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GATS and the Electricity and Water Sectors

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GATS AND THE ELECTRICITY AND WATER SECTORS	1
1. HISTORY OF THE WORLD TRADE ORGANISATION	3
1.1. THE RATIONALE FOR THE GATT	3
1.2. THE PRINCIPLES OF THE GATT	4
2. THE GATS AGREEMENT	4
3. THE GENERAL DEBATE ABOUT THE GATS	6
3.1. GENERAL ARGUMENTS FOR AND AGAINST	6
3.2. KEY AREAS OF DISPUTE.....	6
3.2.1. <i>Forced liberalisation</i>	6
3.2.2. <i>Reversibility</i>	7
3.2.3. <i>Secrecy</i>	7
4. POTENTIAL IMPACT OF THE GATS ON THE ELECTRICITY AND WATER SECTORS	7
4.1. GATS CLASSIFICATION.....	7
4.1.1. <i>Electricity: product or service</i>	7
4.1.2. <i>Services classification: electricity and water supply</i>	8
4.1.3. <i>Decisions of the Disputes Settlement Board (DSB)</i>	9
4.2. POSSIBLE EXEMPTIONS, RESTRICTIONS ON REGULATION AND SUBSIDIES	9
Table 1. Will GATS rules constrain water policy options? ODI opinions.....	10
4.3. GATS NEGOTIATIONS ON ELECTRICITY AND WATER SINCE 2000.....	11
4.3.1. <i>Electricity</i>	11
4.3.2. <i>Water</i>	13
4.3.3. <i>Water and PPPs</i>	14
4.4. PROGRESS ON OFFERS AND REQUESTS.....	14
4.5. THE CANCÚN SUMMIT AND SUBSEQUENT DEVELOPMENTS	15
4.6. EU AND USA POLICIES	16
5. GATS AND THE REFORMS IN ELECTRICITY AND WATER.....	16
5.1. REFORMS TO THE ELECTRICITY SECTOR	16
5.1.1. <i>Privatisation</i>	17
Difficulties of regulation	17
Lack of investors	17
Public unpopularity	18
5.1.2. <i>Liberalisation</i>	18
5.1.3. <i>Deregulation</i>	18
5.2. REFORMS IN THE WATER SECTOR	19
6. OTHER MECHANISMS FOR LIBERALISATION AND PRIVATISATION OF WATER AND ELECTRICITY	20
6.1. ELECTRICITY AND WATER IN THE EU.....	21
6.2. EU NEIGHBOURHOOD POLICY.....	21
6.3. BILATERAL TREATIES AND AGREEMENTS.....	22
6.4. CONDITIONALITIES	22
6.5. MULTINATIONAL PRESSURES	23
7. HONG KONG AGREEMENT, IMPACT ON SERVICES, ENERGY TARGETED BY EC.....	23
8. CONCLUSIONS	24
8.1. POTENTIAL POLICY ARENAS FOR PRACTICAL ACTION	24
8.1.1. <i>Support for protection of energy, water and public services from GATS</i>	24
8.1.2. <i>Initiatives to develop public sector alternatives</i>	24
8.1.3. <i>Resourcing global and local initiatives</i>	25
9. ANNEX: HONG KONG DECLARATION ANNEX C ON SERVICES	26
10. NOTES	29

1. History of the World Trade Organisation

The World Trade Organisation (WTO) was established in 1995 as an international body to govern and expand international trade agreements. Its roots go back to the 1947 General Agreement on Trade and Tariffs (GATT), which was the first major international agreement aimed at reducing barriers, such as tariffs and dumping, to free trade. The WTO states that it does this by:

- administering trade agreements;
- acting as a forum for trade negotiations,
- settling trade disputes,
- reviewing national trade policies,
- assisting developing countries in trade policy issues, through technical assistance and training programmes, and
- co-operating with other international organisations.

It proceeds via a successive series of negotiations, or 'rounds'. One outcome of the Uruguay Round (1986–94) was the creation of the WTO. There are now about 150 members of the WTO, accounting for about 97 per cent of world trade, with 30 further countries negotiating membership. The European Union is a member and in most cases speaks for all 25 member states. The WTO's decision-making body is the Ministerial Conference, which meets at least once every two years. Below the Ministerial Council is the General Council (normally ambassadors and heads of delegation in Geneva, but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council.

1.1. The rationale for the GATT

The rationale for the GATT was that by removing trade barriers, production of individual goods and services would be exposed to competitive forces and consumers would be able to buy the cheapest goods regardless of their origin. This would mean that only efficient businesses would be able to survive and inefficient businesses that had previously survived because they were protected against competition in their home markets would have to emulate the efficiency of the best global companies. Countries with competitive advantages for the production of particular products or services, for example a particularly skilled workforce or advantages in natural resources would be able to expand their markets. The lower prices resulting from closing down or improving the efficiency of companies would stimulate economic growth. According to economics theory, efficient markets lead to an optimal allocation of resources.

While on the face of it the basic logic of the GATT and free trade might appear indisputable, in practice there are circumstances where it is arguable that free trade policies are not appropriate. The following factors (by no means an exhaustive list) are of particular relevance to the electricity and water sectors.

