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The General Agreement on Trade in Services (GATS) and current GATS-Negotiations

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Contents

List of Boxes

List of Abbreviations

AB	Appellate Body
AG	Arbeitsgemeinschaft (Working Group)
CERA	Cambridge Energy Research Associates
CIEL	Centre for International Environmental Law
CPC	Central Product Classification
CTE	Committee on Trade and Environment
CTS	Council on Trade in Services
EC	European Community
ECT	Economies of Countries in Transition
ENT	Economic Needs Test
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPA	Agreement on Government Procurement
IGO	Intergovernmental Organization
JIEL	Journal of International Economic Law
MEAs	Multilateral Environmental Agreements
MFN	Most Favoured Nation
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
PPM	Processes and Production Measures
R&D	Research & Development
SIA	Sustainability Impact Assessment
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UBA	Umweltbundesamt (German Federal Environmental Agency)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
US	United States of America
USTR	United States Trade Representative
WEED	World Economy, Ecology and Development
WPDR	Working Party on Domestic Regulation
WRI	World Resources Institute
WTO	World Trade Organization
WWF	World Wide Fund for Nature (formerly World Wildlife Fund)

Summary

The General Agreement on Trade in Services (GATS) and the current GATS negotiations in the World Trade Organization (WTO) require special attention from an environmental policy perspective. The GATS - which is both a trade and an investment agreement – may have potentially far reaching implications, amongst others for domestic policy choices relating to social and environmental objectives. This study reviews existing literature and conducts a first analysis of current key GATS provisions and new negotiating proposals from an environmental policy perspective. Based on this analysis, the study aims:

- to highlight currently **identifiable environmental policy implications** and problems of the GATS; and
- to suggest some preliminary **policy recommendations from an environmental perspective.**

1. **Services** are **key factors** in today's transnational production chains that shape the **global economy**. Services provide geographic and commercial connections and facilitate the integration and coordination of global production processes.
2. The picture of ”clean” services, i. e. services with no or only few negative environmental implications is rather common, but often false. Services have a number of environmental effects. However, there remains great **need for further research** analyzing the **environmental implications of the ”services society”, of the “services economy” and of e-commerce**.
3. As the GATS establishes a regulatory framework to liberalize trade in services, it can be studied by analyzing:
   - the GATS's real effects on the environment (**factual linkages**), which may take the form of direct or indirect economic, ecological or social outcomes. For example, direct negative effects may result in increasing international consumption of certain environmentally harmful services, such as transport, energy or certain tourism services; and
   - the GATS’s regulatory effects (**regulatory linkages**), i. e. the implications of the GATS on national and international environmental regulation. Unlike trade in goods, international trade in services is not confronted with border tariffs and therefore, non-tariff barriers are considered to be the *main* obstacle to trade. Thus, many domestic regulations are considered barriers to trade, which the process of progressive liberalization aims to eliminate.
4. The GATS is not just a trade agreement, but contains many characteristics of a **multilateral investment agreement**: The GATS considers commercial

presence (foreign direct investment) of service companies as the "third mode" of trade in services. Given that the relationship between investors and host countries is markedly different from that between exporters of goods or services and the importing countries, it is highly questionable whether the WTO-regime, designed to govern trade relations, is an appropriate framework for an international investment regime. Given that issues relating to international investments have been of fundamental importance in the GATS context and bearing in mind their increasing prominence with the Doha Declaration's reference to the relationship between trade and investment, they require comprehensive and detailed analysis, which would go beyond the scope of this study.

5. Only a few WTO Members (USA, EC, Canada), a few international organizations (OECD) and a few non-governmental organizations (WWF) have started to undertake much-needed work on environmental or **Sustainability Impact Assessments**. It is vital to conduct detailed sectoral assessments prior to further or at least in parallel to current negotiations.

6. One of the GATS's characteristics is its **extremely broad scope** both regarding the type of regulatory measures and regarding the great number of services, which are covered by the agreement. Current discussions amongst WTO Members, which address the **classification** of services sectors are ambivalent from an environmental policy perspective: On the one hand, a new and more detailed services classification may enable environmental policy makers to identify those services sectors, which should either remain closed or be only partially opened. On the other hand, a too detailed services classification may also pose a threat to environmental policies. For example, a too detailed classification may open the door to misuse by allowing for increasing pressure to liberalize certain services (sub) sectors, which so far have not been subject to negotiations. This question arises in the context of "environmental" services, the liberalization of which is not in all cases environmentally beneficial. Whilst liberalization might have positive effects such as lower prices and increased availability of these services, others require detailed government regulation to ensure environmental quality.

7. The GATS **market access** (Article XVI) obligation contains a list of quantitative and other restrictions, which - from a trade perspective - are considered barriers to trade and thus should be prohibited by the GATS. However, from an environmental perspective, such measures can constitute important policy tools, aiming to protect vulnerable regions and exhaustible resources. Similarly, policy makers may use such "market access limitations" to grant local communities appropriate access to regional resources.

8. The GATS also adopts the principle of **national treatment (Article XVII)**. While this principle is a key element of the multilateral trading system, from

an environmental perspective, the national treatment standard poses a number of questions and potential problems: For example, it remains unclear, whether the GATS would allow to distinguish between ”**like” and ”not-like” services and service suppliers** based on the different environmental implications of the two services or service suppliers (e. g. the difference between environmentally sound and unsound energy services). Similarly, the GATS's explicit prohibition of **”de facto” discrimination** may further constrain environmental policy choices.

9. Thus, it is vital to identify possible **environmental implications of specific sectors** *before* entering into the next phase of market access negotiations or at least *in parallel* to discussing specific requests and offers. Such assessment should give special attention to sensitive sectors, such as tourism, transport, energy, construction and environmental services.

10. **Domestic regulation (Art. VI GATS)** constitutes one of the most sensitive subjects in the ongoing GATS negotiations as it would appear to suggest possible limits on domestic measures which go far beyond the non-discrimination obligations: Currently some WTO Members suggest to further define the already envisaged **"necessity test"** which would require that domestic regulations are not more trade restrictive than necessary to achieve their policy goal. If WTO Members accept this proposal, it is possible that environmental regulations, which have incidental effects on international trade, may more easily be eradicated in WTO dispute settlement proceedings. In addition, the US proposal concerning “**transparency”** could increase international pressure on domestic policy makers and thus further constrain domestic regulatory processes.

11. **Subsidies** constitute an important policy tool for environmental objectives. Consequently, the GATS negotiations on subsidies (Art. XV GATS) should not develop disciplines, which limit the possibilities of WTO Members to grant environmental subsidies.

12. **Government procurement** of services has potentially important environmental functions. These concern the environmental quality of services, of their production processes and of the services suppliers themselves. It is thus important to further clarify the environmental implications of current and future GATS negotiations and negotiations in the context of the plurilateral Agreement on Government Procurement.

13. Similar to Art. XX GATT, the GATS contains a general **exception clause in Art. XIV**. However, the GATS environmental exception is much narrower than the respective provision in the GATT. In particular, the GATS does not contain any provision similar to Art. XX(g) GATT, which aims to safeguard measures ”relating to the conservation of exhaustible natural resources”. Currently, only Art. XIV(b) GATS allows WTO Members to use measures,

which are otherwise inconsistent with GATS obligations, if these measures are ”necessary to protect human, animal or plant life or health”. So far, Members have only briefly discussed a possible expansion of environmental policy choices under Art. XIV in the context of the Committee of Trade and Environment (CTE). However, Members have not yet addressed this issue in the context of current GATS negotiations in the Council on Trade in Services.

Policy Recommendations

The following policy recommendations address the current GATS negotiations; certain proposals tabled by individual Members in that context and finally, certain environmental aspects of the GATS discussions, including changes of the GATS text itself, which so far have not been proposed by any WTO Member.

- **Conduct Sustainability Impact Assessments**

In the light of the environmental policy implications of services trade-policy it is vital to conduct detailed Sustainability Impact Assessments, which are based on broad participation. These Assessments should first, evaluate the social and environmental consequences the GATS has had until now; second, assess the relevant consequences of further trade policy steps and finally, the assessments should guide the development of future sustainable trade and investment agreements. As the Doha Declaration’s time-frame makes it unlikely that Members will manage to conclude initial assessments *before* entering into the next phase of negotiations in the market access context, such assessments should at least be conducted *in parallel* to the current ‘request & offer’ phase.

- **Sector specific recommendations**

In particular, there is still a great need for further research and discussions concerning the different sectoral proposals submitted in the GATS context. It is crucial to thoroughly analyze the environmental implications of the GATS proposals addressing, inter alia, transport, distribution, construction services and e-commerce.

Similarly, **environmental services** should only be liberalized further in the light of the results of detailed Impact Assessments. Questionable services, such as waste incineration services should be excluded from further liberalization and ”end-of-the-pipe” services should not gain market advantages over integrated environmental services. It is especially important to recognize **access to water as a human right** in the context of current GATS negotiations and to not liberalize the water sector according to the interests of multinational companies. Concerning proposals to liberalize **energy services**, which include many environmentally sensitive services (e.g. the US proposal includes oil drilling “services”), these should

be rejected. In particular, it is vital to distinguish between sustainable and non-sustainable energy services. Furthermore, concerning the **tourism sector**, it is necessary to analyze the social and environmental consequences of further GATS disciplines and to look for possibilities to support sustainable tourism.

- **Assess the environmental implications of the European GATS "requests" and "offers" and discuss the results in a broad public debate**

All European GATS proposals, especially the requests and future offers must be made public and discussed publicly with civil society, parliaments and regulatory authorities at all levels (local, regional, national, international). European and national authorities could build upon international experiences with GATS-related information policies and should strive to open up more effectively their trade policy process.

- **Safeguard the regulatory prerogatives of local, regional, national and international environmental policy makers from threats arising in current negotiations on "domestic regulation"**

From an environmental perspective, there is no need for stronger GATS disciplines on "domestic regulation"; rather, already the current disciplines threaten to restrict regulatory options for environmental policies. Consequently, it is vital:

a) to refrain from introducing any new disciplines on domestic regulation - because of their potentially negative implications on environmental policies and democracy;

b) to reject the proposals on a "necessity test";

c) to refrain from introducing new international "transparency" disciplines (US proposal);

d) to ensure that, if new disciplines on domestic regulation cannot be avoided, these disciplines explicitly recognize environmental protection and human rights as legitimate policy objectives;

e) to ensure, that any new rules on domestic regulation do not take the form of general disciplines, but only apply to specific sectors, dependent on a Member's schedule of commitments.

- **Introduce a broad environmental exception into Art. XIV GATS**

In its current form, Art. XIV GATS constitutes an exception, which is even weaker than Art. XX GATT. Consequently, new GATS negotiations should aim to introduce a new exception clause into Art. XIV of the GATS, which effectively safeguards measures to protect the environment. Effective safeguards should also

apply to measures corresponding to the objectives of Multilateral Environmental Agreements (e.g. the Kyoto-Protocol).

- **Allow exemptions from the Most-Favored-Nation rule for environmental reasons**

It is crucial that Members are allowed to exempt environmental policy measures from the Most-Favored-Nation (MFN) principle (Art. II GATS). For example, the MFN principle must not put constraints on the implementation of Multilateral Environmental Agreements (such as the flexible mechanisms of the Kyoto-Protocol). Thus, current GATS negotiations should not aim at a general elimination of all Art. II exemptions. Instead Members should explicitly call for MFN exemptions for environmental reasons and suggest that they are allowed to introduce new MFN exemptions for that purpose into their schedules. If a renegotiation of the Annex to Article II is not possible, exceptions to Article II should be granted on the basis of a general and indefinite waiver.

- **Introduce horizontal limitations on specific commitments and exclude "de facto"-discrimination from Art. XVII GATS**

Quantitative and qualitative restrictions that are necessary from an environmental policy perspective should be recognized and scheduled on a sectoral basis. In addition, Members should introduce cross-sectoral limitations from market access and national treatment commitments ("horizontal commitments") to protect crucial environmental measures. The horizontal commitments on "public utilities" in the European schedule could serve as a model. Only such a horizontal (cross-sectoral) limitation enables Members to impose environmentally necessary measures, which take the form of quantitative restrictions or special disciplines on foreign investors, even if the relevant sectors are otherwise subject to specific commitments.

It is vital to give special attention to environmental policy measures, which, even though they are not formally discriminatory are considered to be "de facto" discriminatory. In general, these measures should not be covered by Art. XVII of the GATS. If Members fail to reach consensus on this issue, all measures, which might constitute „de facto" discriminations, must be protected by horizontal (cross-sectoral) limitations in individual schedules.

- **Ensure a general exclusion of "public services"**

Certain services, such as energy, water, transport, communication and health are especially important for environmental policies and frequently constitute "public services". In order to guarantee the greatest possible amount of autonomy to regulate these services, "public services" should be generally excluded from the

GATS. Since the current exclusion, which addresses ”services supplied in the exercise of governmental authority” (Art. I.3 GATS), depends too much on the non-commercial and non-competitive supply of these services, Members should extend this clause either through an amendment to the GATS, an interpretative understanding, an authoritative interpretation or at least through a political statement.

- **Secure environmentally oriented government procurement**

From an environmental perspective, there is no need for stronger disciplines on government procurement in the GATS context. Current negotiations on government procurement of services should therefore be conducted very cautiously and seek to preserve the largest capacity possible for government procurement policies that aim to further environmental goals. Market access negotiations for government procurement of services should be rejected.

- **Permit continued use of environmental subsidies**

From an environmental perspective, subsidies are a generally accepted political instrument. it is not necessary to extend GATS disciplines on subsidies. It is therefore not necessary to extend and further develop GATS disciplines on subsidies. A subsidies regime, if there is one, should be shaped in such a way as to avoid placing constraints on the granting of subsidies for environmental reasons.

1. Introduction[1]

The General Agreement on Trade in Services (GATS) and the current GATS negotiations in the World Trade Organization (WTO) require closer attention from an environmental policy perspective. For a long time, environmental considerations have, to a great extent, been neglected in academic GATS-related work and in GATS-processes in the WTO[2]. Also, the GATS has mostly been ignored in the debate on "trade and environment".[3] It is only recently that, environmental Non-Governmental Organisations (NGOs) and some researchers have started to voice concern about the WTO's Agreement on Trade in Services, which, in fact, contains features of both a trade and an investment agreement.

It is feared that the GATS and further liberalization of trade in services may have potentially far-reaching implications. Without the appropriate guidance, these negotiations could bring about practical and regulatory effects, which negatively impact sustainable development. On the practical side, liberalization of services trade could change the nature and level of services provision. For example, liberalization may increase the provision of environmentally destructive services such as services related to mining and oil-drilling. On the regulatory side, international services rules could reduce national sovereignty and limit the regulatory capacity of governments, when making domestic policy choices relating to environmental, social and developmental policy objectives.[4] This study reviews existing literature and examines key GATS provisions[5] and new negotiating proposals from the per-

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1 The views expressed in this paper are only those of the authors and do not necessarily represent the views of the organizations. The authors would like to thank Mireille Cossy, Emily Fortney, Ingrid Hanhoff, Dale Honeck, Ulf Jaeckel, Dan Magraw, Mahesh Sugathan, Magali Stitelmann and Caroline Wiman for their comments on earlier drafts of this paper. All errors are attributable to the authors alone.

2 Nor did the guidelines for further GATS negotiations in the WTO, agreed upon on 28 March 2001, include any reference to environmental implications (see WTO, 2001, Guidelines for Negotiation). Please note, however, that whilst failing to include any mention of environmental aspects in paragraph 15 on „Services", in its para. 31 on „Trade and Environment" the Doha Ministerial Declaration mandates negotiations on „the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services" (see WTO, 2001, Doha Ministerial Declaration).

3 As early as in 1993, the Ministerial Decision on Trade in Services and the Environment acknowledged that „measures necessary to protect the environment may conflict with the provisions of the Agreement". This Decision also mandates the CTE to examine GATS in the context of sustainable development. So far, however, the CTE has not made significant progress. Also, in its work (agenda item 9) it has focused primarily on the potential material benefits of liberalizing environmental services, mostly disregarding potential problems (see WTO, 1993).

4 For example, see Friends of the Earth, 2001; Friends of the Earth US, 2000.

5 This scoping exercise is not intended to provide a comprehensive analysis of all issues potentially relating to GATS and the environment. Rather, it aims only at providing some initial ideas on a range of selected issues. For example, some of the key GATS provisions, such as Article II on Most-Favoured-Nation (MFN) treatment, are outside the scope of this paper. Similarly, the paper does not address any issues arising from the relationship between WTO, in particular the GATS Agreement and Multilateral Environmental Agreements (MEAs). For an initial scoping analysis on the GATS-MEA relationship, see Stilwell/Tarasofsky, 2001. See also initial work undertaken by the CTE, in agenda item 9, mandated in the

spective of environmental policy makers. This study focuses on the regulatory impacts and through this analysis aims to:

- highlight currently identifiable environmental policy implications and problems of the GATS; and
- make preliminary policy recommendations from an environmental perspective.

Although this study aims to give an overview of legal and policy issues arising with respect to GATS, it does not claim to be exhaustive. Rather, it leaves areas for further research, including, analyses of the practical implications of increasing trade in services; analyses of the investment aspects of the GATS legal framework and analyses of the overlaps between multilateral environmental agreements (MEAs) and the GATS.

2. Services, Environment and the GATS

This chapter briefly a) sketches the role of service industries in the modern world economy; b) indicates the relevance of the services/environment nexus; c) gives a short overview of the GATS (aimed in particular at those readers who may as yet be unfamiliar with the key terms of this agreement); and, finally, d) sets the scope of the analysis contained in this study by identifying the difference between the potential *practical* environmental impact of services trade liberalization and its *regulatory* impacts. The latter will then constitute the focus of this study.

