Betrachtungen zur Aussenwirtschaftspolitik

International Economic Relations: Notes & Comments

GATS and Democratic Legitimacy

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Das reibungslose Funktionieren des GATS in der handelspolitischen Praxis und seine breite Akzeptanz auf WTO Ministertreffen, einschliesslich in Seattle und Cancún, stehen in deutlichem Gegensatz zu Befürchtungen einer zumeist ausserparlamentarischen Kritik. Diese bemängelt vor allem ein angebliches Demokratiedefizit und, damit verbunden, das Risiko einer unangemessenen Beeinträchtigung nationaler Entscheidungsspielräume im Dienstleistungsbereich. Solche Befürchtungen erscheinen allerdings wenig stichhaltig, da das Konsensprinzip der WTO nationale Entscheidungsverfahren, wie immer sie auch strukturiert sein mögen, im Prinzip vor externer Einflussnahme schützt. Der Begriff der Demokratie wird jedoch nicht nur mit bestimmten Institutionen oder Verfahren assoziiert, sondern auch mit Grundsätzen wie dem der Transparenz oder der öffentlichen Rechenschaft. In dieser Hinsicht scheint das GATS weniger vorteilhaft abzuschneiden als das GATT, sein Gegenstück im Güterhandel. Während das GATT im Wesentlichen nur eine Protektionsform zulässt, Zölle, ist das GATS wesentlich breiter gefächert und deckt vielfältige Transaktionsformen und Protektionsmechanismen ab. Damit bietet es mehr Nischen für den Fortbestand wirtschaftlicher Privilegien und kann voraussichtlich nicht die gleichen «demokratiefördernden» Wirkungen entfalten wie das GATT.

Keywords: WTO, Trade in Services, Policy Flexibility, Democratic Legitimacy
JEL-Codes: F02, F13, H70, K33

1 Introduction

Critics of the General Agreement on Trade in Services (GATS) frequently express concerns about the Agreement's perceived lack of democracy or democratic legitimacy, although it is not always clear what concept(s) of 'democracy' they have in mind.[1] Reference is made, *inter alia,* to the wide remit of the Agreement, which includes consumer movements and the local presence of foreign firms and persons; related fears that trade policy

* All views expressed are those of the author and should not be associated with the WTO Secretariat or WTO Member States. The author is grateful to MALCOLM BOSWORTH, DALE HONECK, PETER MORRISON and MARTIN ROY for their insightful comments on an earlier draft.

1 The Oxford English Dictionary (OED) gives various definitions of 'democracy'. Particularly relevant in the current context are: "(a) Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised by them (as in the small republics of the antiquity) or by officers elected by them. In modern use often more vaguely denoting a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege; (b) a state or community in which the government is vested in the people as a whole."

considerations might prevail over core social policy objectives; and, more generally, perceived flaws in the WTO decision-making system and ensuing risks of a non-mandated international body encroaching upon legitimate national policy preferences.

It is difficult to see, however, why the GATS' domestic policy implications should be perceived as fundamentally different from those of its counterpart in merchandise trade, the General Agreement of Tariffs and Trade (GATT) of 1947, which has not drawn similar criticism. Both agreements were negotiated and signed by the governments of virtually all democratic states in the world and ratified by the parliaments concerned. (In the case of the European Communities, this not only involved the European Parliament but the national parliaments of all Member States.) The same applies to the schedules of tariff concessions (GATT) and specific commitments (GATS) bound by Members under the two agreements. Moreover, in both cases the WTO dispute settlement mechanism protects Members from unilateral interpretation and application by dominant trading partners; and the traditional consensus principle prevents the passage of any new negotiating mandates, let alone the enactment of new rules, that are not endorsed or at least tacitly condoned by all 147 Members. Although the consensus principle was blamed, among other factors, for the failure of the Cancún Ministerial Meeting and some of its predecessors, it is a constituent element of the system. Sovereign countries can hardly be expected to implement rules imposed on them by a majority of other countries, as large as it may be, in an international forum.

The concept of 'democracy' is not necessarily confined to elected governments exercising power on behalf of their people, however. It also has an egalitarian flavour, alluding to notions such as 'equality of opportunity' or 'non-discrimination' between individuals (regardless of social status, sector of activity, profession, etc.), and it has been associated with core concepts of an open society such as transparency and public accountability. In this regard, it may be argued that the multilateral trading system has made a significant contribution over the past five decades: it not only helped to reduce long-entrenched economic privileges in the form of disparities in sector protection, as well as the associated effects on professions, regions, etc., but encouraged a shift towards more predictable and transparent trade policies.[2] Yet the GATS cannot be expected to be as effective in this respect as the GATT.

2 The concept of transparency used in this context, and throughout the paper, does not relate to the transparency of laws and regulations – the publication and notification requirements under the GATS

While the GATS covers a far broader range of transactions ("modes of supply") than the GATT, it also provides more flexibility in the assumption of access obligations. Sceptical observers have noted that the agreement's broad scope and coverage – in terms of modes and permissible trade barriers – may have come at the expense of another relevant dimension: binding obligations.[3] The GATS' particular flexibility, combined with wide differences in economic conditions between sectors and WTO Members, implies that services liberalization will not proceed at an equal pace, let alone contribute to harmonizing disparities in sector protection. While the new round may result in a significant number of new or improved commitments, these may not in very many cases go beyond the reforms that had already been agreed upon and, possibly, implemented at a domestic level. As in the Uruguay Round, the sector focus is likely to be on typical infrastructural services, such as telecommunications, transport or financial services, as compared to socially sensitive sectors. Moreover, given existing asymmetries in policy access, it will mainly be the services producers, rather than the users, who will assist governments in defining: (a) the sectors deemed 'socially sensitive' and (b) the types of instruments to be used for equity and other public policy purposes. These instruments are likely to include import quotas, discretionary licensing procedures, and discriminatory standards or subsidies, which – unlike in merchandise trade under the GATT – are not prohibited *per se* in services.

