

## THE GATS IMPACT ON PRIVATE INVESTORS: IS IT 'MUCH ADO ABOUT NOTHING'?

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### Abstract

Financial innovations can arise in any facet of commerce from individual firms, regulatory institutions, governments or international organizations. Innovations at all levels can impact private sector investment management. The General Agreement on Trade in Services (GATS) administered by the World Trade Organization represents a major innovation for financial services. The GATS has been in force since 1995 and its impact can now be discerned. While the direct opening of financial services sectors has been modest, as yet, the indirect effects have been significant. In particular, foreign firms offering financial services now operate in a much more secure international environment due to GATS commitments that protect foreign investment. The transparency of foreign rules pertaining to the provision of investment services has improved considerably and disputes can be settled in a multilateral forum that is accessible and binding. Having a formal multilateral structure in place provides an ongoing forum for liberalization.

**Key words:** GATS, Institutions, International Investment, Services Liberalization, WTO.  
**JEL Classifications:** F 21, F33, F53, G38.

### I. Introduction

*The General Agreement on Trade in Services (GATS) ranks among the chief accomplishments of multilateral trade diplomacy at the end of the 20<sup>th</sup> century.*

OECD, 2002, p. 13

Financial innovations can take place in any institution in the commercial sector and at any level. While the majority of these innovations take place in the private sector within firms that engage in financial transactions, manage investments or provide clients with advice, innovative activity is also found in regulatory institutions, in governments and within international organizations. Changes in any of these institutions can impact investment management strategies and procedures and, hence, it is important that financial innovations be monitored by those in the industry and their potential impact understood and the opportunities they may provide assessed. Multilateral agreements and organizations provide the broad financial architecture within which international commerce is conducted. The General Agreement on Trade in Services (GATS), which encompasses a range of financial services, was touted as a major institutional innovation when it was agreed during the Uruguay Round (1986-1994) of General Agreement on Tariff and Trade (GATT) negotiations. The GATS, and its clauses pertaining to financial services, have been operating for more than a decade so its efficacy and impact can now be assessed.

During the Uruguay Round, GATT members negotiated numerous agreements which saw the breadth of issues covered by the organization expand significantly and resulted in the creation of the World Trade Organization (WTO). One substantial agreement administered by the new WTO is the GATS. It represents the first (and only) multilateral agreement to govern the international trade of services. This agreement, along with the others that are administered by the WTO, came into force on January 1, 1995. Creating an agreement on services was viewed as important

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because the share of services in both domestic GDP and international commerce was growing dramatically. Its creation was hailed by some as the most important advance in the multilateral trading system since the founding of the GATT following the Second World War. This is not to say, however, that it was without controversy. Opponents of the creation of GATS feared that it would take away governments' ability to regulate services and provide services that are public goods or viewed as "essential" in a manner that each government felt was socially optimal. These concerns weighed heavily on policy makers and the negotiators and had a major impact on the structure of the final agreement. In addition, after the final agreement was signed, there were many expressions of disappointment from the business community regarding the degree of liberalization that was attained.

The agreement on services trade had to be created "from the ground up" as there were no broad-based precedents to use as a model. The agreement had to accommodate the very diverse and complicated set of sectors that constitute services as well as the various methods of providing services internationally. The major concerns of opponents also had to be accommodated. As a result, it is probably not surprising that pessimists questioned whether the GATS would be able to bring about substantial changes that would improve the ability of firms to engage in international trade in services. The gains from trade liberalization go well beyond those captured by investors who are able to export by improving allocation of resources which make society as a whole better off. In order for these efficiency gains to be realized, however, the agreement must improve the commercial ability of a firm to engage in international trade<sup>1</sup>. Therefore, examining if the GATS had a positive commercial impact is central to determining if it has been beneficial overall.

