

# **Update on the GATS Negotiations**

## **A background paper for TACD by Ellen Gould**

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## **I. Introduction**

1. The General Agreement on Trade in Services (GATS) is an existing WTO agreement that is currently being renegotiated to expand its reach. The Transatlantic Consumer Dialogue has monitored developments in the GATS negotiations and made the GATS an ongoing aspect of its consultations with government<sup>1</sup>. Briefing papers explaining the key terms of the agreement are available in the "Documents" section of the TACD web site - [www.tacd.org](http://www.tacd.org).

2. This report provides an update on topics in the negotiations related to TACD's recommendations on the GATS. The report covers the following areas:

- Section II "Status of the Negotiations" provides a clarification - to the extent possible - of the status of the GATS negotiations in the aftermath of the September, 2003 Cancún WTO ministerial;
- Section III "Developments in the Negotiations on GATS Rules" covers two aspects of the talks concerned with creating new, multilateral GATS rules. It analyzes recent submissions made to the GATS Working Party on Domestic Regulation and summarizes the debate related to possible GATS prohibitions on government subsidies for services;
- Section IV "Developments in the Request-Offer Negotiations" gives an overview of the "requests" and "offers" WTO members are making in bilateral negotiations, focussing on the key sectors of health, education, energy and environmental services;
- Section V "Assessment" summarizes some of the key issues in the assessment of trade in services.

3. The drafting of new GATS obligations is occurring simultaneously with the bilateral negotiations to expand governments' commitments of services to existing GATS rules. The potential impacts of these new obligations are considered first in this paper, because the new obligations could make a significant difference in the way consumers experience the results of the bargaining in particular service sectors.

## **II. Status of the GATS Negotiations**

4. The mandate for the GATS negotiations is contained in Article XIX of the agreement, which calls for repeated rounds of talks "with a view to achieving a progressively higher level of liberalization". Like the GATS, the Agreement on Agriculture and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) also call for further negotiations. These three negotiating mandates make up what the 1996 Singapore Ministerial Declaration identified as the WTO's "Built-in Agenda". Talks on the new GATS round began in the beginning of 2000, and in March 2001, the WTO's Services Council approved negotiating guidelines. These guidelines defined the scope of the negotiations as including all service sectors.

5. At the same time as negotiations on services, agriculture, and "intellectual property" (patents, copyrights and trademarks) have their own treaty-defined mandate, they will only be concluded as part of a "single undertaking", an indivisible package of commitments in diverse areas that is supposed to be in place by 2005. The complicating factor is that there was no agreement at the 2003 Cancun Ministerial on whether this package should include new WTO rules on procurement, investment, competition, and trade facilitation. These items were discussed at the

1996 Singapore Ministerial meeting and were referred to in its formal Declaration - hence the name "Singapore issues". The 2001 Doha Ministerial Declaration stated that negotiations on these issues would begin after the next ministerial meeting, contingent on an "explicit consensus" among WTO members on negotiating modalities.

6. The Cancun meeting demonstrated that there was no such consensus, and disagreement over launching negotiations on the Singapore issues was an important reason for the failure of the ministerial. The Australian trade department has reported that because of Cancun, the meetings of the Services Council and subsidiary bodies "experienced a slowing of momentum."<sup>iii</sup> But while the meetings of other WTO negotiating groups were suspended post-Cancun, some countries submitted their GATS negotiating offers in the fall of 2003, the bilateral negotiating meetings continued, and the various GATS committees held meetings between 29 September and 10 October 2003, in early December 2003, and again in March 2004. Work also continues in informal "Friends Groups" made up of a limited number of delegations working on particular sectors - eg. Friends of Energy, Friends of Education, Friends of Air Transport, etc. Concern has been expressed by some delegations about the lack of transparency these informal groups create, since reports of their meetings are not necessarily provided to the official GATS working parties.<sup>iii</sup>

7. The Doha Ministerial Declaration identified specific deadlines for GATS negotiating requests and offers. These have been missed by most WTO members. By June 2002, WTO members were supposed to exchange requests identifying new services they wanted their negotiating partners to open up to liberalization commitments. March 2003 was the deadline for members to respond to requests and give an initial offer indicating what concessions they were willing to make. Some delegations have treated the deadlines as firm obligations and others are considering them merely as "indicative" target dates.<sup>iv</sup> As of December 2003, sixty-two (out of a total of 148) WTO members had submitted formal negotiating requests and about forty had submitted offers.<sup>v</sup>

8. Bilateral negotiations to get countries to commit to more than what appears in their initial offers were scheduled to conclude by the end of 2004, along with the multilateral negotiations to draft new GATS rules. Some countries' trade representatives are pointing to this looming deadline to caution non-governmental groups who want to have input into government decision making on bilateral commitments and new GATS rules that they must do this immediately. Others officials have said that given the debate over the Singapore issues and the difficulties in the agricultural negotiations, the deadline for the single undertaking will likely slip, allowing more time for public input.

9. In their December 2003 response to public submissions on the GATS, the UK trade department stated: "In practice, following the disappointing outcome of the Cancun meeting, there is still time for public debate on all aspects of the services negotiating agenda, and we would welcome further comments on issues that respondents felt they had insufficient time to address."<sup>vi</sup> Renewed opportunity for public debate is important given the new GATS rules being drafted, the scope of the request-offer negotiations, the outcome of GATS disputes, and new work on assessment of trade in services.

### **III. Developments in the Negotiations on GATS Rules**

10. Although there is uncertainty in the negotiations about the potential impacts of new GATS bilateral commitments, the most profound unknowns stem from the rule-making agenda. This

agenda deals with aspects of the agreement left incomplete at the end of the work of the Uruguay Round. Given the issues at stake, it is easy to understand why. Emergency safeguard measures, government procurement, and government subsidies are the three difficult topics assigned to the Working Party on GATS Rules, according to the mandates laid out in Articles X, XIII, and XV respectively. The Working Party on Domestic Regulation is discussing whether any new rules are necessary to discipline non-discriminatory domestic regulation. The mandate for negotiations on domestic regulation is provided by Article VI.4.

11. Recent developments in the negotiations on Article VI.4 - domestic regulation - and on Article XV - subsidies - are particularly relevant to TACD's areas of concern. Imposition of "necessity tests" on domestic regulation is being vigorously advocated in the GATS Working Party on Domestic Regulation, particularly in a draft annex of regulatory constraints proposed by Japan. Discussions about prohibiting government subsidies for services are evolving in a way that could mean accessibility to basic services or environmental sustainability could be eroded.

## **A. Negotiations on Domestic Regulation Disciplines**

### **i) Background**

12. TACD has identified the jeopardy to regulatory authority represented by the domestic regulation talks as one of the highest priorities for government action in 2003-2004. TACD has stated:

"TACD opposes the imposition through the GATS of proposed new disciplines on domestic regulation that would apply 'necessity tests' or 'proportionality tests' to determine whether a regulation was 'least burdensome' to trade in fulfillment of the regulation's objective. If these new disciplines are adopted in the GATS, regulators will be obliged to draft all rules in a 'least restrictive to trade' manner, regardless of the legal or practical consequences of such an infringement on their regulatory discretion. We agree with the US government that no such disciplines are necessary."

