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Another Look at the GATS

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Introduction

The General Agreement on Trade in Services (GATS) was negotiated during the Uruguay Round (1986 - 1994) of trade negotiations and entered into force for all WTO Members in the beginning of 1995, when the World Trade Organisation replaced the GATT Secretariat. The need for some kind of multilateral rules for trade in services was generally recognised in the 1980s when growth of the service sector accelerated.

Services now account for about two thirds of Gross Domestic Product (GDP) in the EU and the USA, and an even higher share of their employment. In the USA, the sector added some 40 million employees over the last two decades. Services typically account for around 50% of GDP in developing countries.

Trade in commercial services expanded faster than merchandise trade in the second half of the 1980s, before the GATS existed. But the two sectors have evolved in a roughly similar way since 1990. Within services, the fastest growing category includes computer and information services, financial services, insurance, telecommunications, and personal, cultural and recreational services — up from 6.3% of world exports in 1985 to 9.4% in 2002. As a group, developing countries account for about 18% of total world service exports -- up from 14% a decade before.

In 2004, the dollar value of world commercial services trade rose by 16%, to \$2.10 trillion, as compared to an increase of 21%, to \$8.88 trillion, for world merchandise trade. In services trade, transportation and international tourism staged a strong rebound.

A purpose of the GATS is to provide a multilateral framework of principles and rules for international trade in services; in other words to be an instrument for the removal of barriers to the supply of services by foreigners. What is controversial about the GATS is less this specific purpose than the broader GATS objective of general economic liberalisation and the powerful processes it establishes to progressively achieve that objective throughout the national economies of all WTO Members.

The GATS has five salient features. First, its comprehensive scope in terms of the number of countries, the range of services (12 sectors divided into 155 sub-sectors) and the modes of service supply it covers. Second, trade liberalisa-

tion in the context of the GATS means not only more access for foreign competitors, but also economy-wide pro-competitive deregulation or re-regulation. Third, the GATS establishes a permanent mandate for negotiations aimed at "a progressively higher level of liberalisation". Fourth, the GATS has teeth: non-observance of GATS rules or GATS commitments exposes a WTO Member to the risk of WTO-authorized retaliatory measures (e.g., higher tariffs on its exports) by other WTO member countries. Fifth, specific market access and regulatory commitments made under the GATS are difficult to reverse.

This paper will argue that the GATS exceeds the proper mandate of an international trade organisation. The GATS needs to be stripped of its roles in investment, labour migration and competition policy. These matters are related to trade, but should be left to individual countries or handled by regional or world organisations whose processes are more consistent with democratic principles, i.e., government by the people.

1 The GATS Goes Too Far

The GATS goes beyond the normal realm of international trade and reaches too far into other areas of public policy: investment policy, migration policy and competition policy. Much of the criticism of the GATS stems from this point. It can be explained by a closer look at the modes of service supply defined by the GATS and by the agreement's legal structure.

Four modes of service supply – that's two too many

The GATS classifies trade in services into four modes of supply:

1. Cross-border supply: A service is supplied from a supplier's country of residence to a consumer's country of residence.
2. Consumption abroad: A service is supplied through the movement of a consumer to a supplier's country of residence.
3. Commercial presence: A service is supplied through the movement of a service enterprise to a consumer's country of residence.
4. Presence of natural persons: A service is supplied through the temporary movement of an individual to a consumer's country of residence.

Mode 1 concerns international trade as commonly defined: "The exchange of goods or services between countries through exports and imports." The other three modes entail not the cross-border movement of a service but rather the cross-border movement of a person, i.e., a service consumer or a service supplier.

Unlike goods, some services – tourism, for example - cannot be supplied or fully supplied across borders. Hence the need for people to move to such services. Mode 2 is therefore relatively uncontroversial, although it is arguable that the cross-border movement of individual consumers, though closely related to international trade, is essentially an immigration issue. Is an individual allowed to enter the country? Does he or she need a visa? And so on.

It is even more questionable whether modes 3 or 4 belong in a trade agreement. They concern not international trade, but rather international investment (mode 3) and temporary labour migration (mode 4). Trade negotiations are not a suitable method to develop foreign investment or immigration policies, as that requires the involvement of citizens through open, democratic decision-making procedures.

