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978-0-521-89688-7 - GATS and the Regulation of International Trade in Services
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PART 1

Beyond regulatory control and multilateral flexibility: Gains from a cosmopolitan GATS

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Testing regulatory autonomy, disciplining trade relief and regulating variable peripheries: Can a cosmopolitan GATS do it all?

MARION PANIZZON AND NICOLE POHL

The Doha Round seeks to fulfil the mandate of progressive liberalisation inscribed in the General Agreement on Trade in Services (GATS). Members of the World Trade Organization (WTO) agreed to progressively negotiate market access and equal conditions of competition in more services sectors to achieve both a deepening and widening of services trade liberalisation beyond the actual status quo of commitments laid down in GATS during the Uruguay Round. Yet the main benchmark of progress against which a services trade regime will be measured post-Doha lies in formulating behind-the-border disciplines on domestic regulation, agreeing on comprehensive multilateral trade exits, such as trade remedies and temporary import relief, as well as in fostering mutually supportive relationships with services-related agreements, such as in the field of air transport, labour migration, energy and health.

This collection of essays entitled 'GATS and the Regulation of International Trade in Services' analyses two periods of cross-border service supply – the post-Uruguay Round era of multilateral and plurilateral liberalisation, with the associated standardisation of services regulation worldwide and development of a services-specific case law on GATS disputes, and the process, postulates and progress of the current Doha Round negotiations – and speculates on the post-Doha GATS regime.

Services trade is an insufficiently studied field in academia, yet services constitute the complex, higher-value work that affords many countries a competitive advantage on the global labour market. The value of services exports worldwide has increased substantially from US$ 17,439.9 million

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in 2001 to US$ 26,319.3 million in 2004.[1] Services have become engines of growth for many economies and the added value of services as a share of GDP has reached levels higher than 70 per cent in high-income countries and nearly 50 per cent in low-income countries.[2] At the same time, the share of services in international trade has remained below 20 per cent.[3] The continuing technological revolution has significantly enhanced the tradability of many services, emphasising the gap between the potential benefits from services liberalisation, not least because of the trickle-down effects for other sectors, and actual gains from such trade. Therefore, rules conducive to international trade in services and a framework that permits and promotes the gradual liberalisation of the sector were and are important elements of the trade agenda.

Nearly half a century of negotiations in goods markets has taught negotiators that a decade is not a long time when the output has to be assessed in terms of trade liberalisation measures requiring consent from all WTO Members. Looking at services liberalisation ten years after the conclusion of the Uruguay Round, one sees that a decade is a very short time indeed for negotiating free trade in a sector:

- for which there is no international agreement on the state-of-the-art for regulatory standards or on the objectives of regulation;
- which permits trade in several modes, not all of which are yet well understood and for each of which the range of imaginable measures to limit competition seems limitless;
- in which the needs of developing and developed countries differ significantly; and
- for which reliable data are difficult to come by.

Although progress in services liberalisation has sometimes been perceived as difficult and too slow, the GATS provides quite a comprehensive and complex framework of multilateral disciplines. Nonetheless, opinions regarding the best path to liberalisation differ, creating uncertainty as to whether a regime of multilateral disciplines for services paralleling those that already exist for goods would be the best option. While disciplines for goods are complex and controversial, as arguments

[1] Figures from OECD Manual on Statistics of International Trade in Services; the data concern trade between residents and non-residents of countries and are presented in millions of US dollars.
[2] Figures from WTO Secretariat, Measuring Trade in Services, March 2006, for 2005.
[3] Figures from WTO Secretariat, International Trade Statistics 2005, for 2004.

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over safeguards and trade remedies demonstrate, the services sector reveals even more idiosyncrasies to force negotiators to revisit relatively basic questions such as how to measure trade or how to define like products.

The Doha Development Agenda seeks to advance the built-in agenda for services of the Uruguay Round, which Members failed to finalise. Thus, the Doha Declaration did not introduce any new negotiating mandate for services. Instead, the General Council incorporated the pre-existing negotiating mandates of GATS relating to domestic regulation, subsidies, emergency safeguards and government procurement into the Doha Round negotiations. Nevertheless, much has changed for global trade in services in between the Uruguay Round and the Doha Round.