The following sections are structured in the form of questions intended to explore the democratic status of the WTO/GATS framework mainly from two angles: its domestic legitimacy as a system of rules binding participating countries, and its effects on the actual use of trade policy instruments. Starting point is a brief discussion of the basic rationale for having international trade rules at all.

are at least as stringent as those under the GATT – but to the economic effects of the measures that are covered by the two agreements. While the GATT in principle allows Members to use only tariffs for trade protective purposes, the GATS provides far wider scope for interventions (including supply quotas or denials of national treatment in the use of standards) whose effects are extremely difficult to quantify and to compare across sectors and countries.

3 SNAPE (1998) p. 289 ff. The definition of services trade in Article I:2 of the GATS covers four modes of supply: (i) cross-border trade; (ii) consumption abroad; (iii) commercial presence; and (iv) presence of natural persons. For a more detailed discussion of the structure of the agreement, see WTO SECRETARIAT (2001) p. 97 ff.

2 Inter-governmental Co-operation: Basic Rationale

Why do sovereign governments sign international contractual arrangements or otherwise co-operate in common organizations or policy frameworks?

There are at least two types of situations, not necessarily mutually exclusive, in which cross-border cooperation might be deemed necessary or desirable. Co-operation can contribute to ensuring the supply of *international public goods,* e.g. through allocating scarce resources (from air space to radio frequencies) or creating common standards and control mechanisms (from electricity and transport to environment and health), or be intended to add credibility to, or otherwise facilitate, the pursuit of *national policy objectives.* Typical examples in the latter context are joint commitments that may help to stabilize expectations and/or economize on the use of public funds (subsidies, export credits, etc.) in areas that essentially remain under national policy control.

The need for, or desirability of, both types of co-operation seem to have grown over time. Economic growth and technical progress, among other factors, have contributed to a dramatic increase in cross-border contacts, exchanges, and various types of spillovers. In turn, this has widened governments' potential for creating common goods and their (political and/or moral) obligation to address common problems. At the same time, the intensification of trade and financial flows has increased the synergies to be expected from economic policy co-ordination.

Legal obligations under the various WTO agreements seem to fall predominantly in the second category referred to above: governments co-ordinate policies in closely specified areas and, on a voluntary basis, undertake international obligations in the pursuit of essentially domestic objectives. Tariff bindings under the GATT or access commitments for services under the GATS define a maximum permissible range of trade policy options that the governments concerned may use. In turn, this reduces uncertainty for private commercial decisions (on investment, production, trade, etc.), facilitates longer-term economic planning (with potentially positive growth effects) and, in particular, limits the scope for domestic distributional conflict (e.g. between producers and users of individual goods and services, and among different sectors that compete for resources).[4]

4 ROESSLER (1985) p. 297.

If the WTO's role was confined to promoting domestic policy objectives, such as stabilizing expectations and instilling confidence, it might not add much, however, to what can be achieved by appropriate safeguards in national constitutions.[5] International common trade rules and disciplines, subject to impartial monitoring and enforcement, yet serve an additional purpose. The existence of guaranteed access conditions abroad and the protection from erratic and/or aggressive policy interventions by other governments, which are under pressure from own interest groups, reduces the risk for any individual Member to open markets and take advantage of international economic integration and specialization. There is thus a common interest in creating a stable environment for investment and trade; no government, regardless of its economic or political clout, could achieve such effects on its own. This is particularly evident for small economies with a limited domestic resource base, little political leverage, and no power to influence world market conditions. Nevertheless, larger countries may have a similar internal rationale for assuming external policy bindings (see *Section 7*).

3 Implications for the Domestic Policy Process

Is it conceivable that inter-governmental agreements – whether the GATT or the GATS, the Non-Proliferation Treaty, or the Montreal Protocol – could undermine democracy? In what circumstances?

Organizations or institutions may be considered to be 'democratic' or not, depending on whether their policies and/or selection of officers reflect the prevailing opinion of the people. However, these criteria are hardly applicable to inter-governmental agreements, which have no impact *per se* on the internal organization of decision-making processes in participating countries and on the degree to which public opinion is expressed via elections.[6] The fact that, for example, Australia, Cuba, India, South Africa,

5 There are cases where constitutions deliberately limit the scope for short-term economic policies that may run counter to longer-term public interest. For example, the German Constitution *(Grundgesetz)* requires annual net government borrowing not to exceed total investment spending in normal economic circumstances (Article 115:1), and a number of constitutions have conferred responsibilities for monetary or competition policies to institutions operating at arm's length from government or parliament.

6 For a stimulating discussion in this context see DAHL (1999). DAHL seems to make no distinction, however, between international organizations like the European Union, with direct institutional and enforcement powers *vis-à-vis* participating countries and even citizens, and inter-governmental agreements such as NAFTA.