Four types of GATS obligations – that's two too many

The GATS consists of obligations that are applicable to all WTO Members (primarily, most-favoured-nation treatment - MFN) and obligations that are applicable only to WTO Members that make specific commitments. Of the latter provisions, the main ones are not more burdensome than necessary regulation ("necessity test" - Article VI 4-5), and, subject to any limitations in a WTO Member's schedule of commitments, market access (Article XVI) and national treatment (Article XVII).

MFN and national treatment are directly related to international trade defined as the import or export of services. MFN concerns non-discrimination between foreign services and between foreign service suppliers. If a country allows foreign competition in a sector, equal opportunity in that sector must be given to service providers from all WTO Members. National treatment requires WTO Members, once they have committed to open a market to foreign competition, to

accord to foreign services and foreign service suppliers treatment no less favourable than the treatment they accord to their national services and service suppliers.

On the other hand, the GATS provisions on the necessity test and market access are not restricted to the regulation of international trade. They require, in effect, an economy-wide removal of regulatory barriers to market entry, whether the service suppliers seeking market entry are foreign or national. Such GATS measures preserve or lead to the liberalisation of national economies through pro-competitive deregulation or re-regulation.

The WTO's Council for Trade in Services is to develop disciplines to ensure that regulations on qualification requirements and procedures, technical standards and licensing requirements are not more burdensome than is necessary to ensure the quality of the service. Those disciplines, which have not yet been drawn up, would apply to all WTO Members. In the meantime, the necessity principle is applicable where WTO Members have made specific commitments.

Moreover, to ensure market access for foreign services and service suppliers, the GATS defines six categories of national regulations that must, subject to negotiable country limitations, be forbidden. The regulations include limitations on the number of service suppliers, on the total quantity of service output, or on the total number of employees, monopolies or exclusive service suppliers, economic needs tests, requirements of specific types of legal entity for service suppliers, and limitations on the participation of foreign capital.

WTO Members can define additional "regulatory disciplines" by negotiating instruments such as "reference papers" (Article XVIII) or Annexes to the GATS.

Examples of regulations or practices that may be considered barriers to market entry under the GATS are zoning laws and shop-opening hours in distribution services; cross-subsidisation and monopoly activities in postal services; interconnection fees and the bundling of services by national telecoms operators; limitations on the number of hotels in a tourist resort; the prohibition of cross-border gambling; foreign owner-

ship limitations in insurance; measures to protect cultural diversity in media and entertainment services; limitations on telephone or electronic media marketing; limitations on the purchase or rental of real estate; or fees or taxes on licensing payments.

This is another facet of the encroachment of the GATS on issues that are not essentially trade matters. Transferring regulatory issues to trade negotiations removes them from effective parliamentary control and stakeholder consultation.

The GATS' aim of liberalising national economies rather than trade between them is betrayed by its own wording. "Progressive liberalisation" (not progressive trade liberalisation) is the title of Part IV, which requires "successive rounds of negotiations ... with a view to achieving a progressively higher level of liberalisation".

2 Why Make GATS Commitments?

The aim of the GATS is not only international trade (cross-border exchange of services) but also economic liberalisation (pro-competitive de- or re-regulation of national economies). So, a country that wants more services trade may be reluctant to make GATS commitments for fear of being drawn into economic liberalisation that is more extensive than it would have wished. Even a country that does wish to liberalise its economy may nevertheless be reluctant to make GATS commitments because it wants to retain the capacity to change liberalisation measures should they prove inappropriate.

To such arguments it is sometimes replied that GATS commitments should be made because services are important for the economy of any country and, in particular, for the development of developing countries. No one would dispute the importance of services. But with respect to the GATS, the real questions are not whether services are important but whether their liberalisation is desirable and, if so, whether locking in that liberalisation through GATS commitments is desirable too.

Studies by the University of Michigan and others conclude that multilateral trade liberalisation is the best form of trade liberalisation, and that services liberalisation within a successful WTO round like the DDA would raise world annual

income by hundreds of billions of dollars. But, given the lack of hard data and methodological difficulties, such studies provide only rough "guesstimates". Moreover, their conclusions for any given country vary so much that they are not very useful for national policy making (Chen and Schembri, 2003).

Let's assume that a government has decided to liberalise a sector, say telecommunications, and is deciding whether or not to lock that in with a GATS commitment. Should that country opt for autonomous liberalisation or for GATS-committed liberalisation?

