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Paper:

**“The General Agreement on Trade in Services:
Development Tool or Development Wound?”**

Sumithra Gayathri Dhanarajan
Policy Adviser - Private Sector
Policy Department
Oxfam Great Britain

**School of Geography and the Environment
University of Oxford
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Sumithra Gayathri Dhanarajan is a Barrister-at-Law specialised in the protection of Human Rights. She served as a Human Rights Officer at the Malaysian Bar Council (1994) and as a Senior Legal Officer in the Secretariat for Legislative Councillors of the the Democratic Party of Hong Kong (1995-1997). She has a MA in Understanding & Securing Human Rights from the Institute of Commonwealth Studies, University of London, UK (1998). She has been a Business Standards Adviser at the Campaigns Department of Oxfam Great Britain between 1998 and 2000 and a Policy Adviser on Private Sector issues at Oxfam's Policy Department since February 2000. In this latter position she has been working on Oxfam's policy on water services in relation to the General Agreement on Trade in Services (GATS).

For enquiries on this paper, contact Sumithra Gayathri Dhanarajan:

sgdhanarajan@hotmail.com

What were the services that were opened up? Financial services.

Which country is the major exporter of financial services? United States.

What services were not opened up? Construction services, maritime services, services of unskilled labor that are of concern to the developing world. Those remain closed. –

Joseph Stiglitz

Nobel Laureate and former World Bank Chief Economist, October 2001

Introduction

Services are the fastest growing component of trade and foreign direct investment (FDI). In 2000, this sector accounted for nearly 20 per cent of world trade and three-fifths of FDI flows.¹ Growth however, has been disproportionate. The US, Canada, the EU and Japan account for over three-quarters of the world trade in services, the EU being the biggest exporter. By contrast, only some developing countries have seen growth in their service exports² and this has been in specific sectors like travel and transportation services where they still face stiff competition from industrialised

countries. Most have remained net importers. As for FDI, flows have by and large been between industrialised countries. In 1998, 79% of US outbound direct investment stock was located in high income economies, and in 1999, 85% of the UK's stock of service sector FDI abroad was in other OECD countries³. Internationally traded services include financial services, transport, distribution, repair, public utilities, educational, health and recreational services. It is estimated that international trade in commercial services was worth US\$ 1.35 trillion in 1999. The global telecommunications market in 2000 exceeded US\$ 725 billion⁴.

Services are also big business. Global expenditure on education services are upwards of US\$2 trillion; on healthcare, over \$3.5 trillion and on water, over \$1 trillion⁵. Eighteen of the top one hundred economies in the world are service sector companies. A few large, mainly transnational companies dominate the market for services. For example, in the tourism sector, 80 per cent of the global market is held by just four companies - Thomson, Airtours, First Choice and Thomas Cook; in water services, 70 per cent is dominated by two French companies - Suez Lyonnaise des Eaux and Vivendi. This domination by a few has partly been exacerbated by a rapid spate of mergers and acquisitions and the formation of strategic alliances in the service industry. The bulk of M&A activity in 2001 has been in the financial services sector. The Financial Times predicts that the next round of M&As will be concentrated in industries that have yet to consolidate, like the energy sector⁶. Also noteworthy is a trend amongst utility providers to transform into international multi-utility providers supplying electricity, gas and water⁷.

Many services meet our basic human needs and determine our ability to achieve sustainable livelihoods. As such, it is important that they are accessible by all. At

present, poor people in many countries do not have such access. In some developing countries, limited access to capital has meant a limited capacity to provide adequate basic infrastructural services. Under pressure from multilateral development banks and the international financial institutions, many developing countries have resorted to depending upon the private sector, especially multinational corporations to undertake this provision⁸. The problem however is that the primary objective of the service industry is to maximise profits and thus their strategies and operations are designed to meet this end rather than to guarantee equitable access. For example, multinational water companies that enter privatised water sectors often state their preference for supplying urban areas where populations can afford higher water tariffs. Infrastructural services particularly require huge investments and initially bring relatively low rates of return, so the profit focus becomes all the more defined. It is fair to say that in some circumstances, privatisation has led to greater efficiency in the provision of basic services and this explains the faith place in its as a solution. Its long-term efficiency however in meeting basic needs in an equitable manner requires a strong regulatory framework and governance infrastructure. A combination of weak regulation and a monopolistic market (which many utilities services are) can have a very negative impact upon poor people's access to services.

Given the size and continued growth of the service industry at a global level, its inclusion in the WTO framework was an inevitability. The General Agreement for Trade in Services, or GATS, was negotiated as part of the Uruguay Round talks and signed in 1994. The purpose of this Agreement is to liberalise the global trade in services. The nature of this sector though means that issues of investment rather than actual cross-border trade are of more relevance to the industry seeking expansion. As

such, much of the Agreement defines rules that promote investment by the service sector and indeed, a former Director-General of WTO refers to GATS as the first global multilateral agreement on investment. The Agreement heralds a real victory for large service sector firms who lobbied vigorously for it throughout the Uruguay Round. Many developing countries on the other hand, entered, negotiated and signed the GATS agreement with much skepticism.

There are real concerns as to the impact of liberalisation of the trade in services, especially with regards to public services. Whilst it is important not to conflate privatisation with liberalisation, it is necessary to realise the relationship between the two. Many believe that liberalisation of the trade in services as defined under GATS rules will 'lock' developing countries into existing privatisation schemes. It also lends itself to forcing open those public services on the basis that there has already been an injection of private investment and thus, under GATS, the market should be open to competition from foreign providers. Further concerns arise from the severe restrictions GATS places upon governments' abilities to regulate the industry to meet public or national interests once the sector has been liberalised. Under GATS, all measures taken by governments which affect liberalised service sectors are expected to meet the 'least trade restrictive' benchmark.