2.1 The Role of 'Services' in the Current World Economy

According to Dicken[6], one of the most significant developments of the last few decades in the global economy has been the rapid growth of the services industries. In all but the lowest-income countries, services account for the largest share of gross domestic product (GDP) and are increasingly the major source of employment. As a result, the services sector is extremely diverse; it does not have a universal definition. In the WTO context, sectoral classifications are used for negotiation purposes to define the type of services addressed (see box 1 for classification of services in the GATS context and chapter 4 for further explanations on issues related to classification).

Ministerial Decision on Trade in Services and the Environment. For an analysis of issues arising from the relationship between the GATS Agreement and the climate regime, see Wiser, 2002 (forthcoming).

6 Dicken, 1998, p. 387.

Box 1: Classifying Services into 12 Sectors

The GATS schedules mainly follow a classification, based on the United Nations Central Product Classification (CPC) system, which identifies 11 basic service sectors plus an additional category for miscellaneous services. These sectors are subdivided into some 160 sub-sectors or separate service activities.

The 12 sectors are:

- -- business (including professional and computer) services
- -- communication services
- -- construction and related engineering services
- -- distribution services
- -- educational services
- -- environmental services
- -- financial (insurance and banking) services
- -- health-related and social services
- -- tourism and travel-related services
- -- recreational, cultural and sporting services
- -- transport services and
- -- other services not included elsewhere

(Source: WTO, 1999)

It is important to bear in mind, that sectoral classifications do not capture the interdependencies – including the ecological interdependencies – arising in the real world of economic activities. Services are key factors in the transnational *production* chains that shape our global economy. For example, services link different stages of production processes within a single production chain and they also establish linkages between overlapping production chains. In addition, services link production and distribution processes. It is widely acknowledged that „[s]ervices have come to play a critical role in production chains because they not only provide geographical and transactional connections, but they integrate and coordinate the atomised and globalised production process."[7] Or, as Dicken observes: „In many respects it is service activities that make the world go round, which lubricate the wheels of production, distribution and exchange."[8]

2.2 The Services/Environment Nexus

The insight that services are intrinsically linked to production processes may help to avoid falling for the false perception of 'service economies' as environmentally 'clean' or less resource-intensive. In fact, in a recent report called „The Weight of

[7] Rabach/Kim, 1994, p. 123, quoted in Dicken, 1998, p. 390.

[8] Dicken, 1998, p. 391.

Nations"[9] the World Resources Institute (WRI) analyses materials flows that occur in modern industrial economies. The report points out that „even as decoupling between economic growth and resource throughput occurred on a per capita and per unit GDP basis, it is important to understand that overall use and waste flows into the environment continue to grow." Thus, while economic growth as such may no longer be directly linked to resource throughput occurring in economies, this does not imply that economic growth today takes place without the detrimental aspects of such resource throughput. In fact, many of the damaging aspects of resource throughput, in particular waste flows into the environment, continue to increase. The WRI report explicitly states that „[b]etween 1975 and 1996, total quantities of conventional wastes, emissions, and discharges in the five study countries increased by between 16 percent and 29 percent." The report then more specifically addresses the services sector and concludes that „[d]espite the rapid rise of e-commerce and the shift over several decades from heavy industries toward knowledge-based and service industries, we found no evidence of an absolute reduction in resource throughput in any of the countries studied" (Countries studied were: Austria, Germany, Japan, the Netherlands, United States).[10]

Thus, whilst much of today's economic growth and international trade is occurring in the services economy rather than in sectors such as the production of goods or agriculture, there has been no absolute reduction in resource throughput. Consequently, policy makers should not shift their attention away from environmental implications of economic growth and international trade. Instead, the above-described trends render it increasingly important to concentrate on possible environmental impacts emanating from trade in services.

The following overview, prepared by UNEP, lists a whole range of more concrete environmental implications deriving from different service sectors[11] (see table next page).

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9 World Resources Institute (WRI), 2000.

10 World Research Institute (WRI), 2000, p. VII.

11 This table is not exhaustive. In fact, understanding of the environmental implications of services is constantly deepening, covering diverse areas such as the linkages between maritime transport services and invasive species / biodiversity: ballast water which is essential for the safe operation of ships has been recognized to contain thousands of species of marine plants and animals, which - when discharged into new environments - may become invasive and create a serious threat to local ecology. Note however, that the GATS coverage of maritime services is still limited.

Table: Environmental impacts of service industries

Service sector	Potential impacts
Retail sales and distribution: food, consumer goods	• Emissions from transportation • Impacts from ultimate disposal of goods purchased • Potential to influence consumer behaviour – negative impacts from increased consumerism, positive impacts from meeting and contributing to demand for sustainable produced goods
Vehicle services and repair	• Use and disposal of hazardous products • Air emissions from vehicle fuelling and painting • Contamination from leaking fuel tanks
Hotels, restaurants and food services	• Food and packaging waste • Impacts from energy and water use
Consulting	• Indirect impacts through influence on client behaviour
Facilities/building services	• Use and disposal of hazardous products • Positive impacts of recycling programs
Dry cleaning	• Use and disposal of hazardous products • Air emissions from cleaning chemicals • Contamination from leaks of cleaning chemicals
Photo processing	• Use and disposal of hazardous products • Waste disposal impacts - film and disposable cameras
Consulting engineering	• Technology choice with subsequent impacts from construction and operation
Tourism	• Direct impacts on local environment from construction and operation of facilities • Use and disposal of hazardous products for cleaning and maintenance • Impacts from water, energy and resource use • Indirect impacts through influence on client behaviour
Transportation	• Impacts from infrastructure requirements - roads, service centres • Use of gasoline and hazardous substances for vehicle operation and maintenance • Air emissions from vehicles • Noise and visual pollution
Health care	• Use and disposal of hazardous materials, medical and biological waste, radioactive materials from sources such as: transportation, food services, laundries, facility cleaning, photographic processing
Environmental services (waste and water treatment, recycling)	• Soil, water and air pollution from waste disposal sites • Energy use for waste and water treatment • Potential positive impacts from increased recycling and improved management of wastes
Financial services	• Indirect impacts through influence on client behaviour
Other - entertainment, advertising, accounting, computer services, communication, utilities	• Use and disposal of hazardous products • Impacts from energy and resource use • Indirect impacts through influence on client behaviour • Waste disposal impacts

Source: UNEP Industry and Environment, July-Sept. 1998, p. 7

2.3 Services Trade Liberalization in the GATS

In 1995 the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) came into effect as a result of the Uruguay Round of multilateral trade negotiations. The GATS establishes a framework for progressive liberalization of international trade in services. Many of the general principles and provisions of the GATS are to some extent similar to those of the General Agreement on Tariffs and Trade (GATT), which established the main regulatory framework governing international trade in goods. However, unlike the GATT, the GATS allows countries a certain degree of flexibility to determine: 1) which sectors of the service economy they want to open up to foreign suppliers and competition and 2) what options, if any, governments want to retain in these 'open' sectors to keep in place existing, or introduce future regulations at the domestic level. This flexibility is granted by the GATS bottom-up approach (see box 2):

Box 2: „Bottom-up" and „Hybrid" Approach of the GATS

Unlike in most other WTO Agreements, Members do not have to comply with *all* of the GATS obligations from the outset. Rather, some obligations only bind Members once the country in question has explicitly agreed to be bound by them for a particular services sub-sector and for a particular mode of supply. Members enter these explicit commitments into their specific schedules of commitments (individual country schedules), which form an integral part of the GATS.

This „bottom-up approach" applies to the GATS market access (Article XVI) and national treatment (Article XVII) obligations, both of which are called the GATS „specific" obligations. At the same time, the other two main GATS obligations bind all Members from the outset and are thus called „general obligations". The GATS most-favoured-nation obligation (Article II) and transparency obligations (Article III) are such „general obligations". In trade jargon, this mixed system of „general" and „specific" obligations is called the "hybrid approach".

The GATS is based on a comprehensive definition of trade in services in terms of four different *modes of supply*: cross-border, consumption abroad, commercial presence in the consuming country, and presence of natural persons (see box 3). This definition is crucially important, since – in particular with „Mode 3"- foreign direct investment goes beyond the traditional GATT concept of cross-border trade.

According to the WTO,[12] „Mode 3" is probably the most important mode of supply of services, at least in terms of future developments. A large proportion of service transactions require that the provider and the consumer be in the same geographical location. This mostly occurs through foreign direct investment. But rules governing commercial presence also raise difficult issues for host govern-

[12] WTO, 1999, Introduction to the GATS.

ments and in GATS negotiations. In particular, international disciplines governing foreign direct investment need to address issues, which by their very nature are different from those being addressed by international rules governing tariffs or other border measures that principally affect trade in goods. From the outset, the GATS contained components of an international investment agreement. It has had to deal with internal policy issues such as rights of establishment or foreign equity participation, questions which are intrinsically linked to the commercial presence of foreign interests.[13]

Box 3: Modes of Supply in Trade in Services:

Article I GATS sets out a comprehensive definition of trade in services in terms of four different modes of supply:

- Mode 1 - cross-border trade: Only the service itself crosses national frontiers (e.g. international telephone calls)
- Mode 2 - consumption abroad: Supply of a service in the territory of one WTO-Member to the service consumer of another Member (e.g. tourism, repair of a ship)
- Mode 3 - commercial presence: Supply of a service through the commercial presence of a foreign supplier in the territory of another country (e.g. branch office, banking or insurance agencies)
- Mode 4 - presence of natural persons: Admission of foreign nationals to a country to provide services (e.g. hotel managers, doctors)

From an environmental policy perspective, these issues raise a number of questions and concerns. Some environmental NGOs and researchers have begun to develop detailed proposals for a new approach to international investment rules. For example, Konrad von Moltke in his study „An International Investment Regime? – Issues for Sustainability," argues that investments occur over a long time-frame and that the relationship between investors and host countries is markedly different from that between exporters of goods or services and the countries of import. Therefore he questions opting for the WTO/GATS-regime as a forum for investment rules. In particular he argues that traditional „trade law / economics principles", such as 'most-favoured-nation' and 'national treatment' and the WTO dispute settlement system would not be appropriate for an international investment regime. Any potential international investment regime should

[13] In Sauvé/Wilkie, 1999, the authors state that „(s)imply put, the global investment liberalization game is very much services-centric, there simply being relatively few significant barriers to entry via FDI in manufacturing or in primary industries." (p. 15) and „More likely than not, investment rules in the WTO are set to evolve in a slow, incremental manner, with most attention devoted to the twin objectives of enhancing the scope of existing investment-related disciplines whilst seeking to achieve a progressively higher degree of investment regime protection and liberalization under such disciplines. Of all existing WTO agreements pertaining to investment, the General Agreement on Trade in Services (GATS) offers by far the greatest potential for meeting both objectives.", (p. 2).

not build upon the above-mentioned trade principles. If it did, these principles would then need to be adjusted to adequately reflect the dynamic nature of issues arising in the context of international investment flows. Also, there would be urgent need to implement an institutional architecture, which ensures flexible yet effective implementation. Von Moltke concludes that „[t]his strongly suggests that an international investment regime needs to be constructed outside existing international organizations, possibly beginning with a framework convention followed by a series of protocols addressing specific issues."[14]

Given that issues relating to international investments have been of fundamental importance in the GATS context and bearing in mind their increasing prominence with the Doha Declaration's reference to the relationship between trade and investment, they require comprehensive and detailed analysis and will therefore not be included in this study but will be consigned to upcoming work.[15]

Similarly, this study does not go into detail by analysing mode-specific aspects of the three other ways of supplying services: cross-border, consumption abroad and movement of the individual service provider. It aims instead at identifying systemic issues underlying all 4 modes of trade in services.[16]

2.4 Liberalization of Services Trade and the Environment

The 1994 Methodologies of the OECD lists the following categories for assessing environmental effects of trade liberalization: a) scale effects, b) structural effects, c) product effects and d) technology effects of trade liberalization.[17] However, since research on the impact of services trade liberalization is only just beginning, the understanding of these effects is still very limited.

This study takes a more basic approach and distinguishes between two different types of effects, which the increasing liberalization of international trade in services under the GATS might entail. First, such liberalization may give rise to so-called „*practical impacts*". These may take the form of direct or indirect economic, ecological or social outcomes. For example, direct negative effects may result in increasing international consumption of certain environmentally harmful services, such as transport, energy or certain tourism services. Without adequate

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[14] von Moltke, 2000, p. VI.

[15] See WWF International, 2001, p. 57.

[16] From a sustainable development perspective, the movement of natural persons also warrants attention. Liberalizing mode 4 is expected to bring about developmental benefits, because services exports through the movement of natural persons is considered to be the main export potential of Developing Countries. Industrialized countries may therefore wish to identify ways of responding.

[17] OECD, 2000, Towards a Methodology, para. 21 ff.

regulation, the GATS's goal to expand international trade in services may bring about such direct practical effects, which impact negatively on the environment. On the other hand, increasing services trade liberalization may also give rise to indirect practical effects, such as increased information available on environmentally sustainable practices or methods of producing (and consuming) services, including specific management practices. If conducted in a proper manner, liberalization of environmental services could produce such benefits.

Second, liberalization may lead to certain „*regulatory impacts*". These impacts constrain domestic regulators' prerogatives. Domestic regulators may experience constraints when aiming to put in place (or maintain) regulations designed to achieve certain domestic policy choices. Constraints on domestic regulators' prerogatives could occur, as the GATS disciplines are designed to circumscribe national, state and local governments' regulatory activities, which affect trade in services (see below, box 4 on main GATS obligations).

Box 4: Basic Principles and Main Obligations

Similar to other WTO Agreements, the GATS embodies certain basic principles such as transparency, market access and non-discrimination. Non-discrimination is considered a corner-stone of the multilateral trading system and appears in the GATS in the form of national treatment and most-favoured-nation treatment obligations:

- the *„most-favoured-nation" obligation* (Article II) obliges Member to unconditionally and immediately grant the same privileges it accords to a service or a service supplier from one particular WTO Member to any „like" service or service supplier from any other of its WTO trading partners;
- the *„national treatment" obligation* (Article XVII) obliges Members to refrain from treating a service or a service supplier from its WTO trading partners less favourably than a „like" domestically produced service or a domestic service provider;
- the *„market access obligation"* (Article XVI) obliges Members to refrain from using certain quantitative or other restrictions and limitations on the entry of services and services suppliers into its market, and
- the „*transparency obligations*" (Article III) oblige Members to publish promptly certain general measures affecting the operation of the Service Agreement and to inform the Council for Trade in Services of certain changes in its domestic legal framework.

These potential constraints derive from two developments that have shaped the multilateral trading system over the past decades. First, unlike initial trade agreements such as the GATT, more recent trade agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights[18] (TRIPS Agreement) and

[18] TRIPS Agreement.

the Agreement on Sanitary and Phytosanitary Measures[19] (SPS Agreement), address domestic regulatory issues which go beyond those traditionally associated with „trade". Second, and more especially related to the GATS, is the specific nature of barriers or obstacles to trade in services. Generally, trade liberalization aims to increase international trade by reducing obstacles to trade. Traditionally, most obstacles to trade have taken the form of border tariffs applied by the importing country. Unlike trade in goods, international trade in services is not confronted with border tariffs and therefore, non-tariff barriers are considered to be the *main* obstacle to trade.[20] Thus, many domestic regulations are considered barriers to trade, which the process of progressive liberalization aims to eliminate (see also below boxes 6 to 9 on environmental services). The subsequent chapters of this study will focus on these regulatory effects of services trade liberalization.

3. Sustainability Assessments of International Services Trade Policy

3.1 Need for, and Commitment to Sustainability Assessment of Trade in Services at the National Level

Despite the practical and regulatory links between trade in services and the environment, the WTO and most Member States have not yet properly addressed issues such as environmental and/or sustainability impact assessments of the GATS.[21] Whilst the GATS Negotiating Guidelines[22] mandate „[t]he Council for Trade in Services […] to carry out an assessment of trade in services in overall terms and on a sectoral basis", it remains to be seen whether this assessment will be of a purely *quantitative,* economic nature, or whether it will also address *qualitative* aspects. Only the latter would allow for a discussion of the GATS' impact on social, environmental and developmental realities in individual WTO Member countries.

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[19] SPS Agreement.

[20] The so-called „new generation" of trade agreements such as the SPS Agreement cited above increasingly focus on such „non-tariff" barriers to trade in goods.

[21] Switzerland, in the October 2001 session of the Committee on Trade and Environment (CTE) stated that by then there existed a large body of literature on the environmental impact of services liberalization and requested the WTO Secretariat to compile the results of these studies in a document (see WTO, 2001, CTE Report of the October 2001 Meeting, para. 4 ff.).

[22] The GATS Article XIX.3 mandates the Council to assess „trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement." WTO Members have conducted such an assessment, but due to the lack in statistical data and information, this assessment has not produced any satisfactory results. Developing Countries attach great importance to conducting an assessment, and it is especially important for them to analyze whether the GATS has achieved its objective of „increasing developing country participation in trade in services". It is hoped that the assessment language in the GATS Negotiating Guidelines will induce WTO Members to constructively move forward on the assessment issue.

Box 5: Assessment Processes – Some Key Elements

In order to make a valuable contribution, assessment processes in general and services trade assessments in particular should be:

- *timely;* Assessments should be initiated early in the negotiation process and if possible conducted prior to the negotiating process. Assessments would thus provide timely input before important decisions had to be taken – for example, whether or not to negotiate a trade agreement and what an individual country's negotiating position should look like.
- *comprehensive and conducted from a sustainability perspective;* An assessment should look beyond economic aspects of trade liberalization; it should include a review of both positive and negative effects of services liberalization and of all relevant issues with a view to promoting key environmental, social and development goals. It should aim to provide value added to current practices of trade or economic ministries and their industry counterparts.
- *in writing, accessible and open*; Timely and widely accessible documentation of the assessment combined with opportunities for public comment ensure that assessment processes include the views of a broad range of stakeholders who are potentially affected by services liberalization.
- *conducted in full cooperation with relevant governmental, intergovernmental and non-governmental agencies;* Assessment processes should be conducted in close and full cooperation with relevant governmental and non-governmental agencies, both at the national and international levels. This will allow the process to benefit from the expertise and knowledge available outside trade and economic ministries or agencies.