To most authors, the basis for the challenges facing the post-Doha services regime lies within the GATS itself: the flexibility in rule-making and regulation hampers advances in recognition of services disciplines, the divide between deepening horizontal or increasing sector-specific commitments together with the asymmetry between modes of supply, such as the scarcity of mode 4 commitments relative to other modes,[4] threatens meaningful progressive liberalisation. The timing and manner of tackling the unfinished rule-making mandates deepens the divide between developing and industrialised countries.[5]

While the content of discussions, the negotiating positions and the level of commitment relating to the treaty's working programme have remained the same since the establishment of GATS, the political economy and the legal questions of services trade have matured during the first ten years of existence of the multilateral legal framework for services trade. For example, cosmopolitan concerns about expanding the scope of GATS to labour mobility under mode 4, to include air transport services, e-commerce and energy trading into GATS, characterise the debate about the scope of GATS today. Proponents of distributive fairness of GATS relating to the universality of access to services in essential sectors, such as education, health and water, seek a clarification of the underlying policy goals of the GATS. On the issue of sovereignty, governments are faced with a trade-off between committing more sectors to liberalisation

[4] See WTO CTS, Communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay, Categories of Natural Persons for Commitments under Mode 4 of GATS, TN/S/W/31, 18 February 2005.

[5] See WTO CTS, Communication from Switzerland, Temporary Admission of Installers and Maintainers under the GATS: A Case for Mode 4 Commitments, TN/S/W/61, 2 April 2007, as an example for broadening its horizontal commitments on mode 4 by the category of 'installers and maintainers'.

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and offering deeper commitments in existing sectors while retaining a degree of regulatory autonomy over quality control of services supplied.[6] This introduction seeks to set the stage for the following debates in the various chapters by questioning whether a cosmopolitan GATS can do it all: testing regulatory autonomy, disciplining trade relief and regulating variable peripheries. The notion of cosmopolitanism stands for a two-tiered regulatory direction of GATS. In a horizontal dimension, cosmopolitanism establishes a coherent and open relationship to other services-related public international norms and private standards. In a vertical dimension, cosmopolitan services regulation expresses the multi-levelled regulatory jurisdiction linking multilateral disciplines with regional and domestic regulatory autonomy. A third and normative value qualifies the cosmopolitan services supply as one which respects basic human rights, including core labour standards, as well as one which realises a measure of distributive equity of supply and universality of access to essential services.

The choice is one between regulatory competition and transnational regulatory approximation or one between more cosmopolitan content of rules (such as temporary import relief, subsidies, government procurement) or regulatory autonomy for technical standards and licensing requirements. Should GATS seek to define a standard of harmonisation and, if so, how much would such standards reduce the policy space of domestic regulators? Or, should WTO Members agree instead on introducing regulatory competition among WTO Members and how could developing countries keep up in such a situation? To what extent could disciplines in services be set up by drawing on lessons learnt from the goods sector or does the sound regulation of trade in services require an approach distinct from that of the goods regime? To what extent does the GATS model of liberalisation spill over to other services fields governed up to now by non-WTO international norms, such as air transport services, labour migration, accounting and prudential disciplines in finance?

Yet more mundane questions than those relating to unfinished rule-making and the degree of regulatory impact must be asked: how could WTO Members be lured into increasing what some consider to be the disappointingly low liberalisation gains of commitments? How could the emergence of plurilateral and regional free trade agreements be

[6] See Panagiotis Delimatsis, 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS', *Journal of International Economic Law* 10(1) (2006), pp. 13–50.

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monitored for their compatibility with GATS? What issues or which GATS provisions characterised the first decade of GATS jurisprudence from its beginnings in *EC – Bananas* in 1997, when GATS was only dealt with as an accessory to goods to the first two self-standing GATS cases, *Mexico – Telecoms* in 2004 and *US – Gambling* in 2005?

Since only a pluridisciplinary approach to services trade can capture the complex interconnectedness of regulation, liberalisation and negotiation or compare the cosmopolitan nature of multilateral liberalisation with the effectiveness of regionalism, the organisers of the Forum on International Trade in Services – New Perspectives on Liberalisation, Regulation and Development, held in September 2006 at the World Trade Institute of the University of Berne, Switzerland – brought together trade lawyers and economists, as well as political scientists to debate the open issues of GATS and pre-empt new challenges. The resulting collection of essays thus captures the shift in the impact of the GATS from being a classic beacon of trade liberalisation to a behind-the-border promoter of constitutional change.

Participants were asked to take a cross-cutting approach as opposed to making a sector-specific analysis of trade in services. Most contributions use modes of liberalisation and sectoral themes to illustrate specific legal, economic or political challenges to GATS as opposed to discussing a mode of service supply or market access in a sector as an issue in itself. The two exceptions are a chapter on investment in services disputes dealing with mode 3 and a chapter dealing with the air transport services sector.