Sweden, and the United States have been GATT/WTO Members for decades has not affected their domestic institutional structure.

If an issue needs to be raised in this context, it is the question whether individual Members' participation in international agreements is democratically legitimized and/or whether there has been undue external encroachment on internal decision-making processes. For example, have democratically elected governments been induced to participate in the GATS and to adopt or maintain policies against their (or their people's) intentions? Has participation involuntarily reduced the scope for national decision-making on trade policy issues?

The acceptance of compromise or second-best solutions at international level can hardly be deemed incompatible *per se* with a government's mandate to represent and act on behalf of its country. The need to choose between perceived economic benefits or evils, e.g. between the 'cost' associated with WTO membership and the 'cost' of abstention, and to confront internal and external pressures, is symptomatic for virtual all policy decisions. It would be strange, for example, if inter-governmental accords were considered illegitimate simply because one or more of the parties involved had no other promising option than to participate. Governments remain free not to join or to quit the WTO if they feel that the conditions of membership have become too onerous. In an accession case, the maximum pressure a current Member could use to extract concessions from an applicant country is the threat, pursuant to Article XIII:3 of the Marrakesh Agreement, of continued non-application of the main WTO Agreements. This may prove difficult to accept in individual cases. However, the situation is not essentially different from a non-WTO and non-GATS scenario; and it is of no concern to full-fledged Members.[7]

Could the binding nature of WTO obligations, beyond the life of any of the signatory governments, create legitimacy problems? Again, it is difficult to see why. Any meaningful contract, whether between private persons or countries, is binding on the parties involved; otherwise it would be no more than a declaration of intent. And many international agreements, whether on trade, security or political and economic integration, have been

7 Tellingly, on the occasion of his country's accession to the WTO in September 2003, Cambodia's Commerce Minister said that he believed that the concessions and commitments that his country had to accept went far beyond what was commensurate with its level of development. At the same, however, he stated: "if [Cambodia] were not confident that the WTO was taking care of the interests of the developing world, we would not join yet. We would wait." (REUTERS, September 11, 2003).

concluded for an indefinite period of time. Why should the WTO agreements be viewed from a different angle? What might reasonably be expected, however, is that governments and parliaments assuming long-term obligations carefully ponder the implications for future generations as well. This might also justify higher than normal levels of parliamentary approval.[8]

As argued before, international co-ordination and co-operation is objectively required in certain areas. If governments are not responsive, existing opportunities for international market integration – and welfare creation – might remain unutilized and/or alternative mechanisms might compensate for political inactivity. In the absence of internationally guaranteed access conditions, trade and investment flows might shrink as a result of higher risks; and in the absence of international standardization, the standards used in the largest markets or by the largest participants might increasingly be employed as substitutes. Such developments might be compatible with the concept of democratic legitimacy – governments' failure or refusal to act is not 'undemocratic' *per se* – although they might disproportionably affect smaller countries' scope for sovereign decision-making (see *Section 6*).

Finally, it needs to be borne in mind that WTO Members are able to modify their substantive trade obligations over time (see *Section 4*). The GATT and the GATS protect an overall level of access obligations, but not necessarily the sector profile. Article XXVIII of the GATT and Article XXI of the GATS, respectively, allow for the modification of bound tariffs and services commitments. In order to maintain an existing balance of obligations, such modifications are conditional on affected trading partners being accorded compensatory access benefits in areas of interest to them. While about 300 tariff renegotiations have been conducted in the goods area since the GATT's entry into force in 1947/48, no comparable case has been completed in the first nine years of GATS.[9]

Are Member governments properly mandated to act on behalf of their people?

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8 There may be unintended side-effects, however, in so far as the introduction of tougher majority requirements contributes to cementing existing regimes that had been decided upon and implemented under more streamlined conditions.

9 For possible explanations see ADLUNG (2003) p. 152.

Any international agreement necessarily implies, in pursuit of a common benefit, certain constraints on national policy-making in the areas covered. It may be argued that such constraints are acceptable only if: (a) the relevant areas are clearly specified; (b) participation is voluntary and reversible (see *Section 6* below); and (c) the governments and legislators concerned are duly legitimized to bind their countries. Can this reasonably be assumed?

There may be no standard answer across all countries and (political) cultures. A Swiss national might consider the possibility of public referenda on individual policy issues as the ultimate expression of popular policy participation.[10] Against this benchmark, very few countries might be deemed to ensure a satisfactory level of democratic freedom which, in turn, might cast a shadow on many obligations assumed by governments around the world, whether in the WTO or other fora. In the same vein, if politicians were ready, for private gain or other reasons, to succumb to undue pressure or to respond to dubious incentives, all forms of government activity at all international levels, whether bilateral, plurilateral or multilateral, might be affected. As long as international co-operation is deemed necessary (see *Section 1* above), the logical consequence would be to provide for more open decision-making mechanisms and for proper safeguards against abuse of power in the countries concerned. If a country's authorities are not deemed properly legitimized, this may be a cause for reviewing the institutional/constitutional conditions in that country. It would be absurd to blame GATT, GATS or other WTO agreements for lacking legitimacy because some signatories have dubious democratic credentials. The situation might be different, however, if majority decisions could be imposed on dissenting participants (see *Sections 4* and *5*).

4 Policy Constraints under WTO Rules

Is it conceivable that – democratically elected – governments are outvoted in WTO/GATS fora and have to assume obligations against their intentions?

