International Regional Office for Asia and the Pacific) describes how, '(n)egotiators were groping in the dark. Negotiators from developing countries who were at the negotiating talks have made offers without ever knowing the impact of such offers on the various sectors and overall economic, social and cultural development.'⁵³

VIII. Do multinationals have too much influence over GATS?

WDM and others are concerned about the extent of influence that multinational corporations have had over the process of the GATS agreement.

VIII.1 What they say:

"But multinationals or other service suppliers cannot simply go into any WTO member country and buy anything and everything."

Mike Moore, Director-General, WTO, The Guardian, 26/2/01

⁵² Available at http://www.wto.org/english/news_e/pres01_e/pr217_e.htm

⁵³ 'Globalisation & Liberalisation of Healthcare Services: WTO & the General Agreement on Trade in Services', 13/02/01 See: http://www.pha2---.org/issue_bala1.htm

“There is no question of the GATS ensuring the rights of multinationals over those of individual countries or communities.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 28/01/01

“A further assertion is that multinational companies can force governments to liberalise against their will. This again is simply not the case. All WTO agreements are government to government agreements.”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 28/01/01

“...the GATS is a government to government agreement. Multinational companies have no rights under the GATS. Companies may claim to their government that a country is in default of its commitments under the GATS, and dispute settlement cases may be opened as a result if a government judges it appropriate, but these cases are conducted at a government to government level. In this respect the GATS is no different from any other WTO agreement, including the GATT...”

Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 21/01/01

VIII.2 WDM responds

Understanding the influence that service corporations have had, and continue to have, on the GATS process is crucial to understanding the actual contents and aim of the agreement as a whole.

It is widely acknowledged (even by WTO staff and economic advisors to the European Commission) that without the pressure from service multinationals, the GATS would not exist. From the early eighties, large US financial companies such as American Express and Citicorp (and later key City of London financial companies) were actively lobbying their governments to put trade in services on the international trade negotiating agenda.

VIII.2.i Influencing current negotiations

However, their influence in the process extends beyond bringing the GATS into being. Companies continue to influence the agenda of present negotiations and set negotiating priorities. The list of US Coalition of Service Industry members helps explain the priorities set at GATS meetings since the agreement was signed in 1994. For example, the decision on Basic Telecommunications commitments (adopted by the WTO Services Council in 1996) corresponds to the interests of US telecommunications companies such as AOL, AT&T and MCI (all CSI members). In addition, the decision on commitments in Financial Services (adopted by the WTO Services Council in December 1997) reflects the interests of CSI members such as American Express, Chubb, Visa, Chase Manhattan and New York Life.

These companies have unprecedented access to both officials and negotiating civil servants. The EC has acknowledged on its GATS information website, “an active service industry involvement in the negotiations is crucial to target the EU’s negotiating objectives towards priorities for business. The GATS is not just something that exists between governments. It is first and foremost an instrument for the benefit of business.”⁵⁴

⁵⁴ ‘Opening World Markets for Services, Towards GATS 2000’ EC website
<http://gats-info.eu.int/gats-info/g2000.pl?NEWS=bbb>

At a May 2001 debate on GATS, a prominent European Services Forum member commenting on access to Ministers noted that “all you have to do is pick up the phone – I do this everyday!”⁵⁵ Civil society groups have no such access.

The revolving door between government negotiators and the chairs’ of company lobby groups ensures that information flows between government and business. For example, Amsterdam-based Corporate European Observatory has written extensively on the role played by Ex-Commissioner Leon Britten, now lobbying the European Commission on behalf of the UK Financial Services Industry.⁵⁶

Corporate lobbying for WTO agreements, and then ensuring that those agreements are implemented, is not a new phenomena. Those acquainted with the Trade Related Intellectual Property (TRIPs) agreement will be familiar with this process. However, it is always worth highlighting the critical role that service corporations are playing in the GATS process, and the extent to which this is being actively encouraged by the EC and US who regard the GATS as an agreement to further unlock the export potential of their service industry.

IX. CONCLUSION

Perhaps most insidious of all is the way that current proponents of the agreement are trying to shut out real debate. In its March 2001 publication, ‘GATS – Fact and Fiction’, the WTO Secretariat, pushes, with real fervour, an agreement whose policies are still to be assessed.

Critics are raising warning bells based on real experiences of service liberalisation in countries around the world. The WTO’s bunker mentality may be an effective way to avoid real debate, but it is a very poor way of dealing with the widely acknowledged need for fundamental reform of the WTO. The ‘commit now-ask questions later’ approach is highly irresponsible. WDM is part of a growing movement of NGOs concerned about current plans to expand the GATS. Many of these groups met in Geneva in March 2001 and called for a moratorium on negotiations, so GATS can be properly scrutinized and assessed. Over 250 Parliamentarians in the UK have signed an Early Day Motion (parliamentary petition) calling for an assessment of the agreements impacts on public services in the UK and on developing countries. It is time for the WTO, and its champions, to climb out of their bunkers and let the real debate commence.

⁵⁵ Pascal Kerneis, Managing Director, European Services Forum, speaking at the ‘At Whose Services?’ conference, Bonn, Germany, 21-22 May 2001

⁵⁶ See: <http://www.xs4all.nl/~ceo/observer8/index.html>

Appendix: Useful websites

Further References Relating to the WTO document “GATS: Fact and Fiction”

‘GATS: What is fact and what is fiction? A civil society response to the WTO’s publication – GATS Fact and Fiction’

<http://www.xs4all.nl/~ceo/gatswatch/rebuttal-intro.html>

C. Ragavan, ‘GATS – Fact and Fiction: at best a partial truth’, Third World Economics, 1-15 April 2001, Third World Network

<http://www.twinside.org.sg>

E. Gould, ‘Response to Facts and Fiction’, The Council of Canadians, *forthcoming at*

<http://www.canadians.org>

GATSwatch: <http://www.xs4all.nl/~ceo/gatswatch/>

This is website containing links to all of the below, as well as links to sites of organisations raising concerns about the GATS negotiations.

Gateway page to the WTO’s information on GATS:

http://www.wto.org/english/tratop_e/serv_e/serv_e.htm

European Commissions INFO-POINT on World Trade in Services

<http://gats-info.eu.int/index.html>

UK Department of Trade and Industry, Trade in Services

<http://www.dti.gov.uk/worldtrade/service.htm>

European Services Forum

www.esf.be

The World Development Movement (WDM) is an independent membership organisation that undertakes research and advocacy on policies to support the world’s poor.

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