



CHAPTER 13

GENERAL AGREEMENT ON TRADE IN SERVICES

The provision of services has become one of the most important determinants of global GDP and trade. Thus it has critical implications for human development. Efficient and equitable infrastructure and social services are crucial to countries' competitiveness and people's well-being. Excluding public services, services account for more than 60 per cent of GDP in industrial countries and 50 per cent in developing countries (Corner House, 2001).

Services are also the fastest growing component of international trade, jumping from US\$0.4 trillion in 1985 to US\$1.4 trillion in 1999—equal to almost one-quarter of global trade in goods and about three-fifths of foreign direct investment flows (Mashayekhi, 2002). In 1997 industrial countries accounted for about two-thirds of trade in services (exports and imports).

From a development perspective the General Agreement on Trade in Services (GATS) is one of the most important agreements in the World Trade Organization (WTO). The agreement regulates the cross-border flow of trade and investment in services and provides important opportunities for developing countries. But it is not without problems. The human development impact of the agreement will depend on its implications for WTO members' ability to formulate development policies (policy space) and on whether the potential of several of its articles is realized.

FEATURES AND STRUCTURE OF THE AGREEMENT

The GATS provides a legal framework for trade in services, defined to cover a range of areas including transport, investment, education, communications, financial services, energy and water services and movement of persons. The agreement also calls for the negotiated, progressive liberalization of regulations that impede trade and investment in services. Negotiations within this framework could have major implications for human development.

The inclusion of trade in services in the Uruguay Round was largely due to initiatives by transnational financial and telecommunications corporations to include investment in the General Agreement on Tariffs and Trade (GATT). While this provoked resistance from developing countries (box 13.1), the eventual compromise

Box 13.1 THE GENERAL AGREEMENT ON TRADE IN SERVICES:**HISTORY AND WHERE WE ARE NOW***History*

Trade in services was first covered by international trade agreements during the Uruguay Round, but the history of such discussions dates to the late 1970s. At that time the US aimed to expand GATT rules to facilitate the expansion of the global operations of transnational corporations within a predictable and universal contractual framework. The concept of trade in services was invented for this purpose. With a few exceptions, developing countries did not support the idea of bringing trade in services into trade negotiations, because they thought that doing so was a veiled attempt to introduce investment into the negotiations.

Their concerns were heightened by the US negotiation mandate through the 1984 Trade and Tariff Act, which lumped services and investment together under 'trade'. Developing countries accepted the inclusion of trade in services in the Punta del Este declaration of 1986 only on the condition that negotiations on trade in services would occur separate from those on trade in goods, with a clear development orientation. The first meetings on services concentrated on defining 'trade in services'. Industrial countries argued that the presence of a supplier in the foreign market, through some form of investment, was necessary for most services.

At the Montreal midterm ministerial meeting in 1988 it was agreed that the definition of trade in services should include movement of factors of production where such movement was essential to suppliers. This was perceived as a victory for developing countries because it was initiated by a group of them, including Argentina, Colombia, Cuba, Egypt, India, Mexico, Pakistan and Peru. Developing countries had been trying to establish symmetry between capital and labour, and this was a step in that direction. But this definition did not cover permanent establishment or immigration—only activities characterized by specificity of purpose, discreteness of transactions and limited duration.

Between the Montreal and Brussels ministerial meetings (in 1990) much work was done to refine the definitions both of trade in services and of 'barriers' to such trade. The definition was drawn up to cover 'the supply of service by a service supplier of one Member, through commercial presence in the territory of any other Member'. Measures restricting market access and covering all modes of supply were listed in article XVI of the GATS. It was decided, at the insistence of developing countries, that national treatment should be a subject for negotiation of specific sectoral and subsectoral commitments.

The structure of the GATS reflects proposals by developing countries. There had been considerable discussion about whether the commitments should be in the form of a 'negative list' (meaning that schedules would be comprised of measures that each country wished to maintain that were exceptions to a common set of rules) or a 'positive list' (where the schedules would set out the actual access and national treatment commitments that each member was willing to accept for each service sector included). The negative list was seen as infeasible for a number of reasons—the most important being that there was no agreement on a common objective or target. It was also felt that a negative list would be unmanageably long, inevitably including mistakes and oversights, in addition to automatically including new services emanating from technological advances. However, for each sector included on the positive list, all barriers to market access and deviations from national treatment would be bound.

Where we are now

At the end of the Uruguay Round it was agreed to continue negotiations on three sectors and one mode of supply (movement of natural persons) under the GATS. Agreements have since

been reached on basic telecommunications and financial services, resulting in substantial liberalization commitments—especially in the form of access to investment (see box 12.1 for a brief history of investment discussions). Maritime transport, which was not completed in the first round of negotiations, was included in the 2000 negotiations. Commitments on the movement of natural persons are limited in scope (see below). Thus these sectoral negotiations did not provide reciprocal benefits for developing countries.

At the end of the Uruguay Round the GATS also left open for future negotiations articles on emergency safeguard mechanisms, government procurement and subsidies. Negotiations on these issues were not completed in the first round and so have become part of the new round. Negotiations in the new round involve two phases: a rule-making phase during which rules for services on subsidies, safeguards and government procurement are negotiated, and a request and offer (market access) phase during which members negotiate further market access. During this new bargaining phase countries are expected to negotiate on a bilateral basis with specific sectoral requests and offers. The market access phase was formally launched in April 2002 and started with the June 2002 special session of the Council for Trade in Services. Member countries are expected to table their initial offers by March 2003.

Source: Gibbs and Mashayekhi, 1998, 1999; CIEL, 2002; Woodroffe, 2002; WTO, 2002; UNCTAD, 1994.

was a four-mode classification system. The ‘modes of supply’ or categories of service delivery regulated by the agreement are:

- Cross-border supply (mode 1), covering services supplied ‘from the territory of one Member into the territory of any other member’—such as services provided by international postal or telephone companies.
- Consumption abroad (mode 2), covering services provided ‘in the territory of one Member to the service customer of any other Member’—such as services provided to tourists.
- Foreign commercial presence (mode 3), covering services supplied ‘by a service supplier of one Member, through commercial presence of any other Member’—such as the establishment of branches of banks in host countries or the acquisition of foreign companies.
- Presence of natural persons (mode 4), covering services supplied ‘by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member’—such as services provided by foreign technicians or workers temporarily employed in host countries.

The GATS provides a framework for countries to select sectors and subsectors that they will subject to principles of market access (article XVI) and national treatment (article XVII), and to lay down conditions for such access and treatment.

The design of the GATS stands out among WTO agreements in several ways. For example, it includes both general disciplines that apply to all service imports and specific commitments to be listed in country schedules, with application only to certain sectoral measures that a government explicitly agrees to cover. The general commitments, to be accepted by all parties, include most-favoured-nation treatment, trans-

Box 13.2 Overall Coverage of the General Agreement on Trade in Services

Application to government measures. According to its article I:1, the GATS applies to measures taken by member governments at any level and in any form, including laws, regulations, administrative decisions— even unwritten practices affecting trade in services. The agreement also applies to non-government bodies exercising powers delegated by any level of government (article I:3.a.ii).

Application to means of supplying a service internationally. The four modes of the GATS system regulate all possible means of international service provision, including government action. Through this feature the agreement covers not just traditional cross-border trade in services but also all possible means and sources of service provision.

Exceptions. None except for services supplied in the exercise of government authority (as well as certain services in the air transport sector). Article I:1.3.c of the GATS stipulates that services supplied in the exercise of government authority must not be provided on a commercial basis and must not be supplied in competition with one or more other suppliers. This exclusion is often pointed to as evidence of the agreement's flexibility. But the scope of this exclusion may be quite narrow, because many 'public services' involve competitive and commercial (such as fees) aspects.