Bernard Hoekman manages international trade research at the World Bank and was formerly on the staff of the GATT Secretariat. Writing in his personal capacity, he observes, "the characteristics of services and the policies restricting trade in services lend themselves less readily [than merchandise trade] to the method of reciprocal exchange of market access 'concessions.' The challenge, therefore, is to develop negotiation modalities that will encourage governments to use the GATS as a mechanism through which to pursue desired domestic reforms" (Hoekman, 2000). (In contemporary economics, domestic reform will always include economic liberalisation.)

Hoekman then details three reasons for countries to undertake WTO services negotiations and commitments. First, mobilising groups (i.e., service exporters) against domestic interests that oppose liberalisation, thereby changing the political economy of reform. Second, providing templates for pro-competitive regulatory regimes. (Presumably, this covers the negotiation of GATS rules and instruments like the telecoms reference paper.) Third, GATS commitments can enhance the international credibility of a government's economic policy stance; i.e., the GATS offers a mechanism for governments to pre-commit to a reform path and to lock in reforms that have already been achieved.

The first reason suggests a preference for confrontation over consensus. Trade unions, for example, are likely to be regarded as vested interests to be circumvented rather than workers' representatives to be consulted and negotiated with. Related to the third reason is the notion that GATS commitments reduce a country's pol-

icy discretion and therefore its stability for investors, especially foreign direct investment (FDI). That is a debatable proposition. A recent UNCTAD study comments: "... further moves towards liberalisation, with respect to industrial tariffs, and within the framework of GATS, may also constrain the ability of policy makers to choose their own paths The expectation is that, by undertaking these obligations, developing countries will receive increased FDI and technology flows, but there is no empirical evidence that this has taken place to date" (UNCTAD, 2005).

There are other possible reasons for making GATS commitments. It is argued that the GATS' multilateral approach is preferable to bilateral trade negotiations because it gives smaller and weaker countries a better chance. But the GATS has not hindered the proliferation of bilateral trade agreements, and the GATS may have made these more stringent, as the aim of powerful countries/blocs in bilateral negotiations is to achieve GATS-plus concessions.

Countries that have to rely on support from the IFIs (IMF and World Bank) often don't have much scope to choose between autonomous or GATS-committed liberalisation. There seems to be a division of labour between the IFIs and WTO negotiations. IFI conditionality leads to imposed liberalisation and privatisation, which developing countries are then under pressure to lock in through GATS commitments.

Some developing countries try, with more or less success, to use their WTO commitments to limit IFI pressures. But that can be difficult: "Nothing is more distressing for leaders of a country beset by basic economic difficulties, than to prepare reforms consistent with WTO directives and then have problems to convince the IMF and World Bank to accept them," stated the President of Senegal in a communication to the WTO's fifth Ministerial Conference, 2003 (WT/MIN(03)/15).

To conclude, one would recommend a cautious approach to making GATS commitments. A decision regarding domestic liberalisation should be preceded by stakeholder consultations on the basis of unbiased and comprehensible impact assessments that compare a range of policy options. Liberalisation should not be locked in through GATS commitments before a suitable

trial period has elapsed, with an assessment of the experience gained. Liberalisation that remains controversial within the country should not be GATS-committed. A country, if it does lock in domestic liberalisation through a GATS commitment, should consider maintaining "policy space" through less-than-full binding - for example, if a country allows 75% foreign ownership of companies in a given sector, it could limit that cap to 49% in its GATS commitment.

3 Specific GATS Concerns

- Commodification of services and of labour.

Like goods, services are exchanged between people. But, much more than with goods, the exchange of services also determines the way people treat each other. One of the key functions of government at all levels is the defence of the public interest, which includes the provision or the regulation of services to the benefit (in an economic, social, cultural or environmental sense) of the community as a whole (see ALGA, 2003). In some cases, for example, government intervenes to ensure universal access to a service (health, education, basic communications, etc) while in other cases it intervenes to prevent abuses (banking, gambling, etc).

Many fear that the GATS, by powerfully promoting the liberalisation of services, will hamper government action to protect the public interest. True, the GATS recognises the right of WTO Members "to regulate, and to introduce new regulations, on the supply of services within their territories" and the GATS excludes "services supplied in the exercise of governmental authority".

In reality, however, these safeguards are too weak. "Services supplied in the exercise of governmental authority" is a vague term. And the GATS makes it even vaguer and restricts it by adding that such a service is "any service which is supplied neither on a commercial basis nor in competition with one or more suppliers".