13. What is currently being contemplated in the GATS negotiations is imposition of a positive obligation on governments to ensure regulations are "no more burdensome than necessary", "no more trade restrictive than necessary", and/or "proportional" in their trade restrictiveness. The most recent meetings of the Working Party on Domestic Regulation suggest the EC and US positions on implementation of new necessity disciplines is not yet fixed. The EC's July 2003 submission to the Working Party was limited to making generally non-prescriptive recommendations to improve transparency in licensing procedures. But the EC delegation has since stated that this submission was meant to complement new regulatory disciplines and that the mandate of the Working Party included disciplining "substantive" licensing requirements.<sup>vii</sup>

14. The US delegation has in the past pointed out that the Article VI.4 mandate is to negotiate any *necessary* disciplines, and at the end of negotiations the conclusion could be that there is no need to impose them, at least not in an across-the-board, "horizontal" fashion on all services. Their representative continues to say, when commenting on specific aspects of submissions, that such comments "do not prejudice the U.S. position on any necessary disciplines."<sup>viii</sup> However, the US is also making its own contributions to the list of examples of measures to be disciplined, and at the 1 July 2003 Working Party meeting their representative stated: "The United States felt it was still in their interest to possibly pursue a sectoral approach, but was open to a horizontal or sectoral approach."

15. The following analysis will cover four topics that have emerged in recent discussions in relation to GATS disciplines on domestic regulation: the scope of the disciplines; the Japanese draft annex on domestic regulation; the WTO Secretariat's recent paper on necessity tests; and implications for regulatory reform of the accounting sector.

## **ii) Scope of the Proposed Regulatory Disciplines**

16. In consultations TACD has had over the new disciplines, there has sometimes been confusion over what kinds of regulations would constitute violations of the proposed article. Article VI.4 can be mistaken for disciplines on discrimination, which would mean that as long as governments do not discriminate, as long as they apply the same regulations evenhandedly to foreign and local service providers, they are safe from a challenge under the proposed disciplines. The argument has been made, for example, that new GATS disciplines are needed to ensure governments do not impose standards that are really disguised barriers to trade.<sup>ix</sup>

17. However, discriminatory standards can already be challenged under the GATS national treatment provisions. The proposed disciplines would require governments to restrict their *non-discriminatory* regulations. The concept of disciplining regulations for their "trade restrictiveness" has special meaning in the context of the GATS. Since the GATS defines commercial presence as a form of trade, regulations that were deemed to "unnecessarily" restrict commercial interests operating within a country's borders would be vulnerable.

18. Trade officials sometimes discuss the categories of regulation named in Article VI.4 as though they represent a narrow sphere of regulation. For example, the UK government's reply to its GATS consultation states: "the scope of any disciplines would be limited to qualifications, licensing and technical standards, not to the whole range of domestic regulation." TACD's February 2003 GATS briefing paper analyzed how these specific categories of regulation are especially key to consumer protection. The paper appended the GATS restricted document, "*Examples of Measures to be Addressed by Disciplines under GATS Article VI:4*", that lists regulations submitted by delegations as examples of what would be disciplined under the proposed new GATS article. This list provides an indication of what kind of future WTO disputes can be expected if new disciplines are imposed. Limits on the fees charged for services, bonding requirements for construction firms, restrictions on advertizing, and the ability of sub-federal jurisdictions to set different qualification and licensing requirements are just some of the regulations targeted that are of key interest to consumers. But the jeopardy for consumers in limiting these kinds of regulations has not been discussed by the Working Party on Domestic Regulation according to the minutes of the twenty-four meetings held to date.

19. In recent consultations with TACD, officials have characterized the scope of the new obligations as limited because disciplining licensing requirements would not affect regulations of general application. However, licensing requirements for service suppliers can make compliance with general regulations a condition of obtaining permission to supply a specific service. They can also set specific requirements based on these general rules. A challenge to these licensing requirements would inevitably implicate the environmental legislation on which they are based.

20. Reading the requirements of an actual permit<sup>x</sup> to supply a service gives a concrete understanding of what would be captured by the proposed disciplines. Appendix A is a permit issued by the State of Vermont's Air Pollution Control Division to a recreational facility operating its own heating plant. The permit operationalizes US air pollution regulations by setting allowable emissions that are specific to the facility. The permit also identifies thirteen state and federal

regulations - eg. Prohibition of Potentially Polluting Materials, Prohibition of Particulate Matter, Prohibition of Nuisance and Odor - the applicant has to abide by as an integral part of the permit's "**applicable requirements**".<sup>xi</sup> If the proposed disciplines are implemented, all of these statutes promoting environmental sustainability would be vulnerable in the event that Vermont's licensing requirements were challenged as "more burdensome than necessary".

### **iii) The Proposed "Draft Annex on Domestic Regulation"**

21. The "Draft Annex on Domestic Regulation"<sup>xii</sup>, submitted in May 2003 by the Japanese delegation, has been described as "dynamizing" the development of new GATS regulatory disciplines.<sup>xiii</sup> Japan proposes that at the end of this negotiating round governments should add a regulatory annex to their GATS commitments that would obligate them not to "prepare, adopt, or apply" measures<sup>xiv</sup> that are more "burdensome than necessary." Governments would also have to examine their existing measures to determine how they could be made less trade restrictive.

22. The Draft Annex contains a number of radical provisions that have gone unremarked in the Working Party on Domestic Regulation. For example, Japan is advocating a requirement that fees charged for licenses cover only administrative expenses. The EC recommended the same restriction in its July 2003 submission on licensing procedures<sup>xv</sup>. This one obligation alone would have significant ramifications.

23. Developing countries often rely on licensing fees in the absence of other sources of revenue, yet the fiscal consequences for them of this proposed GATS discipline have not been assessed. For example, licensing fees imposed on tour operators can provide cash-strapped governments the funds that would otherwise be unavailable to hire conservation officers. In addition, regulators in OECD countries have argued that even in cost-based licensing fee systems, the true costs incurred from licensing a service should be fully recovered in fees. For particular services where the risk to consumers is high, licensing fees should not be limited strictly to the administrative costs of license processing, but also cover the costs involved in inspection and enforcement of consumer protection measures.