Source: WTO, 1994, 2001; OECD, 2001; Sinclair and Grieshaber-Otto, 2002; CIEL, 2002.

parency rules and increasing participation of developing countries (box 13.2).¹ Specific sectoral commitments involve market access and national treatment.

OPPORTUNITIES PROVIDED BY THE AGREEMENT

The GATS could help enhance human development in developing countries. Its 'positive list' approach offers flexibility, and several of its articles are potentially beneficial.

Sector-specific commitments and bottom-up features

Subject to specific negotiations, commitments are made on market access and national treatment for specific sectors and supply modes. The article on market access stipulates that unless a sector or mode is listed in a country schedule, there should be no limits on the number of service suppliers, the value of transactions and assets, the number of service operations and quantity of output, the number of natural persons employed and the participation of foreign capital. Except as stipulated under the most-favoured-nation principle and its exemptions of the national treatment principle under the GATS, foreign service providers should receive the same (best) treatment as domestic providers.

The positive-list approach leaves member country governments potentially free to choose which sectors and supply modes to include in their liberalization obligations (box 13.3). Each member also determines the services included in their schedules, prescribing terms, limits and conditions for specific commitments on market access and national treatment (Das, 1998a).

Box 13.3 AN EXAMPLE OF A GOVERNMENT SCHEDULE ON A MODE OF SERVICE:**CHILE AND MODE 3**

The schedule of commitment of Chile stipulates the following criteria for the granting of commercial presence:

- The effect of commercial presence on economic activity, including the effect on employment; on the use of parts, components and services produced domestically; and on exports of services.
- The effect of commercial presence on productivity, industrial efficiency, technological development and production innovation.
- The effect of commercial presence on competition in the sector concerned and other sectors; on consumer protection; on the smooth functioning, integrity, and stability of the market; and on national interest.
- The contribution of commercial presence to integration in the world markets.

Measures scheduled as limitations are:

- Minimum requirements for training and employment—such as requirements for a specific number of directors to be nationals, effective control of the enterprise by the domestic shareholders, training of local employees and employment of domestic subcontractors.
- Local content requirement—for example, a certain percentage of screen time in private film screening must be devoted to domestic films or advertisements (80 per cent local content).
- Surcharges and different tax rates—for example, a duty-free system with exemption from import duties applicable only to domestic producers.
- Access to technology—for example, a foreign service supplier should use appropriate and advanced technology, equipment and managerial experience and be obligated to transfer its technology and pass on its experience to the domestic personnel (the build-transfer-operate concept).
- Information relating to operations—for example, a foreign service provider must furnish prompt and accurate reports on operations, including technological, accounting, economic and administrative data.

When a member makes a specific commitment, it can determine (or limit) the number of persons who will reside in the country as service providers, as well as the maximum number and type of establishments needed and permitted in the country. Similarly, the agreement gives members the flexibility to levy conditions, qualifications and standards for market access and national treatment in specific sectors (table 13.1). If a government has not specified a sector in its schedule of commitments, it is under no obligation to provide market access and national treatment in that sector.

Moreover, the GATS allows governments to add further limitations to, and to withdraw from, commitments they had made previously as long as they compensate

TABLE 13.1***An example of a government schedule for engineering services***

Limits on market access	Limits on national treatment	Additional commitments
Supply mode 1: unbound	Supply mode 1: unbound	
Supply mode 2: unbound	Supply mode 2: unbound	
Supply mode 3: only through incorporation, with a foreign equity ceiling of 51 per cent	Supply mode 3: none	
Supply mode 4: unbound except as indicated in the horizontal section cutting across all sectors	Supply mode 4: unbound	

Note: 'Unbound' means that the government is not liberalizing a supply mode. 'None' means that there are no limits on a supply mode—the government pledges full liberalization and market access. These are extreme cases; qualifications and conditions exist between the two (see box 13.3).

Source: Das, 1998a, p 110.

member governments whose service suppliers may be adversely affected. The GATS contains two types of general exceptions—relating to legitimate public policy concerns and essential security interests—that also reflect its potential flexibility. In addition, article X on safeguard measures, often highlighted by supporters of the GATS, would allow governments to act in an emergency to protect or safeguard domestic service suppliers against services that threaten to cause 'serious injury'. (Negotiations on emergency safeguards, which are opposed by some industrial countries, were to have been concluded by 1 January 1998 but are still under way.)

Increasing participation of developing countries and respect for national policy objectives and development levels

Article IV of the GATS stipulates that the increasing participation of developing countries will be facilitated through specific negotiated commitments.² The article regulates three areas:

- The strengthening of developing countries' domestic services capacity, efficiency and competitiveness through, among other things, access to technology on a commercial basis.
- The improvement of developing countries' access to distribution channels and information networks.
- The liberalization of market access in sectors and modes of supply of export interest to developing countries.

Through the inclusion of article IV, the GATS recognizes the basic 'asymmetry' between industrial and developing countries in the situation of services, and especially that between least developed countries and the other member countries. The article obliges industrial countries to support developing countries in strengthening

their domestic service sectors by providing effective market access for their exports. Developing countries remain potentially free to pursue further market access by undertaking liberalization and seeking reciprocal concessions on access in sectors of export interest to them.

The article also tasks industrial country members with establishing contact points to help developing country service suppliers gain access to information on the commercial and technical aspects of the supply of services; on the registration, recognition and obtaining of professional qualifications; and on the availability of services technology. This provision strengthens the transparency obligation, which stipulates that governments should publish or make publicly available all the relevant laws and regulations related to market access and discriminatory restrictions for all service sectors (Mashayekhi, 2000a).

Article XIX, on the negotiation of specific commitments, operationalizes article IV through its part IV (on progressive liberalization). Article XIX:2 provides that liberalization should take place with due respect for national policy objectives and the level of development of parties, both overall and in individual sectors. Developing countries will be allowed appropriate flexibility to open fewer sectors, liberalize fewer types of transactions, progressively extend market access in line with their development situation and, when providing access to their markets for foreign service suppliers, attach conditions aimed at achieving the objectives referred to in article IV.

This flexibility is beneficial for maintaining the policy space of developing countries. The article enables developing country members to take measures to strengthen their services capacity—such as measures relating to technology transfer, conditions on network access for foreign service suppliers, employment requirements and other national policy measures, including subsidizing their service sectors (UNCTAD, 1994). The main challenge is to translate these provisions into meaningful commitments by industrial countries and their service suppliers.

PROBLEMS CREATED BY THE AGREEMENT: ACTUAL FLEXIBILITY

The GATS is not without problems from the perspective of developing countries, especially in terms of policy development. These problems arise primarily from its practical application and the ability of developing countries to derive full benefit from the actual flexibility of the agreement and the operationalization of beneficial articles. This section discusses problems relating to the actual flexibility of the agreement. The next discusses issues relating to the operationalization of beneficial articles.

Policy space for developing country governments requires that they have the flexibility to manoeuvre, including the ability to reverse policy decisions if necessary. The GATS potentially offers that flexibility. But this potential is difficult to realize in practice because of the time and high costs that it involves. Several

issues raise concerns about whether developing countries can benefit from this potential flexibility.

Power bargaining

Mashayekhi (2000b) argues that the actual bargaining process and imbalances in negotiating leverage between developing and industrial countries do not allow developing countries to take advantage of the flexibilities and provisions (like those in articles IV and XIX) that the GATS provides. Thus the voluntary offer process does not work properly. The request-offer modality, though preferable to other modalities on the table, imposes implicit—and even explicit—pressure to offer commitments (box 13.4). Because of this intense pressure, governments that lack the power and capacity to resist may be pushed to make rushed decisions on which sectors to liberalize and what kinds of limitations to place on specific commitments.