## II. Trade in Services

Traditionally, services have been viewed as the quintessential "non-tradable". A classic example is a haircut in which the service provider and the consumer must interact with each other directly in order for the service to be exchanged. The evolution of modern market economies has seen a rapid rise in the proportion of economic activity comprised of services, and as with goods, international commercial opportunities in providing services have expanded as well. In addition, the definition of how services are "traded" has also changed. For example, advances in telecommunications and computers allow a company situated in one country to provide a service to a customer in a different country via the internet. This is, however, only one of several ways a service can be traded. The GATS defines four "modes" of supplying a service internationally. Mode 1 is cross-border supply, similar to the traditional notion of trade in goods where the service moves across the border and direct interaction between the seller and buyer is not necessary. An example is an architect sending blueprints of a building to a client in another country. Mode 2 is consumption abroad where the client travels to the country of the service provider. The most common example of Mode 2 is tourism. Mode 3 is the establishment of a commercial presence where a foreign service provider establishes facilities in a country to provide services to that country's nationals. In a non-GATS setting, this is usually referred to as foreign direct investment (FDI). An example would be a bank setting up branches in a foreign country. Mode 4 is the temporary movement of natural persons<sup>2</sup> to provide a service in the client's country. An example is a repair technician going to a foreign country to fix a specialized piece of equipment.

One of the major challenges in assessing international trade in services is the lack of good statistics. The legal framework of the GATS diverges to a considerable degree from the traditional international statistical architecture, both for balance of payment data and data on trade in goods. For example, the GATS counts services provided by a foreign establishment as a trade of services via Mode 3 while the balance of payments data does not record it<sup>3</sup>. More attention has been paid to

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<sup>1</sup> There are of course, services that are not provided on the basis of commercial interests. These could be provided by governments or various not-for-profit organizations, for example, Doctors Without Borders. The vast majority of internationally provided services are, however, provided by for-profit organizations.

<sup>2</sup> The term "natural persons" is to distinguish individuals from corporations which are defined as a "legal person".

<sup>3</sup> The balance of payment data only records the movement of capital and remittance of profits but does not record the value of the services produced.

the problems of data in recent years and improved data is slowly becoming available (Karsenty, 2000). Many sources highlight the rapid growth in services trade but it is important to remember that trade in services is growing from a relatively small base. The OECD estimates that total measurable trade in services by the various modes of supply, as defined by GATS, was US \$2.3 trillion at the end of 2000. This is equal to approximately 7.6% of world output and almost a fifth of total trade in goods and services. For most OECD countries, the value of service exports is between 20 to 30% of the value of their goods exports (OECD, 2002). This is still significantly below services' share of the Gross Domestic Product (GDP) of most countries. In 2001, services accounted for 72% of GDP in developed countries, 52% in developing and 57% in the Central and Eastern European countries (UNCTAD, 2004). Karsenty (2000) suggested similar estimates of services trade in 1997. He found total trade in services, as defined by GATS to be \$2.17 trillion, which was also equal to 7.6% of world output. Karsenty goes further, however, and breaks his information down by mode of supply. His results are shown in the table below.

Table 1

Service trade statistics by mode of supply

Mode of Supply	Value (billions of US dollars)		Share in GDP (per- cent)		Share in exports of goods and services (percent)	
	1985	1997	1985	1997	1985	1997
Mode 1: Cross-border services	279	890	2.2	3.1	11.9	13.0
Mode 2: Consumption Abroad	120	430	1.0	1.5	5.2	6.3
Mode 3: Commercial Presence <sup>a</sup>	n/a	820	n/a	2.9	n/a	12.1
Mode 4: Movement of Natural Persons	10	30	0.09	0.11	0.5	0.5
Total	n/a	2,170	n/a	7.6	n/a	31.9

Notes: <sup>a</sup> As mentioned above, outputs by foreign affiliates in a country have not traditionally been captured in the statistical data separately. A new system, known as Foreign Affiliates Trade in Services (FATS) was created to address this deficiency. Long term data is unavailable. In addition, due to the novelty of this statistical approach, estimates must be interpreted with caution as data is still unreliable.

Source: Karsenty, 2000.