Barriers to entry. A central assumption of the free trade agenda is that there will be a field of international companies that will compete strongly in newly opened up national markets. Perhaps less obviously, there is an assumption that 'barriers to entry' are low. In other words, it will be easy for new companies to acquire capabilities and to enter markets. If barriers to entry are high, companies that fail or are taken over will tend not to be replaced by new entrants and the sector will become concentrated into an ever narrower field of suppliers. The clear risk in this situation is that market forces will be negated by monopoly or oligopoly power.

Strategic capabilities. In the past, governments have judged that the availability of particular products or services at stable prices was of crucial importance to their economy and that the international market in these products or services was not sufficiently reliable. In this situation, governments set up or protected local suppliers to guarantee the availability of this product or service. This logic has often been applied to commodities such as food and, for example, the European Union continues to have a Common Agricultural Policy aimed at guaranteeing the supply of food by protecting European producers. It has also been applied in the transport sector and the energy sector, particularly electricity, where publicly owned companies or heavily regulated private companies were the rule until the recent trend towards privatisation and liberalisation started to change this. Under the logic of the GATT, strategic national capabilities have little

value because they prevent the development of efficient international markets, and because the companies are protected, there is insufficient pressure on them to be efficient.

Infant industries. Governments have, for reasons of national development, often targeted sectors in which they hope to develop internationally competitive national capabilities. It was argued that new companies or capabilities needed transitional protection so that they could build up their skills to internationally competitive levels. Such arguments were often applied in basic industries such as iron and steel. Particularly for developing countries, which often have quite a narrow industrial base, this was seen as a key way to broaden the industrial base and improve the international competitiveness of their economies. The European Union has also tried to encourage the development of European suppliers, for example in aerospace.

Preserving national capabilities. Particularly for highly cyclical products where periods of low demand might lead to the failure even of highly efficient companies, governments have often tried to protect national companies in periods of low demand or difficult trading conditions, perhaps by bringing forward orders or discriminating in favour of national suppliers. For example, the shipbuilding industry has often received support to prevent the closure of shipyards, while the British government has recently introduced strong support for a privatized nuclear power company to prevent its bankruptcy.

1.2. The principles of the GATT

The WTO identifies five main principles that underlie the GATTⁱ:

Trade without discrimination. This requires that countries apply ‘Most Favoured Nation’ (MFN) treatment to all signatories of the GATT. Under this, countries are required to treat all trading partners equally, or treat each country as well as they treat their most favoured nation partner. They are also required not to discriminate between national and imported goods and services, so-called ‘national treatment’.

Freer trade. This involves the progressive removal of all visible (e.g., import duties) and invisible barriers to trade.

Predictability. Commitments made under the GATT are binding. Countries cannot re-erect trade barriers without paying compensation to any country adversely affected by the change.ⁱⁱ

More competitive. Under the GATT, unfair practices such as dumping and subsidizing exports are discouraged.

More beneficial to less developed countries. A ministerial decision adopted at the end of the Uruguay round gave least-developed countries extra flexibility in implementing WTO agreements. It says better-off countries should accelerate implementing market access commitments on goods exported by the least-developed countries, and it seeks increased technical assistance for them.

These principles raise a number of issues, but of particular relevance to the electricity and water sectors is the third, ‘predictability’. This is seen as ‘locking countries in’ to a commitment, no matter how misconceived that commitment turns out to be. For example, a country might open its electricity sector to competition and adopt an ‘authorisation’ or free market procedure for building new power plants. In other words, a company wanting to build a new power plant would not have to meet any planning requirements that established that the plant was needed in order that demand could be met securely. If the country opened up the electricity sector under GATS but then found that the market was not delivering enough investment to meet demand, it could not go back to a planned system under which entry and exit (building new plants and retiring old plants) were controlled to ensure security of supply was achieved.

2. The GATS agreementⁱⁱⁱ

The Uruguay Round saw, for the first time, a major focus on trade in commodities other than goods, for example, services and intellectual property. The Uruguay Round culminated, in 1994, with the agreement of the General Agreement on Trade in Services (GATS), which came into force in January 1995. Under the GATS, the signatory member governments made a commitment to progressively liberalize trade in services. Article XIX (Paragraph 1) committed them to start a new round in 2000. A new round of negotiations was launched in 2001 at Doha under the banner the ‘Doha Development Agenda’, part of which was the GATS 2000 initiative. The Fifth WTO Ministerial Conference was held in Cancún, Mexico from 10-14 September, 2003.^{iv}

The GATS agreement has two parts. In the first, the general rules are set out, while in the second there are national 'schedules', which list individual countries' specific commitments on access to their domestic markets by foreign suppliers. Subsequent rounds of negotiations have concentrated on increasing the number of national services markets open to competition. These have produced 'protocols' with further commitments on financial services, basic telecommunication services and movement of natural persons. The WTO acknowledges that in the latter case little was achieved.

The GATS agreement^v applies to "any service in any sector except services supplied in the exercise of governmental authority" (Article 1, clause 3(b)). This exception is limited by a definition which states that: "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." (Article 1, clause 3(c)). So in order to claim exemption from the GATS it must be demonstrated that both conditions apply.