For developing countries, the benefits of liberalising trade in services are uncertain. As net importers of services however, unless the GATS promotes the development of their service industries so that they may compete on the global market or at least service the domestic market rather than losing it to large TNCs, there is little to gain and much to be lost.

Since the initial GATS negotiations during the Uruguay Round were concerned mainly with establishing the framework agreement rather than upon binding market access commitments, Members agreed to negotiate progressive liberalisation during subsequent rounds of talks. The first of these rounds, GATS 2000, is currently under way.

This briefing paper highlights how the spirit of the GATS, unlike the letter, does not provide an adequate development tool for developing countries. It shows that, like many of the other agreements negotiated during the Uruguay Round, commitments to advance development and ensure equitable participation by developing countries in the global economy have remained rhetorical. Finally, it argues that current 'progressive liberalisation' negotiations under GATS 2000 must be scrutinised carefully to ensure that they prioritise those elements of the Agreement that will bring benefits to poor people rather than hinder their development further.

Negotiating the GATS

Trade in services first became an issue under GATT in 1982 when the US Government requested that it be placed on the GATT work programme. In 1984, GATT Contracting Parties agreed to initiate a process of exchange of information on services. By the launch of the Uruguay Round however, the Ministerial Declaration limited negotiations on services stating that they would not be placed within the legal framework of GATT but instead, discussions would be in the context of applying GATT procedures and practices to them. In 1990 though, the US submitted a draft agreement on trade in services which referred to the GATT as the regime under which GATS would function.

Subsequently, the merging of the General Negotiations on Goods and the General Negotiations on Services took place. This culminated in the two issues being linked under the Final Act. With the establishment of the WTO, the same principles and dispute settlement mechanisms are now applicable to trade in both goods and services.

It is well-acknowledged that the driving force behind the development of GATS was the service industry. Oft-quoted, David Hartridge, Director of the WTO Services Division has said that *“without the enormous pressure generated by the American Financial Services Sector, particularly companies like American Express and Citicorp, there would have been no services agreement..”*⁹ These two US companies along with big US players from the telecommunications industry and other service sectors came together as the US Coalition of Service Industries in 1982. Their purpose was to ensure that US trade in services was a central goal of trade liberalisation initiatives. The Coalition takes credit for shaping the General Agreement on Trade in Services (GATS) as well as playing a lead advocacy role in the 1997 WTO Basic Telecommunications and Financial Services Agreements¹⁰. Though support for their position was garnered from Quad-based (Canada, Europe and Japan) counterparts, the Coalition was very much the leading corporate lobby during the original GATS negotiations. The key requirements of the service TNCs were: (a) the right of establishment in order to gain presence in the market; (b) national treatment, to maximise their ability to compete; and (c) absence of regulation specific to foreign enterprises. These requirements by and large determined the US position in the negotiations.

When the concept of including trade in services into the GATT was first mooted, developing countries voiced strong opposition.¹¹ They felt that this was unequivocally an industrialised countries agenda, designed solely to advance the cause

of transnational corporations. The service sector in developing countries was then domestic-focused, undynamic and yielded low productivity. Indeed, at the time of negotiation, most developing countries had a trade deficit in services as contrasted with the trade surplus that industrialised countries had.¹² Developing countries argued that conceptually, the constitution of GATT only provided for negotiation on goods, not services. Furthermore, the remit of GATT was to address tariff barriers, not barriers to foreign investment as was the design of GATS. They were also opposed to the idea that the retaliatory measures allowed under GATT could be extended to trade in services.

Developing countries, of whom Brazil and India were the most vocal, maintained a defensive position throughout the GATS negotiations, premising their bargaining on the following: (a) the framework of GATS should be limited to the international trade in services i.e. cross-border trade only; (b) primacy should be given to national policy objectives, regulations and legislation; (c) control on restrictive business practices especially by TNCs should be ensured; and (d) that the *raison d'etre* of the GATS agreement should be the fulfillment of development objectives. This would include promoting technology transfer and the growth of service exports from developing countries, especially those where they had a comparative advantage. On the last point, Brazil went so far as to suggest that the term 'progressive liberalisation' should entail developed countries liberalising their markets first and offering preferential opportunities to developing countries¹³.

In its written form, the GATS agreement does provide for developing country positions. It states as a key objective, the promotion of development and stipulates obligations upon developed countries to meet this. Certain limitations are set to allow for the pursuit of national policy objectives and flexibility for gradual liberalisation is

provided for. In practice however, the positive obligations upon signatory states to ensure the promotion of development through GATS have not been met nor are there any mechanisms to enforce them.

The Agreement

The GATS agreement is described as a multilateral framework agreement. It establishes a set of rules and general principles for the liberalisation of trade in services by which future liberalisation of specific sectors must follow. The overall purpose of the Agreement is to address all measures affecting trade in services. This has been interpreted very broadly so that the measure does not have to be directly related to a service – so long as it affects it, it falls within GATS remit¹⁴.

The Agreement¹⁵ is divided into five parts: Part I defines its scope, Part II sets out the general obligations, Part III refers to the Schedule of Specific Commitments submitted by each member; Part IV obligates members to enter into successive rounds of negotiations with a view to achieving progressively higher liberalisation; and Part V establishes the institutional arrangements e.g. the application of the Dispute Settlement Mechanism to GATS.

With regards to scope, any service in any sector with exception of those services that are supplied wholly in the exercise of governmental authority¹⁶ fall within the agreement. These services may be supplied through four modes:

- **Cross-border supply** i.e. from the territory of one Member State into the territory of another Member State;
- **Consumption abroad** i.e. in the territory of one Member State to the service consumer of any other Member State;
- **Commercial presence** i.e. by a service supplier of one Member State through the commercial presence in the territory of any other member State;
- **Presence of natural persons** i.e. by a service supplier of one Member State through the presence of natural persons of a Member State in the territory of any other Member State.

