

Challenges for the South in the WTO Negotiations on Services

Summaries and Conclusions from Three Case Studies: Health Care (Kenya), Electricity (Colombia), tourism (India)

Introduction

Negotiations to expand commitments under the General Agreement on Trade in Services (GATS) within the WTO have been under way since 2000. These GATS negotiations are expected to continue at least until the end of 2004. The GATS agreement covers a broad spectrum of services such as banking, computer services, tourism and transportation. GATS also applies to essential services, such as energy utilities and health care, which have been privatised or which are offered by private suppliers alongside public providers. As defined by GATS, trade in services means not only that services themselves cross borders, but that service suppliers (persons and companies) establish a commercial presence in another country, or that consumers of services travel abroad.¹

Lack of evaluation

According to Article XIX.3 of the GATS agreement, WTO members must make an assessment of current trade in services, both in general and per service sector, before beginning a new round of negotiations. In particular, they must assess the degree to which the objectives of GATS have been achieved, such as greater liberalisation of the service sector and promoting the economic growth of all WTO member states as well to as the development of developing countries. The assessment must also consider whether the developing countries have been able to increase their trade in services--the objective of article IV. The European Union (EU) and other countries have effectively ignored article XIX.3. They continue to disregard appeals from developing countries to conduct a thorough assessment. Yet without such assessments, it is impossible to hold a wide-ranging, fact-based, political and public debate on the impact of the GATS agreement and the new round of negotiations.

The governments of Western countries operate from the position that liberalisation of trade in services and GATS will have positive macroeconomic effects: more competition leading to more efficiency; lower prices; innovation and transfer of technology; job creation, etc. They mainly point to the export advantages that service suppliers in their own countries stand to gain from the permanent opening of foreign markets.

¹ Concluded within the WTO in 1995, the General Agreement on Trade in Services (GATS) distinguishes in its definition of trade in services (Article 1 of the treaty) four different forms or modes:

1. Cross-border trade in services (neither supplier nor consumer travels),
2. Consumption of services in another country (the consumer travels, the supplier does not),
3. Commercial presence (the supplier opens an office or branch in a foreign market), and
4. Supply of services in another country (the supplier travels abroad and remains there on a temporary basis).

Human rights investigation

SOMO and WEMOS are of opinion that the GATS negotiations should take into account more than just macroeconomic and corporate interests. Especially from a development perspective, an assessment must be made of GATS' influence, positive or negative, on the advancement of the economic, social and cultural human rights of the residents of all WTO member states. The UN High Commissioner for Human Rights emphasises that liberalisation of trade must contribute to the realisation of these human rights, which must not only be achieved through permitted exceptions to WTO rules.²

With this in mind, SOMO and WEMOS have asked Third World partners to do field investigation into the opening of the services market to foreign companies and its consequences for the local population. Foreign providers and liberalisation of services were studied in three relatively sensitive sectors in three different countries:

- health care in Kenya,
- energy (electrical power) in Colombia, and
- tourism in India.

The framework of analysis for the investigation was the International Covenant on Economic, Social and Cultural Rights (CESCR). This covenant maintains that all people have the right, amongst others, to work, adequate working conditions and unionisation, social security, adequate living conditions, enough food, and the best possible health care and education. From the perspective of the CESCR, special attention must be paid to the poor and vulnerable. The principle of non-discrimination within human rights means that states must take positive action to protect the rights of the poor and weak.³

States are responsible for guaranteeing the accessibility, availability and quality of the essential services that make these rights possible. They are obligated to ensure that third parties, including business interests, do not undermine these human rights.

Not only is the government of each country responsible for these guarantees, the governments of wealthy countries have the obligation to support developing countries in achieving them, including within international institutions such as the WTO and IMF.

Relationship to GATS

Each of the three case studies explores GATS from the following two perspectives:

- In two case studies, the effect was examined of the liberalisation of the trade in essential services on the economic, social and cultural rights of the population and of employees. Special attention was paid to foreign service suppliers that have established a commercial presence in the countries studied (see note 1, mode 3 of GATS). In addition, the studies looked at whether future inclusion ('commitment') of a particular sector in GATS would solve the problems the study revealed, or in fact worsen them. One study evaluated the practices of the Spanish energy concern Endesa in the electricity sector in Bogotá, Colombia, while another looked at foreign-owned private hospitals in Kenya. The hope is that, before

² United Nations, Economic, social and cultural rights: Liberalization of trade in services and human rights. Report of the High Commissioner. Executive Summary, Economic and Social Council (Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights), 25th June 2002, nr. 7, 58.

