FACTS against MYTHS

VIKAS ADHYAYAN KENDRA October - November 2003 INFORMATION BULLETIN

In the Service of Corporates & MNCs*: The Myths Behind GATS

COMMENT

Since the 90s there has been a sea change in the economic life of the industrialized countries of the North. The 19th century notion of free trade in goods has been taken over by free trade in services in the 20th century with 'industrialisation' changing to 'servicisation'. Public services have rapidly become key components in the transnational production chains shaping today's global economy affecting almost all aspects of the natural world — energy extraction and production, transport, travel and tourism, construction, distribution, waste disposal and sewage, water and the environment. International trade negotiations are used as tools to formalise and institutionalise this process, providing wide-ranging legal rights to MNCs investing in such services.

On the agenda of the GATT Uruguay Round of trade negotiations the trade in services had been billed "Top Priority". The idea of trade in services had however been first introduced in 1982 by the US, in the negotiations of opening the markets of the South for foreign trade. The US intentions had become clear even in 1981 by the then US Trade Representative Bill Brock The following year at the GATT Ministerial Meeting the US pushed this issue still further by proposing a North-South Round. This process ended in April 1994 at Marrakesh at the conclusion of the Uruguay Round leading to the creation of WTO with the signing of the Agreement under Art.IV that included GATS that came into effect in 1995. GATS is the first multilateral, legally binding agreement that covers trade and investment in services. Its mandate is the `liberalisation of trade in services'. That is, the dismantling of government barriers to the privatisation of public services. The aim is to make it impossible for governments to operate public services on a not-for-profit basis, without the participation of corporates. GATS will allow the WTO to restrict government actions relating to public services through a set of legally binding constraints. Any government breaking the rules of the WTO will face the threat of sanctions.

On a closer look the emergence of such a regime is not surprising. After all, according to the European Commission, "The GATS is not just something that exists between Governments. It is first and foremost an instrument for the benefit of business". The WTO itself defines GATS as: "Under GATS, if a country allows foreign competition in a sector, equal opportunities in that should be given to service providers from all other WTO members. This applies even if the country has made no specific commitment to provide foreign companies access to its markets under the WTO".

"Services" are basically activities that like any other good or product can also be bought and sold. Unlike other goods, however, services cannot be picked up and carried away. For instance, banking and insurance, travel and tourism phone bills, among other services. "Services" are associated with everything the public need and everything they elect governments to do. A service is produce of human activity aimed to satisfy a human need and which does not therefore constitute a tangible commodity. There are many types of services, ranging from heart surgery to road construction, electricity transmission to education, and childcare to water purification and conservation. Countless people deliver services vital to the daily lives of people and in turn, many jobs are directly tied to the provision of services to others. Although a recent development the trade in services is the fastest growing sector in international trade, experiencing an unprecedented boom and offers rich pickings for wily multinationals. About one-fifth of the global trade is trade in services – a global market worth $1,350 b. – a market predominantly controlled by industrialised countries of the North. In the 90s its annual growth rate was 6 per cent and that of the South a mere 0.42 per cent but which comprises an increasingly important sector, constituting a high proportion of GDP (around 50% in 2001 and higher in some of them: 66% in Singapore and Uruguay) and contributes to growth, employment and provision of basic needs.

The relevant point here is that there is great deal of ambiguity on what constitutes "pro-development" regulation of the service sector. After all, GATS — itself a highly complex and confusing process — affects various types of development policies (in the South) e.g. national treatment, market access, bank payment and transfers, environment and the rules on domestic regulation. Ratchet-like tightening of constraints on government regulatory authority is built into the very structure of the agreement, as members have committed to expanding GATS through "successive rounds of negotiations...aimed at achieving a progressively higher level of liberalisation".

GATS is an indirect approach of introducing an agreement on investment since one of the modes of trade in services (See Box on pg.3) imply not only opening up commercial services (such as banking and insurance) to foreign investment but, more significantly, vital social services. Thus, the GATS Agenda is very similar to other efforts, such as the failed Multilateral Agreement on Investment (MAI) to give greater rights to MNCs at the expense of democratic structures.