24. The most significant aspect of the Japanese Draft Annex, however, is its imposition of a raft of necessity tests. The following would put governments in violation of their Annex obligations: measures of general application that create "unnecessary barriers to trade in services"; a measure that is "more burdensome than necessary in order to fulfill its national policy objectives"; licensing procedures that are "more burdensome than necessary to ensure that applicants fulfill qualification and licensing requirements"; technical standards serving anything other than "national policy objectives".<sup>xvi</sup> Some GATS negotiators have expressed concern about necessity tests. One delegate described them as "very controversial"<sup>xvii</sup>, and another "noted that the Working Party was far from understanding the full implications of necessity test, and that perhaps it would be useful to go deeper in examining the existing jurisprudence."<sup>xviii</sup>

### **iv) Secretariat Review of the WTO Disputes Regarding "Necessity"**

25. The WTO Secretariat was asked to update its 1999 paper on necessity clauses in other WTO agreements. Unfortunately, the December 2003 Secretariat paper<sup>xix</sup> that reviews the "extensive jurisprudence" involving necessity tests could give governments an inappropriate sense of confidence that their services regulations would be able to survive a necessity test if they were challenged. For example, the paper states that the existing necessity provisions in WTO agreements can be "viewed as an expression of the right of Members to adopt TBT [technical barriers

to trade] and SPS [sanitary and phyto-sanitary] measures and other forms of domestic regulation, subject to ensuring that those measures comply with the necessity criteria as identified in the WTO provisions and the jurisprudence." Characterizing necessity clauses as an expression of the right to regulate does not convey how severe a constraint these clauses have proven to be: in the history of the WTO and the GATT back to 1947, only one government has ever been able to preserve a regulation from a challenge involving necessity.

26. The Secretariat paper cites panel or Appellate Body statements acknowledging that health and environmental protection are legitimate government objectives, and that governments are entitled to seek the level of protection they choose. The Secretariat refers to the Australia-Salmon ruling as evidence that "the determination of the appropriate level of protection is the right of the Member concerned" and to the European Communities-Beef Hormones ruling as evidence that "Members are not precluded from choosing a 'zero risk' level of protection".

27. It is important to note however that in these and all but one of the other cases cited by the Secretariat, the ultimate ruling was that governments could not maintain their regulation. Governments and consumer organizations need to be alerted to these actual outcomes, and understand why in practice necessity is such a difficult standard to meet.<sup>xx</sup> The major problem for governments in proving necessity of regulations has not been in convincing panels that their objectives are legitimate. Instead, their difficulty generally has been in trying to prove that their measure was the least trade restrictive thing they could have done, or that that its restriction on trade was justified by the importance of the underlying objective.

#### **v) GATS Cases and Necessity**

28. Even without the proposed new obligation to restrict regulations to what is no more burdensome than necessary, the GATS and its related agreements already contain necessity provisions. These have been part of two disputes recently ruled on by WTO panels. The panel rulings provide further indication of the difficulties governments have in meeting tests of necessity.

29. In the *Telmex* case, involving a US complaint against Mexico over its telecommunications' regulations, Mexico attempted to argue the GATS Telecommunications Reference Paper gave it "wide latitude to allow rates that would allow continued development of needed infrastructure and the achievement of universal service."<sup>xxi</sup> The US argued this was equivalent to a Universal Service Obligation (USO) that, under the terms of the Reference Paper, was subject to a necessity test<sup>xxii</sup>. The US claimed that Mexico's regulations failed to meet the requirements of the necessity test because Mexico had not explicitly defined a USO, and therefore Mexico could not prove what rates were necessary to meet the obligation<sup>xxiii</sup>.

30. The panel did not comment directly on USOs and necessity, but they accepted the US argument on how rates should be calculated, a calculation that did not factor in universal service considerations. They rejected Mexico's claim that the "reasonable" rates required by the Reference Paper allowed it to meet broad social objectives. The panel stated: "contrary to Mexico's position, the general state of the telecommunications industry, the coverage and quality of the network, and whether rates are established under an accounting rate regime, are not relevant to determining a proper cost-oriented rate."<sup>xxiv</sup>

31. Mexico also tried to justify its regulations by referring to a provision in the GATS Telecommunication Annex that allows developing countries "to place reasonable conditions on

access to and use of public telecommunications transport networks and services *necessary* [emphasis added] to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services." But the panel rejected this argument as well, partly on the grounds that Mexico had not proven that its regulations were "necessary."<sup>xxv</sup>

32. In April 2004, a dispute panel issued a ruling on an Internet gambling case that also dealt with arguments about what can be justified as necessary. Antigua-Barbuda had brought a complaint against the US for its restrictions on cross-border gambling, which Antigua-Barbuda said violated US GATS commitments related to recreation services. The US defence relied partly on the exceptions clause in GATS Article XIV that allows governments to impose measures "necessary for the protection of public morals". The US had argued any limits it had on Internet gambling were necessary due to the impact such gambling had on minors and the potential for overseas gambling operations to launder illegally-obtained money. U.S. Trade Representative Robert Zoellick, in expressing concern over the implications of the WTO decision, criticized the panel for not allowing the US to defend its ban on the basis of the public morals exception. He stated: "If this isn't an exception that that should meet, I don't know what is."<sup>xxvi</sup>

#### **v) Necessity and Accounting Sector Reform**

33. Negotiators have already agreed to impose a necessity test on accountancy under the "Disciplines on Domestic Regulation in the Accountancy Sector".<sup>xxvii</sup> These constraints on accounting regulation were adopted by the Council for Trade in Services in December 1998 and are scheduled to take effect at the end of this negotiating round. The agreement on Accountancy Disciplines has been referred to in recent Working Party on Domestic Regulation meetings as evidence that a necessity should be applied in other sectors as well: "On necessity, the representative asked what in the Accountancy Disciplines necessity test was particular to accountancy, and therefore not horizontally applicable to other sectors."<sup>xxviii</sup>

34. Delegations may want to reconsider the implementation of this necessity test on accountancy, given the recent high profile corporate crises that some observers are attributing to regulatory failure. The Disciplines would limit accountancy regulations to measures that "are not more trade-restrictive than necessary to fulfill a legitimate objective." In addition, even though "the protection of consumers (which includes all users of accounting services and the public generally)" is listed among possible legitimate objectives<sup>xxix</sup>, under a necessity test governments would have to prove their regulations were effective in achieving this objective - a very difficult task given the complexity of the accounting sector. The US Sarbanes-Oxley Act might have been challenged if the Accountancy Disciplines had already been in place.<sup>xxx</sup>

35. Off-shore entities, trade in derivatives, the granting of stock options are just some of the difficult issues that make accounting reform such a challenge and the subject of debate on the financial pages. New York Times business columnist Floyd Norris has observed that the multi-billion euro problems with the books of Italian transnational firm Parmalat might not have been caught without the provision in Italian law that requires auditors to be rotated every nine years<sup>xxxi</sup>, a requirement the industry has opposed as unnecessary and that could fail a GATS necessity test.

36. The Washington Post has reported that Grant Thornton LLP, the accounting firm that has been linked to the Parmalat scandal, is also under investigation by the US Securities and Exchange Commission for having "'rented' out its name and prestige" to another firm suspected of fraud in a separate case.<sup>xxxii</sup> Yet the GATS Accountancy Disciplines would expressly prohibit

governments from placing restrictions on the use of firm names. In light of the scale of the corporate accounting scandals and their impacts on vulnerable investors, perhaps the least that can be said is that now is not an ideal time to curtail governments' regulatory options through the imposition of a GATS necessity test.

