

GATS

The forgotten battle over WTO investment rules

1. Investment and GATS

Amongst the majority of developing country governments and many civil society organisations, there is huge concern over, and opposition to, the European Union's (EU) proposal for new investment rules in the World Trade Organisation (WTO). The joint opposition of 68 developing country members of the WTO, the major civil society campaign and the collapse of the Cancun Ministerial are all testament to this fact.

But a new agreement has only ever been one aspect of the EU's investment agenda. The other key aspect is the General Agreement on Trade in Services (GATS). The GATS covers the right of service companies to set up operations (establish a 'commercial presence with a Mode 3 commitment' in GATS-speak) in other countries and covers certain regulations applying to those companies. As a rough guide to the importance of the service sector to our lives, it covers 66 per cent of global economic activity.¹ However services are more than just a contribution to national income; they also relate to life's essentials (eg the supply of water and energy).

The EU has some of the world's largest multinational service companies, in sectors such as finance, telecommunications, energy, water and retail. These companies have played a key part in formulating the EU's GATS policy position.

Throughout the GATS negotiations, the European Commission's position has been informed by the European Services Forum (ESF), a network of high-level representatives from European service industries. In confidential correspondence with the ESF the Commission noted that they, "would very much welcome industry's input to this exercise, both in terms of finding out where the problems currently lie and in making specific requests. Without ESF input the exercise risks becoming a purely intellectual one." Following the Cancun Ministerial the ESF issued a statement about current WTO talks demanding that, "*Trade in Services* take centre stage as it has the most to offer the EU economy" [emphasis in original].³ This high level of ambition was reflected in a communiqué issued by the European Commission three weeks later, "[services' negotiations] ... are clearly one of the areas... where the EU has much to gain. Services should therefore be maintained at the top of the EU's negotiating agenda."⁴

The EU, in response to the wishes of many of its key businesses, wants an expanded GATS just as much as it wants new investment rules.

2. The EU's GATS Agenda

The EU has made requests of 109 countries across a wide range of sectors. Based on the numbers of requests made, the most important sectors for the EU are: Financial; Professional; Business; Telecommunications; Construction; Transport and Environmental services. At this stage however, only 42 countries have submitted initial offers, almost a year after the proposed deadline. Less than half of these are from developing countries and only one is from an African country.

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This low response rate has disappointed the EU. In its post-Cancun position paper, the European Commission makes plain the EU’s intentions. In a section entitled “Areas where flexibility is needed from others” the EC says, “On trade in services, the Commission believes that, WTO members and in particular developing countries need to participate more actively in the negotiations by tabling offers to open up trade in services.”⁵

The current GATS talks are not just about sectoral commitments; they are also aimed at expanding the rules of GATS. A key objective for the EU is to create more precise rules to limit governments’ ability to use certain domestic regulations, subsidies and government procurement policies.

3. Why worry?

Concerns surrounding a possible new investment agreement have centred on the impact of the proposed rules on the ability of countries to effectively regulate investment in order to minimise costs and maximise benefits to society. Time and again, developing countries have raised concerns over the threat to their ‘policy space’.

Such rules could critically impact on the ability of developing countries to use both discriminatory and non-discriminatory investment regulations that help to create more backward linkages between the foreign investor and the domestic economy and achieve social and environmental objectives. Yet the GATS is little or no different from the EU’s proposed new investment agreement (see the Table below).

Table 1. Proposed investment agreement and GATS: the similarities

EU’s proposed contents of a new WTO investment agreement	Contents of the GATS
Rules covering Foreign Direct Investment, possibly limited to the primary (eg agriculture) and secondary (manufacturing) sectors.	Rules covering the establishment of a ‘commercial presence’ in the tertiary (services) sector.
Post establishment National Treatment (NT) and Most Favoured Nation (MFN) to apply across the board (ie ‘top down’ with a chance to list exemptions).	MFN applying across the board (ie ‘top down’ with a chance to list exemptions and no distinction made between pre and post establishment).
Pre establishment NT & MFN to apply on a ‘bottom-up’ basis resulting in a likely request-offer bilateral negotiating process.	NT and Market Access (MA) provisions to apply on a ‘bottom up’ basis (no distinction made between pre and post establishment) resulting in a request-offer bilateral negotiating process.
State to state dispute resolution in the WTO.	State to state dispute resolution in the WTO.
Rules on direct and indirect expropriation to curtail new government regulations that adversely affect a company’s investment. Indirect expropriation rules – a form of ‘investor protection’ – is perhaps the main difference between the proposed investment agreement and GATS.	No rules on indirect expropriation, but all GATS rules affect new government regulations that impact adversely on a company’s investment, in a sector where a commitment has been made. For example, it is contrary to GATS MA disciplines (Article XVI), to return a committed sector to public monopoly provision, as this represents a quantitative restriction on the market. Such ‘indirect expropriation’ is therefore covered by bottom-up MA rules.
A likely clause to commit countries to progressive liberalisation (ie an on-going process of ever-deeper investment commitments).	A clause that commits countries to progressive liberalisation (ie an on-going process of ever-deeper GATS commitments).
A likely clause to prevent roll-back or withdrawal of commitments.	A clause to prevent roll-back or withdrawal of commitments.