As to the recognition of the right of WTO Members to regulate, it is included in the preamble of the GATS. Also, that right has to be exercised within the limits of the GATS' general obligations and any specific commitments that a WTO Member may have made. And the central purpose of the GATS is to continue to further limit

the right to regulate by "achieving a progressively higher level of liberalisation" (Article XIX).

Consequently, the GATS needs to list a number of services that are excluded from its scope, certainly public services such as education, health and water supply. That would not prevent WTO Members from excluding additional services in their schedules of specific commitments. It would also not prevent countries from autonomously liberalising such services. But explicitly excluding such services from the GATS would reduce the international pressure on countries to liberalise against their will or lock in autonomous liberalisation through GATS commitments.

Also, to make the right of WTO Members to regulate more effective, it is necessary to change the stated objective of the GATS. That objective should not be "achieving a progressively higher level of liberalisation" (Article XIX 1), but instead "the promotion of international trade in services, taking full account of the need to protect the public interest in the economic, social, cultural and economic senses."

A related problem is that of the GATS and privatisation. The GATS does not explicitly require WTO Members to privatise services. But it does encourage them to do so. If a public service is delivered by a state-owned monopoly operator (e.g., a national telecoms company), then the opening of that market to other operators can be considered a privatisation of the service. If, in another possible case, a state-owned services company is opened up to the participation of foreign capital, then that company has been privatised. Both those measures are expected from a WTO Member that makes a market access commitment (Article XVI 2 (a), (f)).

In addition, the WTO's Trade Policy Review (TPR) process is increasingly being used to press WTO Members to privatise enterprises, so that privatisation is fast becoming a *de facto* WTO obligation.

In the current DDA round of WTO negotiations, the European Union's services offer rightly excludes health, education and audio-visual services. The European Commission said: "The offer that is being tabled is tailored to ensure that public services within the EU are fully safeguarded, and that we keep our ability to set the

rules that service providers will have to respect" (EC Trade, 29 April 2003). Also, the EU's offer itself states: "This offer cannot be construed as offering in any way the privatisation of public undertakings nor as preventing the EC from regulating public services in order to meet national policy objectives."

At issue in the GATS is also the commodification of labour, through the agreement's inclusion of service supply through the temporary presence of foreign individuals (Mode 4).

Strenuous efforts are made to argue that the individuals concerned are not workers in the usual sense but service suppliers. But the practice shows that what is being promoted is the cross-border movement of labour for temporary (up to five or six years) assignments in other countries. Among the individuals concerned are not only business visitors, but also intra-company transferees, contractual service suppliers (employed or self-employed) and worker-trainees. (If it were solely a matter of undergoing training, the persons concerned could be covered by Mode 2.)

Experience has shown that temporary migrants are particularly vulnerable to abuses and exploitative conditions. And trade unions have constantly pointed out that the WTO and the GATS do not and cannot provide the social guarantees required for a sound management of labour migration.

Trade union fears have been more than confirmed by some of the demands that have been made in the current WTO services negotiations, especially that "certain conditions, such as wage parity, should be avoided given that they undermine developing countries' comparative advantage in this mode of supply" (Report by the Chairman of the WTO Council for Trade in Services, July 2005). It need hardly be said that trade unions cannot compromise on non-discrimination and equal pay. Moreover, the violation of those principles in relation to migrant workers would unleash cutthroat competition between migrants from different developing countries, a particularly cruel version of the "race to the bottom".

- **Threat to democratic regulation.** Through the GATS and certain other trade agreements,

the WTO is reaching ever deeper into the sphere of national regulation. Yet it remains difficult to reconcile trade negotiations with parliamentary control and stakeholder consultation. Trade bargaining may be suitable for reducing tariffs, quotas and closely related barriers to trade. But when it comes to broad domestic regulation, a more inclusive process is needed if people are to accept international agreements.

National democratic institutions are not inherently incompatible with international standard setting. The International Labour Organisation (ILO) seeks, especially through its tripartite structure, to replicate at the international level the labour relations structures of a democratic state. At the same time, the ILO has designed its standard-setting procedures so as to involve national institutions as much as possible.

By contrast, the WTO exists in a socio-political vacuum and its processes tend to circumvent national parliaments and consultation processes. And that is what makes the WTO so attractive to people and corporations who see parliamentary and consultative democracy as vehicles for "vested interests", obstacles on the path to ever more economic liberalisation. Hence their desire to expand the WTO's rule-making, regulatory functions as much as possible. For them it represents an opportunity to push through liberalisation measures that they would find difficult to attain through normal parliamentary procedures.