WTO decision-making is based on the principle of consensus. There has been no vote over new rules, or the modification of existing rules, in the

10 In 1994, WTO sceptics were not able to muster, within a three-month period, the necessary 50,000 signatures to call a referendum on Switzerland's participation in the WTO.

history of the system since 1947/48; and the Marrakesh Agreement expressly requires that the practice of consensus be continued (Article IX:1). Even if it came to a vote over amendments of the core GATS obligations, laid down in parts I, II and III of the Agreement, the result would not be binding on a government that has not accepted them (Article X:5). In turn, this puts particular pressure on trade negotiators, culminating at Ministerial Meetings, to explore compromise solutions that accommodate policy objectives and constraints of a wide range of governments around the world.

As far as the assumption of substantive trade obligations is concerned, the GATS offers more flexibility than possibly any other WTO agreement. The only horizontally applicable disciplines that apply across all services sectors are the most-favoured-nation (MFN) principle and some due-process or good-governance requirements.[11] There is no general requirement to grant market access or national treatment. The latter obligations are assumed only in sectors that: (a) are listed in a Member's schedule of specific commitments; and (b) to the extent that particular types of transactions ("modes of supply") or sub-segments of a sector have not been made subject to limitations or exclusions. Regardless of the level of support in the WTO membership as a whole, it would not be possible to subject an objecting Member to any horizontal liberalization requirement.[12]

In contrast, the GATS rules governing domestic regulation apply as they are defined in the Agreement, Article VI, and cannot be waived or modified via scheduled limitations. However, the resulting policy constraints are rather weak. The structural distinction between, on the one hand, access obligations that are laid down in national schedules of commitments and, on the other hand, generally applicable rules on domestic regulation helps to ensure that the two areas are mutually independent. Substance and content of services regulations and, thus, governments' ability to pursue basic quality and equity objectives are not affected by the levels of liberalization bound in schedules.

11 So-called governmental services are completely exempt from cover; see, for example, WTO SECRETARIAT (2001).

12 The Guidelines and Procedures for the Services Negotiations (WTO Doc. No. S/L/93), approved by the Council for Trade in Services in March 2001, expressly provide that "the negotiations shall take place within and shall respect the existing structure and principles of GATS, including the right to specify sectors in which commitments will be undertaken [...]".

Despite a fair degree of public excitement, the GATS provisions governing domestic regulation have not given rise to tension or friction in WTO fora to date. Of the 100-odd dispute settlement panels established during the first nine years since the WTO's creation in January 1995, very few examined GATS-related issues; none of these involved Article VI. If there have been problems in practice, these may be attributed to premature liberalization prior to the establishment of proper regulatory standards and/or enforcement mechanisms at national level. There is a broad range of potential pitfalls: lack of adequate consumer protection, non-compliance with overriding social policy objectives, large-scale financial instability, risk of market dominance, etc. While nothing would prevent governments from devising effective solutions, not all administrations are equally well equipped, however. The ability to regulate and to enforce regulation is related to the level of development, given the attendant need for financial and human resources.[13]

Negotiations on (additional) rules for domestic regulations, mandated under Article VI:4, are ongoing. The intention is to create disciplines that, *inter alia,* would prevent regulatory requirements from being "more burdensome than necessary to ensure the quality of the service"[14]. Disciplines adopted in late 1998 for the accountancy sector provide a possible precedent; they contain some procedural guarantees to be met in the standardization and licensing process by countries that have undertaken commitments on these services.[15] Other elements of the 'disciplines' that may have a more direct economic impact – for example, the provisions governing the recognition of foreign educational degrees and professional qualifications – have, however, remained without bite (relevant rules merely require Members to ensure that their competent authorities "*take account of* qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements" (emphasis added)). Was it lobbying pressure from domestic professional associations that caused negotiators to be so cautious?

13 The GATS accommodates the ensuing constraints in so far as it accords developing countries more flexibility in liberalizing individual sectors and transactions and, if they do so, in attaching conditions that may help to increase their participation in world services trade (Articles IV:1 and XIX:2). These provisions do not relate, however, to the commitments sought from countries in the accession process.

14 GATS Article VI:4 lit. b. The so-called 'necessity test' has proved particularly disconcerting to some observers in view of its perceived effects on national regulatory sovereignty. However, there is little evidence in the history of GATT that would seem to justify such concerns. If there were no constraints on governments' discretionary use of *regulatory measures,* access obligations under the Agreement could be deprived of substance. Panel decisions have made it abundantly clear that governments remain free, nevertheless, to pursue the *regulatory objectives* they deem relevant. For an overview see WTO Doc. No. CTE/W/203, 8 March 2002.

15 WTO Doc. No. S/L/64, 17 December 1998.

5 Conflict Resolution in the WTO

The WTO is equipped with a more stringent dispute settlement mechanism than possibly any comparable international agreement. The rulings are automatically binding on the Member(s) concerned. A threat to democracy?

WTO provisions typically result from lengthy negotiations, involving many countries with very different legal and political traditions. Like other international rules, they may thus offer more scope for interpretation than comparable pieces of national legislation. This seems particularly true for the GATS, given not only the novelty but the broad coverage of many disciplines which extend beyond traditional concepts of trade. Nevertheless, the risk of undue external policy interference, if any, could be contained as long as three conditions are met: (a) equal opportunity to contribute to the legal drafting process; (b) protection of dissenting interests, i.e. no compulsory adoption of new laws (see *Section 4*); and (c) possibility of impartial adjudication of conflicts that may later arise over interpretation and implementation.