As can be seen in the table above, Mode 1 and Mode 3 represent the largest share of services trade, 41.0 and 37.8% of total services trade respectively. It also shows that services trade is growing, both in absolute size and relative to both GDP and total exports of goods and services. Mode 4 – movement of natural persons comprises a very small share of services trade.

Due to the difficulty of measuring output by foreign companies providing service via commercial presence, FDI in services is often used as a proxy to analyze trends in commercial presence. FDI in services is growing rapidly and now exceeds FDI in manufacturing. In the early 1970s, FDI in services was only about one quarter of the world's FDI stock, in 1990 it was approaching 50% and by 2002 it had risen to over 60% of the world's FDI stock or an estimated US\$4 trillion. The share of FDI in services now more closely reflects their importance in the economy. It is important to note that most FDI in services is market-seeking in nature. The scope for efficiency-seeking services FDI (for example, establishing call centres abroad to take advantage of cheaper labour) is growing, however, as technology allows services to become more tradable (UNCTAD, 2004).

### III. Importance of Liberalizing Trade in Services

Achieving a more liberal environment for services could have very large benefits for the world economy, particularly developing countries. While measuring trade restrictions in goods is

typically very easy – in most case all one must do is look at the tariff rates, quota allocations or other clearly defined trade barrier such as a tariff-rate quota that applies to a particular product – measuring trade restrictions on services can be very difficult. As a result, it is a complex task to ascertain how closed the services sector is and the resulting benefits of liberalization. Quantifying the protection afforded to services is difficult because restrictions are often a result of a complex interaction of various domestic policies (non-tariff barriers – NTBs) as opposed to border measures in the case of trade in goods. Most studies that have examined barriers to trade in services focus on small number of sectors<sup>1</sup> and are often also restricted to specific countries or regions. As a result, it is difficult to generalize the overall impediments to services trade across countries and sectors. Evidence suggests, however, that in general, barriers to services trade, particularly in certain sectors, remain high<sup>2</sup>

Despite the inherent difficulties in measuring impediments to services trade and therefore the benefits that would be derived from their removal, numerous authors have examined previous liberalizations in services to determine their effect and extrapolate their findings. These studies overwhelmingly find liberalizing services could have substantially greater welfare benefits than liberalizing remaining barriers in trade in goods (OECD, 2005). A study by Dee and Hanslow (1999) found that of the total world benefits of \$260 billion from eliminating all post-Uruguay Round trade restrictions, half (or \$130 billion) would come from liberalizing services trade. This is significantly more than \$50 billion from liberalizing agriculture trade and the \$80 billion from liberalizing trade in manufactures. In addition, developing countries stand to gain relatively more from services liberalization. It has been estimated services trade liberalization could yield benefits up to four times greater than liberalizing trade in goods for developing countries (OECD, 2005). This is because liberalizing services can have large spillover effects that are expected to be greater in developing countries. According to the OECD, “an inefficient service sector acts like a prohibitive tax on a national economy” (2002, p. 10). Many service sectors are key inputs to almost all businesses. Examples include telecommunications, finance, transportation and energy. The competition resulting from liberalizing these sectors and allowing foreigners to provide services can help to significantly raise the productivity of the firms that use these products as inputs. As a result, liberalization of services trade can also help promote trade in goods and facilitate the diffusion of knowledge in key areas such as finance. Infrastructure services are of particular interest to developing countries as inadequate infrastructure in areas such as transport services, telecommunications, utilities or legal systems can often be a significant factor in the difficulty these countries experience when trying to attract FDI in all sectors. Therefore, by liberalizing infrastructure services (which is often in the form of FDI) it may encourage FDI in other, seemingly unrelated, sectors (OECD, 2005). Given the large potential welfare increases that could be tapped if services trade became less restricted, efforts at the WTO pertaining to services have the potential to be one of the greatest sources of growth and creators of wealth in the world economy.