Drawing on the expertise of the participants from the academic, trade negotiating, regulatory and private sectors, following the introduction, the second part of the book is devoted to economic issues and commercial interests in GATS and the final part covers the political and economic implications of liberalisation of trade in services. Most authors however, discuss legal issues of services trade. The book aims to serve as a reference guide on international trade in services in the context of the GATS, its negotiating methods as well as its emerging jurisprudence. Structurally, the book's eight parts mirror the GATS' identity set around the three pillars of liberalisation, regulation and negotiations.

The book examines the experiences and challenges coming out of a decade of negotiations that are not specific to particular services sectors. Thus, the chapters reflect the challenge of removing distortions that impede the ability of foreign service suppliers to be placed on an equal footing with domestic ones. Another cross-cutting issue dealt with is the

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benefits of GATS for developing countries, for example, how GATS induces reform of domestic law, the increased level of efficiency resulting from more competition and how the dismantling of barriers to foreign services could produce the much needed inflows of capital, investment and skilled labour. On the other hand, many contributions also deal with the overall obstruction of the capacity for openness towards foreign service providers. Such obstructions result from the reluctance to take commitments beyond those locking in the status quo, either because of strategic motivations, such as membership of preferential trade agreements, or because of the 'regulatory weakness' of the GATS, the lack of economic infrastructure and the scarcity of information about relevant services markets.

While the main aim of this book is to evaluate and rethink strategies for liberalising services, taking into account the experience of the last decade, it also examines new avenues for services liberalisation. They show that, in some areas of services liberalisation, although the work agenda is relatively clear, a lot of work needs to be done. At the same time, there are other areas where the agenda has not yet even been defined.

The rest of the book is divided into seven parts. Part 2 deals with 'unexplored economic dimensions', in which trade economists consider the main points of the debate on trade in services and the GATS from an economic viewpoint. It examines the desirability and effects of preferential, often GATS-plus services trade agreements, as opposed to multilateral liberalisation, the relevance of services trade for developing countries, the lack of appropriate data, as well as the emergence of services-specific rules of origin. Using the South–South services trade agreements to demonstrate the fragmentation of services trade into regional and sectoral GATS-plus agreements, Roy, Marchetti and Lim (chapter 3) impressively illustrate how bilateral and regional agreements with levels of commitments higher than those in GATS are being negotiated among developing countries. These authors provide for a qualitative assessment of GATS-plus commitments in preferential trade agreements finding a mixture of new and improved bindings combined with levels of openness that exceed Doha Round offers, in particular in agreements with the US, but with differences across modes of supply. They use evidence from the South–South agreements to demonstrate how the relevance of services trade for developing countries has a bearing on the perceived interests and trade-offs in trade negotiations at both the bilateral and multilateral levels. While they find problems of compliance with Article V GATS in services sectors the fact that in contrast to GATT,

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which does not provide for non-reciprocal treatment in MFN exceptions, the GATS is equipped in Article V:3 with a specific exception for allowing special and differential treatment in South–South trade agreements, suggests that the flexibility in GATS may at times also work in favour of developing country members.[7] Given such new trading opportunities for developing countries, it is suggested that perhaps trade in services is not exclusive to the agendas of developed countries, although some commentators maintain that the virtual absence of commitments in modes 3 and 4 renders GATS irrelevant for developing countries and reflects the fundamental imbalance or bias of GATS towards industrialised countries.

Sufficient data on trade in services for an economic assessment of the effects of barriers to trade in services are as yet unavailable, as the chapter by Dihel, Eschenbach and Shepherd makes clear (chapter 2). Dihel and her co-authors, however, suggest two ways to compensate for the lack of data: first, by suggesting a gravity model approach using foreign direct investment stocks as proxies for trade in services in mode 3; second, by providing figures on South–South services trade which, according to their analysis, takes place predominantly at the regional level. The relevance of bilateral and preferential agreements and the different modes of service supply combined with the diverse nature of trade barriers to services liberalisation add complexity to the topic. Rules of origin have often been seen as potentially protectionist sources of complexity for the goods sector. The research on the effects of different rules of origin in the goods sector is still in its early stages and for the services sector, the level of understanding is still lower. This is the starting point for the research done by Fink and Nikomborirak (chapter 4), who assess the implications of different rules of origin for five Association of Southeast Asian Nations (ASEAN) countries. Their work points to domestic ownership and control as well as incorporation as the most important rule of origin criteria and they note a number of implementation issues related to these criteria. Fink and Nikomborirak lead the way for further research on rules of origin, but also show that rapid liberalisation is not always conducive to the efficient functioning of services trade, since areas

[7] See Cosmas M. Ochieng, 'The EU-ACP Economic Partnership Agreements and the "Development Question": Constraints and Opportunities Posed by Article XXIV and Special and Differential Treatment Provisions of the WTO', *Journal of International Economic Law* 10(2) (2007), pp. 374–377.

