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GATS: A Disservice to the Poor

The high costs and limited benefits for developing countries of the General Agreement on Trade in Services



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None of the above, nor their organisations, are responsible for the opinions expressed in the report. Any errors or omissions remain the responsibility of the World Development Movement.

A short briefing based on the findings of this report is also available from the World Development Movement, along with our other materials on GATS.

The World Development Movement (WDM) campaigns to tackle the root causes of poverty. With our partners around the world, we win positive change for the world's poorest people. We believe that charity is not enough. We lobby governments and companies to change the policies that keep people poor.

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GATS: A Disservice to the Poor

The high costs and limited benefits of the General Agreement in Trade in Services for developing countries

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Summary

Amid the controversy now surrounding the World Trade Organisation (WTO), the World Development Movement is warning that one agreement in particular could be especially damaging to developing countries. This is the General Agreement on Trade in Services (GATS). Like other WTO agreements, GATS is designed to liberalise trade, in this case, the trade in services. However, the World Development Movement argues that GATS is potentially more far-reaching than other agreements, and therefore even more damaging to people in developing countries, particularly the poorest.

GATS poses particular problems for three reasons:

- *The nature of services:* Some services are not just commodities that can be left to the market, with access dependent on income. Instead they are essential to human well-being. Such services include health, education and sanitation. Governments should, we argue, have a responsibility to ensure universal access to such services. The service sector also includes utilities essential to the development of the economy, like telecommunications.
- *The inclusion of foreign investment:* The agreement specifically covers the 'commercial presence' of service suppliers, as well as the cross-border trade in services. This makes it an investment agreement as well as a trade agreement, and therefore influences government policy towards foreign

multinationals located in its domestic economy.

- *The inclusion of government rules on domestic activity:* Core WTO principles require governments to treat foreign firms at least as well as domestic ones, and to treat all foreign suppliers equally. Yet GATS rules extend beyond this, restricting government's ability to make rules even if they apply to both domestic and foreign firms.

Defenders and critics of GATS are locked in debate. Much of this discourse has centred on whether governments retain the ability to regulate service providers under the agreement. In Part Three of the report we look at the kinds of regulations that governments might legitimately want to implement in the interests of their citizens, concluding that there are a range of regulatory objectives, from promoting economic development to ensuring the provision of basic services. A distinction is made between government regulation in the public interest, and regulations which are designed to ensure the smooth running of markets, and which GATS largely allows.

Some of the articles of the agreement are examined in detail, assessing the extent to which they might prohibit public interest regulations. The sections called 'National Treatment' and 'Market Access' are the two main areas of the agreement considered. Under each of these, governments have to 'opt in', actively committing a particular service sector to the relevant set of rules. Where a government has fully committed a service sector to National Treatment rules it could,

for example, be challenged for requiring foreign investors to use local suppliers or hire local managers. The Market Access principle, where applied in full, exposes governments to challenges if, for example, they limit the number of hotels or restaurants in a historic site.

The WTO has developed some standard defences of GATS, which it has shared with member governments. When subjected to close examination, as we demonstrate in Part Four, these are not reassuring. In particular, the suggestion that developing country governments have substantial flexibility is not reinforced by the facts.

One such argument is that governments can limit the extent of their commitments under GATS, specifying particular types of rules that they want to maintain. But, as we explain, this can be highly problematic, particularly due to the level of knowledge and foresight required. The report shows that it is simply unrealistic to expect governments to know what regulations they should maintain, let alone to predict what regulations they may want to apply in the future. Of all the countries that have made market access commitments on tourism, only Egypt has remembered to specify that sites may not have infinite capacity for commercial activity. It states that tours down the Nile are subject to the river's carrying capacity. Similarly, the EU fell foul of GATS rules in the great banana debacle, where the US successfully argued that European preferences for Caribbean bananas were prohibited under WTO rules.

Compounding this problem is the effective irreversibility of commitments made under GATS. As the United Kingdom's (UK) Department for Trade and Industry has said "Commitments are intended to be

binding and ensure predictability for companies"¹

Significantly, in the debate on GATS, there has been much less discussion around the potential benefits to developing countries of service liberalisation in general, and GATS specifically. This topic is therefore covered in Part Five. While there is, at present, limited evidence on the impact of GATS itself, there is however a wealth of examples of the outcome of service liberalisation, often as a result of International Monetary Fund and World Bank designed Structural Adjustment Programmes. The results are, at best, mixed.

The promised benefits of liberalisation, such as attracting new finance, creating employment and the transfer of technology, are examined in the report. The conclusion is that the benefits of service liberalisation for the domestic economy in developing countries appear limited. This is partly because developing countries are not major exporters of services so stand to gain little from the opening of potential new markets overseas. It is also because multinational service providers appear to create limited linkages with their host domestic economy, while potentially undermining nascent service industries.

Nor do the promised benefits to consumers from increased competition materialise. Sometimes this is because multinationals have simply taken over state monopolies, bringing no new benefits of competition. The problem also lies with weak national regulatory bodies, a problem that GATS is likely to exacerbate.

Given the high costs and limited benefits of GATS the obvious question, asked in

Part Six, is why governments have agreed to it. Reports from the WTO Ministerial meeting in Doha reinforce the perception that industrialised countries can exert severe pressure on developing countries. Few commentators could disagree that different countries enter into supposedly equal negotiations with very different levels of capacity. But perhaps less well documented is the close relationship between corporations and some governments, and the influence that this has had over GATS. Given the enormous

amount multinational service providers stand to gain from the agreement, this democratic deficit is particularly worrying.

WDM concludes, in Part Seven, that there are serious grounds for concern over the potentially high costs and low benefits of GATS for developing countries. As a first step, we are supporting calls for an independent assessment of the impact of GATS and service liberalisation. We argue that GATS negotiations should be halted until such an assessment has taken place.

1. INTRODUCTION

International trade rules are vital to protect and promote the needs of ordinary citizens, particularly the impoverished and powerless. Sadly, most existing trade rules administered by the World Trade Organisation (WTO) are adversely affecting these groups of people, as countless non-governmental organisations (NGOs) have pointed out.

The World Development Movement (WDM) is particularly concerned about the WTO's General Agreement on Trade in Services (GATS), because of the ways in which it may affect developing countries to the detriment of their poorest people. Other groups are disturbed about the impact of GATS in industrialised countries, especially in the areas of health and education.

As disquiet has grown among NGOs, trade unions and some developing country governments, a heated debate about GATS has developed. In March 2001, NGOs from around the world gathered in Geneva to express their concerns about GATS. Timed to coincide with this meeting, the WTO took the unusual step of issuing a rebuttal to issues raised by NGOs entitled *GATS: Fact and Fiction*.²

In the United Kingdom (UK), 262 Members of Parliament signed an Early Day Motion calling for an independent and thorough assessment of GATS. Thousands of citizens have written to Parliamentarians and the Government on this issue. Recently uncovered documents suggest that British civil servants have warned corporate representatives about the UK campaign and are actively colluding in an attempt to discredit critics of GATS.³

Much of the debate has focused on whether governments retain scope to regulate under GATS. Two main areas of disagreement have emerged:

- What constitutes legitimate or necessary government regulation? This report looks at the kind of regulations governments need to impose in the interests of their citizens, particularly the poorest, and at what kind of regulations GATS could affect.
- What is the actual meaning of the GATS text? This report analyses key parts of the GATS, and the WTO's interpretation and defence of it, concluding that the agreement has dramatically less flexibility than its defenders suggest.

Yet, for developing countries, the real question concerns not the details of the agreement, but whether or not they stand to gain anything from GATS at all. And if so, are these gains worth giving up their rights to regulate? The report therefore considers how countries are supposed to benefit, in theory, from the liberalisation of international trade in services – and what has happened in practice. A UK civil servant reportedly admitted that the case for liberalisation in services was “vulnerable when the NGOs asked for proof of where the economic benefits lay.”⁴ GATS, however, presupposes that every country benefits from service liberalisation. What's more, it effectively locks countries into the agreement for the foreseeable future.

Citing evidence from NGOs, trade unions, the United Nations, WTO and other official sources, this report demonstrates that:

- governments will pay a high price in losing the right to regulate, a loss which has substantial implications for democratic planning;
- developing countries will gain few benefits from the liberalisation of trade in services, as promoted by GATS;
- countries are under heavy pressure to comply with GATS, which may explain why they are prepared to give up so much for so little apparent gain.

The report is timely. GATS has so far had relatively limited impact, but crucial negotiations are currently taking place within the WTO to extend its remit. Parliaments, NGOs, trade unions and the media are finally becoming aware of its implications and to debate the issue. WDM shares the concerns of many, and urges caution before WTO members take further potentially irreversible and damaging steps on the provision of services.

2. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): AN OUTLINE

2.1 WHAT IS GATS? WHAT ARE SERVICES?

The General Agreement on Trade in Services (GATS) is one of a number of agreements that come under the umbrella of the World Trade Organisation, which came into being at the beginning of 1995. The aim of GATS is to remove what the WTO considers are 'unnecessary' restrictions and internal government regulations that are 'barriers to trade' between countries in services.

As the WTO itself says of GATS, "International bindings [such as those made under GATS] help to enhance a country's locational attractiveness for traders and investors as these are protected from sudden policy changes. Such bindings are particularly important if used to lock in a currently liberal regime or map out a future liberalisation path."⁵

Before 1995, international trade agreements had largely applied to goods, not services. Bringing services within the WTO's remit has meant that rules developed to govern trade in goods have been applied to quite a different sort of process. Services have been described as everything you cannot drop on your foot. They include financial and business services, encompassing banking, insurance and investment; telecommunications including radio, television, film and the Internet; construction and engineering; the distribution of goods through retail, wholesale and franchising; and all aspects of travel and tourism. GATS also covers

what many people consider to be 'basic' or 'essential' services, such as education, health care, and sanitation, which in many countries are provided by public entities rather than private or commercial ones.⁶

The growth in service industries has been substantial in recent years. Services now account for 60-70 per cent of GDP and employment in OECD countries.⁷ UNCTAD calculates that, in 1999, over 60 per cent of global cross-border mergers and acquisitions (M&A) were in the service industries, with nearly 90 per cent of all M&A purchases in developing countries in the services sector, many of them the result of the privatisation of state enterprises.⁸ This expansion in international trade in services is partly the result of technological changes, especially those resulting from computer and Internet developments, but also because industrialised countries have identified whole new export markets.

GATS itself operates in two ways. Some of its rules apply to all service sectors, across the board ('horizontal' rules). Every WTO member has to abide by these rules or risk being challenged by another country at a WTO dispute panel. These rules are 'general obligations' and include the 'Most Favoured Nation' (MFN) principle. Other rules apply to a service sector only after a government has actively listed it to come under GATS, and it is these 'specific commitments' that are at the core of the agreement. These rules include those on National Treatment and Market Access. (See pages 20-26)

Box 1

What constitutes a 'government measure'?

GATS appears to apply to just about every action or measure taken by governments at the national, regional and even local level. These might include subsidies and grants, nationality requirements, residency requirements, and local content provisions.⁹ Moreover, GATS covers all government measures *affecting* services, not just those designed to regulate them.¹⁰ This is particularly relevant for social regulations such as labour or environmental laws.

Upon completion of the Uruguay Round of trade negotiations in 1994, which brought services under international trade rules for the first time, WTO members set a 'built in agenda' mandating discussions to continue on some WTO agreements without further approval from the WTO Ministerial (the large meetings of Ministers from WTO countries). As GATS was part of this built-in agenda, WTO member countries were able to begin a new set of negotiations to expand GATS in February 2000.

GATS rules, which are already being criticised, will therefore be extended to yet more areas. In addition, some governments are going further, suggesting changes to the structure of the agreement, and so extending its reach. Critics are concerned that proposals such as those on domestic regulation (see page 26) will make the agreement even more damaging to a government's ability to regulate in the interests of society and the environment.

2.2 WHY IS GATS SO IMPORTANT?

GATS is essentially a liberalising agreement - an agreement to open up a country to international trade in services. As such, its goal is similar to that of other WTO agreements covering goods, agriculture and textiles - and thus it creates similar problems to these agreements.¹¹

One unique feature, and problem, of WTO agreements compared to most other international agreements is they have teeth: a country violating WTO rules can face trade sanctions. The potential enforcement of these rules is a much greater deterrent to developing countries than richer industrialised ones.

GATS sets legally binding rules which can be enforced through the WTO dispute settlement body. Any WTO member can lodge a complaint with the WTO against another member country which it believes has broken its GATS commitments. A panel of trade officials then adjudicates. If the WTO arbitrators find the complaint to be justified, the offending member country must adjust its contested domestic policy to comply with the GATS rules, to the satisfaction of the WTO arbitrators. If it fails to do so, the complainant can, with the permission of the arbitrators, impose trade sanctions on the offending country. For most countries this is a high penalty; for smaller trade-dependent countries, it can be disastrous.

Those adjudicating tend to be trade experts who are not necessarily best placed to pronounce on general government policy-making. And although complaints are brought by countries - the WTO is, after all, an agreement between countries - it is corporations of a particular

country which are frequently the driving force behind a government's complaint. The corporations will often use their extensive resources to hire the best lawyers to argue their case. Much is left to the discretion of the panel, which creates yet further problems in an agreement such as GATS that is so unclear and thus open to wide interpretation.

Certain features particular to GATS raise three more concerns. First, the agreement is extremely wide-ranging covering more areas of economic activity than most other 'trade' agreements. In addition to cross-border trade in services (the familiar way in which a service would be sold in another country), GATS also covers a service provided *to* a national of one country while in a foreign country and a service provided *by* a national of one country while in another country. Significantly, GATS also covers services supplied by a company of one member country, which has set up shop in another member's territory - 'commercial presence' in GATS-speak. The agreement thus affects the ability of governments to regulate foreign companies that set up within their countries. It is this rule that makes GATS, in effect, an investment treaty, as well as a trade agreement, therefore influencing core government decisions. For example, the ability of developing countries to protect their own nascent or 'infant' industries or to stipulate that ensuring inward investment must benefit the national economy and society could be open to a WTO challenge.

Second, GATS rules intrude further into government policy-making than those of other WTO agreements. Many governments have tended to regulate services more than other sectors of the economy, partly because services are

Box 2

GATS identifies four categories of service delivery or 'modes of supply'¹²

Mode 1 Cross border supply

Covers services supplied "from the territory of one Member into the territory of any other Member."¹³ This is closest to what is typically understood as international trade in services. It would encompass, for example, services provided by international postal or telephone companies.

Mode 2 Consumption abroad

Covers services supplied "in the territory of one Member to the service consumer of any other Member"¹⁴. It includes tourism when a tourist travels to another country.

Mode 3 Commercial presence

Covers services provided "by a service supplier of one Member, through commercial presence in the territory of any other Member".¹⁵ This includes all foreign investment related to services, such as foreign banks setting up branches overseas.

Mode 4 Presence of natural persons

Covers services provided "by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member."¹⁶ This provides for the temporary employment of foreign workers delivering services.

much more integrated within the economy. Many sectors such as agriculture, goods, education or health care require banking and telecommunications services, for

instance. Moreover, GATS rules go well beyond simply requiring equal treatment of foreign firms with domestic ones - they restrict the ability of governments to regulate *any* economic activity, whether domestic or foreign (see page 22). In practice, it is as though GATS gives corporations a right to exist, above and beyond, a governments right, and need, to govern on behalf of a country's citizens.

Finally, and most importantly, some services are not just commodities which consumers can do without if they cannot afford them. Health care, waste collection and education have become basic necessities in many societies and cannot simply be left to the market or subject to market-based international agreements if they are to be accessible to all. Access to financial credit, electricity and telecommunications can also be important for those struggling to get out of poverty.

3. THE HIGH COST TO GOVERNMENTS

3.1 MARKET VERSUS STATE

In the early years of the WTO, GATS was largely unknown to the general public, many NGOs, the media or many civil servants in government departments (although several developing countries had raised major objections during the Uruguay Round of negotiations and after). Criticism tended to focus more on other WTO agreements, such as those governing agriculture and intellectual property rights. In the last couple of years, however, the critical spotlight has increasingly turned towards services as fears have been expressed not only about the *current* impact of GATS, but also its *potential* impact.

To what extent will GATS curtail governments' ability to regulate the market? In many ways, this is the key issue of concern. Many believe the agreement has the potential to tie the hands of governments from any attempt to regulate markets in favour of their citizens, particularly the poorest. As already pointed out, services have been highly regulated, one reason why companies have promoted and lobbied for the GATS agreement so strongly. Those defending GATS, such as the WTO Secretariat and the UK Government, have taken great pains to refute this concern. The often unproductive debate that ensues usually revolves around two questions: what is regulation, and what should the role of government be?

When GATS defenders contend that the agreement protects the right of governments to regulate, they tend to

understand 'regulation' to mean regulation of the market to ensure that it operates smoothly. In practice, this narrow understanding refers to those regulations that tackle the market's imperfections and abuses and create a stable business environment, for example, when competition policy is designed to protect the build-up of monopolies.¹⁷ This is very different from regulation that *restricts* the market to ensure that political, social or environmental goals are met. It is also different from the kind of economic regulation (such as the protection of infant or nascent industries) which developing countries believe they need to maximise their own economic growth. (These types of regulation are expanded upon below, see page17).