## **B. Negotiations on Government Subsidies**

37. The elimination of "trade distortive" subsidies is on the agenda of the Working Party on GATS Rules, and has implications for TACD's concerns about access to basic services and environmental sustainability. Negotiating positions though have not firmed up on the most basic questions, and the range of possibilities under consideration is very wide. Developing countries understandably have expressed reluctance to respond to market access requests without knowing if the country making the request is subsidizing its exporters. At the December 2003 meeting of the Working Party on GATS Rules (WPGR), Chile's representative stated: "One needed to know, when undertaking a commitment, whether foreign service suppliers were benefiting from subsidies, as this could generate distortions." Subsidies to energy companies, for example, might permit these companies to unfairly take advantage of market access commitments for energy services. On the other hand, delegations have expressed concern that disciplines on subsidies not negatively impact the ability of governments to subsidize necessary services.

38. Under the GATS, government subsidies already have to be granted without discriminating between local and foreign suppliers when governments make unlimited national treatment commitments. Both the EU and US maintain limitations to shield a variety of government subsidies from national treatment complaints. However, these scheduled limitations would not protect subsidies from the kind of outright prohibitions envisioned under GATS Article XV.

39. Some trade experts have suggested environmentally-friendly subsidies might be challenged under Article XV, which is particularly cause for concern given the absence of an exception in the GATS for natural resource conservation. For example, a study conducted for the Inter-American Development Bank has suggested that subsidizing domestic rail transport - an environmentally preferable form of transport - could be a violation of Article XV disciplines because it restricts the market for foreign bus service providers.<sup>xxxiii</sup> But subsidy disciplines might also be crafted to benefit the environment. A March 2003 conference entitled "Towards Pro-Sustainable Development Rules for Subsidies in Trade in Services", trade experts discussed how GATS Article XV could be used to ban environmentally destructive subsidies, such as ones that subsidize excessive tourism in sensitive areas.<sup>xxxiv</sup>

40. Recent submissions from various delegations state that the fundamental importance of government's capacity to subsidize key services is one that should not be jeopardized by new GATS disciplines on subsidies. New Zealand's representative underlined this point at the December 2003 WPGR meeting, saying that "Finding an appropriate manner to treat public service subsidies would be key to advancing the Working Party's discussions in this area." In practice, this will be hard to achieve, particularly as governments do not agree on what public services are. And even in sectors where governments might agree there is a role for government subsidies, such as health and education, the Secretariat has stated that with the development of exports in these sectors, subsidies "may be viewed with concern from a trade perspective."<sup>xxxv</sup>

41. Consideration is being given in the Working Party on GATS Rules to relying on the GATS exemption for services in the exercise of governmental authority to exclude grants for public services from Article XV subsidy disciplines. TACD has recommended that this exemption be clarified, pointing out that the qualifications placed on this exemption - that the service cannot be

supplied on a commercial basis nor operate in competition with other service suppliers - may not effectively protect public services. The difficulties resulting from the lack of clarity in this exemption pose problems not only in the negotiations on government subsidies but in the request-offer negotiations as well, as will be discussed in the following section.

## **IV Developments in the Request-Offer Negotiations**

### **A. Background**

42. TACD's letter to the EU-US Summit, held in Washington on May 2, 2002, asked that "the right of governments to provide and regulate basic services in the consumer interest should be broadly asserted in a new article of the WTO services agreement" and identified this safeguard as particularly important for critical services such as health, education, telecommunications, water and energy utilities.

43. The "request-offer" negotiations currently being conducted put public services at risk in a number of ways. The negotiations are not transparent, as negotiating requests are kept secret and only a limited number of offers have been made public. But the information available from leaked documents and the offers that have been published indicate that requests have been made in every one of the twelve broad categories used to classify services, including health, education, water supply, library, and postal services. For some of these services, governments are being asked to make unlimited national treatment commitments, which means that they would have to subsidize foreign and domestic supplied services on an equal basis.<sup>xxxvi</sup> They are also being asked to make unlimited market access commitments in key sectors, which would prohibit them from either maintaining or creating an exclusive service supplier in those sectors. Maintaining a monopoly, either public or private, means a denial of GATS market access.<sup>xxxvii</sup>

### **B. Overview of the Requests and Offers**

44. As might be expected in any bargaining process, negotiators in this round of GATS talks have aired complaints that what is being offered to them is too little. European Trade Commissioner Pascal Lamy, for example, has characterized the US initial offer as "half-empty", and suggested that the US strategy is to make a modest initial offer so that it can offer more later on in the negotiations.<sup>xxxviii</sup> But the same could be said of other initial offers, including the EC's. The EC is not making any new commitments in key sectors like health, education, or audio-visual sectors.<sup>xxxix</sup> While it is asking other countries to commit water supply, its own initial offer does not contain this commitment. The new commitments contained in the initial offers rarely<sup>xl</sup> go beyond the liberalization that has already been implemented domestically. The EC offer in postal services, for example, conforms with the EC's first postal directive of 1997 opening aspects of the sector to competition. The US offer in the financial services sector, allowing supply of services through branches of foreign institutions, reflects changes that have already been made at the state level. Binding existing liberalization through GATS commitments is significant in terms of reducing a government's future policy flexibility, but it tends not to generate public controversy.

45. In contrast, the requests that have become public have been controversial. As a report on the GATS negotiations in financial services has observed: "The fact that the EU is submitting opening requests involving financial services to ninety-four countries demonstrates the high priority that financial services have for the EU. The main emphasis of the content of these opening requests for the EU is on the opening of pension and insurance markets, on the abolition

of limitations on holdings by foreign capital, and on the liberalization of the movement of capital - all areas considered sensitive in terms of development policy."<sup>xli</sup>

46. The fact that requests are being made in sensitive areas is perhaps an inevitable consequence of the formal guidelines approved for the negotiations, which stipulate that there should be no *a priori* exclusion of any service. Some delegations are interpreting this guideline to mean governments have to be willing to bargain in every sector, despite the fact that the GATS is an agreement that is supposed to allow national choice over the pace and focus of liberalization - governments are allowed to make commitments in some sectors but not in others. Developing countries are rejecting arguments that areas like audio-visual services, health, and Mode 4 - the "movement of natural persons" - should be handled differently in the negotiations because they are sensitive areas, pointing out that their countries have areas they consider sensitive and yet these too are on the bargaining table. The Brazilian representative has "noted his delegation's concern that some Members had refused to exchange information on this [the audio-visual] sector in bilateral consultations."<sup>xlii</sup>

47. The ability to maintain limitations on commitments was extensively used in the schedules of commitments that emerged at the end of the Uruguay round. Negotiating requests in the new round of GATS negotiations are targeting these limitations. For example, Canada is being asked by the EC to remove the limitation it placed in 1994 on its market access commitments for auto insurance. Auto insurance has been an ongoing concern for Canadian consumers, and has become more so of late, with premiums skyrocketing as much as 70 percent in the past year and figuring as a key issue in regional elections. Consumers in rural areas are having difficulty getting insurance at any price. The September 2003 Consumers' Association of Canada study of the industry looked at 7,000 auto insurance rate quotes, and found that auto insurance rates "provinces with public auto insurance systems, are the lowest in Canada, in some cases dramatically lower."<sup>xliii</sup> Canada's scheduled limitation allows provinces with public auto insurance monopolies to maintain them, preventing market access to private insurers who would compete for the most lucrative aspects of the market. If Canada removes the limitation as requested, the risk is that the public insurers would no longer be viable, and consumers would no longer be able to benefit from a public insurance system that has provided them with significant cost savings.<sup>xliv</sup>