(Sources: WWF/CIEL Joint Statements on Services Trade Assessment, July 2001, September 2001, December 2001 and May 2002, available at http://www.ciel.org)

Timely and comprehensive assessments, which are conducted from a sustainability perspective that build upon open, accessible and written processes and which are carried out in full cooperation with relevant governmental, inter-governmental and non-governmental agencies are of crucial importance. Failing such assessments, WTO Members will be unable to achieve what the EC stated as one of the major objectives of the GATS 2000 negotiations, namely to ensure that „[t]rade, environment and social policies play a mutually supportive role in favour of sustainable development."[23]

Some WTO Members (EU, US) are conducting environmental or sustainability impact assessment at the national level and others have made explicit reference to such assessments in their communications to the CTS (Canada). The US, for example, established an co-called Inter-Agency Process[24] and announced that it would conduct an environmental review of the WTO services negotiations. It issued an executive order for an environmental review and the relevant imple-

[23] WTO, 2000, EC-GATS 2000 Cover Note, para. 6.

[24] An interagency process aims to ensure that legislative acts are endorsed by all affected US governmental agencies. It aims to increase co-operation and collaboration through information exchange and comment procedures.

menting guidelines have been prepared.[25] While such action stops short of fully putting into effect some of the above-mentioned suggestions on assessments, they nevertheless allow policy makers to gain some initial experience with assessments. Similarly, the EU has committed to carrying out a Sustainability Impact Assessment (SIA). The EU SIA consists of three phases, the third of which is currently under way.[26] Finally, Canada,[27] in its communication to the CTS, states that it „believes that a systematic process of identifying and evaluating likely and significant environmental impacts of trade negotiations is essential […]". The Canadian submission also states that „[…] to this end, [Canada] will undertake domestically an environmental assessment of the GATS in accordance with Canada's Framework for Conducting Environmental Assessment of Trade Negotiations".[28] Canada has now initiated an internal process for services trade assessment in the context of WTO negotiations. However, the extent to which the Canadian authorities will share relevant information with affected stakeholders still remains unclear.

The above examples show that industrialized countries have begun to place greater importance on assessments and that they are at least developing practical experience on assessment processes. Whether these assessments are politically effective is yet another matter. In that context, it is hoped that the Doha Declaration's references to voluntary environmental assessments at a national level[29] will encourage WTO Members to carry out assessments that study the sustainability implications of services trade liberalization.

3.2 Services Trade Assessments – Linking National and International Processes

For GATS assessments to be useful from a sustainability perspective, national or regional services trade assessments should be conducted in cooperation with trade and non-trade ministries, parliamentary bodies, intergovernmental organizations (IGOs), NGOs and academia – all of which may either have expertise in assessment-related questions or represent stakeholders affected by services trade liberalization. WTO Member governments should then feed the results of these national experiences back into the current assessment discussions in the CTS. This would enable WTO Members to undertake a comprehensive, not purely economic,

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[25] See USTR documents and further information, i.e. Executive Order 13141 and Guidelines for its implementation, under www.balancedtrade.panda.org/approachfiles/natgovap.html,

[26] See relevant documents and links under www.balancedtrade.panda.org/approachfiles/instappr.html

[27] For further information on the Canadian approach, see documents and links under www.balancedtrade.panda.org/approachfiles/natgovap.html.

[28] WTO, 2001, Canada – GATS, para. 11.

[29] See WTO, 2001, Doha Ministerial Declaration, para. 6, where Members „take note of the efforts by Members to conduct national environmental assessments of trade policies on a voluntary basis."

assessment at the international level. The CTS in turn, should engage in such an international assessment. Again, the assessment discussions at the international level should be carried out in a transparent and participatory manner, involving IGOs, NGOs, academia and non-trade bodies or entities. Several international bodies have already stressed the importance they attach to an assessment of trade in services.

For example, in its Resolution Services Liberalization, the UN Sub-Commission on Human Rights, „*[r]equests* the United Nations High Commissioner for Human Rights to submit a report on the human rights implications of liberalisation of trade in services, particularly in the framework of the General Agreement on Trade in Services (GATS), to the Sub-Commission [...]" It also encourages other relevant UN agencies to undertake analyses in their respective competencies and finally recommends that „[…] the World Trade Organization take into account in assessments of the implementation of GATS the report to be prepared by the United Nations High Commissioner for Human Rights and any analyses prepared by other United Nations agencies."[30]

Similarly, civil society organizations have called for a thorough and balanced assessment of trade in services in the WTO context. They have even provided practical suggestions on how to undertake such a sustainability assessment.[31] For example, WWF produced a discussion paper focusing on how to apply sustainability assessments on liberalization in specific services sectors, i.e. the liberalization of tourism services.[32] In addition, many other civil society organizations have called for a GATS assessment. They request an assessment that specifically addresses their constituencies' concerns, including a gender or social impact review of the currents GATS regime and of the proposed changes and additions to the GATS.[33]

Intergovernmental organizations also have expertise on how to carry out sustainability assessments. The UNEP Reference Manual for Integrated Assessment of Trade-Related Policies, although it does not specifically focus on trade in services, provides further suggestions for WTO Members and domestic policy makers who are carrying out a comprehensive assessment.[34] Similarly, UNCTAD has engaged in extensive work on services trade assessment.[35] WTO Members might therefore

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30 UN Sub-Commission on Human Rights, 2001, Services Liberalization.

31 WWF/CIEL, 2001, Joint Statement July/01; WWF/CIEL, 2001, Joint Statement October/01.

32 WWF International, 2001.

33 White, 2001.

34 UNEP, 2001, Reference Manual.

35 See UNCTAD, 1999.

wish to consult the relevant expertise developed by IGOs and civil society groups on that issue.[36]

It is vital that, in the coming months, services trade assessment does not disappear from the WTO agenda. The status of assessment as a standing agenda item of the CTS Special Session takes on an even more important dimension in light of the deadlines for the market access phase to submit initial requests and offers (June 2002 and March 2003). In the run-up to the Doha Ministerial Conference, several civil society groups called for a moratorium on the then-ongoing negotiations until such time as a satisfactory national and international services trade assessment was concluded.[37] However, Ministers in Doha did not accept such a delay. Instead they agreed upon new, tight deadlines for launching the next phase of the negotiations. Therefore, the current negotiating context does not permit Members to conclude assessments before entering into the next phase of market access negotiations, i.e. to conduct truly *timely* assessments.

Nevertheless, the call for a *timely* assessment can also be interpreted in a broader sense, whereby. Members would not be able to *conclude* the next phase of negotiations, i.e. enter into binding commitments on market access and national treatment, without having satisfactorily concluded assessments prior to the end of negotiations and with no clear feedback of results into the negotiating process.[38] Conducting assessments *in parallel* to the negotiating activities would also ensure ongoing input and guidance. It would also make assessments more easy to conduct, as country specific requests and offers provide clear-cut examples of exactly *what* should be assessed.

Thus, a national assessment could take the form of a „request assessment". The WTO Member identifies in its request the changes in domestic policies it expects its trading partner to make. The trading partner in question will then communicate

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[36] Some argue that the diversity of approaches and methodologies for assessments might endanger the comparability and reliability of results. It is argued that a certain standardization of assessment approaches might be useful to avoid any discrepancies. However, standardization should not limit the variety and flexibility of different assessments methodologies. This is very important, as the success of an assessment also depends upon the ability to tailor assessments to the specific negotiating context in question. Similarly, a call for standardization should not constitute an argument to postpone assessments until there is agreement on a certain harmonized approach.

[37] See WWF/CIEL, 2001, Joint Statements October/01, in addition, other civil society groups and international networks of civil society organizations have been calling for a thorough GATS assessment. See: http://focusweb.org/our-world-is-not-for-sale/statements/Stop-gats-attack.html, http://www.wdm.org.uk/campaign/GATS.htm, or http://www.forumue.de/forumaktuell/positionspapiere/0000001d.html.

[38] The fact that the GATS presents an already existing framework for trade in services also points towards understanding the requirement for a *timely assessment* in a broader manner. Thus, an assessment should therefore, first, evaluate the social, environmental and developmental consequences the GATS has had until now and, second, assess the relevant consequences of further trade policy steps.

its willingness to effect such policy change in the form of an offer. A 'request assessment' would thus be based upon the specific policy changes expected by the requesting trading partner. Such a 'requests assessment' would aim at identifying implications at the domestic level. Domestic implications can be both of a practical and of a regulatory nature. For example, implementing a request can have practical effects in terms of direct environmental, social or developmental impacts and it can have regulatory impacts in terms of creating limitations on the flexibility of a government's policy. These assessment processes generate information about these effects, which then should then form the basis of a WTO Member's offer.

In this context, it is important to stress that the request / offer aspect of assessment is only one particular aspect of the overall GATS assessment. It is equally important to undertake assessments of other GATS negotiating items, such as negotiations on domestic regulation, government procurement or on subsidies. Both of these processes are most likely to occur at the national level, but the results must be fed into the negotiating processes at the international level.

While it is important to conduct „on the grounds assessments" at the national or regional level it is equally essential that these results be fed into international processes, i.e. into WTO negotiating processes. This is true for both bilateral and multilateral negotiating processes at the WTO. As stated above, information generated in national or regional assessments is paramount for bilateral request / offer negotiations.[39] Another issue – just as important – is the progress of assessment in the multilateral process, i.e. in the CTS.

Given that the real market access negotiations take place in a bilateral context, discussion of assessment experiences in the multilateral context could contribute to and shape the political setting in which a bilateral process takes place. Collective discussion of both positive and negative experiences in services trade liberalization or of challenges arising from liberalization processes would constitute the background for bilateral negotiations. If a Member voiced its negative experience or concern with a certain liberalization measure in the multilateral forum, it might make it easier for this or for another Member to resist pressure to commit to undertaking the same measure in the bilateral process. With this in mind, individual Members may wish to present their assessment experiences in the CTS.

Increasing discussion of national and regional assessments would also assist in ensuring that assessment „[...] shall be an ongoing activity of the Council". If the

[39] These negotiations are only taking place between the two negotiating partners bi-laterally – not in the multilateral context of the CTS.

CTS moved forward constructively on assessment, it would also facilitate compliance with the GATS Negotiating Guidelines which state that „[…] negotiations shall be adjusted in the light of the results of the assessment". Therefore, WTO Members' single-minded commitment to assessment, both at the national and international levels, is crucial for ensuring that future commitments in services trade actually bring the expected benefits in economic, developmental and environmental terms.

So far, Developing Countries in particular have shown commitment to assessment as a standing agenda item on the CTS and as a pivotal element of the GATS negotiations. For them, services trade assessment in the CTS is of special importance because they lack the greatly needed information and data to adequately determine their overall policy objectives and to design their specific services trade-negotiating positions. Developing Countries have repeatedly emphasized the need for services trade assessment in their submissions and communications. In these documents, they have also touched upon issues, which are central to a sustainability perspective. Amongst these issues are the privatization of services, its effect on local communities and the marketisation and commoditisation of common / public resources.[40]

3.3 Conclusions

Given the far reaching implications that further liberalization of trade in services might have on the environment, local communities, human rights and the development of Developing Countries, it is vital that WTO Members start carrying out a comprehensive and thorough analysis of these highly complex issues and inter-linkages. Only a comprehensive assessment conducted from a sustainability perspective will allow trade policy makers to identify negotiating positions - for discussions on horizontal issues and particularly for forthcoming talks on sectoral issues – which promote rather than endanger sustainable development.[41] Assessments of individual requests and national environmental assessments both form aspects of such broader sustainability assessments. Environmental policy makers may consider turning services trade assessments into one of their priority activities in the years to come. In this context, national environmental policy makers will also need to engage in discussions on services trade assessment with their counterparts in health, education or development ministries or agencies. Finally, they need to ensure that their experiences and results are carried forward to the international level, into both the bilateral and multilateral negotiating processes.

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[40] See WTO, 2001, Cuba et al., Assessment, para. 18 ff.

[41] WWF/CIEL, 2001, Joint Statement October/01.

4. Scope of the GATS and Matters Relating to Classification of Services

A series of questions arises when conducting an assessment of trade in services or when analysing how best to ensure that future and existing disciplines in trade in services do not constrain domestic regulatory choices. For example, it is important to understand which *obligations* the GATS impose on national and sub-national regulators including: *those domestic regulatory actions that* fall under its scope, and *those types of services sectors and activities that* WTO Members aim to liberalize. While later chapters of this paper will address existing and possible future obligations of the GATS and their implications for environmental policy-making, this particular chapter more broadly analyses the scope of the GATS. More specifically, it examines the type of *regulatory activities* and the *type of services sectors and activities* covered by the GATS.

4.1 The GATS Covers a Broad Set of Regulatory Activities

A distinctive feature of the GATS is its extremely broad scope. Not only does it cover "measures *regulating* trade in services“ but, more broadly, Article I of the GATS establishes that „[t]his Agreement applies to measures by Members *affecting* trade in services“. Accordingly, the GATS also covers environmental measures which are designed to regulate production, sale or trade in *goods,* or any other economic or non-economic activity, but which simultaneously have an adverse impact on trade in a *service*.

The GATS application to regulatory measures affecting *goods* could create ramifications for environmental regulators who aim to limit the environmental damage associated with the provision of certain services. Unlike goods, services are considered „intangible“ by nature. Nevertheless, the provision of a service frequently entails the use and/or disposal of a good. In transport, for example, a bus is crucial to the provision of the service. Similarly, the provision of health services entails the use and subsequent disposal of hazardous materials, such as medical, biological or radioactive waste. In these cases, a large part of the environmental impact of the *service* originates from the consumption, use and disposal of a *good* rather than from the provision of the *service per se*[42]. Consequently, regulators might decide to address the environmental damage of the *service* by regulating the *good*. However, such a regulation might have an *incidental impact* on *trade in this service*, thereby constituting a „measure affecting trade in services“, and would

[42] Andrew, 2000, Environmental Effects, p. 27 stating that „[t]racing the effects of the goods used in the supply and consumption of services …is key to understanding the environmental impact of the services sector”; see also OECD, 2000, Services Trade Assessment, para. 24.

consequently be included in the scope of the GATS. This would in turn lead to an obligation to comply with the respective GATS disciplines.

This extremely broad scope of the Agreement has been confirmed in recent WTO case law. Decisions by the Appellate Body (AB) in the Bananas,[43] Canada Periodicals[44] and Canada Auto-Pact,[45] address the scope of the GATS and lay down how international rules on trade in services (i.e. the GATS) apply in relation to disciplines regulating trade in goods (i.e. the GATT).

In the Bananas case, for example, the panel stated that „[…] no measures are excluded *a priori* from the scope of the GATS […]"[46] The AB then elaborated on the term „measures affecting trade in services" in Article I GATS and stated that, „[…] the use of the term 'affecting' reflects the intent of the drafter to give a broad reach to the GATS". The ordinary meaning of the word „affecting" implies a measure that has „an effect", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term „affecting" in the context of Article III of the GATT is wider in scope than such terms as „regulating" or „governing".[47] Thus, environmental regulations „regulating" goods, but „having an effect on" trade in services, are not *a priori* excluded from the GATS, but rather would fall within the scope of the services Agreement.

The AB then addressed the question as to whether the GATT and the GATS are mutually exclusive, and confirmed that certain measures could fall within the scope of the GATS as well as the GATT. The decision states that this would be the case for measures *involving a service relating to a particular good* or measures *involving a service supplied in conjunction with a particular good*. AB concluded that such measures „[…] could be scrutinized under both the GATT 1994 and the GATS" and then stated that „[w]hether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis."[48] It thus seems that, in many cases,[49] the question as to whether or not

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[43] Appellate Body Report, 1997, EC-Bananas AB, especially paras. 217-222.

[44] Appellate Body Report, 1997, Canada Periodicals, AB, especially Section IV.

[45] Appellate Body Report, 2000, Canada Auto-Pact, AB, especially paras. 148-167.

[46] Panel Report, 1997, EC-Bananas, especially para. 7.285.

[47] See Appellate Body Report, 2000, Canada Auto-Pact, AB, para. 158, quoting Appellate Body Report, 1997, EC-Bananas AB, para. 220.

[48] Appellate Body Report, 1997, EC-Bananas AB, para. 220.

[49] In Appellate Body Report, 1997, EC-Bananas AB, the AB stated that the question of overlap between agreements would depend on the nature of the measures in question. It then identified three categories of measures: those, falling exclusively within the scope of the GATT, when they affect trade in goods as goods; those falling exclusively within the scope of the GATS, when they affect the supply of services as

the GATS will bring to bear its regulatory scrutiny on domestic measures cannot be determined in advance. It is therefore vital that trade negotiators and environmental policy makers adequately consider this lack of clarity, when elaborating their countries' GATS commitments.

4.2 The GATS Comprehensively Covers All Services

The application of the GATS is not only extremely broad because of its indirect application to measures regulating goods, but also because its disciplines cover all services sectors.[50] (see above, box 1)

Article I.3 (b) of the GATS determines that „services" include any services in any sector.[51] This provision raises concerns, as it could result in a comprehensive and broad coverage of *all possible* services activities. For example, the GATS covers basic education and medical services – both fundamental to society. The GATS also covers activities having a high potential to cause environmental damage, i.e. tourism, transport, construction and energy services. To facilitate understanding of what is covered by „any sector", during the services negotiations in the Uruguay Round, the GATT secretariat established a classification document which lists the services sectors and sub-sectors covered by the GATS Agreement.[52] This list draws on part 3 of the UN Provisional Central Product Classification devoted to services. Both lists classify services in hierarchical categories and sub-categories. A decade later, many believe that these classification lists, developed at the beginning of the 90s, no longer reflect the reality of today's services economies. In response, the Committee on Specific Commitments is currently reviewing the WTO classification list and is discussing WTO Members' written contributions on that issue.

