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Report on Trade, Environment, and Trade in Services

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Preface

The Concerted Action on Trade and Environment (CAT&E) is designed to provide an opportunity for the large and growing community of European researchers working on trade and environment issues to meet regularly, to discuss research hypotheses and methods, to review results, and to develop new lines of co-operative research. CAT&E will launch a dialogue with policy makers at all levels. It aims to create a process that can document the progress of research and generate new research impulses in this area. It seeks to advance the resolution of current conflicts between trade and environment.

The information obtained in the course of the Concerted Action is summarised annually in state of the art reports and bibliographies in a fashion that is useful to both researchers and policy makers. These reports serve as input to CAT&E's annual members' meetings and open conferences. To structure the reports and discussions, the following themes have been initially identified (in random order; the theme of the present paper is underlined):

- ✓ Subsidies
- ✓ Government Procurement
- ✓ Investment
- ✓ TBT, SPS, and Labelling
- ✓ Trade and Development
- ✓ Trade, Environment, and Human Rights
- ✓ Trade in Commodities
- ✓ Implementation Procedures
- ✓ Trade in Services
- ✓ Intellectual Property Rights
- ✓ Trade and Multilateral Environmental Agreements
- ✓ Dispute Settlement
- ✓ Transparency and Participation
- ✓ Sustainability Assessment of Trade Agreements
- ✓ European Trade Policy Development
- ✓ Trade and Agriculture
- ✓ Trade, Environment, and Labour
- ✓ Trade, Environment, and Public Health
- ✓ Science and Precaution
- ✓ Trade and Environment in the Architecture of International Governance.

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1. Introduction

World-wide trade in services is an area of huge economic significance. Approximately one-fifth of total global trade now comes from trade in services, and over the past ten years trade in services has grown at an average of 6% per year to equal US\$1.35 trillion.¹ Needless to say, this qualifies trade in services as "big business", and the environmental impact of this rapid growth in services trade should not be discounted or underestimated.

The Uruguay Round introduced the General Agreement on Trade in Services (GATS) into the WTO system. Although the GATS has a surface resemblance to the General Agreement on Tariffs and Trade (GATT), in practice it is likely to evolve in response to a quite different dynamic. The interests in trade in services are significantly different from those involved in trade in goods, and the institutional structure of the GATS exhibits a number of singularities. Also, services represent a significant arena of environmental concern: On one hand, a number of services might have the potential to contribute to achieve environmental objectives. These services include basic environmental services but also environmental assessment, auditing, research services, or monitoring. On the other hand, many other services, such as transport, tourism, and oil exploration services, have significant negative environmental implications, and it is important to ensure that international market disciplines are in place as the markets for these services become increasingly international. Yet another link is the decrease in policy space for national governments to interfere in the market for environmental purposes once these have been liberalised.

However, the linkages between GATS and the environment have not been systematically explored. Still, as GATS evolves it is to be expected that a fair amount of original research will be undertaken in this area. This state of the art report will briefly summarise the main hypotheses and methodologies used in the research on the interlinkages between GATS and the environment.

In layman's terms, services are known as "anything you can't drop on your foot".² In the language of the GATS, services are defined as "any services in any sector except services supplied in the exercise of governmental authority" (Art. I:3(b)). Analysing the relationship between the GATS and the environment, it has to be kept in mind that although 'environmental services' is defined as the only one of the 12 core service sectors under the GATS classification, we will find some services in the other sectors which can be relevant to or regarded substantially as environmental services. In addition, to provide these services, the GATS identifies four different "modes", namely cross-border supply (Art. 1.2a), where services, such as international telephone calls, internet services, or electricity, are supplied from the territory of one Member into the territory of another Member; consumption abroad (Art. 1.2b) allows the supply of services in the territory of one Member to a consumer visiting from another Member; commercial presence (Art. 1.2c) includes the setting up of a business, subsidiary, or branch in the territory of another Member; usually referred to as foreign investment; and movement of natural persons (Art. 1.2d) allows workers from one Member to enter another Member's territory to temporarily provide services for a business.

¹ Waskow and Vincente, 2001.

² Friends of the Earth, GATS Primer.