Even in the absence of formal consultation procedures at the WTO, business interests are sure to be heard, if only because negotiators need the information that only business can provide. Hoekman writes: "Given the weakness of the available data on barriers, governments must rely on their private sectors to inform them on what they think matters, and on their economists to tell them what types (clusters) or regulatory reforms are in the national interest" (Hoekman, 2000). Basically, the process consists of governments receiving wish lists from business groups, which, with the help of experts, they then translate into proposals for GATS rules, GATS market access requests and offers, or GATS-based complaints to the WTO dispute settlement machinery.

A substantial amount of resistance to the GATS process has come from sub-national levels of

government. The GATS does not require or facilitate their involvement in GATS decision-making, but it does require each WTO Member to "take such reasonable measures as may be available to it" to ensure the observance of its GATS obligations and commitments by regional and local governments and authorities. Many regional governments and local authorities fear that the trade negotiation process is inherently biased towards governmental centralisation, and that they will lose powers or capacity to deliver services and determine regulations. They have called for meaningful consultations and prior impact assessments. In order to protect their autonomy, some have also declared themselves GATS-free zones.

Each WTO Member must also "take such reasonable measures as may be available to it" to ensure the observance of its GATS obligations and commitments by "non-governmental bodies within its territory". It is difficult to say what the scope of this provision could be and, in particular, whether it could have implications for regulations contained in collective labour agreements.

The general functioning of the GATS can put considerable pressure on labour and the capacity of trade unions to negotiate decent collective agreements. Mode 3 favours the transfer of production abroad, mode 1 cross-border outsourcing (business process outsourcing, call centres, etc), and mode 4 the use of temporary foreign labour. Unions have reacted to such practices through a variety of measures ranging from resistance to adjustment, including the conclusion of collective agreements to guarantee re-employment at home and labour standards in outsourced operations abroad.

To defuse growing anti-WTO, anti-GATS sentiment, some governments have, in the context of the current WTO negotiations, sounded out the views of civil society and trade unions. For example, the UK, followed by the European Union, Australia and New Zealand, held nation/EU-wide consultations on the basis of a government/Commission document summarising the requests they had received from other governments. There was a positive response by civil society to these initiatives.

However, there was next to no consultation on the offers submitted by WTO Members. After

applying a lot of pressure, a few parliamentarians and two trade union representatives in one European country were allowed a glimpse at the EU's draft offer – they got two hours to look through the 400-page text and take some notes. Not what one would call a full and frank exchange! But much more than what people got in most other countries.

Given the very large scope for GATS de- and re-regulation, a strong parliamentary role is essential. Within countries, parliaments should have a powerful committee on trade, with a sub-committee on trade in services. Trade in services concerns a range of sectoral or issue-based parliamentary committees. But it is useful to have also one committee or sub-committee that has an overall view of developments, and whose members can be held politically responsible for any parliamentary failings in this area.

The notion of a WTO parliamentary assembly should not be rejected out of hand. Even if its powers were limited, it could foster contacts and a better flow of independent information and thereby strengthen the capacity of national parliamentarians.

Moreover, as is stated in the Trade Union Statement to the WTO's Hong Kong Ministerial Conference, the WTO must be made more transparent and accessible for trade unions and other representative and democratic organisations. The Statement says a formal consultative process should be established at the WTO to ensure that trade unions, non-governmental organisations and other representative elements of civil society can present their views to WTO Committees, Working Groups, Negotiating Groups, the General Council and Ministerial Conferences.

- Obscurity of the GATS. The GATS is not only complex; it is also obscurely formulated and there is much uncertainty as to how it will be interpreted in specific cases.

The irony is that one of the supposed advantages of the GATS is that it creates greater "predictability", thus encouraging trade and investment. Instead, the uncertain implications of the GATS are likely to increase the reluctance of many WTO Members to bind themselves to GATS commitments.

The uncertainty does not spare central elements of the agreement. For example, which "services supplied in the exercise of government authority" are outside the scope of the agreement (Article I.3 (a)-(b)), and which financial services supplied in the exercise of government authority are excluded (see same Article in connection with the mind-boggling Annex on Financial Services).

Another example: how are the central concepts of "unnecessary barriers to trade" and "not more burdensome [requirements] than necessary" to be interpreted and applied across all services sectors? These and other questions place a heavy responsibility and too much power in the hands of rule-making trade negotiators and WTO dispute panels.