Two general (or "horizontal") obligations apply automatically to all signatory States. The Most-Favoured-Nation principle requires that if a concession is given by a Member State to one Member, it must, without discrimination, offer the same concession to all Members. Prior to the establishment of the WTO, Members could register GATS exemptions from MFN where certain criteria were met. Now, any such exemption can be registered as a waiver, but it cannot last more than 10 years in total and must be open to being removed during the five-year periodical liberalisation negotiations. The Transparency Requirement obligates Members to proactively make known their trade policies, laws and regulatory frameworks to all Members. One of the responsibilities of the Council for Trade in Services is to oversee Members' adherence to this requirement. The Council can also make recommendations where a Member is in the Council's opinion, not complying with the GATT principles or GATS obligations

The GATS agreement is said to take both a "top-down" and a "bottom-up" approach - the former referring to the principal obligations to liberalise the general service sector; the latter, to Members ability to decide which service sectors it is liberalising and to what extent, and this information is captured in the Schedule of Specific Commitments submitted by each Member. The Schedule is referred to as a 'positive list' approach, whereby each participant lists the conditions of market access

and national treatment for foreign service suppliers in the sectors and modes of supply for which it has undertaken a commitment. Currently, the schedule contains eleven service sectors and 155 detailed sub-sectors. There are however significant limitations upon Members freedom to define the scope of liberalisation. Firstly, Members must not restrict market access through their schedule commitments; secondly, they must apply the principle of National Treatment i.e. treat foreign suppliers equitably as compared to domestic suppliers; thirdly, Members are committed to working towards progressive liberalisation and therefore must open their Schedules to re-negotiation during successive rounds of negotiations; and fourthly, commitments made in the Schedule are difficult to reverse¹⁷. The first round of liberalisation negotiations were scheduled to take place no later than five years from the date of entry into force of the WTO agreement and are currently underway under the banner, GATS 2000.

The GATS does impose a general obligation under Article IV upon signatories to increase the participation of developing countries in world trade by: (a) strengthening the capacity, efficiency and competitiveness of their domestic services through access to technology; (b) improving their access to distribution channels and information networks; and (c) liberalising market access in sectors and modes of supply of export interest to them. This development objective was included at the behest of the developing countries¹⁸. How far it has been prioritised however, is questionable. For example, the mode of supply which brings about the most gains for developing countries - Presence of Natural Persons - has been given the least attention by developed countries with barriers to entry remaining stringent.

A major weakness of GATS negotiations at the time of the Uruguay Round was an uncertainty as to its implications or impact. This is a legacy that extends to current

negotiations. Statistics were vague on trade in services so it was difficult to judge what the impact of GATS would be. The Agreement in itself was complicated. In fact, WTO secretariat has recorded a significant number of mistakes in many countries' schedules of commitments. It would seem that many countries signed up to the eventual agreement in the spirit of the single undertaking requirement of the Uruguay Round, taking into account the trade-offs across the board rather than specific to GATS.

To date the impact of the GATS agreement has not been significant. Given the concentration of efforts on negotiating the framework agreement, liberalisation was contained and developing countries were able to take advantage of the flexibility offered by the Schedule of Commitments. Having said that, neither have developing countries seen their position advanced by GATS. In specific sectoral negotiations on financial services and on telecommunications, no primacy was given the development objectives. Furthermore, additional negotiations on the Movement of Natural Persons were restricted to intra-corporate transferees rather than to lower-skilled and labour intensive services¹⁹.

The GATS 2000 negotiations will prioritise greater market access and will seek to tighten up the agreement so that it achieves its purpose of liberalizing the trade in services to its maximum extent. Quad negotiators and the transnational corporate sector have already shown much determination to achieve this aim. Developing countries have been less enthusiastic and more cautious in their approach towards GATS 2000.

GATS 2000

GATS 2000 negotiations began on 25 February 2000 within the WTO Council for Trade in Services. Built into the GATS, Article XIX obligates signatories to enter into successive rounds of negotiations with a view to achieving a progressively higher level of liberalisation. Progress so far has included a 'road-mapping' exercise completed in May 2000 and a stock-take of initial proposals in March 2001. Although the US is pushing for completion of negotiations by December 2002, this is believed to be unrealistic. Currently, the UK's Department of Trade and Industry estimates that this round will not end until 2004.

This round of GATS negotiations has seen the EU taking a strong lead. Commissioner Lamy has stated that "*the EU has very strong offensive interests in services, and we must push them forward.*"²⁰ It has also witnessed the European service industry lobby coming into its own. Having played something of a supportive role during the original GATS talks through smaller groupings like the European Services Forum, the industry has now organised itself into the European Services Network with a mandate to advise EU negotiators on the key barriers and countries on which they should focus. Led by Andrew Buxton, Chairperson of Barclays Bank PLC, the network is made up of: the European Service Leaders Group comprising forty CEOs from across the European Service sector; the Policy Committee, composed of sectoral services organizations, UNICE and representatives of the CEOs; and a small secretariat²¹. The European Commission has been proactive in encouraging business input into shaping the EU position by seeking input through questionnaires, arranging and attending meetings and raising awareness of different channels of influence open to the private sector. At a conference held by British Invisibles²² in September 1999, Robert Madelin

from DG Trade of the European Commission stated the need to work *"not only with the member state experts but directly with European industry"* and that the Commission would be relying on the European Services Network *"just as heavily on member states direct advice in trying to formulate our objectives"*. Madelin went on to identify how the industry could help the Commission in its negotiations: by being advocates of the benefits of open trade, by identifying their needs so that the Commission could have their 'shopping list' as well as their arguments on specific issues and, by being involved in formulating objectives and in negotiations²³.

The three main areas of negotiations for GATS 2000 are:

- Expanding market access commitments;
- Addressing the scope of domestic regulation; and
- Application of GATS rules especially emergency safeguards, subsidies and government procurement.