As to the relative roles of government and market, proponents of GATS tend to follow a school of thought which focuses primarily on the economy and economic growth, and which regards regulation as generally undesirable and a hindrance to productive market forces. Although the language used by GATS supporters has become more sophisticated there is still a basic faith in the ability of the market to provide services to the benefit of all in society.

In some ways, the WTO itself is a clear example of this belief that the market can provide for everything. The rules of the various WTO agreements all prioritise the expansion of trade over other goals. They allow some regulation, but only as long as trade is not 'adversely affected'. Even the World Bank and International Monetary Fund have accepted that the liberalisation

policies they promote should be judged at least in part against the objective of poverty reduction.

Many of those concerned about the WTO agreements in general, and GATS in particular, argue that taking a broader view of society than simply its economic dimensions reveals why government intervention is vital to safeguard public interests. While few critics would advocate full state control, many recognise that governments play a key role in shaping the market.

Market forces alone have tended to favour powerful multinationals at the expense of smaller companies and those with little or no purchasing power. Regulations are clearly needed, moreover, to bring about poverty reduction or equitable income distribution, as well as democracy and other non-economic goals.

In its policy paper on globalisation the UK's Department for International Development is clear: "Only the state can ensure the provision of key public services...the unique and indispensable role of government remains that of setting policies and priorities, ensuring that basic services are provided to all, and regulating to ensure quality and standards." It goes on to say: "The process of opening up – to both trade and financial flows – has to be carefully managed....the benefits will not automatically reach poor people."¹⁸

The UN Research Institute for Social Development shares the view that the market alone will not always bring the best outcomes: "Left to their own devices, TNCs are likely to fulfil their responsibility in a minimalist and fragmented fashion. Their strategies may be conducive to economic growth and the stability of their operating environments, but not

necessarily to sustainable development. They still need strong and effective regulation."¹⁹

The 'free market' approach can also have a damaging impact on struggling democracies. For instance, in official pronouncements about 'good governance' in Africa – or rather its lack – weak state capacity is often identified as the major stumbling block. Yet liberalising agreements may exacerbate rather than address this problem by reducing governments' role. In the democratic compact between government and citizens, the people, in effect, agree to abide by government rules in return for government protection from harms and promotion of public interests. The ability to regulate economic activity and to provide basic services are core tools enabling governments to carry out their side of the bargain.

In the UK, the market versus state debate has been heated, too. The Government is proposing to involve the private, for-profit sector still further in a range of public services such as health and education, suggestions that have met with vocal opposition from workers and consumers. If the Government decides not only to implement its plans but also to include them in its GATS commitments, future governments will in practice be unable to reverse the decisions, however persuasive the counter arguments may be, or however detrimental the results.

Given this context to GATS and the concerns raised, this report considers next the kinds of regulations governments need to apply if social and environmental objectives are to be met. Such objectives would, for example, include International Development Targets for halving world poverty by 2015, agreed by all OECD

countries, and widely promoted by the UK Government. The report then goes on to look in more detail at the GATS agreement itself.

3.2 WHY ARE REGULATIONS NEEDED?

A government's right to regulate is more than a theoretical nicety. Regulations enable governments to pursue policies that are fundamental to achieving equality and other social goals to which many governments are committed – promoting equitable development, providing basic services, protecting citizens and the environment, to name a few. While not all governments may choose to implement all of these policies, WDM argues that keeping their ability to do so is fundamental to democracy. GATS would close down their future options.

3.2.1 Promoting equitable development

Studies of the potential impact of foreign direct investment (FDI) on developing countries have found that the ability of governments to regulate selectively is key to equitable development.²⁰ The so-called 'free market' has not always proved the best way of achieving economic growth. Moreover, there is little evidence that it is the best way to achieve social goals such as equity. A national development strategy aiming to increase economic growth and development among the poorer sections of society may well want to ensure that a foreign investor:

- provides new capital rather than simply buying up an existing national company;

- transfers technology to local people and companies;
- employs local managers;
- provides high quality jobs appropriate to local skills and supplies training;
- sources locally and supports local development of business.

An UNCTAD Expert meeting on Existing Agreements on Investment and their Developmental dimensions, held in May 1997 in Geneva, produced a list of criteria for 'development friendly' investment, similar to the one above, and included the following advice on regulatory frameworks:

- "Frameworks should take into account host countries' developmental objectives, reserving for those countries the ability to pursue economic development.
- Frameworks should not make it difficult for developing countries to protect their culture, environment, economic mechanisms and social goals."²¹

One way in which many developing countries try to promote local and national development is by protecting domestic infant industries from competition from more advanced firms. Multinationals can destroy local competitors through economies of scale, access to public subsidies, greater resources, or use of more advanced and expensive technology. They can also use subtler methods, such as the creation of particular tastes through advertising. Soft drink companies have done this throughout the world, in the process putting out of business local brands, which cannot compete with the cachet attached to the big, usually Western, names. Protecting domestic industries undoubtedly discriminates against foreign firms, but can be a vital way of ensuring that developing countries actually develop and are better able to support themselves in

the future. It is in restricting governments' ability to do so through its national treatment and market access rules (see pages 20-26) that GATS has the most immediate impact and implications.

3.2.2 Providing basic services

Ensuring adequate, and affordable, access to basic services for all citizens is regarded by many as one of the core tasks of governments. The market alone cannot do this, not least because profit-making corporations have no incentive to provide services to those who cannot afford to pay. Some form of subsidy is needed if the poorest are to have access.

Traditionally, taxation or social insurance has provided the funds for government schemes to ensure universal access to essential services. Many governments fund free or subsidised health care or education services for all, regardless of an individual's ability to pay. Many governments also use cross-subsidies, where revenue gained from one part of the service subsidises another part. For example, in the water and sewerage sector, wealthier urban consumers effectively subsidise delivery into poorer areas, while in the postal sector, the more lucrative business post subsidises rural domestic delivery.

Increasingly, however, the trend in many countries is towards private sector provision of even basic services, with targeted public subsidies. In practice, this has involved 'unbundling' what were comprehensive services into their various constituent parts. Companies move in and take over the more profitable elements of the service (for example, the business express post), leaving governments to maintain and fund the less lucrative infrastructure and unprofitable sectors.

Moreover, because the service has been broken up, governments cannot cross-subsidise and thus have a more limited budget to maintain what they're left with. In the USA's health care sector this model has seen the creation of large health care companies but has failed to provide health care to many - some 55 million people now have no health insurance.²²

3.2.3 Protecting citizens

For several decades, many people have come to think of it as a government's job to protect consumers from harmful products. But under WTO rules, this has already proved difficult to do. The onus is on governments to prove, beyond doubt, that a product or service is harmful, rather than on a company to prove that it is safe. Yet there is seldom incontrovertible scientific evidence of the problem until after much of the damage has been done.

And trade still takes priority over the protection of health and safety. For example, a GATT (WTO's predecessor) disputes panel in 1990 ruled that Thailand's ban on tobacco imports, challenged by the US, was not allowed under international trade rules as it was not the 'least trade restrictive' way of reducing smoking.²³

3.2.4 Promoting social or cultural objectives

In addition to ensuring everyone's access to safe and affordable services, governments may wish to 'interfere' in the market to pursue other social objectives. For example, they may want to promote racial, ethnic or gender equity, or to favour some countries over others.

The EU, for instance, has long favoured small-scale Caribbean banana producers, with which it has long-standing historical links, rather than the Latin American plantations run by US companies. Using the GATS agreement, the US has successfully prevented them from doing so in one of the most publicised WTO debacles (see Box 5, page 31)

3.2.5 Protecting the environment

Awareness of the need to protect the environment and limit environmental degradation and pollution, particularly from the workings of an expanding industrial economy, has increased substantially in recent years. As a result, the trend in many industrial countries has actually been for more, rather than less, regulation over the last couple of decades. Moreover, to ensure sustainable development - economic development that minimises social and environmental disruption - governments may need to set limits on resource use and exploitation in the future. Yet these regulations are now under threat from GATS.

3.3 REGULATIONS AFFECTED BY GATS

Despite the recognised need for government regulations to restrict some of the market's operations, the GATS agreement has a profound and effectively irreversible effect on the ability of governments to regulate the service market in this way. The costs are high.

All service sectors are covered by some basic GATS rules, such as the Most Favoured Nation rule. As they cover all services, they are referred to as 'horizontal' rules. GATS also has specific

commitments, such as those on National Treatment and Market Access, which form the core of the agreement and in many ways are the most far-reaching aspects of GATS. Governments have to actively 'commit' a sector (such as tourism) before these specific commitments apply.²⁴ Each WTO member country has a 'country schedule' listing its commitments.

Adding to the agreement's complexity, GATS allows governments to limit the extent to which both horizontal and specific commitments apply to its service sectors. These 'limitations' are also listed in a country's schedule (see appendix). Many GATS defenders cite the combination of specific commitments and these limitations as evidence that governments can control the extent to which they wish to liberalise their service sectors. In practice, however, the limitations are difficult to use and can be overturned (see page 39).

Ostensibly, most of the GATS rules are designed to prevent governments from discriminating against foreign companies in favour of domestic ones, or in favour of one foreign company over another. But the implications are much greater because the rules can also affect a government's ability to regulate even when applied equally to both foreign and domestic firms.

Moreover, in addition to the current rules, members are negotiating yet more rules, for instance on 'domestic regulation', which would further tie the hands of governments. So, too, will the increasing use of the term 'like' services within the WTO, which potentially prevents governments from discriminating among different types of service providers (see page 27).

3.3.1 Most Favoured Nation (Article II)

The Most Favoured Nation (MFN) concept runs throughout the WTO agreements. It means that all trading partners must be treated equally. A major implication for government policy-making is that this 'horizontal' rule prevents countries from discriminating amongst trading partners for social or political reasons.

The US State of Massachusetts passed a law in 1996, for instance, modelled on anti-apartheid measures aimed at South Africa in the 1980s, prohibiting the state government from buying goods and services from companies doing business in Burma. The Burmese military rulers constantly flout international workers and human rights treaties and rely on slave labour. The European Union and Japan challenged the legislation at the WTO, but it was overturned in the US domestic courts before the WTO could adjudicate on it. This type of 'discrimination' could easily be challenged under the GATS MFN principle.

When South Africa began to open up its telecommunications industry to competition in 1997, the Government awarded contracts to Malaysian companies because of their experience in dealing with racial issues in Malaysia, an aspect that the South African government was keen to address. It wanted to ensure that black households were connected to a telephone network. This kind of social policy, favouring one investor over another, is not allowed under GATS rules - any country pursuing such a policy could easily find themselves subject to a WTO challenge which it would be unlikely to win.²⁵

Developing countries are already at a huge disadvantage in international trade in services. Most service exports come from industrialised countries. Developing countries could build up their own services capacity by co-operating with other countries at a regional level. MFN rules make this virtually impossible in the long-term, as such action could be challenged, once again, as discriminating against one country in favour of another. In the short-term, such cooperation is possible. When WTO members signed up to the GATS agreement in 1994, they were allowed to exempt named service sectors from the MFN ruling in their schedules of commitments (see appendix). Thus several Asian, southern African, Arab and European regional groupings all made provision to favour trade amongst themselves. According to GATS rules, however, these exemptions can last for just ten years and will end therefore in 2004.

3.3.2 National Treatment (Article XVII)

The principle of national treatment is another concept common in the WTO agreements. Essentially, it means that foreign companies must be treated the same as domestic ones. According to this principle, a government's action discriminating against a foreign firm in this service sector could be open to a WTO challenge by another WTO member. The principle under GATS is much more intrusive than in other WTO agreements dealing with the trade in goods, because it applies to foreign investment as well as cross-border trade (see Box 2, page 13), and thereby, in effect, removes key policy tools from governments, particularly those of developing countries.

National treatment is one of the ‘specific commitments’ under GATS. National treatment rules only apply in full if a government has committed a sector fully to national treatment rules in its schedule (that is, no conditions or limitations are listed). When deciding to commit a service sector to national treatment rules, a government can specify ‘limitations’ on its commitments, but this is problematic (see page 36).

Many developing countries have policies that favour the growth of local companies. For example, domestic banks may be given greater scope to conduct their business than foreign-based banks, or local institutions may be solely eligible for government research and development grants. Ensuring that local people benefit from foreign investment by requiring that investors use local suppliers and local managers, hire or train local staff and/or transfer technological know-how could all be challenged under GATS national treatment rules if a sector had been fully committed. So, too, could regulations requiring investors to pay specific taxes, or giving local firms tax breaks. Consumers International point out that, under GATS, governments could find it hard to stipulate that food for hotels is sourced from local farmers.²⁶

Campaigners for sustainable tourism in India fear that a policy established by the authorities in Goa, reserving restaurant and taxi concessions for local people, could be challenged under GATS as India has not listed these as exceptions to its commitments in the tourism sector.²⁷

Friends of the Earth (US) warn that a government’s attempts to protect the right of local communities to live off their land could be threatened. Granting preferential resource extraction licences (such as for

fishing) to local communities could be prohibited.²⁸

In the current negotiations to expand the GATS agreement, industrialised countries have given several examples of the kind of rules they consider to run counter to the ‘national treatment’ principle and have outlined the problems their companies face overseas due to domestic legislation that favours local firms. The US, for example, has cited the ‘minimum requirement for local hiring’ as an obstacle to trade in accountancy services. Japan has raised the problem of local production requirements.²⁹

Two additional issues, outlined below, are relevant in understanding national treatment rules.

a) Intrinsic differences between foreign and domestic firms

The national treatment principle makes no provision for the intrinsic differences between domestic firms, which are likely to remain in a country, and foreign firms which can ‘cut and run’ at any time. This difference often affects the extent to which a firm will be committed to preserving the natural resources on which it depends. Domestic firms, moreover, tend to have closer links with their workforce and consumers.

Neither does the national treatment principle take into account the fact that the assets of locally incorporated companies can usually be reached through domestic courts in the event of a disaster. For example, the assets of a waste disposal company can be seized by a court in the case of a toxic spill. It is much harder, however, for foreign companies to be held to account in similar cases.

b) De facto discrimination

The GATS agreement takes the basic principle of national treatment a step further and explicitly includes in the text, issues which in previous WTO agreements have only been developed through legal dispute cases. It does so by including 'de facto' discrimination - where the discriminatory effects are unintentional. Thus, even if the wording of a regulation is completely neutral with regards to foreign and domestic firms, the regulation could still be challenged by another country if, in practice, it placed a foreign firm at a disadvantage compared to a local one. A WTO member could argue that its companies, as foreign firms, find it harder than domestic ones to comply with rules designed to ensure that the local economy benefits because they are less integrated into the local economy, for example.

Although a footnote (footnote 10 of the GATS agreement)³⁰ suggests that de facto discrimination arising from the foreign nature of a firm is not included, more recent documents suggest otherwise. In a discussion document, the WTO Secretariat itself describes all the following measures in the construction services sector as being, in practice, potentially more burdensome on foreign firms, even if the measures are applied in a neutral way to both domestic and foreign firms:

- controls on land use
- building regulations and technical requirements
- building permits and inspections
- environmental regulations
- requirement to employ and train local staff.³¹

A WTO member could possibly even use the GATS national treatment rule to challenge governments which stipulate

that companies must use more socially or environmentally-friendly procedures. If a domestic firm was using such a procedure but a foreign firm wasn't, the legislation could be argued to constitute discrimination – even though the foreign firm was at no disadvantage because of its national base, but simply because it had less experience of the procedure.³²

3.3.3 Market Access (Article XVI)

Another set of specific commitments are designed to guarantee firms market access in a service sector, regardless of whether they are domestic or foreign. Market access rules cover all quantitative limits on services, whether they apply to foreign and domestic firms, or just to foreign ones. Governments' ability to put limits on the number of service suppliers or outlets in a sector could be curbed, as this would prevent the right of new firms to enter the market. When combined with full commitments under national treatment, market access provisions go far beyond the more common approach in international trade rules of equalising domestic and foreign access to a market. They in effect, give service corporations a 'right' to set up shop wherever they like. Other aspects of the market access rules overlap with the national treatment principle, and deal specifically with foreign firms and their assets. They generally cover that proportion of a country's economic activity under the control of a foreign firm. As with the national treatment rule, governments can place limitations on their market access commitments (see page 36).

'Economic needs tests' are one type of regulation that could be challenged. Many governments employ these 'tests' (a

series of checks to ascertain whether foreign investment is really needed in the country) before agreeing conditions with a potential new inward investor. For example, in the retail sector, a government might use such a test to assess whether supply already outstrips demand before granting or refusing permission for a new superstore. Similarly, in the tourism sector, an economic needs test is often required before new bars and restaurants can open. Such tests could be challenged under the market access rules.

Market access rules cover six areas in which restrictions are prohibited. Some involve limits on foreign activity only, others on overall commercial activity whether by domestic or foreign firms. Some governments have so far resisted these rules by placing limitations on their market access commitments. Below are examples of the kind of government policies designed to monitor commercial activity in service sectors, with details of how they relate to market access commitments.

a) Limits on the number of service suppliers

Preventing a government from limiting the number of service suppliers operating in its country is one of the most problematic aspects of the market access rules. A government may wish to restrict new developments in a sector if the supply of services already meets local demand and further supply would threaten the viability of existing businesses.