Although these reclassification activities might seem to be of a rather technical exercise, it is important to follow these talks closely, especially in the light of the next phase of market access negotiations. While there is no official obligation for WTO Members to use the WTO classification as the basis for their individual

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services; and those measures that could fall under both (see Appellate Body Report, 1997, EC-Bananas AB, para. 221).

50 The GATS's specific obligations, namely, market access (Article XVI) and national treatment (Article XVII) only apply to those services sub-sectors and modes of supply, by which a WTO Member has explicitly agreed to be bound.

51 Article I.3 (b) GATS states that „[f]or the purpose of this Agreement […] (b) „services" includes any service in any sector except services supplied in the exercise of governmental authority". Note that the exact scope of this exception for services provided in governmental authority is unclear and raises a series of questions, in particular, whether the GATS excludes „public services". For a legal analysis of this provision, see Krajewski, 2001.

52 WTO, 2001, Scheduling Guidelines, attachment 8.

schedules, so far most Members have voluntarily opted to use the WTO list. The revised classification list will therefore most likely form the basis for most of the forthcoming market access negotiations. In addition, while the GATS will cover many outstanding services activities „by default", the updated classification list will clearly delineate those services activities, which are undoubtedly covered under „general disciplines".

From an environmental perspective, several aspects of this classification exercise could give cause for concern and therefore require particular attention:

First, renewing the classification list might provide an opportunity to effectively „expand" the scope of the GATS to production-related activities. For example, under the pretext of discussing changes in the services classification list, some Members initiated a discussion on how to address activities „incidental" to the production of goods. Before the GATS, the production and sale of goods were solely covered by the disciplines relating to trade in goods. WTO Members are currently discussing whether "services incidental to manufacturing, such as drilling" and services "related to pure manufacturing" (such as manufacturing on a fee or contract basis) should be classified as services under the GATS.[53] One WTO Member argued "that classifying manufacturing on a fee or contract basis as a service would extend arbitrarily GATS obligations to non-services activities […]"[54]

Given that, compared to disciplines covering trade in goods, the GATS has the potential to impose more stringent obligations on domestic regulators[55], the question as to whether a certain economic activity is covered by one agreement or the other is of great importance.[56] Because many of the areas in which WTO Members discuss classification issues are sectors with activities having a potential for negative environmental implications (i.e. whether the provision of energy is

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53 See, for example, the US Energy Services Proposal, which lists „services incidental to mining", „services incidental to manufacturing", or „installation work". WTO, 2000, US Energy Services. Note that the proposal states it does not prejudge the question which of the activities in its list fall within the scope of the GATS. See also WTO, 2001 European Energy Services Proposal, which explicitly mentions „services related to exploration and production".

54 WTO, 2000, Committee of Specific Commitments, Minutes of October Meeting, para. 4.

55 See the following sub-chapters of this study, in particular the parts relating to Article XVII on national treatment and Article VI on domestic regulation. Note that the GATS disciplines, in particular market access, also apply to „investment" in services, whilst the disciplines relating to investment in goods (TRIMs), are much more limited.

56 The Cambridge Energy Research Associates (CERA) explicitly state that „[i]f WTO members decide to define generation [of energy] as a manufacturing process, then companies that seek to build or acquire power generation facilities will have no rights or privileges under the GATS. This would significantly reduce the scope of GATS Energy Services coverage [...] [and] the GATS services negotiations could become far less interesting to global power firms […]". See CERA, 2001, Private Report, p. 12.

considered a service or whether electricity is considered a good), environmental policy makers may wish to closely follow these discussions.

Box 6: What are Environmental Services?

The GATS current classification list covers four environmental services sectors: sewage services; refuse disposal services; sanitation and similar services; and „other" environmental services.

The EC communication suggests in more detail that the following activities be considered as „environmental services": water for human use and wastewater management; solid/hazardous waste management; protection of ambient air and climate; remediation and cleanup of soil and water; noise and vibration abatement; protection of biodiversity and landscape and other environmental and ancillary services; business services with an environmental component; R&D with an environmental component; consulting, contracting & engineering with an environmental component; construction with an environmental component; distribution with an environmental component; transport with an environmental component and finally others with an environmental component.

On the other hand, footnote 19 of the current US Schedule of Specific Commitments limits the application of the GATS market access and national treatment disciplines in environmental services sectors to a clearly delineated set of activities that are environmentally beneficial.

It seems as if currently there is no common understanding on what is the meaning of environmental services or what criteria services activities should fulfil in order to qualify as environmental services. From an environmental perspective, it is crucial that environmental *benefit,* which the service activity in question brings about, is a decisive determinant in that process.

(Sources: Services Sectoral Classification List, MTN.GNS/W/120, 10 July 1991; Communication from the European Communities, S/CSS/W/38; US Schedule, GATS/SC/90)

Second, renewing the classification list might provide an opportunity to explicitly list „new" services activities. Many services activities, which are currently not listed in sectoral classifications, might, for practical purposes, be covered by the GATS „by default". Several WTO Members are pushing for the explicit listing of such services sectors in the revised classification list. For example, the European Community proposes to specifically include the provision of water in the GATS classification list. This raises the question of whether services intrinsically linked to human rights[57] or to natural resources should be covered by a commercial agreement such as the GATS. This question is particularly important because to date it remains unclear as to what extent the GATS covers public services - the provision of water being one of them. Policy makers may therefore wish to carefully consider the pros and cons of such an approach.

Finally, a renewed services classification might be used to „green wash" certain potentially environmentally dangerous services activities. For example, the European Commission recently presented a very detailed list of what it considers

[57] UN Sub-Commission on Human Rights, 2001, Services Liberalization.

to be environmental services, i.e. waste water management, solid waste management or the protection of ambient air and climate.[58] Whilst the liberalization of some of these „environmental" services might have genuinely beneficial effects for the environment (i.e. lowering the price and increasing the availability of these services)[59], these clearly beneficial, so-called „win-win" effects can only be identified by carrying out a comprehensive sustainability assessment, as described above. In addition, certain aspects of environmental services and their provision warrant close attention. For example, in order to ensure adequate supply, many of the suggested services sectors require detailed regulation or governmental provision (see box 7 on the need to regulate environmental services).

Box 7: Why is Regulation Crucial for the Provision of Environmental Services?

To ensure that provision of environmental services really does create beneficial effects for the environment, governments may need to carefully regulate economic activity in these services sectors.

For example, authorities might find it necessary to set certain emission and quality standards for services such as the incineration of waste, landfill and treatment plants, in particular those for hazardous waste.

Similarly, certain environmental services, such as sewage services, require special distribution or collection networks. They therefore tend towards being natural monopolies and economic theory suggests that such services would, for that reason, most efficiently be provided by means of governmental provision of the service.

Finally, regulators might wish to regulate the location of potentially dangerous services such as landfills for hazardous or non-hazardous waste. Again, there are concerns that certain of these regulations could be considered as barriers to trade.

Some of these aspects, for example the natural monopoly characteristics are acknowledged in the WTO Background Note (paras. 3 and 27). It remains unclear, however, whether the GATS highly ambiguous „carve out for public services" will provide adequate solutions in this respect (CIEL Research Paper).

(Sources: WTO, 1998, CTS Background note on Environmental Services; also Krajewski, 2001)

It is very important, therefore, to ensure that liberalization in such sectors does not threaten the design and development of an adequate regulatory framework, and that possible environmental benefits emanating from liberalization in certain

[58] See WTO, 2000, EC Environmental Services Proposal, para. 8, which addresses both, „core" and „cluster" environmental services. When discussing this proposal, Members had to address the fact that many of today's environmental services actually pertain to sectors such as business, construction and engineering, education and tourism services and might thus not constitute „core" environmental services. Because of the „exclusivity" of the GATS sectoral classification, i.e. a service activity pertaining to one sub-sector should not be included in another, it became apparent that „restructuring" the services classification is „not an easy task".

[59] See WTO, 1998, CTE Background Note on Environmental Benefits, explaining that „[…] free flow of environmental goods and services […] has the potential to contribute to enhancing environmental quality [...]." para. 32.

services sub-sectors are not used to justify liberalization in other, potentially environmentally destructive, services sectors. Moreover, liberalization should focus on those services technologies, which promote cleaner integrated technologies, rather than „end-of-pipe" services[60] and should effectively aim to make such cleaner technologies available to Developing Countries.[61]

The above has highlighted some of the potentially detrimental implications of current classification discussions. It is important to bear in mind that, frequently, services activities – while not explicitly appearing in either the UN or WTO list – might, in effect, be covered by the GATS „by default". In such cases, trade negotiators might be unaware that commitments they are entering into may also extend to tangential services or aspects of the provision of such services.

Box 8: WTO Secretariat Background Notes: „Trade Liberalization Perspective" to the Regulation of Environmental Services

While the need to regulate environmental services is widely acknowledged, trade policy makers might view such regulation from a different angle.

In a series of background papers, the WTO Secretariat notes that, „[t]he environmental services sector is affected by a wide range of government regulations" (para. 36) and that „[a]s environmental regulations and standards and their enforcement differ between countries this will affect market access for environmental goods and services." (para. 27) The Secretariat also stresses that „the opportunities for trade in environmental services were limited because many of the major environmental services, like sewage and refuse disposal, were provided by governments" (para. 3).

(Sources: WTO, 1998, CTS Background note on Environmental Services, paras. 3 and 36 ff; WTO, 1998, CTE Background note on Environmental Benefits, para. 27)

The current discussions on classification may also, to a lesser extent, have certain positive effects. For example, a renewed services classification may provide greater clarity as regards the services sectors and sub-sectors covered by the GATS and improve understanding of a WTO Member's commitments in its schedules. A more detailed classification could help environmental policy makers and civil society groups to determine those services sectors and sub-sectors where trade negotiators should refuse any liberalization. It would also help to identify services sectors and sub-sectors in which „conditions" or „limitations" should be imposed to safeguard environmental policy measures. Finally, the current discussions allow policy makers to pinpoint sectors and sub-sectors that should be totally exempt from the GATS (see examples above). Rather than have these

60 OECD, 2000, Benefits of Environmental Services Liberalisation, para. 39.

61 For issues surrounding environmental services and Developing Countries, see Palmer, 2001.

sectors included either by extensive interpretation of certain sectors[62], or „included by default", i.e. by assuming that they fall within the residual categories of „others", negotiators should explicitly exclude them from the GATS.

Box 9: WTO Members' Negotiating Proposals on Environmental Services – Challenges and Possible Responses from Environmental Policy Makers

In addition to the WTO Secretariat's background notes, WTO Members' negotiating proposals also suggest that WTO Members aim to eliminate the types of governmental regulation that they consider as barriers to trade in environmental services.

The EC proposal on environmental services states that the EC „…aims at engaging WTO Members in negotiations to reduce trade barriers to the minimum as well as increase country coverage"(para. 5). Similarly, the Canadian proposal states that Members „…should aim at reducing or elimination existing restrictions on national treatment and market access and broadening their commitments to related services"(para. 10).

On the other hand, WTO Members also acknowledge the value of regulation in the environmental services sector. The US proposal, for example, explicitly states that „…liberalization in these sectors must not impair the ability of governments to impose performance and quality controls on environmental services and to otherwise ensure that services providers are fully qualified and carry out their tasks in an environmentally sound manner" (para. 7).

Whether such statements will provide sufficient safeguard for environmental services regulation during the request / offer negotiations remains to be seen.

(Sources: EC communication, S/CSS/W/38; Canadian communication S/CSS/W/51, para. 10; US communication S/CSS/W/51, para. 7)

4.3 Conclusions

Chapter 4 highlighted the broad scope of the GATS, relating both to types of *regulatory measures* and *services sectors* covered. Section 4.1. demonstrated that the GATS also covers measures other than those *regulating* trade in services. Section 4.2. showed that current discussions among WTO Members relating to the classification of services also warrant close attention. The extremely broad scope of the Agreement, together with the far-reaching substantive obligation of the Agreement (see the following chapters), form the basis of the potentially constraining effects, which the GATS may have on the prerogatives of domestic environmental regulators. In order to most effectively pre-empt possible future challenges to environmental, consumer and other legitimate domestic regulations,

[62] For example, see WTO, 2001, Canada Oil and Gas Service Proposal, para. 10, stating that „Canada believes that all services in the oil and gas sector can be found in the W/120. In addition to services incidental to mining, different related oil and gas services may be included in real estate services, rental/leasing services, technical testing and analysis services, services incidental to energy distribution, related scientific and technical consulting services, and construction and related engineering services".

trade, environmental and other ministries need to cooperate closely in developing individual countries' negotiating positions. Similarly, inter-ministerial co-ordination activities should include civil society groups, which, in many cases, have a stake in issues related to the scope of the GATS and the current ongoing classification activities.

5. The Market Access Phase of the GATS-Negotiations

5.1 The Need for a Timely Environmental Examination of the Market Access Phase

Under the heading „Progressive Liberalisation“ Article XIX of GATS mandates WTO Members to conduct negotiations on „specific commitments“. WTO Members officially launched these negotiations in March 2000 and set out the methods for negotiations in the Negotiating Guidelines in March 2001. This subpart of the GATS 2000 negotiations is also called the „Market Access Phase“ and aims to increase the scope and depth of individual WTO Members' commitments under Article XVI (market access) and Article XVII (national treatment of the GATS).[63]

In March 2001, WTO Members completed a stocktaking exercise in the Special Sessions of the CTS, where they agreed on the organization of future work. They also addressed issues relating to the market access phase of the negotiations. By autumn of 2001, more than 40 Members had submitted some 70 proposals. These proposals mainly outline the Member's general approach to services liberalization, identifying and concentrating on those sectors where the Member has a particular negotiating interest. Sometimes the proposals generically determine restrictions, which the Member's services providers face in a particular sector. Future submissions will, on a sector-by-sector basis, target specific market access restrictions in individual countries. The Doha Ministerial Declaration establishes deadlines for the submission of requests (June 2002) and of offers (March 2003)[64] and WTO Members are at present preparing these submissions, focusing on requests first. It is important that environmental policy makers become involved in this process at the national level.

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[63] Article XVIII of the GATS, entitled „additional commitments” is also considered to be a specific obligation, only applying once a Member decides to be bound. Unlike Articles XVI and XVII, the Article on additional commitments grants Members more flexibility to determine the exact nature of the obligations adopted. For example, Members have decided to use Article XVIII to include the „Reference Paper on Telecommunications”, which mainly contains disciplines on anti-competitive practices.

[64] See WTO, 2001, Doha Ministerial Declaration, para. 15. It is important to stress that this paragraph does not establish „deadlines” which would impede any later addition or modification of requests, but rather para. 15 establishes „time-lines” for the submission of *initial* requests and offers.

For example, environmental policy makers might want to review their own country's „requests“ to ensure that these reflect a sustainable approach. Similarly, the involvement of environmental policy makers will be crucial, especially in terms of assessing the „requests“ a WTO Member receives during the negotiations. Most importantly, environmental policy makers should have a strong say in the elaboration of national „offers“. This is particularly significant, as a WTO Member's negotiating „offer“ will eventually translate into this Member's specific commitments in market access and national treatment and thus determine constraints that the GATS will impose on domestic regulatory flexibility.

Box 10: The Doha Mandate on Environmental Services

In para. 31 on Trade and Environment, the Doha Ministerial Declaration states that:

„With a view to enhancing the mutual supportiveness of trade and environment…[Ministers]…agree to negotiations, without prejudging their outcome on:…

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.”

This negotiating mandate gives rise to a series of questions, including: What are environmental services? Should negotiations on the liberalization of environmental services take place together with other environmental negotiations in the Committee on Trade and Environment, or together with other services issues in the Council on Trade in Services? And to what extent could the mutual supportiveness of trade and environment, rather than the objective of increasing liberalization of trade in services, be considered the overall benchmark of the negotiations? It remains to be seen how Members will address these issues in the coming months.

(Sources: WTO 2001, Doha Ministerial Declaration)

So far, there has been no analysis of the implications - positive or negative - of the current level of commitments or of any future effects that the current negotiations might have on the environment or on domestic and international environmental policy-making in WTO Member States. The extent and likelihood of any environmental implications depends, among other things, on the particular services sector in question, the type of GATS obligation and, finally, on the degree of openness of an economy.

This study will now briefly explain the types of obligations covered by the market access negotiations. It will then give a rudimentary overview of the current state of play and highlight those areas requiring the attention of environmental policy makers. This chapter is not intended to be exhaustive in listing potential problems, nor does it aim at providing ready-made policy options for negotiators. Rather, it will attempt to identify areas for further research, which should be carried out

before WTO Members proceed with further negotiations, or at least in parallel to the next negotiating phase.

Such research should be undertaken in cooperation with trade and non-trade ministries, intergovernmental organizations (IGOs), NGOs and academia. Its results should be fed into the current discussions of assessment of trade in services in the CTS to facilitate a comprehensive assessment and to benefit forthcoming discussions on requests and offers. Only if such comprehensive research and assessment is conducted *before, or at least in parallel to,* the next phase of negotiations, trade policy makers will be well placed to identify their positions -in particular in which sub-sectors and modes of supply they want to fully open up their domestic services market and on which of their domestic policies they need to impose limitations or conditions as regards their market access commitments.[65] However, it is vital that such research and assessment is carried out *before the conclusion* of any request/ offer negotiations, and that any results deriving from such negotiations adequately take into consideration policy recommendations made in the context of assessments.

5.2 Disciplines

5.2.1 Bottom-up Approach

Both the GATS market access and national treatment obligations apply only to those services sub-sectors and modes of supply where a Member explicitly agrees to be bound by them. A Member's market access and national treatment commitments are listed in that Member's „schedule of commitments". These schedules form an integral part of the GATS. In its schedule, a Member lists the services sectors, sub-sectors and modes in which it agrees to be bound by either market access or national treatment obligations. In the case where a Member does not want to open up, i.e. bind a particular sub-sector, it enters „*unbound*" into its schedule - indicating that it does not want to be bound by any disciplines. If a Member decides to grant full openness in a certain sub-sector and mode, it indicates this by entering „*none*" into its schedule.[66] However, Members can also put „limitations" and „conditions" on such individual commitments. Again, they must indicate this in their schedules.