³ This does not mean that everyone must always receive the same treatment. The UN High Commissioner for Human Rights has pointed out that this is a different form of 'non-discrimination' than the one described in WTO and GATS regulations, in which all foreign companies and service suppliers, whether rich or poor, are also entitled to equal treatment (for example, the same treatment as a national company) (*ibidem*, nr. 59).

countries make a binding commitment under GATS, discussion can be encouraged of the strengths and weaknesses of the GATS rules in dealing with the problems that have risen, both nationally and internationally.

- Because there have been too few assessments of the impact on economic, social and cultural rights in countries that have already made binding commitments under GATS, one case study investigated the consequences of tourism in India, a country that has already committed to the liberalisation of hotels, restaurants and travel agencies under GATS. Another case study looked at foreign health insurance companies in Kenya, a country that has liberalised its financial services under GATS. In both studies, researchers have again explored the ways in which GATS rules can help or hinder the approach to problems that arose in the study.

Case studies

A summary of all three studies follows, along with general conclusions and recommendations. The complete final reports of the studies are available in English on various internet sites, or by request from SOMO and WEMOS. They are:

- John Kinuthia, Trading in Healthcare Services in Kenya, are we prepared? Case study on the implications of committing healthcare services in Kenya under GATS. Consumer Information Network Kenya, Nairobi, Kenya.
- Benny Kuruvilla and Janak Rana Ghose, Weighing the GATS on a development scale - The case of tourism in Goa. Equations, Bangalore, India. (contact: research@equitabletourism.org)
- Néstor Y. Rojas, GATS, liberalisation and privatisation of the power sector in Colombia - The Endesa case. Censat Agua Viva, Bogotá, Colombia. (www.censat.org)

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The health care sector and foreign health care providers in Kenya

Current Policy

The government of Kenya is gradually decreasing its active role in providing health care. Under pressure from the International Monetary Fund (IMF) and the World Bank, it cut its budget in the late '80s and early '90s in order to deal with the economic crisis and pay back large foreign debts. As a result, the Kenyan government transformed its role from that of provider of health services to that of policy maker and regulator of health service provision. Its goal is to restructure the health care system, making it more effective, affordable and accessible, while improving the health of the Kenyan people. In this scenario, private companies and NGOs are gradually taking over health care provision.

The Kenyan government has in all business sectors been actively working to attract foreign investors. Although the market for foreign-owned hospitals in Kenya has not yet been permanently opened under the GATS agreement, in this and other sectors the government has placed very few restrictions on what foreign companies and organisations may do, in order to make foreign investment as attractive as possible. For example, foreign-owned hospitals are not required to treat poor and uninsured patients. The market for insurance, including health insurance, has already been opened according to GATS rules.

According to the International Covenant on Economic, Social and Cultural Rights (CESCR), every person has the right to the enjoyment of the highest possible standard of health. Non-discrimination is one of the covenant's basic principles (see introduction). Governments are expected to protect, respect and fulfil CESCR rights, such as by providing accessible and high-quality health care services.

Discriminatory practices in commercial hospitals

Until 1989, all Kenyans received free health care. After 1989, in order to reduce government health care costs, user fees were introduced and uninsured patients were required to make out of pocket payments. The quantity and quality of public health services declined. Public health care became much less accessible for most Kenyans, while commercial care remained financially out of reach. Foreign-owned hospitals are located exclusively in cities, as are the offices of foreign insurance companies. But only 20 percent of Kenya's population lives in the cities. In rural areas, health care services have collapsed since the institution of user fees. Many clinics and health care posts are out of use and there is just one doctor for every 33,000 people. In the city there is a doctor for every 1700 people.

Like all private hospitals, Kenya's foreign-owned hospitals are often guilty of discriminatory practices that violate the right to the best possible health care for all. For example:

- Patients who have no money for further tests or treatment are sent away before treatment is completed--even in life-threatening situations. Each treatment must be paid for separately and in advance.
- Patients may be chained to their bed until their bill is paid or required to work in the hospital to pay off their debt.

- Accident victims are not automatically admitted to the nearest hospital if that hospital is beyond their means.

The cost per day for a foreign-owned hospital may be ten times as high as the cost for the subsidised general wing of the national hospital in Nairobi. Even there, patients must pay almost 4 American dollars a day--despite the fact that 56 percent of the population lives below the poverty line and has no more than 1 dollar a day to spend. The poor who are turned away from the commercial hospitals end up in the public sector, which is then burdened with the poorest patients.

In order to cut costs, the government-run national hospital in Nairobi has set up a private wing alongside the subsidised wing. This has made the double standard highly visible. In the subsidised wing, patients share beds and there is no pharmacy, while the private wing has enough beds and medicines. Doctors prefer to devote their time to the patients from their private practice, rather than to public health care.

