The GATS Negotiations: Some Issues for Consideration

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I. Introduction

When the 146 member countries of the WTO got together at the Fifth WTO Ministerial Conference in Cancun to assess the state of the Doha Round trade negotiations,[1] the issues of trade-off between agricultural subsidies and 'new issues' eclipsed one of the more contentious problems within the WTO negotiations, namely those related to the General Agreement on Trade in Services (GATS). However, the ongoing negotiations in services trade are of central importance to the current development concerns affecting developing countries.

The GATS, which applies the basic rules on trade in goods to trade in services, is one of the most striking embodiments within the WTO of the excesses ingrained in the neo-liberal approach to economic growth. Twelve broad categories of services are covered by the GATS, namely, business services, communications, construction and engineering, distribution, education, environment, financial services, health and social services, tourism, recreation, sports and culture, transport, and "others".[2] Under these broad sectors, a total of 160 sub-categories are covered, ranging from legal and IT-enabled services to postal services, water supply and sanitation.[3]

In contrast to the earlier phase of liberalisation of trade in goods where the transformation of an agenda of trade reform- which should actually involve a rationalization and restructuring of trade rules and systems – into a full-fledged trade liberalization agenda, happened over several decades; the pace of services trade liberalisation set under the GATS agenda has been (relatively) more drastic. Services were not part of the GATT rules historically. But, when the GATS was introduced at the end of the Uruguay Round in 1994, the WTO members already signed on to a range of commitments to liberalise their domestic services sectors at various levels, with an obligation to progressively liberalize trade in services inbuilt in the Agreement .

Specifically, Article XIX (Paragraph 1) committed WTO member governments to a new round of negotiations for service trade liberalisation from February 2000. Accordingly, the negotiations for further liberalisation of services started officially in early 2000 under the Council for Trade in Services. In March 2001, the Services Council fulfilled a key element in the negotiating mandate by adopting the negotiating guidelines and procedures. Pursuant to these guidelines, negotiations are to be based on the so-called 'requests' and 'offers' process. The Doha Declaration of November 2001 endorsed the work already done and set specific deadlines for the services negotiations.

Thus, "initial" requests for specific commitments were to be submitted by 30 June 2002 and initial offers by 31 March 2003. Pursuant to the negotiating guidelines, WTO members started to exchange formal negotiating requests, which consist of lists of changes they want their negotiating partners to make to their existing GATS commitments. The deadline by which each country had to

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[1] With the accession of Nepal and Cambodia completed at the Cancun Ministerial, the total membership now stands at 148.

2 For example, energy, previously considered a good, comes under "other" services.

3 The EU's inspired definition of services coming under the GATS is "anything that cannot be dropped on your foot".

respond with 'initial offers' and state what further liberalization they were willing to undertake was March 2003.

By the end of August, about 60 member governments had tabled formal requests. Based on the requests received, countries have been replying to each other and announcing which service sectors they are prepared to open up further. However, only about 30 governments have made initial offers. This request-offer negotiating process is scheduled to proceed continuously until the conclusion of the Doha Round in January 2005. In the process, there has been enormous pressure on the developing countries to change the ownership and delivery of services in their countries in ways that are expected to increase the absolute freedom of big service providers from the developed countries.

During the Uruguay Round, developing countries were persuaded to accept the GATS on the promise of substantial positive benefits that would accrue to them from liberalised trade in agriculture and textiles and clothing. With no substantial widespread gains which have been forthcoming for developing countries after nearly a decade of promised market access particularly for agricultural exports, it is indeed fitting that the former would come together to use the impasse in agriculture to slow the pace in other areas of negotiations, including services. This is particularly so given the widespread concerns among developing countries that the GATS, through its massive deregulation and privatization agenda covering the entire scope of services, aims to secure a global market for services provision under the control of transnational corporations, including in public services.

Paradoxically, just when the Southern countries have been able to find their voice at the negotiating tables in the WTO, the former are being blamed for the impasse at the last Ministerial Conference. This in fact clearly shows how they will come under immense pressure from various quarters in the days to come. Against this imperative, this paper attempts to bring out some of the issues of concern for developing countries in services negotiations. Given the sweeping scope of the issues under the GATS negotiating agenda at the overall and the sectoral levels, the focus in this paper is on the following: the lack of flexibility for governmental regulation of service enterprises once countries have made commitments; and the significance of the links between the agreement on services under the WTO umbrella and the parallel processes of liberalization taking place through the programmes of the Bretton Woods Institutes as well as free trade agreements.

II. The Agreement

As is known, the GATS consists of: (1) a framework of rules that apply to measures affecting trade in all service sectors; and (2) liberalisation commitments which pertain only to the specific service sectors and sub-sectors as listed in each member's Schedule of commitments.

The specific commitments listed in country Schedules are the extent of liberalisation in market access and national treatment that a country is willing to provide to other WTO members. Market access (Article XVI) commitments require countries to liberalise their domestic service sector. On the other hand, the national treatment principle (Article XVII) requires that members should not treat foreign services and service providers less favourably than their domestic service products and service providers. Members may also negotiate commitments with respect to measures affecting trade in services not subject to scheduling under market access or national treatment, including those regarding qualifications, standards or licensing matters. These additional commitments are also to be listed in the Schedules.

Simultaneously, the general framework of the GATS requires members to apply the Most-Favoured-Nation (MFN) treatment to all WTO member countries, by not discriminating between service products and service providers of different countries. As each member must grant to every other member the most favourable treatment which it offers to any of its trading partner with respect to its trade rules, in actual terms, the MFN rule has the effect of consolidating liberalization wherever it occurs. However, it may be possible for a country to maintain, for a transitional period of 10 years, measures that are inconsistent with the MFN principle. But, any such exemptions have to be listed in each country's Schedule of commitments. In general, the exemption of a country from its obligations under Article II with respect to a particular measure should not exceed a period of ten years. Further, all exemptions will be subject to negotiation in each successive round of trade liberalizing negotiations.

The general obligations imposed by the Agreement are applicable to all service sectors and modes of provision. The latter has been technically termed as: cross-border movement of service products (Mode I); consumption of services abroad (Mode II); commercial presence (foreign direct investment-Mode III); and presence of natural persons (Mode IV). This essentially means that there is no exclusion of any means of service supply in any sector, be it their production, distribution, marketing, or sales and delivery. This expansive definition of the scope of what constitutes 'trade' in services, has been one of the remarkable feats of the proponents of service sector liberalisation, and sets the GATS apart from other trade agreements.

Further, the Agreement applies to all measures affecting trade in services not only involving private-sector service enterprises, but also by companies owned (or controlled) by governments. The governmental authority exclusion is of little or no practical effect, as this exemption is immediately followed by a qualifier that such "governmental services" must be supplied "neither on a commercial basis nor in competition with one or more service suppliers". It can be clearly seen that at present very few public services then qualify to be "governmental services" under this qualification, because many governments have privatised at least some of their public services,[4] this makes it difficult for governments to exempt their public services from the purview of the GATS. Together with the fact that the GATS ingeniously achieved foreign direct investment liberalization (Mode III) in the area of services, this could pave the way for the entry of foreign enterprises in the production and supply of even essential public services.

In addition, the GATS is applicable to measures taken by all levels of government, namely central, regional, and local governments or authorities. It even includes measures taken by non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.[5] Thus, only services obtained by government departments and agencies for their own use are excluded from the agenda.[6]

Thus, it can be seen that the agenda which the GATS has set for itself is comprehensive and far reaching and that the concerns of developing countries about losing national economic sovereignty are not unwarranted. Further, when we look at the various Articles of the Agreement in detail, it is revealing how a lack of national regulatory flexibility is embedded within the GATS rules.

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[4] For example, developing countries that have privatised their water supply or healthcare under the structural adjustment policies imposed by World Bank and IMF conditionalities would be unable to exempt these from further liberalisation. This point will be elaborated later on.