In tourism, for example, governments often require companies to apply for a licence to open a restaurant with permission usually dependent on an 'economic needs test'. Egypt, for instance, operates an economic needs test policy when companies seek permission to set

up hotels and restaurants. It assesses market needs and the location of different categories of hotel. To protect their right to regulate in this sector, Italy, Spain, Portugal and Greece all limited their market access commitments in the hotel and restaurant sector by stating that: "Authorisation can be denied in order to protect areas of particular historic and artistic interest".³³

Belgium limited market access commitments in the retail sector with considerations such as, "the number of and impact on existing stores, population density, geographic spread, impact on traffic conditions and creation of new employment."³⁴

Regulations that aim to preserve natural resources could be particularly affected by this market access rule. Government limits on the number of gas or oil extractive operations in a particular region, on the number of hazardous waste sites, or on the number of diving boats on coral reefs could all be open to a WTO legal challenge if a country does not specify limitations in these areas when committing a sector to GATS.³⁵ Equations, an Indian NGO, have raised the example of biodiversity in the Western Ghats forest in India. They fear that the unlimited GATS tourism commitments made by the Indian Government provide a blank cheque for multinationals wanting to build hotel chains, for example. This would have far reaching social and environmental impacts.³⁶

Regulations allowing one firm to be the exclusive service supplier could also be affected. For many developing countries, promising restricted access to a sector such as telecommunications, rather than open access, is the only way that they can persuade a private company to make the

necessary investment in infrastructure. Countries may also choose to open a sector up to market competition at a gradual or staggered pace, allowing access to just a limited number of suppliers over a certain period of time, as South Africa has chosen for its telecom sector. This approach is intended to prevent the domestic market from being swamped by foreign suppliers and to ensure that necessary social and environmental objectives are met. In the water delivery sector (an area which the European Communities and member states are pushing to see included in current GATS negotiations)³⁷ governments, especially in the drought-prone areas, may want to preserve their access to water by restricting contracts for water delivery out of the country.

b) Limits on the total value of activity of transaction or assets

A government may wish to put a percentage restriction on the amount of domestic assets a foreign company can control in a service sector. For example, it might want to ensure that a foreign-based bank did not control most of the domestic savings in its economy. Such legislation could be open to a WTO challenge under this market access rule, unless a government has listed its exemption.

c) Limits on the total number of service operations or quantity of output

Many countries place restrictions on the amount of broadcasting time available for foreign films (particularly English-language films). Others restrict the size of developments, such as retail outlets. The WTO Secretariat itself queried whether “restrictions on the size of the retail outlets” (which directly limit output) could violate market access commitments in distribution services.³⁸ In education, a country may wish to restrict the total

number of students to be taught in a particular discipline or occupational category or to limit the total number of institutions permitted to offer certain qualifications. All these regulations could fall foul of this rule.

d) Limits on the number of people employed in a sector

Some countries insist that foreign labour does not exceed a specified proportion of the total labour force. For example, Zambia and the Philippines restrict the number of foreign citizens working as architects. These types of restrictions could be challenged under this aspect of market access.

e) Joint venture or legal entity requirements

Requiring foreign firms to work jointly with a domestic company can be a productive way of ensuring that local business benefits from inward investment. A requirement that shareholders are also drawn from the country in which investment takes place is also valuable in terms of domestic decision-making and keeping a percentage of the profits, from the investment, within the country. Insisting on a joint venture arrangement can also ensure that a foreign company holds some domestic assets within the country in which it is operating, which can be crucial in case of accidents for which a court holds it liable for damages. Again, all these types of requirements could be challenged.

Preventing legal entity requirements may, according to Canadian researcher Scott Sinclair, conflict with Canadian governments’ policies of restricting social service contracts to non-profit organisations or to service providers with local representatives on their boards.³⁹

f) Limitation on the participation of foreign capital

Many countries have regulations designed to ensure that foreign investors do not gain complete control of vital service areas

such as telecommunications. For example, South Africa has a foreign equity ceiling of 30 percent of its telecommunications industry.

Box 3

GATS in Action: *Mexico and telecommunications – a case study*

In preparation for opening up the Mexican telecommunications service sector to competition and liberalisation, the government privatised the national telephone company, *Telefonos de Mexico* (Telmex), in 1990. Mexico made GATS telecommunication commitments in 1995 and the sector was opened to competition in January 1997.

Three and a half years later, on 17 August 2000, the US filed a formal request at the WTO for dispute consultations with Mexico, alleging a lack of competition in the telecoms market and claiming that Mexico was violating its market access obligations under the 1995 GATS and the 1996 Telecoms Reference Paper.⁴⁰ The US brought the case in response to lobbying by US telecommunications giants, led by AT&T Corp. and WorldCom Inc who have long argued that Mexico's national carrier, Telmex, refuses to share with them its basic wiring into homes and businesses and therefore impedes their efforts to reach customers.

Although the dispute is about whether Mexico has upheld its 1995 GATS commitments and its 1996 obligations under the Telecoms Reference Paper, a more critical question is whether the Mexican government should protect an important domestic company from foreign competition and potential outside control.

Telmex represents almost 30 per cent of the country's stock market. Although the national telecommunications market is relatively small, it holds prospect for dramatic growth.⁴¹ Since 1990, the industry experienced rapid growth, with over \$17 billion invested between 1990-1999. Telmex argues that complying with the GATS regulations will "only result in higher prices for the consumer, while at the same time preventing them from enjoying the full benefits of the [Mexican] company's increased profit margins."⁴²

Recent Government legislation in Mexico has tried to deal with US complaints by allowing greater market access opportunities for foreign companies, but the WTO case is still listed as 'pending consultation'. The WTO's dispute settlement body continues to defer the establishment of a panel to take the legal request from the US forward.⁴³

What might happen if such regulations are not allowed can be observed in Aotearoa/New Zealand. Here, the full liberalisation of financial banking services has left every one of Aotearoa's/ New Zealand's high street banks, including the Bank of New Zealand, in foreign-based ownership. This led to a dramatic reduction in the availability of cheap services and low cost loans. The Government is now proposing to set up a new bank, the People's Bank, owned and operated by the Government.⁴⁴

3.3.4 New proposals on 'domestic regulation' (Article VI:4)

The types of government policies that could be challenged under the GATS market access and national treatment rules are extensive, yet the rules are not all encompassing. There are still many conditions that governments might want to place on the operation of firms domestically which GATS rules would not affect.

This may all change in the future, however. In the current block of negotiations, WTO members, through the Working Party on Domestic Regulation, are discussing new proposals under Article VI:4 of GATS. If such proposals were accepted, they would increase the reach of GATS right into the heart of government decision-making.

Although not explicitly stated, many lawyers and analysts believe that the fourth clause of Article VI could be interpreted by a dispute panel as applying across the board to all services, rather than only to those sectors that a government has committed to GATS rules. (Other clauses in Article VI explicitly state that they apply where specific

commitments are undertaken; the fourth clause omits this qualification.) If this was the case, the implications of this clause and the proposals are all the more far reaching.

The 'domestic regulation' mechanisms tackled by Article VI:4 concern the quality of a service. This refers to "measures relating to qualification requirements and procedures, technical standards and licensing requirements."⁴⁵ Such instruments are key in any government policy intended to promote the interests of its citizens. The definition of such mechanism is not clear, but they would seem to include:

- Qualification requirements, which include professional accreditation and educational requirements ensuring a sufficiently high standard of expertise to provide the service;
- Licensing requirements, which include zoning restrictions when setting up retail stores;
- Technical standards, which affect a broad range of rules stipulating how a service must be performed, according to the WTO Secretariat.⁴⁶ They could, for example, include quality regulations in the water industry.

The proposals to expand the domestic regulation clause would still permit such regulations, but allow the dispute panel to subject them to a series of tests if a WTO member challenged the regulations. The unclear wording, however, means that governments would simply have to guess what might or might not be deemed permissible by a WTO dispute panel. The cost of a WTO legal challenge, and potential sanctions, is a high one, particularly for developing countries. They have less capacity to assess whether a rule could be successfully challenged. They are also far more likely to receive

challenges than to issue them, given that they have far fewer service exporters. They would also suffer more from any sanctions that might follow.

a) The necessity test

If challenged, a domestic regulation would, if current proposals were accepted, be subject to a 'necessity test', which would have two elements. First, a government would have to prove that the objective of its challenged regulation is 'legitimate' according to WTO rules. That a trade body should define for governments what aspects of their *domestic* policy making are legitimate has extremely disturbing implications for democratic decision-making.

Second, if the regulation passes the legitimacy hurdle, a government would then have to prove that the regulation was the 'least trade restrictive'. This condition could have far-reaching impacts on society and the environment because, in practice, an alternative measure, which could have less impact on trade, can almost always be found. The fact that such a measure might be less effective in meeting the original objective would not seem to be taken into account. Many countries, for example, now have technical standard regulations limiting or banning the use of ozone-depleting substances. A corporate tax on their use would be a less trade-restrictive measure, but would in practice be a less effective way of reducing or preventing their use. Regulations governing pollution in general could be similarly affected.

The trade bias embedded in these tests would be accentuated by the composition of the dispute panel adjudicators, who are invariably trade bureaucrats, not a panel of democratically-elected, legal, social or scientific experts.

The test would also reverse the onus of proof. If challenged, it would not be the responsibility of the service provider to prove that the quality of service met the government regulation; instead, it would become the responsibility of the government to prove that the challenged regulation, such as an environmental standard, is necessary. This departs from the 'precautionary principle', which allows regulations restricting a practice if there is a reasonable risk that harm would be done otherwise.

3.3.5 Extending equal treatment to services which are 'like' each other

Another serious aspect of GATS, which could in effect further reduce a government's ability to regulate, stems from the apparently benign concept of 'like' and 'not like'. These definitions are crucial for the GATS non-discrimination provisions (for example in the National Treatment and Most Favoured Nation articles described above). When a dispute is brought to the WTO the concept of 'like' is used when comparing how a service is supplied. By taking a broad definition of 'like', the WTO is suggesting that service suppliers using quite different methods are 'like' and therefore must not be discriminated amongst.

GATS applies to four different ways or 'modes' of supplying services: cross border; consumption abroad; commercial presence; and the presence of natural persons (see Box 2, page 13). Drawing on existing interpretations of "like" in GATS disputes it would seem that 'like' in practice means that governments cannot discriminate amongst companies which supply services in these different ways. Thus, for example, a government must

treat a company delivering services over the Internet in the same way as it treats one physically setting up its operations inside a country, or as a domestic company providing that service locally. Several cases, which have already come before the WTO dispute panel, illustrate this. WTO dispute settlement panels have opened the door towards a very broad interpretation of 'likeness' which ultimately restricts government policy making.

When the EU and Japan challenged Canada's Auto Pact, a long-standing national trade agreement designed to encourage domestic car manufacturing (See Box 5, page 31), the dispute panel ruled against Canada. One of its findings was that the way in which the Canadian 'value-added quotient' on vehicles was calculated provided an incentive to auto manufacturers in Canada to use services supplied by firms established in Canada (commercial presence) rather than by firms based elsewhere (such as the EU and Japan) which could provide the service 'cross border'. In this case, such discrimination between suppliers using different 'modes' of supply was declared contrary to GATS rules.⁴⁷ The concept of 'like' was part of the case brought under national treatment rules.⁴⁸

Also, when only looking at different treatment for services or suppliers *within* one mode of supply, the concept of 'likeness' may be interpreted so as to constrain domestic regulatory practices. For example, governments may wish to differentiate between service suppliers according to certain *supplier related characteristics*, such as the *company's size*, its number of *employees* or its *production processes*. Similarly, regulators may wish to accord different treatment to huge *vertically integrated* companies than to small *service providers*, both of them

rendering the same, i.e. 'like' service. Again past WTO dispute panel rulings open the door for a potentially overwhelmingly constraining application of GATS disciplines.

In the bananas dispute between the US⁴⁹ and Europe, for instance, the interpretation of 'like' service suppliers was central and is illustrative of how dispute panels can be expected to make future interpretations. The US brought a case to the WTO against the EU contending that they were granting preferential conditions to (generally small scale) producers from African, Caribbean and Pacific (ACP) countries compared to those offered to producers from Latin America. One of the US arguments was that within the wholesale trade services sector a member cannot offer trading advantages exclusively to another member as this is contrary to the most-favoured nation principle.

The GATS arguments in this case boiled down to whether small wholesale banana exporters are 'like' a multinational where wholesale and banana exports are just one of their many functions. If such companies are considered to be 'like', then favouring a small supplier could be considered to violate certain GATS provisions or commitments. The WTO appellate body ruling on the case stated that to the extent service suppliers supply like services, they are like.⁵⁰

The implications of this ruling are still unclear and are one of many aspects of GATS that must be clarified before negotiations to expand the agreement continue. However, using the bananas case as an example shows that the 'like' concept could prevent governments from distinguishing between service suppliers on their social, ethical or environmental

records of behaviour. If this is true, then for example, a government wishing to favour energy suppliers using renewable energy sources such as solar energy could find that a company using finite and polluting gas or oil resources expected the same treatment because they were a 'like' service provider. Or a government could find that its ban on the use of nuclear energy to supply electricity could be challenged by a country with a disadvantaged nuclear power producer.⁵¹

It appears it could also be the case that in service sectors in which countries have made full national treatment commitments under GATS, with no conditions or limitations government subsidies would have to be given without discriminating between foreign and domestic service suppliers or risk a challenge.⁵² This could mean that a government could not provide funds to a public hospital without also subsidising a foreign-owned commercial clinic that provided a 'like' service.⁵³

3.4 CONCLUSION - THE COST OF GATS IS HIGH

Governments need to retain the right to regulate if they are to govern responsibly. This includes the ability to implement not just regulations to ensure that the market operates smoothly, which GATS allows, but also regulations designed to meet the social, political and environmental goals that citizens and their governments aspire to.

GATS clearly goes well beyond ensuring the equitable treatment of foreign and domestic firms; it restricts government freedom in domestic decision-making. The guarantees GATS is supposed to offer to governments, that they can liberalise at their own pace and still regulate, have failed to reassure many critics. Regulation under GATS is not a right for governments but an exception.

Box 4

What kind of regulation?

GATS proponents contend that government regulation is still permitted under the agreement - but what kind of regulation do they have in mind? Two service sectors - financial services and telecommunications - are governed by more detailed GATS rules than other sectors because of separate annexes negotiated since 1994 for these areas. The financial services annex makes clear that only those regulations vital for the prudential running of the sector are allowed; the majority of regulations such as those discussed above are outlawed. In telecommunications, the situation is more extreme. Here, governments are actually instructed to intervene in the market - that is to regulate - in cases where foreign firms might be at a disadvantage. There is no such encouragement, however, to intervene to protect the needs of the poorest people or domestic firms.

Financial services and market prudence

The WTO Secretariat notes in a paper on financial services that governments may need to intervene to address market failure so as to reduce systemic risk and to maintain a safe and sound financial system while enhancing competition.⁵⁴ In banking, for example, liquidity requirements, prohibitions on insider trading and transactions giving rise to conflicts of interest, and rules on the classification of and provisioning for non-performing assets would all be considered prudential measures and thus acceptable government regulations.

The Secretariat goes on to say that it would not consider regulation for 'non-prudential' purposes, such as public policy objectives, as legitimate or appropriate. As part of a national development strategy, however, it can be crucial to ensure that local businesses, particularly in deprived areas, have access to affordable credit. Some governments, meanwhile, may hold that provision of certain services to give all citizens access to credit facilities, regardless of their income or geographical location, should be a 'public' service. The market alone will not necessarily provide either of these. To implement regulations to facilitate these services, governments must list them in their schedule when they commit financial services under GATS. Mozambique, for example, has listed no such regulations. In rural areas there is a severe problem of access to credit and their GATS commitments may limit what can be done about this problem (see Box 8, page 47).

Telecommunications

The WTO's Telecomms Reference Paper discusses a regulatory framework for the telecomms sector.⁵⁵ It deals with regulations which are considered to be of an anti-competitive nature and therefore go against the spirit of GATS. The Paper includes cross-subsidisation by monopoly providers in its list of anti-competitive practices because this restricts market entry by competing suppliers. The Paper also identifies the funding of services to ensure universal access as potentially anti-competitive if they are not 'completely neutral' or are 'more burdensome than necessary'. The US has proposed that similar terms of reference be incorporated into the Article VI.4 discussions on domestic regulation (see page 26). These US proposals could represent a serious threat to government policies that currently use non-market mechanisms such as cross-subsidisation to ensure the delivery of services to everyone who wants or needs them.⁵⁶

4. THE WTO DEFENDS GATS

The stated goal of GATS is to liberalise trade in services. Part IV of the agreement states, “members shall enter into successive rounds of negotiations...with a view to achieving a progressively higher level of liberalisation.”⁵⁷ In practice, this means removing barriers to international trade in services including, it would seem, government regulations, which restrict this trade (such as those mentioned above.)