48. The ability of developing countries to qualify their commitments in order to meet their development objectives is also coming under pressure. They are being requested to remove limitations on market access such as requiring that foreign companies enter into joint ventures.<sup>xlv</sup>

### **C. Ambiguity over the Governmental Services Exemption**

49. Although bargaining is occurring over such key sectors as health, education, and water supply, there is still no clarity on what aspects of these services might be exempted by the "governmental authority" exemption - Article I.3.c - of the GATS. Before the GATS negotiations began, TACD recommended that governments clarify the meaning of GATS Article I.3.c that exempts "services in the exercise of governmental authority." TACD has pointed out that the qualifications placed on this exemption - that the service cannot be supplied on a commercial basis nor operate in competition with other service suppliers - leave a lot of room for interpretation.

50. Governments do not agree on how much this exemption covers, and this disagreement was highlighted at an October 2003 meeting of the Working Party on GATS Rules. New Zealand's representative suggested the exemption would be enough to exclude public services from new subsidy disciplines, since it was her delegation's view that public services could co-exist with

private services without competing with them. The representative of Poland, though, intervened to say that "the co-existence without competition between private and public services was the exception rather than the rule"<sup>xlvi</sup> and therefore the governmental authority exemption was not "sufficient" to exclude public service subsidies from Article XV.

51. The UK government's reply to its GATS consultation describes a "notion of co-existence" as the reason why National Health Service (NHS) hospitals could not be defined as falling within the scope of the GATS. The UK explanation of this notion is that while private hospitals compete for patients with NHS hospitals, "NHS hospitals merely co-exist with them and do not actively compete for patients."<sup>xlvii</sup> This interpretation would seem to be saying that NHS services are not "in competition with one or more service suppliers" and therefore exempted from the GATS because only private suppliers are trying to compete.

52. The WTO Secretariat's original 1998 background paper on health services posed a number of questions that have yet to be answered by the Services Council. The Secretariat analyzed whether public and private hospital services could be considered in competition, not on the basis of whether either sector had an intent to compete, but whether they offered "like" services. This approach would appear to be consistent with how WTO panels have addressed the question of competition in relation to disputes over goods. The Secretariat suggested that: "Given the perceived advantages of private over public hospitals - the absence of waiting periods, use of modern equipment, etc. - the two groups might not be considered to provide 'like' services."<sup>xlviii</sup> However, if panels agreed with this interpretation, it would have the perverse result that the more public hospitals improved to become "like" private ones in quality, the more jeopardy they would be in of failing to qualify for the GATS governmental authority exemption and any preferential treatment accorded them by governments.

#### **D. Meaning of Commitments in Relation to Public Services**

53. Some governments have not relied exclusively on the governmental exemption and have scheduled limitations in an effort to make clear their public services are not covered by their commitments. For example, in its 1994 original schedule the European Commission listed an across-the-board limitation on market access for "services considered as public utilities at a national or local level", stipulating that these "may be subject to public monopolies or to exclusive rights granted to private operators." The EC has declined to specify which "public utilities" are covered by this limitation, so the utilities covered are not confined to specific ones named on a list. Yet the EC is asking countries that do not have this exemption in their schedules to make unlimited market access and national treatment commitments for public services.

54. With the accession of Finland, Austria and Sweden to the European Union, the EC has now listed its horizontal limitation for public utilities as covering the acceding countries as well. In addition, the consolidated schedule the EC submitted to the Services Council in April 2003 specifies "only privately funded " education services are covered for all fifteen EU members, a qualification that was not placed on Austria's 1994 commitments for primary, secondary, and adult education. Another change is that Austria originally listed no limitations for national treatment of subsidies, but now Austrian subsidies are included in the overall exemption for public sector subsidies in the EC consolidated schedule.

55. The US has also not relied exclusively on the governmental authority exemption to safeguard its public services. Commitments it made in 1994 for wastewater and solid waste services were specifically restricted to those "contracted by private industry." In its initial offer for the current

negotiations, the US has clarified that its commitments for libraries, museums, and archives do not apply to "non-profit, public, and publicly-funded entities"<sup>xlix</sup>, a qualification that did not appear in its original schedules.

56. Talks regarding revisions to existing schedules are currently underway and sixteen countries have submitted notifications that they wish to discuss the changes to its consolidated schedules with the EC. This could mean that they will ask to be compensated for the EC's extension of its public utility exemption and other alterations to its schedule intended to protect public services.

## **E. Education in the Request-Offer Negotiations**

57. The US, in asking countries to make unlimited commitments in higher education and training, has argued: "Availability of these education and training services can help to develop a more efficient workforce, leading countries to an improved competitive position in the world economy."<sup>1</sup>

58. However, since 2002 when South Africa received requests to commit its education sector, the South African education minister, Kader Asmal, has explained why liberalization of education under the GATS is not in his country's best interest. He has described South Africa's experience with liberalizing education after the end of apartheid as having had a "devastating" effect on efforts to build a national university system<sup>ii</sup>. As well, foreign education providers had not addressed South Africa's overall higher education needs, but had only supplied lucrative aspects of the market that were already well-served. He has said that "Trade considerations cannot be allowed to erode the public good agenda for higher education" and that "We must ask whether there should not be a fundamental re-thinking of the inclusion of education in GATS."<sup>iii</sup>

59. Norway had requested South Africa commit its higher education sector. However, on 6 October 2003 at an international education conference in Bergen, Norway, a representative of the Norwegian government said that given South Africa's response to Norway's requests in the education sector, their negotiators would no longer press South Africa to make a commitment.

60. Education is one of the sectors where there are very few existing GATS commitments, so there is not much experience governments can draw on in deciding whether to make the unlimited commitments requested of them in the negotiations. The WTO Secretariat has identified a number of areas where there is ambiguity about what GATS education commitments mean, including the extent of a government's national treatment obligations to subsidize foreign education suppliers<sup>liii</sup>, and so far these questions have gone unanswered in GATS meetings.

## **F. Water and Energy Services in the Request-Offer Negotiations**

61. Two major new thrusts of the current negotiations, requests for drinking water supply and energy services, are also venturing far into unknown territory. The issues involved are if anything more complex than in education because they concern sectors where the basic infrastructure of the service tends to be a natural monopoly, creating an apparent conflict with GATS market access obligations not to "maintain or adopt" monopolies. They also involve services that are often defined as government procurement. GATS Article XIII currently exempts procurement, but like the governmental authority exemption, its provisions are unclear.