5 The GATS, Article I.

[6] These are also being attempted to be brought under the 'new issues' in the WTO, through "transparency in government procurement'.

II.A. The Illusive Flexibility of the GATS

It is sometimes argued that the rules on national treatment (Article XVII) and transparency (Article III)[7] together only require of each country that its trade-affecting measures be transparent and not discriminate between its trading partners. Thus, it is pointed out that even if a country were to prohibit all foreign supply, if it would make this fact public, then it would have met its general obligations.[8] However, this is a fragmentary interpretation. The supposed flexibility offered by the fact that national treatment is applicable only to those sectors in which countries have made specific commitments in their Schedules is illusive, given the various nuances of qualifications that have been built into the several Articles of the GATS. We address these issues in the following paragraphs.

1. In general, domestic service industries are protected through a range of regulations on the number of service providers/establishments, limitations of foreign equity involvement, etc. and also through policies such as the establishment of public monopolies, etc. However, all these are deemed to affect 'trade' in services through any of the four modes defined earlier. Therefore, GATS market access commitments require that countries make assurances to liberalise access in each of the above-mentioned four modes, through modifications to any such regulations. Thus, in general, regulations or policies that may be in the form of numerical quotas, monopolies, exclusive suppliers, choice of form of legal entity, limitations on foreign capital share, number of service personnel that may be employed, etc. cannot be used,[9] unless a country can specify in its Schedule, the terms, limitations and conditions for market access and national treatment in various sectors, in each of the four modes.

   Clearly, these envelop the entire range of various types of national regulations that had been historically used by both developed countries as well as newly developed countries both in the West and the East. However, it is clear that any of these measures that would have been used by countries for effective coordination and regulation of enterprises towards meeting various national policy objectives can now be applied by developing countries, only if they have been specified under "the terms, limitations and conditions for market access" in their Schedules. However, by leaving many sectors bound in their initial GATS commitments (Schedules) without specifying appropriate limitations on MFN, national treatment or market access and thus not making full use of their one-time chance to specify limitations, most governments have already deprived themselves of much flexibility in this context.

   This is because, once a country has undertaken specific commitments in various sectors, any restrictions in addition to what have been put down in its Schedule, cannot be used by the country, as Article XIX[10] calls for progressively higher levels of liberalisation. Further, unless any exemptions (to MFN treatment) are explicitly listed in the Schedule itself, the MFN principle automatically extends the commitments in that sector to all WTO members. Thus, the MFN principle and national treatment together make the GATS fundamentally imbalanced against the concerns of developing countries.

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7 Article III also requires each member country to establish one or more enquiry points from which other members can obtain information on all the domestic laws and regulations affecting trade in the services of interest to their industries.

8 See for instance, Aaditya Mattoo, 2003, Making Services Work for Poor People: Is the GATS a Help or Hindrance?, The draft for World Development Report 2004, at <http://www.brettonwoodsproject.org/>

9 These In fact, Article XVI.2.d emphasises that even economic needs test at the micro/enterprise level, for determining the total number of natural persons that may be employed by a service supplier cannot be maintained.

10 Negotiation of Specific Commitments.

2. Again, applying the same rules in a non-discriminatory manner between domestic and foreign service suppliers may not be sufficient for complying with the GATS. A reasonable interpretation of Article XVII (national treatment) would only mean that as long as the same rules are being applied equally to foreign and local firms,[11] then countries are meeting their GATS commitments. However, the WTO Secretariat has pointed out that even if the same measures are applied to all suppliers, domestic or foreign, they may be still found to be more onerous to foreign suppliers,[12] and can therefore be questioned. This is despite the fact that Footnote 10 under Article XVII clearly emphasizes that no country needs to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers. But, the above example reveals the scope for variable and broad interpretation. Such readings then could potentially lead to disputes and reduce the flexibility of countries to apply or implement their national treatment conditions.

3. GATS also put strict constraints on domestic regulations (Article VI) in the service sector not only at the national level, but also at the regional level, and the smallest administrative unit. It has been pointed out that the restraints on domestic regulation being developed by the GATS Working Party on Domestic Regulation would go further in limiting flexibility in government regulations, regardless of how non-discriminatory they were. Article VI requires that all domestic regulations of general application affecting trade in services be administered 'in a reasonable and objective way' and that measures relating to qualification requirements, technical standards and licensing requirements do not constitute "unnecessary barriers to trade in services".

   To ensure this, the Council for Trade in Services was given the mandate to develop any "necessary" disciplines to require that measures over services are "no more burdensome than necessary to ensure the quality of the service."[13] This evidently leaves the scope for very broad interpretation. The examples of regulations to be disciplined provided by Gould (2002) clearly indicate the range of non-discriminatory regulations at risk.[14] Indeed, if WTO members amend the GATS to include new constraints on domestic regulation, governments at every level would be under increased pressure to respond to similar objections. This is at the same time when countries like the US (by listing relevant exceptions in its Schedule) have ensured that its commitments in the services sectors do not apply to or extend to the constituent states and/or local authorities that may have overlapping jurisdiction.[15]

   As Gould (2002) has dealt with in detail, among the options under consideration for new GATS disciplines on domestic regulation is a requirement that WTO members only adopt the "least

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[11] Paragraph 2 of Article XVII clearly states that "A Member may meet the requirement of paragraph 1 (that is, national treatment) by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers."

[12] See Ellen Gould, 2002, Draft TACD Background Paper on Trade in Services, October 2002.

[13] The GATS Working Party on Domestic Regulation set up with this mandate began its work in 1999. It took over from the GATS Working Party on Professional Services, which had completed a draft agreement to constrain - to "discipline" in WTO terms - regulation over the accounting profession. See Ellen Gould, 2002, opcit.

[14] As pointed out by this analyst, many of the examples on the list beg the question of how the terms should be interpreted and by whom. "*Inadequate* information available to market participants", "*too many* licenses required", "changes without *adequate* prior notice", "*long* delays", "*overly complicated* licensing procedures" - these complaints can be legitimate in some countries that require domestic regulatory reform. However, in many countries these kinds of objections have been raised by business to challenge or stall genuine consumer protection/public interest legislation. Ibid.

[15] See Chakravarthy Raghavan, 2002, GATS Council extends time for safeguards agreement, at www.twnside.org.sg

trade restrictive" of their regulatory options. This discipline would commit WTO members to extensive deregulation, as they would have to revise their regulations to ensure that only the regulatory tool that restricted commercial activity the least was adopted.[16] The fact that the GATS defines "trade" very broadly to include investment (Mode III) is key to understanding the potential implications of this wording. Being obligated to only do what is the "least restrictive" to investors could tip the regulatory balance very heavily in favor of their commercial interests, paving the way for a range of investor-to-state disputes, and hampering whatever little regulatory flexibility has been left in unbound sectors.

4. Article VII on recognition requires that a member recognises the standards or criteria granted by another country for the authorisation, licensing or certification of its service suppliers. This may be achieved through harmonisation or otherwise, either through bilateral or multilateral agreements or autonomously. However, given that the member cannot accord such recognition in a manner which would constitute a means of discrimination between countries (in the application of its standards or criteria), this essentially means a move towards harmonisation or the adoption of common international standards and criteria, which in turn takes away the flexibility of developing countries to formulate their own procedures.

   Given that it is only now that developed countries like the US and the EU are themselves able to come to some sort of a consensus on mutual recognition of qualifications and licensing requirements in services like accountancy, it is clear that the ability of developing countries with sparse experience to match the pace of harmonisation that is taking place between developed countries will be low. Further, although Article VII provides that a member shall not accord recognition in a manner which would constitute a disguised restriction on trade in services or as a means of discrimination between countries, the nature of the harmonisation process which provides for the interests of 'substantial trading partners' would naturally give service suppliers from the countries entering into such harmonisation negotiation a definite advantage over other countries in each other's markets, and thus constitute a form of restriction on Mode 4 in the case of business services. This is also because developing countries are likely to adopt the common standards agreed to by major trading partners owing to various reasons, and this would mean that the differences in their development stages would not be amply accounted for in such a process.