The basic principle of opening up trade in services is enshrined in the general requirement for GATS signatories to give "immediately and unconditionally" equally favourable treatment to service suppliers of all countries – the Most Favoured nation (MFN) principle (Article II, clause 1). There is an exemption for government procurement of goods and services, which is expected to be covered by a separate agreement on government procurement (Article XIII, clause 1)

The agreement makes allowance for domestic regulation of services by requiring qualifications and standards, but specifies that such regulation should be "not more burdensome than necessary to ensure the quality of the service" (Article VI, clause 4(b))

The agreement also provides for member states to make commitments, through legally binding schedules, opening specific sectors, without limitations on market access, and on the same terms as national service suppliers. Public monopolies, limitations on foreign suppliers, or quotas are explicitly prohibited. (Articles XVI, XVII). There is again an exemption for government procurement of goods and services (Article XIII, clause 1).

Signatories to the GATS make a general commitment to achieve 'a progressively higher level of liberalisation.' (Article XIX, clauses 1 and 4) so the signatories are committed to open up sectors where possible. There is no list of sectors in the GATS agreement itself, which refers simply to "any service in any sector", but the guidelines for making commitments state that "In general the classification of sectors and sub-sectors should be based on the Secretariat's Services Sectoral Classification List".^{vi}

The agreement also specifies that signatories will take action to avoid subsidies which "may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects." (Article XV clause 1)

The GATS agreement defines four 'modes' in which a service can be traded (Article 1, clause 2):

Cross-border supply. Services supplied from one country to another (e.g. international phone calls).

Consumption abroad. Consumers from one country use a service in another country (e.g. tourism).

Commercial presence. A company from one country sets up subsidiaries or branches to provide services in another country (e.g. a bank from one country setting up operations in another country).

Movement of natural persons. Individuals travelling from their own country to supply services in another (e.g. an actress or construction worker).

For electricity and water supply, it is the third mode which is of greatest relevance, as it would allow the commercial presence of any multinational company in the water or electricity sectors of any country in the world. The first category could be relevant for bulk water supply across borders, for example a reservoir in one country being used to supply the drinking water in another country, or for the supply of electricity across borders.

The GATS is being implemented on a 'request offer' basis. Under this rule, participants had to submit initial requests for specific commitments by 30 June, 2002 and initial offers by 31 March, 2003. Requests are generally from one signatory to one or more other signatories, requesting an opening up of a specific sector. The request might be to add a new sector or to reduce restrictions on an already partly open sector. The process of 'requests' is a purely bilateral one between the requesting government and the target government, about which the WTO is not usually informed. Given the overall objective to open up trade in services, the WTO is keen to encourage requests. It states:^{vii}

'It is important to keep in mind that when each Participant submits an initial request it does not have to be exhaustive and a Participant does not necessarily have to think of every conceivable item it wishes to request of other participants. In order to meet the dates, it might be necessary to avoid seeking perfection which might cause delays.'

Requesting a market opening seems a largely cost-free exercise: essentially, if successful it opens up an option for companies from the requesting nation. If there is any likelihood that a nation's companies might benefit from the opening up of another country's market, there would seem to be no reason not to request the opening of a sector. A request commits the requesting country to nothing. By contrast an offer is a major commitment. As with requests, offers may open up a new sector or reduce trade restrictions on a sector that is already partly open. This represents a major obligation, although the offer does not become binding until it has been the subject of negotiations and has been incorporated in the offering country's schedule of commitments.

3. The general debate about the GATS ^{viii}

3.1. General arguments for and against

The general arguments for and against the GATS can be summarised as follows.

The main argument for the GATS is, as for free trade in goods, economic efficiency. By exposing services to international competition, they will become more efficient; consumers will pay less for these services and will therefore have more money to spend on other goods and services. Competition will also stimulate innovation. The WTO argues that this process will be good for developing countries on a number of specific grounds. It suggests that service companies in developing countries will be able to take advantage of more open international markets to expand their businesses. It also suggests that the GATS will stimulate technology transfer. Foreign direct investment will bring with it new skills and technologies that local companies and employees can learn and adopt. ^{ix}

The fundamental argument against the GATS is that the GATS agenda is being driven by the interests of large companies in developed countries. These companies will increasingly dominate world markets, not because of superior efficiency but because of greater resources, political influence and sheer market muscle. Without the opportunity to nurture local companies while they develop their capabilities, developing countries will be locked into a role as low-skill, low-wage providers of basic goods. Once commitments are made under the GATS to open a sector, government attempts to develop national capabilities by fostering local companies will be impossible and community-based non-profit service providers will find it impossible to survive against the corporate power of multinational companies. ^x Even if a local company could provide a cheaper service in the long-run, a large multinational company might be prepared to suffer short-term losses to force the weaker local company out of the market.

3.2. Key areas of dispute

The main areas of argument between the two sides are on:

- the extent to which the GATS will force the liberalisation and privatisation of vital public services, such as health and water,
- the reversibility of the GATS commitments, and
- the secrecy of the negotiations.