Relationship to GATS

Kenya has not yet liberalised the hospital sector according to the rules of GATS, but during current negotiations, Kenya may permanently open the commercial health care market to foreign corporations. Research into the practices of foreign-run hospitals shows that they do not respect the principle of equal care for all, particularly for the poor. In this way they violate Article 12 of the International Covenant on Economic, Social and Cultural Rights. The GATS agreement does give WTO member states the right to regulate sectors that are subject to GATS provisions (within the limits of the GATS rules), in order to discourage abuses and excesses. But during GATS negotiations and in the GATS agreement, little attention is paid to the ability of a country like Kenya to make complementary regulations to protect its health care system. In addition, countries like Kenya are under pressure from the international financial institutions not to stand in the way of foreign interests--a pressure that is increased by the GATS rules for equal treatment for national and international corporations.

The practices of foreign health insurance companies increase the double standard

Wealthy, healthy Kenyans can increasingly spread risks and contract out their health costs by purchasing commercial insurance policies or joining Health Maintenance Organisations (HMOs). These companies tailor their services to the wealthy city-dwellers who were already able to pay their hospital bills. Some private insurance companies, such as the British/Kenyan AAR, charge between 190 and 344 American dollars a year.

Private, foreign insurance companies refuse to accept patients who suffer from illnesses such as HIV/AIDS. This is in sharp contrast to the government's public health insurance system, which is obligated to accept all patients. Private hospitals and commercial insurers are profit-driven and often transfer their profits abroad.

It is extremely difficult to collect data on foreign insurance companies and their practices. The Kenyan government has no such data. There is a suspicion that foreign insurance companies and HMOs work closely together, exchanging information on clients' health and finances. In turn, HMOs work closely with certain hospitals to ensure that patients who can no longer pay for their health care are turned away. At this moment there is no Kenyan legislation whatsoever covering health care or insurance that applies to HMOs.

Relationship to GATS

During the previous GATS negotiations Kenya chose to liberalise its financial services without fully realising that it was also subjecting the health insurance sector to the rules of GATS. Article XVI prohibits governments from taking six specific kinds of measures to place limitations on companies, such as restricting the number of service suppliers. During the negotiations governments can limit these prohibitions but Kenya made only one limitation to complete market access under Article XVI. The Kenyan government could have required foreign insurers to insure poor patients, but did not take that opportunity during previous negotiations. The government can now require foreign companies to insure poor and vulnerable (HIV-positive or terminal) patients only if it also sets the same requirement for Kenya-based insurers, according to the GATS principle of non-discrimination and national treatment (Article XVII). If the Kenyan government sets the requirement only for foreign insurance companies, then other WTO member states can begin or threaten a trade dispute. If Kenya issues licenses to health insurers or sets standards of quality, then according to GATS Article VI.4-5, these measures must not be more burdensome to trade than necessary. It is feared that the discipline that GATS demands of governments will put pressure on their ability to protect human rights, because these protections can be seen as limitations on trade.

According to the GATS agreement (Article XI), countries are not permitted to apply restrictions to international transfer of profits in sectors that they have liberalised under GATS. Foreign health care providers and insurers earn a good profit from wealthy Kenyans. It is distressing that the profit from foreign insurers is not required to remain in Kenya, while the Kenyan health care system suffers from a chronic shortage of capital.

Certain provisions of GATS require complete transparency of government regulations and decisions, to help industry guard against loss of profits. But the GATS agreement does not require the business practices of foreign investors to be equally transparent. This case study has made clear that the government has little power to obtain answers to questions such as who is the owner of a company, what its policies and practices are with regard to poor patients, salaries, etc. The operations of foreign-owned hospitals and health insurance companies are anything but transparent.

Mobility of medical personnel and patients⁴

More and more wealthy patients from neighbouring countries are coming to Kenya for treatment in Kenya's private hospitals. This leaves fewer beds for Kenyans, particularly poor Kenyans. In turn, those Kenyans who can afford it prefer to travel to other, often distant countries for treatment. The best-trained medical personnel tend to abandon the public for the private sector, where the pay is better. Anyone who can seeks work abroad. As a result, public health care suffers from brain drain and lack of personnel. Meanwhile, commercial hospitals attract foreign specialists, but they do not pass on their knowledge to local personnel.

Relationship to GATS

The member states of the WTO also negotiate within the GATS agreement about the supply of health care services to foreign patients and the admission of foreign service

⁴ See note 1, notes 2 and 4.

personnel. Wealthy patients from neighbouring countries who come to Kenyan hospitals yield cash, but at the expense of poor Kenyan patients. In the current round of negotiations, the Kenyan government is considering asking the North to open its market for medical personnel, so that Kenyan doctors and nurses can practice in the European Union. Kenyan nurses working abroad supply hard currency to support their families at home. Kenyan negotiators are inclined to focus on the economic advantages at the expense of their own people's right to universal health care.