In theory, the „bottom-up" approach of the GATS allows WTO Members to carefully schedule their commitments, and to commit to a degree of openness accord-

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[65] For further suggestions on such assessment please see chapter 3 of this paper.

[66] The term „none" indicates that this Member does not wish to qualify its commitment by any conditions or limitations.

ing to their level of economic development and domestic policy objectives. It remains to be seen, however, whether the political dynamic of trade negotiations will really sustain this theoretic flexibility for WTO Members. It may well transpire that, depending on the different negotiating modalities and political considerations, more powerful WTO Members will be able to exert pressure on their weaker trading partners. In practice, they may be able to force their less powerful trading partners to open up markets in the most vulnerable sectors.

5.2.2 Market Access Obligations

Article XVI contains the GATS disciplines on „market access". A WTO Member grants full market access in a particular sector and mode of supply when it does not have any of the measures listed in Article XVI GATS in place. The prohibited measures comprise four types of quantitative restrictions, certain limitations on forms of legal entity and certain limitations on foreign equity participation.[67] Once a WTO member has granted full market access in a particular sector and mode of supply, he may not limit:

- 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;
- or require a certain type of legal entity or joint venture;
- the participation of foreign capital.

From a trade-liberalization perspective, many of these measures might be deemed „barriers to trade". However, many of them play a key role in environmental policy making. For example, regulating access to natural resources or services markets or mandating a particular way of providing the services (i.e. public provision or provision via joint venture) are strategic environmental policy tools.

First, regulations restricting access to environmental benefits or natural resources are a well-recognized means of preserving the natural resources in question.[68] For example, in order to preserve non-renewable resources, it might be necessary to limit the number of service suppliers engaged in services related to the extraction of such natural resources.[69] Similarly, it might be necessary to subject service suppliers' activities to certain quantitative restrictions in terms of output or of input in

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[67] WTO, 2001, Scheduling Guidelines, para. 8.

[68] WWF, 1998, Environmental Review of MAI, p. 2.

[69] A US Communication on energy services addresses activities related to exploration and drilling. See WTO, 2000, US Energy Services Proposal, Attachment A.

a particular service.[70] Such measures could be used in services related to mining, forestry or fishing or other services related to water.[71] In order to preserve marine or other living resources in sensitive areas, it might also be useful to impose quantitative limitations on certain tourism services.[72] For this reason, the provision of tourism services related to activities in natural parks is frequently subject to approval, e.g. licences for whale-watching operations, ski lifts, or coral diving. To allow for such regulatory flexibility, it is vital that when „opening up" in the tourism sector, WTO Members include the relevant conditions or limitations in their schedules. Egypt, for example, included specific limitations for its commitments in mode 3 of the tourism services sector. Egypt's schedule specifically includes the condition that „[t]he addition to the inland water passenger and/or local tours is subject to the physical capacity of the Nile river."[73] It might equally be necessary to regulate the construction of tourism facilities such as hotels and restaurants. Similarly, in order to ensure that it is not only business interests, but also environmental and consumer concerns are adequately taken into consideration. The building of large department stores, shopping centres (outlets) and waste incineration facilities frequently require detailed regulatory approval (i.e. zoning regulations).[74] Should a country decide to enter into specific commitments in sectors where it currently applies or may, in the future, wish to apply, such or similar policies, it needs to ensure that its commitments are complemented by the relevant limitations or conditions.

Second, regulations determining the way a service is performed also serve as economic policy tools. In some cases, the state itself may be the owner of the natural resource.[75] The government may therefore want to exploit these natural resources through a public monopoly. Alternatively, it may want foreign investors to enter

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[70] In its proposal on environmental services, including the „collection of water", the European Commission explicitly states that „[i]t is understood that the GATS does not cover measures of a Member which limit inputs for the supply of services. As a consequence, any commitment undertaken in this sub-sector does not preclude a Member to regulate the supply and demand of natural resources." (see WTO, 2000, EC Environmental Services Proposal, footnote 5).

[71] The UN CPC classification lists services incidental to agriculture, hunting, forestry and fishing, including logging-related services, Division 88 of the CPC (see UN, 1991, Statistical Papers).

[72] Some of the Tourism proposals include a reference to the environment as a legitimate policy objective. For example, the Swiss proposal on tourism services explicitly states in para. 14 that it is „important to ensure that the principles of sustainable development of tourism are respected, particularly as regards the protection of the environment - which often represents a considerable capital asset put to good use by the suppliers of tourism services - and the protection of natural communities." (see WTO, 2001, Switzerland Tourism Proposal).

[73] WTO, 1994, Egypt, Schedule of Specific Commitments.

[74] It remains unclear whether measures such as ENTs or zoning regulations are to be covered under the GATS specific commitments, or should be addressed under Article VI.4 on domestic regulations. See also US market access proposal for distribution services, which explicitly mentions zoning and ENTs.

[75] WTO, 2000, US energy services proposal, para. 9, it explicitly states that it „is not propose to address issues of ownership of natural resources" and includes a reference to the protection of the environment.

into joint ventures with para-statals or local investors.[76] Furthermore, limited foreign ownership or joint ventures allow for the participation of local people who have a deeper commitment to and understanding of the resource at risk, which may in turn improve certain aspects of investment in environmentally sensitive areas.[77] Finally, limited foreign ownership or joint ventures might be necessary to achieve the successful implementation of environmental regulations.

Given the importance such quantitative or other restrictions may have for the achievement of environmental policy goals, it is vital that trade negotiators do not enter into any commitments which might endanger domestic environmental regulations. It is important that trade negotiators have accurate information about which sectors they should leave unbound, and in which sectors they need to impose „conditions“ or „limitations“ should these sectors be put into a country's „offer“. In order to best achieve these objectives, trade and environmental policy makers must cooperate closely. They must carefully analyse domestic regulatory framework, and identify those environmental policies, which could be harmed by market access commitments that are too far-reaching.

5.2.3 National Treatment - Like Service Providers – De Facto Discrimination

The National Treatment Standard is considered to be the centrepiece of the multilateral trading system. There are certain aspects relating to national treatment that warrant attention from environmental policy makers. For example, issues such as the „likeness“ of services providers (a) and the general nature of „non-discrimination“ obligations, in particular when prohibiting „de-facto“ discrimination (b), might considerably constrain domestic environmental policy choices.

5.2.3 (a) „Likeness“ of Services and Service Providers

Article XVII, the GATS contains a national treatment obligation. In order to fulfill such an obligation and grant full national treatment in a given sector and mode of supply, a WTO Member government must accord the same „equal“[78] conditions of competition to foreign services and service suppliers of other Members, as it accords to its own „like“ services and services suppliers.[79] Thus, a Member may not discriminate between domestic and foreign „like“ services and service suppliers. Consequently, any question about a possible violation of the national treatment obligation boils down to whether two services or service suppliers are

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[76] WWF, 1998, Environmental Review of MAI, p. 3.

[77] WWF, 1998, Environmental Review of MAI, p. 3.

[78] A Member is obliged to provide „not less favourable treatment“ to foreign service providers. It is however, allowed to provide „less favourable treatment“ to its domestic service suppliers.

[79] WTO, 2001, Scheduling Guidelines, para.13.

considered „like“. However, neither the GATS nor any other WTO Agreement provides rules on how to determine the „likeness” of services and service providers.

This issue has only been briefly addressed in existing GATS case law. In *EC-Bananas*, the Appellate Body confirmed the Panel's statement that entities providing „like“ *services* should be considered as „like“ *service suppliers*.[80] However, WTO tribunals have failed to provide guidance on which elements and factors should be relevant for the definition of „likeness“ of „service suppliers“. Rather, the tribunal's focus on the characteristics of the *service* in question seems to ignore the characteristics of the *supplier*. This could have far-reaching consequences, for example, generating a vast array of „like” service suppliers. Moreover, it is not certain whether future trade tribunals will take into consideration such factors such as the size of a company, its type of assets, its traditional field of business or its technological equipment when deciding whether two service suppliers are „like“. However, criteria such as whether a *service provider* employs sustainable, as opposed to environmentally destructive, technologies might be a principal determinant in designing environmental regulation.

For example, in the context of energy services, different energy sources[81] may merit different treatment for environmental or other legitimate policy reasons.[82] The European Commission's energy proposal explicitly mentions the need for different treatment with respect to nuclear energy.[83] However, when listing different energy activities, the proposal goes on to emphasize that, „[…] the list […] currently applies irrespective of the energy source concerned”.[84] The US proposal explicitly recognizes the need to implement „[…] regulations requiring the use of technology in order to achieve environmental or conservation goals […]”[85]. However it does state that, „[…] commitments should be made without regard for the technology used to provide energy services, [except as noted above]”.[86]

If services providers using sustainable or environmentally friendly technologies for the delivery of their services are considered to be „like” to those service providers using unsustainable or even environmentally harmful delivery or pro-

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80 Panel report, 1997, EC-Bananas, para. 7.322.

81 Electricity per se is considered a „good“, but see the position of energy services providers in CERA, 2001, Private Report.

82 Several countries have opted out of using certain energy sources (nuclear energy) or have introduced so-called portfolio requirements for their energy sectors.

83 See also WTO, 2001, Japan - Energy Proposal.

84 WTO, 2001, Europe Energy Services Proposal, paras. 5 and 6.

85 WTO, 2001, US Energy Services Proposal, para. 6.

86 WTO, 2000, US Energy Classification Proposal, para.13

duction processes, commitments under the GATS's national treatment obligation would constrain governments' ability to accord different treatment to these two sets of service providers. As explained above, such differential treatment for the two sets of service providers might constitute an essential element in regulatory efforts to protect the environment or to achieve other legitimate domestic policy goals.

5.2.3 (b) Discrimination „de jure" and „de facto"

The GATS national treatment provision establishes both a *de jure* and a *de facto* obligation and there are therefore two kinds of measures that could violate Article XVII. First, Article XVII of GATS prohibits regulations, which directly single out „like" foreign services and service providers and accord them less favourable treatment. Second, the GATS national treatment obligation also prohibits regulations which, although appearing to be non-discriminatory on the surface, may be discriminatory in practice, i.e. „practically" have more negative implications for the „like" foreign supplier.

The implementation of certain limited types of discriminatory regulations (*de jure discrimination)* might constitute a useful means of environmental policy making[87], for example, with a view to facilitating the application or the implementation of certain environmental policies.[88] Enforcement of environmental regulations is particularly important in environmentally sensitive services sectors, such as forestry, toxic waste processing, or extraction and drilling. In such areas, services are frequently traded via mode 3 - the foreign direct investment mode. The main assets and the corporate control of the service provider could therefore still lie outside the jurisdiction of the service importing country. Thus, in order to ensure that domestic environmental regulation is truly enforceable, the host or importing country may seek to impose higher standards on the mode of foreign investment. For the above-mentioned sectors it is crucial to ensure that any specific commitments in national treatment will not limit a government's right to legitimately pursue such policies.

Successful implementation of environmental regulations restricting access to environmental benefits or natural resources may depend upon the support of domestic communities that demand preferential access to these resources. For example, a government aiming to protect the country's water, forestry or other natural resources, may wish to continue granting preferential access for its own citizens

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87 For example, see Friends of the Earth US (2000), A Disservice to the Earth. It emphasizes the need to distinguish between domestic and foreign service operations in order to limit „cut-and-run" service operations.

88 WWF, 1998, Environmental Review of MAI, p. 2.

and local communities as their livelihoods and culture may depend upon such continued access.[89] At present, some of the negotiating proposals explicitly state that they do not affect ownership of the resources in question, nor do they limit a government's right to restrict inputs for the supply of a service or to regulate supply and demand of a natural resource, such as water. Environmental policy makers might therefore wish to ensure that similar provisions are included in their country's specific commitments and are not lost in the politics of sector-specific request / offer negotiations.

Without being facially discriminatory, many domestic environmental regulations may result in *de facto discrimination* between domestic and foreign services and service suppliers. For example, to reduce emissions, a WTO Member government may decide to adopt a regulatory framework for transport and other polluting services. By virtue of their long-standing operation in their home market, domestic service providers have already adapted to this regulation, while foreign transport providers effectively face a barrier to entry. Similarly, several countries have opted out of using certain energy sources, introduced so-called portfolio requirements for their energy sector[90] or adopted energy sector regulations with general performance requirements, obliging market players to buy a certain type of environmentally sound electricity. It may happen that most of the environmentally sound energy is being produced locally, effectively placing foreign service providers at a disadvantage. Consequently, there are fears that such obligations could be considered *de facto* discrimination.

Recently, the European Commission[91] voiced concern that neutral governmental measures and regulations, which „may be fully justified on environmental grounds", can have *de facto* discriminatory effects on foreign services suppliers and therefore be prohibited once a Member has made a commitment under Article XVII. This aspect is also discussed in academic and other trade law related literature.[92] It therefore seems to be a well-founded concern that a potentially broad interpretation of the GATS *de facto* non-discrimination obligation could, in effect, undermine sovereign regulatory powers of WTO Member governments. In this

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89 WWF, 1998, Environmental Review of MAI, p. 3.

90 Such regulations can consist of quantitative measures setting – within total electricity consumed - certain numerical quotas for electricity produced from renewable energy sources. Mandatory portfolio requirements thereby effectively reserve a certain market share for „green" electricity. They are currently used in several states of the US, in Austria, Denmark and Italy. Other countries, such as Belgium, plan to introduce such quota requirements. For a comprehensive overview over the state of energy regulation, both in the goods and services area, see Energy Charta Secretariat, 2002, Regional Energy Markets in the ECT Area.

91 EC, DG Trade, 2000, GATS Environmental Exception

92 See also Zdouc, 1999, GATS Dispute Settlement Practice, p. 342.

context, it would also constrain governmental prerogatives for putting in place vital environmental regulations.

Given the potential breadth of the GATS national treatment obligation, it is of utmost importance that environmental regulators closely monitor the sectors and sub-sectors that their counterparts in economic ministries register market access and national treatment commitments, and that, where necessary, trade negotiators impose the relevant „conditions“ or „limitations“ on such commitments. Otherwise, the GATS's general exception in Article XIV is the only safeguard for „conflicting" environmental regulations.[93]

5.3 Conditions and Limitations - Examples Identified by the WTO Secretariat

In a recent document,[94] the WTO Secretariat compiled the results of a survey that reviewed existing WTO Members' schedules with regard to measures, which were listed as „conditions“ and „limitations“ because they were considered to be (potentially) in conflict with market access and national treatment obligations. The list of examples that the WTO Secretariat identified includes the following measures, many of which could be justified on environmental policy grounds:[95]

- „license for a new restaurant based on an economic needs test“ - environmental policy makers might want to introduce policies designed to limit tourism facilities in environmentally sensitive areas, such as natural parks and consider ENT licenses a useful tool;
- „nationality requirement for suppliers of services (equivalent to zero quota)“ - environmental policy makers might want to facilitate the implementation of certain policies, by granting access to services related to exhaustible natural resources exclusively to local communities;
- „in sector x, commercial presence must take the form of a partnership“ - environmental policy makers might need to introduce similar partnership measures to facilitate implementation and enforcement of environmental regulations;
- „foreigners may not acquire direct ownership of land in a 100 km strip along the frontiers“ - environmental policy makers might want to consider a similar provision for natural parks;
- „the acquisition, purchase as well as rent or lease of real estate by foreign natural persons as juridical persons requires an authorization by the competent regional authorities which will consider whether important economic social or

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[93] For problems arising from Article XIV's limited scope, see chapter 9 of this study.

[94] WTO, 2001, Scheduling Guidelines.

[95] WTO, 2001, Scheduling Guidelines, para. 12.

cultural interests are affected or not“[96] - environmental policy makers might wish to design a similar policy for considering whether environmental interests are affected by the purchase of a real estate by foreigners;

- „government or privately owned monopoly[97] for labour exchange agency services“[98] - environmental policy makers might want to promote government monopolies for the exploitation of exhaustible natural resources.

The WTO Secretariat has identified the above measures as those, which Members need to explicitly list as conditions or limitations in their schedules, so as to continue pursuing these policies without being faced with a possible WTO challenge. Environmental policy makers should therefore assist their trade policy counterparts in identifying domestic regulatory measures, which might need scheduling as „conditions” or „limitations”. Members should fully use the flexibility for scheduling such conditions and limitations as granted by Article XIX of the GATS and the Negotiating Guidelines and, when in doubt, opt for *broader* rather than more *limited* limitations in their commitments.[99] In this context, it is very important that Members stand firm vis-à-vis other Members' suggestions to „consider entering in their schedules „no limitations” on market access […]”[100] and with policy recommendations from industry which suggest that „exceptions to GATS commitments should be […] temporary and limited to the minimum required for specific purposes”.[101]

5.4 WTO Members Market Access Proposals – Two Sector Specific Examples

Neither the market access and national treatment provisions in the GATS nor the Secretariat's note on scheduling guidelines refer to regulatory measures in specific individual services sectors and sub-sectors. Rather, they aim to identify generic

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[96] This WTO Member, while having realized the importance of cultural and social aspects, unfortunately seems to have forgotten environmental considerations.

[97] Although GATS Article VIII on monopolies does not from the outset prohibit monopolies, the fact that the WTO Secretariat lists public or private monopolies as a measure which needs to be scheduled as a „limitation” or „condition” indicates the breadth of the GATS disciplines.

[98] This reference indicates that, despite many statements, GATS, unlike the GATT, does not establish an outright prohibition of monopolies.

[99] Some also argue that Members should not schedule measures with environmental objectives because these would be covered by the GATS's environmental exceptions. However, as chapter 9 of this study will explain, there are doubts as to the scope and effectiveness of the GATS environmental exception. There is also a fundamental difference, between a situation where a domestic measure, which is considered as violating a Member's obligations, is then „justified” under the GATS Agreement's exception, or - as in the case of a condition or limitation – where the measure in question does not violate any of the Member's obligations.