On the other hand the pro-active state intervention to affirm its obligations to the people is being replaced by a market paradigm as the only provider and the "new solution" to the problems of underdevelopment of the South. Accordingly, the so-called Quadrilateral governments – the US, Japan, EU and Canada — pressurize the South for guaranteed irreversible access to the markets of the South. Further, the GATS process involves resorting to the so-called "Request and Offer" method in which all countries make their initial "requests" to any other WTO member country. Such requests details the sectors and sub-sectors that the requesting country wants the other member State to open up, and the restriction that need to be removed. For instance, one among such "requests" was made to the Government of India by the EC[1] During the GATS negotiations in July 2002. The EC demanded virtually unlimited and unconditional access to services sectors like urban water supply, sewage and waste water service; energy distribution services including oil, gas and electricity; retail sale of fuel oil, bottled gas and wood; postal services; wholesale and retailing; construction of roads, highways, bridges, dams, buildings, etc., tourism; rail and road freight services; financial service many others. Their demand also stressed further privatisation and commercialisation of public services such as education and health care, and further de-regulation of publicly regulated sectors such as media, publishing, telecommunications, energy, transport, financial, postal and even services like water utilities. These negotiations are to be closed by January 2005.

Public Services have been classified into 3 major principles and into 4 types depending on their mode of provisions (see box on pg.3).

Prior to the GATS negotiations the powerful US lobby group, the Coalition of Service Industries along with the European Services Forum and the US Trade Representative and European Commission identified the following priority areas for trade liberalisation: health care; hospital care; home care; dental care; child care; elder care; education; museums; libraries; law; social assistance; architecture; energy; water services; environmental protection services; real estate; insurance; tourism; postal services; environmental protection services; transportation; publishing; broadcasting and many others.

GATS: Principles & Modes

The three major principles are i) the most-favored nation treatment ii) market access (Art.XVI) and iii) national treatment (Art.XVII). The first refers to a country that must treat the service supplier of another member-country no less favorably than it does the service supplier of any other member-country. Market access obligations imply that a country is bound to allow Foreign Service supplier to enter its market for providing services. The last refers to treating foreign supplier under the same terms and conditions laid out for domestic suppliers.

Apart from these principles there are also 4 modes through which trade in services operate that differs substantially from trade in goods. These Modes are:

Mode 1: Cross Border Services that are delivered to consumers in another country by a person in the provider country (e.g. call centres);

Mode 2: Consumption Abroad. The service consumer comes to provider country to avail of service (e.g. a tourist; or an international ship getting repaired in workshop in provider country);

Mode 3: Commercial Presence. The service provider opens up a company in the consuming country. (e.g., legal firm of UK opens office in India and starts legal consultantcy)

Mode 4: Movement of natural persons. Temporary movement of persons from provider country who go to a consumer country for delivering services (e.g. computer software engineers from India visiting the US on assignment)

These developments are highly ominous and chilling with serious implications for the South. However, central to the whole issue is the serious threat that GATS poses to India. GATS mandates unrestricted space to corporates and TNCs in the national economy forcing the government to accord national treatment to their services in all respects whether in the form of law, regulation, or administrative action including the production, distribution, marketing, sale and delivery of services. In essence, what all this amounts to is that (whilst implementing the three principles)

- There will be no control over foreign equity participation,
- There will be unlimited access to TNCs to invest in any area of the national economy
- Foreign trading monopolies , etc will be allowed to be established in the country and
- Even unlimited entry of foreign experts invited into the country by TNCs

This has naturally led to concerns worldwide among networks, NGOs among others viz.,the Common Front on the WTO, the Commonwealth Public Service Union, Friends of the Earth International, Alliance for Democracy, Save the Children, Third World Network,, International Restructuring Educational Network, the Global Policy Forum, the Public Services International, among others. When viewed in the context of the new phase of economic globalisation and in the second generation of economic reforms underway — the State withdrawing from public utility services, that is, abdicating its responsibility of providing such services to the people is no longer seen as such but as a function of the market — the implications of GATS is all the more ominous. That is, natural resources become tradable goods and access to them is priced and controlled by profiteers affordable to those with the purchasing power but beyond the means of the vast majority of the poor in rural and urban areas. In all this, international agencies, governments and even TNCs design and implement policies to reduce the role of the State in all aspects of life on the one hand and yet on the other demand free access to natural resources of the host country for commercial exploitation by corporates.