Privatisation of electricity in Colombia and the take-over by Endesa

Acting on the advice of the World Bank and the IMF, the government of Colombia has liberalised its electricity sector--in other words, privatised it and opened it to foreign electricity companies. Although the nature of the sector makes competition within a given region difficult and allows consumers little choice, Colombia decided to adopt a full market model instead of improving public management. The public electricity company had heavy debts, which increased its desire for private capital. It incurred these debts by building hydroelectric power plants, again at the suggestion of the IMF and the World Bank.

To stimulate competition, the privatisation also involved breaking up the utility into separate companies for generation, transmission, distribution and supply. The government's new role is to set policy and monitor quality while carrying out a strategy to attract foreign investors. Regional and local governments are required to implement privatisation within the established criteria.

Colombia has not yet made a binding commitment to liberalising the electricity sector under the rules of the GATS agreement. This case study shows what problems have arisen in the sale of a privatised company to a foreign investor (see mode 3 of GATS), and what if any options there are for dealing with these problems in a future commitment under GATS.

How Endesa got around government regulation

When the electricity utility for Bogotá, Colombia's capital, was privatised, it was divided into three parts. The original company, EEB, remained responsible for electricity transmission. A new company, Emgesa, was formed for the generation, and another company, Codensa, for distribution and supply. This was done without permission of the responsible city council. Employees protested, but a court found that it was more important not to undo the capital injection.

Because the government wanted to sell the original EEB as fast as possible, it was willing to accept the lowest appraisal of the company's value, although it is in the public interest to obtain the highest possible price for the sale of public property. The offer of the highest bidders was in fact above the lowest appraisal.

The new shares of Emgesa and Codensa were bought by companies that were owned for the most part by Endesa, a Spanish energy multinational with extensive holdings in Latin America. But the extent of Endesa's control over the purchasing companies was not clear, because Endesa participated in the purchase both directly and via Chilean subsidiaries. Endesa also acquired 11 percent of the transmission company, EEB. As a result, the division of the electricity sector into separate companies meant little in practice. But the Colombian government lacked the resources to do anything about it.

The capital injection from the new shareholders was not used to pay off all the energy company's debts, nor was it invested in infrastructure and maintenance, as was the intention. Instead, the money was used to pay severance to the 40 percent of the employees who were laid off--although personnel reduction was not an objective of the privatisation. In addition, part of the capital was drained off via a large dividend payment to the shareholders, including Endesa.

Meanwhile, the local government lost its majority vote in Emgesa and Codensa. This transfer of control over the privatised companies violated the legal agreement that not more than 49 percent of the shares would be sold.

Relationship to GATS

Like the Colombian government, many governments wish to maintain control over privatised utilities by retaining a majority of the shares. But when a country liberalises its utilities under the GATS agreement, Article XVI (2f) does not allow the government to limit the participation of foreign capital, unless the government explicitly states from the very beginning that it wishes to do this. Under GATS Article XXI, establishing a limitation at a later stage is difficult and expensive. GATS also requires governments to draw up standards and licensing criteria so as to interfere as little as possible (Article VI.4-5) with trade, including investment (see note 1, mode 3), rather than maintaining as much control as possible over essential services in the public interest.

If Colombia were to permanently liberalise its electricity sector, it would not under GATS be in a position to deal with some of the problems that have arisen:

- If the government privileges foreign companies while failing to protect the interests of its own people, the people have no international recourse. Meanwhile, the GATS rules give international protection to foreign companies, allowing them, for example, to protest administrative decisions by national governments (Article VI.2), which may in the end be punished by sanctions.

- The GATS agreement demands that governments make their regulatory structure transparent for other WTO members and their companies (Article III). But Endesa was able to use complex corporate constructions to get around the government's division of the electricity sector into separate entities. Clearly, transparency in the structure of multinational corporations is also essential, but the current GATS rules do not promote corporate transparency.

- GATS rules do not take into account that governments must have the resources to monitor foreign corporations that buy up privatised companies, in order to protect the public interest. They offer governments no tools with which to challenge foreign corporations that flout national laws. Yet GATS does guarantee foreign corporations the right to enjoy the same status as national corporations.

Consequences for employees and consumers

At Codensa, with Endesa's participation, 40 percent of the company's employees were voluntarily or involuntarily laid off without regard to the procedures of the collective labour agreement. Employees who were involuntarily laid off lost their source of income and their social security. New workers were hired at lower wages and with fewer benefits. To reduce payroll costs, the company switched to outsourcing. Outsourcing companies paid lower wages and had worse working conditions, and their employees had no collective labour agreement. As a result, the company undermined the union. These are clear violations of the right to work, income, adequate working conditions and union representation as has been established in the International Covenant on Economic, Social and Cultural Rights (CESCR Articles 7, 8 and 11). With this strategy, Endesa hoped to reduce its own high debts of 23.8 billion Euros (as of September 2002) and remain competitive in the international market. Endesa incurred its heavy debts by rapidly buying up power companies, particularly in Latin America and southern Europe.