The outcomes of the two GATS cases that have been handled by the WTO dispute settlement machinery have heightened the sense of uncertainty. In both the US-Mexico and the Antigua-US cases, a country with a strong and sophisticated trade bureaucracy was found to have seriously misunderstood the implications of its GATS commitments: Mexico in the first case, and the US in the second case.

There may be other international agreements that are as vague as the GATS. But mistakes are usually not as costly for the countries concerned, because non-WTO multilateral agreements are not enforced through the sort of sanctions-based dispute settlement machinery that the WTO possesses. To reduce the risk of error, it should perhaps be made possible for WTO Members to ask WTO panels for advisory opinions.

- Ambiguity of the GATS as regards the voluntary or the mandatory nature of specific commitments. That there is no obligation on WTO Members to make commitments under the GATS is something that has been stressed by the WTO Secretariat, especially in response to NGO criticism. A WTO brochure states: "There is complete freedom to choose which services to commit. In addition to the services committed, the schedules [of specific commitments] limit the degree to which foreign services providers can operate in the market."

Many NGOs have always doubted such reassurances. They have pointed out that a country's

decision not to commit a service sector and any limitations in sectors it does commit will be challenged by other WTO Members in the successive rounds of negotiations required by the GATS.

And, sure enough, it is the latter point that is being emphasised in the current WTO services negotiations. The July 2005 report by the Chairman of the Council for Trade in Services states: "...it is to be recalled that Article XIX 1 mandates that 'Members shall enter into successive rounds of negotiations [...] with a view to achieving progressively higher levels of liberalization'" (WTO, 2005). Theoretically, that process continues until each WTO Member has liberalised all service sectors across all four modes of service supply.

This ambiguity is another example of the GATS' lack of clarity in key areas. It could even be argued that a WTO Member is not obliged to take part in a round of GATS negotiations, let alone offer to make further commitments. The Ministerial Declaration of the WTO's Doha Conference reaffirmed the previously negotiated Guidelines and Procedures for the Services Negotiations. Those state that the negotiations shall be open to all WTO Members, which is not the same thing as saying that all Members must participate.

Although some WTO Members might have been disappointed by the commitments on offer by autumn 2005, others could complain that other key provisions of the negotiating guidelines had not been fulfilled; for example, the completion of the negotiation on safeguards and a continuing assessment of trade in services.

- Lack of policy coherence within the international system. The agreement establishing the World Trade Organisation refers to the objectives of raising standards of living, ensuring full employment, and sustainable development.

However, the WTO does not interact with other international organisations in a way that would encourage and help countries to integrate trade negotiations and trade measures into those objectives. Not only is there insufficient coherence between international organisations and agreements, but also the co-ordination that does exist is unbalanced. For the WTO works with the IFIs to promote trade and economic liberalisation,

but much less so with the UN agencies that are responsible for social and environmental protection and development.

GATS Article XI states that nothing in the agreement "shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund". To restore some social balance, a parallel Article could extend that principle to the rights and obligations of WTO Members under the Charter of the United Nations and the constitutions of its specialised agencies.

The Trade Union Statement to the WTO's Hong Kong Ministerial Conference regrets that some governments continue to seek a short-term competitive advantage in international trade through the violation of fundamental workers' rights – undermining their own long-term development prospects and forcing other countries to follow suit. The GATS must allow WTO Members to take measures to protect their workers against competition from services produced under conditions that are incompatible with core labour standards, as determined by the ILO. In order to guarantee this right to WTO Members, GATS Article XIV (General Exceptions) should be amended.

- Various other concerns about the GATS could be raised. For instance, a little-noticed provision (Article XXIII 3) allows a WTO Member to have recourse to the WTO's binding dispute settlement machinery even in cases where it considers that a benefit it could have expected from another Member's commitments is being nullified or impaired by a measure that does not conflict with the GATS. Such an open-ended provision could be abused, especially to the detriment of WTO Members that cannot easily afford to protect themselves under the costly WTO dispute settlement machinery.

4 Current GATS Negotiations – What Are the Rules?

Business groups and the governments close to them like to paint a dismal picture of the state of the current WTO negotiations on trade in services.