Both the different categories and number of supply modes obviously have an extremely wide reach and therefore considerable potential to affect the environment and the lives of citizens. As a result, there has been a substantial amount of debate surrounding the GATS negotiations, much of which has found civil society organisations in direct opposition to many WTO claims. Numerous allegations have emerged, including threats to democracy, health concerns, and deterioration of services of general interests. The following will structure the hypotheses along factual linkages, regulatory linkages, and the implications stemming from the negotiation process.

2. Hypotheses

2.1 Factual Linkages

The underlying assumption of liberalisation of trade in goods is that it brings about increased competition, which induces higher quality and lower prices. This is also true for the service sector. A resulting hypothesis is that the liberalisation of services automatically causes an increase in consumption, given the decrease in prices. These effects brought about by changes in the consumption patterns are so called factual linkages. Consequently, critics to the GATS frequently point out the fact that the increasing international consumption of certain environmentally harmful services, such as transport, energy, and tourism services, will contribute to an increased destruction and exhaustion of natural resources.

Another hypothesis, mainly pointed out by those in favour of the GATS, is that the increased trade in services will be beneficial for the environment, given its potential benefits of increased technology exchange, greater efficiency, faster innovation, greater transparency, and predictability. Along that line, the liberalisation of environmental services is often called a "win-win situation", in which the economic benefits of trade liberalisation are enjoyed while sustainable development goals are pursued at the same time. However, opponents argue that the core services of this sectors are "end-of-pipe" services, rather than environmental services which provide *prevention or remediation of environmental damages*.³

2.2 Regulatory Linkages

The legal provisions of the GATS agreement harness governments' potential to interfere in the service market. Several GATS obligations apply directly and automatically to all WTO Members for all services. Most importantly, governments are obliged to apply the Most-Favoured-Nation (MFN) Treatment and to introduce certain transparency standards. In addition, there are other obligations that apply only to those services that a country lists in its Schedule of Specific Commitments.⁴ The main provisions here are market access (Art. 16) and national treatment (Art. 17). While the GATS leaves flexibility for countries to restrict access by limiting: the number of suppliers, operations or employees in a certain sector; the legal form of the supplier; the value of transactions or assets; or the participation of foreign

³ Waskow and Vincente, 2001.

⁴ Specific obligations can be applied "horizontally" (across all service sectors or across all modes of supply), or "vertically" (so that they are only applicable to one service sector or to a specific mode of supply).

capital⁵, it is often assessed that the GATS have an impact on governments' ability to regulate service sectors within their jurisdiction. These regulatory effects of the GATS include national environmental regulation.⁶ The role of regulatory linkages are fundamentally important given that once a government has committed itself under GATS to opening a service sector to foreign competition it is hardly possible to reverse this decision. Regulatory implications on the environment include the following:

- Market Access Rules could potentially inhibit a government's ability to limit the number of service suppliers in a region based on social or conservation concerns.
- The MFN Treatment (Art. II) provision prevents countries from discriminating against trading partners for social or political reasons (i.e. human rights offences or environmentally-unfriendly procedures). This might have major implications for sustainable development concerns.
- From an environmental perspective, the National Treatment (Art. XVII) provision raises many questions. It remains unclear whether GATS would allow for a distinction between "like" and "not like" suppliers based on different environmental implications of the two services or service suppliers. Similarly, there are fears that GATS' explicit prohibition of "de facto" discrimination may further constrain environmental policy choices.
- Domestic Regulation (Art. VI: 4) is one of the most important GATS provisions, which established a number of onerous tests, such as objectivity, transparency, and necessity, which any environmental initiative must pass.⁷ These criteria might undermine the effectiveness of the precautionary principle in environmental law and policy by making it increasingly difficult to prove that environmental regulatory efforts are appropriate.
- Conversely to the GATT, the exceptions in the GATS are limited to the protection of human, animal, or plant life or health (Art. XIV (b)), but not to the "the conservation of exhaustible natural resources". Therefore, the GATT ground for exception is open to a broader and more environmentally sensitive interpretation than it is in the GATS.
- Traditionally, environmental services have been conceptualised and defined in quite basic and narrow terms relating to the operation of facilities to provide water and waste treatment services, often by the public sector. In fact, major environmental services were largely provided by the government, because some environmental services may have the characteristics of public goods, which no single firm has an economic incentive to provide. Furthermore, some environmental services may require comprehensive distribution or collection networks and equipment infrastructure, such that the high level of investment required tends to create conditions of natural monopoly. However, over the past decade or so, domestic and international markets for environmental services have begun to emerge. One factor is increased trade in environmental-related equipment and technology, involving associated services. The other factors are the adoption of world-wide environmental

⁵ Consumers International, 2001.