In general, Quad countries are pushing for the widest possible market access commitments by encouraging countries to include more sectors in their Schedules and to remove any reservations and limitations that were included during the Uruguay Round. They are also proposing interpretations of GATS that may broaden out the types of services covered and that could bind countries to a minimum level of commitment on liberalisation across all service sectors. On domestic regulation, their aim is to limit its scope and to ensure it is of a pro-competitive nature. The proposal involves circumscribing governments' ability to regulate through imposing a 'test of necessity' that involves an objective consideration of proportionality, legitimacy and availability of other means that are least trade restrictive. With regards to GATS rules, developed countries are unsympathetic to emergency safeguards²⁴ seeing them as a barrier to

liberalisation. Similarly, with subsidies²⁵, the Quad countries want to tighten up the current provisions on the basis that they allow for actions that run counter to national treatment requirements. Such a move will further limit many developing countries' efforts to build up their local service industries. Finally, on government procurement²⁶, there is a general move to break down the exemptions from WTO rules. This will open up government purchasing contracts and government funding for public services to transnational corporations. This paper specifically considers negotiations on market access commitments and domestic regulation.

Civil society groups both in developed and developing countries have expressed most concern about the nature of market access commitments sought in the GATS 2000 round of negotiations. As stated previously, the Uruguay Round of negotiations focus on rule-setting meant that the market access commitments were mainly 'standstill bindings' i.e. most Members simply included already liberalised sectors in their Schedules. This time, liberalisation will be the main aim and the concern is that infrastructural services that provide for basic needs – like health, water, energy and education - will be targeted.

The Committee on Schedule Commitments is tasked with handling negotiations on market access. Its agenda is two-fold: (1) to consider how to expand market access generally in trade in services; and (2) to focus on these specific sectors: environmental services, legal services, energy services, postal services and construction services.

In order to expand market access, the Committee has been asked to consider a number of options. These include:

- narrowing the description of service sectors excluded from the GATS and including new service sectors into the GATS to broaden its scope;
- disaggregating certain services so that it is easier to gain liberalisation for a more precise sector;
- ‘clustering’ certain sectors together where the services are inter-related with the liberalisation commitment covering all services in the cluster; and
- moving away from the traditional ‘request-offer’ approach in negotiations towards a formula approach whereby a minimum level of liberalisation across all sectors is negotiated as a whole. On this last option, one commentator has suggested four examples of what the formula approach could look like: (a) a minimum level of commitment is expected in every sector; (b) each Member must offer to cover a certain specified percentage of their total services by GDP; (c) each Member must reduce its limitations in its Schedules by a fixed percentage; and (d) all Members must eliminate certain defined types of measures that are found to be trade restrictive.²⁷

It is these options that have led to speculation of future GATS coverage of services that meet basic human needs. For example, although the distribution of water for human use is not presently a sub-sector of environmental services, it may well be included as part of the GATS 2000 negotiations since the EU has explicitly included ‘water for human use and wastewater management’ in its classification proposal along with another proposal to ‘cluster’ a range of services with an environmental component.²⁸ This is a very important service sector for the EU given that eight of the ten largest water companies are based in Europe (three are French and five are British). Suez Lyonnaise des Eaux and Vivendi, the two largest, comprise almost 70% of the global water market. If this proposal is accepted, then there will be pressure upon governments to liberalise this service in their Schedules which may compound some of the negative aspects of privatisation of water delivery that have already been seen. (*See Appendix 1: "What if the WTO gets hold of our water?"*).

The US has prioritised liberalisation of the energy sector with a specific focus upon supply and distribution of electricity and natural gas. Again, this was not a sector

included during the Uruguay Round of GATS talks. Privatisation in this sector is gaining rapidly reflecting the size of the global market estimated at US\$1.6 trillion in 2000. Between 1990 – 1999, seventy-six developing countries introduced private participation in energy with total investment amounting to US\$187 billion.²⁹ In this sector, US companies dominate with four out of the top ten sponsors of private energy projects worldwide during the last decade being US-based.³⁰ Liberalisation of this sector would ease entry into markets for the multinationals that formed in 1999 into the Energy Services Coalition. The ESC's purpose is to promote negotiations on energy services within the WTO.

Concerns have also been expressed about further liberalisation of public services like education³¹. To date, three countries have included further liberalisation of educational services in their GATS 2000 proposals: the US (the lead exporter of education services, the trade generates some US\$7 billion per annum for the country), Australia and New Zealand. Although education services is sub-sectored as primary, secondary, higher (tertiary), adult and other education, all the focus has been on the latter three given that these are the segments that have a degree of private participation, offer lucrative markets and possibly pose the least obstacles in terms of market access and domestic regulation. That is not to say that liberalisation commitments haven't been made with regards to primary and secondary education. They have; and whilst they may not be subject to further opening in this round, this may well happen in the future. Even with regards to tertiary education though, the commodification of education should sound alarm bells, particularly for developing countries³². Entry by foreign suppliers through commercial presence (Mode 3 supply) can have a number of destabilising effects. For many developing countries, a key purpose of education is to create a sense

of national unity, the benefit of which to the social, political and economic development of a country should not be underplayed. Private education provided by foreign suppliers does little to meet this purpose. The focus upon generating a profit has meant thus far that curricula are designed in industrialised countries without recourse to local input and choice of courses and delivery tends to reflect global industry demands. Students accessing such services do so primarily to gain a stronger foothold in the employment market, both nationally, and globally and courses written in industrialised countries are design to meet this aim. The significance of the latter is its potential contribution to 'brain-drains' from developing countries to the industrialised world (be it in terms of actual migration as well as shifts from domestic, local grown industry to multinational corporations). Local academic institutions also suffer where local academic talent is drawn towards private foreign institutions that offer better pay and benefits packages. In such institutions, local academics are expected to concentrate efforts upon delivering courses rather than pursuing broader academic interests like research thus stunting a nation's intellectual growth. Liberalisation of the big growth area - online learning - also poses significant challenges to developing countries since it may play more of a role in widening rather than narrowing the divide between the haves and the have-nots. To access online learning means having access at a minimum to a telephone line and a working computer. In forty-nine countries, there is less than one telephone per hundred people. Thirty-five of these countries are in sub-Saharan Africa. The UNDP Human Development Report 2001 estimates that industrialised countries, with only 15% of the world's population, are home to 88% of all Internet users and that in South Asia less than 1% of people are online even though it is home to one-fifth of the world's population. Whilst public provision of online learning services may or can be expected