In response to NGO criticism during the past couple of years, however, WTO

officials have, surprisingly, defended GATS by arguing that it maintains governments' 'right to regulate'.⁵⁸ Director of the WTO's Trade in Services Division, David Hartridge stated that: “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.”⁵⁹

Box 5

GATS in Action: *Automobiles and Bananas*

Canada's industrial strategy for over 30 years has included developing domestic production of vehicles. A 1965 agreement known as the Auto Pact encourages companies selling vehicles in Canada to invest in, purchase parts from, and create employment for Canada. This is exactly the kind of support for domestic industry that GATS prohibits. In 1999, European and Japanese vehicle manufacturers set about prising open the Canadian market and challenged the vehicle arrangement at the WTO. The dispute panel decided that the Auto Pact fell foul of a number of WTO agreements, including GATS.⁶⁰

WTO rules, supposedly intended to end trade wars between countries, caused a long-standing dispute between the US and Europe over bananas. But the real losers have been the impoverished Caribbean banana farmers. Unable to compete with the economies of scale of the largely US-owned banana plantations of Latin America, these farmers survived because Europe gave them preferential access to its markets under the long-standing Lome convention (an agreement between European and Asian, Caribbean and African countries on trade). The US used the GATS agreement to have this preferential treatment ruled illegal, even though the European Union had long before negotiated and obtained an exemption for its Lome commitments under the agreement covering trade in goods, the General Agreement on Tariffs and Trade.⁶¹ (GATS applied because the distribution of bananas is a service.) Had the EU remembered to obtain such an exemption under GATS the result could have been different.

The WTO Secretariat's publication 'GATS: Fact and Fiction' contends that: "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 objectives'".⁶²

This is a strange defence of an agreement designed to limit governments' ability to take action. It would make more sense for GATS proponents to provide evidence of the benefits of liberalisation. Instead, they appear to be trying to reassure critics that there are loopholes in the agreement allowing regulation to continue.

The WTO assures critics that GATS recognises "the right of Members to regulate, and to introduce new regulations on the supply of a service within their territories in order to meet national policy objectives."⁶³ It omits to mention, however, that this right is stated only in the preamble to GATS, which is not legally binding. It also keeps silent on another statement in the preamble on "desiring the early achievement of progressively higher levels of liberalisation of trade in services through successive rounds of multilateral negotiations."⁶⁴

Despite the WTO's public reassurances about governments' right to regulate, they have another, more private, perspective, which can be gleaned from WTO materials not intended for public consumption.

In a confidential (but leaked) internal document, for instance, the WTO Secretariat explicitly recognises that there

are, "two potentially conflicting priorities [in GATS]: promoting trade expansion versus protecting the regulatory rights of governments."⁶⁵

The Secretariat also acknowledges that the nature of services makes the GATS agreement more intrusive than other trade legislation: "Because the large share of trade in services takes place *inside* national economies... its requirement will, from the beginning, necessarily influence national domestic laws and regulation in a way that has been true of the GATT [General Agreement on Tariffs and Trade] only in recent years."⁶⁶

Thus, despite the WTO's reassurances, the text of the agreement itself and these memos suggest that GATS puts the pursuit of trade liberalisation before any other objectives, including governments' right to regulate. The agreement is designed to provide security for investors. In doing so, it leaves governments and citizens constrained and unsure which regulations are permissible.

Potentially, GATS does allow other goals to be pursued or protected - but only as a few exceptions to its general thrust of increasing trade by removing obstacles, even if these 'obstacles' are measures key to protecting the rights and needs of citizens and local communities.

The exemptions and exceptions allow the WTO Secretariat and supporting governments to suggest that sensitive sectors can always be protected. But it is already becoming apparent from the few dispute panel adjudications that have taken place that, in practice, the exceptions are invariably ruled against. There is thus little guaranteed security that they will hold in the future.

In assessing the potential impacts of GATS, it is also important to remember that multinationals eager for new markets have considerable resources, which they can use to argue their case. The GATS rules will not, therefore, be enforced equally or neutrally. They are an addition to the substantial armoury already at the disposal of corporate lawyers.

From the outset, GATS is clearly not an agreement that starts with the need to protect citizens from the harmful effects of trade or investment, or even to ensure that they benefit. It is not, therefore, the type of agreement which many of its critics believe is really needed to ensure equitable, sustainable development.

What matters is not assurances made by GATS supporters in their speeches, nor even the contents of the non-binding preamble. What counts is the actual content and practical implications of the agreement.

4.1 THE ARGUMENTS IN DEFENCE OF GATS

Although GATS commits governments to liberalise all their services over time, the WTO's contention that this does not undermine governments' right to regulate is based on four arguments:

1. The 'bottom-up' approach allowing governments to choose which service sectors to commit under GATS means that governments can liberalise at their own pace.
2. Governments can specify the regulations they want to maintain.
3. Get-out clauses allow governments to reverse their GATS commitments.
4. Exemptions allow governments to protect certain areas.

Closer examination of these four arguments reveals that government regulation would be the exception rather than the rule.

4.1.1 Not all of GATS is bottom up

Despite repeated assertions to the contrary, it is simply not true that governments can enter GATS entirely at their own pace. Some GATS rules, such as the Most Favoured Nation principle, run 'horizontally' across all service sectors. This means that governments have to comply with these rules in all service sectors, irrespective of whether they have opted to liberalise them or not under GATS. As it currently stands, a domestic regulation clause could also apply horizontally (see page 26).⁶⁷

Are services provided by government, such as essential services including health care and education, excluded from these 'horizontal' rules? There is immense confusion and a lack of clarity on this point. GATS Article I.3 states that *all* services are covered by GATS *except* those "supplied in the exercise of government authority."⁶⁸ However, it goes on to define such services as those "supplied neither on a commercial basis nor in competition with one or more service suppliers."⁶⁹ GATS supporters argue that this clause is sufficient to protect public services such as health care and education. However, others point out that the increasing commercialisation of public services casts doubt on whether they are really protected (see Box 6, page 34).⁷⁰

Moreover, even for those rules such as national treatment and market access, which are 'bottom-up', some developing country governments will be under pressure during negotiations to commit more sectors to liberalisation, which is

after all the point of GATS. GATS Article XIX commits governments to “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.”⁷¹ The EU, USA and Canada are all keen to push forward on this. Sir Leon Brittan, former European Commissioner for Trade, explained that: “No sector will be excluded, and the aim must be, in no more than three years, to conclude an ambitious package of additional liberalisation.”⁷²

The ability of developing countries to control the pace of service liberalisation is already limited. It may become even more so if EU proposals in the current negotiations to ‘cluster’ some service sectors together are agreed to. In effect this would speed up the liberalisation process as governments would have to deal with a group of sectors at a time rather than just committing them one by one. It would also reduce the flexibility of governments to make more detailed choices as to which sectors to commit under GATS. As European companies are keen to gain access to water supplies, the EU has proposed that water supply should be considered part of an environmental services cluster.⁷³

Box 6

Article I.3 on public services

Claims made by service industry lobbyists that “GATS can encourage more privatisation particularly in the field of health care”⁷⁴ have contributed to grave concern about the status of health care and education services under GATS.

The dilemma is whether the wording of Article I.3, covering services provided by governments, is secure enough to keep such services off-limits to GATS, particularly given that, in many countries, private and public provision of health care and education exist side by side. The *Financial Times* referred to the Article as “a piece of clumsy drafting” and revealed that WTO staff “concede a clarifying declaration by members would be helpful.”⁷⁵

The WTO Secretariat itself appears to be in doubt. Its paper on health and social services points out that: “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?”⁷⁶

The UK Government has been robust in its defence of GATS. Former Minister of Trade, Richard Caborn, disagreed with those who suggested that GATS posed a risk to the state provision of health and education services. He declared, “We simply do not believe such fears are justified.”⁷⁷

The minister argued that Article I.3 on government services, “is intended to exclude public services such as health and education services (although private services are covered by

Continued

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).⁷⁸

But even though public services are not supplied for profit, privately-supplied, comparable, services would certainly seem to be in competition with them. Private hospitals in Britain, for instance, advertise their advantage of enabling patients to leapfrog National Health Service waiting lists.

The minister also argued that, “There is no evidence that any member government of the WTO is seeking a different interpretation”⁷⁹ of Article I.3 on government exemptions. But to a certain extent, it is irrelevant how individual governments interpret the exemption: what matters is how a WTO dispute panel would adjudicate.

The minutes of a meeting of the WTO Council for Trade in Services advocate 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 the remit of the GATS; the exception provided for in Article I.3 of the agreement needed to be interpreted narrowly.”⁸⁰

No WTO member has raised objections to this ‘narrow interpretation’. In the absence of any other collective interpretation by WTO Members of a broad exemption, a dispute panel’s only reference point would be the ‘clumsily drafted’ Article I.3, and based on this wording, the panel could well opt for a narrow exemption clause, leaving most public services vulnerable to inclusion under GATS.⁸¹ Even the UK Government has conceded that, “These terms, like most of the GATS, have not...been tested in WTO jurisprudence.”⁸²

Moreover, even if no government is currently thinking of challenging another country’s government services under Article I.3, the clause could enable it to do so at any point in the future.

Legal niceties aside, it is clear that service industries want publicly-provided and funded health and education sectors to be opened up to competition. Many EU countries (including the UK) have already made commitments in the health and education sectors.⁸³ In current GATS negotiations, through the ‘request-offer’ process, the EU is seeking to open up markets, including health markets, in ‘third countries’ and emerging markets in key developing countries.

European Trade Commissioner, Pascal Lamy, has stressed that European Commission GATS negotiators are seeking to: “preserve legislative priorities...in areas linked to state provision, such as energy, postal services, education, culture and health [but at] the same time we are seeking fair and negotiated access for our service providers to such sectors in third countries, where market-based, and there is no contradiction in this.”⁸⁴

4.1.2 It is difficult for governments to protect regulations they want to keep

The suggestion that governments can specify the regulations they want to maintain is perhaps the greatest 'half-truth' among all the assertions that GATS allows governments to regulate. In theory, when a country commits a particular service sector for liberalisation under GATS, it can, at that time, specify, in the form of 'limitations', any regulations governing that service that it wants keep. In other words, the government agrees to liberalise a sector, but specifies limits on the number of investors in the sector, for instance, or how they can operate. It can also place such limitations which apply across the board, covering all sectors and all commitments (see page 20).

In practice, however, countries rarely do this, for several reasons. For example, many developing countries would think it sensible to protect the interests of local suppliers in the construction sector. Yet of the 69 WTO Members that have made GATS commitments in their construction sector, only two explicitly reserve the right to require that investors engage in technology transfer.⁸⁵

The main reason why governments do not specify limitations is lack of information. Moreover, when and how to regulate foreign investment is still subject to fierce debate. As yet, there are no hard and fast rules. Five areas where lack of information hinders governments are explored below:

a) Level of knowledge required

Developing countries are constantly told by donors that inward investment is their only hope of economic growth, and that any regulation restricting such investment will deter investors. But the evidence of the last decade suggests that foreign

investment has not proved a universal panacea to the economic and other problems developing countries face, and limited advice is given as to how to improve their situation. There has, moreover, been woefully little assessment of the consequences of foreign investment or service liberalisation.

Understanding and finding a way through the complex, yet hazy, maze of GATS rules is time consuming. Developing country governments and delegations are already stretched in their capacity to keep up with international negotiations. Thirty countries cannot even afford permanent delegations at the WTO's head office in Geneva.

Even those countries with greater resources are running into difficulties. At the end of the Uruguay Round in 1994, for instance, the Aotearoa/New Zealand Government had tabled the most GATS commitments. And now a Government from the same party is coming to realise just how tied its hands are by those commitments. The communications and education sectors are just two examples. Following the Government's election promise to rebuild national broadcasting, it is reintroducing local content quotas to offset problems such as poor coverage of current domestic affairs, which had resulted from Audio-visual services liberalisation. Such quotas, however, conflict with the full GATS liberalisation commitments that the Government made in the communication sector and could, therefore, be challenged by another WTO member.

Similarly, the Aotearoa/New Zealand's Government's proposed legislation to limit the number of universities, so as to protect the standard of education in the country, has also run into problems. To be GATS

compliant, the legislation can apply only to new public universities. This is because of its GATS market access commitments in tertiary education, which mean the Government cannot restrict the number of private universities in Aotearoa/New Zealand. Presumably Aotearoa/New Zealand could go ahead with limits on all universities as long as it offered compensation by increasing liberalisation in other areas, (see page 39) – but Aotearoa/New Zealand has few areas left to liberalise. An academic consulted the WTO Secretariat, which responded by suggesting that no one would bother to challenge Aotearoa/New Zealand in this area.⁸⁶ This accents the point that it is not so much the text of GATS that is crucial, but the wider political and economic context as to whether another country wants access to a country's markets.

b) Lack of clarity in the agreement

As analysis of Article I.3 on government services and Article VI.4 on domestic regulation show, (see Box 6, page 34 and page 26, respectively.) the GATS agreement is, in countless respects, unclear. As 'services' and 'sectors' are not themselves well defined, it is not necessarily clear, for instance, which sector an activity falls under. Canadian researcher Scott Sinclair cites the example of an individuals' health records.⁸⁷ On the one hand, they could be protected from competition because Canada has not committed the health service to GATS specific commitments; but on the other, they might not be because it has committed data processing without limitation. Do health records come under 'health' or 'data'?

An on-going dispute between South Africa and the US is just one of many examples of different interpretations of GATS. South Africa maintains that its GATS

commitments in the telecoms sector allow it to restrict the activities of the US-based telecoms giant, AT&T. The company (that claims to be acting on behalf of 40 other suppliers) has pressed the US Government to launch an investigation into the matter. The South African Government is disputing the US's interpretation of its GATS commitments for value added networks. The US argues that South Africa's draft telecommunications law breaches their GATS commitments.⁸⁸ In September 2001 the South African Government challenged the American Chamber of Commerce (a group taking the issue forward) to take their allegations of protectionism to the World Trade Organisation.⁸⁹

c) Different levels of government

GATS obligations apply to regional and local as well as national governments. The agreement clearly states that it applies to all "measures taken by central, regional or local governments and authorities."⁹⁰ Many services are regulated and delivered by local governments, many of whom are not aware of the commitments their national government has made under GATS – let alone had an opportunity to propose limitations. On the agenda in the current phase of GATS negotiations are proposals to extend obligations on national governments to ensure that local authorities comply with a country's GATS commitments.

Similarly, this lack of consultation and awareness among sub-national government authorities has posed a particular problem in India where state and local governments have substantial power and duties in the provision of services.

d) Looking into the future

'Limitations' on a country's GATS commitments have to be listed when a country commits that sector. It may be possible to add more later, but only by going through the long and complex 'modification' procedure (see page 39). An outstanding degree of foresight is therefore needed to predict future developments and to anticipate changes in political and economic culture.

The South Asian non-government organisation, SAWTEE, points out some of the difficulties this poses for telecom liberalisation, a new area for many South Asian countries: "Market structure, regulatory framework and technology are all evolving simultaneously making it difficult to foresee the changes necessary."⁹¹

Of all the countries that have made market access commitments on tourism, only Egypt has remembered to mention the carrying capacity of the site, stating that tours down the Nile are subject to the river's carrying capacity.⁹²

Consensus on the need for environmental regulations has developed only in the last 20 years or so, even though environmental degradation and pollution has been taking place for much longer. It is nigh on impossible to predict what regulations may become vital in decades to come.

e) Regulations can be challenged in the future

Even if governments can overcome all these hurdles and put down the limitations they want on their GATS commitments (and even the EU seems to have forgotten to put in a limitation for its Lome convention commitments under GATS)

they soon discover that even these 'limitations' are not guaranteed.

The WTO's Council for Trade in Services has stressed that "The negotiations on specific commitments should aim...at progressively higher levels of liberalisation, through commitments across a fuller range of sector and through *the reduction or elimination of limitations.*"⁹³

Once it becomes apparent just how far reaching GATS could be, and the extent to which a WTO member country could use the agreement to gain access to another country's markets, most governments would want to reserve their ability to regulate across all sectors. To do so, however, would clearly go against the spirit of the agreement and would probably not be tolerated by other Member governments.

Egypt, Malaysia and the Philippines, for example, all put down limitations to their Uruguay Round GATS commitments. As a result, they have been singled out by the EU in draft GATS proposals, which request their removal. For instance, in its draft proposals on tourism to Egypt, the EU lists the limitations that Egypt currently has in its schedules. For example, in Hotels and Restaurants, the EU requests that Egypt "remove licensing requirements and limitations on the total number of service operations." In the draft request to Malaysia the EU targets the requirement that foreign investors operate through a locally incorporated joint venture and that foreign shareholdings in this venture should not exceed 30 per cent. In their request to the Philippines the EU requests the removal of restrictions on foreign company participation throughout the sector and nationality restrictions which state that as a general rule only Philippine

citizens can be employed in tourism orientated establishments.⁹⁴

This long list of problems should send warning signals to governments. The likelihood that they can list, and maintain, all the rules they may need to implement, both now and in the future, is very low.

4.1.3 Effective irreversibility

A common defence of GATS is that governments can change their minds in the future about their service commitments. This is crucial. Many governments experience difficulties in identifying which regulations they need to protect when making GATS commitments, only realising what is needed once another country challenges their regulations.

But making changes to a commitment is practically impossible. In theory, a government can add in limitations after it has committed a service to GATS, but in practice, this is very difficult. A government can do so only after embarking on a lengthy and difficult 'Modification of Schedule' process, as set out in Article XXI. The process can start only "after three years have elapsed from the date on which that commitment entered into force."⁹⁵ Then a member wishing to modify a commitment must give other members at least three months notice of its intention. It has to come up with substitute commitments that not only compensate for the modification, but are also satisfactory to all WTO members. Any government opposed to the modification can argue that substitute compensatory commitments are not acceptable - and the text of GATS would be on their side. After all, GATS is in itself a commitment to the progressive liberalisation of services, which means that, ultimately, a country

should have no sectors left to offer up in compensation.