This pressure takes several different forms. First, an inherent pressure emanates from the nature of the agreement, even in its written form. The principle of progressive liberalization implies that a country needs to increase its liberalization commitments progressively. In the ongoing round of service negotiations, which started in March 2000, industrial countries intend to push for greater liberalization, including by developing countries. For example, the US proposal of 13 July 2000 for the ‘Framework for Negotiation’ states its challenge as the ‘significant removal of . . . restrictions [on trade in services] across all services sectors, addressing measures currently subject to GATS disciplines and potentially measures not currently subject to GATS disciplines, and covering all ways of delivering services’ (Office of the US Trade Representative, 2000, quoted in TWN, 2001, p 68). The US followed through with detailed requests to more than 120 countries in July 2002.

Second, there has been intense pressure on developing countries during the negotiation process to liberalize key service sectors. The initial specific commitments agreed to by developing countries during the Uruguay Round were made under this kind of pressure. One example often cited is the US refusal at the end of the Uruguay Round to conclude a financial services agreement. This led to two years of intense negotiations on financial sector liberalization, throughout which Southeast Asian countries such as Malaysia came under intense pressure to open their financial sectors to US and European Union (EU) service providers (TWN, 2001; Sinclair and Grieshaber-Otto, 2002; Raghavan, 1997b). Another example of this pressure in the request process is a recent EU negotiating stance: unless developing countries liberalize their banking and insurance markets, the European Union will not enlarge market access for developing countries’ agricultural, textile and clothing products.

Developing countries acceding to the WTO have found themselves in a weak position to resist such pressures. Most countries that have recently acceded, including China but also small countries such as Jordan and Oman, have schedules of concessions much longer and much more intrusive than those accepted by the original

Box 13.4 THE REQUEST-OFFER APPROACH AND THE FORMULA APPROACH

New approaches are being proposed in the ongoing round of service negotiations that would accelerate liberalization, which is already advancing too fast for developing countries. Formula approaches multilateralize request-offer processes across members, sectors and modes of supply. The purpose is to identify subsectors and commitments on market access and national treatment by mode and measure that would be assumed by all members or a critical mass. The US has proposed a formula approach in electronic commerce, while Australia, Chile and New Zealand have proposed removing all residency and nationality requirements.

Many argue that the proposed approaches—such as the cluster, formula, horizontal modalities or even negative list approach—may change the nature of the GATS. Contrary to the request-offer approach, the formula approach, which may result in a switch (at least implicitly) to a negative list approach, does not allow for gradual liberalization. Most developing countries have opposed the formula approach and also oppose making their schedules uniform.

Some additional proposals have been developed for application across all members, without regard to their level of development. Two such proposals are the reference paper on basic telecommunications and the annex to the understanding on financial services. In the annex, for example, most developing countries decided to follow the GATS approach rather than the formula and negative list approach. But the formula approach could be useful in cases where substantial commitments have been made—in mode 3, for example, for tourism, telecommunications, financial services and professional and business services. It could also be useful for developing countries to adopt a formula approach in mode 4 on the basis of a proposal by Pakistan centred on removing the economic needs test based on occupation, simplifying visa and work permit regimes and overcoming barriers posed by qualification standards and licensing requirements.

Source: Mashayekhi, 2000b; UNCTAD, 2002.

developing country members of the WTO. In this context it should be recalled that all countries were required to negotiate a schedule of commitments on services as a condition for WTO membership. In the current negotiations, however, they need not make further commitments unless these are judged to be in their development interest or are made in return for effective applications of articles IV and XIX or meaningful reciprocal concessions in other sectors.

Third, there is significant external pressure on developing countries, especially indebted countries, to liberalize their services sector and develop privatization schemes to generate resources. The International Monetary Fund (IMF) and the World Bank have asked developing country governments, as part of the conditions for loans or debt relief, to privatize state enterprises and impose user fees on services essential to poor people (through cost recovery programmes), such as education, health care, water and sanitation. While this policy has recently been reversed for user fees in education, the power imbalance between developing and industrial countries remains critical in determining whether the GATS can deliver its flexibility in practice.

Problems in actual reversibility

Governments need to retain some important domestic regulations that are potentially inconsistent with the GATS and may wish to add others as development needs arise or change. Despite the potential flexibility provided through horizontal limitations (provisions applying to foreign suppliers of all services that have been scheduled) and specific limitations in country schedules, it is difficult if not impossible for developing country governments to take advantage of this flexibility in practice. Horizontal limitations are determined when initial schedules are prepared, and it is difficult for a developing country to add a new one (for a more detailed discussion of this difficulty, see Woodroffe, 2002 and Sinclair and Grieshaber-Otto, 2002, p 30 ff). Limitations to specific commitments are complex and can be more problematic for developing countries. Like horizontal limitations, these limitations must be determined while making the initial commitments, and while a member country may add new limitations after its initial commitments, this is arguably difficult.³

Most developing countries, especially the least developed ones, lack crucial data and information to assess which sectors and subsectors to limit in their schedules and what kinds of regulations to keep or impose at the time of the initial commitment. This makes the decision-making about what kinds of limitations to include in their schedules very difficult. In practice, the lack of information works against the flexibility of the GATS in three areas.⁴

First, enormous knowledge and foresight are required to determine which areas to liberalize and what kinds of limitations to include in country schedules, and there are major shortcomings in the data on world trade in services. Even rough data for assessing the value of concessions exchanged in service negotiations are not readily available to member countries. The current data on trade in services are based on the IMF's balance of payments statistics. The data set is highly aggregated and does not reflect the four-mode classification in the GATS (TWN, 2001). The UN and the United Nations Conference on Trade and Development (UNCTAD) tried to address the data issue during the Uruguay Round, but these attempts have not been sustained.

Second, the agreement lacks clarity. The GATS does not give a sufficiently clear definition of services nor of the sectors in which they fall (Woodroffe, 2002). Moreover, certain GATS provisions, such as the government authority exclusion, are undefined and untested. This implies that not scheduling commitments in a specific sector—or scheduling limitations in that sector—does not necessarily provide protection, depending on how the commitments are interpreted and by whom.⁵

Third, the GATS applies to all levels of government. In developing countries such as India local governments provide essential services and yet are often unaware of the commitments the federal government makes in international forums, even though they are bound by those commitments. Moreover, in the specific case of

India the federal government is concerned that the GATS could undermine the provision of essential services at the local level and that it will be unable to influence or contest this process. At the same time, in many cases (though perhaps less so in India) there may be a lack of communication between trade negotiators and ministries or subnational governments about existing programmes and regulations that may be inconsistent with the GATS. This structural problem may mean that reversals of commitments will be needed, but this possibility is not sufficiently recognized in the GATS.

Problems of general exceptions

Implementing general exceptions under GATS article XIV is difficult for developing countries. To successfully invoke article XIV, governments must demonstrate that any challenged measure is 'necessary' to meet certain legitimate public policy concerns, such as the protection of human health. This is difficult and costly for developing country governments, which constantly need to maintain important public interest measures and regulations and put new ones into place.

HUMAN DEVELOPMENT IMPLICATIONS OF THE AGREEMENT AT THE SECTORAL LEVEL: OPERATIONALIZING BENEFICIAL ARTICLES

Among the main impacts of the GATS is its effect on policy space for human development. The agreement puts pressure on governments to deregulate their domestic markets, privatize public entities and open their markets to the rest of the world.