#### **IV. Difficulties in services negotiations**

Given the significant trade barriers in services that exist and substantial welfare improvements that could be achieved from reducing or eliminating them, policy makers were wise to add services trade to the multilateral agenda. Adding them to the agenda, however, met with substantial opposition at first and further progress has not been easy. In the preparatory stages of the Uruguay Round, the U.S. was the only vocal proponent for a new round of trade negotiations and, as a central component of that, adding services to the agenda. Developing countries, in particular India and Brazil, opposed their inclusion and important developed country markets, such as the European Union (EU) did not lend strong support (Adlung, 2000).

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<sup>1</sup> Most often, the sectors examined in these studies are those viewed as critical inputs to business such as telecommunications, financial, business services (accounting, consulting, human resource management, marketing, etc.), distribution/transport and/or education.

<sup>2</sup> See Warren and Findlay (2000) for an excellent overview of different methodologies that are employed to measure impediments to trade in services and selected results from these methodologies.

Many opponents to the inclusion of services in trade negotiations felt it would threaten the provision of essential services to the poor, allow multinational corporations to dominate global services markets, lead to the demise or marginalization of indigenous cultures, prevent government from protecting the health and well-being of consumers and diminish the regulatory sovereignty of states. This is because many restrictions to services trade come in the form of government provided services (e.g. healthcare and education), competition policies on natural monopolies (e.g. utilities), consumer protection orientated policies (e.g. licensing of various professionals such as doctors, lawyers, accountants etc.) or restrictions on foreign ownership within the country (i.e. foreign direct investment) (OECD, 2002). This was a fundamental consideration during the negotiations. In response, the GATS contains numerous carve outs, exceptions and flexibilities that are available to countries, and in particular to developing countries where barriers to services trade tend to be the highest. In particular, the agreement does not apply to services supplied in the exercise of government authority<sup>1</sup>. Rodrik (1995) argues that as a result, “the negotiations have yielded a rather weak document which leaves developing countries relatively free in choosing the extent and range of liberalization they will undertake” (p. 43). This structure, however, was necessary to gain approval from most countries, not only developing ones, to enter into negotiations.

A crucial input to any decision making process is information. GATS negotiators, however, did not have good quality or plentiful information available to them, further complicating their task. As mentioned above, traditional statistical frameworks are ill-equipped to properly measure services trade, particularly via Mode 3 – Commercial Presence. In addition, there was no comprehensive source of information regarding where trade restrictions were present and in what form. A great deal of the evidence they had available to them was case specific. This made scheduling liberalization commitments very complex. According to Rodrik (1995), “restrictions on services trade are ubiquitous and their liberalizations hard to gauge”.

Beyond the issue of ensuring governments had the regulatory flexibility to meet various social policy goals, such as competition policy, consumer protection and provision of essential services, many other factors complicated negotiations significantly. ‘Services’ encompass a very large variety of sectors, many of which have issues that are very particular to one individual sector. In addition, the way each sector is supplied varies significantly. It was for that reason the GATS defined the four Modes of supply and allowed countries to make commitments or reservations in the Modes they saw fit for covered sectors. Many times, however, properly serving the market requires liberalization in numerous Modes simultaneously. For example, taking full advantage of any liberalizations in Mode 3 – Commercial Presence may require senior management from the parent company’s home country, a commitment governed by Mode 4 – Presence of Natural Persons (OECD, 2005). Countries may be willing to open up one mode of supply in a sector but unwilling to open a necessary complimentary mode that can result in investors experiencing difficulties capitalizing on the commitments made.