Broadly speaking, their view is that the Uruguay Round established the GATS as an enabling

framework for future services trade liberalisation. But few specific commitments were made at that time. And in the present DDA round, according to this view, the offers made so far are disappointing as regards both quantity and quality. Consequently, there is a GATS crisis, which requires a rewriting of the rules for the negotiations. This crisis, say the EU, the US, Japan and other industrialised countries, is hindering a balanced outcome of the DDA round of trade negotiations: concessions to developing countries on agriculture must be balanced by developing country concessions in manufactures and services trade.

Various high-income WTO Members have put forward proposals to supplement the current request-offer method of services negotiations with benchmarks, to ensure a set of commitments across a broad spectrum of sectors and in all four modes of supply - the EU, Australia, Japan, South Korea, New Zealand, Taiwan, and Switzerland (ICTSD, September 2005).

Developing countries, including Argentina, Brazil, Egypt, Malaysia, and the Philippines, oppose the benchmarking concept. They contend that the premise underlying the proposals - the notion that there should be a collective level of ambition for liberalisation applicable to all Members - runs counter to the GATS, which provides WTO Members with the flexibility to open fewer sectors and modes of service supply.

Overlooked in this debate is that the dismal view of WTO services negotiations, a view that underpins the new negotiating proposals, is unwarranted. Among the points forgotten:

- The GATS is not simply an enabling framework; it also contains rules, including MFN (though exemptions are allowed). The Uruguay Round also produced a number of Annexes to the GATS, including a substantive one on telecommunications.
- Since the Uruguay Round, the WTO has adopted voluntary accountancy rules, and held negotiations on telecommunication and financial services, resulting in many more specific commitments and, in telecommunications, a flawed "reference paper" on regulatory disciplines. The outcome of those negotiations shows that GATS negotiations can, or even

are more likely to, succeed without being folded into a global round of WTO negotiations.

Consequently, when seen in this longer-term perspective, GATS negotiations and commitments have advanced at a steady pace, given the novelty of the area and its technical complexity. WTO Members will understandably continue to be cautious, since GATS commitments are difficult to reverse, prior impact assessment is uncertain, governments need to maintain policy space, and no progress has been made in the negotiation of safeguards.

The existence of a safeguard mechanism, making it possible for a WTO Member to protect itself against an unexpected surge in foreign services in a GATS-committed sector, would seem to be a pre-requisite for any dilution of the more flexible request-offer negotiating method. If there is less flexibility in the negotiations, then there needs to be more flexibility in the commitments themselves.

5 The Way Forward

It would be desirable to reduce the GATS to a treaty that is restricted to the promotion and protection of international trade in services. MFN would be respected by all WTO Members, subject to certain exceptions including measures to protect core labour standards. WTO Members would be able to make specific access commitments under modes 1 and 2, comprising appropriate national treatment of foreign services. Modes 3 and 4 would be removed from the GATS, which would also no longer be an instrument for the general liberalisation of national economies through pro-competitive deregulation and re-regulation (deletion of Articles VI 4-5 and Article XVI 2).

In the present circumstances, there is admittedly little chance of realising such reform. But in the absence of profound reform, popular opposition to the GATS is likely to go on growing. And it should be possible for WTO Members to open a debate on the functioning of the GATS. Meanwhile, it is important to:

- Avoid, in future, the inclusion of GATS negotiations in global rounds of WTO talks like the DDA round. Such rounds may facilitate nego-

tiation by permitting trade-offs across the areas covered: services, agriculture, manufactured goods, etc. But such cross-sector bargaining, even within services, comes at the cost of transparency and democratic control, which are particularly important in services, given the regulatory implications. Also, reciprocal, cross-sector bargaining is difficult under the GATS because of the technical complexity of services negotiations - as each service sector has its own regulatory particularities, it is difficult to value concessions. The advances made after the Uruguay Round suggest that separate sectoral and issue-based negotiations are more likely to succeed.

- Ensure more transparency and more meaningful stakeholder consultations at all levels, including at the WTO.
- Ensure the involvement of other international organisations concerned by the issues or sectors under negotiation. In accordance with GATS Article XXVI, the WTO must arrange for consultation and co-operation with the United Nations and its specialised agencies and with other intergovernmental organisations concerned with services. It is for example unacceptable that, as is presently the case, postal services are negotiated within the WTO in the absence of the Universal Postal Union.