In line with its neo-liberal perspective of the global economy and privatisation as its key mantra the World Bank aptly chose the theme, "Making Services Work for Poor People" for its Annual Report 2004.This report further reinforces the way services, under "public responsibility", will be made to open up to private sector participation and eventual ownership under the facade of economic liberalisation and investment. To understand how all this can happen and how even the Indian government could allow this removal of the most basic of human rights without even – or informing – its citizens makes it necessary to go to the roots of the global trading system, examine what the GATS issue is all about, and unravel such false claims that GATS is a "development friendly" trade agreement that favours the poor of the South.

MYTH: Being pro-development the GATS Agreement benefits the South.

FACT: This myth is prevalent among many Governments of the South as well as several global NGOs. GATS, however, poses particular problems for poor counties around the world!

The fact that liberalisation need not be done at one stroke but gradually over several rounds of negotiations – in effect allowing domestic reforms and external openings to be in step – does not make it any more "development friendly".

Firstly, it is due to the very nature of services and the inclusion within it of social concerns like health, education and sanitation where governments have a responsibility to ensure universal access, while other services include utilities essential to the development of the economy, such as telecommunications. Secondly, through the provision for "commercial presence" (foreign investment) as well as cross-border trade, as modes of supply of services, GATS influences government policy for MNCs and TNCs located in the domestic economy. Thirdly, core WTO principles require governments to treat their domestic counter-parts (even though limitations can be put in countries' schedules of commitments), and treat all foreign suppliers equally. Yet, the GATS rules extend beyond this, restricting government's ability to make rules even if they apply tao both domestic and foreign firms. For instance, the adverse implications for the South in implementing the three GATS principles. (see above)

Similarly Art.VI on any type of environmental law or regulation can clearly obstruct – if not entirely halt – reasonable efforts to protect the environment. The EU proposal to include water as subject to GATS discipline would expand the access of the water MNCs like Vivendi, etc., to this vital resource. Market access limits the right of governments to restrict the amount of water taken from lakes, rivers and groundwater sources.

Access to potable water is a basic human right and regulating access to water is often entrusted to local authorities that supply water through public or communities. A number of large predominantly European water companies, such as Vivendi Universal (now Veolia Water operating from Bangalore, Jamshedpur, Agra, Kolkata, Chennai, Delhi and Visakapatnbam), Monsanto, Suez, Bectel, Coca Cola and Pepsi are already operating in India.Some 30 cities in Maharastara, Karnataka, A.P. and Rajhasthan are bidding their respective municipal water supply to a few mega MNCs.

Privatised and commercialized supply of water are already depriving the poorer and marginalised part of society of their basic right to water and pushed further towards deprivation. Water thus ceases to be a social asset as the process of corporatisation is inevitably accompanied by commercialisation/commodification.

The resulting increased pressure on water sources will also lead to environmental damage.

Furthermore, the range of sectors and sub-sectors requested to be opened by EC has serious implications as well. For instance, opening up of the retailing trade. This has already opened the way for huge shopping chains have entered the country, which is wiping out livelihoods of lakhs of small shopkeepers and vendors. In this city of Mumbai itself state of the art shopping malls continue to mushroom.This is what has happened in Thailand after it liberalized its retail sector. However, the most serious implications are in sectors like water. A further illustration of what such a agreement implies relates to the Power sector. Since signing GATS in this sector, India has signed over 20 MOUs with foreign firms. But most of these pacts are flawed and favouring these firms. Some of these negative features are

- projects are awarded without the proper bidding process;
- 16 per cent rate of returns in dollars is guaranteed on the highly inflated capital investment;
- Borrowings are allowed at very high rates of interests as in the case of the MNC, ENRON, to whom the rates that were offered were even higher than the existing borrowing rates! In 1994 tahe Central Government allowed ENRON to borrow at 13% without caring to note that such a rate would be tahe bench mark for lending to any Indian firm in the future. Also in the Enron case the state electricity boards were compelled to purchase all power produced, irrespective of demand.