The GATS has two related mechanisms that operationalize its influence on policy space for human development. First, GATS rules such as market access and national treatment have a human development impact through their effect on governments' ability to formulate domestic development policy, especially public and industrial policy. Second, GATS directly affects key sectors related to components of human development. Among these sectors, those of most interest to developing countries are public services, financial services, the movement of natural persons (mode 4) and some sectors of export interest, such as construction services.

Human development implications of the principle of market access

Market access measures have implications for member governments' ability to pursue a development strategy, especially given the imbalances in commitments between developing and industrial countries (see below). Development policy may require that governments protect some service sectors, but under the principle of market access a government that wishes to do so may be challenged. Development policy may require, for example, that a government limit the number of service suppliers in such sectors as banking or telecommunications. Or a government may wish to direct some of the savings in the economy towards industrial and agricultural producers and provide tax breaks to domestic firms, as was done in successful East

Asian and Latin American economies—thereby limiting the amount of savings controlled by foreign-based banks. Such measures will require that the government have the flexibility to at least regulate the number of service suppliers and the value of transactions or assets.

The national treatment principle and the priorities of development

A vital part of the investment strategy in successful developing economies (such as those in East Asia) has been the creation of an enabling environment for promising domestic companies in key sectors. To achieve this, governments have needed to ensure, for example, that the banking sector favours domestic firms in allocating credit. Similarly, an important part of an industrial strategy is requiring foreign investors to use local suppliers, hire local staff and transfer technical know-how. The GATS permits such performance requirements in the services sector. The challenge for developing country governments is to ensure that the commitments they make allow the necessary policy space and reflect an overall development strategy, especially a human development strategy.

Such commitments should recognize the differences between domestic and foreign firms in their interaction with the labour force and the environment and their response to volatility. Foreign firms are likely to be much less inclined to maintain cooperative relations with the labour force, and they may be less willing to protect and preserve the environment. And they have an inherent tendency to ‘cut and run’ if the social and political environment does not favour their interests. This makes it necessary for governments to implement policies favouring domestic establishments, which are more stable and ‘there for the long haul’.

Imbalances in commitments and market access

Operationalizing the development-oriented articles of the GATS (articles IV and XIX:2) must also involve action at the sectoral level. An analysis of the GATS from a human development perspective must include a sufficient sectoral and modal analysis of its human development impact. Accordingly, the negotiations on services will have to deal with the tension and even contradictions between the interests of industrial countries that see the GATS primarily as an opportunity for increasing market shares in developing countries and those of developing countries that see market access as one means to their development (UNCTAD, 2002, p 2).

Developing country governments have made substantial commitments and accepted a larger share of full market access bindings under the cross-border and commercial presence supply modes than industrial countries. This implies the pre-commitment of future policies without any implementation experience. By contrast, industrial countries have made very few liberalization commitments, especially in mode 4. A similar imbalance is apparent in sectors of export interest to developing countries. Delivered mainly through mode 4, these sectors include those in which developing countries have niche opportunities, such as health,

transport, tourism, construction, education, audiovisual services, energy-related services and professional and business services (Mashayekhi, 2000b).⁶

The important lack of market access provided to developing countries under mode 4 is analysed in detail below. Beyond this, several critical market access barriers to service exports from developing countries have been identified:⁷

- Subsidies, including horizontal subsidies and investment incentives, provided in industrial countries in sectors of export interest to developing countries. The effect of subsidies is especially critical in such sectors as construction, where developing country service providers now have an obvious financial disadvantage. But it is also important in some high-technology services of particular interest to a few developing countries.
- Technical standards and licensing, especially for the provision of professional business services. The non-recognition in industrial countries of many developing country qualifications and standards also serves as a significant market access barrier.
- Lack of access to information and distribution networks such as those in telecommunications and air transport services (through ‘alliances’).

Supply constraints in developing countries also constitute an effective market access barrier to their exports of goods and services.

Increasing developing country participation in services trade requires eliminating these imbalances in market access and supply constraints, a need that calls for action by industrial countries. Mashayekhi (2000b, p 183) suggests that

‘Positive measures could be taken by developed countries to implement article IV, for example, through encouraging investment in services sectors in developing countries, transfer of technology and access to distribution channels and information networks by providing incentives such as fiscal advantages for enterprises which undertake investment and facilitate access to technology and distribution channels and information networks in developing countries’.

In turn, this would require that developing countries identify sectors of interest because of their export potential or role in national human development. These sectors should constitute the basis for further negotiations. In the current phase of placing requests and offers, for example, developing countries need to invoke the flexibility granted under article XIX to initiate a substantive discussion on the current imbalances stemming in part from their limited supply capacity (Das, 2002).

The GATS, public services and social policy

The GATS has important potential policy implications for the provision of public services. Part of the reason is that half of all foreign direct investment in developing countries goes to the provision of services—and much of this to public services (Oxfam, 2002). Since the negotiations on basic social services have not yet been

completed, many developing countries have not committed themselves in such areas as health and education, services that governments have traditionally provided or heavily subsidized. Accordingly, developing countries face pressures relating to the deregulation of markets for public services and the commercialization of these services. There are three main sources of concern.

First, as indicated, GATS rules do not apply to services provided in the exercise of government authority (see box 13.2). But the criterion of government authority does not necessarily prevent the agreement from intruding into the basic services critical to the poor. Sinclair and Grieshaber-Otto (2002), among others, argue that since the agreement does not clearly define the key terms ‘commercial’ and ‘in competition with’, the WTO panels and the appellate body will rely on their own interpretations. Developing such interpretations may be problematic, however, because it is difficult to find any developing country government that is the sole supplier of any public service. Health and education services are supplied by a constantly changing mix of public and private enterprises. This means that a government entity providing a service will potentially be ‘in competition with’ private enterprises, opening the way to challenge and retaliation within the WTO dispute settlement system (Sinclair and Grieshaber-Otto, 2002).

Moreover, the GATS restricts the activities of monopolies and exclusive service suppliers, public or private. Many developing country governments continue to rely on public monopolies to provide basic services such as education, health care, rail transport, postal services, health insurance, water distribution and power generation and transmission. Monopolies must be scheduled as limitations or dismantled in sectors covered by a country’s specific commitments (article XVI). The GATS also exposes public monopolies to charges that they are competing unfairly in listed sectors outside the scope of their monopoly (article VIII).⁸ In addition, the compensation requirement—in cases where a new monopoly is established or an existing one expanded—could be very costly for member countries, especially for developing ones. If the government of a country that has committed its health insurance sector decides to expand its compulsory health insurance coverage to prescription drugs or home care, it could be challenged under the GATS.

Second, the GATS does not force governments to privatize, but it facilitates the commercialization of basic public services, especially when combined with the other pressures for privatization that developing countries face—whether because of resource constraints or because of conditions in structural adjustment programmes. Privatization of basic social services is already quite problematic in developing countries. Many have been unable to privatize social services with a corresponding increase in competition—that is, without the involvement of mostly foreign private monopolies. In Latin America, for example, the privatization of utilities resulted in public monopolies being replaced by private ones (Oxfam, 2002). Leaving social services in the hands of private monopolies may have important adverse consequences, especially for equity in access to basic services, because

of the user fees involved. This will further marginalize segments of the population, including the poor and women.

Rapid privatization and commercialization of health services without regard to equity and accessibility, combined with the pressures to reduce public spending in health, can be especially harmful to human development. Cost recovery programmes introducing user fees and price increases for health services led to a decline of up to 50 per cent in the use of medical services in countries such as Ghana, Kenya and Nigeria. This has contributed to higher child mortality, greater incidence of tuberculosis and sexually transmitted diseases and an increase in maternal deaths. In Nigeria maternal deaths rose by 56 per cent (Corner House, 2001).