[100] WTO, 2001, US-Express Delivery, para. 10.

[101] In the context of financial services, this issue has been raised in a recent document by: Financial Leaders Group, 2001, Commentary on Proposals for Liberalization in Financial Services.

types of measures, which violate Members' specific commitments. From an environmental perspective, however, it is important to place these generic types of measures in the context of real individual services sub-sectors, each of which have their own environmental sensitivities. This exercise might also prove useful because WTO Members would negotiate further market openness on a sector-by-sector basis.

The following paragraphs highlight a series of measures that WTO Members may consider as obstacles to trade in services and which are therefore likely to be negotiating targets in the forthcoming sectoral market access negotiations. As WTO Members are currently in the process of submitting more general negotiating proposals, this part of the study focuses on individual Members' negotiating proposals, which have been submitted during 2001. While these proposals are not yet very detailed, they do provide some indication of where WTO negotiators might be heading in the run-up to the June 2002 and March 2003 CTS Special Sessions.[102] Consequently, the following part of this study is far from exhaustive, both in terms of sectoral coverage and level of detail. However, the examples below aim at providing environmental policy makers with some preliminary ideas on the kind of issues trade negotiators will be dealing with in the near future. While many distinct services sectors are relevant to environmental policy makers, the following examples of tourism and distribution should merely be of an indicative nature, pointing towards the type of issues, trade negotiators will address in the forthcoming market access phase.

Tourism Services

Many activities, which could be covered by „tourism services", may have environmental implications and should therefore be subject to „limitations" or „conditions".[103] A proposal by a developing country lists among others the following activities:

- hotels and restaurants (holiday centre and holiday home services);
- theme park services, amusement park services, golf course services, ski field operation services, recreation park and beach services;
- hunting and fishing license services;
- tourist guide services (sightseeing services, aircraft or helicopter, tourist guide services);
- guide services (mountain, hunting, fishing);

[102] Throughout spring 2001, several organizations, for example UNCTAD, the South-Centre and also the WTO Secretariat itself, produced „tables" compiling the different expressions of interest from WTO Members.

[103] See, for example, WTO, 2000: Dominican Republic et al., Tourism Service Proposal

- risk sport and adventure;
- passenger transportation in air, on road and water.

In its market access proposal for tourism services[104], the US in particular, seeks to „remov[e] obstacles to the establishment and operation of hotels and other lodging places“ and then identifies, among others, the following obstacles:

- economic needs tests on suppliers of hotel and lodging services;
- lack of readily available information on zoning and lack of opportunity for service suppliers to meet with local officials and community representatives to discuss location facilities.

However, in paragraph 6, the US also notes that, „[…] governments may wish to take account of sustainable development and environmental goals as they define their approach to addressing certain of these obstacles.”

The EC proposal[105] explicitly states that, in mode 3 (foreign direct investment) requests, it will not target exceptions or limitations linked to the protection of areas of particular historic and artistic interest. However, it fails to incorporate a similar statement for environmental policy reasons, an issue which could also eventually become important for Developing Countries who wish to conserve their nature as one of the main tourist attractions. Finally, the Swiss tourism proposal[106] also contains a specific reference to sustainable development and protection of the environment. As none of the references to environmental considerations as yet takes the form of precise, operative provisions environmental policy makers may wish to ensure that current general language will finally be reflected in the specific legally enforceable commitments and will not be lost in the politics of request / offer bargaining processes.[107]

Distribution Services

Negotiations in the distribution sector may also give rise to environmental concerns. For example, the US communication highlighting market access interests in the distribution sector lists the following obstacles to trade in services: [108]

- economic needs tests for services suppliers;

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[104] WTO, 2000, US Tourism Services Proposal, para. 3.

[105] WTO, 2000, EC Tourism Services Proposal, para. 10.

[106] WTO, 2001, Switzerland Tourism Proposal, para. 14.

[107] See also the reference to „sustainable development of tourism, in particular in relation to its economic, environmental and quality aspects”, in WTO, 2000, Dominican Republic Tourism Services Replies.

[108] WTO, 2000, US Distribution Services Proposal, para. 8.

- prohibition on size and/or location of stores and other facilities without an opportunity to establish such facilities under prescribed conditions;
- limitations on the number of outlets in store operations;
- lack of readily available information on zoning and lack of opportunity for service suppliers to meet with local officials and community representatives to discuss location facilities.

Switzerland's communication on market access issues in the distribution sector is another example indicating the wide-ranging aspects, which negotiators may address in the forthcoming market access phases. For example, Switzerland explicitly states that „[d]istribution […] is dependent upon the existence and reliable and transparent implementation of national regulations. Health, safety, urban planning and the environment are amongst the reasons often adduced by Members in order to enact rules affecting the supply of a distribution service. Although such rules are legitimate, they can at times be more restrictive than is truly necessary".[109] This statement suggests that trade negotiators will apply strict scrutiny to environmental and other legitimate regulations.

5.5 Conclusions

Increasing market access and national treatment commitments may have practical and regulatory effects, which put additional stress on the environment (see above chapters 1 and 2). For example, increased market access commitments may result in constraints for environmental policy makers at the national level. Similarly, by increasing economic activity in environmentally sensitive sectors, they may directly affect ecosystems and the environment. WTO Members need to act to avoid such negative effects.

First, WTO Members must carry out a detailed assessment of potential implications *before* entering into the next phase of market access negotiations or at least *in parallel* to discussing specific requests and offers (see above chapter 3). In order to facilitate the approach to such a complex task, Members may wish to focus first on a series of selected priority sectors. From an environmental and developmental perspective, services such as tourism, transport, energy, construction, and environmental services, are fundamental. However, an assessment should also identify cross-sectoral issues relevant to environmental policies.[110]

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[109] WTO, 2001, Switzerland, GATS 2000, para. 10. Note that the exact borderline between Articles XVI and XVII on the one hand and Article VI.4 on the other remains unclear.

[110] For a comprehensive overview of issues related to such an assessment on a sectoral assessments basis, see WWF International, 2001. See also chapter 3 of this study.

Second, before accepting any additional commitments, WTO Members should have a clear and in-depth understanding of the exact scope of the GATS's market access and national treatment obligation. Only if Members are conversant with the legal content of these disciplines, will they understand the possible ramifications for domestic environmental policies. At the present time, Members are discussing the scope of GATS Articles XVI/XVII and the overlaps between them in the so-called technical review – work being conducted outside of the negotiating process. WTO Members may also consider discussing potential problems arising from the GATS prohibition on *de facto* discrimination.

Finally, in order to safeguard domestic environmental policies, WTO Members may wish to carefully design conditions and limitations to their commitments. Again, in this context, it is vital to give special attention to environmental policy measures, which – even though they are not formally discriminatory – could be considered „de facto" discriminatory. In addition, Members could consider introducing cross-sectoral limitations to protect environment-related measures. The horizontal limitations on „public utilities" in the European schedule could serve as a model.

6. Domestic Regulation

The discussions on domestic regulations are another area, and perhaps the most controversial, in the current WTO GATS negotiations.[111] Article VI GATS is entitled „Domestic Regulation", and contains a series of different provisions. Paragraph 4 of Article VI mandates WTO Members to „develop any necessary disciplines […] to ensure that measures […] do not constitute unnecessary barriers to trade in services". WTO Members, in their recent submissions to the Council on Trade in Services, state that „[t]he need for such disciplines appears increasingly important"[112] and according to the Negotiating Guidelines, Members aim to conclude these negotiations prior to the conclusion of the market access phase of the negotiations.[113]

The following sub-chapter will in turn discuss those aspects of negotiations on Article VI.4 which warrant particular attention from environmental policy makers:

- the general or sectoral applicability of future Article VI.4 disciplines;

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[111] Sinclair, 2000, GATS, p. 75.

[112] WTO, 2000, EC-Overall Approach to Services Negotiations, para. 1 (b); see also WTO, 2001, Norway - The Negotiations on Trade in Services, para. 8 and WTO, 2000, Japan - The Negotiations on Trade in Services, para. 23.

[113] WTO, 2001, Guidelines for Negotiations, para. 7.

- the potentially far-reaching scope of those disciplines;
- the potentially far-reaching substantive obligations such future disciplines might impose on domestic regulators; and
- finally, certain procedural transparency requirements.

6.1 Taking a Horizontal or Sectoral Approach to the Development of Future Article VI.4 Disciplines

First, environmental policy makers may wish to carefully follow WTO Members' discussions on whether any future disciplines on domestic regulations will take the form of „general" i.e. „horizontal" disciplines or whether they will take a „sectoral" approach. Members followed the latter approach when adopting the accountancy disciplines, which will enter into force once they have been formally integrated into the GATS - ostensibly no later than the conclusion of the current GATS 2000 negotiations.[114] In this context, Members also agreed that they would „aim to develop general disciplines for professional services, while retaining the possibility to develop or revise sectoral disciplines".[115] Current proposals suggest that only after further examination of how the main elements and concepts of future disciplines would apply to individual sectors, will it „[…] be possible to evaluate the […] value of general or sector-specific disciplines, or any combination of the two."[116] Given the different regulatory environments in different sectors, a sectoral rather than a general approach seems more appropriate from a domestic regulator's perspective.

6.2 Applying Future Disciplines as General or Specific Commitment Based Obligations

Second, environmental policy makers may wish to carefully follow developments in the Working Party on Domestic Regulation (WPDR) on whether any future disciplines will apply as specific obligations, i.e. only if a Member has entered into specific commitments for these discipline, or whether future disciplines would apply even if a Member had not entered into any commitments, i.e. similar to GATS Articles II and III. This second option might constrain individual the flexibility of WTO Member States to decide in which sectors and sub-sectors they will be bound by Article VI.4 disciplines. This might effectively change the structure of the GATS and further restrict the freedom of individual countries to adopt domestic regulatory polices.

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[114] See WTO, 1998, CTS Decision on Disciplines.

[115] Ibid.

[116] WTO, 2001, European Domestic Regulation Formal Communication.

The current wording of Article VI.4 leaves the issue of general or sector-specific applicability open and simply states that Members „shall develop any necessary disciplines". In a previous paper, the WTO Secretariat argued that Article VI.4 disciplines should apply generally in all sectors, irrespective of whether or not a WTO Member has scheduled commitments in a specific sector.[117] Some WTO Members argued along the same lines during the run-up to the Ministerial Conference in Seattle. For example, Hong Kong China suggested that the WPDR should „conduct…work on the development of general disciplines on domestic regulations".[118] Similarly, an Australian submission to the WPDR suggested that „making these disciplines […] conditional on the scheduling of sectors would add another layer of unnecessary complexity to the architecture of the GATS."[119] Canada, too, aimed „to advance the development of the concept of generally applicable disciplines on domestic regulation".[120] So far, the issue has not been resolved.[121] If there is a need to develop future Article VI.4 disciplines at all, designing them as „specific commitments" similar to market access and national treatment obligations under the GATS would constitute a more adequate solution.

6.3 Scope

Third, environmental policy makers may wish to carefully follow discussions on the scope of future Article VI.4 disciplines. Current discussions suggest that the scope of such future VI.4 disciplines is likely to be extremely broad[122], and may therefore have the potential to encompass a vast range of environmental policy tools. For example, the language of Article VI.4 GATS clearly envisages the development of disciplines for „measures relating to qualification requirements and procedures, technical standards and licensing requirements". First, this does not only encompass the listed regulatory tools per se but also measures *relating to* them. Second, the types of regulations listed practically encompass many domestic regulations. Among the possible regulations covered, at the national and sub-national levels, are also those measures that fall within the prerogatives of environmental regulators. For example, the term „qualification requirements" may refer to measures such as professional accreditation or competency certification for service suppliers performing potentially dangerous services, such as the incin-

[117] See WTO, 1999, Note on Domestic Regulation Applicable to All Services, part II, Article VI.4.

[118] WTO, 1999, Hong Kong China, Services in 1999 Ministerial, p. 3.

[119] WTO, 1999, Australia Communication to the WPDR, para. 3.

[120] WTO, 2000, Canada's Intervention at the February Meeting, WPDR, para. 1.

[121] For example, in its Submission to the WPDR the European Commission explicitly reserves its right to come back to this issue at a later stage. See WTO, 2001, European Domestic Regulation Formal Communication, para. 15.

[122] Even the European Commission acknowledges in its communication to the WPDR that the categories of measures in Article VI.4 are relatively broad. See WTO, 2001, European Domestic Regulation Formal Communication, para. 9.

eration of waste. Similarly, the concept of „licensing requirements" could cover a wide variety of licensing processes, including those covering facilities such as chemical laboratories, waste disposal or waste incineration. Finally, the category of technical standards[123] appears to incorporate both regulations affecting the „technical characteristics of the service itself" and „rules according to which a service must be performed".[124] In addition, the European Commission suggests in its most recent proposal to the WPDR that „[a]lso certain self-regulatory measures should be subject to disciplines".[125]

The practical implications of such a broad scope become more evident in light of recent WTO submissions. In proposals outlining their overall approach to the GATS negotiations[126], some Members have explicitly stated that certain sectors are „subject to many different aspects of domestic regulation". They state that these regulations „include controls on land use, building regulations and technical requirements, building permits and inspections […] [and] […] environmental regulations."[127]

The potentially broad scope of future disciplines may consequently extend into the domain of domestic environmental policy making. In response, it is vital for domestic regulators to acquire a clear understanding of which national and sub-national policy tools could be affected by future obligations at the international level in order to carve out crucial environmental policy tools.[128] As a first step,

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[123] In WTO, 1996, TBT Relevance to Article VI.4. of the GATS, para. 6, the WTO Secretariat suggests that technical regulations may cover not only mandatory regulations affecting service providers, but also voluntary standards. In this background note the Secretariat heavily draws upon the scope of „technical regulations" as used in the Agreement on Technical Barriers to Trade (TBT). However, it is questionable, whether similar language in different Agreements automatically implies similar concepts. Any reference to the TBT Agreement is of particular concern since the ruling in the recent *EC-Asbestos case.* This prominent „Trade And" case addressed a French regulatory measure for the protection of human health from the threats arising of asbestos. It was one of the main findings of the AB ruling that the French import *ban* on asbestos was a *technical regulation*. See also Appellate Body Report, 2001, Asbestos AB, paras. 59-83. For an analysis of this case see Howse/Tuerk, 2001.

[124] Sinclair, 2000, GATS, p. 76 citing, S/WPPS/W/9. Also WTO, 2001, European domestic Regulation Formal Communication

[125] WTO, 2001, European domestic Regulation Formal Communication, para. 12.

[126] In sectors such as tourism and distribution, the US have considered „lack of readily available information on zoning and lack of opportunity for services suppliers to meet with local officials and community representatives to discuss location of facilities" as obstacles to trade in services. See WTO, 2000, US Tourism Services Proposal, para. 6.

[127] WTO, 2001, EC-Construction and Related Engineering Services Proposal, para.10. This seems to target „de facto" discrimination. See also WTO, 2000, US Distribution Services Proposal, which amongst others lists obstacles such as „lack of readily available information on zoning and lack of an opportunity for services suppliers to meet with local officials and community representatives to discuss location of facilities."

[128] In the context of financial services Members have agreed to a general „carve-out" for „prudential regulations".

environmental policy makers may wish to ensure that they are actively involved when their country's trade-policy makers provide examples of the kinds of measures to be addressed by future VI.4 disciplines to the WPDR.[129]

6.4 Substantive Obligations: A Necessity Test – Going Beyond Non-Discrimination and Market Access

Fourth, environmental policy makers should carefully consider the potentially constraining effects the *substantive obligations* of future VI.4 disciplines may impose upon their prerogatives. For example, Article VI.4 would appear to suggest possible limits on domestic measures, which go far beyond the non-discrimination obligations in Articles XVI and XVII.[130] Consequently, for domestic regulations falling under Article VI.4, it would not be enough to comply with either market access or national treatment disciplines.[131] Disciplines going beyond non-discrimination and market access are outside the *traditional* realm of trade policy under the GATT. Only with the establishment of the WTO, new Agreements such as TBT[132] and SPS have moved in that direction. Both SPS and TBT go beyond national treatment and market access and both agreements have given rise to concerns among civil society and domestic policy makers. Many of these concerns relate to the TBT and SPS „necessity test" obligations, alleging that they might unduly constrain domestic sovereign policy choices.

In the context of Article VI.4, an Australian proposal of September 2000 suggests incorporating a „necessity test" into future disciplines on domestic regulations.[133] Another more recent Australian submission states that such a necessity test would, „[…] require that any domestic regulation adopted to meet a legitimate policy

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[129] Members, in the WPDR have agreed to provide examples of the kind of measures to be addressed by future Article VI.4 disciplines. See WTO, 2000, Report of the December 2000 Meeting, para. 124. Work on this issue has not yet produced exhaustive examples.

[130] For example, see WTO, 2001, Scheduling Guidelines, para. 11. Some recent submissions to the Council on Trade in Services also specifically found that „some obstacles which, although not limitations on market access or national treatment per se, may result from regulatory provisions which make it difficult for foreign suppliers to market their services". See WTO, 2000, US Distribution Services Proposal, para. 9; See also WTO, 2001, US Express Delivery Services Proposal, para. 11; WTO, 2000, US-Tourism and Service Proposal, para. 6, and see also WTO, 2001, Norway - The Negotiations on Trade in Services, para. 8.

[131] It has been suggested that disciplines on domestic regulation might apply irrespective of whether a country has made any specific commitments under either market access or national treatment. It is, however, difficult to envisage, how domestic regulations could be required to be not more trade restrictive than necessary, while at the same time not being required to fulfill market access and national treatment obligations.

[132] Agreement on Technical Barriers to Trade, Multilateral Agreements on Trade in Goods, Annex 1 A to the Marrakech Agreement Establishing the World Trade Organization.

[133] WTO, 2000, Australia, Domestic Regulation September 2000 Communication.

objective be the *least trade restrictive possible*".[134] It is feared that, in the event of a dispute among WTO Members, such obligations could allow international trade tribunals to scrutinize domestic regulations. This would in turn allow trade tribunals to second-guess whether environmental or other domestic regulations are not more trade restrictive than necessary to achieve their policy goal.