As one African trade ministry official noted in the context of ongoing GATS negotiations, *“Zambia is currently undergoing a revision of its Investment Act and submissions are being received from the public on what they feel should go into the Act. In this regard we have encountered a number of hitches as most of the submissions if accepted, will contradict our schedule of [GATS] commitments in its current form. For example, some of the submissions border on joint venture conditions for foreign investment and setting aside of certain sub sectors for locals ... Zambia is currently very cautious in its approach to the GATS negotiations considering the hitches we are facing in attaining our developmental objectives through the adoption of other policies and regulations.”*⁶

It is worth noting that service companies have lobbied for the proposed new investment agreement to cover all sectors, but only if it includes investor protection (ie rules on expropriation). As Leon Brittan, former EU Trade Commissioner and now a service industry lobbyist, said in a letter to the UK Government before Cancun, “We hope that the EU will not accept an investment agreement which deals solely with market access and not investor protection. Such an agreement would hold little attraction for service industries, given that GATS already provides for market access for service industries under Mode 3, but not for investor protection.”⁷

4. Don't want it, don't need it, don't 'buy' it

The proponents of new investment rules have argued that the drawbacks of reduced policy space are a price worth paying for being able to attract more investment. But there is no good evidence to support the assertion that such an agreement would help poor countries attract more Foreign Direct Investment (FDI). Noting the findings of a recent survey of FDI flows from OECD members to 31 developing countries over 20 years, as well as previous UNCTAD research, the World Bank acknowledges, *“Countries that had concluded a BIT [Bilateral Investment Treaty] were no more likely to receive additional FDI than were countries without such a pact.”*⁸

The evidence on GATS is the same. As UNCTAD concluded, on the basis of its assessment of the impact of GATS commitments on foreign investment, *“There is no empirical evidence to link any significant increase in FDI flows to developing countries with the conclusion of GATS.”*⁹

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It is critically important to separate the issue of liberalisation and the issue of making GATS commitments. Liberalisation and attracting foreign investment can be achieved without making GATS commitments. Regardless of the pros and cons of liberalising services, not making GATS commitments at least allows governments the flexibility, in light of experience, to modify policies in the future.

Making GATS commitments (ie reducing your own ‘policy space’) therefore only makes sense in the context of WTO bargaining. Without any compelling economic or developmental reason to legally bind and lock-in investment policies, the only real justification is if a developing country wants the policies of an industrialised country changed and ‘locked-in’ to benefit its own multinational companies or exporters.

Such trade-offs are particularly likely to be offered in relation to the agriculture negotiations. The EU itself has indicated that it is prepared to show some flexibility on agriculture if other countries, particularly developing countries, make more GATS commitments.¹⁰ Yet such

flexibility is an illusion; the EU is not even going so far as to commit to abolishing export subsidies. In any case, as one Harvard economist concludes, “*The exchange of reduced policy autonomy in the South for improved market access in the North is a bad bargain where development is concerned.*”¹¹

Also, with the possible development of rules on domestic regulation still to take place, making GATS commitments in the absence of knowing exactly what rules will apply to these commitments is a dangerous business.

5. What can be done?

Services are as, if not more, important for economic and social development as the primary and manufacturing sectors. The GATS, the services investment agreement, therefore has just as significant implications as the proposed WTO investment agreement.

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So what can governments do about it? Given that the agreement already exists, making it hard for developing countries to argue for major reform, the most sensible course of action is to exercise extreme caution. This entails resisting EU and US pressure to make a commitment and stalling the development of new rules.

This, of course, is easier said than done when countries are coming up against industrialised country pressure in the bilateral request-offer process, but, at least in dealing with the EU, it may be worth quoting one EU member state. In its reply to submissions received as part of its GATS consultation, the UK Government says, “If a country chooses not to pursue liberalisation, or not to make it binding, that is entirely a matter for them and liberalisation cannot be forced against a country’s will.”¹² This will no doubt be tested to the full in the coming months and years.

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For more information on the implications of the EU’s GATS requests see: ‘Whose Development Agenda?: An analysis of the European Union’s GATS requests of developing countries.’ April 2003. <http://www.wdm.org.uk/cambriefs/Whose%20development%20agenda%20v-4.pdf>

For more information on the lack of flexibility in GATS see: ‘The ‘Flexibility’ Myth: Why GATS is a bad model for a new WTO investment agreement.’ March 2003. <http://www.wdm.org.uk/cambriefs/flexmyth.pdf>