3.2.1. Forced liberalisation

In the first area, the WTO argues that under the GATS, member states are free to retain existing arrangements, for example, a nationally owned monopoly service provider could be retained. The WTO states that:

'The GATS does not require the privatisation or deregulation of any service. In respect of water distribution and all other public services, the following policy options, all perfectly legitimate, are open to all WTO Members:

- (i) To maintain the service as a monopoly, public or private;
- (ii) To open the service to competing suppliers, but to restrict access to national companies;
- (iii) To open the service to national and foreign suppliers, but to make no GATS commitments on it;
- (iv) To make GATS commitments covering the right of foreign companies to supply the service, in addition to national suppliers. ^{xi}

Opponents argue that by signing up to the GATS countries have committed themselves to ‘achieve a progressively higher level of liberalisation in their service sectors’.^{xiii} In its introduction to the GATS, the WTO states:^{xiii} ‘The Uruguay Round was only the beginning. The GATS requires more negotiations, the first to begin within five years. The goal is to take the liberalisation process further by increasing the level of commitments in schedules.’ This, on top of the policies of the IFIs such as the World Bank that encourage privatisation, puts heavy pressure on developing countries to liberalize/privatize services, regardless of the options technically open under the GATS. The developed countries such as the USA and the EU are also lobbying hard for privatisation and liberalisation.

3.2.2. Reversibility

The WTO argues that there are ways to reverse commitments. However, of the four mechanisms it lists, two allow only a temporary suspension of commitments, one is likely to require the payment of compensation and the other is applicable only in extreme circumstances such as endangerment of national security or public morals. If a government decided simply that a sector was more efficiently or reliably run as a public-sector monopoly rather than as a competitive private sector business, it is hard to see what grounds a country could invoke to withdraw a commitment. In other statements, the WTO is less optimistic about the possibility of withdrawal. In its ‘introduction to the WTO’, it states:^{xiv}

‘These commitments are “bound”: like bound tariffs, they can only be modified or withdrawn after negotiations with affected countries — which would probably lead to compensation. Because “unbinding” is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.’

3.2.3. Secrecy

On the charge of secrecy, the WTO counters that intergovernmental negotiations are inevitably secret, but that governments are the legitimate representatives of countries and that it goes to great lengths to publicize the results. The World Development Movement contrasts the involvement of industry lobbies in the development of proposals, particularly ‘requests’ to countries to open up sectors, with the minimal attempts to stimulate public debates on what sectors should be opened up in home markets and what governments should be asking, in the form of ‘requests’ of other countries. The heading on the ‘request’ to Sri Lanka from the European Union states ‘Member states are requested to ensure that this text is not made publicly available and is treated as a restricted document’. This hardly suggests an open and democratically accountable process.

4. Potential impact of the GATS on the electricity and water sectors

The actual impact of the GATS on the electricity and water services of countries has so far been minimal. Liberalisation of electricity services, and privatisation of both electricity and water services, are widespread, but this has been driven by factors other than GATS (see below). The relevance of the GATS agreement is its potential to lock countries into liberalisation and privatisation, making reversion to public provision illegal or extremely costly, and to restrict the ability of countries to regulate and subsidise these services.

This potential impact of GATS on the electricity and water sectors revolves around a number of issues of interpretation of key features of the agreement. These concern:

- the coverage of the sectoral classification
- the possibility of exemption of electricity and water services under various headings: the exemption for services provided under government authority, and the exclusion of government procurement rules
- distortions to public service provision as a result of the limitation on regulation to be ‘not more burdensome than necessary’, or the requirement to avoid subsidies which distort trade

4.1. GATS classification

4.1.1. Electricity: product or service

The classification of electricity and whether it is a good or a service has long been recognised as a difficult issue. The industry can be divided into four main sectors, generation, transmission (the high voltage network that takes power from power plants to centres of demand), distribution (the low voltage network that takes power from the transmission network to final consumers) and retail or commercialisation (sale of electricity to final consumers including purchase of wholesale power, billing and metering). Intuitively, while the latter three activities would appear to be services, generation seems more in the character of a product.^{xv} However,

until about the last decade, electricity was generally supplied by a single monopoly company supplying a given territory or tightly linked companies with non-competitive supply arrangements. For example, in many countries, generation/transmission companies supplied distribution/retail companies on a monopoly basis so the industry was not easily divisible. The drafters of GATT assumed electricity should not be classified as a commodity because it was not storable. Energy goods were also regarded as outside the scope of GATT on grounds of the exception relating to the conservation of exhaustible natural resources (Article XX:9g)) and on the national security exception (Article XXI).

The World Custom Organisation (WCO) Harmonised Commodity Description and Coding System (HS) classifies electrical energy as a product, although it is an optional heading in the WCO HS and WCO members are not required to classify it as a commodity for tariff purposes.

However, under reforms to the electricity industry ongoing in many countries, the industry is being 'unbundled' into its four component parts with distribution and transmission remaining regulated monopolies, and generation and retail becoming competitive activities. This raises the possibility that parts of the electricity industry be classified as a service subject to GATS, while others would be regarded as a product subject to GATT.

The WTO, in its 1998 background note, was concerned that there would be problems if electricity was part-product, part-service.^{xvi} It said:

It appears, however, that under the current WTO agreements the distinction between production (goods) and transmission/distribution (services) might create an imbalance in the application of multilateral trade rules to different liberalised segments of a previously vertically integrated market, especially with respect to establishment trade and restrictive business practices. The GATS provides legally binding rules (including MFN, national treatment, market access and domestic regulation) applying to the establishment of energy services suppliers, while at least for the time being there are no comprehensive rules on investment for goods. Moreover, the GATS also includes binding rules on monopolies and exclusive service suppliers and the legal framework to develop more regulatory disciplines touching upon important anti-trust issues, on the example of the telecommunications Reference Paper, while RBPs of goods manufacturers are currently out of the scope of the WTO Agreements.