Similar concerns relate to a recent European proposal that introduces the concept of „proportionality" as a means of assessing the trade impact of domestic regulations. In particular, the proposal suggests that, „[a] measure should be considered not more trade-restrictive/not more burdensome than necessary if it is not *disproportionate* to the objective[s] pursued."[135] There are concerns that such a test may imply a *value judgment* about the *importance* of the *legitimate objective* in question. The European proposal aims to address such concerns and explicitly states that, „[…] the validity or rationale, of the policy objective[s] must not be assessed"[136].

However, recent WTO case law on „necessity" in the context of trade in goods proposes to „[…] take into account the *relative importance* of the *interest* pursued by the *national policy*".[137] For example, the AB carries out a „necessity test" in Korea-Beef and explicitly states that „[t]he more vital or important those common interests or values are, the easier it would be to accept as „necessary" the measure designed as an enforcement instrument."[138] In the context of the WPDR, Members had extensive discussions on whether *specific* legitimate objectives, i.e. the interest pursued by the national policy, or whether only a *general reference* to legitimate policy objectives should be made in future VI.4 disciplines. For example, a previous EC proposal recommended inserting an explicit reference to „environment" into the text of possible future disciplines. However, the EC also realized that this „is […] difficult, as it raises issues which some or all WTO Members may consider sensitive" and finally, the EC proposal acknowledges that „[t]he WPDR would also need to consider how to deal with regulatory objectives that are identified by Members but on which there is no agreement as to their legitimacy."[139] So far Members have not agreed upon a list of legitimate objectives and

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[134] WTO, 2001, Australia Engineering Services Proposal, para. 6 and WTO, 2000, Australia - Construction and Engineering Services Proposal, para. 7.

[135] WTO, 2001, European Domestic Regulation Formal Communication, para. 17. Previous to this publicly available document, the European Commission had submitted an informal note to the WPDR, which unfortunately was not available to the public (see WTO, 2001, European Domestic Regulation Informal Note).

[136] Ibid.

[137] Appellate Body Report, 2000, Korea-Beef AB, para. 162.

[138] Appellate Body Report, 2001, Asbestos AB, para. 172, quoting Appellate Body Report, 2000, Korea-Beef AB, para. 162.

[139] WTO, 2001, European Domestic Regulation Informal Communication, p. 3.

the Commission has adapted its position to these developments. Its more recent proposal now explicitly states that they „do not consider […] a list [of legitimate objectives] as an indispensable requirement for the work on necessity."[140] It remains to be seen whether the Commission's approach is an adequate means to safeguard environmental and other legitimate domestic regulations in the context of VI.4.

The validity of such concerns regarding a necessity or proportionality test is upheld when an analysis is made of the WTO Secretariat's approach to that issue. In a March 2001 background note, the Secretariat stated that a necessity test „[…] is the means by which an effort is made to balance between two potentially conflicting priorities: promoting trade expansion versus protecting the regulatory rights of governments."[141] In the light of these statements, concern that the inclusion of a „necessity test" into future Article VI.4 disciplines might impose a straitjacket on environmental regulators and a Member's right to regulate appear well-founded. It remains to be seen whether the Preamble's specific reference to the „right to regulate in order to meet national policy objectives" will suffice to disperse these fears. This is especially important, since the preamble language of Agreements could be crucial in the interpretation of the operative provisions of the Agreement, but which, in itself, is not considered to constitute legally binding rights or obligations. The potential for controversy in this issue[142] is also highlighted in proposals stating that future disciplines on Article VI.4 „[…] should […] *to the extent possible*, recognize the right of Members to regulate."[143]

Consequently, environmental policy makers should carefully follow developments in these issues. For example, from an environmental perspective, it is very important for such future disciplines to explicitly recognize „the protection of the environment" as a legitimate policy objective. Nevertheless, others argue that there is no need for an explicit reference to „the environment" because the current language in Article VI.4 GATS already refers to the „quality of the services". The quality of a service, it is argued, necessarily encompasses its harmless nature from an environmental perspective. However, it is not clear whether WTO tribunals would follow such a broad interpretation of „quality". In the case of a dispute, they could possibly adopt a narrower interpretation of „quality". It would then remain to be decided if the domestic environmental measure would prove „necessary to ensure the quality of the service" if its main purpose is to preserve the

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[140] WTO, 2001, European Domestic Regulation Informal Note, para. 20. For a comprehensive analysis of the notion of „proportionality" in the WTO, see Desmedt, 2001.

[141] WTO, 2000, Secretariat Note on Necessity Test for Domestic Regulation, para. 2.

[142] In similar discussions relating to disciplines for the accountancy sector, „safeguarding the public interest" was rejected as a legitimate objective.

[143] WTO, 2000, Japan - The Negotiations on Trade in Services, para. 23.

environment rather than ensuring the quality of the service. In order to strengthen their case, environmental policy makers may wish to refer to a WTO Secretariat background note, which explicitly refers to the „protection of the environment" as one of the objectives and rationales for regulatory measures stated in the TBT notifications.[144]

6.5 Transparency

Finally, the WPDR is also discussing disciplines, which might have the effect of exposing domestic regulatory decision-making processes to influence and pressure from interest groups outside the regulating WTO Member state. Under the heading „transparency", the US suggested that, „Members should address disciplines on the notification of proposed regulations and solicitation of comments from interested parties."[145] The US proposes to draw on the TBT disciplines, which effectively go even further. Article 2.9 TBT does not only oblige WTO Members to make draft regulations available to other Members and allow them to comment, but it also obliges WTO Member regulators to „discuss these comments upon request, and take these written comments and the results of these discussions into account".[146]

If adopted in the GATS framework, this could have far-reaching effects on WTO for the regulatory prerogatives of Members. In practice, the US proposal might enable influential WTO Members to more easily exert pressure on their weaker counterparts, obliging them to amend draft legislation and regulations. It is likely that such practices will, to a greater extent, serve the interests of those WTO Members who have the administrative resources to keep abreast of law-making processes in other Member States. It is also likely that such disciplines would uphold the export interests of those service providers who view domestic regulations as an impediment to trade rather than as a legitimate policy tool. In the light of these circumstances, it is vital that environmental policy makers watch closely the development of such disciplines.

The US recently submitted a new „transparency" proposal[147] which merits attention for two reasons: first, the US does not directly draw parallels to TBT disciplines and second, although the US refers to the benefits such procedures could bring to foreign service suppliers, it clearly mentions that prior comments could be

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[144] The Secretariat's background note explicitly refers to the „protection of the environment", as one of the objectives and rationales for regulatory measures stated in TBT notifications. See WTO, 2001, Secretariat background note on Necessity Test, para. 22

[145] WTO, 2000, US Transparency Submission to WPDR, para. 11.

[146] WTO, 1996, TBT-Relevance to Article VI.4 GATS, Article 2.9.4.

[147] WTO, 2001, US Transparency CTS, para. 6.

received from the general public, thus ensuring an informed debate on the formulation of national regulation. Environmental policy makers may wish to look carefully at the pros and cons of this approach.

6.6 Conclusions

WTO Members will continue to discuss the above issues in forthcoming sessions of the WPDR. Given the ambitious goal of the negotiating guidelines to finalize work on domestic regulation prior to the conclusion of the market access phase, it is likely that discussions will proceed more quickly in the near future. However, considering the potentially far-reaching impact such future disciplines might have on national and sub-national regulatory policies, WTO Members should tread with caution. Members may wish to consider rejecting the development of any future disciplines on domestic regulation. On the other hand, it is especially important that any future domestic regulation disciplines only apply to those sub-sectors where Members explicitly undertake specific commitments. If such disciplines are developed at all, it is very important to specifically refer to „Members' right to regulate". Whist this is currently mentioned in the Preamble of the GATS, Members' right to regulate should form part of the operative and legally enforceable provisions of possible future disciplines. Similarly, it is crucial for any future disciplines to explicitly recognize „the protection of the environment" as a legitimate policy objective. In light of the concerns raised above, it is vital for trade negotiators to engage in a broader dialogue involving social, environmental and other ministries that might be affected, as well as the general public, *before* agreeing on any future disciplines. Again, a comprehensive assessment, to be conducted *before and in parallel to ongoing negotiations*, might constitute an adequate tool to ensure that Members would be able to balance possible benefits and disadvantages in the elaboration of future Article VI.4 disciplines.

7. International Disciplines on Subsidies for Services

7.1 Subsidies as an Important Environmental Policy Tool

At the present time, the GATS does not contain a specific regime for subsidies. However, it does contain two provisions relevant to subsidies. First, Article XVII, the GATS national treatment obligation, applies to subsidies.[148] Second, Article XV of the GATS mandates Members to „enter into negotiations with a view to developing the necessary multilateral disciplines" in order to counter the trade

[148] WTO, 2001, Scheduling Guidelines, para. 16. See also WTO, 2000, Secretariat note on Subsidies for Services Sectors, para. 25.

distorting effects caused by subsidies. Both provisions warrant attention from environmental policy makers.

Subsidies are an important tool of environmental policies. They can be granted for research and development of environmentally sound techniques or for the use of these techniques. They can also be used to discourage environmentally damaging economic or other activities. Consequently, environmental policy makers should try to ensure that future commitments or future disciplines under the GATS do not constrain the use of this policy tool.

7.2 Existing GATS Disciplines for Subsidies: National Treatment

At present, the GATS national treatment provision prohibits subsidies, which discriminate between domestic and foreign like services and like service providers.[149] The WTO Secretariat has identified that subsidies programs, which reserve the eligibility for subsidies to nationals, are in violation of Article XVII GATS - unless the Member in question has explicitly included the relevant „limitations" or „conditions" in its Article XVII commitments. In such cases, the violation of the national treatment obligation is quite obvious. However, there could also be less clear-cut cases where any possible violation of Article XVII is open to interpretation. For example, how would a WTO panel treat a subsidies program providing benefits to environmentally sound services whilst not providing benefits to similar services supplied in an environmentally harmful way - irrespective of the origin of the services supplier? This could happen if a WTO member grants financial benefits to the producers (and providers) of renewable energy but not to environmentally unfriendly energy sources. Problems could occur if effectively most producers and providers of renewable energies are domestic, whilst virtually none of the foreign service providers is eligible for subsidies. Such a situation could again be considered to be placing foreign services and service providers at a disadvantage. Similar considerations might apply to the subsidization of research in environmentally friendly technologies.[150]

Such a situation might raise a series of legal questions in relation to the GATS national treatment provision. Most of the questions would relate to the „likeness"

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[149] According to WTO, 2001, Scheduling guidelines, paras. 15 and 16, Article XVII does not require a Member to take measures outside its territorial jurisdiction. Therefore Article XVII does not require Members to offer such a subsidy to a service supplier located in the territory of another Member.

[150] This is particularly important, as the EC Environmental Services Proposal explicitly includes, Environmental R&D services (R&D with an environmental component) as environment related subsectors which could be subject to a „cluster" negotiation, together with the services in the environment classification. See WTO, 2000, EC-Environmental Services Proposal. Currently, the EC schedule is „horizontally" unbound for „subsidies for research on development" in mode 3 - but not explicitly relating to environment. See European Schedule.

of services or service providers (see chapter 5 above). As GATS Article XVII (national treatment) prohibits discrimination between „like" services and „like" services suppliers of domestic and foreign origin, any question about a possible violation depends on whether two services or service suppliers are considered „like".[151] However, as explained in chapter 5 of this study, neither the GATS nor any other WTO Agreement provides rules on how to determine which services and service providers are „like". For example, would a panel consider the provision of sustainable energy as „unlike" from the provision of unsustainable energy?[152]

While the response to this and similar questions remains unclear, it is important that environmental policy makers pay due regard to these issues. In particular they may wish to encourage their respective trade negotiators to refrain from accepting and demanding additional national treatment obligations in sensitive areas – especially if the exact scope of these obligations remains unclear. However, the EC environmental services proposal explicitly mentions, amongst other things, R&D services with an environmental component as one area where they are seeking additional commitments from their trading partners.

7.3 Current GATS Negotiations on Subsidies

In addition, Article XV of GATS is relevant for environmental policy makers. This provision mandates Members to design disciplines for trade-distorting subsidies. These discussions are still at a rather early stage and WTO Members have not yet defined what they understand as trade-distorting subsidies.[153] However, the Secretariat has conducted a review of existing subsidies in different services sectors[154] and has identified several countries that apply subsidies or other benefits schemes for environmental purposes. For example, Poland and Japan were identified as granting financial incentives for environmental purposes.

To date, it remains unclear as to what extent any future disciplines will cover such financial incentives for environmental purposes. It is nevertheless important to stress that Article XV only mandates WTO Members to negotiate the „necessary multilateral disciplines to avoid […] trade distortive effects". Trade negotiators

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[151] See WTO, 1996, Secretariat note on Subsidies and trade in services, para. 9. Another open question is how the national treatment obligation extends across the modes of supply. See para. 28 above.

[152] The current Energy Services Proposals mainly address all energy services irrespective of the source of energy. See above discussion on market access.

[153] At the outset of these talks, the Secretariat suggested that „Members may wish to consider […] how far the definition of subsidy should be taken into the regulatory domain", WTO, 2000, Secretariat Note for in Services Sectors, para. 8.

[154] WTO, 1996, Secretariat note on Subsidies and Trade in Services, paras. 5 and 9.

will therefore have to determine what exactly they view as „trade distortive effects". Environmental policy makers may wish to closely monitor these negotiations. They should aim to ensure that trade negotiators – if they do develop new disciplines - do not adopt a definition of „trade-distortive effects" that is overwhelmingly broad and thus has the potential to constrain domestic environmental policy tools.

7.4 Conclusions

Given the importance of subsidies regimes for the attainment of environmental objectives, it is important that the GATS regime does not constrain these policy tools. For this purpose, WTO Members shall only accept with caution additional commitments under the GATS national treatment obligation (see also chapter 5 above). Second, WTO Members shall tread with caution when developing additional disciplines for trade-distortive subsidies.

8. GATS-Rules on Government Procurement

8.1 Government Procurement as an Important Environmental Policy Tool

Government procurement plays an important role in pursuing domestic policy objectives. When a government entity purchases certain goods or services, it may wish to base its decision on a factor other than „market objectives". Accordingly, purchasing entities might not only take into account the price of the good or service, but also certain other policy objectives.[155] Often the environmental implications of the purchase play an important role and it is widely recognized that the economic importance of government procurement in some sectors (such as construction) makes government procurement a policy tool, which is of equal importance in the pursuit of environmental, social and other economic goals.

Government procurement of services has an important impact on environmental policies in various ways. These impacts may be felt in relation to the objectives of the service itself, the process and production of the service and the service supplier.[156]

Concerning the service itself, a government may wish to ensure that the service it is purchasing is benefiting the environment or at least not causing any environ-

[155] For example, the purchasing entity may wish to consider aspects such as supporting local businesses, businesses employing minorities or former long-term unemployed workers or businesses owned by women (non-market objectives).

[156] See Kunzlik, 1998, p. 199.

mental damage. It can do that by imposing „product-related" environmental requirements, which relate to the post-procurement environmental performance of the product. Taking the example of the construction services sector, a governmental authority erecting a school building may want to ensure that no environmentally harmful construction materials are used or that their building is highly energy-efficient.

Second, a government may also wish to ensure that the process of producing the service and the production methods (PPMs) are environmentally sound. For example, a government might want the contractor to take certain precautionary steps against spilling environmentally harmful materials or it might stipulate that the contractor only use energy-efficient machinery.

Finally, a government might wish to support service suppliers with a positive overall environmental performance and prefer them to another service supplier, even though the service in question and the methods of providing it are the same. For example, a government might want to contract a company specializing in solar-energy roofs, because it wants to make sure this company remains in the market (affirmative purchasing).

The boundaries separating these three categories are not clearly defined and all three aspects could be found in a given procurement situation. The different situations, however, show that the relationship between government procurement, environmental policies and the WTO legal framework is complex and involves many aspects. It is therefore very important to study this relationship closely in order to ensure that any future disciplines will not further constrain this vital policy tool.

8.2 Government Procurement Regulations in WTO Agreements

Government procurement (of goods or services) is to a large extent beyond the scope of existing GATT and GATS disciplines.[157] Rather, the WTO's most important framework on regulations concerning government procurement is the plurilateral *Agreement on Government Procurement* (GPA). This plurilateral agreement currently comprises 28 parties (WTO Member governments) and covers procurement in all goods unless otherwise mentioned as well as procurement in a number of service sectors.[158]

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[157] According to Article III.8(a) GATT the national treatment provision does not apply to government procurement. For comments on GATS Article XIII.1 see below.

[158] The scope of this agreement is defined in Article I.1 GPA and determined mostly by the different annexes each party has attached to Appendix I of the GPA. Accordingly the GPA applies to central government, sub-central government and other entities as specified in Annexes 1-3.

The GPA distinguishes between the construction service sector as specified in Annex 5 and all other services as specified in Annex 4. Construction services covered by the GPA are based on a broad and uniform definition according to which a construction service contract is a „contract which has as its objective the realization by whatever means of civil or building works, in the sense of Division 51 of the Central Product Classification". Division 51 includes all types of services in connection with construction, from the pre-erection work to the completion and finishing work – all of which may entail environmental effects.[159] The lists describing all other services in Annex 4 differ among the GPA parties. Some types of services, however, have been „covered" by all parties. These include sewage, refuse disposal, and most other environmental services.[160] Finally, GPA parties, in their annexes, also specified the threshold values of purchases covered by the agreement.

Purchases covered by the GPA are subject to most-favoured-nation and national treatment principles (Article III of the GPA) as well as to certain tendering procedures, with a special emphasis on transparency at each stage of the procurement process.[161] Under these disciplines, GPA provisions allow purchasing entities to specify several procurement requirements, for example, requirements relating to the product and its process and production methods.[162] However, it has been argued that requirements solely relating to the service provider (affirmative purchasing) are not permissible under the GPA.[163] When drafting procurement guidelines and engaging in a procurement process, government officials must make sure that, in sectors covered by the GPA, they do not apply affirmative purchasing practices. For example, they should not favour services suppliers with a positive overall environmental performance.