If a government is properly legitimized to participate in international lawmaking, the interpretation of the ensuing legal provisions by independent and competent judges appears legitimized as well. Impartial dispute settlement may even be viewed as a pre-condition for the proper functioning of the Agreement, in particular from the perspective of less economically and politically powerful Members. Nevertheless, the conferment of relatively broad powers of interpretation to international judicial bodies that have not been directly mandated by competent domestic institutions raises questions as well. In view of the uncertainties surrounding individual WTO provisions (e.g. national treatment, MFN, necessity), JOEL TRACHTMAN considers the judges involved to be agents of the legislature and the "default option" for dealing with particular circumstances.[16] In view of their status, Panels and the Appellate Body have apparently sought to exercise restraint and limit the legal coverage of rulings to what is absolutely necessary to solve a case.[17]

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16 See TRACHTMAN (2003) p. 194.

17 See ESSERMAN and HOWSE (2003) who, while emphasizing that the judges should adopt the interpretation most deferential to state sovereignty, recognize that "[g]enerally speaking, the Appellate Body has followed this cautious approach" (p. 135). See also BACCHUS (2003) pp. 429–441.

What is typical for national courts – mandatory submission and binding rulings – is rare at international level. The WTO dispute settlement system as it emerged from the Uruguay Round constituted a major innovation. It ensures that conflicts are now settled "largely on the basis of the rule of law rather than simple power politics"[18]. Litigation has gained ground *vis-à-vis* diplomacy. Affected interest groups may thus find it more difficult, even impossible, to prompt governments to use procedural tricks and/or political arm twisting in order to avoid potentially unpleasant outcomes. From that perspective, the strengthening of the dispute settlement mechanism has contributed to containing the influence of vested interests that have easier policy access (see also *Section 7*).

It is important to bear in mind, however, that WTO obligations or recommendations, including those resulting from dispute settlement, are not directly enforceable at a national level.[19] The maximum 'sanction' that could be imposed on a Member that was found in contravention of relevant provisions and has failed either to correct the disputed measure(s) or to agree on compensation with affected trading partners, would be for the latter to be authorized to suspend the application of concessions or other obligations under the covered agreements.[20] There is no possibility for a WTO body to override national policy decisions and to intervene directly. Compliance ultimately depends on the political difficulties for a government to let a non-involved industry 'pay' for a contravention of WTO obligations and on a longer-term interest in protecting the integrity of the system.

6 Imbalances between WTO Members

Are Member governments sufficiently well equipped – with human resources, expertise and intelligence – to specify national policy objectives, translate them into external negotiating positions, and pursue them effectively?

Many developing countries have only small missions in Geneva, with one or two delegates covering all areas of the WTO and, in some cases, other

18 ESSERMAN and HOWSE (2003) p. 132. By the same token, however, concerns have been expressed about the confidential nature of Panel and Appellate Body hearings, although all relevant documents are made public.

19 Nevertheless, there are cases where national constitutions provide for the direct applicability of international legal obligations assumed by the competent authorities.

20 See Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22:2.

organizations as well. They are therefore required to set priorities in selecting negotiating issues, attending meetings, and consulting relevant documents. A number of least-developed countries are not even represented in Geneva. Moreover, there are concerns that, despite the recent establishment of an Advisory Centre on WTO Law, developing countries' recourse to dispute settlement continues to suffer from an imbalance in power and resources.[21]

These deficiencies may need to be put into perspective, however. First, considerable efforts have been made in recent years, as required under the Doha Ministerial Declaration, to upgrade developing countries' ability "to adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership [...]"[22]. Second, possibly more importantly, the composition of WTO membership has changed dramatically since the early days of the GATT. About four-fifths of Members are now developing countries. The WTO thus offers more potential for resource pooling, information sharing, policy coordination and coalition-building than would exist in any other framework, bilateral or plurilateral, within which international trade would otherwise be conducted.[23] As strange as it may sound, the failure of two recent WTO Ministerial Meetings, in Seattle and Cancún, may also be indicative of developing countries' increased interest in effective participation in the WTO, combined, however, with frustration about a complex negotiating agenda and perceived lack of leverage.

It would be naïve to assume that in the absence of GATS, international trade relations would dissipate. There will always be e-commerce across borders; consumers of services (tourists, students, patients) will continue to move between countries; foreign-established companies will keep operating in host markets; and foreign services professionals (doctors, nurses, lecturers) will still be needed and welcomed in many sectors.[24] However, the flows involved might be lower and more volatile. Small and poor

21 See ESSERMAN and HOWSE (2003) p. 138. Nevertheless, developing countries brought 40 per cent of the 300 complaints filed between 1995 and September 2003, dwarfing their share in world trade, and the trend is rising; see WTO website.

22 WTO Doc. No. WT/MIN(01)/DEC/1, 20 November 2001, para. 38. Since 2001, WTO Secretariat spending on technical assistance has thus risen by about 50 per cent to reach some US$ 16 million in 2003. For more details see WTO SECRETARIAT (2003) p. 159 ff.