Privatization of water supply is another area of concern in developing countries, because it can restrict poor people's access to water services. In some cases the commercialization of water supply has produced mixed results at best. In Bolivia, where one-third of the population has no access to clean water, privatization improved access to piped water but also increased water prices (Oxfam, 2002). Because the price elasticity of demand for water is higher among poor people than among the non-poor, price increases will widen the gap in water consumption in Bolivia. In the capital of Mauritius, the privatization of water services has meant that poor families have to spend up to 20 per cent of their income on water (World Bank, 2000).

One way to increase access to water is through cross-subsidization, by increasing taxes in rich regions and using the funds to finance lower water prices in poor regions. But unless a government had foreseen the use of cross-subsidies and included pertinent qualifications in its schedule, it would be unable to prevent foreign companies that supply water in rich areas from benefiting from its GATS commitments, since any measures the government may wish to take would be inconsistent with 'national treatment'.

Most developing country governments cannot afford to leave basic social services completely to private—including foreign—competition. The provision of these services affects vital concerns such as equity, human rights, social justice and state responsibility—in short, many components of human development (Oxfam, 2002). Thus opening basic services to foreign competition and subjecting them to GATS rules, which may induce further deregulation through channels such as power bargaining, may be problematic, especially where regulatory capacity is weak (Oxfam, 2002).

Third and related to this, new proposals on domestic regulation (article VI:4) are being negotiated through the Working Party on Domestic Regulation. These negotiations are aimed at, among other things, ensuring the quality of public services. If accepted, these proposals may force governments to further deregulate public services and weaken other public interest regulations. And they may reduce even existing policy flexibility by intruding into aspects of government policy involving non-discriminatory government regulation of services.

Proposals on expanding the domestic regulation clause would not eliminate governments' right to regulate the quality of services, but they would restrict the means available to do so. If challenged, regulations on the quality of services would come under the scrutiny of a dispute panel, compelling governments to undertake a difficult and costly exercise to prove that the regulations are necessary. Governments would need to demonstrate through a 'necessity test' that the regulations are not unnecessary trade restrictions—and are necessary to ensure the quality of service.

The necessity test could limit governments' ability and flexibility to undertake policy and regulatory reform in important service sectors. A narrowly defined notion of necessity could also lead to the harmonization of domestic policies based on those of industrial countries, reinforcing a 'one size fits all' approach to public policy in this vital area (Mashayekhi, 2000b). Moreover, if adopted, the necessity test may facilitate the questioning by trade bureaucrats, under the multilateral rules of trade, of regulations adopted and implemented by a democratically elected governing body, undermining the role of domestic courts and legislators (Woodroffe, 2002).

The GATS mode 3 (commercial presence) is the main vehicle through which trade in health care occurs.⁹ When all the parts of the agreement as well as new proposals are combined with pressures on economic policy (including the GATS obligations), commercial presence may easily mean that a country's health care system will be left to foreign private multinationals. Foreign investment in health care is dominated by giant multinationals based in the US and Europe (Hilary, 2001). While foreign investment may be needed to fill many gaps in the health sectors of developing countries, it is risky to leave a country's health care system to always-fluid foreign direct investment: the departure of such investment could lead to the system's collapse, especially where regulatory capacity is weak.¹⁰

Liberalization and deregulation of financial services

Effective, broad-based financial services are a crucial element of development policy. But as the East Asian financial crisis and others before and after it have shown, rapid liberalization of financial services such as banking and insurance is likely to cause instability in already fragile economies. Commitments for liberalization under the GATS may be inconsistent with developing countries' capacity to regulate their financial sectors, providing a recipe for financial crisis (Oxfam, 2002). But most government regulatory interventions in specific financial subsectors will likely be inconsistent with the GATS.

National treatment and most-favoured-nation principles are likely to work to the benefit of foreign financial firms, which have greater financial strength, more sophisticated information technologies and greater economies of scale than developing countries' domestic financial firms, as well as the ability to move between and within countries. Under the GATS provisions, which pressure countries to

deregulate their financial markets, a country with commitments in this sector may be unable to protect its own banking industry through tax breaks, credit and interest rate subsidies and the like. This would undermine the creation of capacity in financial institutions for longer-term credit support to firms generating new technologies or employment, as well as the development of new financial instruments for small and medium-size enterprises.

Rapid and progressive liberalization in financial services could be detrimental to small and medium-size enterprises in both the financial sector (through direct effects) and the industrial sector, especially in infant industries. Women, and thus human development, could be especially affected where women own and operate small and medium-size enterprises, particularly in the informal sector (box 13.5). GATS commitments could limit member governments' ability to direct preferential credit to and cross-subsidize small and medium-size enterprises in keeping with their industrial and human development policies.

Moreover, liberalization and deregulation of financial markets, especially in developing countries with weak regulatory capacity, can lead to instability, resulting in adverse human development outcomes. A large share of global capital flows

Box 13.5 WOMEN AND FINANCIAL LIBERALIZATION

There is insufficient evidence to conclude that financial liberalization cannot benefit women. But based on the little research that has been undertaken, it is clear that the claims that liberalizing financial markets will broaden access to these markets and expand opportunities for saving and credit have not been proved for women.

Disproportionately excluded from the formal sector, women in developing countries often must turn to informal sector providers of financial services. The informal financial sector, unregulated and unsupervised, is dominated by providers that typically offer loans at very high interest rates. Still, it does provide access to credit for consumers and small enterprises largely excluded from the formal banking sector. Informal financial services are offered by a wide range of individuals and enterprises—from friends and family to pawnbrokers, specialized moneylenders, sector-specific lenders and rotating savings and credit associations. Women are more likely than men to be excluded from the formal sector, since they tend to conduct smaller transactions, hold fewer assets for collateral and, in some instances, may be unable to obtain bank loans without their husband's approval.

A detailed literature review by BRIDGE (a network striving for gender equity as an outcome of development) examines the direct and indirect effects of financial liberalization in developing countries and looks at the gender impact at the macro, meso and micro levels. The study concludes that institutional barriers between formal and informal financial sectors persist even after markets are liberalized. A case study of four Sub-Saharan African countries comes to the same conclusion. Moreover, the BRIDGE review provides little evidence that financial liberalization has benefited women. The one exception: women receiving remittances from family members working overseas may benefit from greater access to deregulated foreign exchange markets.

Source: Gammage and Jumelle, 2002, p 70; Baden, 1996; Aryeetey and Nissanke, 1998.

originate in industrial countries and take the form of highly liquid capital seeking arbitrage profits—and are thus an extremely unreliable source of development finance (UNCTAD, 1999). Liberalization of financial services in developing countries may quicken the flow of this footloose capital. This occurred in the recent East Asian financial crisis, which, in many respects, resulted in a serious setback to human development.

UNCTAD's *Trade and Development Report 2001* (2001b) outlines key standards for financial markets necessary for maintaining national and international financial stability. These standards relate to macroeconomic policy and data transparency, institutional and market infrastructure and financial regulation and supervision. While the GATS may encourage data and policy transparency, it may make it difficult to regulate other areas in financial systems. Financial liberalization, for example, is likely to make it more difficult to strengthen standards for corporate governance and banking supervision, crucial for promoting domestic financial stability.

Movement of natural persons

Mode 4 of the GATS covers not labour migration, but temporary cross-border movement of skilled and unskilled labour. There are strong theoretical and empirical justifications for the temporary movement of labour in the services sector (box 13.6). Nevertheless, there are significant barriers to this, resulting in an imbalance between the international movement of capital and that of labour.