It is not clear how this issue can be resolved. As is noted in section 4.3.1, discussions continue between countries on how electricity should be classified but ultimately, it cannot be a selection of countries that unilaterally decide.

4.1.2. Services classification: electricity and water supply

The GATS agreement itself is not restricted to any list of sectors: "classification issues do not affect the sectoral scope of GATS. GATS applies to all sectors of the service economy with the exception of air transport rights and services 'supplied in the exercise of governmental authority'^{xvii}."

However, there is a Services Sectoral Classification List, which is used for the purpose of making commitments under GATS. The classification identifies 12 categories of service, which include business services and environmental services – but nowhere does the list mention water supply or electricity generation, supply, or distribution.^{xviii}

Within environmental services, there are three subcategories: Sewage services, Refuse disposal service, and Sanitation and similar services. This is the only aspect of water and sewerage services mentioned in the classification: water supply itself is not mentioned.

Within 'business services', there are six subdivisions, including 'other business services'. Within this category, there are 20 further sectors, including 'services incidental to energy distribution'. This is the only specific mention of energy in the schedule of sectors. Energy services were not negotiated as a separate sector during the Uruguay Round. The WTO reports that 'though a few WTO members undertook sparse commitments in various energy-related services the vast majority of the global energy services industry is not covered by specific commitments under the GATS'.^{xix}

The GATS classification was based on the original UN provisional CPC. This did include, under 'services incidental to energy distribution', an explicit mention of core distribution and transmission activities, which was not however copied into the GATS classification. On the other hand, the provisional CPC **explicitly** excluded the "collection, purification and distribution services of water", from the environmental services section (9401), and classified it in the subclass 18000, as "natural water" – in the section on goods.^{xx} The current version of the UN CPC (1.1) – which has not been incorporated into the GATS classification – adopts a different approach. It created two new headings covering electricity distribution services, and gas

and water distribution services through mains - but placed them under the broad category of Trade Services, not under environmental services or business services. It confuses matters further by creating other, separate, services, of “Water distribution services through mains (**on a fee or contract basis**)”, and “Electricity distribution services (on a fee or contract basis)” and placing them in a new subcategory, Services incidental to electricity, gas and water distribution, which is even assigned to a different broad category, that of Business Services.^{xxi}

The GATS classifications list is in principle subject to change by agreement and negotiation. There has been one explicit but unsuccessful attempt to do so. In 2000, the EC proposed, unsuccessfully, changing the classification list so that it would explicitly include “Water for human use & wastewater management: Water collection, purification and distribution services through mains..” (roughly the sectoral definition created under another heading by the later UN-CPC).^{xxii} The classification itself

The classification thus creates uncertainty, in both directions. A recent presentation in April 2005 by World Bank and OECD officials^{xxiii} discussed the ‘inadequacy of the classification scheme, pointing out that “Services are only covered unambiguously when they can be clearly identified under an existing sectoral classification for which commitments have been entered”, highlighting in particular the omission or uncertain classification of ‘intermediate services’ such as a call centre or medical transcription services for hospitals.

The EC’s latest proposition (in 2005) implies a further possibility, that the classification could be extended by discussing public-private partnerships (PPPs) in elements of the service – such as engineering – which are included in the GATS classification even though the service of water supply itself is not included (see below, section 4.3.2).

4.1.3. Decisions of the Disputes Settlement Board (DSB)

Decisions of the Disputes Settlement Board (DSB) are relevant only when one country challenges another country over a commitment that has been made: but the effect of these rulings may be to alter the interpretation of the classification systems of the WTO. For example, a complaint was brought against the USA by Antigua and Barbuda that the USA had prevented Antigua and Barbuda from supplying gambling and betting services to the USA on a cross-border basis because the USA had committed ‘other recreational services’ under the GATS arrangements.^{xxiv} :

“The US maintained that it never intended to commit gambling, gambling never came up during negotiations over its commitments, and it defied common sense that the US government would have made a commitment in an area that is so sensitive and has been strictly regulated for such a long time. The United Nations and WTO classification codes used by most WTO members includes gambling under the category of “other recreational services”. While the US schedule [of commitments under the GATS] does not refer to these codes, the service categories it uses are similar. The Appellate Body ruled that if the US had wanted to exclude gambling from its commitments under “other recreational services”, it should have clearly listed this exemption on its schedule of commitments.”^{xxv}

Water or electricity could thus be implicated as a result of rulings by the Disputes Settlements Board, for example if the board made a ruling in such a dispute that ‘sewerage’ for example implicitly covered water supply as well, then that would undoubtedly have general consequences for the interpretation of the classification. This could also arise as a result of a dispute over commitments in other sectors which are themselves inputs into or part of the system of water or electricity services: for example, engineering, testing and analysis, urban planning, all of which are explicitly mentioned in the list.^{xxvi}

4.2. Possible exemptions, restrictions on regulation and subsidies

There is no relevant WTO case law on the relevance of the ‘government authority’ exemptions in these sectors. The criteria for deciding whether this exemption applies require proof of two conditions; that the service is “neither supplied on a commercial basis, nor in competition with one or more suppliers”. These criteria do not allow for argument over public interest, nor even over the general system of provision, so that some degree of commercialisation, or some instances of competition, may be enough to include a sector. A paper by Turk and Krajewski observed:

“The interpretation of “commercial” and “in competition” shows that the sectoral scope of GATS does not exclude particular service sectors because of their nature or because of a “public interest” in their supply. Rather, non-competitiveness and non-commerciality determine whether a service sector is covered by GATS. These characteristics describe the economic conditions of the supply of a service.”^{xxvii}

There is also no certainty on whether the various forms of contract used in these sectors – concession, lease, management and power purchase agreements – are considered as part of government procurement. This is especially so in the case of the various forms of public-private partnerships (PPPs): even EU law is unclear on the extent to which PPPs are covered by procurement regulations.^{xxviii}

There is at least uncertainty on whether water or electricity could be exempted under either heading. In which case, the various restrictions on public policies in the GATS agreement would apply (especially once a commitment was made in the sector). This could affect a number of policies, including public monopolies, or the introduction of new public service obligations.^{xxx}

There are also potential effects on water resources policy. Cross-border trade in water itself is not covered by the GATS agreement (but remains subject to the general principle of the GATT), but policies designed to protect water resources could be outlawed under GATS because they affect trade. For example, regulations designed to conserve water resources by limiting its uses for various purposes, including public consumption, or to control pollution, could risk being ruled unlawful because they interfere with trade.^{xxx}

An overview of the impact was offered in an October 2005 study of Mexico, Senegal and South Africa by the Overseas Development Institute. The paper considered that there was no observable impact at present in the countries studied, but that if a change in classification led to water being covered by GATS, the sector could be affected by at least four aspects: the principle of irreversibility, the requirement that restrictions on trade must be reasonable, uncertainty over whether water concessions would be covered by procurement (and so under separate rules from GATS), and uncertainty over whether water would be exempt as part of ‘government authority’ (see table). The GATS rules could thus impose real and potentially damaging constraints on a country’s ‘policy space’, especially the principle of irreversibility, because:

“Ongoing social, economic and political transformation in developing countries demands flexibility at all levels of government to vary the level of public and private involvement as appropriate to different steps of development. The GATS principle of ‘irreversibility’ (sometimes also called ‘lock-in’) seems to threaten this freedom. WTO Members can modify their schedules of commitments or withdraw any commitment, but in such circumstances any Member may ask for compensation which, if agreed upon, must be extended to all Members.”^{xxxi}

The following table presents the ODI view on the main questions. Despite the fact that ODI considers its position to be a ‘middle way’ between advocates and opponents of GATS, all their judgments emphasise the uncertainty created by the GATS rules.

Table 1. Will GATS rules constrain water policy options? ODI opinions

Note: emphasis in **bold added by PSIRU**

GATS rule	ODI view	ODI text
Subsidies	WTO rules under GATS are likely to apply to firm or industry-specific not economy-wide subsidies, i.e. not to subsidies for (poor) water consumers. [So, a scheme such as South Africa’s policy commitment to provide ‘Free Basic Water’ would probably not be impeded.
Irreversibility	Each country’s ‘schedule of commitments’ must explicitly define the circumstances in which the rule will not apply.	If, at the end of a 25 year concession involving a substantial delegation of functions to the private sector, the public authority decided, for whatever reason, it wanted to go back to a contract with a lesser delegation of functions, would it be entitled to reduce, to return, functions delegated to PSP without paying compensation? The answer seems to be that, if a GATS commitment had been made in the water sector with no specific limitations stipulating that freedom to reduce/return was being retained, then compensation would need to be paid (if challenged).
Unnecessary’ barrier to trade	<i>as above</i>	Among the weakest and most undeveloped elements of GATS are the specific obligations under Article VI that domestic regulatory measures affecting services trade must be administered ‘reasonably’, ‘objectively’ and ‘impartially’ and should not constitute ‘unnecessary’ barriers to trade (unintentionally or as disguised protectionism). The reference to ‘necessary’ disciplines has promoted concern that WTO panels would interpret this as ‘least trade restrictive’ .
Competitive Bidding	<i>as above</i> Not clear if participation in bidding processes for PSP contracts are or are not included under GATS as	A related issue is whether the right to participate in the bidding process for concession contracts amounts to granting market access, or if these would fall within the remit of government procurement (and so be excluded).

	'government procurement'.	
Governmental Authority	Technically services supplied 'in the exercise of governmental authority' are excluded from GATS, but it is not clear whether or not that applies to water services under PSP concessions.	An important element in the debate is that services supplied in the exercise of governmental authority are excluded from the scope of the GATS (Article 1:3). In the case of water services, the question arises as to the extent to which water services provided by the private sector operating under concessions could be excluded as essential government services. The degree of government funding varies across countries, depending on social and political preferences over the role of the state in their provision.

Source: Briefing Paper: Water and the GATS: Mapping the Trade - Development Interface October 2005^{xxxii}

There has been comparatively little specific analysis of its impact on the electricity sector. This is surprising, given that electricity is such a major service both in terms of its economic significance and also its importance to consumers. One notable exception is the analysis by Cho and Dubash,^{xxxiii} which reaches similar conclusions to the ODI study. It argues that committing the electricity sector to international investment under the GATS would shrink the policy space open to developing country governments and jeopardize the ability of national governments to promote sustainable development in the electricity sector. They argue that governments will need to use policy instruments that might conflict with international investment disciplines. They cite a number of examples where the use of such instruments has been successful in meeting sustainable development goals.