to take into account such factors given the negative impact of disenfranchisement upon the social and economic development of a nation, it is unlikely that profit-motivated private foreign providers will. Finally, one of the dangers posed by the perception of education services as a tradable commodity rather than a public good is that some governments may see fit to relinquish their responsibilities towards its provision. Such an outcome would undermine the goal of increasing the proportion of GNP spent on education.

Supporters of liberalisation of these service sectors have accused civil society groups of ‘scare-mongering’. GATS, they say, allows governments to choose whether or not to liberalise a sector and that public services - which may include infrastructural services like water and energy supply, or health and education - are especially protected under Article I(3). Article I(3) provides that services supplied in the exercise of governmental authority are excluded from GATS³³. The protection offered by this article is however, ambiguous since the definition of such service is one “*which is supplied neither on a commercial basis nor in competition with one or more service suppliers.*”³⁴ A recent report by the Ministry of Employment and Investment of the British Columbia provincial government observes that the current governmental authority exclusion under Article I(3) is very narrow in that it will only protect those services that are provided by completely non-commercial, absolute public monopolies. To corroborate this interpretation, the report points to the fact that this Article is worded like Article 55 of the EU treaty³⁵ and in the eight challenges before the European Court of Justice brought against governments, all found against the government³⁶. The report goes on to state that most public services are supplied through a mixture of public and private suppliers or include commercial aspects and that these would fall outside the

exclusion. It also refers to a background paper by the WTO Secretariat on health and social services which finds that the hospital sector in most countries is made up of government- and privately-owned entities which both operate on a commercial basis and it would seem “unrealistic in such cases to argue” for the application of Article I(3)³⁷.

Others argue that in many countries privatisation is already occurring in infrastructural services and in many cases, these service sectors have also been liberalised with multinational companies managing and providing the service. Indeed such privatisation often serves as a conditionality for loans from the World Bank and the IMF. The difference with applying GATS disciplines however is that its provisions – like Article XVI on Market Access – severely limit a government’s ability to define the terms and conditions of the privatisation scheme in a manner which concurs with national policy objectives. That is to say, the government would not be able to, for example, stipulate that contracts must be in the form of joint ventures with domestic companies in order to develop a local industry, or to limit the number of suppliers in that sector. Further, as we will see below, there may be limits on the government’s ability to regulate, for example, the protection of the environment or to ensure that certain vulnerable sectors of society have affordable access to the service.

Domestic regulation is provided for in Article VI of GATS. Under this round of negotiations, a Working Party on Domestic Regulation has been tasked to develop a ‘test of necessity’. This is to allow judgments to be made as to whether “*the measures relating to qualification requirements and procedures, technical standards and licensing requirements*” constitute “*unnecessary barriers to trade in services.*”³⁸ The test is to include objective criteria which firstly decides whether a measure taken by the

government is proportional and legitimate, secondly, whether it is least trade-restrictive and thirdly, whether it is pro-competitive. Pro-competitive in this context, refers to measures which limit governmental regulation rather than which tackle restrictive business practices. The imposition of an objective test in this context runs counter to one of the key principles of GATS articulated in the Agreement's preamble. This 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 and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.

A key concern is that limitations placed on domestic regulation will hamper governments' abilities to set its policy objectives on the service industry in a way that maximizes benefits to its citizens. Instead, what is being called for is that the key determinant of any regulation should be whether it restricts foreign suppliers entry into the market or their ability to maximise profit. Such a test will be applied during the course of a dispute settlement proceeding or under threat of one. If such a test were to be included, it is hoped that at least it will be interpreted as to place the burden of proof upon the Panel to prove that the measure taken was disproportionate or illegitimate or least-trade restrictive. Further, governments' abilities to take measures in the public interest or to meet a development objective should be accorded due weight given the objectives of GATS.

As noted previously, the language of GATS does lend itself to development and certainly there are service sectors where developing countries do have strengths like tourism, shipping and industries that are labour-intensive. It has however been difficult

to capitalise upon this since the agenda to date has been set and acted upon largely by industrialised countries and the big transnational service corporations. Some attempt has been made in the tourism sector. A joint submission from the Dominican Republic, Honduras and El Salvador proposes the establishment of a separate annex on the trade in tourism services³⁹. The proposal states that the objective of such an Annex would be to elaborate upon the provisions of GATS to ensure equitable trading conditions for trade in tourism services, consistent with Articles IV and XIX and with the needs of sustainable development, including through co-operation efforts and the prevention of anticompetitive practices in the tourism industries. In relation to the last, the proposal suggests the provision of competitive safeguards which would address competitive exclusion through the discriminatory use of information networks, ancillary services to air transport, predatory pricing or the allocation of scarce resources, abuse of dominance through exclusivity clauses, refusal to deal, tied sales, quantity restrictions and misleading or discriminatory use of information by a juridical person⁴⁰.