23 As already indicated, the scenario is different in accession negotiations. The applicant government is expected to negotiate its future trade regime with interested Members, mostly in a bilateral setting, in order for them to approve membership. In turn, this might have contributed to acceding countries undertaking wider and deeper commitments than existing Members at similar levels of development; see WTO SECRETARIAT (2001) pp. 114–116.

24 These examples correspond to the modal definition of services trade under the GATS (Article I:2).

economies could find themselves operating within a patchwork of rules determined by larger and more economically advanced countries or, more precisely, by their prevailing economic and political interests. While it would be premature to infer gains or losses in democratic participation, as long as the political regimes of the countries are not taken into account, there are at least losses in national sovereignty for the smaller participants, combined with increased political and economic dominance of the more powerful.

The continued increase in membership, from less than 40 countries in the 1950s to close to 150 at present is testimony to the (relative) attractiveness of the WTO framework, which is apparently considered either as a preferable alternative or, at least, a necessary complement to other arrangements. If 25 or 30 applicant countries were added, the WTO's country composition would almost be identical to that of the United Nations (UN). By the same token, however, given the consensus principle, such gains in 'universality' might coincide with growing diversity in actual trading conditions should the slow(er) pace of WTO decision-making prompt sub-groups of Members to move ahead in areas that, actually or potentially, fall within the remit of the WTO. In turn, the ability of individual governments to initiate and shape such initiatives outside the multilateral system may (again) be related to size and power.

7 Imbalances in the Domestic Political Process

Do democratically legitimized governments pursue the 'national economic interest'? Does membership in the WTO matter?

If there is a link between internal policy participation and openness to international trade, it seems to be positive rather than negative. Available evidence suggests that democracy and democratization go hand-in-hand with, or even contribute to, trade liberalization. Authoritarian governments are not generally supportive of trade reform (however, the relevant literature deals with merchandise trade only).[25] Possibly not coincidentally, there is virtually no parliamentary democracy in the world that is not Member of the WTO or is currently seeking accession. While it cannot be inferred, of course, that all non-WTO Members are less democratic than Members, open societies may find it easier to accommodate the adjust-

25 For references see WTO SECRETARIAT (2003) p. 97.

ment pressures generated by international structural change and, thus, prove a more natural equivalent to open economies.

Democratic processes *per se* do not, however, ensure balanced decisions in the sense that all conceivable policy interests have the same chances of being heeded. Vocal producer associations tend to prevail over more heterogeneous consumer groups; old and shrinking industries are in general more effectively organized than emerging sectors; large-scale industries (mining, ship-building, steel) are more influential than small-enterprise sectors; interest groups in marginal constituencies ('swing states') carry more weight than those in other regions; and so forth. As a general feature, it can be assumed that, other things being equal, the propensity for individuals and firms to form groups, pursue common interests and share in the costs involved is inversely related to the number of potential beneficiaries.[26] Prevailing patterns of trade protection testify to such imbalances in the political process and, in many cases, to a tendency for protective commercial interests to outweigh broader social policy objectives.[27]

The intensity of political lobbying may vary over time. Before major elections, governments typically receive more requests for industrial assistance than normal, and they tend to be more responsive. Is such responsiveness tantamount to being more 'democratic' or, rather, to buying political advantage at consumers' and taxpayers' expense? Compounding the damage, proponents of vested interests typically prioritize opaque and distortive support mechanisms – regulated prices, private exclusivity rights, state guarantees – over more transparent and economically efficient alternatives, such as tariffs, subsidies, and, not least, direct consumer assistance. While perfectly understandable from the proponents' perspective, such bias not only adds to the social cost of intervention but contravenes basic democratic concepts of transparency and accountability.

Nevertheless, governments' ability to respond to lobbying pressure is not unlimited, but may be constrained by WTO rules and access commit-

26 For a seminal discussion see, for example, OLSON (1982).

27 For instance, it is not rare for governments at the same time to subsidize tobacco growing and no-smoking campaigns; the exploration of domestic coal deposits and investment in 'clean' energies; or industrial development abroad and, even more strongly, competing domestic producers. In a similar vein, policies in pursuit of social equity objectives may run alongside trade measures that hit in particular the poor. As a case in point, a study for the United States estimates that working welfare leavers who earn some US$ 15,000 a year lose about 1.9 per cent of their incomes, i.e. one week's salary per year, to import tariffs on relatively highly protected products such as shoes and clothes. This compares with a loss of about 0.6 per cent for families with an annual income of about US$ 110,000 (see GRESSER 2002).

ments that have been accepted in previous trade negotiations. For example, tariffs bound in national schedules could be exceeded only after renegotiation with, and compensation of, affected Members; GATT disciplines governing the use of safeguard and anti-dumping measures may reduce the risk of arbitrary application; and a general ban under the GATT on quantitative restrictions and (non-agricultural) export subsidies precludes governments' recourse to such particularly distortive measures in international trade.

Eight rounds of trade negotiations have also brought about tangible changes in the protection of manufacturing industries (agriculture is a notable exception). Not only have tariff averages been significantly reduced over time, the tariff dispersion between highly protected and more open industries has come down in parallel.[28] The gradual harmonization in protection across sectors is attributable in part to the diversity of negotiating interests in a broad-based trading system where even the relatively few powerful players are induced, to a certain degree, to accommodate the interests of many economically weak participants. Since the industries that call for trade protection in country A necessarily are the export earners of other countries, trade-offs emerge. They contribute *within* country A to counterbalancing the clout of the protection-seeking branches with the commercial interests of other sectors that push for better access conditions abroad and, coincidentally, with the income interests of consumers and/or taxpayers.