62. The debates about the EC's request for water supply services have often focused on experiences with water privatization. As the UK Department of Trade has pointed out, the GATS

cannot be blamed for failed examples of privatization because water supply was not part of the first round of GATS negotiations. The question rather is, in light of the experience to date with liberalizing water services, would GATS commitments aggravate any of the problems governments have encountered?

63. If a privatization experiment fails and governments want to reestablish an exclusive public provider of the service, this would violate GATS commitments. The options governments have available to them in the event that a GATS commitment is creating untenable problems have been discussed in the Working Party on GATS Rules in relation to the possibility of creating a GATS emergency safeguard measure. Some delegations have suggested governments could use GATS Article XXI that provides for the modification of scheduled commitments. However, that article requires compensation<sup>liv</sup> to be paid to the satisfaction of all WTO members if a government wants to rescind a commitment. Governments may be able to compensate for a commitment in financially insignificant services, but there are very few services that are equivalent in commercial value to water supply.

64. The UK government has stated "We have already specifically made clear in the GATS that we reserve the right – as do all WTO Members – to define our own universal service obligation in the context of basic telecommunications services. It follows that that right also exists in relation to other sectors, and to issues such as safety, affordability, quality of service, security of supply and other public interest objectives..."<sup>liv</sup>

65. It is not apparent that a WTO panel would read into the GATS a WTO member's right to define a universal service obligation in all sectors on the basis of provisions for this in the Telecommunications Reference Paper. The Telmex case against Mexico also raises doubts of how useful such universal service provisions are given that they are subject to a necessity test.

66. The World Bank has recommended that liberalization be preceded by implementation of regulations to ensure consumer protection. Under bilateral investment treaties, though, there has been a sharp increase over the past few years of disputes taken by investors to international arbitration. A number of these have involved water liberalization. Corporations have taken complaints over government attempts to enforce infrastructure improvements, to address consumer complaints about water quality, and to limit tariffs charged.<sup>lvi</sup> In addition, the GATS Working Party on Domestic Regulation has targeted "limitations on fee setting" and "unnecessarily burdensome" domestic regulation for new GATS disciplines, which could further jeopardize the ability of governments to create the proper regulatory framework to ensure consumer protection.

67. The US energy request encompasses the transmission and wholesale distribution of electricity. Since it does not make sense to have firms competing to supply transmission lines and other infrastructure fundamental to electricity services, the US has suggested a pro-competitive regulatory model might be implemented through GATS commitments. The model would be based on the existing GATS Telecommunications Reference Paper, enforcing non-discriminatory access to basic infrastructure.

68. The question of how electricity markets should be structured to ensure reliability and optimum prices has proven to be a difficult one. California's problems with trying to establish competitive markets demonstrated firms were able to exercise market power with comparatively small market shares. Blackouts in Italy, London, and the northeastern US in 2003 have also renewed the debate about how trade in electricity should be regulated. Implementing a

single regulatory model that is effectively irreversible at this time could counter the objective of providing reliable and affordable energy services.

## V. Assessment of Trade in Services

69. The GATS Article XIX mandate to conduct the current negotiations also calls for an assessment of trade in services, generally, sector by sector, and in terms of whether the objectives set out in Article IV - "Increasing Participation of Developing Countries" - are being achieved. Article IV requirements mean an assessment has to be done of whether negotiated commitments benefit developing countries by strengthening their domestic services capacity, improving access to technology and distribution channels, and liberalizing areas of particular interest to their exporters. The formal negotiating guidelines adopted in March 2001 state that assessment will be an ongoing responsibility of the Services Council and that "negotiations shall be adjusted in the light of the results of the assessment."<sup>lvii</sup> Before the negotiations conclude, the Services Council is obligated to conduct an evaluation of whether they have achieved the goals set out in Article IV.

70. The discussions in the Council for Trade in Services Special Session, where the assessment issue is a standing item on the agenda, deal primarily with the general impacts of liberalization, rather than the specific impacts of GATS commitments. In presenting its case against the US in the current GATS dispute over Internet gambling, Antigua gives the perspective of one small developing country of the results of having made a GATS telecommunications commitment:

"AT&T now operates in Antigua but employs very few people there because its installations in Antigua are mainly operated from within the United States. The low prices that this gigantic company charges for its services in Antigua can not be matched by the competing indigenous operator. As a consequence the indigenous company (which does provide local employment) is slowly being driven out of the market, resulting in domestic unemployment, a loss of revenue to the government and the risk that AT&T may raise prices once local competition has disappeared. Further, while AT&T does not generate foreign exchange earnings for Antigua, it must convert the local currency into foreign exchange in settlement of its payments from subscribers in Antigua, fostering a drain on the country's scarce foreign exchange earnings."<sup>lviii</sup>

71. In the Special Session meetings dealing with assessment, the wide difference between developing and developed country services exports has been an issue. Pakistan presented an assessment paper on behalf of a group of developing countries pointing out that "developed countries account for three quarters of world exports of services and represent most of the 20 top exporters in different services sectors."<sup>lix</sup> Corporate concentration in the services sector was identified as a particular problem for developing countries, as their service exporters tend to be small enterprises trying to compete with large multinationals. As the Antigua submission in the GATS gambling case suggests, developing countries are concerned that once multinationals have eliminated competition from local companies, prices for consumers may rise. Thailand has made a similar point about the market shares being captured by large foreign retail chains; initially Thai consumers have undeniably benefited from liberalization but the government is concerned this may change as "the retail service is developing into an oligopolistic structure where a handful of players can dictate prices..."<sup>lx</sup>

72. Developing country representatives have been urged in Special Session meetings not to be "negative"<sup>lxi</sup> and rather than basing their analysis on global balance of trade data have been told to

instead consider qualitative issues, and how their overall economies can benefit from imports of more efficient services. The Chair of the Special Session has circulated the findings of the OECD paper, "Services Liberalization: Identifying Opportunities and Gains". This paper presents examples of how developing countries benefit from domestic liberalization even when their companies cannot compete in export markets.<sup>lxii</sup>

73. Some of the questions about how to deal with the downsides of liberalization have emerged in the negotiations on the possible implementation of an emergency safeguard measure (ESM). A recurring theme in both the assessment and the ESM discussions has been that improved regulation is a necessary, if not sufficient, prerequisite to obtain benefits from liberalization and counter any negative effects. However, the suggestions for enhancing regulations made in these working party meetings do not take into account what is being proposed in the Working Party on Domestic Regulation. For example, when Thailand raised the problem of how liberalization of the retail sector had negative impacts on small operations, Switzerland suggested that appropriate zoning and hours of operation rules could be implemented to assist small stores.<sup>lxiii</sup> However, these exact regulations are explicitly named in the Working Party on Domestic Regulation's list examples of measures to be disciplined under Article VI.4.<sup>lxiv</sup> From the consumer perspective, a significant omission in the assessment process is how proposed GATS disciplines on domestic regulation could constrain governments' ability to protect the consumer interest.