5. Article VIII on rules governing monopolies and exclusive service suppliers, and Article IX on other business practices restraining competition also reduce the flexibility available to countries by imposing new burdens on monopolies and exclusive service supplier arrangements. Monopolies (such as in postal services, electricity supply, and water distribution) and exclusive supplier arrangements (common in health care and other social services) are thus inconsistent with GATS provisions and must be listed as country-specific exceptions in the covered sectors. Further, governments wishing to designate new monopolies in listed sectors are required to negotiate 'compensation' with other member governments or face retaliation. Since it prohibits limits on the number of service suppliers, it has been pointed out that even limits that are non-trade-related such as those imposed to conserve resources or protect the environment may also be called into question, when particular interest groups are involved. In the case of other business practices too, if any other member requests, a member has to enter into "consultations with a view to eliminating the practices" that have been deemed anti-competitive by another member.

[16] See also Scott Sinclair, 2002, Facing the Facts: A Guide to the GATS Debate, at www.citizen.org

6. In the case of any modifications to its specific commitments (Article XXI) also, there is hardly any flexibility since a member wishing to modify or withdraw any commitment in its Schedule can do so only after three years have passed since that commitment came into force. Further, another member whose benefits may be affected by the modification or withdrawal of a commitment by the first member can demand "compensatory adjustment" (which will then have to be made on an MFN basis). And if the modifying country should find itself unable to make the compensatory adjustments as determined by arbitration, the affected member may modify or withdraw substantially equivalent benefits.

   Again, if any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of the Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU (and therefore may be liable to 'compensatory adjustments'). In building up such 'compensation negotiations' into the GATS Article on market access (Article XVI) and other Articles (Articles VIII, IX, etc.), the GATS has eroded developing country governments' ability for appropriately flexible rules for taking care of even the fundamental needs of large sections of populations.[17]

7. Article X on negotiations on emergency safeguard measures, originally mandated by GATS to be taken up and completed before the negotiations on specific commitments, have been extended many times, and the deadline for concluding these negotiations has now been extended to March 15, 2004. Safeguards are emergency actions intended to provide temporary protection against "fairly traded" imports that cause or threaten to cause serious injury to domestic producers. In terms of the Council for Trade in Services' decision, until emergency-safeguards rules are agreed and in place, any GATS Member, in terms of Article X.2 of GATS, will be free to notify the Council and modify or withdraw a specific commitment already made. However, given that this is possible only after a period of one year from the entry into force of a commitment, it is also limiting in its scope for protecting against unanticipated emergencies.

   Further, as Raghavan (2002) has pointed out, there are other practical problems in invoking the safeguard measures. For instance, even when there is adequate data in the goods sector, the large number of disputes that have arisen in that sector shows the difficulties of invoking safeguards rules to curb imports. By contrast, according to him, the UN-approved manual for collection of national services data will even not record the data and directions of trade in terms of the GATS definition of trade in services and this would make resorting to safeguard measures

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[17] Note that this effective irreversibility of exisiting commitments is imposed on developing countries at the same time as the powerful developed countries are modifying their previous commitments in matters of less serious concern. For example, WDM (2003) points out that the US, in its initial offer tabled on 9 April 2003, is doing precisely what developing countries have been told they cannot do (that they cannot review previous commitments). It is pointed out that in both 'entertainment services' and 'libraries, archives, museums and other cultural services', after recognising the potential problems created fr public libraries and other cultural institution, the US is adding a restriction to its existing commitment in order to exclude 'non-profit, public and publicly-funded entitites'. Similarly, with the tabling of its offer, the EU has made clear its intention to make changes and modify the commitments of Austria, Sweden and Finland in order to make them more restrictive, based on the argument that these were not members of the EU in 1994 when the first set of GATS talks was finalised. The latter is especially considered significant, given that it is the first time that Article XXI will be used. Interestingly, according the WDM article, GATS proponents are anxious that the EU's modification goes ahead smoothly as this would enable them to demonstrate that GATS is not irreversible and argue against the critics of GATS that it is indeed possible to modify commitments. However, as rightly pointed out, it is clear that synchronising a powerful regional trading bloc's table of GATS commitments is not the same as for example, a developing country trying to withdraw its financial services from the GATS rule. See WDM, 2003, GATS: From Doha to Cancun, September 2003 at <www.wdm.org.uk>

even more difficult in the case of services.[18] Further, it is not easy to see how and what kind of safeguards can be applied against "commercial presence" mode - an euphemism for foreign investment - in a number of service sectors. The only mode of supply against which it is easy to apply such safeguards is "movement of natural persons"[19], and there is understandable reluctance and opposition from several developing countries (which have a comparative advantage in this mode) to reach an agreement that would strengthen the hands of 'importing' countries. Thus, the lack of consensus on what constitute emergency safeguard measures and under which all conditions they may be applied, still remains.

8. Already, under Articles XI and XII of the GATS, members cannot apply restrictions on international transfers and payments relating to its specific commitments, except under serious BOP and external financing difficulties or threat there of, or at the request of the Fund. Significantly, this is a crucial Article of the GATS, whose financial and macroeconomic implications have not been amply highlighted in the many analyses of the GATS.

   It can be seen that the GATS has achieved integration of the various parallel processes of financial sector liberalisation going on outside the WTO into its provisions, by building in restrictions on the use of capital controls into the GATS Agreement. A crucial way in which this has been achieved in non-financial service sectors is through the inclusion of Mode 3 or foreign direct investment into the scope of activities coming under 'trade in services' and thus, the GATS. For instance, if a country has undertaken market access commitments in the supply of a service through either cross-border trade in services or FDI (commercial presence), Footnote 8 under Article XVI on Market Access clearly emphasizes that the country is thereby committed to allow such movement of capital as an essential part of these modes of service supply. Thus, market access commitments in particular sectors (through specific commitments, Article XVI) in effect also lead to concomitant commitments on capital account liberalisation (in those sectors).

   Given this, Articles XI and XII can be seen to confer overriding powers to the IMF and its assessment of the BOP situation of a country, when it comes to determining the need for restrictive measures. To the extent that this enables smooth coordination of the rights and obligations of members under the Articles of Agreement of the Fund and the provisions of the GATS, this is welcome. However, the major disadvantage of this lies in the fact that the Fund has failed several times even in the most recent past to correctly anticipate BOP and external financing problems in several developing countries. A substantial amount of useful work is now available on the problems with IMF's crisis prevention measures. Thus, leaving the assessment of the need for intervention to this institution which has failed repeatedly in predicting crises, takes away the power of the member country to utilise exchange controls in an appropriate manner to protect their financial stability and economic interests. With the Bretton Wood institutions remaining unchanged in their ideologically-driven advocacies on financial liberalisation, such powers given to the IMF within the GATS take away whatever flexibility that could have been there for members to introduce BOP-related restrictions.

   This is all the more serious given that progress made on crisis prevention measures including prudential regulations in the financial sector remain patchy and there is as yet any lack of consensus on the crisis resolution mechanisms that can be adopted to protect countries from financial and economic collapse in the event of a crisis. Even though there is nothing that

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18 Chakravarthi Raghavan, 2002, opcit.

19 That is, supply by the service supplier of a Member country through the presence of natural persons of that Member in the territory of another Member.

prevents a member from adopting restrictive measures on international transfers and payments in sectors where no specific commitments have been made, it is clear that such measures will have to be necessarily linked to concerns other than protectionism.