The lack of commercially meaningful commitments by industrial countries on the movement of natural persons is the basic source of the imbalance in services trade (Mashayekhi, 2000b). In the Uruguay Round, commitments scheduled under mode 4 were limited largely to two categories: intra-company transferees regarded as 'essential personnel', such as managers and technical staff linked with a commercial presence in the host country; and business visitors—short-term visitors who are generally not gainfully employed in the host country (WTO, 2001). Since these categories consist mostly of higher-level senior professionals linked to mode 3, the commitments benefit industrial countries more than their developing country counterparts (Butkeviciene, 2000; Mashayekhi, 2000b).

The barriers to market access under mode 4 are broadly related to the nature of the commitments; strict visa, nationality, residency and licensing requirements; lack of recognition of qualifications and the existence of wage comparisons; and economic needs tests. There are also price-based restrictions, such as visa fees, exit and entry taxes, airport taxes and licensing fees (CUTS, 1999; Mashayekhi, 2000b). Other important barriers to market access include lack of transparency in measures relating to the movement of natural persons and lack of clarity relating to the existence, implementation and application of policy guidelines relating to work permits (Butkeviciene, 2000).

While industrial countries are pushing to deepen the commitments under mode 3—such as in financial services and health and other basic services—a major

Box 13.6 INTERNATIONAL MOVEMENT OF LABOUR: THEORY AND EMPIRICS

International movement of labour occurs for a complex set of reasons. The major structural explanation at the macro level is disparities in income levels and employment opportunities between countries. On the supply side, unemployment and poverty are the main explanations. Alongside these ‘push factors’ are ‘pull factors’ on the demand side, both static and dynamic, such as cross-country differences in wage levels and employment opportunities at any point in time as well as the differences in the income stream and the quality of life over a period of time. Because of the segmentation of the labour market, push factors dominate in some parts of the market and pull factors in others. For example, ‘brain drain’ is explained mostly by pull factors, while unskilled labour migration is better explained by push factors.

Demand-side factors determining the movement of natural persons between poor and rich countries include labour shortages in the rich countries. There are different ways to compensate for labour shortages. Capital or trade flows can be substituted for labour, or labour can be imported from abroad. For the services sector capital and trade flows are unlikely to work because ‘services are not quite as tradable as goods and even international trade in services often requires physical proximity between the producer and the consumer for the service to be delivered, because these are services which cannot be stored and transported across national boundaries in the same way as goods’ (Nayyar, 2000, p 9).

There is justification for international migration of labour from many perspectives. According to traditional trade theory, the free movement of labour, like that of capital, between two countries results in efficiency gains for both. International labour migration also helps to optimize resource allocation and maximize economic welfare for the world as a whole, just as free movement of capital is supposed to do. International movement of labour can also be logically justified on the basis of rights and equality: it is perfectly reasonable to argue that any provision for capital or commercial presence of corporate entities should be matched by provisions for labour or temporary migration of workers across borders, ‘just as the right-of-establishment for corporate entities (capital) has an analogue in the right-of-residence for persons (labour)’ (Nayyar, 2000, p 25).

There are also empirical grounds for freer international movement of labour. Using computable general equilibrium (CGE) modelling, Walmsley and Winters (2002) estimate the effects of increasing temporary workers’ permits in industrial countries by 3 per cent of their current skilled and unskilled workforces—permitting about 8 million skilled and 8.4 million unskilled workers to enter. (The problems in CGE modelling, especially those relating to degree of aggregation, should be noted here.) The potential economic benefits are huge: while some estimates project that complete liberalization of trade in goods would lead to global gains of US\$66 billion a year, complete liberalization of the movement of natural persons is expected to yield gains of more than US\$150 billion a year. Moreover, the global gains from mobility of unskilled labour would exceed those from mobility of skilled labour, since lost inputs for developing country production resulting from transfers of unskilled labour are likely to be less in value added terms than those resulting from transfers of skilled labour.

Winters (2002) argues that many of the extremely poor still would not benefit from the new opportunities to work abroad. But they might benefit, at least in the beginning, from simple trickle-down and increased tax revenues from those who do benefit. And in the long run higher returns to the skills needed for mobility may encourage people to seek greater education—and governments to provide it (Winters, 2002).

Despite all the potential benefits, international migration of labour, as measured by new immigrants per 1,000 world inhabitants, declined between 1970 and 1990. This trend contrasts

(Box continues on next page.)

with that in trade and capital flows. World exports increased from 12.1 per cent of global GDP in 1985 to around 20 per cent in the late 1990s. Total flows of foreign direct investment rose from US\$55.7 billion in 1985 to US\$395.4 billion in 1997 and US\$637 billion in 1998. The turnover in foreign exchange markets expanded from US\$15 billion in the 1970s to US\$1.5 trillion in 1998. And international bank lending jumped from US\$265 billion in 1975 to US\$4.2 trillion in 1994 (UNDP, 1999).

It is important to understand the reasons behind this asymmetry between capital and labour, as '[t]his asymmetry, particularly that between the free movement of capital and the unfree movement of labour across national boundaries, lies at the heart of inequality in [the] rules of the game for globalization in the late twentieth century' (Nayyar, 2000, pp 15–16). This imbalance exists and grows for a variety of reasons related to ideology, interests and institutions. It is difficult to separate these three, as they are all part of the political economy of globalization. But the major determining factor of the imbalance appears to be institutional aspects involving industrial country commitments on the movement of natural persons under the GATS, reinforced by the other two factors.

shortcoming of the GATS from a human development perspective remains the lack of operationalization of its provisions on the movement of labour. These provisions could cover a wide range of service exports of interest to developing countries, including construction services (see box 13.8 in next section).

There is no similar restriction on the movement of capital in the GATS—indeed, the GATS encourages the free movement of capital through financial services liberalization. Shukla (2000) and many others argue that this has created a heavy bias in favour of the movement of capital, technology-intensive services and industrial countries. Today, transnational corporations based in foreign countries account for about 33 per cent of global services, while the transfer of labour accounts for only 1 per cent (McCulloghy, Winters and Cirera, 2001; Oxfam, 2002).

There is also a great imbalance in the application of the GATS between skilled workers and semi- and unskilled workers. Rather than facilitating the movement of unskilled labour between countries with a surplus of such labour (developing countries) and those with a deficit (industrial countries)—which could create a 'win-win' situation—the commitments on the movement of natural persons focus on professionals, who are favoured by and may also come from industrial countries. This imbalance also exacerbates the 'brain drain' problem in developing countries. In Jamaica, for example, 50 per cent of nursing positions remain vacant because Jamaican nurses are working in North America. Cuban and Indian doctors are among the favourites in industrial countries (Corner House, 2001).

This imbalance raises human development concerns in developing countries. In the health sector, for example, developing countries with an insufficient stock of professionals import them from those with routine surpluses, such as the Philippines. This might seem to be a good market solution, but it has allowed governments to put off addressing problems in their domestic career structures and to depress standards in the health profession (ICN, 1999). More important, many of the countries that export doctors and other professionals have shortages themselves.

Weighed against the losses, such benefits as remittances and the skills that professionals bring with them when they return—if they return—may not be sufficient compensation.

But while there is an apparent imbalance—generating other kinds of imbalances—in the agreement, the issue is not clear-cut. Major developing countries are keen to have access to industrial country labour markets for their independent professionals, and industrial countries are eager to have these professionals (Winters, 2002). In fact, the governments of some developing countries—such as India, which received the most workers' remittances in 1998—promote migration biased towards skilled labour out of a belief that qualified professionals constitute part of their competitive advantage in the world market (Butkeviciene, 2000; Corner House, 2001).