8.3 Current Negotiations on Services Procurement: in the GATS and the GPA

Negotiations relating to government procurement and services are at present taking place in two WTO bodies. Environmental policy-makers might want to monitor both of them, even though negotiating processes have not evolved very far to this date.

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[159] Reich, 1999, p. 288.

[160] Reich, 1999, p. 289.

[161] Low/Mattoo/Subramanian, 1996, pp. 15-16.

[162] For product-related measures this is established GATT praxis, while the argument for PPMs can be based on Article VI.1 GPA, which explicitly mentions „processes and methods for their production". See also Kunzlik, 1998, p. 203.

[163] Kunzlik, 1998, p. 200.

In the *Working Group on Transparency in Government Procurement*[164], WTO Members address questions relating to transparency in government procurement for both goods and services. Discussions in this group have mainly focused on definitions and all aspects of transparency in the procurement process.[165]

The second negotiating forum is the *Working Party on GATS Rules* which, among other issues, conducts the negotiations mandated in Article XIII.2 of the GATS.[166] In 1999, these negotiations focused on definition issues.[167] In 2000, Members began covering multilateral disciplines. While Members agree on the point that the negotiations under Article XIII.2 of the GATS should not duplicate the work of the Working Group on Transparency, Members' positions differ on a variety of other points. For example, WTO Members could not agree on the exact scope of Article XIII.1 of the GATS.[168] Neither could Members reach consensus on issues relating to „market access". Some countries maintain that the mandate of Article XIII.2 of the GATS should also include market access negotiations in services procurement even though they acknowledge that it is too early to start with them. Developing Countries disagree and only seem to be willing to discuss the development of disciplines, without touching on market access.[169]

8.4 Conclusions

Government procurement negotiations on transparency and services are at an early stage and it is not entirely clear in which direction they will evolve. Given the importance of procurement issues for environmental policy makers, it is vital for them to analyse possible implications and to participate actively in the development of national negotiating positions.

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[164] This working group was established by the 1996 Ministerial Conference in Singapore.

[165] See WTO, 2000, Report to the General Council.

[166] Article XIII.2 GATS reads: „There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement."

[167] See for example WTO, 1999, Working Party on GATS Rules, nos. 39-50, pp. 11-13.

[168] Article XIII.1 GATS states that: „Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale." The exact scope of this provision is debatable. Some academics and developed countries argue that only the most-favoured-nation principle (Article II), the market access and the national treatment disciplines (Articles XVI, XVII) do not apply to government procurement whereas other GATS disciplines, especially the transparency requirement, do apply to it (see: Low/Mattoo/ Subramanian, 1996, p. 7 and WTO, 2000, WPGR Report of the July Meeting, p. 8, No. 37). Developing Countries have, however, argued that such a conclusion cannot be drawn from the wording of Article XIII.1 GATS. (see WTO, 2000, Statements of India, Hong Kong, Brazil et al. on GATS Rules, pp. 9-10).

[169] WTO, 2000, Statements of India, Hong Kong, Brazil et al. pp. 9-10.

9. Broadening the Environmental Exception in GATS

9.1 Differences Between the General Exceptions in GATT and GATS

Similar to Article XX of the GATT, the GATS contains a general exceptions clause as set out in Article XIV.[170] However, despite being modeled on Article XX of the GATT,[171] the respective provision in the Services Agreement is far more limited in scope. In particular, Article XIV of the GATS does not contain a provision similar to Article XX (g), which, under the GATT, has been interpreted as the „environmental exception".

GATS only addresses environmental concerns in Article XIV (b) which allows WTO Members to adopt exceptional policy measures if these are „necessary to protect human, animal or plant life or health". This provision is similar to the famous GATT Article XX (b). However, the GATS does not contain the other relevant exception of the GATT. Nothing in Article XIV of the GATS allows WTO Members to take measures „relating to the conservation of exhaustible natural resources". Furthermore, unlike other provisions of agreements that address trade in goods,[172] there is nothing in Article XIV of the GATS that, as such, specifically mentions „the environment" as a legitimate policy objective.

9.2 Reasons Why the GATS's More Limited General Exception Gives Rise to Concerns

The limited general exception gives rise to a series of concerns: First, the lack of a provision similar to Article XX(g) of the GATT raises concern because previous WTO disputes have shown that this Article has proved to be more reliable than Article XX (b) of the GATT when governments tried to justify an environmental measure before a trade tribunal.[173] Second, the lack of an explicit exception for the

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[170] GATS Article XIV reads: „Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including […]".

[171] The structure of the GATS and GATT general exceptions is very similar. Both provisions start with a similarly worded „chapeau" or introductory clause and then continue by listing a series of sub-heads specifying the legitimate objectives the domestic policy measure must aim to achieve. In order to be justified under sub-head (b), the human health exception, the policy measure must be „necessary" to protect human, animal or plant life or health. Note that not all sub-heads contain such a "necessity" test. The second sub-head, which is relevant for environmental policy making, establishes that a measure must be „relating to" the conservation of exhaustible natural resources" (see Article XX (g) GATT).

[172] TBT Agreement, Article. 2.2.

[173] Appellate Body Report, 1998, USA-Shrimp-Turtle AB.

„conservation of exhaustible natural resources" could be even more alarming in the light of current market access and classification proposals. Some of these proposals specifically aim to address services incidental to mining, drilling, fishery and forestry, all of which relate to exhaustible natural resources. Finally, the lack of a provision to justify environmental measures might have a dampening effect on domestic regulatory measures to protect the environment. Although the WTO Secretariat stresses that the right to regulate is a fundamental premise of the GATS,[174] the Services Agreement contains a series of features – its broad scope, *de facto* discrimination and disciplines on domestic regulation – which are cause for concern with regard to the prerogatives of environmental regulators.

For example, the GATS covers all measures *affecting* trade in services. Consequently, even measures which do not aim at regulating trade in services, but which have an incidental impact on it, are subject to the GATS scrutiny, and might require justification under the environmental exception. In particular, such measures might need to be justified under the „exception", as the GATS national treatment obligation in Article XVII.2 of the GATS specifically prohibits *de facto* discrimination. Situations are likely to occur where seemingly origin-neutral environmental measures and regulations cause a *de facto* discriminatory effect on foreign services suppliers.[175] Domestic regulators might not be able to anticipate any effects that their domestic measures might have on trade in services. Consequently, in the case of national treatment commitments, it is effectively impossible for trade negotiators to know *in advance* which conditions or limitations they should impose on any commitments they negotiate. In turn, lack of an effective environmental exception and uncertainty about whether or not their domestic measures might violate WTO obligations could make domestic regulators reluctant to pass new regulations to protect the environment.

Similar concerns arise from the strictures that future disciplines on domestic regulation might impose on environmental regulators. Again, given the potentially broad scope and strength of currently negotiated obligations, it is likely that domestic measures could be found to violate WTO obligations. In such cases, having recourse to a strong environmental exception is vital, and the lack of such a safe haven for domestic regulations, might effectively quell certain regulatory developments at the national level.

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[174] WTO, 2001, Facts and Fiction, p. 9.

[175] EC, DG Trade, 2000, GATS Environmental Exception.

9.3 Why the Possibility of Resorting to a Strong Environmental Exception in GATS is Crucial

The WTO Secretariat also emphasizes the importance of the GATS general exception, and stresses that Article XIV of the GATS overrides „all other provisions of the Agreement, entitling a Government to violate or withdraw its own commitments if necessary.“[176] Bearing in mind the importance of this clause, it is vital that the GATS general exception also applies to domestic regulatory measures designed to protect and improve the environment.

This issue has already been discussed on different occasions during the Uruguay Round Negotiations, both in the Council on Trade in Services and in the CTE (Committee on Trade and Environment). During the Uruguay Round, negotiators could not reach agreement on making specific reference to „the environment“, „sustainable development“, „the integrity of infrastructure or transportation systems“ or to „the conservation of exhaustible natural resources“.[177] Consequently, Article XIV does not contain any of these concepts. The Council for Trade in Services, at its first meeting, adopted a Ministerial Decision acknowledging that measures necessary to protect the environment could conflict with the provisions of the Agreement and decided to request the CTE „to examine and report, with recommendations if any, on the relationship between services trade and the environment, including the issue of sustainable development.“[178] Discussion in the CTE has not been very intense and has not produced any results. In the light of the expansion of trade in services and the current GATS 2000 negotiations, it is time for WTO Members to return to this issue.

9.4 Conclusions

WTO Members must begin with negotiations on a meaningful environmental exception clause in the GATS. It is unfortunate that this issue does not form part of the negotiating guidelines nor does it appear as an agenda item in the CTS. Up to now, only certain delegations have expressed their intention of addressing this issue in the CTE.[179] However, negotiations on an environmental exception clause

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[176] WTO, 2001, Facts and Fiction, p. 12.

[177] WTO, 1995, CTE Background note on Environment and Services, para. 5.

[178] WTO, 1995, Ministerial Decision on Trade in Services and the Environment, para. 1.

[179] The European Commission is currently discussing with Member States a submission to the CTE on Article XIV of GATS (see EC, DG Trade, 2000, GATS Environmental Exception). The US, in its „Overall Approach to Trade in Services” to the CTS notes „the work that has been done on the relationship between services trade and environment and welcomes future consideration of this issue in the appropriate forum“. It is likely that the US refers to the CTE as the other appropriate forum, as opposed to the CTS.

must take place in the CTS[180], because the CTE is not a negotiating forum and has remained largely ineffective for the past year or so.

10. Policy Recommendations

The following policy recommendations address the current GATS negotiations, any communications or proposals tabled by individual Members in that context and, finally, certain environmental aspects of the GATS discussions, including changes in the GATS text itself, which have so far not been proposed by any WTO Member (including the EC or Germany). Whilst the conclusions below cover more issues than the limited set of questions addressed above, they do not claim to be comprehensive. Rather, the set of recommendations below aim to achieve two goals: first, to provide specific suggestions on selected issues which seem of major importance at this stage of the GATS negotiating process; and second, to generate discussion on issues related to the systemic implications of existing GATS provisions.

- **Conduct Sustainability Impact Assessments**

In the light of the environmental policy implications of services trade policy, it is vital to conduct services trade assessments. For optimal effectiveness, such assessments must be timely, comprehensive, conducted from a sustainability perspective, must build on open, accessible and written processes and, finally, they must be carried out in full cooperation with relevant governmental, inter-governmental and non-governmental agencies.

As the Doha Declaration's time-frame makes it unlikely that Members will manage to conclude initial assessments *before* entering into the next phase of negotiations in the market access context, such assessments should at least be conducted *in parallel* to the forthcoming request / offer phase. This will not only ensure ongoing input and guidance through the assessment process, but will also facilitate carrying out assessments, as country-specific requests and offers provide precise examples of *what* sort of policy changes should be assessed. Whilst rapidly initiating such request assessments, Members should also conduct sustain-ability assessments of the other GATS negotiating items (domestic regulation, government procurement, subsidies). Finally, parallel conduct of assessments should also ensure that no final agreement on any offer is made without adequate input from ongoing assessment processes.

[180] Norway stated in 1999, „that the CTE did not have the technical expertise to deal with services trade issues". It was therefore" desirable that environmental issues be taken up in the context of services negotiations" see: WTO, 1999, Norway services negotiations. and WTO,1999, CTS Report

WTO Members should carry out these assessments at the national level and feed their experiences into the CTS discussions at the international level. The GATS assessment being a standing agenda item of the CTS, Members should further explore and fully utilize the possibilities arising there from. To avoid further imbalances in the negotiating process, WTO Members from developed countries shall actively support Developing Countries' efforts in the area of assessment in the CTS and provide financial and technical assistance to make assessment a concrete reality of the services talks.

- **Sector specific recommendations**

Whilst future initial assessments should focus on providing information and data on certain priority sectors with clear-cut environmental or social implications (transport, distribution, tourism and construction services), certain initial policy recommendations can already be set out for some sectors such as, environmental services (including provision of water), energy and tourism.

Environmental services should only be further liberalized in the light of results of detailed assessments and to the extent that their liberalization provides clear benefits to the environment. Questionable services such as waste incineration services should be excluded from further liberalization and liberalization should not result in "end-of-the-pipe" services gaining market advantage over integrated environmental services. It is especially important to recognize *access to water as a human right* in the context of current GATS negotiations and the water sector should not be liberalized merely to satisfy the interests of multinational companies. Proposals to liberalize *energy services*, which include many environmentally sensitive services (e.g. the US proposal includes oil drilling "services"), should be rejected. Maintaining regulatory flexibility to distinguish between sustainable and non-sustainable energy services is particularly important. Furthermore, concerning the *tourism sector*, it is necessary to analyze the social and environmental consequences of further GATS disciplines and to look for possibilities to support sustainable tourism.

- **Assess the environmental implications of the European GATS „requests" and „offers" and discuss the results in a broad public debate**

All European GATS negotiating positions, especially European requests and future offers – including all details, i.e. contact details for the relevant officials, both in the European Commission as well as in the EC Member States – should be publicly available (on the www etc.). Foreign requests to the EC should be made public when they are received and, in the case of European offers or European requests, these documents should be made publicly available well in advance of their discussion date in the 133 Committee in Brussels.

The above-mentioned documents should be subject to a broad public debate amongst civil society groups, parliaments and regulatory authorities at all levels (local, regional, national and international). European and national authorities could build upon international experiences with GATS-related information policies and should strive to open up more effectively their trade policy process.

- **Safeguard the regulatory prerogatives of local, regional, national and international environmental policy makers from threats arising in current negotiations on „domestic regulation"**

From an environmental perspective, stronger GATS-disciplines are not required on „domestic regulation"; in fact, the current disciplines already threaten to restrict regulatory options for environmental policies. Consequently, it is vital:

a) to refrain from introducing more stringent disciplines on domestic regulation;

b) to reject the European proposal of a „necessity test", or similar proposals from other WTO-Members and to ensure that work or future disciplines based on such documents fully respect and protect the flexibility to pursue legitimate policy objectives (i.e. in the operative part of any disciplines and not only in the Preamble);

c) to refrain from introducing new international „transparency" disciplines (US proposal);

d) to ensure that, if new disciplines on domestic regulation cannot be avoided, these disciplines explicitly recognize environmental protection, human rights and developmental policies as legitimate domestic policy objectives;

e) to ensure that any new rules on domestic regulation do not take the form of general disciplines, but rather adopt a sectoral approach and, in any case, only apply as specific commitments, dependent on a Member's schedule of commitments.

- **Introduce a broad environmental exception into Article XIV of the GATS**

In its present form, Article XIV of the GATS constitutes an even weaker general exception than Article XX of the GATT. Consequently, new GATS negotiations should aim to introduce new language into Article XIV of the GATS, which effectively safeguards measures to protect the environment. The same shall apply to measures corresponding to the objectives of Multilateral Environmental Agreements (e.g. the Kyoto-Protocol).

- **Allow exemptions from the Most-Favoured-Nation rule for environmental reasons**

It is crucial to allow Members to exempt environmental and other domestic policy measures from the most-favoured-nation principle (Article II of the GATS). For example, the most-favoured-nation principle must not put constraints on the implementation of Multilateral Environmental Agreements (such as the flexible mechanisms of the Kyoto-Protocol). Current GATS negotiations should therefore not aim at a general elimination of all Article II exemptions. Instead, Members should explicitly call for MFN exemptions for environmental reasons and suggest that they are allowed to introduce new MFN exemptions into their schedules. If a renegotiation of the Annex to Article II is not possible, exceptions to Article II should be granted on the basis of a general and indefinite waiver.

- **Introduce sectoral and horizontal limitations on specific commitments and exclude „de facto"-discrimination from Article XVII of the GATS**

Quantitative and qualitative restrictions necessary from an environmental policy perspective should not be only recognized and scheduled on a sectoral and sub-sectoral basis, but Members should also consider introducing cross-sectoral market access and national treatment limitations („horizontal limitations") to protect environment-related measures. The horizontal limitations on „public utilities" in the European schedule could serve as a model. Only such a horizontal (cross-sectoral) limitation would enable Members to impose environmentally necessary measures in the form of quantitative restrictions or special disciplines on foreign investors, even if the relevant sectors are otherwise subject to specific commitments.
Finally, it is vital to give special attention to environmental policy measures, which, although not formally discriminatory, could be considered „de facto" discriminatory. In general, these measures should not be covered by Article XVII of the GATS. If Members fail to reach consensus on this issue, all measures that might constitute „de facto" discriminations should be protected by horizontal (cross-sectoral) limitations in individual schedules.

- **Ensure a general exclusion of „public services"**

Certain services, such as energy, water, transport, communication, health and primary education are especially important for environmental or social policy objectives and frequently constitute „public services". In order to guarantee the greatest possible amount of autonomy in regulating and providing these services, „public services" should, in general, be excluded from the GATS. Since the current exclusion, which addresses „services supplied in the exercise of governmental authority" (Article I.3 of the GATS) is unclear and depends overwhelmingly on the non-commercial and non-competitive supply of these services,

Members should extend this clause either through an amendment to the GATS, an interpretative understanding, an authoritative interpretation or at least through a political statement.

- **Secure environmentally-oriented government procurement**

From an environmental perspective, stronger disciplines on government procurement in the GATS context are not required. Current negotiations on government procurement of services should therefore be conducted very cautiously and should seek to preserve the largest capacity possible for government procurement policies that aim to further environmental goals. Market access negotiations for government procurement of services should be rejected.

- **Permit continued use of environmental subsidies**

From an environmental regulatory perspective, subsidies constitute a widely accepted policy tool. It is therefore not necessary to extend and further develop GATS disciplines on subsidies. A subsidies regime, if there is one, should be shaped in such a way as to avoid placing constraints on the granting of subsidies for environmental reasons.

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