9. Article IV, which calls for measures to be taken by all members for securing the greater participation of developing countries in services trade, has been widely claimed by GATS proponents as meeting the needs of developing countries and providing additional flexibility to them. Thus, it warrants a detailed discussion.

II.B. The Promise of Increased Participation of Developing Countries

Article IV on 'increased participation of developing countries' includes the following:

a. A call for giving priority to the liberalisation of market access in the modes of supply and service sectors of export interest to developing countries, with special priority to be given to the least-developed country members.

b. The improvement of their access to distribution channels and information networks.

c. The strengthening of their domestic services capacity, efficiency and competitiveness.

First of all, the scope for developing countries to achieve any of the above is constrained by the fact that such increasing participation by developing countries through any of these is not automatically guaranteed by the Article, as is sometimes made out to be. Rather, this has to be negotiated with other Members to obtain specific commitments from them for the preferential treatment supposedly allowed by Article IV.[20] Surely, this then does not give much power to the developing countries to alter the existing power balance with developed countries, in terms of any assured special and differential treatment.

Recognising the need for developing countries to maintain higher levels of protection (both overall and in individual sectors) in order to develop their service industries, Article XIX (on Negotiations on Specific Commitments) provides that the process of negotiations shall provide due respect to the national policy objectives and the level of development of individual members, in general and in specific sectors. It accords "appropriate flexibility" to developing country members to open fewer sectors and liberalise fewer types of transactions in line with their level of development. However, even though it allows developing countries to attach to the access that it offers, such conditions as might be needed to achieve the objectives referred to in Article IV, "progressively liberalising market access" is an integral part of the Article.

Thus, the repeated rounds of negotiations going on in the services sectors take place in such a manner that WTO members bargain with each other not only about making liberalisation commitments in new services (that have been left unbound), but as well as about removing limits they might have originally placed on their commitments. In the Doha Round, offers have to be submitted against the backdrop of pre-existing schedules and would have to normally address (in response to such requests): (i) the addition of new sectors; (ii) the removal of existing limitations or the introduction of bindings in modes which have so far been unbound; (iii) the undertaking of additional commitments under Article XVIII; and finally (iv) the termination of MFN Exemptions. Thus, even countries who have managed to retain any regulatory measures towards meeting some

[20] Article IV states: The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III (Specific Commitments) and IV (Progressive Liberalization) of this Agreement.

of their development objectives will face increasing pressure during the ongoing negotiations on specific commitments. It has been pointed out that even the restrictions the industrialized countries themselves apply domestically, such as the "needs test" (applied by the states in the US) before licensing banks and other services, are also being sought to be blocked in the developing world. Further, developing countries face parallel liberalisation pressures at various political economic levels, as will be discussed later on.

Another channel through which the 'increased participation of developing countries' is to take place is through the strengthening of domestic and export supply capacity of developing country service sectors. Clearly, this essentially relies upon the ability of developing countries to upgrade their technological capacity continuously. However, while the provision in Article IV.1.a apparently provides for various types of technical assistance programs, this is immediately qualified by the clause which states that such strengthening of domestic services capacity and competitiveness of developing countries is to be achieved through "access to technology on a commercial basis", in effect rejecting the scope for demands for more reasonable/concessionary access to technology for the developing countries.

Further, given that the requirements for capital goods and other intermediary goods integral to developing "efficient and competitive" service industries are increasingly sophisticated and technology-intensive; this is likely to bring an increase in associated capital goods imports into developing countries. Barring a few service sectors like tourism and Mode IV activities, which have the potential to generate better net returns for the host country, most services sector exports have also shown similar import dependency due to various reasons like: pressures for harmonisation; technological reasons, or simply customisation needs for adapting to the need of customers across the border; and the structure of deals such as sub-contracting.[21] This is relevant for the majority of service sector activities, since developing countries' capital goods industries are not well developed and they also lack the capacity to upgrade and ramp up to the higher technological needs at the pace in which their service sectors are being opened up. This brings out the crucial links between the goods trade liberalisation that has been undertaken under the GATT, the erosion of developing countries' industrial policy tools under various obligations due to Agreements such as TRIMs and TRIPs, and the liberalisation in service sectors being advanced through the GATS. At a macro level, the consumption pattern which such activities would generate would lead to further import dependence for developing countries and could offset any potential gains that developing countries may gain through increased participation in services trade.

Another manner in which developing countries' capacity for making use of Article IV provisions is undermined is by the requirement in Article XXI (Modification of Schedules) for governments to offer compensation to other WTO countries whose service suppliers are allegedly adversely affected if they withdraw previously-made commitments. This is similar to the so-called balance of benefits principle embodied in the nullification and impairment of benefits clause (GATT Article XXIII), which is integral to the WTO and is meant to achieve "a careful balance of the interests of the contracting parties". The rationale is that if the benefits accorded to any member should change, the balance must be restored by providing for compensatory adjustment in the obligations which the Member has committed to. But, this rule gives leeway for countries to raise disputes when they perceive that their benefits are substantially reduced, even in the absence of a direct violation of the WTO law. All these could make the implementation of Article IV provisions difficult, making it only

[21] The service exporter can insist that provision of a particular service or technology transfer is tied to the import of particular machines or equipment by the service importer.

a façade put up by the developed countries in addressing the concerns of the developing world in service sector liberalisation.

More crucially, the very agenda of 'compensation negotiations' leads to a sharp eruption or aggravation of the conflicts of interests among various social groups in a country's services sector, and thus reduces government manoeuvrability in national policy formulation. Inevitably, it will be the sectors with large-scale overt or veiled campaign power involving substantial stakes for particular business groups, who will be able to get the upper hand in the trade-offs that the government will be forced to make under such negotiations. It may be argued that a socially committed government could obtain the necessary 'sacrifices' from the interest groups in the other sector involved in the bargain. However, the kind of pressures which are thrust upon governments from innumerable angles means that within the framework of the existing market-driven paradigm of macroeconomic policy making that restricts government spending, the tendency for governments to compromise liberalization in socially-oriented sectors to obtain market access in other countries for, say, commercially viable services, may well be strong. The prospect of facing retaliation in sectors or modes of export interest to the segment of the highly educated service providers, in itself creates a sufficiently powerful domestic interest group (and thus allies for the interested foreign investors) for faster liberalization of the social service sectors.

The point is not to negate the fact that certain high value-added service segments or service providers in countries such as India do stand to gain substantially by obtaining improved market access to developed and also other developing countries' markets.[22] Rather, what is being questioned here is that currently, in that process, governments are being asked to trade-off their social sector commitments which are basic to the human development needs and in fact, human rights of the majority of their populations, in most developing and LDC countries. By building **'**balance of benefits' between nations into its agenda, the GATS tips the 'balance of benefits' within a nation against its economically and socially deprived, and in favour of segments that could do without the additional market access they would gain through such trade-offs. Unless the governments concerned become deeply aware of the trade-off that is being asked of and has the political will, this means that poverty and income inequality are bound to increase due to liberalization of the social sectors being promoted under the GATS. This is substantiated by the evidence from existing and previous experiences with privatization of public services in developing countries.

In the context of Article IV, much has also been made of the Doha Declaration, which seemingly reaffirmed the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services. However, the fact that the Doha Ministerial Declaration had pledged to reject the use of protectionism, in its very first paragraph,[23] has not been highlighted by commentators. Given that 'protectionism' is a word that has been misused by the proponents of fast-track liberalization to cover various developmental interventions that have been put in place in trade regimes across the world, this clearly reveals the insincerity with which the

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22 In fact, the acceptance of Mode 4 on the liberalisation of movement of natural persons was seen as a victory for developing countries as they could obtain access for their professionals and workers in return for reciprocal concessions in other services or goods. MNP is the only means for many developing countries to gain benefits from globalization and thus inclusion of this "mode" was what made GATS acceptable to them. However, ironically, the general findings of the studies conducted on MNP suggest that the current structure of MNP commitments under the GATS does not provide meaningful access and discriminates against the poor, exacerbating inequalities. See Rupa Chanda, 2003, "Trade in Services – Movement of Natural Persons and Human Development (IT & Health) Country Case Study – India", Paper for the Asia Pacific Regional Initiative on Trade, Economic Governance and Human Development.