⁶ Andrew, 2000.

⁷ Tarasofsky and Pfahl, 2001.

standards, and the decision in many countries to commence domestic privatisation and de-monopolisation of public utilities. At any rate, environmental services are now intrinsic to both the delivery of traditional pollution control and the remediation of clean-up activities and of newer techniques of pollution management, installation of cleaner technologies, and resource management activities⁸.

GATS does not apply to services supplied under governmental authority. Government authority is “neither on a commercial basis nor in competition with one or more service suppliers”. Based on an interpretation of the terms in accordance with interpretative standards of public international law, only services which are supplied on a non-profit basis by a public monopoly supplier are excluded from the scope of GATS. As mentioned above, many environmental services are supplied on a profit-seeking basis, and current policies for the privatisation and liberalisation of environmental services lead to a commercialisation of those services. It is therefore safe to assume that most environmental services of general interest are covered by GATS⁹.

Practically, there has been an increasing demand for a revision of the existing GATS classification (W/120 list) of environmental services (which reflects the traditionally narrow conceptualisation of environmental services). Important and more recent international attempts to define environmental services have been contributed by OECD and the Statistical Office of the European Communities (Eurostat) and by UNCTAD. Both of these definitions are more comprehensive than the W/120 list, and seem to reflect more adequately a modern understanding of environmental services. Consequently, suggestions by WTO Members for new classifications for environmental services have made use of the more comprehensive definitions. For example, the EC’s approach closely resembles the OECD/Eurostat classification. *Classification determines the scope of further liberalisation*. By including water services in the sectoral classification of environmental services, the EC indicated its interest in negotiations on liberalising water services¹⁰.

The underlying hypothesis is that government regulations are needed to achieve sustainable development objectives. Given the transboundary and global scope of environmental issues, developments under GATS (especially, Art. VI and VII) can be expected to help enhance positive environmental effects and mitigating negative ones by, for example, diffusing best practices, harmonizing standards, and promoting mutual recognition arrangements. However, given the restrictive nature of the GATS on the states’ ability to regulate, negative impacts on the environment are also to be expected. Therefore, it seems crucial to seek the right balance between liberalising service markets and establishing effective frameworks for these markets which adequately contributes to the achievement of sustainable development goals.

⁸ OECD, 2000

⁹ Krajewski, 2004.

¹⁰ Krajewski, 2004.

2.3 Bi-lateral negotiation structure and the pace of negotiations

Another issue of concern is the negotiation structure of the GATS. Since entering into force on January 1st 1995, the GATS has asked WTO member countries to embark on negotiations with one another, with the ultimate objective of achieving "progressive liberalisation" of trade in services. The procedure of negotiations is characterised by a bilateral structure, where members make specific requests and offers to other members. Given the bilateral structure, uneven trading partners negotiate with different means and different interests. The underlying hypothesis is that mature economies exert pressure and negotiation power on developing countries to open their service markets to foreign competition. However, there is a general consensus that service liberalisation might only prove to be economically beneficial, and it will not harm the environment if adequate market conditions are in place. As a result, it might happen that countries liberalise their service sectors although market conditions, in terms of transparency, competition, and regulatory institutions, are not in place. Frequently, it is considered dangerous not to achieve higher competition and better service provision through liberalisation and to turn formerly public monopolies in services into private monopolies. However, although often not the most effective, public monopolies in areas of public concerns, such as water, waste, and telecommunication, take sustainable development objectives more into account than profit orientated private monopolies do.

3. Survey of methodological approaches

There is ample literature on services liberalisation under the GATS. However, the literature focusing on the potential impacts of liberalization of trade in services on environmental policy aims comes mainly from the civil society and is primarily qualitative and speculative. Most of the research on the linkages between the GATS and the environment focus either on the factual or regulatory linkages. There is only limited research done on the negotiations themselves.