It is important that during this current round of negotiations, developing countries are able to stand their ground and pro-actively lobby for market access commitments and interpretations of the GATS that meet their needs. With regards to market access, efforts should be focused upon, for example, gaining higher liberalisation for Mode 4 supply i.e. Movement of Natural Persons, though this should be balanced by ensuring that those workers involved are provided with protection of their labour rights and the necessary social safety nets. Present proposals from industrialised countries have limited Mode 4 negotiations to inter-corporate transferees. If developing countries are to gain, issues such as excessive immigration rules and labour mobility, discriminatory regulations on licensing and technical standards with

regards to cross-border employment and recognition of professional qualifications gained in Southern countries need to be addressed by industrialized countries⁴¹. Developing countries should also push for Article IV development objectives to be met. As the current proposals stand, reference to Article IV by industrialised countries is limited to differential periods of transition (Canada) and support for capacity-building programmes (Australia)⁴², rather than addressing market access issues of interest to developing countries. The South Centre suggests that a monitoring mechanism which ensures implementation of Article IV be negotiated⁴³. Linked to this, it is imperative that mechanisms such as emergency safeguards, subsidies and the ability to regulate are reinforced and strengthened so that developing countries have an equal opportunity to develop a viable service industry both domestically and internationally. Further, such mechanisms need to be in place to ensure that public interest needs are met. For example, with basic infrastructural services, governments should be able to ensure access to all parts of the population, not just those who live in urban areas or who can afford to pay. Finally, the overall emphasis of GATS 2000 talks should be on “progressive liberalisation” rather than “ maximum liberalisation”. The flexibility and gradualism that enabled GATS to be agreed to during the Uruguay Round needs to prevail if GATS is to be a tool for development.

CONCLUSION

Any conclusions on the impact of GATS are necessarily speculative at this stage. Impact will really only be measurable sometime post-GATS 2000 talks during which the bulk of market access negotiations will take place as well as finalisation of the framework agreement in itself. There are however some indicators as to how

liberalisation of trade in services as envisaged under GATS will run its course. These derive from the nature of negotiations to date which have de-prioritised those elements of the Agreement which seek to promote the development aims and needs of developing countries. Also indicative is the agenda and the preliminary proposals being put forward by a number of key players in the GATS 2000 negotiations. Although mandated to achieve 'progressive liberalisation', the aims of this round seem to seek to extend market access commitments to the fullest possible as well as to interpret the framework agreement in a way that prescribes regulatory activity that is least trade restrictive and pro-competitive. Given the infancy of most service industries in developing countries, moves to reinforce national treatment requirements alongside imposing objective 'tests of necessity' with regards to domestic regulation, will most certainly disable governments' abilities to nurture domestic industries in the face of strong competition from transnational corporations.

With regards to access to basic services, it would be careless to accept reassurances being put forward by supporters of GATS that those services provided under exercise of government authority are exempted given the very narrow definition under Article I (3). Most basic services already include commercial elements and therefore do not qualify. A clearer statement of interpretation that reflects the purpose of Article I (3) i.e. to protect the government's prerogative to provide public services as it deems fit - is needed. Liberalising access to these services, if signed-off during GATS 2000, will surface real fears surrounding access particularly for the poor and marginalised, who in many cases, are already being affected by these services being privatised. Applying a GATS framework - with its demands for least trade restrictive measures and controls on domestic regulation - will impede a government's ability to

determine the terms and conditions of privatisation schemes as well as to control the activities of those companies involved in them. Further, governments' will be 'locked-in' to such schemes and further privatisation.

Whilst some developing countries can and will benefit from liberalisation in certain sectors, their ability to sustain these benefits in the face of tough competition from TNCs should be considered. GATS 2000 negotiations must be approached with far more care and consideration than was exercised during the Uruguay Round. Although it is inevitable that some decisions to liberalise will be based upon broader 'horse-trading' where access to services may be traded-off for access to markets for goods, the implications of liberalisation upon development must factor into decisions. A concerted push to place the developmental objectives of GATS back at the centre of this agreement is critical.

APPENDIX**What if the WTO gets hold of our water?**

Earlier this year, a US-based NGO called the Alliance for Democracy issued a campaign brief entitled *"Don't Let the WTO Get Hold of Our Water!"*. It claims that European negotiators want to include the supply of drinking water within the GATS remit and that the US negotiators are considering a similar position. Other pressure groups issued similar warnings. In an aggressive response, the WTO Secretariat issued a document entitled "GATS - Fact and Fiction". It states that services supplied in the exercise of governmental authority are exempted by virtue of GATS Article I(3). It does not however consider the situation, as discussed in this paper, where services are not exclusively supplied by the government thus subject to competition, and therefore not exempt from the GATS. At the same time, the Secretariat does not categorically deny that water for human use is exempted from GATS. Fears voiced by have been reinforced by a now official EU position that explicitly calls for 'Water for Human Use' to be classified under Environmental Services, one of the sectors subject to liberalisation under GATS.

The impact of liberalising the water supply sector has serious implications in a time where the scarcity of potable water is a grave problem. Today, 1.3 billion people do not have access to safe drinking water. By 2035, this figure could rise to 3 billion people. With increased populations, the demand rises. At the same time, industrial activities are threatening supplies. Most of those denied access live in Sub-Saharan Africa, South Asia and East Asia⁴⁴ and many are from rural communities. Some believe that liberalisation will solve problems by providing the much-needed investment in this service especially in developing countries. Indeed the UN has estimated that to provide

water and sanitation to everyone would require an additional \$9 billion a year and that there is an estimated shortfall of at least \$75 billion in necessary investment for the most basic water and irrigation provision for the next twenty years. The other view is that liberalisation may worsen this impending crisis especially for the poor and the marginalised of our societies.

The fears surrounding liberalisation of water supply have been fueled by a recent increase in privatisation activity in this sector. In its report to the World Water Forum in the Hague in March 2000, the World Commission for Water recommended "*a greatly increased role for the private sector in providing water services for people, irrigation and electric power*" seeing it as a key mechanism for bringing about reform in this sector⁴⁵. It called for full-cost pricing of water use and services in order to encourage private sector participation and limiting to the use of subsidies to welfare provisions targeted only at ensuring poor and marginalised groups can afford to pay for their water. This call has resonated within the loan policies of international financial institutions like the World Bank and the IMF. In a random review during 2000, it was discovered that IMF loan agreements with twelve borrowing countries - including Benin, Guinea-Bissau, Honduras and Tanzania - stipulated conditions imposing water privatisation of cost recovery requirements⁴⁶. Currently the World Bank has outstanding commitments of about \$20 billion in water projects. Of this, about \$4.8 billion are for urban water and sanitation and \$1.7 billion for rural water and sanitation.⁴⁷ These commitments manifest a general call from the World Bank to re-define water as an 'economic' rather than a 'common' good.