23 WTO (2001), Doha WTO Ministerial 2001: Ministerial Declaration, WTO Document Code: WT/MIN(01)/DEC/1, 20 November 2001.

Doha Declaration claimed to keep the needs and interests of the developing countries at the heart of the Work Programme adopted.

In a recent paper analyzing the actual application of Special and Differential Treatment (S&DT) for developing countries in the WTO negotiations, Ajit Singh (2003) has also shown that notwithstanding all the pious references to S&DT in the Doha Declaration, the ground reality is that any such considerations are being blatantly ignored in the negotiations on services modalities which have recently been agreed.[24] Thus, while there has been ample acknowledgement of the special requirements of the developing countries, the rhetoric has failed to match the formulations in negotiating modalities and implementations.

III. Parallel Processes

The usefulness of Article IV in providing any effective S&DT treatment for developing countries in services trade has also been almost systematically undermined by the several covert and explicit parallel pressures for liberalisation operating on developing countries at various levels outside the WTO.

Under the prevailing dominant market-driven economic growth paradigm, liberalisation has often been the focal point of the conditions put forward for gaining access to external finance for developing countries, either directly imposed by the international financial institutions (IFIs), or through its impact on the 'success' of the country's economic performance in the perception of foreign investors/creditors. Thus, in several instances, developing countries have already had to liberalise significantly under the conditionalities attached to financial assistance, loans or debt relief from bilateral or multilateral donors.

Despite the supposed shift in IFIs' focus from structural adjustment towards poverty reduction and after considerable evidence establishing its effects on increasing poverty and income inequality, privatisation is one of the core policies that have endured since the days of the adjustment programs. Structural policy prescriptions (such as privatisation, labour market reforms, pension reforms, etc. previously under the tutelage of the World Bank) have also entered the macroeconomic framework of the IMF's lending programme through the Poverty Reduction Strategy Papers (PRSPs).[25] According to Chandrasekhar (2003), independent of the circumstances affecting the country concerned, PRSPs have as their medium-term goals, the realization of some combination of the following: an open trade regime based on unilateral liberalization involving removal of quantitative restrictions and reduction of tariffs; a high degree of currency convertibility; the abolition or substantial curtailment of deficit financing based on strict limits on government spending, cuts in subsidies and imposition of user charges for provision of crucial public services such as water, sanitation and primary health services; and removal or substantial dilution of any regulatory measures aimed at influencing private decisions with regard to investment, production and pricing.[26]

Thus, PRSPs, which are also necessary for countries to qualify for debt relief under the Heavily Indebted Poor Countries (HIPC) initiative, are littered with commitments to privatise. In fact,

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24 See Ajit Singh, 2003, Elements for A New Paradigm on Special and Differential Treatment, at <www.networkideas.org>

25 See Kate Bayliss, 2003, 'Privatisation and Poverty: The Distributional Impact of Utility Privatisation', Centre on Regulation and Competition.

26 See C.P.Chandrasekhar, 2003, PRSP as a Development Paradigm: A Critique and the Contours of an Alternative'. (forthccoming)

reaching the 'Completion Point' and receiving debt relief is itself made contingent upon fulfilling a range of policy conditions set by the World Bank and IMF through the PRSPs. Due to its connection to aid disbursement, privatisation is often rushed, with attention being focused on securing the deal as opposed to the interests of the end users.[27]

It is no coincidence that the IFIs, especially the World Bank, has been consistently involved in attempts to find ways of conceptually linking up their privatisation programmes with economic growth and efficiency imperatives/arguments. In parallel, the mainstream academic literature has seen a series of (neo-classical) theoretical works looking at the role of infrastructure development in countries' economic growth and the efficiency arguments in the private provisioning of infrastructure services. The co-opting of social services under the public infrastructure umbrella followed and then came the argument that even essential services are most effectively delivered when driven by economic, as opposed to social principles. Responding to growing criticism of its privatization initiatives, the World Bank currently takes on board the social importance of water and electricity, but maintain that market forces will achieve social goals – including poverty reduction — more effectively than government.[28][29].

Thus, the Bank now believes that the success in reaching the Millennium Development Goals (MDGs), particularly those related to human development outcomes, will depend not just on faster economic growth and the flow of resources, but the ability to translate those resources into basic services.[30] And the WB's latest World Development Report (2004) details precisely how this can be achieved. Continuing on its earlier tradition of endorsement of privatisation, the World Development Report 2004 aims "to provide a practical framework for making the services that contribute to human development work for poor people".[31] The report strongly promotes commercialization of public services in developing countries such as health care, education and water utilities, neglecting totally the risk to national development objectives posed by the entry of foreign private corporations into key services.[32,33] Meanwhile, the Bank has been conducting regular courses in various regions 'to address the critical need ... to build capacity in regulatory agencies which have been or are being created to manage the new world of private sector-led investment in electricity, natural gas, water, telecommunications, and transport.'[34]

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[27] Bayliss, 2003, opcit.

[28] See Tim Kessler, 2002, "Putting the Private Sector in its Place Part I", at <www.ServicesForAll.org>

[29] The WB and the IMf also take on board concerns for sustainable development, by legitimising the imposition of user fees by arguing that the latter will ensure sustainabile use of resources. For instance, the EC has sought to project its requests for water privatisation (under environmental services) in terms of sustainability of water resources and ensuring proper mechanisms for pricing, etc.

[30] See The World Bank, 2003, Public Services Research Program: Making Services Work for the Poor, Development Research Group, available at <www.theworldbank.org>

[31] World Development Report 2004: Making Services Work For Poor People.

[32] See Tim Kessler, 2003, 'Review of the 2004 World Development Report', (Citizens' Network on Essential Services) available at www.networkideas.org for a detailed critique of the 2004 WDR.

[33] Since February 2002, the World Bank has already adopted a private sector development (PSD) strategy that promotes an unprecedented expansion of private sector participation in infrastructure and social services in developing countries. The strategy could make lending to the poorest countries contingent on agreement by borrowing governments to delegate service provision to private firms or non-profit organizations. In March 2002, the World Bank also unveiled its Water Resources Sector Strategy (WRSS), which makes the privatization of water supply and sanitation, irrigation and dams a cornerstone of its new approach to development. See Tim Kessler, 2002, opcit.

34 See the South Asia Forum for Infrastructure Regulation (SAFIR), "Realizing the Promise of Private Infrastructure" at <http://wbln1018.worldbank.org/sar/>. SAFIR was developed under the aegis of the International Forum of Utility Regulation (IFUR), an initiative established by the World Bank in 1996 to build capacity and share expertise in utility

Thus, despite growing evidence from existing privatisation experiences that the WB's arguments linking efficiency and social equity have not held true, the IMF, WB and other bilateral and multilateral donors have been effectively mandating policies requiring privatisation and/or cost recovery of key functions within the public sector through various channels. The Citizens' Network has documented that in thirty Low-Income Countries Under Stress (LICUS), Independent Service Authorities (ISAs) have assumed the responsibilities of governments for provision of primary health, nutrition, education, and related infrastructure services (water supply, sanitation services, roads).[35] According to the Bank, the governments of these countries are too weak to perform their ordinary functions. It has been suggested that donor and creditor concern with corruption could eventually lead to the establishment of ISAs (or their equivalent) in other countries. Other donor/creditor channels that bypass governments to decentralize and contract out service provision include Social Funds, post-conflict funds, multi-donor trust funds, UNDP area-based schemes, etc.