4.3. GATS negotiations on electricity and water since 2000

Since 2000, the Council for Trade in Services has met in Special Session several times a year, but it was not until March 2003, that electricity was mentioned as an explicit item on the agenda.^{xxxiv} Electricity and water did not seem to play a major role in the Cancún negotiations.

4.3.1. Electricity

The initial lack of interest in electricity services between 1995–9 led to pressure for greater commitments but since then only eight countries (or trading blocs) have submitted 'negotiating proposals'. In December 2000, the USA tabled a document intended to encourage discussion on services (Document 00-5556)^{xxxv} and to stimulate further commitments.^{xxxvi} It defined 'services incidental to energy distribution' as broadly as possible to include 'exploration, development, extraction, production, generation, transportation, transmission, distribution, marketing, consumption, management and efficiency of energy, energy products, and fuels'. The document sought to explain the lack of interest shown in the opening up of the energy sector by, for example, the dominance in many countries of nationally owned monopoly suppliers, and identified barriers to the opening up of the sector, such as discriminatory regulatory regimes.

The USA proposed a separate and comprehensive section in the GATS on energy that would include all activities in the energy chain, including electricity generation as a service rather than as a good, which meant that generation should come under the provisions of the GATS rather than the normal goods provisions of the GATT.

The European Union followed this up in March 2001 with a further discussion paper on energy services (Document 01-1425). Like the US paper, it preached the virtues of liberalisation and competition in the energy sector – 'a win-win opening up of national markets to competition and to foreign suppliers' – and exhorted signatories to the GATS to open up their electricity sectors. Like the USA, the EU took a very comprehensive view of the applicability of the GATS to electricity and energy in general.

Norway submitted a negotiating proposal in March 2001 (Document 01-1412) that covered several sectors including energy. Like the USA and the EU, it argued that energy production should fall under the auspices of the GATS and argued strongly for an opening up of the sector. Chile, in May 2001 (Document 01-2474), also in a document covering a number of sectors, supported the arguments put forward by the 'liberalizers', the USA, the EU and Norway.

Venezuela responded, also in March 2001, with a document that tried to promote the position of developing countries (Document 01-1552). It contradicted the US position that energy production should come under the GATS and stated that production should be seen as a good and come under the GATT. It also listed a number of provisions to protect developing countries. It stated:

- These negotiations should ensure that energy services are made accessible to as many people as possible, in order to improve their standard of living, and to as many industries, businesses and services as possible, in order to promote economic growth.
- The market opening resulting from the negotiations should help to increase the energy supply capacities of all members.
- Furthermore, the agreements resulting from the negotiations should help developing countries to achieve improved access to technology and, in general terms, to pursue services-related policies designed to increase the competitiveness of all their production sectors.
- Consequently, the results of the negotiations should enable countries which use the supply of energy services as an instrument for boosting their development and as a means of diversifying their economy and strengthening the private sector to continue to pursue and to consolidate these policies.

More specifically, it stated:

- The negotiations should respect the appropriate flexibility for individual developing country members to open fewer sectors, liberalize fewer types of transactions and progressively extend market access in line with their development situation, in accordance with Article XIX of the GATS.
- The negotiations should respect the developing countries' space to implement policies aimed at domestic capacity-building, in particular the capacity of their small and medium-sized energy service suppliers.
- The ownership and rights of access to and use of natural resources are issues that should not be addressed in these negotiations.

It did support the USA in calling for a separate energy classification to reflect the full range of activities in energy that were covered by the GATS.

A Japanese contribution in October 2001 (Document 01-4772) also supported the need for a specific classification of energy services and stated that energy production should not be seen as a service. The tone of this contribution was cautious to the opening of energy markets. It argued:

'When taking into consideration the following three points, i.e. countries with scarce energy resources; developing countries whose energy services industry is still at the developing stage; and the existence of differences in capital scale by country, energy security itself should continue to be of great importance in national energy policy. In particular, in light of the recent cases where liberalized markets have faced difficulties in supply, thus causing heavy burdens in a country in which regulatory reform of energy services is ongoing, it is also necessary to make efforts to ensure energy security and supply reliability when pursuing regulatory reform and business reorganisation.'

In March 2002, Cuba (Document 02-1500) broadly supported the Venezuelan position in its contribution, particularly stressing the need to take account of the special needs of developing countries.

The countries that had submitted proposals on energy services (USA, EU, Venezuela, Cuba, Norway, Chile and Japan) formed a self-styled 'energy friends group' that started meeting in 2001. After negotiations with the other seven members, in June 2003, Venezuela submitted a proposed detailed classification of energy services (Document 03-2883). It divided the sector into two parts, 'upstream' and 'downstream', with the downstream part of most relevance to electricity. Downstream services were split into three main sections:

- services for design, construction, and operation and maintenance of energy facilities, including networks,
- services for the commercialisation of energy, and
- other energy services.

Within these three main categories were eight further divisions, for example, 'operation and maintenance of energy networks', and 27 further subdivisions, for example, within 'operation and maintenance of energy networks', there is 'operation and maintenance of electricity networks'. Production of energy was excluded from these proposals.

A constant theme through all the contributions has been the need for strong regulatory bodies, although in the case of those advocating liberalisation, the objective is to ensure transparent and non-discriminatory rules, while in the case of those arguing a special case for developing countries, the objective is to allow countries to pursue domestic policy objectives.