As mentioned above, one of the major impediments to services trade can be the domestic regulations that are put in place for a variety of legitimate social policy goals. These most often pertain to competition policy to prevent abuse by natural monopolies and consumer protection regulations. These regulations vary significantly from sector to sector and traditionally, WTO negotiations are not organized on a sectoral basis. This makes it difficult to bring the necessary people together to negotiate on a particular sector. Adding to this difficulty, the agencies responsible for regulating these sectors are not part of the trade ministry responsible for negotiations. Many of these agencies do not have more than one or two experts in international affairs or negotiations and even fewer who understand how international trade liberalization commitments must be scheduled. Many Members, particularly developing country Members, do not have the coordinating mechanisms to keep all necessary parties involved to move negotiations forward. Trade ministers and negotiators often face difficulty in getting these responsible parties to devote the necessary time and resources to supporting negotiations (Jara and Domínguez, 2006). One way of addressing this problem was to create sectoral agreements. This allowed the regulators from each country to meet with their counterparts from other

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<sup>1</sup> A “service supplied in the exercise of governmental authority” is defined in the GATS as any service which is not supplied on a commercial basis or in competition with one or more service suppliers.

countries to create a sector specific agreement. Sector specific negotiations have not worked well historically because it cannot use the mercantilist negotiating model to mobilize support from export-oriented producers to overcome the resistance from producers in other sectors that would face increased import competition. Some success has been achieved, with agreements in sectors such as telecommunications and financial services. In order to achieve this, a strong case had to be made that regulatory reform in the sector was to everyone's advantage. This was possible in these crucial input services but may prove much more difficult with additional sectors (Feketekuty, 2000). Creating international obligations on domestic regulations is further complicated by the fact that rapid technological change, for example, the introduction of e-commerce, can quickly render these obsolete. Often, domestic regulatory frameworks lag new technologies to a significant extent and countries struggling to get their domestic "house in order" are usually unwilling to tackle questions of international liberalization. Of course, as with trade liberalization in goods, domestic vested interest seek to limit foreign competition and attempt mask their protectionism in a cloak of legitimacy by arguing they are acting in the interest of society.

In addition to the factors discussed above, negotiators were starting from a blank page. A great deal of preparatory work was required to advance countries' understanding of services trade to establish what their negotiating positions would be. Determining the basic framework of the agreement took a significant amount of negotiating time and energy during the Uruguay Round, leaving less for negotiating liberalizations. Many issues remained unresolved and left for later negotiations, some of which have already been concluded (e.g. the telecommunications agreement) and some that were rolled into the Doha Round (e.g. emergency safeguards and subsidies in services). The large number of issues that were unresolved and were left on the table led skeptics to suggest that the issue of services trade is simply too complicated to address comprehensively. However, as Jara and Domínguez (2006) point out, goods have been subject to multilateral rules for over 50 years and yet there are still aspects to be negotiated. This highlights one of the greatest advantages of the GATT system that was also enshrined into the WTO – the progressive liberalization that occurs after each negotiating round so that efforts do not have to be "one-shot" deals.

## **V. Commercial Impact of the GATS on Private Investors**

To determine the commercial relevance of an international agreement such as the GATS, one could examine any number of different criteria. Feketekuty (2000) suggests at least the following four are necessary: 1) Did the negotiations achieve a reduction of trade barriers? 2) Did the agreement restrain the introduction of new trade barriers? 3) Does the legal framework and dispute settlement procedures facilitate settlements of disputes? and 4) Does the agreement establish a transparent and stable commercial environment? These four criteria are used to evaluate the GATS.

### ***Reduction of trade barriers***

Although the GATS has now been in place for over ten years, it is still early to make conclusive judgments regarding the impact GATS has had in encouraging international trade in services. Evidence from other trade agreements such as the GATT and the European Union suggests that agreements must mature for a decade or two before enterprises or governments will actively use them in managing their affairs (Feketekuty, 2000). It is widely acknowledged, however, that commitments countries undertook in the GATS did not reduce trade barriers significantly. As mentioned above, negotiators spent a great deal of time during the Uruguay Round establishing the framework of the GATS leaving little time for negotiating liberalizations. In addition, countries were reluctant to push strongly for liberalization during this first round out of fear that it would result in much greater resistance to the entire agreement. The schedules that were agreed upon, for the most part, represented a locking in of the regulatory status quo (or less). In particular, there was significant concern that developing countries, particularly small countries with non-lucrative markets, were able to free-ride on the negotiations and made few or no economically meaningful bindings (Adlung, 2000). Rodrik points out, however, that while the GATS did not require many developing countries to undertake a substantial amount of obligations, it was a useful tool for countries that desired more disciplines to bring them upon themselves (1995).