As mentioned earlier, once commercialisation of essential services has been introduced in this manner, they will no longer be eligible for the exemption provided in the GATS under governmental services. Further, due to the existence of Mode III, this would lead to the entry of foreign corporations in the service provision of essential public services in developing countries. At another level, GATS will also lead to institutionalisation of these liberalisation initiatives that have been taking place in parallel.

By insisting that the borrowers carry out drastic liberalisation in their trade and investment regimes in order to be eligible for financial assistance, the IMF and the World Bank conditionalities thus typically pre-empt the "Special and Differential Treatment" (S&DT) that the WTO offers the poor nations. Meanwhile, through constant harping on technical cooperation and capacity building as the core elements of the development dimension of the multilateral trading system, the delivery of WTO technical assistance is designed to assist developing and least-developed countries and transition economies to adjust to WTO rules and disciplines, implement obligations, rather than grant them any flexibility. Indeed, the New Strategy for WTO Technical Cooperation for Capacity Building, Growth and Integration endorsed by the Doha Declaration is to mainstream trade into national plans for economic development and strategies for poverty reduction.[36] The emphasis is on coordinating the delivery of technical assistance programs with bilateral donors and the OECD Development Assistance Committee and other multilateral and regional intergovernmental institutions. In fact, in the run-up to the Cancun Ministerial, the World Bank had played a special role with regard to the poorest countries, in leading the diagnostic work on impediments to trade through the Integrated Framework for Trade-Related Technical Assistance.

In yet another instance of seeking refuge behind development-friendly phrases when confronted with the need to legitimize their policies, the WB now emphasizes 'development-promoting trade reforms' and expects to be increasingly "called upon to do a better job at integrating trade into our

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regulation worldwide. (IFUR has conducted an intensive training program for utility regulators in conjunction with the University of Florida since 1997, and since that time more than 600 people from around 90 countries have completed its two-week course.)

[35] The ISAs, which work like a multi-donor trust fund (MDTF) channeling both donor and government resources for the provision of basic services, are wholesalers, contracting with multiple channels for retail provision — private, NGO, local government — with performance at the retail level properly monitored so that cost-effectiveness can be compared. ISAs are largely autonomous from government, with high standards of accountability directly to donors. See 'Undercutting the Role of Governments: ISAs Deliver Health, Education and Water Services in Thirty Countries', Citizens' Network on Essential Services (CNES), December 06, 2002, available at <http://www.servicesforall.org>

[36] See paragraph 38 in Doha Declaration.

work with clients on country strategies and to step up our trade-related assistance—both under the Integrated Framework and in special areas such as standards and logistics". [37] This means that the pressure on poor countries to acquiesce to accelerated trade and financial liberalization agenda will only intensify, despite all the propaganda on 'development-promoting trade reforms'.

Another parallel process through which some other developing countries have already liberalised are the various regional or bilateral investment treaties and free trade agreements. Article V of GATS provides the framework ensuring that these trade arrangements are compatible with the WTO. In fact, an increasing number of developing countries are going overboard with the liberalisation of their service sectors under various bilateral and regional free trade agreements, which in many instances go far beyond their present commitments under the GATS schedules. The preferential treatment that a member extends to bilateral or regional trading partners could be in terms of access to national subsidies for R&D, regional development or environmental technology application, or tax exemptions, subsidized bank credit, etc. There is a clear danger that such preferential treatment currently being offered to only these favoured members will have to be extended to all other WTO member countries as well, if these become the benchmark in the future for extending similar liberalisation at the MFN level in the multilateral negotiations. Thus, by taking a 'GATS-plus'[38] approach in regional agreements, developing countries are jettisoning any bargaining leverage that could have been maintained when negotiating for liberalisation with countries that have more restrictive regimes. This possibility will get intensified given that the focus on bilateral free trade agreements (FTAs) by countries such as the US (and others) is on the rise in the post-Cancun scenario,[39] which inevitably has the upper hand in bilateral negotiations with individual developing countries.

IV. The Current State-of-play in the GATS Negotiations

In the current negotiating phase pursuant to the Doha Round, while virtually all WTO members have received initial requests from some 62 mainly developed and larger developing countries,[40] only about 30 countries have tabled their initial formal offers so far. These are: European Communities and its Member States, Japan, United States, Canada, Australia, Switzerland; Argentina, Mexico, Chile, Panama, Paraguay, Uruguay, Fiji, Macao, Chinese Taipei, Hong Kong, Republic of Korea, China, Iceland, Poland, Slovenia, Czech Republic, St. Christopher and Nevis, Turkey, New Zealand, Norway, Liechtenstein, Bahrain, and Israel. Of these, offers of only 12 countries, namely, the initial offers of the US, Norway, Australia, Iceland, Chile, Slovenia, Liechtenstein, and 'Conditional Initial Offers' by the EU, Japan, Canada, New Zealand, Turkey are so far available in the public domain.

The country offers that are in the public domain[41] show that most governments have (with certain exceptions in some sectors) mainly offered to lock in, or bind, existing levels of liberalization. That

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[37] See "Looking Beyond Cancun" at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/>, Sep. 16, 2003.

[38] As for instance in the case of ASEAN members.

[39] The risk of the US pursuing a unilateral approach to trade deals was underlined by its trade representative Robert Zoellick after the Cancun Ministerial when he said that the US is determined to move on multiple fronts as it has a clear agenda to keep opening markets one way or another. He suggested that the US will pursue bilateral free-trade accords with individual nations.

[40] LDCs have not yet tabled any requests.

[41] The exchange of requests as a process has traditionally been purely bilateral. It is simply a process of letters being addressed from the requesting participants to their negotiating partners. Although initially, a copy of the requests exchanged was also sent to the Secretariat for records, it was subsequently abandoned. Thus, only some of these are made public by the members involved, in spite of all the calls for increased transparency of the negotiating process. But, unlike

is, they have offered to lock in those changes that they have made to their domestic services regimes since the GATS came into effect on January 1, 1995.[42] According to the Council for Trade in Services, model coverage and depth of developed countries' initial offers to developing countries have proven to be limited and leaves much to be desired. Many developing countries such as India have also been concerned that no developed country has offered commitments on the movement of natural persons (Mode 4).[43]

The services paragraph of the draft Cancun declaration was designed to intensify and accelerate this GATS request-offer process. The First Cancun Draft Ministerial Text (July 18, 2003) called upon participants to intensify their efforts to bring the process to a successful conclusion, calling upon all WTO members to make new GATS commitments and for those countries that had not made any 'offers' (mainly poor countries with limited capacity to engage), to submit them as soon as possible. While the Text strongly emphasised these market access issues in services negotiations, it completely neglected many outstanding horizontal and rule-making issues of serious concern for developing countries.[44] Horizontal issues include assessment of the liberalisation process and modalities for least-developed countries (LDCs) and rule-making issues include emergency safeguards, subsidies, government procurement and domestic regulation. The 'Negotiating Guidelines and Procedures' adopted in 2001 had mandated that negotiations on these horizontal and rule-making issues should be completed before the market access negotiations were to be concluded.

For example, Article XIX:3 of the GATS requires the Services Council to carry out an assessment of trade in services, in overall terms and on a sectoral basis, with reference to the objectives of the Agreement, including those set out in Article IV:1. In fact, the guidelines provide that the negotiations "shall be adjusted in the light of the assessment". However, assessment issues have not been addressed adequately in the special sessions and actual assessment of trade in services has not progressed to any significant degree that would enable the developing countries to first assess and understand the impact of the liberalisation they have already undertaken in their existing commitments, before making further commitments. Developing countries had thus submitted calls for assessment of the development impacts of services liberalisation as required by Article XIX. This call was not included in the Draft Negotiating Text.