Greater and more secure access to industrial country markets for skilled people from developing countries could be beneficial in the medium and long term. But Winters (2002) argues that a key to reducing poverty and international and domestic inequalities is effectively extending mode 4 to less-skilled and, ultimately, unskilled workers.

Indeed, developing countries are interested in market access (not linked to investment) for persons in all categories (Butkeviciene, 2002). For most sectors covered by the GATS, the movement of natural persons would offer developing countries a great potential advantage for promoting their trade in services.

Among the barriers to market access noted above, the economic needs test seems to be the most controversial for and detrimental to service exports through the movement of natural persons from developing countries. There are several proposals for remedying the situation. Among these is a proposal by Pakistan for economic needs test exemption lists, by profession or sector or both (proposal to the preparations for the third ministerial, cited in Mashayekhi, 2000b).¹¹

India has also developed proposals (box 13.7). It recommends that governments:

- Provide free and accessible information about the movement of personnel.
- Provide equal treatment of all foreign nationals.
- Standardize or harmonize qualifications and experience with the help of agreements.
- Remove all restrictions on temporary movement of professionals, salary and wage comparisons with residents and local competency or certification requirements, such as medical boards (CUTS, 1999).

THE WAY FORWARD

Based on the discussion in this chapter, it can be argued that the most immediate action needed is to operationalize the development-friendly aspects of the GATS.

Box 13.7 SOME OF INDIA'S PROPOSALS ON REMOVING LIMITATIONS ON THE MOVEMENT OF NATURAL PERSONS

Economic needs tests

- Multilateral norms need to be established to reduce the scope for discriminatory practices in the use of economic needs tests.
- Clear criteria need to be laid down for
 - Applying such tests.
 - Establishing norms for administrative and procedural formalities.
 - Specifying how the results of such tests would restrict entry by foreign service providers.
- Fewer occupational categories should be made subject to such tests, and consensus should be reached on those categories.
- Specified occupational categories of professionals should be exempted from economic needs tests.

Administrative procedures relating to visas and work permits

Multilateral guidelines and norms are needed to tackle administrative procedures relating to visas and work permits, as these can negate even the limited market access available.

- Member countries should work towards a more transparent and objective implementation of visa and work permit regimes.
- Temporary service providers should be separated from permanent labour flows, so that normal immigration procedures would not hinder the commitments on temporary movement of labour. This could be achieved by introducing a special GATS visa for personnel categories covered by horizontal and sectoral commitments undertaken by a member in mode 4 under the GATS or through a special subset of administrative rules and procedures within the immigration policy framework.
- In both these cases the conditions for entry and stay should be less stringent than those for permanent immigration.
- The above would be possible if the recommendations on specificity, finer classification and wider coverage of personnel categories and transparency are reflected in the sectoral and horizontal commitments, achieving minimum discretion and greater certainty.
- The main features would include:
 - Strict time frames within which visas must be granted (two to four weeks at most).
 - Flexibility in granting visas on shorter notice for selected categories of service providers.
 - Transparent and streamlined application processes.
 - Mechanisms for finding out the status of applications, the causes of rejection and the requirements to be met.
 - Easier renewal and transfer procedures.
 - GATS visas for selected companies for use by employees temporarily posted abroad.
 - Adequate built-in safeguard mechanisms to prevent temporary labour from entering the permanent labour market.

Source: WTO, 2000b.

This will require that developing countries themselves press for negotiating modalities, in the exchange of offers and requests, that ensure that articles IV and XIX are effectively implemented at the sectoral level. In addition, the agreement should be strengthened by specifying the actions required to achieve or make the three goals of article IV legally enforceable.

The policy space needed to promote human development should not be traded for market access advantages in, for example, goods sectors. The provisions that impede developing countries from realizing the flexibility in the agreement should be modified. And the requirements for the reversal of commitments and additions to limitations in country schedules should be eased.

As recognized by the Doha work programme, special provisions in GATS articles IV and XIX:2 enable developing countries to participate in the international services trade in a much more efficient and equitable way. Consistent with the spirit of these articles, the international community and developing countries need to find ways to make liberalization more development friendly. This could best be done at the sectoral level. Assistance should be provided to developing countries in selecting sectors and subsectors to liberalize, in determining limitations and in making requests for access to industrial country markets in areas most important for developing countries as well as in areas significant for human development (boxes 13.8, 13.9 and 13.10).

The GATS architecture should be kept intact—though improved through the adoption of such methods as the conditional offer approach—but the agreement must be simplified and its coverage reduced. The agreement should also be improved through clearer language and limits in its scope.

Box 13.8 CONSTRUCTION: A SERVICE SECTOR OF INTEREST TO DEVELOPING COUNTRIES

The world construction market is estimated at US\$3.2 trillion. Over the past two decades projects in developing countries, primarily in infrastructure, have accounted for up to 70 per cent of the construction business opportunities in international markets, as measured by the size of contracts.

Construction as a share of GDP varies across countries, ranging from 2–3 per cent to more than 7 percent. But because of its labour-intensive nature, construction remains a relatively large employer, accounting for an average 10 per cent of total employment. In developing countries the sector has great potential to reduce rural poverty and provide opportunities for women. Moreover, many developing countries, especially those in Asia, have great capacity to export construction services—but barriers to the movement of natural persons limit their market access. Visa and residency requirements and economic needs tests, even for projects of short duration, often appear to penalize nationals of developing countries.

One way to enhance developing countries' access to construction markets would be to include local companies in designing and implementing international construction projects. This has proved to be the most effective way for developing countries to obtain access to technology.

Source: Butkeviciene, Benavides and Tortora, 2002.

Box 13.9 SERVICES AND HUMAN DEVELOPMENT: THE ENERGY SECTOR

Energy is probably the biggest business in the world economy, with a turnover of US\$1.7–2 trillion a year. The World Energy Council estimates that between 1990 and 2020 global investment in energy will total some US\$30 trillion at 1992 prices.

Energy is key to achieving the social, economic and environmental aims of sustainable human development—and energy services are crucial in providing efficient access to energy in support of development. Developing countries thus face the challenge of achieving more reliable and efficient access to energy through greater availability of energy services. To ensure that the link between market access and development is clearly established, access to developing country energy markets could be made conditional on the transfer of technology and managerial know-how, the acceptance by foreign suppliers of public service obligations and the setting up of alliances between foreign and domestic firms, including small and medium-size enterprises.

Negotiations on energy issues are ongoing, with the aim of achieving the broadest possible market access and national treatment commitments. Canada, Chile, the European Union, Japan, Norway, the US and Venezuela have all submitted proposals. Except for the Venezuelan proposal and to some extent the Norwegian one, all proposals call for a total liberalization of energy services. The Norwegian and Venezuelan proposals emphasize the need to promote trade for all and to secure a share of the trade in energy services for developing countries.

From the perspective of developing countries, two related issues appear to be quite important in the ongoing GATS deliberations: ‘classification’ and ‘additional provisions’. If classification permits sufficient precision in defining specific energy services, as is argued in the Venezuelan proposal, it will help facilitate an approach under which developing countries can undertake more informed commitments in specific areas, liberalizing their markets not in ‘one go’ but in line with their national development strategies. This possibility is very important in view of the US preference for ‘technological neutrality’.

Developing countries should try to relate their liberalization commitments to articles IV and XIX:2, especially provisions such as transfer of technology and access to distribution channels and information networks, with a view to increasing the competitiveness of their firms in the supply of energy services. Similarly, attaching a set of public service obligations to an annex or reference paper applicable to the energy sector could ensure that developing countries obtain benefits that they may be unable to effectively negotiate with stronger trading partners or investors in a bilateral context.