As the British Government has said: 'Commitments are intended to be binding and ensure predictability for companies.'⁹⁶

4.1.4 Exceptions

a) Protecting 'human, animal or plant life or health' (Article XIVb)

An exception to GATS rules which is often cited, and seems to be a get-out clause, is in fact of limited value. Article XIV of GATS allows exceptions to GATS rules where it is "necessary to protect public morals or to maintain public order" or to "protect human, animal or plant life or health."⁹⁷

But what constitutes 'necessary' and who determines this? In order to invoke an exception a WTO member must put forward its case to a panel of WTO trade experts who then adjudicate. The onus is on a government to prove that its regulation is necessary, rather than on a company to act responsibly. As part of the test, governments must show that there is scientific evidence of the threat to 'human, plant or animal life or health' and so on. This is frequently difficult to prove, and could therefore be easily used to prevent governments from taking precautionary measures. Again, any dispute process is likely to be long and expensive, which is particularly burdensome for developing countries.

To date, no country has called for an exemption to GATS rules under Article XIV and no challenge has been brought to a dispute panel, so it is not possible to say what the outcome of a challenged exemption would be. But a similar exception in the GATT agreement on international trade in goods, Article XX,

has been overruled by the WTO in all but one case brought before the dispute panel. A French ban on imports of 'white' asbestos, challenged by Canada, is the first trade-restrictive measure to be exempt from GATT rules on health grounds under this article.

b) Emergency Safeguard Measures (Article X)

Some GATS supporters also cite Article X on emergency safeguard measures as an example of how the agreement is 'development friendly'. The Article would allow a government to act in an emergency to protect or safeguard domestic service suppliers against 'fairly traded' services that threaten to cause 'serious injury'. It could allow governments, therefore, to reverse, at least temporarily, their commitments that have had catastrophic consequences.

But far from allowing governments to introduce these measures, GATS Article X simply provides for negotiations among WTO members to introduce them into the agreement at some point in the future. Various deadlines have been set, and missed, over the past six years and it looks unlikely that any consensus will be reached in the near future. The latest date for completion of Article X is 15 March 2002,⁹⁸ but this deadline continues to slip.

The Quad group of countries (US, Canada, EU 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 such as GATT.

Even it was concluded, however, this Article would probably be drafted in such a way that it focused on economic difficulties a country faced because of market saturation once a service sector was

opened up under GATS. It would be unlikely to offer reprieve from GATS commitments to countries facing social or political difficulties ignited by inadequate service delivery linked to liberalisation, such as poorer people's lack of access to essential services.

4.2 CONCLUSION - THE NEED FOR CAUTION

The WTO Secretariat attempts to be reassuring when it states that: "There is nothing in the GATS...that would oblige governments to sacrifice any *reasonable* level of technical or commercial regulation. The GATS imposes constraints, however, on the use of *unnecessarily restrictive* or discriminatory requirements in scheduled sectors." But herein lies the crux of the problem: who decides what is 'reasonable' and what is 'unnecessarily restrictive'? Not democratically-elected representatives but trade 'experts'.

It appears that the WTO feels confident in its rebuttal of critics at least in part because it is underestimating the extent to which government regulation is not just legitimate but vital in the pursuit of poverty reduction and other social goals. It appears, also, that part of the problem with the WTO defence of GATS is that it is not based in the real world where there is imperfect knowledge, and corporate lawyers ready to use any loophole in their interests.

The present implications of GATS are already sufficiently worrying to suggest that new rounds of commitments and further development of rules should not be made until a proper and independent assessment of the impacts of service liberalisation has been carried out.

5. THE LIMITED BENEFITS OF GATS - The service liberalisation debate

Much of the debate about GATS, and many of the concerns raised by developing countries and NGOs, has focused on governments' 'right to regulate'. Less attention has been paid to the benefits of service liberalisation: what are they, who really gets them and do they outweigh the costs?

Service exporters certainly believe they will gain new markets and new consumers. The way corporations have been lobbying for GATS since its inception is testimony to this. However, whether developing countries really stand to benefit from service liberalisation, and what ordinary citizens, particularly the poorest, will get from the process, is less clear. Given the high costs associated with making commitments under GATS, as detailed in the previous section, it is critical to ensure that real benefits will ensue. Yet there has been woefully little assessment carried out, either of the impacts of service liberalisation or of GATS itself.

There is, however, some evidence of the effects of liberalisation on developing countries outside the auspices of GATS. For many of these countries, liberalisation, the opening up of a sector to competition, and privatisation of state-run or -owned enterprises, has gone hand-in-hand. With developing countries having just a few domestic service providers with limited capacity, it has tended to be foreign firms, who have the resources and the capacity, that buy the newly-privatised entities.

Sometimes governments have themselves initiated the process, but more often than not, both privatisation and liberalisation

have been the price of receiving aid or debt relief, as conditions required by the World Bank and International Monetary Fund in the form of Structural Adjustment Programmes.

GATS is not the cause of privatisation nor even of much of the service liberalisation which is currently taking place. But the agreement takes place in the context of a live debate and it is negligent of GATS negotiators and promoters not to acknowledge the ongoing debates and controversy about privatisation and liberalisation. Moreover, GATS potentially locks countries into one development option, even though the merits or otherwise of that path are still hotly disputed. GATS does not force governments to privatise the services they provide or fund, but it does effectively prohibit them from ever re-regulating or re-nationalising them. More immediately, advocates of privatisation and liberalisation often respond to critics by arguing that these processes are accompanied by regulation to ensure that a service is still delivered and to promote benefits for the domestic economy. Yet GATS restricts government's ability to do just that.

This section therefore takes a brief look at some of the problems privatisation and liberalisation have created for domestic economies and consumers, so adding background to the GATS debate. Some of these problems stem from the removal of state control; others arise because the company taking control is not based in the country.

5.1 THE DOMESTIC ECONOMY

The WTO Secretariat's claims for the benefits of liberalisation are hardly modest: "The liberalisation of trade in goods, which has been promoted through negotiations in the GATT over the past 50 years, has been one of the greatest contributors to economic growth and the relief of poverty in mankind's history...[T]he potential benefits or services liberalisation are at least as great."⁹⁹

Advocates of GATS often cite five benefits of service liberalisation in developing countries:

1. export of services
2. new sources of finance
3. the stimulation of local firms
4. transfer of technology and knowledge
5. creating employment.

5.1.1 Export of services?

The most obvious benefit of service liberalisation is that service exporters can capitalise on new markets. It is here that the gap between developed and developing countries is most stark. Indeed, at the start of negotiations to draw up the GATS agreement in 1987, EEC negotiators admitted that, for the foreseeable future, they could not see any comparative advantage for developing countries in any sector of services trade.¹⁰⁰

Five years after GATS came into effect, Argentina has confirmed this assessment in a recent report to the WTO, noting that developing countries "have failed to increase their share of global trade in services since the conclusion of the Uruguay Round in 1994".¹⁰¹

Even an economy as large as India has little chance of making in-roads into service exports, such as tourism, although it has two relatively strong domestic tourist companies, the two large hotel providers, Taj and the Oberoi Group. With insufficient trained managers or capital to invest, the potential for exploiting new opportunities is minimal.¹⁰² Both companies have been making little headway into the Middle Eastern market; gaining a foothold in industrialised country markets is even less likely. The export of unskilled labour, like domestic workers, is one area where developing countries could potentially benefit for liberalisation, but is an area on which there has been little movement in the GATS agreement.

Some developing countries feel they could benefit more in this area if concessions were made on the movement of natural persons under supply 'mode 4' (see Box 2, page 13). In a paper presented to the Council for Trade in Services in October 2001 a group of ten developing countries observe that most member countries only allow the entry of high level managers or specialists. The movement of low-skilled labour overseas in order to provide services, an area where developing countries have a comparative advantage, is still highly restricted.¹⁰³

5.1.2 New sources of finance?

For developing countries, one of the main benefits of service liberalisation is supposed to come in the form of inward investment, which is meant to boost the local economy. WTO officials repeatedly defend GATS by maintaining that service liberalisation brings in more foreign investment, particularly into new areas.

According to UNCTAD, “The ongoing deregulation and privatisation of infrastructure continues to spur the growth of FDI [foreign direct investment] in services.”¹⁰⁴ Yet, 80 per cent of FDI to developing countries goes to just 10 countries.¹⁰⁵ Africa receives just over one per cent of global FDI in-flows.¹⁰⁶ Investors are looking for economies with infrastructure and a consumer market; they are not aiming to build them. Only a reduction in poverty would make the poorest countries an attractive investment opportunity for multinationals.

Even in countries where foreign investment does arrive, its benefits to the local people and country are frequently limited, for three reasons. Firstly, much of the new investment in services in developing countries has taken place as a result of the privatisation of public utilities. These are ‘take-overs’ rather than ‘greenfield sites’ or ‘new start-ups’: the new investors simply takes over existing operations and assets rather than starting up new ones with new investment. Secondly, the international think-tank Public Services International Research Unit (PSIRU) has shown that multinationals try to minimise their own outlay when investing in developing countries by turning to public sources of funding on offer from international financial institutions, such as the World Bank. The amount of new or extra money actually brought in may be very limited.¹⁰⁷

Thirdly, because of their dominant market standing, foreign investors are frequently in a strong bargaining position. Some corporations have been able to negotiate highly beneficial deals for themselves, which severely restrict the benefits to the country in which they operate. For example, in the energy sector, multinationals building power plants have

been able to make arrangements that pass almost all the financial risk of the project onto the (usually state-owned) companies who distribute and supply the energy to consumers. A typical ‘power purchase agreement’ requires the public authority to buy a fixed amount of power at a price denominated in foreign exchange for a set period of time, often 20 years or more. If consumer demand for electricity falls or the local currency declines in value, the public authority still has to pay-up, while passing on higher costs to consumers is not really an option when many don’t have the money to pay. In Pakistan, Indonesia and the Indian state of Maharashtra, a standoff has resulted between the multinational, demanding its guaranteed payment, and the authorities, which have no money left to pay it.¹⁰⁸ Equations, an Indian NGO, describe energy privatisation as “an unmitigated disaster for the state of Maharashtra”.¹⁰⁹

5.1.3 The stimulation of local firms?

Stimulating local business is often said to be another major advantage of inward investment. In theory, foreign firms providing services in a country will use existing local businesses to supply them with raw materials (creating ‘backward linkages’) or to market and distribute the service (creating ‘forward linkages’).

In practice, however, this rarely happens. Tourism, for instance, is considered to be one of the best potential earners for many developing countries. Yet research suggests that strong links are seldom made with the local economy, especially with ‘all inclusive’ package holidays. On average, between 60 and 90 per cent of the price that tourists pay for their holidays goes to the multinationals who own the airlines and run the hotels.¹¹⁰

Joint ventures between domestic and foreign firms are one way of ensuring that local business benefits. But the Public Services International Research Unit (PSIRU) has found that, when looking for joint venture partners, foreign corporations sometimes prioritise firms with political connections over those with expertise in the sector. This can limit the positive impact of FDI on the development of the local private sector.¹¹¹

In practice, local firms frequently lose out completely because many multinationals source their materials, and other needs, from within their own company or franchises, either to cut costs or to meet particular quality requirements. Moreover, while governments may have used their 'public procurement' policies to support the development of certain types of local firms, or of those located in disadvantaged areas, multinationals are unlikely to take account of such 'social goals' in choosing their suppliers.¹¹²

Foreign investment can also have a negative impact on domestic firms trying to compete with a multinational. These large incomers are often in a position to initially offer consumers very low prices, thereby pushing out domestic companies unable to compete. Corporations can do this because of their economies of scale or because they can afford to run at a loss for a short period of time (in effect cross-subsidising themselves from their other operations). Once they've destroyed the competition, they often hike up their prices. They also use advertising to differentiate between the foreign and domestic product, a tactic famously pursued by one famous company to destroy indigenous 'cola' production in India.

The South Asian NGO, SAWTEE, has found that domestic firms in South Asia are unable to compete with multinationals once privatisation and liberalisation is introduced.¹¹³ When multinationals are granted concessions or win contracts for long periods of time (which is often the case), there is little hope of local firms competing with them, even if they did have the capacity in the future. For example, in Mendoza, Argentina, a water consortium was awarded a 95-year concession.¹¹⁴

Box 7

Hungarian regulations help consumers and the local economy

In Debrecen, one of the largest cities in Hungary, the municipal authority annulled two water delivery contracts awarded to French companies because the companies were claiming high costs for future investment. A public sector entity, owned by the municipality, went on to carry out and finance the necessary improvements at a much lower cost using engineering, construction and building resources drawn from the local economy and local suppliers. Pipework, for instance, cost 60 per cent less than the contracted French company would have charged, while buying locally-supplied plastic piping instead of French-manufactured equipment cost 30 per cent less than the French company would have paid, without any transportation costs. The switch to the domestic, public organisation has not only had a positive impact on the local economy, but has also benefited the consumer because the development of the water delivery infrastructure meant that prices for the consumer were 75 per cent lower than those offered by the French private company.¹¹⁵

The WTO Secretariat itself recognises the increasing concentration in the retail sector, noting that, “traditional shops selling basic products are being replaced by larger chain stores”.¹¹⁶

Government regulation can play a key role in ensuring that foreign investment helps, rather than harms, local business. Yet this is just the kind of regulation that GATS may threaten. UNCTAD concludes: “The interests of TNCs and host countries do not always coincide. Governments have to make sure that they create conditions in which their economies gain the maximum benefits from FDI and suffer the minimum of losses. The issue of cross border M&As [mergers and acquisitions] is very relevant here. So is the issue of increasing the local roots and spill-over of TNCs, with corresponding benefits for the development of domestic enterprise.”¹¹⁷

5.1.4 Transfer of technology and knowledge?

The presence of foreign ‘advanced’ technology and processes, combined with experienced staff and managers, will increase local understanding and expertise, or so the theory goes. “Services commitments at the WTO help to encourage foreign direct investment [which] brings with it new skills and technology which spill over into the wider economy in various ways,” says the WTO Secretariat.¹¹⁸

But this is another area where the much promised benefits are not always forthcoming, and is one reason why governments sometimes stipulate some kind of technology transfer from foreign investors.

Unsurprisingly, foreign firms tend to be reluctant to hand over their know-how to

local, potential competitors. Some US financial service suppliers operating in Africa and Asia have stipulated in their employees’ contracts that staff cannot join a rival domestic firm for a fixed period of time once they have left the US firm. This ensures that there is no spill-over of skills and certainly no technology transfer.¹¹⁹

As early as 1987, European GATS negotiators acknowledged that developing countries would only benefit from the agreement if service providers were obliged to transfer technology - but they also recognised that this would be almost impossible to enforce and implicitly acknowledged that technology transfer to developing countries, much needed if they are to grow economically, was unlikely to happen.¹²⁰

UNCTAD concludes that: “Technology transfers by TNCs to their foreign affiliates in developing countries depend on the nature of the industry, the pace of technological change and conditions in the host economy...Where local supply capabilities are low, spillovers will also be low.”¹²¹ It also says that: “If the local linkages of acquired firms are weak or inefficient, M&As will lead to a switching of supply chains abroad, with lower diffusion of new technologies locally.”¹²²

5.1.5 The creation of employment?

If poorer groups in society are to benefit at all from foreign investment, it is most likely to be through the creation of income-earning employment. The WTO Secretariat asserts, “Economists are generally wary of claiming that trade liberalisation creates jobs, but in the services sector there is strong evidence that this is the case.”¹²³

Jobs should be forthcoming when local business is stimulated but, as pointed out above, this doesn't always happen. Moreover, the take-over of previously state-owned enterprises often leads to redundancies. Indeed, foreign firms often claim that they will increase efficiency and productivity levels when they buy up state enterprises, but one of the main ways they do so is by getting rid of staff rather than by increasing production or capacity.

One UNCTAD report found that: "Cross-border acquisitions in privatisations often lead to lay-offs after the change of ownership. This was the case with recent privatisations of electric power generation and distribution in Latin America involving the Spanish firm Endesa and the privatisations of telecommunications services in several developing countries and economies in transition. For example, in Asia, after multinationals acquired the Manila Water Works in 1997 employment dropped from 7,370 to 4,580 employees."¹²⁴

Similarly, when the railways were privatised in several Latin American countries, 'productivity' rose by downsizing the workforce.¹²⁵ In Malawi, the privatised Central East African Railway Company laid off over half its workers because, as one spokesperson noted, "if we have to make it profitable we have to streamline."¹²⁶

5.2 CONSUMERS

In addition to its impact on the domestic economy, service liberalisation also has an impact on consumers. One of the arguments in favour of service liberalisation is that it results in increased competition among producers and

suppliers, which in turn leads to improved quality and lower costs for consumers. In its defence of GATS, the WTO argues that: "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."¹²⁷ Consumers International has argued that consumers can benefit from service liberalisation for similar reasons, although it stresses that continued government regulation is necessary if such benefits are really to accrue and all consumers are to benefit equally.¹²⁸

Service liberalisation and the potential need for regulation, is an issue for consumers in developing countries in three areas:

1. the quality of service that most consumers receive;
2. the poorest people's access to basic services;
3. consumer protection in the areas of health and safety.