The GATT system has thus helped to reduce asymmetries in the political process (and ensuing distortions of economic incentives) that exist even in open societies. Possibly no other system could have played a similar role; alternative arrangements are likely to be shaped and dominated by the large economic powers in their respective zones of economic and political influence. Smaller participants would carry less weight in the rule-making process and, in the event of trade frictions, might find it politically more difficult to invoke the dispute settlement procedures that are (hopefully) available. Moreover, the influence of the smaller participants within regional arrangements is likely to fluctuate over time, depending on political developments, including the election cycle, in the dominant member.

An increase in negotiating strength may prove a double-edged sword even for the 'hegemon', however. Since the external costs of obstructing

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28 See, for example, FRANCOIS and MARTIN (2003) pp. 1 ff.

trade, including the risk of foreign retaliation, are lower in a bilateral or regional setting, it is politically more convenient for the government to respond to internal demands for industrial support. This does not mean, however, that the economic effects would be any different: the domestic resource flow from stagnant, protection-seeking industries to more competitive sectors is retarded, and available human and physical capital is used less efficiently than in the absence of protective government intervention. Gains in external political leverage must thus not be equated to gains in economic welfare. Nor may they promote internally "a social state in which all have equal rights, without hereditary or arbitrary differences of rank or privilege"[29] and where economic success does not depend mainly on policy access. External policy bindings can thus help to ensure more open and balanced (or 'democratic') internal conditions.

8 From GATT to GATS: From Collective (Formula-Based) to Co-ordinated (Autonomous) Liberalization

To what extent is past experience with liberalization of merchandise trade under the GATT relevant for services?

Liberalization under GATT has benefited greatly from an archaic give-and-take ritual, the exchange of tariff 'concessions'. The term reflects the *political* difficulties for governments to overcome the resistance of vested interests in order to create a less distorted, i.e. economically preferable, environment for growth and development. The use of tariffs as the only instruments of protection, plus the availability of detailed trade data, facilitated such negotiations in subsequent GATT rounds. In addition, the horizontal application of reduction formulae on several occasions contributed to a sense of balance and fairness, and helped to shield governments from immediate lobbying pressure. The negotiations were not about individual tariff changes, but a general mechanism that applied across the board. Through appropriate calibration, it was also possible to subject high tariffs to relatively stronger cuts, thus gradually narrowing disparities between sectors.

Critics may consider this to be a genuinely 'undemocratic' process: governments signed up to policy packages, couched in terms of an abstract formula, which might not have been approved if individual measures had

29 Oxford English Dictionary (OED), see *Footnote 1* above.

been submitted case-by-case (or sector-by-sector) to parliament. However, it is difficult to see why package deals – a typical feature of representative democracies – should be less democratically justified than a sequence of individual decisions. Moreover, the gradual harmonization of economic conditions between sectors, including in the area of trade, might in itself be viewed as a move towards the democratic ideal of equal opportunity. Why should investors and workers in sector X (construction, health, passenger transport) be better protected from foreign competition than those in sector Y (textiles, garments, leather)? Why should the heirs of farmers, apart from taking over their parents' property, also benefit from a virtually life-long guarantee of protected markets for their produce?[30] Popular policy objectives, such as social equity and distributional justice, do not necessarily provide a satisfactory answer since these could be more efficiently pursued through more targeted support, e.g. direct assistance to low-income families.

For better or worse, however, GATT-type liberalization formulae are hardly relevant for, or applicable to, services trade under the GATS. There are serious economic, institutional, and political impediments.

First, reflecting the specificity of services trade, including the need for direct physical contact between supplier and consumer in many cases, the GATS covers a far wider range of transactions and measures than the GATT. It extends to consumers travelling abroad as well as to inflows of investment and labour; it applies to measures affecting products (services) and suppliers (producers and distributors); and it allows for the application of a far broader set of trade restrictions than tariffs only (e.g. quotas on the number of suppliers or on the value of transactions, ceilings on foreign equity participation or limitations on the legal form of incorporation, and specified departures from national treatment in the use of subsidies, internal standards and other 'domestic' policy instruments). It is thus virtually impossible to estimate tariff equivalents that would capture levels of protection across all types of transactions ("modes of supply") and permissible trade restrictions, and that could be made subject to negotiated formulaic reductions.

30 Like some other European countries, Germany has subjected the sale of farm land to non-farmers to authorization. While intended to prevent the "deterioration of agricultural structures", the measure also excludes 'ordinary people' from participation in the highly subsidized social insurance schemes for farmers. Since the relevant legislation has been drafted by the government and approved by parliament, there can be no doubt about its democratic legitimacy. However, the *implications* may not necessarily be in tune with the Oxford English Dictionary's definitions of 'democracy' (see *Footnote 1* above).

Second, to help accommodate developmental and other policy constraints in "sensitive" areas, the GATS does not prescribe any particular pattern of sector commitments (see *Section 4*). For example, out of a total of close to 160 service sub-sectors, developed countries have scheduled about 100 on average while developing and least developed countries have scheduled less than 40 and less than 20 sub-sectors, respectively.[31] The complete exclusion of health, education, and certain transport services from the great majority of schedules reflects the institutional peculiarities of many countries, including the existence of public supply monopolies. Governments are reticent in such areas to engage in trade negotiations.