Codensa's aggressive practice of installing new, expensive--and for some unaffordable--electricity meters led to resistance and demonstrations in Bogotá. In direct contrast to the objectives of privatisation, household electricity prices went up, especially for low-income households, some of which could no longer afford electricity. Large companies and wealthy households, however, saw their rates go down. The Colombian government took measures to make these pricing strategies possible and has been very receptive to the lobbying of companies like Endesa. Yet according to Article 11 of CDESCR, the government has the obligation to promote acceptable living conditions, explicitly including access to affordable electric power. On the other hand, Endesa has succeeded in substantially reducing power cut-offs and decreasing operational losses.

Relationship to GATS

Governments in countries such as Colombia often lack the resources to carry out their obligations under CDESCR and to enforce their own legislation on the subject. They also lack the capacity to investigate foreign companies, which makes them more likely to give in to the interests of investors. The GATS agreement contains nothing that would strengthen the ability of individual countries to deal with the problems they encounter with foreign service suppliers. GATS acknowledges only that many developing countries lack the resources to participate in international trade in services, and that developed countries can take measures to promote the export in services from developing countries (Article IV). However, developing countries do not have the power to enforce this article.

If Colombia commits to liberalising electricity generation, distribution and delivery under GATS, then GATS will discipline the regulatory actions of Colombia's national, regional and local governments in order to give rights to foreign companies, such as the right to enjoy the same status as a national company (Article XVII) or to operate without limitations (Article XVI). The international organisations that put pressure on governments to ensure adequate working conditions, guarantee the right to organise, and protect consumers cannot enforce these rights with the same kinds of sanctions that are available under GATS and the WTO. International regulation to rein in multinational corporations is weak and not binding. As a result, rights and responsibilities are not in balance.

WEIGHING THE GATS ON A DEVELOPMENT SCALE THE CASE OF TOURISM IN GOA, INDIA

Policy

India's central government has opened up part of India's tourism sector, i.e. hotels, restaurants and travel agencies, according to the provisions of the 1995 GATS treaty. India's tourist industry provides jobs, and tourists are an important source of foreign currency. Although GATS is intended to stimulate investment by providing stability in laws and regulations, the opening of the sector failed to generate sufficient concrete investment. In 2001, the Indian government took more measures as part of its autonomous liberalisation initiatives to attract foreign tourist businesses, such as giving tax breaks to hotels in remote areas and important tourist destinations.

For the most part, India's tourist industry is informally organised and comprised of small and medium-sized businesses. Because the government lacks reliable data, it has no real insight into the consequences of liberalisation. Policy and regulations for the tourist industry are made largely at regional and local levels. Local decision-making is important for the tourist industry in particular: each area is different, and flexibility is essential. But the decision to liberalise the tourism sector under GATS was made by the national government, without input from regional and local regulatory authorities. If decisions by local governments go against GATS regulations, however, India could be summoned before the WTO Dispute Settlement Body.

Member states of the WTO can from March 31, 2003, indicate which services sectors in their own country they wish to open to foreign investment or personnel or service products. Because developing countries such as India have little data on the environmental and social impact of tourism, they are not really able to prepare for the further liberalisation of the tourist industry, in part because of the rapid and undemocratic way in which preparations for the negotiations are being conducted.

Consequences for local residents

The province of Goa, on India's west coast, is a popular tourist destination. Goa has a large budget for promoting tourism, although the tourist industry itself would prefer better transportation and reliable electrical power. Such improvements would also benefit local residents.

The hotel sector has intensively lobbied government agencies and pushed for changes in environmental planning. Government agencies have failed to enforce environmental regulations that are intended to protect dunes and beaches. The two luxury hotels that were examined for this study have both expanded into a no-development zone along the coast. Permanent construction in areas with large tidal action has caused dramatic erosion of the beach. Around the Goa Marriott Resort. Turbulent waves have increased in such way that that tidal waves wash into the hotel's swimming pool during the monsoon, resulting in

periodic closures. The Taj Fort Aguada Beach Resort has done some construction without permits and had a waste treatment plant that did not work.

The unrestricted construction of hotels along the sensitive coastline of Goa has done irreparable damage to the environment:

- the ecological balance between land and marine life has been disturbed,
- sandstorms block roads,
- excessive pumping of ground water HAS lead to salt water ingress in the coastal aquifers,
- the coastline is eroding,
- non-biodegradable garbage, such as plastic bottles, is piling up,
- nightly parties cause noise pollution.

The hotels were designed without taking protests from neighbouring residents into account. The Taj Fort Aguada Beach Resort forced neighbouring residents from their land and houses, in some cases using physical threats. This took place with the knowledge and support of the government, which thereby failed in its responsibility to guarantee adequate living conditions (CESCR Article 11).