5.2.1 Quality of service

If services are liberalised, governments may need to ensure that there really is increased competition among suppliers and improvements in quality. Otherwise, especially in developing countries, just one multinational can enter a market and effectively ruin local infant industries unable to compete with a multinational's economies of scale or sophisticated branding and advertising. UNCTAD cites the example of the retail trade "where TNC's take over local retail chains and combine their advantages of global sourcing with the advantages of the established distribution network."¹²⁹

In other instances, far from encouraging competition, privatisation has often entailed a single firm taking over a natural monopoly, such as water and energy distribution, as happened with public utilities across Latin America and in some countries in Africa.

Argentina, for instance, has faced problems with both water and electricity supplies. A subsidiary of the French company, Generale des Eaux, was granted a 30-year contract to deliver water to a rural province in the country. Water rates doubled and the water turned brown. Customers forced out the company by not paying their bills.¹³⁰

After Guinea privatised its water sector in

1989, water prices nearly doubled.¹³¹ Following some water privatisations, (such as in Cartagena, Colombia) multinationals have reduced employment – but added to their profit margin rather than passing savings on to the consumer.¹³²

In addition to the problem of consumers not being provided with a quality service they want, another problem is that they are persuaded to buy services they don't really need and may not be able to afford without getting into debt. Some service industries, like advertising, can create 'needs' which thus become new markets. The 'beauty' industry has become adept at this – for example, promoting the fashion for straightening 'afro' hair.

Box 8

GATS in Action: *Financial services in Mozambique*

Mozambique's only GATS commitments are for 'Financial Services – Banking and Other Financial Services'. The Government has committed itself not to restrict 'market access' to inward investors providing they abide by domestic rules and regulation.

The country's financial sector has been liberalised for over a decade as a condition of an International Monetary Fund's programme. But these reforms did not increase competition nor did they improve services. The Government agreed to commit the sector under GATS, presumably in the hope of attracting foreign investors.

Yet the entire banking system still cannot raise more than US\$30-40 million a year for investment. As a result, major projects, like the aluminium smelting plant outside Maputo, are heavily dependent on relatively volatile foreign financing.¹³³

Meanwhile, liberalisation of the rural banking network led to a reduction in the number of rural branches. Farmers heavily dependent on seasonal income, in a country where transport is difficult, were left with no access to credit. Liberalisation simply made a difficult situation worse for many people.

The overall result of financial services liberalisation in Mozambique has meant foreign funds needed for domestic investment have not flowed in, while service provision has deteriorated significantly, particularly for the poorest customers.

5.2.2 Access to services

In many developing countries, the poorest in society do not have access to safe, affordable services. Privatisation and liberalisation policies have frequently failed to remedy this. Without government subsidies, private companies have no incentive to provide services to those who cannot afford to pay.

Argentina provides another example of how liberalisation has benefited existing customers but has failed to extend service provision more widely. In Buenos Aires, the water supply concession was awarded to the company offering the lowest prices to existing customers, but the 'connection fee' for new customers remained high, making it unaffordable to low-income households.¹³⁴ In 1995, water privatisation in Puerto Rico left poor people without water while US military bases and tourist resorts remained well supplied.¹³⁵

Many of the privatised railways in Latin America in the early 1990s found it easier to lower their costs than to increase demand, leading to the closure of unprofitable passenger lines in favour of freight lines or high-density passenger services.¹³⁶ Similarly strategy's prevailed in Africa, such as the case of the privatised Abidjan-Niger Railway between the Cote d'Ivoire and Burkina Faso. After privatisation the new company (owned by Bolloré, a French multinational) closed all the small town stations, keeping only the city express and freight lines running. The villages and towns along the railway line had been dependant on the service because it was their only way of travelling the 70km to the regions administrative centre and local hospital.¹³⁷

Similarly, in the Philippines, a project to build an overland metro line in Manila under a privatised Build, Operate and Transfer (BOT) contract does not meet the needs of those who most need transport – the urban poor. On paper, the project seemed to make sense – a 16.8 kilometre, 13 station, elevated rail line that does not interfere with the existing highway and would serve one of the busiest 'transport corridors' in Manila. But, unfortunately, the project was not planned to extend transport services to the poorer areas, which were either under-served or who had no bus service at all. Instead, the planned metro will serve a corridor that already has an extensive bus service on an 8-lane motorway.¹³⁸

In a report on the health sector, the WTO Secretariat itself recognised that not everyone will benefit from liberalisation: "The co-existence of private and public hospitals may raise questions, however, concerning their competitive relationship and the applicability of GATS."¹³⁹

A paper published by the World Bank on private sector involvement in infrastructure services noted that some of the poorest consumers are dependent on 'alternative' types of service providers. This is because most multinationals entering this sector supply a 'one-size-fits-all' service, while alternative providers can be more flexible to differing circumstances, especially those of the poor. For example, an estimated 20-30 per cent of urban dwellers in developing countries do not get their water from taps in the homes, but by buying it by the bucket, either from licensees of standpipes, owned by small businesses, (as in the Kenyan capital, Nairobi) or from traditional water carriers. Likewise, more consumers in rural Kenya get their electricity from household solar cells than from the official rural

electrification program, which is constrained by limited resources. For households with low consumption, this is cheaper than other options, such as getting connected to the main electricity grid, isolated generators, kerosene or dry cell batteries.¹⁴⁰ A new multinational provider, with virtual monopoly power, may discourage such practices or may even ensure they are outlawed in the contract, persuading the government to stipulate that they are the sole service provider. They are unlikely, however, to set up such small-scale distribution mechanisms. While alternative providers are often under-regulated, their disappearance may simply mean that the poor are excluded from accessing essential services.

5.2.3 Consumer protection

Clearly, some of the promised benefits of privatisation and liberalisation to consumers have not materialised. In addition many harmful or disruptive effects have been the consequence of weak or insufficient regulation to protect consumers from negligent privatised companies cutting corners to reduce costs. This has been particularly the case in developing countries, which have weak state capacities to enforce regulations that do exist. IMF conditions to cut public spending have made their capacity weaker still because many countries have to had reduce the numbers of public employees who would enforce the regulations.

Sometimes, such negligence can be lethal. The Peruvian Consumers Association (ASPEC) has reported numerous cases of 'accidental electrocutions'. In May 1997, a Peruvian woman died after receiving a 10,000-volt electric charge when she picked up her

telephone. Similarly, an Argentinean woman died when she was hit by a 13,200-volt charge from her phone. Both died because telephone and electricity cables had been installed too close to one another. In both Argentina and Peru, the telephone service is provided by Telefonica de Espana, but in neither case has the company accepted responsibility. In Peru, the family of the woman won a preliminary court ruling citing negligence by both telephone and electricity companies - but the companies are now taking the case to the costly Supreme Court. ASPEC claims that dozens of such cases have occurred in recent years "without any official sanctions having been taken."¹⁴¹

In 1999, the Chilean Consumers and Users Organisation (ODECU) took the Chilean Government to court over weak regulations, which failed to protect consumer rights. In a letter to the President, ODECU asked for, "greater transparency in a market obscured not only by abusive, arbitrary and illegal practices on the part of the owners (of the power companies), but also by the regulatory norms which enable these practices to continue". Jose Vargas, Director of Consumers International (Santiago), claims that the situation in Chile, which has been aggravated by power cuts, rationing and price hikes, is a result of privatisation. He suggests that, "Weak regulation distorts responsibilities because when crises occur, who can people complain to? Not the companies, but to the government. And the government – due to a lack of political will during privatisation – has to deal with a situation for which it is not solely responsible."¹⁴²

5.3 WHY SERVICE LIBERALISATION CAN GO WRONG

The examples above demonstrate that service liberalisation can do as much harm as good, both for the development of the domestic economy and for consumers. It appears that the market cannot meet non-profit objectives, such as supporting local development or ensuring universal access. The GATS agreement seems to ignore this fundamental problem experienced with market liberalisation. The process also creates problems of capacity and implementation. Developing countries seldom have the capacity to implement the kind of regulations needed if social goals are to be protected under market liberalisation, particularly given the substantial political pressure they will be under to abandon such regulations. GATS negotiations are continuing apace despite recognition of these problems. This section considers what the underlying problems of service liberalisation are, in order to explain why things go predictably wrong., and looks at the following three areas:

1. Poor state provision
2. Market theory applied to an imperfect market
3. Weak regulatory bodies

5.3.1 Poor state provision

One of the arguments in favour of liberalisation has frequently been that state provision is poor. It is true that in many cases, state provision of services has been non-existent or poor quality. But publicly owned enterprises can be just as efficient as private sector ones – and are usually better at reconciling commercial and social objectives. The Public Services International Research Unit (PSIRU) has documented several examples where publicly owned enterprises have offered

an effective alternative to privatisation.¹⁴³ Yet rather than the reform and improvement of publicly owned enterprises, the politically motivated trend has been towards liberalisation and the free market.

5.3.2 Market theory applied to an imperfect market

Market mechanisms are inappropriate for many service sectors, particularly basic services and utilities, as the examples in this report illustrate. As UNCTAD notes, “Markets and supporting institutions...do not work perfectly – far from it. Moreover, the interests of TNCs and host countries do not always coincide. Policy therefore matters. Because markets are not perfect, moreover, it is important for countries to preserve a ‘policy space’ for themselves in the new international environment. They should, for instance, keep room for manoeuvre when negotiating international investment agreements in order to ensure that they are able to further national economic interests.”¹⁴⁴

The preponderance of natural monopolies makes market liberalisation difficult in several service sectors. Water, transport and energy, for instance, are all natural monopolies. It is difficult for new firms to enter the market as economies of scale greatly favour existing large firms. The small number of multinational service suppliers give them a virtual monopoly of supply, allowing them to dictate conditions which effectively insulate them from any of the normal market risks (for example two French companies – Vivendi and Suez – account for over half of world water sales.¹⁴⁵) The evidence suggests that, in developing countries, liberalisation leads to concentration in market power among a few multinationals, rather than increased competition among many firms.

Privatisation of the Latin America railways allowed a single company to manage both infrastructure and train operation under concessions lasting for up to 50 years. This pattern replicated the US model, which has met with fierce opposition from consumer groups.¹⁴⁶

Once it has gained an effective monopoly, there is little incentive for a private company to respond to consumer demands (and it does not have the political pressure from the electorate that should influence state monopolies). Companies have often managed to ensure that public authorities absorb all the financial risk by guaranteeing them basic payment. The public authority cannot pass on the exaggerated costs to consumers without harming poorer consumers and local businesses, which would be politically unfeasible in many cases. But the public authority cannot go bankrupt in the same way a business can. It is left with all the risk but with no control over the quantity or price of the service provided.

What happened in Argentina is illustrative of the problems which occur when no one is prepared to pay to ensure universal water delivery. The water sector in the country was liberalised in 1995. One local government authority awarded a contract to a multinational on condition that it provided water to shantytown dwellers, regardless of their ability to pay. Unsurprisingly, the company said that somebody had to meet the costs or they would stop operating. The local government refused, as they had not received the necessary financing from central government. Unusually, the company decided to subsidise the provision by charging wealthier customers a 'solidarity tax'. This was not popular, and the customers used the courts to get

the surcharge ruled illegal. In this case, market mechanisms were thus incapable of meeting the social objective of universal access to water.¹⁴⁷

5.3.3 Weak regulatory bodies

As Consumers International has observed "While there are real potential benefits from the liberalisation of service markets, regulatory policies and their enforcement will be key factors in determining how these benefits are distributed."¹⁴⁸ Yet the weak regulatory bodies are usually unable to stand up to the multinationals, a failing which becomes all the more important when services are necessities, not luxuries.

Through liberalisation and privatisation, governments have moved from being providers of services to guarantors of provision. However, many governments in developing countries do not have the capacity to effectively regulate these service sectors, particularly foreign firms operating within them. In the shift from provider to guarantor, governments have often devolved responsibility to government authorities created at the time of privatisation. These authorities often lack funds and experience, while the foreign companies tend to have greater access to resources and information. GATS is likely to leave multinationals with even more leverage against regulatory authorities.

In all service sectors, but especially in sectors such as water and telecommunications, it is crucial that governments ensure, before liberalisation takes place, that necessary regulations are in place to safeguard against market abuse and to address issues crucial to each sector, such as universal access and quality of service.

This is especially problematic in developing countries where regulatory bodies are often non-existent. For example, after Guinea privatised and liberalised its water sector in the late 1980s, a World Bank audit subsequently found that a rapid price rise was caused by weak regulation, in particular a combination of the government regulator's inadequate administrative capacity and the company's failure to comply with requests for information.¹⁴⁹

5.4 CONCLUSION – GATS BENEFITS ARE LIMITED

The results of service liberalisation for developing countries, and the poorer people within them, has been, at best,

mixed. Many developing countries have little to gain from the process because they do not have service exporters or strong regulatory bodies to oversee the process. The gains of foreign investment for the local economy are frequently overstated, but especially in the service sector where local linkages can be minimal. Consumers are supposed to benefit from increased competition, yet liberalisation does not automatically bring such competition; it may even restrict it. What is clear, however, is that strong regulatory bodies are essential if developing countries are to have any hope at all of benefiting from service liberalisation. Yet it seems that GATS will restrict the ability of just such bodies to regulate.

6. THE POLITICAL CONTEXT

Given the controversy over service liberalisation, the lack of assessment of its results so far, the pressure on governments to increase their GATS commitments in the current round of negotiations, and the effective irreversibility of the agreement, it would seem that countries are not always making free and informed choices.

The problem is a live one. There are still crucial decisions for governments to take over what service sectors to commit under the 'request and offer' process of GATS. Moreover, sections of the agreement are still under discussion with, for example, proposals on domestic regulation. The WTO Secretariat makes it clear that the current GATS package is just the beginning: "Among the most important elements in the GATS package is the promise that successive further rounds of negotiations will be undertaken to continue opening up world trade in services."¹⁵⁰

This section considers the limits on government choice under GATS, then goes on to take a brief look at the current negotiations.

6.1 DO GOVERNMENTS REALLY HAVE A CHOICE?

Although the WTO claims that decisions are made by consensus, the reality is that developing countries have less negotiating power than industrialised countries. This is not surprising, but still has to be fully acknowledged to understand why developing countries have made commitments under GATS. Perhaps more

surprising is that industrialised countries seem to have given up their powers to regulate so willingly. To explain this, analysis of the enormous level of corporate influence over GATS negotiations is illuminating. Moreover, current proposals in the GATS negotiations would reduce governments' ability to go at their own pace in making commitments. A recurring problem is that governments, again particularly those of developing countries, have to enter into discussions without knowing all the facts.

6.1.1 Rich countries influence over developing countries

"Over 50 years of multilateral trade have shown that the developed countries clearly hold the cards in these deliberations. So at the implementation level the freedom to commit does not exactly translate into action."¹⁵¹

EU officials have acknowledged that while GATS does not create unequal negotiating power between countries, such inequality is the context in which GATS negotiations take place.¹⁵² The well-documented unequal negotiating power at the WTO is broader than just the GATS agreement. One example of the clear inequities is the so-called 'green room' negotiations, conducted behind closed doors and where critical decisions are taken among a select group of countries where the Quad (Canada, EU, Japan and the USA) dominates. Another example is the way sanctions imposed as part of the dispute process hit small economies much harder than larger ones. These inequities continue, partly because the less powerful countries are dependent

on the Quad countries for new investment, aid and political favours.

At the WTO Ministerial meeting in Seattle in 1999, the UK Government and others partially recognised this problem. Yet negotiations on GATS are continuing apace, despite no meaningful reforms to address the differential negotiating power. In particular, the UK recognised the limited capacity of developing countries and has discussed possible long-term solutions. However, at the same time the UK has ignored calls to halt new negotiations to existing WTO agreements. NGO representatives at the Ministerial meeting in Doha in November 2001 reported on the widespread pressure that industrialised countries put on developing country negotiators, including suggestions that aid would be withdrawn.¹⁵³

Negotiations, moreover, take place in a context not just of unequal negotiating power but also of drastically unequal resources. Many developing country delegations, comprising just a few people, are expected to understand and negotiate their way through this highly complex and often unclear agreement. For example, at the Doha Ministerial, the total number of delegates from the G7 nations (481) was almost twice that of the combined delegations of the 39 Least Developed Countries (276).¹⁵⁴

This inequality is clearly present in GATS negotiations. As a former Indian Ambassador and Permanent Representative to GATT concludes: "There is no effective commensurate benefit to the developing countries by liberalisation commitments of the developed countries in services sectors. The result has been that the developing countries have given concessions without...getting concessions in return.

The outcome has naturally been severely unbalanced."¹⁵⁵

Adding to these pressures are new proposals to change the structure of future GATS negotiations, which would make it even harder for countries to resist service liberalisation. For example, frustrated by the slow pace at which many countries are committing sectors under GATS, the US and EU have tried to 'cluster' some sectors together. They have come up with proposals for countries to commit not just one service, but all interrelated services in one package or cluster.

K.T. Suresh of the Indian NGO Equations says: "The areas of interest to the developed countries have seen all the action. The cluster approach to enable the GATS to move into the fast track of negotiations is indicative of this."¹⁵⁶ The areas of interest that developing countries have raised as priorities for them, such as those relating to foreign workers being employed in other countries (the 'presence of natural persons' mode of supplying services, see Box 2, page 13) have largely been ignored or sidelined.