Despite the lack of sweeping reductions in trade barriers, the GATS was successful in reducing a considerable range of barriers. The most important liberalizations the GATS achieved were in the sectoral agreements concluded after the conclusion of the Uruguay Round. These include agreements on telecommunications and financial services (both were completed in 1997). The Agreement on Basic Telecommunication Services (GBT) will, over time, open the provision of basic telecommunication services to international competition. An important result was also the adoption of a reference paper that sets out a common framework for the regulation of competition in this area (Feketekuty, 2000). There is strong evidence this agreement had a dramatic effect on lowering the cost of long distance telephone calls. While technology advances have meant the cost of long distance telephone calls has been steadily declining, the GBT also helped. As an example, in the 13 years from 1983 to 1996 (the year before the GBT was concluded), the real cost of calling from the United States to the United Kingdom and Japan fell by 60.3 and 55.7% respectively. In the year following the conclusion of the GBT, they dropped by another 86.8 and 67.3% respectively (OECD, 2002). This agreement is generally viewed as one of the major liberalization successes of the GATS thus far. The agreement on financial services was a more modest success. Few reductions were achieved in existing barriers to trade in financial services and few commitments were made with respect to cross-border sales of financial services. Many countries, did however, agree not to tighten existing barriers (Feketekuty, 2000).

An important indirect benefit of the GATS was the encouragement of domestic debate regarding the regulations of services. As mentioned above, one of the major trade barriers facing services can be how the sector is regulated. With the exception of financial services and telecommunications, the GATS did not result in binding commitments regarding the regulation of many service sectors, with the exception of general obligations such as increasing transparency. The debate that the GATS created, however, often spurred domestic debates regarding the optimal regulation of certain sectors, encouraging movement away from the entrenched approach. This often led to unilateral liberalization in countries. Thus, while not directly a result of GATS (and also not bound by GATS), the negotiation of the GATS resulted in the issue being brought to the fore of regulators' attention, who then often chose to make liberalizing changes (Feketekuty, 2000).

While the GATS did not impose significant reduction commitments to existing Members, it has been used to obtain liberalization in countries as part of countries' accession packages. For example, the average number of sectors in which commitments were made in existing developing and transition countries Members was 54 (out of approximately 160) while up to March of 2004, the average for countries acceding to the WTO, all of which are developing or transition countries, was 106. This is as many, and in some cases more, than the commitments made by large developed countries. In addition, the quality of the binding is higher than in any other group of countries and restrictions are often explained much more clearly. While domestic policy considerations certainly play a role, negotiators are often willing to make substantial service liberalization promises rather than face continuing non-membership (Adlung, 2004). As only one of many possible examples, China undertook substantial liberalizations in areas such as banking, insurance and telecommunications. Many of these liberalization were scheduled to be phased in over five years and represent significant opportunities for foreign firms to obtain a greater presence in the market and Chinese firms to obtain a wider range of services previously not available in their market, particularly in the financial sector. Further, many services that had been available were purchasable at a much lower cost (US-China Business Council, 2006). The work undertaken in the GATS has also facilitated the negotiation of services agreements in bilateral or regional trade agreements where achieving liberalizations can be easier (UNCTAD, 2004).

#### ***Restrain introduction of new trade barriers***

Restraining the introduction of trade barriers in the future can be as important, if not more important, than liberalization undertaken during the current timeframe. The greatest benefit of having liberalization commitments "locked-in" is the positive impact it has on investment decisions. The investments needed to provide services in a foreign country may be large, country specific and take a long time to be recouped (particularly if the service is provided by Mode 3 – Commercial Presence). As such, it is not only the degree of openness that is currently available to a private

company that is important, but also the probability of that level of openness being maintained (or even improved) over the lifetime of the investment. In the Uruguay Round of the GATS, few substantial reductions in barriers to trade were achieved but many countries did make binding commitments that “locked-in” the existing status quo. This is one of the foremost achievements of the round as it increases transparency and predictability for businesses. These bindings have not yet proven to be particularly important but as demand for services continues to rapidly expand, however, if a downturn in the global economy was to occur, protectionist pressure can be expected to increase (Feketekuty, 2000). The current commitments will improve the ability of governments to resist requests for protection.