## **VI Conclusion**

74. Given the significance of the uncertainties that persist regarding key aspects of the GATS, the pause for reflection on the negotiations structure and objectives that the failure of the Cancun ministerial provided for can be viewed as positive. TACD's recommendation that the meaning of the governmental service exemption in the GATS be clarified is given added weight by the divergent interpretations that have emerged very recently in GATS meetings. The UK government has indicated that they "accept that there is room for improvement here and that there is no WTO jurisprudence on which to rely. The Government agrees that it would be better for WTO Members to agree an interpretation and has long made clear that that we are open to this."<sup>lxv</sup>

75. The fact that negotiating requests in the critical areas of education, energy, and environmental services are being pursued with particular intensity makes the lack of clarity in the GATS over the meaning of the governmental authority exemption and "procurement" even more problematic. In addition, the value of universal service provisions has been placed in doubt in the Telmex dispute, and the panel ruling may confirm that subjecting these to necessity tests significantly compromises their usefulness in ensuring access to key services.

76. In the absence of a clear definition of governmental authority, however, and to be consistent with their assurances that the negotiations are not about privatization of public services, governments should refrain from seeking compensation for corrections to GATS schedules that clarify commitments do not cover public services. Revisions to the schedules of the sort that state that European public utilities or American publicly-funded libraries are not covered by existing commitments should be understood to be a clarification, not a change requiring compensation.

77. Governments need to consider the losses governments have almost universally suffered in WTO/GATT necessity decisions to date rather than pressing ahead with a new GATS necessity test over domestic regulation, particularly in problematic sectors such as accounting. The categories of regulation targeted for disciplines are central to consumer protection, and broad consumer and environmental protection measures can be embedded in licensing requirements.

Assessment of the impacts on consumers of restricting non-discriminatory domestic regulation is a significant gap in the deliberations of GATS working groups.

78. Chakravarthi Raghavan's book<sup>lxvi</sup> on the GATS characterizes the experience of developing countries in the current round of negotiations as similar to "chasing a black cat in a dark room, blindfolded." But even with their superior resources, developed countries are faced with responding to requests where the unknowns are great, and their delegations could benefit from informed public discussion of the issues at stake. Publication of requests is necessary because the requests identify the specific services targeted in the negotiations. TACD has recommended that the request-offer negotiations be made transparent. Governments should not only publish their requests, but also commit to timely release of new offers so that there can be a full public discussion before final commitments are made.

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<sup>i</sup> TACD, "Priorities for Government Action 2003-04", available at: <http://www.tacd.org/docs/?id=194>

<sup>ii</sup> Australian Department of Foreign Affairs and Trade, "General Agreement on Trade in Services (GATS) - Current State of Negotiations", November 2003

<sup>iii</sup> WTO Committee on Specific Commitments, "Report of the Meeting Held on 12 May 2003", S/CSC/M/28, 24 June 2003

<sup>iv</sup> WTO Council for Trade in Services Special Session, "Report of the Meeting Held on 19 - 22 May 2003", TN/S/M/7, 30 June 2003

<sup>v</sup> *Bridges Weekly Trade News Digest*, "Services Week Shows Dynamism Despite Stalled Doha Talks", Vol. 7, No. 42, 11 December 2003

<sup>vi</sup> UK Department of Trade and Industry, "Consultation on the WTO General Agreement on Trade in Services (GATS) - Government Response", 18 December 2003, para. 6

<sup>vii</sup> WTO Working Party on Domestic Regulation, "Report on the Meeting Held on 30 September 2003", S/WPDR/M/23, 27 November 2003

<sup>viii</sup> *ibid*

<sup>ix</sup> TransAtlantic Consumer Dialogue Trade Working Group conference calls with trade officials, March 2003

<sup>x</sup> According to the EC, Article VI.4 covers not only licenses strictly speaking but as well other kinds of "authorization regimes" such as permits. The US has stated it finds the EC definition too "broad and sweeping", as it could mean the disciplines would cover building permits. Working Party on Domestic Regulation, "Report of the Meeting Held on 30 September 2003", S/WPDR/M/23, 27 November 2003

<sup>xi</sup> The example also highlights how radical a curtailment of governmental regulatory authority is being contemplated if licenses have to be "no more burdensome than necessary to ensure the quality of the service". Users of the Vermont facility could be shown in a trade dispute case to have found the quality of the service offered excellent even if the facility created serious environmental problems.

<sup>xii</sup> WTO Working Party on Domestic Regulation, "Communication from Japan - Draft Annex on Domestic Regulation, Revision", JOB(03)/45/Rev.1, 2 May 2003

<sup>xiii</sup> WTO Working Party on Domestic Regulation, "Report on the Meeting Held on 15 May 2003", S/WPDR/M/21/Rev.1, 25 June 2003

<sup>xiv</sup> GATS Article XVIII states that : "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form...." The Working Party on Domestic Regulation is discussing whether Article VI.4 covers this broad category of government measures or is restricted to the five categories listed.

<sup>xv</sup> WTO Working Party on Domestic Regulation, "Communication from the European Community and Its Member States - Proposal for Disciplines on Licensing Procedures", S/WPDR/W/25, 10 July 2003

<sup>xvi</sup> No consideration is given in the Draft Annex for regulations that serve state, provincial or local government policy objectives.

<sup>xvii</sup> WTO Working Party on Domestic Regulation, "Report on the Meeting Held on 15 May 2003", S/WPDR/M/21/Rev.1, 25 June 2003