The hotels use large amounts of water, decreasing the supply for local residents. Tourism has also driven up the price of basic foodstuffs. This has increased the work burden of women in particular.

Tourism has also commercialised local cultural products and festivals, despite the government's responsibility to protect and develop cultures (CESCR Article 15.2).

Increased tourism has also led to a growth in prostitution, child prostitution and traffic in women and children. The tourist industry tends in general to discriminate against women.

Local activists believe that Goa is likely to emerge as one of the primary child prostitution destinations in the world. The government, unwilling to discourage tourism, turns a blind eye. Yet according to Article 10 of CESCR, children have the right to be protected from exploitation.

Relationship to GATS

GATS negotiations tend not to take into account the fact that many developing countries lack the resources and the political will to establish and enforce adequate regulations protecting local residents and the environment. The international tourism lobby WTTC would prefer that governments not regulate the tourist industry at all, but only facilitate it.

In addition, the GATS agreement stipulates that qualification requirements, technical standards and licensing should not constitute unnecessary barriers to trade (Article VI.4-5). These are regulations that affect the construction of hotels.

If India's government wishes to safeguard economic, social and cultural rights and protect the environment, it can under Article XIV take measures to protect 'public morals' or 'human, animal or plant life or health'. But if other WTO members accuse India of using these measures to limit trade in services, then India must be able to prove that the new measures are necessary.

When it liberalised travel agencies and the hotel and restaurant sector under GATS, India's central government stipulated that the participation of foreign capital should be limited to a maximum of 51 percent. But it chose not to make any other limitations on foreign companies. As a result, local governments may not limit the number of (foreign) hotels, even though Goa's coast is full in environmental terms and the area has social problems that must be addressed. GATS makes it difficult and expensive to go back and add new limitations (Article XXI). Article XVI prohibits six types⁵ of

⁵ The six kind of limitations which a WTO member state may not maintain or adopt are limitations on:

measures that governments might use to set limits in a sector that has been liberalised under GATS, unless a country has already requested an exception ('limitation') during the negotiations. Before the opening of the tourist industry, India's central government could have negotiated such exceptions, but failed to do so. During current negotiations, India can only either preserve the status quo or abandon the limitation on foreign investment in hotels and restaurants. The United States has already stated that it would like to see this limitation withdrawn.

Under the GATS agreement, foreign and national companies must be accorded equal treatment (Article XVII). If local authorities in a Goan village issue hotel and restaurant licences to local residents only, or give preference to small, locally owned hotels that do less damage to the environment, and exclude foreign hotels, this can be challenged by other WTO members.

Consequences for employees

The American hotel chain Marriott dominates the tourism industry worldwide, but seldom invests in ownership of hotels. Instead Marriott enters into management contracts with local hotels, which are permitted to use the Marriott name as a mark of quality, and sets standards for issues such as personnel policy and waste water treatment. Marriott tries to employ local managers as much as possible, which can lead to transfer of knowledge. Individual Marriott hotels pay a fee for the use of the chain's worldwide reservations system and other services.

The Goa Marriott Resort was found to have, for the most part, adequate working conditions as described in the International Covenant on Economic, Social and Cultural Rights (CESCR Article 7). Working mothers were also adequately protected (Article 10.2). But Marriott International has actively worked against union organisation, in conflict with Article 8 of CESCR. At the Marriott Resort in Goa, none of the employees belonged to a union. The Taj Fort Aguada Beach Resort, which is fully Indian-owned, was found to violate Article 7 of CESCR with regard to decent wages, opportunity for promotion, and healthy working conditions, including meal time and breaks. The International Labour Organisation (ILO) has also received complaints that the Taj Fort Resort has actively worked against the right to organise, in opposition to Article 8 of CESCR.

Although tourism has created jobs, others, such as fishermen, have been cut off from their traditional work and income and have lost their right to work (CESCR Article 6).

Relationship to GATS

International corporations with a worldwide reservations system can stimulate smaller local businesses to work more efficiently. But smaller businesses can also end up being forced out, and too much competition can put pressure on working conditions. GATS stipulates that businesses in developing countries must be given access to distribution channels and information networks (Article IV), such as Marriott's Internet reservations system, but developing countries cannot enforce this. Article IX (which prohibits practices that undermine competition) has not been able to prevent a few

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- the number of service suppliers
 - the total value of transaction or assets
 - the total number of service operations or quantity of service output
 - the total number of natural persons
 - the type of legal entity or requirement to set up a joint venture
 - the participation of foreign capital

major players from monopolising the tourist industry, along with related sectors such as travel information, airline reservations, etc.