There are weaknesses in the binding ability of the GATS, however. Most importantly, there is a large difference in the level and quality of bound commitments in the GATS compared to the openness that currently exists. Many countries have maintained a wedge, similar to the analogy of bound versus applied tariffs in goods, and this wedge takes away from the predictability the agreement is designed to foster (Sauvé and Wilkie, 2000). The GATS follows what is referred to as a “positive-list approach” meaning certain obligations only apply to the industries listed in the schedules<sup>1</sup>. Therefore, if a sector is not listed in the schedules of commitments, the country has the liberty to increase the restrictions on the sector in the future (UNCTAD, 2004). In addition, there are many ways in which a service can be restricted and so it follows naturally that not all possible ways have been recorded in the schedules. While the bindings may make it more difficult, for example, for a country to tweak domestic regulations in some way so as to restrict trade without infringing on their obligations, it is likely still possible to some degree.

#### *Ability to Settle Disputes*

The GATS is subject to the binding dispute settlement mechanism of the WTO. The WTO dispute settlement process was one of the most important achievements of the Uruguay Round. Applied to services, it has advantages and disadvantages. Despite the difficulty experienced creating the GATS, it has functioned very smoothly and has been subject to little acrimony since it went into force. This may be because the flexibility that was required to see the completion of the GATS did not impose large constraints on many countries and/or the continuing increases in demand for services given strong growth in the global economy has meant there has, as yet, been little protectionist pressure. During the period in which the GATS has been in force (over ten years), only two disputes specifically relating to GATS have been brought to the WTO Panel (out of 100 total) – against the US regarding measures affecting cross border supply of gambling and betting service (brought by Antigua and Barbuda) and against Mexico regarding measures affecting telecommunication services (brought by the US) (Adlung, 2004).

The binding state-to-state dispute settlement mechanism of the WTO has been shown to work effectively for disputes relating to over-arching regulatory measures, usually affecting a large number of investments. For specific disputes, however, for example, involving an expropriation claim, investors would much prefer an investor-to-state dispute settlement process, similar to those found in various bilateral or regional agreements (Loppacher and Kerr, 2006)<sup>2</sup>. This form of dispute settlement is not a part of the GATS and is unlikely to become part of it in the future for both political and practical reasons. Politically, an investor-state dispute settlement procedure would provide more ammunition for detractors of the WTO in civil society. Critics of the WTO argue it holds the rights of capital holders above those of other stakeholders such as the environment or labour. As these stakeholders cannot bring a complaint to the WTO, allowing private sector investors access to the dispute settlement system would further discredit the organization among those suspicious of its activities. Practically, the dispute settlement resources of the WTO would likely be overwhelmed if private-parties could bring disputes to the WTO (Sauvé and Wilkie, 2000). Therefore, investors will likely utilize any bilateral agreement available to them such as bilateral investment treaties or free trade agreements to settle issue specific disputes rather than the WTO.

<sup>1</sup> As opposed to what is known as the “negative list approach” where sectors not on the list cannot be regulated in trade restricting fashions. This is particularly important for new sectors that did not exist when an agreement was signed. It would mean that such new sectors would be open to global competition.

<sup>2</sup> The NAFTA for example.