<sup>xviii</sup> *ibid*

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- <sup>xix</sup> WTO Working Party on Domestic Regulation, "Necessity Tests in the WTO - Note by the Secretariat", S/WPDR/W/27, 2 December 2003
- <sup>xx</sup> A review of some necessity decisions and their ramifications for consumer protection regulation is provided in TACD's 2003 GATS background paper. A review of necessity cases in relation to environmental regulation is provided in the paper "Second Guessing National Policy Choices: Necessity, Proportionality and Balance in the WTO Services Negotiations", Kennett, Neumann & Tuerk; August, 2003
- <sup>xxi</sup> WTO, "Mexico-Measures Affecting Telecommunications Services - Report of the Panel", WT/DS204/R, 2 April 2004, para. 4.180, p. 60
- <sup>xxii</sup> In its submissions to the panel, the US raised questions about whether Telmex was actually directing its profits to extending universal access, arguing that Mexico seemed to be lagging behind other Latin American countries in teledensity. But the panel did not address this issue.
- <sup>xxiii</sup> WTO, "Mexico-Measures Affecting Telecommunications Services - Report of the Panel", WT/DS204/R, 2 April 2004, para. 4.303, p. 92
- <sup>xxiv</sup> *ibid.*, para. 7.183, p. 182
- <sup>xxv</sup> para. 7.388, p. 255
- <sup>xxvi</sup> *Reuters News Service*, "WTO gambling decision 'deeply flawed' - Zoellick", 25 March 2004
- <sup>xxvii</sup> WTO Council for Trade in Services, "Disciplines on Domestic Regulation in the Accountancy Sector", S/L/64, 17 December 1998
- <sup>xxviii</sup> WTO Working Party on Domestic Regulation, "Report on the Meeting Held on 15 May 2003", S/WPDR/M/21/Rev.1, 25 June 2003
- <sup>xxix</sup> Negotiators have decided there will be no illustrative list of legitimate objectives attached to any new Article VI.4 disciplines.
- <sup>xxx</sup> The TACD 2003 GATS background paper reviewed the Sarbanes-Oxley Act's individual provisions, summarizing industry arguments that have questioned their effectiveness and suggested less burdensome alternatives.
- <sup>xxxi</sup> *The New York Times*, "The Auditors Never Noticed", 24 December 2003
- <sup>xxxii</sup> *The Washington Post*, "Two Audit Firms Charged With Aiding Clients' Fraud", 21 January 2004
- <sup>xxxiii</sup> Luis Abugattas Majluf, "Toward Disciplines on Subsidies on Agreements to Liberalize Trade in Services - Report Prepared for the CRNM/IDB Project", August 2002, p. 29
- <sup>xxxiv</sup> International Centre for Trade and Sustainable Development conference, "Towards Pro-Sustainable Development Rules for Subsidies in Trade in Services", Geneva, Switzerland, 10 March 2003
- <sup>xxxv</sup> WTO Working Party on GATS Rules, "Subsidies and Trade in Services - Note by the Secretariat", S/WPGR/W/9, 6 March 1996
- <sup>xxxvi</sup> WTO Council for Trade in Services, "Guidelines for the Scheduling of Specific Commitments under the GATS", S/L/92, 28 March 2001. The Guidelines state: "Article XVII [National Treatment] applies to subsidies in the same way that it applies to all other measures. Article XV (Subsidies) merely obliges Members to 'enter into negotiations with a view to developing the necessary multilateral disciplines' to counter the distortive effects caused by subsidies and does not contain a definition of subsidy. Therefore, any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article."
- <sup>xxxvii</sup> TransAtlantic Consumer Dialogue Trade Working Group conference calls with trade officials, March 2003
- <sup>xxxviii</sup> *BNA WTO Reporter*, "EU's Lamy Says U.S. Services Offer In WTO Talks 'Half Empty,' Needs Work", 30 April 2003
- <sup>xxxix</sup> WTO Council for Trade in Services, "Communication from the European Communities and Its Members States", TN/S/O/EEC, 10 June 2003
- <sup>xl</sup> The EC offer to expand the ability of foreign professionals to supply services is perhaps the offer that signifies the most change required in domestic policy.
- <sup>xli</sup> Isabel Lipke and Myriam Vander Stichele, "Financial Services in the WTO: A License to Cash In?", World Economy, Ecology, and Development working paper, September 2003
- <sup>xlii</sup> WTO Council for Trade in Services Special Session, "Report of the Meeting Held on 9 December 2002 - 13 January 2003", TN/S/M/5, 21 February 2003
- <sup>xliii</sup> Consumers' Association of Canada, "Review of Automobile Insurance Rates", September 2003, p. 11

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- <sup>xliv</sup> In theory the public insurers could continue to operate even if the market was opened to competition through GATS market access commitments. But in practice, this would likely result in foreign firms taking over the most lucrative aspects of the service, making public insurers no longer viable.
- <sup>xlv</sup> For example, the EC Request to Antigua and Barbuda states: " Under MA[Market Access], Antigua and Barbuda specifies that 'Joint Ventures are encouraged; approval must first be obtained.' EC Request: Eliminate these restrictions." Available at: <http://216.18.14.226/antiguabarbuda.htm>
- <sup>xlvi</sup> WTO Working Party on GATS Rules, "Report of the Meeting of 1 October 2003", S/WPGR/M/44, 28 October 2003
- <sup>xlvii</sup> UK Department of Trade and Industry, "Consultation on the WTO General Agreement on Trade in Services (GATS) - Government Response", 18 December 2003, para. 83
- <sup>xlviii</sup> WTO Council for Trade in Services, "Health and Social Services - Background Note by the Secretariat", S/C/W/50, 18 September 1998
- <sup>xlix</sup> WTO Council for Trade in Services Special Session, "Communication from the United States - Initial Offer", TN/S/O/USA., 9 April 2003
- <sup>l</sup> WTO Council for Trade in Services Special Session, "Communication from the United States - Higher (Tertiary) Education, Adult Education, and Training", S/CSS/W/23, 18 December 2000
- <sup>li</sup> *Business Day* (Johannesburg), "Asmal Warns Against Trade Agreement", 5 March 2003
- <sup>lii</sup> *ibid*
- <sup>liii</sup> WTO Council for Trade in Services, "Education Services - Background Note by the Secretariat", S/C/W/49, 23 September 1998
- <sup>liiv</sup> The compensation would take the form of substitute commitments, and not monetary payments.
- <sup>liv</sup> UK Department of Trade and Industry, "Consultation on the WTO General Agreement on Trade in Services (GATS) - Government Response", 18 December 2003, para. 33
- <sup>lvi</sup> For a description of these cases, see the archive of the Investment Law and Sustainable Development (INVEST-SD) Weekly News Bullet, at <http://www.iisd.org/investment/invest-sd>
- <sup>lvii</sup> WTO Council for Trade in Services, "Guidelines and Procedures for the Negotiations on Trade in Services", S/L/93, 29 March 2001
- <sup>lviii</sup> WTO, "United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services - First Submission of Antigua and Barbuda", WT/DS285, October 2003, para 11.
- <sup>lix</sup> WTO Council for Trade in Services Special Session, "Communication from Cuba, Dominican Republic, Kenya, Nigeria, Pakistan, Senegal, and Zambia", TN/S/W/3, 10 June 2002
- <sup>lx</sup> WTO Council for Trade in Services Special Session, "Communication from Thailand - Assessment of Trade in Services", TN/S/W/4, 22 July 2002
- <sup>lxilxi</sup> WTO Council for Trade in Services Special Session, "Report of the Meeting Held on 23 July 2002", TN/S/M/3, 17 September 2002. Pakistan's delegation stated: "With regard to the comment by the European Communities that their submission in document TN/S/W/3 depicted a negative assessment, he said that they had not given a preconceived opinion on the assessment but had carried out an assessment based on objective analysis. If the conclusions reached were negative, it was because that was the situation in reality."
- <sup>lxii</sup> WTO Council for Trade in Services Special Session, "Report of the Meeting Held on 4 and 10 July and 3 September 2003", TN/S/M/8, 29 September 2003
- <sup>lxiii</sup> WTO Working Party on GATS Rules, "Report of the Meeting of 13 and 14 May 2003", S/WPGR/M/42, 19 June 2003
- <sup>lxiv</sup> WTO Working Party on Domestic Regulation, "Examples of Measures to Be Addressed by Disciplines under Article VI.4", JOB(01)/62/Rev.2, 11 July 2002. The list includes: "Restrictive regulations relating to zoning and operating hours, to protect small stores."
- <sup>lxv</sup> UK Department of Trade and Industry, "Consultation on the WTO General Agreement on Trade in Services (GATS) - Government Response", 18 December 2003, para. 32
- <sup>lxvi</sup> Chakravarthi Raghavan, "Developing Countries and Services Trade", Select Books Online, 2002