Third, design and implementation of services reforms need in many cases more time than simple tariff reductions in merchandise trade. The institutional and regulatory changes required by the opening of previously closed markets are difficult to achieve within the four- or five-year timeframe of a negotiating round, let alone in the few weeks or even days within which final packages are being prepared.[32] Government-internal co-ordination is complicated by the fact that policy responsibilities in services tend to be spread over far more agencies, sometimes even beyond federal government competence, than is normally the case in merchandise trade. The scope of new commitments may thus remain confined to reform programmes already in preparation, possibly with some modifications or accelerations.

Fourth, even in fully liberalized sectors, Members remain largely free to operate the technical standards, licensing and qualification systems they deem necessary (see *Section 4*). The application of a general liberalization formula, even if possible, would thus not necessarily lead to improvements in effective market access. Institutional and regulatory peculiarities need to be taken into account. This implies, in turn, that trade negotiations are more resource-intensive in services than in merchandise sectors. Governments interested in achieving better export opportunities are thus likely to focus on relatively large and commercially lucrative markets.

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31 See ADLUNG (2003) p. 151. The essentially voluntary nature of commitments is also reflected in wide variations in scheduling practices even among otherwise comparable countries. For example, a handful of Sub-Saharan countries have not included more than one services sub-sector in their schedules, while two others have listed over 100. As already noted, however, recently acceding countries do not necessarily fit into this picture.

32 This applies in particular to domestic legal changes that may need to accompany investment liberalization under mode 3 of the GATS ('commercial presence').

Fifth, while the GATS simply lists possible negotiating approaches (bilateral, plurilateral and multilateral), which might be used to increase the "general level of specific commitments" (Article XIX:4), priority has since shifted to bilateral negotiations. The Negotiating Guidelines for the current round explicitly call for request-offer procedures to be the main approach.[33] A significant number of Members is apparently suspicious of horizontal negotiating formulae which, in their view, might undermine the GATS' bottom-up mechanism of assuming commitments through deliberate inclusion of sectors in national schedules of commitments.

The flexibility of the GATS and the absence of a broad-based negotiating approach in services makes it easier for governments to accommodate domestic policy pressures and constraints. It may also explain, at least in part, why services have not proved a controversial issue, despite much public excitement, in any of the Ministerial Meetings since Marrakesh in 1994. Tellingly, even the draft declarations submitted to Ministers in Seattle and, recently, in Cancún had been agreed before by negotiators in Geneva without any substantive issues left open for Ministerial decision. However, the absence of tensions in WTO fora does not necessarily portend meaningful outcomes.

What are the implications for future services regimes – and the pursuit of 'democratic values'?

While trade negotiations have traditionally been driven by mercantilist instincts, i.e. governments exchanging access 'concessions' against better export conditions, services liberalization requires "a large dose of unilateralism"[34]. In other words, the negotiating momentum must be generated predominantly within the countries concerned. However, since economic interests and conditions vary widely across sectors, the results – in terms of new or improved commitments under the GATS – are likely to vary as well.

Typical candidates for new or improved commitments are infrastructure-related services that provide universally used inputs for down-stream user industries. In such cases it is not only the final consumers but – possibly even more so – goods and other services producers who call for access to competitively priced financial, telecommunications, and freight transport

33 See WTO Doc. No. S/L/93, 29 March 2001.
34 Hoekman and Messerlin (2000) p. 494.

services. Increased competition in goods markets, associated with tariff reductions under the GATT, may reduce the manufacturing sector's scope for absorbing artificially increased input prices and further amplify such calls.

There is less pressure for change in typical consumer services such as health or education. Not only is it difficult for consumers in general to organize and articulate their interests, but such interests may remain elusive in sectors where – for overriding policy reasons – prices are disconnected from the quantity and quality of supplies. While a tourist travelling overseas may at least get a glimpse of the price and quality implication of different farm trade regimes, such comparisons are not normally possible in many social services. These are neither part of an everyday consumption basket, nor are they offered with a price tag attached.

Future services negotiations are thus likely to leave a weaker and more uneven imprint on national regimes than past experience with the GATT suggests. While infrastructural services, in particular telecommunications and transport, will continue to be subject to essentially autonomous liberalization moves in many countries, with the new frameworks then bound under the GATS, many consumer services are more likely to defy change, regardless of the costs or benefits involved. The sector focus of the negotiating proposals submitted at earlier stages of the round, mainly in 2000/01, confirms such expectations. No other large service sectors have attracted less attention than health and education.[35]

Apart from the most-favoured-nation (MFN) principle, there are virtually no general constraints on the use of trade measures under the GATS.[36] The range of permissible restrictions is almost unlimited. As noted before, the GATS does not contain horizontal disciplines that would favour the use of price-based instruments, such as tariffs, which can be administered without much discretion. The Agreement's domestic policy implications may thus prove to be not only more modest, in terms of liberalization effects, but also less supportive of traditional 'democratic values', including transparency and non-discrimination, than those of the GATT. Since it condones the use of protective and discriminatory policies whose effects are virtually impossible to measure and to compare across sectors and countries, there are more niches for vested interests under the GATS to

35 See ADLUNG (2002).
36 'Governmental services' are fully exempt even from the MFN requirement.

elude scrutiny and to thrive. However, given the peculiarities of services trade and the diversity of the WTO membership, this price may have to be paid.

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