Meanwhile, with the adoption of the modalities for the treatment of liberalisation measures taken unilaterally by WTO members since the previous multilateral negotiations ('autonomous

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a request, an offer is normally presented in the form of a draft schedule of commitments. While requests are addressed bilaterally to negotiating partners, offers are traditionally circulated multilaterally, as in an offer, a participant is actually responding to all the requests that it has received. That offer would also be open to consultations and negotiation, not only by those who have made requests to the participant concerned, but also any other participant in the negotiations.

[42] See International Centre for Trade and Sustainable Development (ICTSD), 2003, Doha Round Briefing Series: Cancun Update, Vol 2 (13), at <www.ictsd.org>

[43] In fact, it is increasingly observed that many developed countries are currently forging new laws aimed at preventing foreign companies and workers from accessing jobs in the West or are in fact attempting to prevent their companies from outsourcing jobs/contracts. In the US, five states are considering legislation to ban outsourcing of local government data-processing contracts to companies in developing countries. Congress is also studying a bill that will prevent foreign software companies from working at the American offices of their US customers. In Britain, Labour MPs and rightwing columnists have called for measures to protect British industries such as call centres and low-level IT development; two sectors which are increasingly relying on outsourcing to developing countries.

44 See Bridges, 2003, 'Services: Developing Countries Call For Stronger Focus On Horizontal Issues, Mode Four', 28 August, 2003 and Scott Sinclair, 2003, 'Rough Trade: A Critique of the Draft Cancun Ministerial Declaration', Canadian Centre for Policy Alternatives, September 5, 2003.

liberalisation') in March 2003, the Council for Trade in Services asserted to have fulfilled one important part of its Doha negotiating mandate.

The guidelines have also mandated that negotiations on GATS Article VI:4 (domestic regulation), XII (government procurement) and XV (subsidies) be concluded before the conclusion of the market access negotiations. On the first two items, the ministers were to take stock of the negotiations at Cancun. Meanwhile, as mentioned already, the deadline for the conclusion of the negotiations on 'emergency safeguard measures' has been extended again to 15 March, 2004.[45] Given that the current round of mandated service negotiations are to conclude as part of the single undertaking agreed to in Doha, and that the deadline for this is 1 January, 2005, the crucial importance of concluding the negotiations of these 'outstanding issues' for the developing countries is clear.

Thus, disappointed with the lack of any attempt to address any of these critical rule-making negotiations in the first Cancun draft, a number of developing countries had submitted a proposal for revising the first draft of the ministerial text in early August. This proposal recognized progress made in the market access component of the services negotiations, and "urged participants to intensify [...] their efforts and improve the quality of their offers, particularly in sectors and modes of supply of export interest to developing countries especially Mode 4". Regarding rule making, the countries proposed that these "negotiations shall be concluded in accordance with their respective mandates and deadlines, noting especially the deadline of 15 March 2004 for emergency safeguard measures, on which we urge Members to intensify their efforts towards a successful conclusion".

In response, some changes were integrated into the final pre-Cancun draft ministerial text released on 24 August. It called upon "those participants that have not yet submitted their initial offers to do so as soon as possible." It would also require those countries that have already tabled offers to submit "improved offers" by a deadline to be agreed at Cancun, most likely before the spring of 2004. The draft text also called on members to complete the negotiations on rule-making under GATS Article VI.4, [Domestic Regulation] X [Emergency Safeguards], XIII [Government Procurement], and XV [Subsidies] in accordance with their respective mandates and deadlines. The Special Session of the Council for Trade in Services shall review progress in these negotiations by 31 March 2004." However, the reference to Mode IV was still limited to "We also note the interest of developing countries, as well as other Members, in Mode IV." While there was little of concrete substance on S&DT in the earlier Text, the new draft text explicitly states the existence of a "text to be added on modalities for the special treatment of least-developed country Members depending on the outcome of the ongoing consultations". According to various sources, both developing and developed countries seemed satisfied with the new text, except for Bangladesh, India and Egypt mentioning the need for stronger language on mode four in the last General Council meeting.[46]

The draft Cancun Ministerial Text (13 September, 2003) submitted to ministers in Cancun was a duplication of the above, while additionally welcoming the adoption of the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, which had been agreed upon by then.[47] The Modalities for the Special Treatment of LDCs, adopted by the Council for Trade in Services (CTS) in September 2003, repeat all the general provisions for special

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[45] It must be noted that emergency safeguard measures are already included in other Agremments such as the GATT and the Agreement on Agriculture.

[46] See Bridges, 2003, 'Services: Developing Countries Call For Stronger Focus On Horizontal Issues, Mode Four', 28 August, 2003.

[47] See Draft Cancún Ministerial Text 24 August 2003 and Draft Cancún Ministerial Text Second Revision, 13 September 2003 available at http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm

treatment that have already been included in the GATS text. [48] Apart from rhetoric, most of these may effectively be of not much use to the LDCS at least in the short-to-medium term, as they do not have many service sectors which are developed enough to begin accessing developed country markets. Again in Paragraph 8, it is given that members shall take measures, in accordance with their individual capacities, aimed at increasing the participation of LDCs in trade in services. Three of the measures referred to are all programmes intended to promote developed country investment in LDC service sectors, in the pretext of building their domestic services capacity and enhancing their efficiency and export competitiveness. The reference to export and import promotion programmes also imply that the strategy being advocated is that of service sector export promotion dependent on import promotion, rather than indigenous development-(just as that has been advocated and adopted by many developing and LDC governments in the case of FDI-led import-dependent manufactured goods export promotion).

Currently, unlike in other WTO bodies - such as the Committee on Agriculture, where negotiations are at present suspended - members have been meeting from 29 September to 6 October in sessions of the Council for Trade in Services (CTS) as well as its subsidiary bodies. Not much movement has, however, been seen in members' positions or on the issues since the fifth WTO Ministerial in Cancun in mid-September.[49] Two special (negotiating) sessions of the WTO Council for Trade in Services (CTS) were held on 6 October and 9 October. The current CTS meetings basically covered routine items - the 9 October meeting mainly focused on a report by the OECD on the Assessment of Trade in Services. The major concern delegates expressed was related to a lack of clarity as to how negotiations should proceed. The Heads of Delegation (HOD) meeting reconfirmed that the regular Council would meet as planned in December. However, no decision was taken on potential future negotiating sessions in the services area.[50]

V. Conclusion

Thus, given the fact that many contentious issues in the GATS have not been sorted out, and would have probably been rushed through to unwarranted compromises by developing countries, the manner in which GATS-related issues got sidelined at the Cancun Ministerial, seems to have given some breathing space to the developing countries to put their act together on the GATS. But, given that all the four major developed countries, the US, EU, Japan and Canada are united in their push for broader and deeper GATS commitments,[51] negotiations to broaden and deepen GATS coverage will make services one of the centrepieces of the new Doha Round of negotiations. To the extent that the Agreement on agriculture remains the key for the developed countries to gain leverage for efforts to get the developing countries to the negotiating table after Cancun,[52] if and when there is a breakthrough in agriculture, there could be overwhelming pressure for all governments to concede substantially in the forthcoming services negotiations. This will become intense as the submission

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[48] Modalities for the Special Treatment of Least-Developed Country Members in the Negotiations on Trade in Services JOB(03)/184/Rev.2

[49] Bridges Weekly Trade News Digest, 8 October, 2003.

[50] See 'GATS: Discussions Continue Without a Finish Line on the Horizon', Bridges Weekly Trade News Digest, 15 October, 2003.

[51] This unity on the services often overtakes all the outsatanding issues of trade conflicts between them, especially between the US and the EU, for instance in the case of steel, in the case of GM food, etc.

[52] In particular, the EU has been bargaining for service sector liberalisation by developing countries as a quid pro quo for dismantling the farm subsidies provided through its common programme on agriculture.

of initial offers is the real start of the advanced stage of bilateral negotiations [53] and the final deals will be struck only at the conclusion of the Doha Round negotiations before 1 January, 2005.