### *Transparent and stable environment*

As mentioned previously, the confidence investors have regarding the future commercial environment has a significant impact on their investment decisions. One of the major objectives of the GATS was to increase the transparency and predictability of the services sector. Although the scheduling process did not reduce trade barriers significantly in most cases, it did create a standstill and will help ensure access to the sector remains as good as or better than what it is now. As mentioned above, it is likely that the methodology of the scheduling has resulted in some loopholes remaining but has reduced governments' discretion to restrict market access considerably. In addition, Members were required to publish all measures of general application and establish national enquiry points with the mandate to respond to other Members' information requests. The scheduling process has also provided more information to investors investing in a foreign market, particularly in the accession countries whose schedules have contained a substantial amount of detail and clarification (Sauvé and Wilkie, 2000). According to the OECD, given services tend to be highly regulated, "effective access to markets can depend crucially on service suppliers gaining accurate knowledge of the laws and regulations in force in a prospective market" (OECD, 2002, p. 59). It is for this reason that increasing transparency could be the single most commercially meaningful contribution of the GATS. In addition, the GATS also states that countries may not restrict firms from transferring money out of the country that was received as payment for the services supplied in a sector the government has committed to being open to foreign competition unless the country is experiencing balance of payment difficulties. This also helps reduce uncertainty and encourage investment.

## **VI. Conclusion**

The GATS has been hailed as one of the greatest achievements in the multilateral trading system since the inception of the GATT. It is widely acknowledged, however, that it resulted in little actual liberalization. How can these two seemingly contradictory views be reconciled? Unfortunately, it is still too early to make a definitive judgment of the agreement based on the experience gained since its inception because it can easily take a decade, or even two, before it is actively used in business and policy making decision. The GATS has value for investors because of advances in areas other than liberalization such as transparency and because of the benefits that can be expected from its addition to the negotiating agenda.

As discussed above, numerous complexities and political sensitivities resulted in a final agreement which some may view as weak. It was, however, a remarkably important stepping stone towards greater liberalization. The GATT has been governing trade in goods for over 50 years and is still working to reduce traditional trade restrictions such as tariffs and to limit the ability of governments to enact less transparent restrictions on trade, for example, product standards. Achieving trade liberalization, whether it be in goods, agricultural products or services, is a worthwhile pursuit but takes time to accomplish. Many studies have pointed out numerous issues and faults contained in the GATS (and difficulties of service trade in general) that have yet to be resolved. Without the completion of GATS, however, many of these issues could not have even been conceptualized, let alone resolved. The GATS has been successful in calling attention to trade in services, both by governments and researchers. As a result, problems and eventually solutions to many of these problems will be discovered.

The GATS has not been the panacea for investors who already have or would like to begin trading their services internationally but it has helped. There were some liberalizations undertaken and many more existing market access conditions locked in that companies can now take advantage of with greater confidence. Many acceding countries, which traditionally have had a relatively closed economy in all areas, have made significant liberalization commitments in services, helping both foreign service providers and companies operating in the country to improve their competitiveness. The sectoral initiatives in telecommunications and financial services has a similar effect as both services can be a critical component of a firm's (and a country's) competitiveness. In addition, transparency was encouraged by Members notifying various trade restrictions to the GATS and creating national enquiry points for investors interested in a particular market. The provisions relating to allowing transfers out of the country help create a more inviting climate

for investors. The overall environment was also improved when numerous countries examined their regulatory structure and made changes in response to the debate that was created by the discussions surrounding the GATS negotiations.

Critics who look at the GATS and point out all that it did not accomplish and question its value are taking an overly narrow and shortsighted view of the agreement. The completion of the GATS in the Uruguay Round is one of the most significant advances in the international trade law system not because of what it accomplished in and of itself, but what its accomplishment in creating a foundation to build upon. It was not a “waste of time” and negotiating resources and rather than abandoning it because liberalizations in the first round were modest and negotiations proved to be labourious during the Doha round, more efforts need to be made to continue to advance negotiations to tap into the large benefits available from liberalizing services, which make up such a large part of economic activity but until recently, have been traded very little. As the former WTO Director General Renato Ruggiero stated in 1998, “I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments” (Ruggiero, 1998). This statement is likely as true now as when it was made.

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