Despite the inability of local, national and international authorities to guarantee labour rights, not to mention social and cultural rights, calls are being made in the current GATS negotiations for giving complete freedom to businesses and consumers in the tourist industry. As a result, there are too few instruments for dealing with the problems that arise from liberalising trade in services.

Wealthy Northern countries are reluctant to open their markets under GATS to unskilled workers from developing countries, which would improve the right to work. They are only willing to give limited access to skilled personnel who have money to invest or who can ease labour shortages. However, wealthy countries want their own skilled labour to be admitted to other countries. They also demand extensive market access in sectors where they stand to make a profit. As a result, the GATS agreement is unbalanced and favours the North.

Conclusions and recommendations from the three case studies

Not just a trade perspective

The case studies that have been carried out by partners of SOMO and WEMOS show that liberalisation of services such as health care, electricity utilities and tourism, or their inclusion in the GATS agreement, have complex consequences for societies. In the countries studied, corporate and financial interests dominate, and the advantages that are expected from liberalisation and the GATS agreement are primarily economic. An analysis from the perspective of the International Covenant on Economic, Social and Cultural Rights shows that liberalisation of services also has direct and indirect consequences for society, and especially the more vulnerable groups. The availability and accessibility of essential services such as health care and electricity is crucial to guaranteeing the socio-economic human rights the CESCR was intended to protect. As a result, such services cannot be treated as ordinary merchandise. The consequences of tourism, too, show that this sector cannot be dealt with in GATS negotiations purely from a perspective of trade.

Evaluation that takes people and policy into account

* Much information is still missing that is needed for adequate decision-making in the current round of GATS negotiations. What is missing is not only statistical data, or actual knowledge of how foreign service suppliers operate. As the case studies show, it is still unclear how economic, social and cultural human rights will be guaranteed in sectors that are regulated by the GATS agreement, or how sustainable development will be encouraged.

► ***For this reason, it is essential to conduct evaluations before proceeding with negotiations. The case studies show that such an assessment per service sector must pay special attention to the consequences of liberalisation and GATS rules for:***

- ***the economic, social and cultural human rights of all people, and particularly for the poor, women and children;***
- ***consumers;***
- ***employees;***
- ***local small businesses;***
- ***the environment and ecology.***

The case studies show clearly that such an evaluation must also take into account:

- ***national policy and the capacity to carry it out;***
- ***existing social and environmental legislation and its enforcement in practice;***
- ***the influence and requirements of the World Bank and IMF;***
- ***the dynamics of the international market and competition per service sector;***
- ***the strategies of the major international companies per sector.***

* The case studies also show that national decision-making on GATS negotiations seldom takes place democratically. Local governments, responsible agencies, interest groups

representing the poor, and citizens as a whole are almost entirely excluded from the process. Partly as a result, complex relationships and larger social issues within a service sector tend to be neglected.

► ***In order for countries to take positions in the GATS negotiations it is essential that:***

- ***all relevant agencies and ministries confer and coordinate on an equal basis;***
- ***local governments be involved in this coordination and their jurisdiction not be restricted without their consent, as happened in India;***
- ***a multi-stakeholder approach be used, with special attention to the interests of the poor.***

GATS does not address the problems of liberalisation of services

* The case studies show that liberalisation of services tends to strengthen companies' right to operate freely, which works to the advantage of customers who can afford to pay, but at the cost of the environment or of the rights of the people as a whole. It widens the gap between rich and poor:

- In Kenya, adequate health care and health insurance are within the reach of the wealthy only; brain drain to the commercial sector and abroad increases the gap;
- in Colombia, electricity prices for the poor have risen and wages for ordinary employees have fallen, while a foreign company drains off capital;
- in India, tourism gives the poor less access to water and there are other social costs that accompany tourism liberalisation like child labour and child sexual abuse, while rich tourists and hotel owners encounter few obstacles.

This two-tiered system violates the non-discrimination principle of CESC. According to this human rights covenant, governments must take special measures to guarantee the rights of the poor. Yet when a service sector is subjected to the GATS rules, governments cannot treat foreign companies differently from national companies or other foreign companies (Articles XVII and II respectively) to protect the poor. In case of conflicts, it is the WTO panels who may decide.

* The case studies show that when governments attempt to carry out policy, they are often hampered by a lack of transparency on the part of foreign service companies. This was the case with both the privatisation of electricity in Colombia and Kenya's quest for better health care for all its people. The GATS rules do little to increase the transparency of foreign service suppliers. Only Article IX makes it possible to request available public information from the home country of the parent company in case of unfair competition practices by the company. In contrast, GATS requires governments to make their laws, regulations and administrative decisions transparent. In addition, measures to ensure quality may not be more burdensome to trade than necessary. This works to encourage maximum freedom and profit for the business sector, while governments are given no instruments with which to monitor the policy and actions of multinational corporations. It is not sufficient to leave this monitoring to the host countries, because many states do not have the power to do this.