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characterised by a high level of technical complexity may not get the attention necessary to ensure sound implementation of rules of origin.

Part 3 entitled 'the limits of request–offer negotiations: plurilateral and alternative approaches to services liberalisation' explores the different strategies for conducting services negotiations. The ability to find effective and efficient strategies to negotiate new packages depends as much on the ability of negotiators to design appropriate rules as on their speed of liberalisation. Three chapters in this volume contribute to the analysis of the experience with negotiating approaches adopted so far and make suggestions for alternative approaches. Türk (chapter 6) discusses plurilateral negotiations and finds that they have contributed to enhancing transparency on negotiating positions and shedding light on technical issues, but have failed to produce concrete outcomes. Plurilateral negotiations in services replace the traditional request-and-offer mode and have further-reaching potential for unblocking other areas of trade negotiations.[8] Türk points to the value of 'narrowing down' and 'zooming in' processes as procedural outcomes of plurilateral negotiations. In addition, she suggests a number of criteria against which negotiation approaches can be judged, thus bringing more structure to the discussion about negotiation strategies.

Kelly (chapter 7) examines New Zealand's experience with bilateral and plurilateral negotiations focusing on their impact on the country's negotiating positions and the decisions on resource allocation. She concludes that, despite being time-consuming and costly, the bilateral request–offer is a vital element in negotiations because of the contribution it makes in terms of generating information and building relationships with key interlocutors. She describes plurilateral negotiations as complements to bilateral negotiations because they build on shared interests and draw on the strengths of other parties. Gao (chapter 8) adds to these findings by looking at sectoral and modal approaches which, he argues, are inherently plurilateral in their approach and become feasible alternatives as the complexity of the negotiations increases. Overall, all three papers agree that the formation of plurilateral perspectives is a constructive process per se. Although the negotiation process yields information

[8] Alejandro Jara, Speaking Notes, Annual Conference NCCR-Trade, World Trade Institute, Berne, Switzerland, 3 July 2007, observes that plurilateral negotiations in services have been compared to sectoral negotiations in non-agricultural market access (NAMA) and could supposedly be used in agriculture, when a group of members agrees to a level of ambition for one sector that is higher than the result of a formula cut, given that obviously that result is applied on a MFN basis.

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about objectives, issues and political realities, it can also prove extremely burdensome. It is, however, a process that helps negotiators to understand the shape of a possible services package.

The jurisprudence of GATS forms Part 4 of the book. In 'GATS case law: a first assessment', four authors describe the transition of GATS from being an ancillary item of disputes over goods, to services issues becoming the subject of contentious claims in their own right. While Andrew Shoyer (chapter 10) puts the emphasis on the *Mexico – Telecoms* case, which has not been appealed, both Eric Leroux (chapter 11) and William Davey (chapter 12) investigate the systemic issues of GATS adjudication. While Leroux points out the relationship between the GATS guidelines for domestic regulation, adjudication of domestic law and interpretation of scheduled commitments, Davey unravels services specificities that have challenged the trade-in-goods bias of the WTO judiciary. Finally, Martín Molinuevo (chapter 13) asks whether foreign investors can benefit from the WTO dispute settlement systems when their investment abroad qualifies as commercial presence as defined by mode 3 of the GATS. Given that WTO adjudication, unlike investor–state arbitration under International Centre for the Settlement of Investment Disputes (ICSID) and other arbitral tribunals is closed to claims from private parties, there is a need to examine what private investors in services stand to gain if their governments launch a dispute against the host government before the WTO, but also whether elements of WTO law have shaped the content and scope of investor–state arbitration.

Part 5 comprises four chapters on 'market access, national treatment and domestic regulation'. The papers revolve around the common theme of non-discrimination in services liberalisation and regulation. Firstly, national treatment is preconditioned on the likeness of services and service suppliers. Thus, Mireille Cossy (chapter 14) discusses the concept of likeness in services by comparison to that in relation to goods and suggests 'something different' in the form of an improved aims-and-effects test according to which elements related to the regulatory context 'of the service and/or of the supplier should play a role in relation to GATS national treatment'. Such a bona fide regulatory distinction that operates without creating disproportionate burdens on foreign services providers comes close to the necessity test as suggested by Panagiotis Delimatsis. Joost Pauwelyn (chapter 15) finds Cossy to follow a 'misguided' approach to national treatment as the GATS 'core' principle of non-discrimination. In his view, the prevailing focus on the 'likeness' test should be replaced by defining what constitutes less favourable treatment, including examining

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