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Annex: TRADE UNION STATEMENT ON THE AGENDA FOR THE 6TH MINISTERIAL CONFERENCE OF THE WORLD TRADE ORGANISATION (WTO), Hong Kong, 13-18 December 2005

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V. Services

1. The current negotiations under the General Agreement on Trade in Services (GATS) risk undermining the universal service obligations of governments and their capacity to regulate. Such obligations must not be jeopardised by private sector competition under WTO disciplines and governments must preserve full responsibility and accountability in the area of such services. Therefore, the terms of the GATS agreement should be amended to exclude public services (above all, education, health and essential public utilities such as postal services and telecommunications) including at sub-national levels of government, and socially beneficial service sector activities, from all further GATS negotiations. Across all GATS negotiations, provision should be made on a horizontal basis for access to universal services at uniform and affordable prices. Such universal public provision is also vital in order to move towards achieving the Millennium Development Goals (MDGs). It is especially important because any reduction in public services tends to have its most negative effects on women through reduced access to services such as health care, child support, maternity assistance and so forth. The above conditions and provisions are a prerequisite for continuation of the GATS negotiations.

2. The conditions of secrecy under which the GATS negotiations have been taking place must be brought to an end, with publication of the details of the "requests" and "offers" under negotiation. All WTO members must be entitled to take part in consultations and negotiations, regardless of whether they have submitted a GATS offer or of the content of that offer.

3. In conformity with Article XIX of the GATS, a full development, employment and gender assessment of trade in services is needed both in overall terms and on a sectoral basis. This should be conducted immediately and concluded before the completion of the current negotiating round as a basis for any commitments that are made by governments.

4. The current efforts by some WTO members to establish "benchmarks", stipulating minimum levels of GATS liberalisation, undermines the principle of a "positive list" approach to GATS (by which countries are free to indicate which sectors they want to include for GATS commitments) and should be ruled illegitimate in further GATS negotiations.

5. Article XXI of the GATS agreement should be amended to include an explicit clause to enable governments to withdraw or diminish their GATS commitments so that they can improve their universal services, on grounds of social or developmental need, without any risk of challenge under WTO rules that could require them to pay compensation (so preventing foreign service suppliers from using the WTO as a tool to maintain market access).

6. Article I.3 (b) and (c) of GATS should be supplemented by a formal statement to make it absolutely clear that 'the exercise of governmental authority' allows WTO members to maintain public services (defined by national governments as appropriate to their conditions) without any threat of legal challenge that could require them to open up these sectors to competition or to reduce public support (including through cross-subsidisation) to such sectors.

7. GATS Article VI.4 should be deleted or revised in order to protect effectively the ability of governments to regulate and to enact domestic regulatory measures (in accordance with the preamble of the GATS) without possibility of legal challenge. A clarifying statement should be adopted that social and environmental concerns have primacy over the principle of free trade and that such regulations cannot be subject to any 'necessity test' under WTO disciplines based on a principle of 'no more burdensome than necessary'.

8. With regard to "Mode IV" (i.e. temporary cross-border movement of natural persons), the trade union movement opposes any increase in clandestine migration to the detriment of workers and communities both in the countries of origin and of destination. We underline the far greater desirability of orderly arrangements for permanent migration where necessary, including full measures to guarantee migrant workers equal rights, encourage their full integration (including through acquired rights to permanent residence and citizenship), prevent exploitation by employers and protect them against all forms of discrimination. Temporary migration such as that contemplated under "Mode IV", by contrast, does not enable such rights to be defended effectively and leaves the men and women migrant workers concerned extremely vulnerable to exploitation. The competences and structure of the WTO do not enable it to regulate migratory movements, including those on a temporary basis such as under Mode IV, in a manner that protects migrant workers' rights. If any governments do nonetheless make Mode IV offers that would include the temporary movement of workers, these must be agreed with the trade unions concerned on a prior basis and ensure: observance of core labour standards, national labour law (incorporating and going beyond those standards) in the country where the service is delivered, and existing collective agreements in the host country by all parties, with regard to all workers concerned; full involvement of the ILO; protection of the workers concerned against all forms of discrimination and exploitation; and guarantees of the remittance of their contributions to social security and insurance schemes. In the absence of such conditions, GATS negotiations and commitments under Mode IV should not go forward.

9. The cultural diversity of WTO member countries must not be undermined by GATS negotiations, rules or commitments that jeopardise protections of their cultural identity.

10. Regulations to ensure the continued existence of quality retail trade services and of smaller companies that would be unable to compete with large enterprises in a deregulated environment must not be dismantled through the GATS negotiations.

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