This push from the international financial institutions has mainly benefited large multinational water companies. To increase profits, many are seeking markets outside

their countries of domicile and although current private sector investment in water is much smaller than in other infrastructure projects (telecommunications, energy, transport), it is definitely growing.⁴⁸ Indicative of its expansion, the British company, Thames Water, currently has a US\$3.5 billion overseas project portfolio including projects in Puerto Rico, Brazil, Turkey, South Africa, China, Thailand and Indonesia. It currently leads a project to supply water to the Koceali province of Turkey which, at £560 million, is one of largest privately-financed water project in the world and the largest UK-led investment in Turkey for over quarter of a century⁴⁹. As water supplies become more precious, so to do they guarantee big profits to he who owns. Recognising this, Monsanto, for example, plans to earn revenues of US\$420 million and a net income of \$63 million by 2008 from its water business in India and Mexico.⁵⁰

The situation in many developing countries can lend itself to an assumption that privatisation of water supply is a panacea. Production and delivery of water by municipal or state companies has been found to be inefficient. Many poor people become dependent upon private vendors who may operate on the black-market. The price of such privately sold water can be between US\$2 - \$3 per cubic metre, some 12 times higher than the price of subsidised piped city water⁵¹. In Luanda for example, recipients of piped water pay less than 1 cent per cubic metre, whilst those without connected water supply may pay as much as US\$16 per cubic metre for untreated water delivered by tanker.⁵² Systems of delivery can be poor and often loss is sustained through leaks. As governments are unable to make the profits necessary, it becomes very costly to supply water. Private sector involvement in water supply and management can be at different levels⁵³:

Firstly, through management agreements where the operation and maintenance of the service is contracted out to the company for a fixed term but the public sector finances both fixed assets and working capital. Secondly, through lease agreements where the company leases, operates and maintains a State-owned asset for a fixed term. The public sector retains the responsibility of financing the investments in fixed assets. Thirdly, and most commonly, the government grants a concession to the company to develop or rehabilitate and operate a State-owned asset or service for a fixed period. The concession could include build-operate-transfer (BOT) or rehabilitate-operate-transfer schemes. Finally, complete privatisation where the State-owned assets are sold to a company or a consortium.

The flip-side is reflected in a number of instances where privatisation has had a significant negative impact upon access. The privatised sector of the water industry is currently dominated by a small group of multinationals, the biggest members being the French Vivendi and Suez-Lyonnaise des Eaux. UK companies that are tackling the international market are Anglian Water, Thames Water and United Utilities, plus a number of smaller players including Biwater, Hyder and Severn-Trent⁵⁴. Given the dominance of this market-place by a few large multinationals, there is a legitimate concern that instead of improving access to potable water to the deprived millions, private companies could take advantage of their monopoly power and either price water tariffs beyond the reach of poor people or 'cherry pick' their customers according to cost effectiveness criteria including their ability to pay. Evidence of this is mounting. In the Czech Republic, water rates increased by more than 100 per cent in the first three years of a concession to a subsidiary of UK-based Anglian Water. In Cochabamba, Bolivia, residents demonstrated vociferously against a concession granted to a consortium

comprising International Water and Bechtel Enterprise. In 1999 when their water bill rose on average by 35 per cent. The scheme came about after pressure from the World Bank who refused to guarantee a US\$25 million loan unless the local government sold its public water utility to the private sector. The government was eventually forced to pull the concession in 2000. The company is now suing for compensation of US\$ 12 million.⁵⁵ In terms of selective supply, when the Mexican Government considered inviting private sector investment into this sector, the multinational companies that responded stated that they would only be interested in supplying cities with populations exceeding fifty-thousand.⁵⁶

Box 1: Case-study - Ghana

The government of Ghana is currently undertaking a privatisation scheme which will involve leasing the operation, maintenance and management of the urban water supply system to two multinational corporations. This process has been pushed through by the World Bank as part of a loan conditionality. Privatisation of the water sector will trigger a loan of up to US\$ 640 million. The World Bank has encouraged a scheme that will involve full cost recovery from consumers stating that debt-ridden governments can ill afford subsidies and that they are cost inefficient. In a country like Ghana though, higher water tariffs could force people to make trade-offs on food, schooling and healthcare. The proposed raised tariffs of ninety-five per cent in order to cover operating costs could amount to eight to twelve percent of monthly incomes of poor communities. So far, five multinational companies have put in bids for this scheme - Saur, International Water and United Utilities, Biwater, Halliburton Co. and Suez Lyonnaise Des Eaux. A previous winning bid from Enron / Azurix was cancelled because of allegations of corruption.

The scheme does not extend to rural communities. Rural supply will be managed by the Community Water Supply Agency that will build the capacity of district assemblies to manage water procurement and the delivery systems. Consumers will be expected to make between a five and ten per cent contribution towards capital costs and to pay for the operation, maintenance and repair costs for the facilities. This contribution is considered to be beyond the paying ability of most rural dwellers.

Women and children bear the brunt of these schemes. Where tariffs push prices beyond affordability, so to do they have to go further to collect water, often resorting to untreated sources. This in turn impacts upon their health as they become exposed to water-borne diseases.