6.1.2 Corporate influence over governments

It is particularly difficult to understand why powerful industrialised countries should hand over their right to regulate. Yet this seems to be the trade-off they are prepared to make to guarantee new markets for their service exporters - potentially putting the needs of their corporations before those of their citizens. Pascal Lamy, European Commissioner for Trade, explains the trade-off: "If we want to improve our hard won access to foreign markets then we can't keep our protected sectors out of the sunlight...In the US and

EU that means some pain in some sectors, but gain in many others”¹⁵⁷

This trade-off is testimony to the success of the corporate lobbying of policy-makers. If unions, consumers and other civil society groups had as much influence over their GATS negotiators, the agreement could look very different. As corporate service exporters stand to gain the most from GATS and the current negotiations, it is thus all the more striking that, in the delicate decisions governments have to make to balance corporate and citizens’ interests, corporations have had so much influence. In some ways, the political context is as much corporate dominance as it is Quad power.

Corporate lobbying of governments and international bodies is nothing new, but has reached new heights of influence in services. WTO staff and negotiators openly acknowledge that GATS exists only because of pressure from service multinationals and that this influence has continued since GATS came into effect.¹⁵⁸ Relations between the US Coalition of Service Industries and the US negotiators are close and constant.¹⁵⁹

The access of European companies to EU policy-makers seems to be just as good. One member of the European Services Forum, in defending the transparency of GATS negotiations explained that ‘all you have to do is pick up the phone – I do it every day!’ He seems not to realise that the rest of society has no such hotline to the ears of Ministers.¹⁶⁰ Civil society groups have to struggle hard to get a meeting or access to documents. The EU admits quite openly that “an active service industry involvement in 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.”¹⁶¹

A report by Corporate Europe Observatory (CEO) revealed clear evidence of the close relationship between the UK Government and a services industry lobby group. Corporate financial services representatives and civil servants meet regularly as the LOTIS (Liberalisation Of Trade In Services) group. Minutes of this group suggest that documents not publicly available were released to the lobbyists.¹⁶²

The report quotes minutes revealing that corporate representatives were warned about NGO campaigns critical of GATS. The LOTIS Committee chair singled out two main groups: the World Development Movement and Christian Aid: “The WDM had, usefully for them, been able to point to some examples in the developing world where consumers had been given a bad deal as a result of privatisation. She [a DTI official] said we would be right to take this campaign very seriously.”¹⁶³

It appears that corporate representatives and civil servants went on to have joint discussions on how to counter the critics. The LOTIS secretary presented a proposal to, “counter the NGOs anti-GATS campaign and partly to convince developing countries to open their markets”. The idea was to spend between £50,000 and £70,000 on a series of case studies, “exploring the economic benefits for developing countries of services liberalisation”. The tone of the proposal suggested that the research was motivated to counter anti-GATS arguments rather than to discover the actual impact of the agreement.

CEO concludes that “While it is useful and justified for governments to take business

concerns into account when formulating trade policy, privileged co-operative arrangements between business and government as embodied in the...LOTIS do not belong in a truly democratic decision-making process.”¹⁶⁴

6.1.3 Lack of evidence and information

Some governments, including the UK, have recognised that there has been no thorough assessment of the impact of service liberalisation. Without this evidence, governments will be making blind decisions blind to what the effects of service liberalisation will be.

Some NGOs have also pointed to the lack of data available, particularly to developing countries, on service sectors. Even larger countries such as Egypt and Brazil do not have the necessary information – information vital in assessing which sectors they should protect and which to open up.

Moreover, the government officials who have sector specific experience, such as health, education or development civil servants, do not conduct negotiations. They are largely conducted by trade officials, who have little or no experience of social or development issues nor of the regulations imposed on services by other government departments. The WTO Secretariat itself questions whether all government health officials are sufficiently informed of the health commitments their governments have made under GATS.¹⁶⁵

6.2 CURRENT NEGOTIATIONS AND CONTINUING PROBLEMS

Although GATS has been in place for over six years, negotiations on both the text and the implementation of the agreement

are still taking place. Some developing countries have continued to express their concern about this process.

As part of the ongoing GATS negotiations, the WTO Council for Trade in Services meets every two months, usually in Geneva.

In February 2000, the first phase of discussions (in the current round of negotiations) developed procedures and guidelines determining how the negotiations should be carried out. Member states eventually concluded the discussions at the end of March 2001 at a WTO Council for Trade in Services meeting, agreeing to a document that outlines these guidelines and procedures.¹⁶⁶ The agreed document was in fact the fourth version. Developing countries had rejected previous drafts because they did not address their concerns sufficiently, particularly their two main (and rather modest) concerns on ‘Assessment’ and ‘Emergency safeguards’.

With the agreement of these guidelines in March 2001, the next stage of negotiations began the ‘market access’ phase. From March 2001, Members were able to submit general liberalisation proposals on a sector basis. (However, several WTO members, such as the US and EU, began to submit these general proposals as early as December 2000, strongly influenced by corporate lobbying.)

Developing country participation in the March 2001 meeting was low. Many developing countries are becoming increasingly disturbed that agreed aspects of the guidelines are still being ignored. Just before WTO members met for a Ministerial meeting in Qatar in November 2001, over 90 percent of the current

proposals on the negotiating table came from developed countries. Developing country delegates have explained that it is difficult to ascertain what the implications of the proposals might be, and so they are unclear as to how they should react. They have insufficient information about their own service sectors and insufficient resources to analyse the various ways the wording in these proposals could be interpreted by a WTO dispute panel. Any mistakes now, however, could mean a WTO case being brought against them in the future.¹⁶⁷

Ministers for the WTO member countries met in Doha, Qatar in November 2001. GATS is part of the set of talks launched at this Ministerial meeting. A major implication of this is that concessions on GATS can now be traded for concessions in other agreements. Some NGOs fear that developing countries will be persuaded to give way in the services negotiations in order to get desperately wanted, and long argued for, gains on other issues such as tariff reductions, agricultural, textiles and intellectual property rights. Those concerned about the impact of a new round of negotiations argue that developing countries should be getting these long requested improvements without having to give ground in negotiations on other agreements, like GATS.

These fears are confirmed by the enthusiasm expressed for the new round by Lord Brittan, Chair of the LOTIS group representing the interests of the UK

Financial Services industry. He said: "The decision taken by Ministers at Doha to launch a wide ranging new trade Round is most welcome. Further liberalisation in trade in services is in all our interests. But I doubt if we would have got very far if the negotiations had been confined to services and agriculture. With a full-scale and wide ranging Round, the scope for trade-offs between the different areas under negotiation should enable us to achieve a high quality services package which will benefit all WTO Member countries, whatever their stage of development."¹⁶⁸

There was no mention of assessment of GATS within the Doha's Ministerial declaration and its absence has not brought caution to proceedings. Instead, it appears GATS negotiations may even accelerate. The 'request-offer' phase of negotiations on which specific sectors will be committed to GATS rules looks set to proceed rapidly now that a deadline for requests has been set for 30 June 2002 and a deadline for offers of 31 March 2003. Some developing countries have also pointed to the absence in the Ministerial declaration of any mention of the implementation of Article IV of GATS, which refers to the particular needs of developing countries.¹⁶⁹

The reality of negotiations in Doha and Geneva appears to reinforce the view that developed country positions are dominating, and that corporate lobbying has strongly influenced these positions.

7. CONCLUSION AND THE WAY FORWARD

7.1 CONCLUSION

Negotiations on the GATS agreement will continue, regardless of what happens within wider negotiations on all the World Trade Organisation agreements.

The impact of GATS could be substantial, a sentiment shared not just by NGOs but also by corporations and the WTO itself. It is substantial because the services sector is growing so rapidly and because the agreement, in practice, covers investment as well as cross-border trade.

The potential costs are high: governments will undoubtedly lose some of their ability to regulate, not just in promoting domestic over foreign firms, but also over domestic commercial activity itself. The potential benefits, particularly to developing countries, are low.

Why, then, do governments sign up to GATS? Answers lie in the various ways they are, in effect, denied a free and informed choice and are subjected to corporate lobbying. The agreement takes place within an unequal political context which influences the process.

There are clearly many problems and concerns about the agreement. These range from serious concerns that the wording of the agreement is unclear to more fundamental doubts about whether so-called 'free trade' objectives should take priority over social and environmental objectives, including the provision of basic services. Moreover, the rationale for GATS appears to rest on the remarkable and unproven assumption that service liberalisation benefits developing

countries, and the poorest people, despite the lack of any real assessment of the implications of the agreement.

All the evidence and examples of the costs and benefits of GATS could do have yet to be collected. As a first step it is clear that proper assessment is vital. But more than enough evidence has already become available to raise doubts about the benefits and to suggest that GATS negotiations should be put on hold, at least until a proper assessment has been carried out.

7.2 THE WAY FORWARD - The need for an assessment of service liberalisation

Given the substantial potential impact of the GATS agreement and the hotly contested debate about the benefits, or otherwise, of wholesale service liberalisation, a thorough assessment of GATS and service liberalisation is vital before negotiations continue any further. Yet, as we have just seen, negotiations are continuing unabated.

GATS Article XIX.3 actually mandates the WTO Council on Trade in Services to carry out such an assessment *prior* to establishing negotiating guidelines. The Council has not done so. Developed countries have ignored the importance of an assessment and are carrying on with the current phase of market access negotiations without it.

Given the lack of information about GATS and its implications, developing country

representatives are demanding with increasing force that the WTO fulfil its obligations. Ten developing countries (Cuba, Dominican Republic, Haiti, India, Kenya, Pakistan, Peru, Uganda, Venezuela and Zimbabwe) presented a paper in October 2001 calling for proper assessment to the Council on Trade in Services. They argue that assessment is particularly important given:

- The failure of developed countries to open their service sectors to areas of interest to developing countries
- The threat posed to developing country service suppliers from foreign competition.
- The danger that access to basic services or public goods may be put out of reach of many people in developing countries.

The group argues that an assessment must look not just at the impact of trade in services but also at employment and access to basic services.¹⁷⁰

The paper quotes from the GATS negotiating guidelines, adopted in March 2001, which stipulate that the Council for Trade in Services should carry out an: “assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Article IV [on developing country needs] in particular. This should be an ongoing activity of the Council and negotiations shall be adjusted in the light of the results of the assessment.” As the group of 10 countries point out rather dryly: “In order for such an assessment to be on-going, it should in the first place commence”. They conclude that: “Further negotiations may only commence after conclusions from this first assessment have been drawn.”¹⁷¹

In August 2001, the UN Sub-commission on the Promotion and Protection of Human Rights also called for an assessment. It adopted a resolution that, “called upon all governments and international economic policy forums, including the WTO and its GATS Council, to conduct an assessment of the impact of GATS on the implications of international trade in basic services such as health and education services and their impact on human rights.”¹⁷²

The UK Government has acknowledged that it is “certainly not against an assessment in principle and the need for one is mentioned in the GATS itself.”¹⁷³ This sounds promising, but there are at least two problems with its approach. The first is that it assumes that any assessment would look only at existing implications of the agreement, rather than potential future implications as well. This would limit the assessment’s value to governments trying to assess their position in future negotiations. The second problem with the UK position is that it contends that negotiations should still proceed, despite the absence of an assessment.

A thorough and useful assessment should be independent of the WTO, done by a respected body without the ideological bias towards liberalisation so apparent within the WTO. It would need to look at the agreement’s social, economic and environmental impacts, not just its effects on trade. It would need to be based on existing evidence, so that countries can make informed choices now, rather than waiting until after they have committed to GATS and begin to experience the (negative) effects for themselves. The effective irreversibility of GATS commitments makes such an assessment all the more important.

7.3 WDM RECOMMENDATIONS

The next step should be wide reflection and assessment before governments enter into any further extension of the agreement. Given that there is substantial evidence to suggest that service liberalisation poses problems particularly for the poor, WDM is supporting calls for a halt to further negotiations until a thorough and independent assessment has taken place. Such an assessment should look at the welfare of groups within society as well as the overall impact on economies. It should cover four main areas:

1. Clarification as to what the text actually means.
2. Political sovereignty and policy making issues, clarifying what governments will and will not be allowed to do as a result of the agreement.

3. The potential benefits and costs of service liberalisation, not just for economic development prospects, but also for the welfare of citizens, particularly the poorest and most marginalized. This should include the full impact of past service liberalisation, not just that undertaken under GATS.
4. Identification of regulations in the public interest, which might increase the benefits or reduce the costs of service liberalisation, particularly for developing countries and their poorest and most marginalized citizens, and whether these will be allowed under GATS.

Such an assessment is merely the first step in improving the information available to governments and their citizens enabling them to decide how, and whether, to liberalise their service sectors under GATS.

APPENDICES

These are selected abstracts from GATS country schedules, agreed during previous GATS negotiations. They illustrate what types of exceptions and limitations countries place on their GATS commitments. Appendix I looks at MFN exceptions, while Appendix II and III looks specifically at 'Commercial Presence' (or Mode 3) commitments and limitations.

APPENDIX I - Exemptions to Article II (Most-Favoured Nation)

Country	Sector or sub-sector	Description of measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
South Africa	Financial Services	Members of the Common Monetary Area enjoy preferential access to the South African capital and money markets and the transfer of funds, to or from the area of any other member of the Common Monetary Area, is exempt from exchange controls	Lesotho Namibia Swaziland	Indefinite	The Common Monetary Area Agreement is aimed at the sustained economic development of the area as a whole. In particular, it encourages the advancement of the less developed members of the area through preferential access to South Africa's capital and money markets.
Egypt	Audiovisual services (Co-production Agreements)	Full national treatment is extended to audiovisual works (Co-production Agreements) originating only in countries indicated in column 3, with which Egypt is a party to bilateral or multilateral agreements	Algeria Cyprus Iraq Jordan Kuwait Lebanon Libya Mauritania Morocco Oman Sudan Syria Tunisia United Arab Emirates and possibly: other countries	This measure shall be maintained as long as the agreements referred to in column 2 remain in force or are extended	To maintain the Arab culture and identity

Indonesia	Construction Services (government funded projects) ¹⁷⁴	Measures relating to preferential shortlisting in international competitive bidding	Nationals of Brunei Darussalam, Malaysia, The Philippines, Singapore and Thailand have been granted special treatment	These measures shall be maintained as long as the treaties of Asean remain in force	The implementation of a preferential shortlisting scheme for Asean contractors enhances the advancement of civil works, industrial construction and the economic development of the Asean region
Jamaica	ALL SECTORS	The work permit requirement will be waived for citizens of the countries indicated in column 3.	Member States of the Caribbean Community (CARICOM) Antigua and Barbuda Barbados Belize Dominica Grenada Guyana Monserrat St. Kitts and Nevis St. Lucia St. Vincent and the Grenadines Trinidad and Tobago	To be implemented by 1995 for an indefinite duration.	CARICOM Members are in the process of creating a single market, which, inter alia, will provide for the free movement of personnel within the Common Market States
Uruguay	Land transport (cross-border supply)	The International Land Transport Convention, signed by Uruguay, provides for national treatment for authorized suppliers of signatories in respect of international transport of passengers and freight	Signatories are Argentina, Brazil, Bolivia, Chile, Paraguay, Peru and Uruguay	Indefinite	The Convention is to facilitate transport among neighbouring countries within the "Southern Cone" on the basis of reciprocal treatment for suppliers of these services

(Abstracts from selected schedules)

APPENDIX II - Horizontal Commitments on Commercial Presence

(To be read in conjunction with Appendix III on Sector Limitations)

Country	Limitations on Market Access	Limitations on National Treatment
Indonesia	<p>3) Commercial Presence of the foreign service provider(s) may be in the form of joint venture and/or representative office, unless mentioned otherwise.</p> <p>Joint venture should meet the following requirements:</p> <p>i) should be in the form of Limited Liability Enterprise (Perseroan Terbatas/PT),</p> <p>ii) not more than 49% of the capital share of the Limited Liability Enterprise (Perseroan Terbatas/PT), may be owned by foreign partner(s).</p>	<p>3) The Income Tax Law provides that non-resident taxpayers will be subject to withholding tax of 20% if they derive the following income from Indonesian source:</p> <p>a) interest</p> <p>b) royalties</p> <p>c) dividend</p> <p>d) fee from service performed in Indonesia</p> <p>Land Acquisition</p> <p>Undang-Undang Pokok Agraria (Land Law) No. 5 of 1960 stipulates that no foreigners (juridical and natural persons) are allowed to own land. However, a joint venture enterprise could hold the right for land use (Hak Guna Usaha) and building rights (Hak Guna Bangunan), and they may rent/lease land and property.</p> <p>Any juridical and natural persons should meet professional qualification requirements</p>
Malaysia	<p>3) Acquisition, Mergers and Take-overs</p> <p>The acquisition of assets or interests of Malaysian companies and businesses, mergers or take-overs requires approval and apply to the following:</p> <p>a) the acquisition of the voting rights of a Malaysian corporation by any single foreign interest or associated group of 15 per cent or more, or an aggregate foreign interest of 30 per cent or more or exceeding RM5 million in value;</p> <p>b) any proposed acquisition of any assets or interests by any means which will result in ownership or control passing to foreign interest; and</p> <p>c) control of Malaysian corporations through any form of joint-venture agreement, management agreement, technical assistance agreement or other arrangements.</p> <p>Approval is normally granted. However it may be denied in circumstances where the proposed investment conflicts with the interest of the State.</p>	<p>3) Land, Property and Real Estate</p> <p>Approval may be denied if the acquisition, disposal or dealing of land or any interest in land, property and real estate is undertaken for speculative or non-productive purpose or for purposes which may conflict with the interest of the State.</p> <p>Incentives/Preferences</p> <p>Incentives are limited to eligible Malaysian-owned corporations engaged in service sectors promoted by the Government.</p> <p>Any measure and special preference granted to Bumiputera, Bumiputera status companies, trust companies and institutions set up to meet the objectives of the New Economic Policy (NEP) and the National Development Policy (NDP) shall be unbound.</p> <p>Corporations in which the Government has an interest shall, in acquiring services, give first consideration to service suppliers in which the Government has an interest. This requirement does not prevent the acquisition of services from other service suppliers where their services are competitive in terms of price, quality and delivery.</p>

India	N/A	3) In case of collaboration with public sector enterprises or government undertakings as joint venture partners, preference in access will be given to foreign service suppliers/entities which offer the best terms for transfer of technology.
Thailand	3) Unless otherwise specified, commercial presence in sectors or subsectors in this schedule is permitted only through a limited liability company which is registered in Thailand and which meets the following conditions: a) Foreign equity participation must not exceed 49 per cent of the registered capital; and b) The number of foreign shareholders must be less than half of the total number of shareholders of the company concerned.	3) Unless otherwise specified national treatment for this mode of delivery is unbound.
Turkey	3) Monopolies The following sectors are closed to private investments because of the public monopolies: postal services and telecommunications, railways; administration of harbour and quay; lotteries in cash, football pools and public utilities.	N/A
Jamaica	3) Branches of Companies incorporated outside Jamaica are required to register their Instruments of Incorporation with the Registrar of Companies their before they may carry on business. Part X of the Companies Act states their legal and administrative responsibilities.	3) Foreigners are not precluded from owning land. It is preferred however that the purchase of land in large acreages should be for specific Investment projects
Philippines	3) In Activities Expressly Reserved by Law to Citizens of the Philippines (i.e., foreign equity is limited to a minority share) (...) Acquisition of Land (...)	3) Access to Domestic Credit (...)