Equally disturbing but less known is the link between services and the ENRON scam — that is the role-played by the audit and accounts firm, Arthur Andersen. Prior to the revelations of this scam a major attempt had been launched to harmonise the accounting rules.[2] Until its collapse, ENRON was a major player (directly through the US Government and indirectly via the Coalition of Service Industries (See Above) and its lobbying with WTO officials and delegations). Five accounting firms have a virtual monopoly on the audit of roster of the US companies listed on the stock markets, and had enough political clout to prohibit conflicts of interests. These firms often audit the accounts of companies while also acting as paid financial consultants.[2]

Clearly, the claim that GATS is "pro-Development" is sheer nonsense. At the most it may be as friendly to development as the 17th-18th century British Navitation Acts were to American colonies which sparked off the Boston Tea Party and the American Revolution!

World Trade System: The Origins

MYTH: Multilateral trade agreements are the result of the exponential rise, in recent times, in foreign investments.

FACT: Global trade agreements are not a recent phenomenon. Its roots were first laid after the Second World War, to forge a multilateral agreement on foreign investments.

In 1947, a draft Charter to establish a global trading system was first presented at a conference in Havana, Cuba, called the International Trade Organisation (ITO). Along with the IMF and WB, the ITO represented the third institution for promoting post-war economic cooperation. The ITO was to be created with a very different mandate to today's WTO. It was to promote orderly global trade under the jurisdiction of the UN. The pursuit of trade was to explicitly take into account important social considerations, including full employment and the human and social rights guaranteed by the UN's Universal Declaration of Human Rights. The draft document known as the Havana Charter not only addressed trade issues but had provisions to deal with FDIs. The ITO even had the right to regulate TNC capital to ensure it served these social ends. The Havana Charter however was not ratified and so the ITO was stillborn unable to play a decisive role in the investment policies of governments worldwide.

Earlier proposals on the Charter by the US had extensive right for investors including the obligation of host countries to extend national and the most-favored-nation. But these measures were strongly opposed by other countries. For instance the then Czechoslovak government was not in favour of giving German investors the same status as investors of other countries. As a result, the US had to dilute several rights granted to foreign investors in its earlier proposals. The Charter also had to face the wrath of the US MNCs who were incensed on the provision in Chapter V regulating anti-competitive policies of the private corporate enterprises. In comparison to the present situation, the scope of investment policies under the Havana Charter was rather limited. For instance, the Charter did not incorporate any rules related to performance requirement and dispute settlement mechanism between government and foreign investors.

Despite the fact that the US Government was one of the main forces behind the Havana Charter, the US Congress refused to ratify it. Consequently, the proposal for establishing ITO was given up and the General Agreement on Tariffs and Trade (GATT) was launched as a temporary measure. For nearly 4 decades since its inception, GATT never brought investment issues under its rubric and prudently maintained the dividing line between trade and investment issues.[3] It was only at the Uruguay Round of the GATT negotiations (1986-94) that the investment issue was brought within its framework.

The failure to establish the ITO was one of the major reasons which facilitated a shift from multilateral to bilateral investment agreements. In the 1950s and 60s, bilateral investment agreements were the dominant instruments of investment agreement.

MYTH: GATS has space for flexibility in-built in its framework and does not impinge on the vital interests of the South.

FACT: The so-called flexibility space that GATS is both ambiguous and uncertain. This makes it difficult for countries to be flexible and undermines effective government policy-making. For example, there is uncertainty over what measures are covered by the "de facto discrimination" rules of Art.XVII; uncertainty over exactly what constitutes "government procurement"; uncertainly over whether the rules on "domestic regulation" will apply across the board or only to specific commitments and therefore whether and how government can list limitations to these rules; uncertainty as to what kind of regulations would violated a "necessity text" requiring measures to be "no more burdensome than necessary"; and uncertainty over how GATS applies to subsidies.[4]

There is also confusion over the exact coverage of the standard market access and national treatment rules. For example, if GATS rules so clearly exempt all public interest regulations – as claimed by the EU – why did 4 EU countries feel that need to specifically list a limitation to their commitments in the hotels and restaurants sub-sector allowing them to "protect areas of specific historic and artistic interest"?