For all their short-comings, at least in theory, under current privatisation arrangements, governments do retain a certain amount of flexibility to ensure that they are a beneficial replacement to state-run services. The government can, for example, include coverage targets in contracts, it can make consumer interests central to the contract design and continue to provide subsidies to enable poor people's access to water supply. It can also regulate the setting of water tariffs and the performance of the utility company in meeting environmental targets. If this service sector is brought under GATS however, governments' abilities to define the terms and conditions of privatisation schemes will be severely limited. GATS puts curbs on Member's ability to regulate domestically, obligating them to only take measures that are least trade restrictive and which do not restrict the competitiveness of the service provider. Many of the current mechanisms the governments use to preserve water as a common good and to meet their obligations to respect and protect access to potable water as a human right will be hampered.

ENDNOTES

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² In 1999, only five out of the 16 leading developing countries recorded export surpluses in trade in commercial services: Hong Kong, China, Singapore, Thailand and Turkey. See Communication from Argentina WTO document S/CSS/W/44, 29 January 2001, at <<<http://docsonline.wto.org>>> accessed on 22 August 2001

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⁸ See BAYLISS, K. (2001), 'Does Privatisation have a place in a poverty reduction strategy?' (unpublished).

⁹ HARTRIDGE, D. (1997), 'What the General Agreement on Services Can Do', speech at the conference Opening Markets for Banking Worldwide: The WTO Agreement on Trade in Services, 8 January 1997, UK.

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¹² For example, in 1980, industrialised countries registered a trade surplus in services of US\$9 billion whereas in Latin America, the corresponding deficit was US\$9 billion. See Mendoza, M., Latin America and the Negotiations on Trade in Services, Uruguay Round: Papers on Selected Issues, UNCTAD (1989)

¹³ GIBBS, M & MASHAYEKHI, M. (1989), 'Elements of a Multilateral Framework of Principles and Rules for Trade in Services', Uruguay Round: Papers on Selected Issues, UNCTAD.

¹⁴ See US-EU WTO Banana dispute

¹⁵ See DHANARAJAN, S., (1994) 'Understanding the GATT and the Uruguay Round', Malaysian Bar Council.

¹⁶ GATS, Article I(3)

¹⁷ GATS, Article VIII(4)

¹⁸ Also, Article XIX (2) states that during subsequent rounds of negotiations on progressive liberalisation, developing countries should be given the appropriate flexibility to open fewer sectors and to progressively extend market access in line with their development situation.

¹⁹ Masheyekhi, op cit. 1

²⁰ Speech to the European Services Forum Conference, 27 November 2000.

²¹ European Services Industry United in Favour of Ambitious Worldwide Trade Liberalisation, news release, see <<<http://gats-info.eu.int>>> last accessed 8 June 2001.

²² British Invisibles was the precursor to the International Financial Services London organisation, the UK-based services industry lobby of which the LOTIS (Liberalisation of Trade in Services) Committee is one of the working groups. The LOTIS Committee and the IFSL were instrumental in setting up the European Services Forum.

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²⁴ GATS, Article X

²⁵ GATS, Article XV

²⁶ GATS, Article XIII

²⁷ SINCLAIR, S. (2000), 'GATS: How the World Trade Organization's new "services" negotiations threaten democracy', Canadian Centre for Policy Alternatives.

²⁸ Communication from the European Communities and their Member States to the Committee on Specific Commitments, 28 November 2000.

²⁹ IZAGUIRRE, A.K. (2000), 'Private Participation in Energy', Public Policy for the Private Sector, World Bank.

³⁰ AES Corporation, Enron Corp., Southern Energy Inc. and CMS Energy Corporation. See World Bank, PPI Project Database.

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³⁴ GATS, Article I(3)(c)

³⁵ EC Treaty, Article 55: "...the provisions shall not apply so far as any given member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority."

³⁶ Corporate Europe Observatory newsletter, Issue 9, June 2001

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³⁸ GATS, Article VI(4).

³⁹ WT/GC/W/372

⁴⁰ Mashayekhi, op cit.1

⁴¹ 'The General Agreement on Trade in Services: the Debate between the North and the South' , International Gender and Trade Network, On line Economic Literacy Project Module 2, accessed at <<http://www.genderandtrade.net/GATS%20-%201.htm>>> on 12 November 2001

⁴² 'Exploring the issues of the GATS Negotiations', Note by the UNCTAD Secretariat for the High-level Brainstorming meeting for African Trade Negotiators in preparation for the Fourth WTO Ministerial Conference, June 2001.

⁴³ Masheyekhi, op cit. 1

⁴⁴ The UNDP Human Development Report 1996 estimates that populations without access to drinking water (in millions) are: 398 in East Asia, 285 in Sub-Saharan Africa, 248 in South Asia, 180 in South-east Asia and the Pacific, 92 in Latin America and the Caribbean and 67 in Arab countries.

⁴⁵ A Water Secure World: Vision for Water, Life and the Environment, World Commission for Water in the 21st Century, March 2000

⁴⁶ GRUSKY, S., 'IMF and World Bank push water privatisation and full cost recovery on poor countries', Globalization Challenge Initiative

⁴⁷ The rest of the amount is accounted for in \$5.4 billion for irrigation and drainage, \$1.7 billion for hydropower, and about \$3 billion for water-related environment projects. Regional distribution of this lending is: Africa, 7 percent; East Asia and the Pacific, 36 percent; Europe and Central Asia, 10 percent; Latin America and the Caribbean, 19 percent; Middle East and North Africa, 8 percent; and South Asia, 20 percent.

See <http://www.worldbank.org/html/extdr/pb/pbwater.htm>

⁴⁸ According to the World Bank's PPI Project Database, the total FDI in the water sector during the period 1990 - 98 was US\$23.3 billion as compared to US\$214 billion in telecommunications, \$177.1 billion in energy and \$82.2 in transport.

⁴⁹ <<<http://www.thameswater.co.uk/international/iindex.html>>>

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⁵⁵ Corporate Watch, 'Water Privatisation - global domination by a few', Issue 12, Autumn 2000.

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