(Abstracts from selected schedules)

APPENDIX III - Specific Sector Limitations on Commercial Presence*(To be read in conjunction with Appendix II on Horizontal Commitments)*

Country	Sector or sub-sector	Limitations on Market Access	Limitations on National Treatment
Indonesia	General Construction Work for building; General Construction Work for Engineering Installation and Assembly Work Other	3) a) Joint operation: To form a joint operation by establishing a representative office b) Joint venture: to establish a joint venture company by fulfilling the requirements as specified in the Horizontal Measures and the Foreign Capital Investment Law	3) a) Joint operation: 1. Registration fee requirement 2. Licence for representative office shall be valid for 3 years and can be extended 3. Registered foreign company shall form a joint operation with local partner(s) which is (are) member(s) of the Indonesian Contractors Association having qualification A b) Joint venture: Local partner(s) in joint venture shall be member(s) of the Indonesian Contractors Association and having qualification A
Mozambique	Banking and other Financial Services (excl. insurance)	3) Any foreign bank or financial institution can operate in Mozambique as long as they abide by the domestic rules and regulations governing investment and operations of such institutions	3) None
Malaysia	Hospital Services	3) Economic needs test; Only through a locally incorporated joint-venture corporation with Malaysian individuals or Malaysian-controlled corporations or both and aggregate foreign shareholding in the joint-venture corporation shall not exceed 30 per cent; and The joint-venture corporation shall operate a hospital with a minimum of 100 beds	3) Establishment of feeder outpatient clinics is not permitted
India	Hotels and other lodging services; Travel Agency and Tour Operator Services	3) Only through incorporation with a foreign equity ceiling of 51 per cent	3) None
Thailand	Travel agency and tour operator services	3) None other than that indicated in the horizontal section and not less than half of the board of directors of the company must be Thai nationality	3) No limitations as long as foreign equity participation does not exceed 49 per cent

Turkey	A. Sewage Disposal Services B. Refuse Disposal Services C. Sanitation and Similar Services	3) None	3) None
Jamaica	Primary Education Services; Secondary Education Services; Higher Education Services;	3) None Local certification, registration, licensing required.	3) None
Philippines	All subsectors (financial services)	3) The appropriate regulatory authority in the Philippines shall determine whether public interest and economic conditions justify authorization for the establishment of commercial presence or expansion of existing operations in banking and other financial services in the Philippines. For foreign financial institutions with internationally recognized standing, such determination shall include a demonstrated capacity to contribute to the attainment of Philippine development objectives particularly in the promotion of trade, investments and appropriate technology transfer; and the country of incorporation has strategic trade and investment relations with the Philippines. In banking, the Monetary Board shall ensure that at all times seventy per cent (70%) of the resources or assets of the Philippine banking system is held by domestic banks which are at least majority-owned by Filipinos.	N/A

(Abstracts from selected schedules)

¹ DTI (2001), *Frequently asked questions about the GATS: Briefing note on the General Agreement on Trade in Services* UK Department for Trade and Industry, London

² WTO (2001) *GATS: Fact and Fiction*. World Trade Organisation. Geneva.

³ Wesselius, E. (2001) *Liberalisation of Trade in Services: Corporate Power at Work*. Corporate Europe Observatory, Amsterdam, Netherlands.

⁴ Wesselius, E. (2001) *Liberalisation of Trade in Services: Corporate Power at Work*. Corporate Europe Observatory, Amsterdam, Netherlands. p.1

⁵ WTO, 'The GATS: objectives, coverage and disciplines'.

www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm

⁶ 160 sectors are grouped into 11 categories: Business; Communication; Construction; Distribution; Educational; Environmental; Financial; Health related and social; Tourism; Recreational; Transport and Other.

⁷ Kang, NH. and Johansson, S. (2000) 'Cross-border Mergers and Acquisitions: Their role in Industrial Globalisation', *Science, Technology and Industry (STI) Working Paper, OECD, 10/01/00*

⁸ UNCTAD (2000), *World Investment Report 2000*, UNCTAD, Geneva. pp123-126

⁹ Sinclair, S. (2000) *GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy*, Canadian Centre for Policy Alternatives, Canada, p.32

¹⁰ Sinclair, S. (2000) *GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy*, Canadian Centre for Policy Alternatives, Canada, p.40

¹¹ For more information see: WDM (2001) *If it's broke, fix it!* World Development Movement, London

¹² WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (2)*

¹³ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (2a)*

¹⁴ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (2b)*

¹⁵ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (2c)*

¹⁶ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (2d)*

¹⁷ Examples can be found in the UK Department for Trade and Industry's introduction to GATS where it identifies European negotiating priorities that involve the 'consideration of pro-competitive principles'.

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

¹⁸, DfID (2000) 'Eliminating World Poverty: Making Globalisation work for the Poor', HMG White Paper, Department for International Development, London.

¹⁹ UNRISD (2000) *Visible Hands: Taking Responsibility for Social Development*. UNRISD Geneva.

²⁰ Khor, M. (2000) *Globalisation and the South: Some Critical Issues*, Third World Network, Malaysia, Chapter 4.

²¹ UNCTAD (1997), 'Expert Meeting on Existing Agreements on Investment and their Developmental Dimensions'. UNCTAD, Geneva, May 1997.

²², WDM (2001) *The General Agreement on Trade in Services: Report of a seminar held by the WDM on the WTO's GATS*, World Development Movement, London, 29/03/01

²³ Hilary, J. (2001) *The Wrong Model*. Save the Children Fund, London.

²⁴ Countries do not have to commit a whole sector as each sector is broken down into at least 4 subsectors. For example, in tourism, a country might chose to commit 'Hotels and restaurants', but not 'Travel agencies and tour operators'. For the WTO's 'Service Sectoral Classification List', see http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc

²⁵ 'Wiring the wilderness', *The Economist*, 08/06/00

²⁶ Consumers International (2000), *Services at the WTO*, Trade and Economics Briefing Paper, No.3.

²⁷ Equations (India), *Liberalising Tourism under GATS – Pitfalls for Developing Countries*, Paper presented at the 'At Whose Service?' Conference, 21-22 May 2001, Germany.

²⁸ Waskow, D. and Yu, VP. (2001) *A Disservice to the Earth: The Environmental Impact of the WTO General Agreement on Trade in Services*, Friends of the Earth, USA.

²⁹ South Centre, *Services Matrix*, Geneva, 11 May 2001

³⁰ The GATS Agreement in footnote 10 notes that 'Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers'.

³¹ WTO (1998), *Construction and related engineering services – background note by the Secretariat*.

Council for Trade in Services, 8 June 1998

(Document code: S/C/W/38)

³² Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada

³³ European Communities (EC) and their Member States, *Schedule of Specific Commitments: Tourism and Travel Services – Hotels and Restaurants*.

See <http://www.gats-info.eu.int/index.html> for all specific commitment information.

³⁴ European Communities (EC) and their Member, *Schedule of Specific Commitments: Distribution Services*.

See <http://www.gats-info.eu.int/index.html> for all specific commitment information.

³⁵ Waskow, D. and Yu, VP. (2001) *A Disservice to the Earth: The Environmental Impact of the WTO General Agreement on Trade in Services*, Friends of the Earth, USA

³⁶ Equations (India), 'Liberalising Tourism under GATS – Pitfalls for Developing Countries', Paper

presented at the 'At Whose Service?' Conference, 21-22 May 2001, Germany.

³⁷ WTO (2000), *GATS2000: Environmental Services*, European Communities (EC) and their Member States, 22/10/00 (Document code: S/CSS/W/38). In this proposal the EC reiterates its previous proposals (28/09/99 and 28/11/00) which seek a reclassification of "core" environmental services included in GATS which "better reflect(s) the trade and sectoral relativities." In this proposal there is a category 'Water for human use and waster management' which would apply directly to water delivery for human consumption.

³⁸ WTO (1998) *Distribution Services – Background note by the Secretariat*. Council for Trade in Services 10/06/98 (Document code: S/C/W/37).

³⁹ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada p.67

⁴⁰ WTO (2001), *Overview of the State-of-Play of WTO Disputes*, 2 May 2001, Section VII(68), p.37.

⁴¹ *The Washington Post*, 29 July 2000

⁴² Telmex statement in America's Network, 'Telmex refuses to share the pie', 01/01/01. www.americasnetwork.com/issues/2001issues/20010101_telmex.htm

⁴³ WTO (2001), *Overview of the State-of-Play of WTO Disputes*, 2 May 2001, Section VII(68), p.37

⁴⁴ 'Ready to nationalise.' *The Guardian*, 14/02/01

⁴⁵ WTO, *General Agreement on Trade in Services, Article VI:4*

⁴⁶ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada, p.74

⁴⁷ Appellate Body Report, Canada, 'Certain Measures Affecting the Automotive Industry', WT/DS139/AB/R and WT/DS142/AB/R, 31 May 2000.

⁴⁸ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada, p.45

⁴⁹ The case was brought by the US together with Ecuador, Guatemala, Honduras and Mexico.

⁵⁰ Appellate Body Report, EEC – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, 25 September 1997

⁵¹ Waskow, D. and Yu, VP. (2001) *A Disservice to the Earth: The Environmental Impact of the WTO General Agreement on Trade in Services*, Friends of the Earth, USA p.9

⁵² According to the GATS Scheduling Guidelines, the GATS national treatment provision does not require a Member to take a measure outside its territorial jurisdiction. Therefore this article does not require a Member to offer such a subsidy to a service supplier located in the territory of another Member.

⁵³ In addition to this, GATS also has a separate article (Article XV) not yet fully agreed, which deals with any government subsidies that distort trade. This Article

should be completed as part of the current GATS 2000 negotiations.

⁵⁴ WTO (1998), *Background note by the Secretariat: Financial Services*, WTO Secretariat, 02/12/98 (Document code: S/C/W/72)

⁵⁵ World Trade Organisation, *Telecommunications Services: Reference Paper from the Negotiating group on basic telecommunications*, 24 April 1996

⁵⁶ For a discussion of this issue see A.M Pollock and D.Price, 'Rewriting the regulations: how the World Trade Organisation could accelerate privatisation in health care systems', *The Lancet*, Vol 356, 9 December 2000.

⁵⁷ WTO, *General Agreement on Trade in Services, Part IV – Progressive Liberalisation, Article XIX: Negotiations of Specific Commitments (1)*

⁵⁸ For a good example of the WTO's defence see: WTO (2001), *GATS: Fact and Fiction*. World Trade Organisation, Geneva.

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

⁵⁹ Speech by David Hartridge, Director of Trade in Services Division, WTO Secretariat, 27/11/00. For full text see:

http://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm

⁶⁰ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada p.42

⁶¹ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada p.49

⁶² WTO (2001) *GATS: Fact and Fiction*. World Trade Organisation, Geneva

⁶³ WTO, *General Agreement on Trade in Services - Preamble*

⁶⁴ WTO, *General Agreement on Trade in Services - Preamble*

⁶⁵ WTO (2000), *Application of the Necessity Test: Issues for Consideration*, WTO Secretariat, 9 May 2000, Job No, 5929, para 2

⁶⁶ WTO (1999) *An Introduction to the GATS*. WTO Secretariat, Trade in Services Division. [Emphasis in original] Full text at:

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

⁶⁷ As part of the negotiating process members can list horizontal restrictions which allow them to maintain policies that conflict with any GATS obligations. For example in India's horizontal restrictions it maintains the right to grant contracts to those companies offering the best conditions for technology transfer. These restrictions also apply to any sectors that have been committed for market access or national treatment rules.

⁶⁸ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (3b)*

⁶⁹ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (3c)*

⁷⁰ Krajewski, M. (2001) *Public Services and the Scope of the General Agreement on Trade in Services*, Centre for International Environment Law (CIEL).

www.ciel.org

⁷¹ WTO, *General Agreement on Trade in Services, Part IV – Progressive Liberalisation, Article XIX: Negotiations of Specific Commitments*

⁷² Brittan, L. (1998) *Towards GATS 2000 – A European Strategy*.

⁷³ European Communities (EC) submission at http://www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

⁷⁴ 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', 05/08/99

⁷⁵ 'WTO foresees tough talks on opening up of services provision', *The Financial Times*, 16/3/01

⁷⁶ WTO (1998) *Health and Social Services – Background Note by the Secretariat*, Council for Trade in Services, 18/09/98 (Document code: S/C/W/50)

⁷⁷ Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 3/4/01

⁷⁸ Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 3/4/01

⁷⁹ Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 3/4/01

⁸⁰ WTO (1998), *Report of the meeting held on 14 October 1998 – Note by the Secretariat*, Council for Trade in Services, 12/11/98 (Document Code: S/C/M/30)

⁸¹ Krajewski, M. (2001) *Public Services and the Scope of the General Agreement on Trade in Services*, Centre for International Environment Law (CIEL). www.ciel.org

⁸² Richard Caborn, UK Minister for Trade, Written reply to a WDM supporter, 3/4/01

⁸³ For EC post-Uruguay Round commitments, see http://www.wto.org/english/tratop_e/serv_e/sc31.wpf

⁸⁴ See <http://www.esf.be/docs/plamy.doc>

⁸⁵ In both cases it is mentioned in horizontal limitations, not in construction specific. Qatar may require technology transfer. India, has said that in case of collaboration with public sector enterprises or government undertakings as joint venture partners, preference in access will be given to foreign service suppliers/entities which offer the best terms for transfer of technology.

⁸⁶ Personal communication with Professor Jane Kelsey, University of Auckland, 27 July 2001

⁸⁷ Sinclair, S. (2000) 'GATS: How the World Trade Organisation's new 'services' negotiations threaten democracy', Canadian Centre for Policy Alternatives, Canada, p.36

⁸⁸ Personal communication with Kato Lambrechts, Christian Aid, 18 May 2001, based on communications with a representative from the South African Department of Trade

⁸⁹ B.Boyle, 'U.S and S.Africa clash on draft telecomms law' Reuters 26/9/01

⁹⁰ WTO, *General Agreement on Trade in Services, Part 1 – Scope and definition, Article 1 (3.a.i)*

⁹¹ SAWTEE (2001) *Services Trade Liberalisation in South Asia*, South Asia Watch on Trade, Economics and Environment, Briefing Paper, No1, Kathmandu, Nepal.

⁹² WTO (1994), 'Egypt's Schedule of Specific Commitments', 15 April 1994 (Document code: GATS/SC/30)

⁹³ WTO (2000), *Report of the meeting held on 25 February 2000: Note by the Secretariat*, Special Session, Council for Trade in Services. (Document code: S/CSS/M/1) (emphasis added)

⁹⁴ EC (2000) *Draft Proposals by the European Communities and their members – GATS 2000: Tourism*. European Communities.

⁹⁵ WTO, *General Agreement on Trade in Services, Part IV – Progressive Liberalisation, Article XXI (1a)*

⁹⁶ DTI (2001), *Frequently asked questions about the GATS: Briefing note on the General Agreement on Trade in Services* UK Department for Trade and Industry, London

⁹⁷ WTO, *General Agreement on Trade in Services, Part II – General Obligations and Disciplines, Article XIV – General Exceptions (a-b)*

⁹⁸ Agreed in the Negotiating Guidelines, 28 March 2001. Available at

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

⁹⁹ WTO (2001) *GATS: Fact and Fiction*. World Trade Organisation, Geneva

¹⁰⁰ Raghavan, C. (1990) *Recolonisation: GATT, the Uruguay Round & the Third World*. Third World Network, Penang, Malaysia p.108.

¹⁰¹ WTO, 'Assessment of trade in services', Argentine submission.

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