If similar rules on domestic regulation, market access, de facto discrimination and subsidies are transposed into a new investment agreement – and there is every reason to believe they will be – the uncertainty will simply be transferred to more parts of the economy. The flexibility of countries to regulate in the manufacturing, mining, agriculture and fisheries sectors will be undermined by not knowing what is WTO legal. And effective development policy will be left hanging on the interpretation of future WTO panels

Another problem with this claim is that policies become locked-in. The GATS does have a procedure (Art.XXI) for governments to withdraw commitments but this can only be initiated 23 years after the commitment is made and requires compensation, normally in the form of some other kind of liberalisation, which then requires the consent of other WTO members that may be affected. This makes it very difficult, and perhaps impossible for governments to withdraw commitments. Thus, once a country makes GATS commitment, there is effectively no turning back. This has serious implications for democracy and the right of future governments to change the direction of economic and social policy.

On this issue of lock-in, it is worth bearing in mind a case from Thailand. In a submission to the WTO in 2002, Thailand described how it liberalised its retail sector, attracting investment from European retail chains. This has had both benefits and drawbacks. Over time, the Thai govenment realised that it needs to intervene in the market to address the adverse impacts on its domestic retailers. Critically, it has not made any GATS commitments in retail so it is relatively free to develop whatever mechanisms are appropriate.

The lessons from this case are twofold. First, it is clearly possible to attract investment without making GATS commitments. Second, all governments make mistakes and it is much easier to go through an iterative regulatory process if GATS commitments have not been make. Unfortunately, the EU has targeted the Thai retail sector and the Thai government seemed to have had second thoughts about implementing strong regulations.[4]

The past history of industrilised country service provision also demonstrates the need to avoid locking-in policies. Some industrialised countries started off providing services through disparate private companies, but then changed the form of service provision through a series of regulatory developments. For instance, the UK railways

- in the 19th century had over 120 private railways ;
- in 1921 a Government act allowed these to be merged into 4 big companies;
- in 1947, the railways were nationalised;
- in 1993-1996, the railways were privatised (including infrastructure)
- in 2002, the ownership of the tracks and responsibility for maintenance were put in the hands of a 'not for profit' company;

Making full GATS commitment is a prescription for just one dominant model – private, profit-driven service provision. Real flexibility allows governments to learn from experience and allows future governments to change policies. The GATS denies this, and there is every reason to think that a similarly strict withdrawal process will be included in any new investment agreement. This will, over time, ensure that the South is unable to re-regulate investment in response to changing circumstances, changing governments or evidence that a particular policy is failing.

The third but important problem is that the flexibility governments can exercise in the GATS, and their ability to choose exactly when and how to liberalise, is dependent on a fair process conducted amongst equals. This is not the present case in the WTO – the South are put under intense pressure by economically and politically dominant WTO members such as the US and EU.

In theory, the WTO is a place where the South can group together to increase their bargaining power but the bilateral "request-offer" process in GATS makes such strength in numbers difficult, if not impossible.

This problem is exacerbated by the lack of capacity in poor countries to adequately deal with the scope of GATS. It has been reported that single developing country negotiators — often responsible for covering a wide range of different, and very complex, WTO agreements – are going into bilateral GATS negotiations against 12 or so industrialized country experts, each specializing in just one part of one WTO agreement.[4]

It is therefore asking people to be very politically naïve if they are expected to believe that bilateral GATS negotiations are simply a friendly one-to-one chat between a rich and poor country official discussing the relative human development merits of different possible GATS commitments. Pressure is part and parcel of the process and a country's GATS "flexibility" is therefore, to some extent, relative to its political and economic clout.

Clearly, given the unequal power equations between countries of the North and the South, the latter has been compelled to undertake treatment commitments over time by narrowing down the flexibility available to them. For instance, as pointed out above, the EU "Request List" seeks removal of a wide range of regulatory measures in several sectors (e.g. telecommunications, environment and financial services).

MYTH: The interests and concerns of the South whilst opening up various sectors of their economies, towards trade liberalization, are protected under Art. XIX of GATT Treaty.