We have clearly seen that the mere affirmation of the right to regulate contained in the GATS preamble, does not fully protect governments' right to regulate. It has been pointed out that this language has strictly limited legal effect.[54] More specifically, the national treatment, market access, and MFN rules combined together stand to ensure that the scope for government to 'regulate' services or service suppliers without becoming incompatible with some provision of the Agreement or another, may become nil for all practical purposes. The accompanying clause on overall GATS/WTO compatibility ensures that "governments retain their freedom to regulate under the GATS only to the extent that the regulations they adopt are compatible with the treaty". This then typically opens up - at the overall level itself- the scope for many regulations to be called into questioning by foreign investors from any country.

Further, given that the negotiations on the GATS are tightly linked to other areas of negotiations because of the linkages with other areas of the Doha Agenda, including the 'new issues' of investment, competition policy, government procurement and trade facilitation, developing countries will be making a strategic error of judgment if they were to consider services negotiations in isolation. It is crucial that developing countries approach their participation in future negotiations by considering issues on trade in services in relation to these areas as well. Only through such an approach will developing countries be able to ensure that other trade rules besides the GATS that will be part of the "single undertaking" are compatible with the development and export goals that the developing countries set on the basis of their current assessment of the GATS.[55]

For example, any inclusion of investment negotiations in the WTO will have to be addressed and carried out in the most careful manner, as it should not take away whatever limited scope for developmental restrictions that exists currently in the services sectors through limited commitments undertaken so far by developing countries. Presently, several countries have numerous conditions while allowing market access, which are intended for ensuring that the entering foreign firms are required to apply various national developmental objectives by involving domestic firms (through joint ventures, etc.), thereby paving the way for effective technology transfer and managerial practices. An investment agreement, which seeks to take away such rights from national governments in the name of national treatment, will lead to further exacerbation of the difficulties already faced by developing countries and LDCs in meeting their developmental targets. The inclusion of investment can thus jeopardize whatever little flexibility has been retained in the GATS for service sector regulation.

Further, apart from the Fund and the Bank, the rules and agreements that are formulated by the regional development banks, ILO, WIPO, UN bodies, World Customs Union (WCU), International Council for Standards (ICS), Bank for International Settlements (BIS), Basel Committee on Banking Supervision, etc. also have a bearing on the WTO negotiations, as the agreements reached in each of

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[53] Once the initial offers have been submitted, "that is when negotiators will come to Geneva and have each time a long schedule of bilaterals with other delegations and the whole place becomes like a "beehive". Delegations will spend less time in Council Meetings and more time negotiating with each other. The submission of offers could also trigger submission of further requests, and then the process continues and becomes a succession of requests and offers." See 'Technical Aspects of Requests and Offers', Summary of presentation by the Secretariat, WTO Seminar on the GATS, 20 February 2002, at <www.wto.org>

[54] See Scott Sinclair, 2002, opcit.

[55] This is because the format of the "single undertaking" will determine the final assessment, in January 2005, of the overall outcome of the Doha negotiations. See UNCTAD, March, 2002.

these bodies with a mandate for rule-making in specific areas are often taken on board at the negotiations on the relevant WTO agreements and become the template for negotiations. Therefore, it is imperative that developing countries abandon the casual approach which is often adopted by their representatives at these bodies and identify and understand the links carefully, analyse the implications of the undertakings they sign up separately under these or other similar international legal bodies, and ensure the insertion of adequate safeguard measures for protecting basic developmental needs and maintaining sovereignty into such agreements. [56]

Given that negotiations will always be based on further relaxations of existing commitments,[57] it is of utmost importance that developing countries and LDCs take the most gradual approach possible, since going back on commitments once liberalised will always prove very difficult or almost impossible (for the various reasons discussed earlier). Further, agreeing to binding commitments also has consequences other than that were probably envisaged previously. An important example is the current call for modalities for pre-establishment commitments in a possible investment agreement within the WTO to be predicated upon a GATS-type approach. [58] Thus, it is crucial that wherever possible, developing countries should retain whatever restrictions they have already specified in their Schedules and bargain for appropriate conditions to be added to their Schedules (while making commitments in sectors that had been so far unbound), making use of the existing provisions of the GATS.

We have also seen how from various directions, members continuously face intense pressure to compromise whatever flexibility remains, in successive rounds of negotiations to expand GATS coverage and in parallel processes. Therefore, even where specific limitations have indeed been entered by countries, they will endure the succeeding rounds of "progressive liberalisation' only if their governments are committed, visionary, and technically capable to withstand the pressures of negotiations under intense pressure.[59] Therefore, in the imminent negotiations on services, especially in the context of the negotiations on the 'outstanding issues', developing countries must take active participation. Further, taking a united stand will be crucial as never before so that they can ensure that positive elements are put into place in support of their service sector development, for meeting social obligations of the state, and for maintaining economic sovereignty.

But, even as the negotiations on the GATS offer-request process gets prolonged, bilateral free trade agreements are being used by several major developed countries for immediate acceleration of liberalization of services and investment rules. In the most recent example, the US House approved a FTA with Singapore in July. It is noted that since trade in goods between the two is already 99 percent duty-free, the focus of the present FTA is on removing barriers to services and investment. Meanwhile, the pressure to abandon capital controls is also being put on countries seeking bilateral agreements with the US. While those countries eager for access to US trade and investment might readily agree to such terms, it would be a major mistake as developed countries could use such bilateral deals as benchmarks for broader international rules under the WTO.

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[56] It has been pointed out that it is often the case that developing countries are made to realise the import of the various legally binding agreements that they have signed up, only when they are at the WTO negotiations, when cited by member/s on the other side of the negotiating table.

[57] See Paragragh 10 under 'Modalities and Procedures' in WTO, 2001, Guidelines and Procedures for the Negotiations on Trade in Services, doc. S/L/93, 29 March 2001. "The starting point for the negotiation of specific commitments shall be the current schedules, without prejudice to the content of requests".

[58] Doha Declaration, work programme for the Working Group on Trade and Investment talks of 'modalities for pre-establishment commitments based on a GATS-type, positive list approach'.

[59] A central part of this is a condition that the country should not be over dependent on external finance, which in its own makes it extremely vulnerable to a range of pressures, including the inability to trade off the potential supply of external finance with the required developmental policy objectives of the state, as discussed earlier.

Thus, concerted efforts to defend developing and LDC interests at each of these levels are required, if their legitimate concerns are to be taken care of. With the sovereignty in economic policymaking of countries coming under constant pressure, only informed cooperation among the developing countries and LDCs will ensure sustained campaign.[60] In this sense too, the sudden acceleration in the number of FTAs being signed across-the-board, does not augur well at all in taking a common stand. But, given that services trade is one of tremendous breadth and scope and will assume increasing significance in the years to come for developing countries' economic growth, developing countries have to endeavour to bring to the negotiating table their own positive agenda for change, reflecting their individual and collective concerns.[61, 62]

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[60] Towards this, developing countries will gain much to integrate the ongoing work on: public goods; the human rights understanding of basic economic rights; the linkages between sustainable sovereign debt, poverty reduction, attainment of the Millennium Development Goals (MDGs), and the policies of the Bretton Woods institutions (for example, the macroeconomic policy prescriptions through PRSPs, financial sector liberalization, etc.); etc. being undertaken at the UN and other organizations.

[61] In this context, individual developing countries will have to also determine how to balance the interests of their services exporters and domestic service providers, a was highlighted in the discussion on domestic conflicts of interests .

[62] Meanwhile, one major ally for developing countries against privatization under the GATS may well come from the public sectors in the EU and other developed countries, as their own governments seek to negotiate and sell off their services to each other's private sectors. In many of the developed countries, the future of several service sectors as fully public services are undergoing substantial debate and are helping create awareness about the pitfalls of privatization as they increasingly question the reliability of full and equal coverage for people by markets.