Researchers have very different focuses within the **factual linkages**. One of the main distinctions made is the differentiation between service sectors that have clear and direct impact on the environment and others, where only the cumulative impacts on the environment is significant.¹¹ Another distinction is made between direct and indirect effects, as a number of services, such as engineering, consulting, and banking, have an impact on the environment by facilitating further action of their customers.¹² Moreover, there are scale effects, structural effects, products effects, technology and innovation effects that are analysed and investigated. Given the difficulties linked to the macro analysis of very different sectors, most analysis is done sector-specifically.¹³ There is a large amount of ex-ante and ex-post analysis on the impacts of liberalisation in certain service sectors, where changes in economic sectors are linked to changes in environmental indicators. Case studies and

¹¹ Salzman, 1999.

¹² Jarreau, 1999.

¹³ See also Andrew, 2000, pp.32.

comparative studies cover a whole range of issues, such as water¹⁴ and water supply services¹⁵, telecommunication¹⁶, forests¹⁷, biodiversity¹⁸, energy¹⁹, education²⁰, or tourism²¹. Methodologies used in these studies range as well from an ex-post analysis to an ex-ante screening, and from scenario building to entire sustainable impact assessments.

With regards to the **regulatory effects** of service liberalisation, most of the documents take a closer look at the remaining legal opportunities to regulate under the GATS regime. The main underlying assumption is that regulatory interference in the market is necessary to achieve sustainable optimal outcomes. This legal analysis is mainly done on an ex-ante basis, given the short amount of time that the GATS has existed and the small amount of relevant WTO jurisprudence. Assessments analyse the GATS' impacts on the right to regulate with regards to environmental and consumer policy²², the right to subsidise environmentally friendly services, government procurement, or the ground for exceptions on environmental grounds²³. Given the GATS's broad coverage, which can include major public services, political and social scientists also look at the issues of democracy and justice²⁴. Little research has been carried out so far on the relation between the GATS and other international regimes, such as multilateral environmental agreements. An example of this is the potential conflict resulting from the interrelation between the GATS and the Clean Development Mechanism of the Kyoto Protocol²⁵.

Negotiation theory, actor analysis, and also game theory are deemed to be appropriate methodologies for the analysis of the **GATS negotiations proceedings**, with the objective of determining whether the negotiation structure itself undermines the objectives of GATS. For example, Mattoo and Olarreaga (2000) argue that a more explicit and wider application of the principle of reciprocity is needed in order to deliver greater liberalisation and more balanced outcomes. On the other hand, an approach emphasizing reciprocity depends on the negotiators' ability to compare tradeoffs with a common yardstick. Hoekman (1994) notes that previous negotiations over nontariff barriers either utilized some kind of proxy focal point (for example, the value of government procurement in the past), or, when no proxy was available, involved like-minded governments unconcerned about nonsignatory free riders. In those instances where an insufficient number of countries were like-minded and it proved difficult to quantify tradeoffs, little progress was made.²⁶ In the situation where many complaints about the closed negotiations among unequal partners exist, there is a need for more applied research on the GATS negotiations and how the negotiations could be

¹⁴ Hoering, 2001; Gleick et. al., 2002, The European Environmental Bureau (EEB), 2002; Caplan, 2003.

¹⁵ Stone and Webster Consultants, 2003.

¹⁶ Consumers International, 2001.

¹⁷ Tarasofsky and Pfahl, 2001.

¹⁸ Laurance, 1999.

¹⁹ Botchway, 2001.

²⁰ Larsen, Morris and Martin, 2001.

²¹ Bendell and Font, 2004.

²² Consumer International, 2001.

²³ Fuchs and Tuerk, 2003.

²⁴ Weltwirtschaft, Ökologie & Entwicklung (WEED), 2001.

²⁵ Wisner, 2000.

²⁶ Crystal, 2003.

conducted in a way that is more effective for environmental regulation and pursuits through, for example, full transparency or the participation of civil society organisations.

4. Conclusion

In conclusion, there is ample literature on the GATS and its potential impact on the environment. However, a coherent framework for further research on this topic is missing. Moreover, given the fundamental role of public service and the low likelihood of a GATS concession reversal, it is essential to have a clear understanding of both direct and regulatory effects of the GATS. Yet, the current research basis on service liberalisation does not seem sufficiently robust to provide the kind of support policy makers and negotiators need to ensure that the outcome is desirable from an environmental and sustainable development perspective.

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