FACT: The reality is just the reverse! This was evident as soon as the WTO came into being.

The services that were opened up were those that were highly capital and technology intensive – in which the advanced countries have a distinct competitive advantage. Service areas, like consultantcy and construction, in which India has a comparative advantage, find no mention at any time. Worse still the annex on "Movement of National Persons Supplying Services" states that the Agreement shall not apply to national persons seeking access to the employment market of a Member..."

The North is constantly advocating free movement of goods, services, capital, technology, etc., but when it comes to the unhampered flow of labour across the countries, it erects new barriers to repel labour, including skilled personnel, from developing countries. One cannot talk about free markets and free capital flow and yet restrict free flow of labour.[5]

When the GATT Treaty was ratified, India was forced to remove all restrictions on the entry of MNCs in all sectors – banking, insurance, power, telecommunication, deep sea fishing, media, financial services, etc. The Foreign Service enterprises, not interested in national priorities, social commitments and obligations, indulged in immense profit making at the cost of social good! And India's service industry, having failed to compete with mega TNCs is totally shattered.[5]

To conclude, the Preamble and Art.IV are a sop to the South. They identify the steps to be taken but they do not contain any commitment to adopt these measures. Similarly, Art.IX pertaining to restrictive business practices of MNCs is an eyewash. It merely recognizes that certain business practices of service suppliers may restrict trade in services. But it has no specific commitment to eliminate these practices except that "Each member shall, at the request of any other member, enter into consultations with a view to eliminating (restricting) practices...".

MYTH: Binding commitment to GATS ensures the South economic growth and FDIs

FACT: There is, however, little or no evidence to this claim. According to UNCTAD – on the basis of its assessment of the impact of GATS commitments on foreign investments – there is no empirical evidence to link any significant rise in FDI flows to the South with the conclusion of GATS.[4] The World Bank reports similar findings for bilateral investment treaties (BITs), which despite being typically more ambitious than multilateral agreements like GATS, have also had minimal effect in increasing FDI flows. Noting the findings of a survey[4] of FDI flows from OECD to the South over 20 years, as well previous UNCTAD research, the WB acknowledges, "countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact". In fact, the evidence suggests that the main factors determining where companies invest in the South are the size of the economy and, for the poorest countries, natural resource endowments, not the level of government intervention or the degree and nature of multilateral commitments.

In the absence of any evidence to support this claim, the rationale for making such commitments is therefore reduced to one of "bargaining". Without any compelling economic or developmental reason to legally bind and lock-in investment policies, it only makes sense to do so if a country wants the policies of another country "locked-in" to benefit its own MNCs.

Furthermore, this drive towards further commitments is especially problematic since there is much doubt about the potential benefits of further liberalization. Though the GATS treaty demands it, a comprehensive and thorough assessment of the effects of trade liberalization, especially on the South, is still missing. Still further, negotiations on other important aspects of GATS, such as safeguard measures are not progressing.[6] Such measures would allow governments to pull an "emergency break" if GATS commitments would have detrimental effects on the national economy.

WTO investment negotiations therefore come down to some kind of national cost-benefit analysis of whether the gains of locked-in market access for a country's MNCs outweigh the costs of a country reducing its own policy space to effectively regulate investment now and in the future. However, this bargain is a particularly difficult one to strike for the South. "The exchange of reduced policy autonomy in the South for improved market access in the North is a bad bargain where development is concerned."[4]

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* The acronyms MNC (Multi National Corporation) and TNC (Trans National Corporations) are often used interchangeably. However, there are differences between the two. A Company that has commercial or business interests across the whole country is a transnational company. An international company is one that is collectively owned by a number of nations or groups belonging to different nationalities. Multinational corporations are very large international companies with branches, subsidiary companies or production units in several countries. For instance, Coca-Cola, Pepsi, Ford, etc. Further, a transnational corporation (TNC) repatriates its profits to other countries and an international company interferes with the profits of other States and then multiplies it.

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Facts Against Myths is a bi-monthly bulletin of factual information on a number of development myths and fallacies, etc, including information against alien development models, paradigms and false concepts on caste, creed and gender.

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