Three objectives can be pursued with this strategy: levelling the playing field, establishing a clear link between energy and human development and avoiding creating ‘race to the bottom’ competition among developing countries, in which countries lower their requirements in an effort to attract investment.

Source: Butkeviciene, Benavides and Tortora, 2002.

The multilateral trading system for services could also be improved in several more specific areas:

- Concrete measures and their time frames should be established for improving commitments on the movement of natural persons, especially unskilled workers, with a view to reducing the asymmetry between these

Box 13.10 SERVICES AND HUMAN DEVELOPMENT: THE ENVIRONMENT SECTOR

The global environment market reached an estimated US\$522 billion in 2000. While industrial countries—mainly the US and countries in Western Europe—accounted for 85 per cent of this market, demand for energy in these countries has collectively grown by only 2–3 per cent annually in recent years. By contrast, strong growth in energy demand is forecast in transition economies and subsequently in developing countries as domestic policy and development assistance programmes combine to create a market out of the tremendous need for environmental equipment and services.

To reinforce both equity and efficiency, a strong, effective regulatory and incentive framework is needed for private actors providing environmental services. In some cases, such as water, developing countries should be cautious in liberalizing their markets and privatizing public entities. The environmental services sector presents equity problems in ensuring universal access to clean water. It also raises the important question of how to secure the participation of domestic firms in delivering services. Developing countries may wish to set conditions under which all private companies are to operate, possibly setting maximum prices for consumers, determining the percentage of profit that should be reinvested in infrastructure and establishing public service obligations. To help build capacity in developing countries, market access requirements might include training of personnel, a minimum local content requirement and transfer of technology and managerial know-how.

Source: Butkeviciene, Benavides and Tortora, 2002.

commitments and those made on the mobility of capital. Explicit and implicit barriers, such as immigration and visa requirements and economic needs tests in industrial countries, need to be effectively addressed and resolved.

- Developing countries may seek to introduce the conditional offer approach to operationalize the provisions under articles IV and XIX:2.¹² This approach would recognize the differences in capacity and development levels between different countries. However, developing countries would also need to identify what is needed to improve their participation in selected service sectors and suggest including and negotiating additional disciplines to facilitate this.
- In the interests of human development it is vital that governments have greater flexibility in exempting basic public services—such as health, water, education and social protection—from the progressive liberalization principle. Mechanisms need to be in place to ensure that the exemption of government authority is understood not in terms of means of delivery but in terms of function (Hilary, 2001). This requires strengthening the GATS government authority exclusion. International cooperation is needed to prevent the unnecessary privatization of basic social services or the recourse by developing country—especially least developed country—governments to schemes such as cost recovery programmes to remedy resource constraints in financing basic social services. The 20/20 initiative constitutes a good framework for such cooperation. This initiative, proposed by the UN in the early 1990s, encourages developing countries to allocate about 20 per cent of their national budgets, and developed countries about 20 per cent of official development assistance, to basic social services.

- The rules of the global trading regime should not constrain developing country governments from strengthening their existing domestic regulation and policies and introducing new ones if necessary. Requirements such as the necessity test and ‘the least trade restrictiveness’ criteria should not be made binding constraints.
- An urgent need is to address the lack of information, and thus lack of foresight, that limits the ability of developing countries to choose service sectors and subsectors to liberalize in line with their human development needs. Solving this problem is also important in order to create an effective and beneficial temporary safeguard provision, as countries will need appropriate data to show that the injury to domestic service sectors is in fact caused by increased imports and access granted to foreign suppliers. The solution will require an agreement on data collection and collation at the national and international levels in all four modes of supply. At the same time, developing countries will need to undertake national data estimations, for example, by using options theory (Raghavan, 2000).
- A full assessment of the human development impact of liberalizing services trade in developing countries needs to be carried out, based on complete and improved data and information. The provision in article XIX:3 requires the WTO Council for Trade in Services to assess the consequences of liberalizing services trade overall and at the sectoral level. This assessment should be carried out more completely. Moreover, it should include not only the direct impact of liberalization and deregulation across service sectors, but also the indirect and longer-term impact on components of human development, including the impact on marginalized groups such as poor women. Finally, in keeping with the Doha mandate on technical assistance and capacity building, a rapidly accessible funding mechanism should be put into place for developing countries willing to conduct an assessment, or to request an assessment, on trade in services (CIEL, 2002).

NOTES

1. Another important general obligation relates to monopolies and business practices (Mashayekhi, 2000a).

2. This section draws on UNCTAD (1994, 2001a), Mashayekhi (2000a) and WTO (2002).

3. Adding limitations to specific commitments is a long, complex process that can begin only three years after the commitment was made. Moreover, the other members must be notified at least three months before the change. If a negotiated settlement is reached, the government must compensate others by replacing the withdrawn commitments with substitutes that satisfy all WTO members. If a negotiated settlement is not reached, the withdrawing government faces retaliation (article XXI also permits cross-retaliation) not limited to service sectors (Sinclair and Grieshaber-Otto, 2002). Furthermore, according to the principle of progressive liberalization, even existing limitations can be challenged in the future, so effectively there is reverse flexibility.

4. This discussion draws largely on Woodroffe (2002) and TWN (2001).

5. For example, Canada has not committed its health services, but has committed its data processing without limitations. That raises the question of whether the management of health records falls under health services or data processing services (Sinclair, 2000; Sinclair and Grieshaber-Otto, 2002).

6. According to Mashayekhi (2000b, p 174), these sectors have been identified in UNCTAD's sectoral analysis and the outcomes of the sessions of the Commission on Trade in Goods and Services.

7. This discussion draws heavily on Mashayekhi (2000b).

8. Sinclair and Grieshaber-Otto (2002, pp 46–47) cite the example of education: 'Where a government makes specific commitments covering private education, this could trigger complaints that post-secondary institutions are abusing their monopoly position. For example, if a university offers a non-credit course that competes with courses offered by private training institutes, it could be exposed to charges that it is leveraging its monopoly position by using facilities and faculty supported by its monopoly status outside the scope of this monopoly.' Similarly, since China's entry into the WTO, China Post, the national postal administration, has faced charges from international courier companies that it is abusing its monopoly position by regulating the prices private couriers must charge when delivering parcels under 500 grams. The country is facing a difficult decision in the dispute, as the postal monopoly has come to rely on revenue from the fast-growing express market to subsidize its national postal network. This cross-subsidy has allowed China Post to withstand government cutbacks and fulfill its mandate, providing postal services throughout the entire country (McGregor, 2002).

9. When the provider is a powerful multinational, mode 3 is only part of the service provision; different companies can provide different aspects of health services through different modes. In the Indian state of Maharashtra, for example, the World Bank supports a private hospital through medical equipment and personnel (modes 3 and 4). The project is co-funded by a pharmaceutical giant, Wockhard, which is linking up with a giant US health insurance provider (mode 1) (Corner House, 2001).

10. There is also a need to address the issue of developing country access to industrial country markets for health services. According to UNCTAD (2002), portability of insurance is a precondition for increasing the participation of developing countries in international trade in health services. Also necessary for effective liberalization of market access is recognition of the qualifications of medical and other health professionals and measures to facilitate the temporary movement of persons in selected categories and occupations. Necessary too is recognition of measures aimed at protecting the health of the population in developing countries as a social obligation of their governments.

11. The economic needs test can be used for public policy purposes only with certain clear guidelines, which do not currently exist under the GATS (Butkeviciene, 2000).

12. According to the conditional offer approach, developing countries would be willing to undertake liberalization commitments in line with article XIX:2 if industrial countries would undertake to implement certain provisions and additional commitments for implementing article IV on the increasing participation of developing countries.

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