► ***In the GATS negotiations, binding agreements must be made that will increase the transparency of internationally operating service companies, for example, that WTO member states must enact measures or laws to require internationally operating companies to report on their international structure***

and their compliance with social and environmental laws and agreements in the countries in which they operate.

* Foreign service suppliers and service consumers (tourists) do not always respect economic, social and cultural human rights. As a result, rights such as the right to work, adequate working conditions and unionisation may be violated.

If the governments of developing countries wish to keep a sector attractive for foreign investors, they may have difficulty in implementing a policy that protects the interest of the whole population. In addition, the World Bank and the IMF influence developing countries to adopt a policy that benefits foreign investors and free markets. The public interest comes second, as it did during the sale of the privatised electricity utility in Colombia, and as it has in India's handling of prostitution problems. The new role of regulator and policy-maker poses many problems for these governments. They are often influenced by business interests in enacting regulations and enforcing existing laws.

The GATS agreement permits national regulation up to a certain point, but the case studies show that regulation is often lacking in practice. As a result, an inequality of rights arises, to the disadvantage of the poor.

► (1) *Prior to liberalisation under GATS, a country must, for each liberalised sector, establish national regulatory and supervisory agencies that are separate from the executive governments.*

► (2) *In GATS negotiations and rules, it must be recognised that for the liberalisation of services in general, and the subjection of specific sectors to GATS in particular, necessary national anticipatory policy is often absent or not enforced. For this reason, Article IV must not only strengthen the ability of developing countries to export services, but strengthen their ability to deal with problems that arise in 'importing' services, such as admitting foreign service companies or foreign consumers (tourists). Article IV must not be, as it is now, non-binding. Here is a clear responsibility for wealthy countries. According to the ESCR covenant, they must take measures to help developing countries realise human rights. A coherent policy aimed at achieving sustainable development is essential.*

The consequences of GATS rules

* The findings of the case studies on the liberalisation of services confirm the conclusions of the UN High Commissioner for Human Rights (June 2002), who invokes the obligation of governments to regulate so as to guarantee the economic, social and cultural human rights of all. This must have higher priority than the rules of trade.

The GATS agreement and the application of the GATS rules formalise liberalisation and make it legally binding. This works mainly to the advantage of powerful corporations and economically powerful countries, giving them an instrument that allows them to challenge certain administrative decisions (Article VI.2-3), to insist on the same treatment as other international corporations (Article III) and to drain off profits to their home country (Article XI).

* For service sectors that fall under GATS rules, the GATS agreement offers too little flexibility to undo liberalisation or refuse to implement GATS rules if ESC rights are violated or if they conflict with a government's responsibility to implement the ESCR covenant. In Kenya, for example, the government discovered only afterwards that in liberalising the health insurance sector under GATS it had made too few exceptions ('limitations') to prevent foreign health insurers from refusing to accept poor patients.

► ***When economic, social and cultural human rights are violated, the GATS agreement must provide more flexibility to:***

- ***reverse the liberalisation of a sector under GATS without having to wait for maximum three years or to agree on 'compensatory adjustments' for other WTO countries, as is now stipulated in Article XXI. Protection of ESC rights must also be discussed in the current negotiations on measures that can protect an economy from severe damage through import (Article X on 'emergency safeguard measures');***
- ***substantially ease policy limitations on market access (Article XVI) and equal treatment for national and international companies (Article XVII);***
- ***give highest priority to respect CESC in current negotiations on the further disciplining of domestic regulation on standards and licensing by governments (Article VI.4), instead of prioritising the principle of the least burdensome to trade, or of economic necessity.***

* As a result of the liberalisation of the hotel and restaurant sector in India, it has become difficult to give preference in licensing to local and small-scale enterprises that do less damage to the environment (see the obligation not to discriminate against foreign companies under Article XVII). To protect the environment, Article XIV stipulates that a government can take measures to protect plant and animal life. This is insufficient to protect whole ecosystems. In addition, India's governments would bear the burden of proof if another WTO member state were to challenge the measures' necessity. And the obligation under Article VI.4-5 to make licences no more burdensome than necessary is too unclear about what this means in practice and to which service sectors it applies.

► ***The GATS negotiations must clarify the intent of GATS rules, or modify its regulations to give more weight to environmental protection.***

* The case studies show that much more must still be done to balance economics and trade with social, cultural and environmental policies. Only then will the benefits of trade in services be available to all.

► ***The negotiation process on further liberalisation of service sectors under GATS must be suspended. In the international market, international instruments must first be strengthened that can defend the interests of the poor (e.g. against child prostitution); protect the rights of consumers and employees; guarantee ESC rights; and protect the environment. Economic, social and cultural human rights and the environment must have priority over trade rules.***