Overall, it is clearly no coincidence that the strongest advocates of an opening of the energy sector, particularly electricity, are countries (or regions) such as the USA, the EU, Norway and Chile that have been amongst the most aggressive in opening their national markets to competition.

4.3.2. Water

In December 2000 the USA submitted a paper on environmental services. This highlighted the importance of pollution control and waste management, and criticised the current classification for failing to recognise how the industry operates, and failing to include some important sectors: “For example, the classification is focused on “end-of-pipe” clean up services, as opposed to today’s focus on engineering and designing for pollution prevention”. Water supply is not mentioned in the USA submission, but it concludes that “liberalisation should be sought for those sectors that are listed as environmental in the current WTO classification. Additional sectors that are related to the core environmental services sectors should also be subject to these discussions.” (Document 00-5553) ^{xxxvii}

This was followed, also in December 2000, by the EC submission which proposed revising the definitions of environmental services to include water. (Document 00-5633) ^{xxxviii} This revised and updated the previous EC proposal of 1999. It did not support the inclusion of design or construction work in the environmental sector, unlike the USA proposal, but focussed on a ‘purely environmental’ classification, with seven proposed sub-sectors including “Water for human use & wastewater management”, alongside solid waste management, and protection and cleanup of air, soil and water, noise and vibration, biodiversity and landscape, and other environmental services. The EC’s concern to include water for human use can be seen as a direct reflection of the fact that the dominant water multinationals are European, whereas USA companies have little market share in this sector.

In March 2001 Canada submitted a proposal which followed the USA path, advocating re-classification to include engineering and design, but not mentioning water (Document 01-1407). ^{xxxix} The Swiss proposal in April 2001 also proposed a new classification, agreeing with both the EC and the USA that “the classification currently in use is no longer adapted to present circumstances.” It followed the USA in proposing the inclusion of design and engineering, and followed the EC in proposing a series of subsectors concerned with solid waste, air, soil, noise, biodiversity – but pointedly not including water supply. The paper emphasised this by drawing attention to the fact that water supply is not included under environmental services because in the original UN classification it is assigned to ‘natural water’, which is not itself a service: “Exclusions: Collection, purification and distribution services of water are classified in subclass 18000 (Natural water)”. (Document 01-2363) ^{xl}. Australia then submitted a paper which declared ‘support, in principle’ for the EU approach, with reference to the classification by environmental media “air, water, solid and hazardous waste, noise, etc” but without explicitly agreeing with the inclusion of water supply. ^{xli}

In November 2001 a statement was submitted by Colombia. Unlike the others, this sets out an explicit case for privatisation of environmental services, arguing that although these services has been traditionally run by the state because of public interest and natural monopoly considerations, economic policies of the last 20 years had “led to the privatisation of services provided by state enterprises. The idea underlying this process is that a private enterprise management approach, in conjunction with a proper regulatory system, would lead to more efficient management in the provision of the service and ensure wider coverage... The provision of the services mentioned in paragraph 1 requires high levels of investment and expertise. Accordingly, the commercial presence of foreign enterprises in the provision of environmental services may be beneficial for the developing countries”. Colombia supported the EC proposed classification as ‘a useful working basis’, but made no mention of water supply. (Document 01-6059) ^{xlii}

In March 2002 Cuba made a submission, pointing out the importance of environmental services, agreeing that market opening could help developing countries if “the requisite conditions for ensuring the protection of health, safety and the environment have been established”, but then immediately arguing that “The process of liberalisation does not automatically enhance the competitiveness of the developing countries” because their capacity needs strengthening in order to compete with multinational companies. Therefore “Cuba is of the opinion that trade liberalisation in this field will only be able to strengthen domestic service suppliers if differential treatment is applied.... negotiations should take account of Members' right to regulate.... National capacity-building must be one of the guaranteed results of the negotiations on environmental services....[including] The real transfer, on a favourable commercial basis, of technologies which guarantee the required degree of competitiveness” (Document 02-1498) ^{xliii}

4.3.3. Water and PPPs

After a gap of nearly three years, a further communication on environmental services came jointly from the EC, USA, Australia, New Zealand, Japan, and Taiwan, who had discussed a number of issues amongst themselves. These included discussion of the scope for mode 1 (cross-border supply), classification of consultancy and engineering. More generally, the group said that the EC proposal had ‘served as a basis’, but did not state that the group agreed with all of it, and there was no mention of water supply. The paper then takes a new approach, noting that countries use various methods of provision of environmental infrastructure, including direct provision, exclusive rights to a public or private entity, various forms of public-private partnerships (PPPs), and direct supply to commercial customers. From this description, it is clear that water and sewerage services are implicitly covered by the proposal. The paper then raises three questions:

- “In which subsectors of environmental services are these forms particularly relevant? A more thorough examination of the subsectors that utilise PPPs and the various types of these partnerships would be useful in order to gain a more thorough understanding of the environmental services sectors.
- For those countries wishing to make commitments in services provided through various forms of public-private partnerships, what should such commitments look like? How can Members clearly indicate the existence of exclusive rights contracts while also indicating that foreign service providers can be granted national treatment for such contracts?
- Which types of activities or public-private partnerships are to be considered as government procurement under GATS Article XIII?” (Document 05-0581)^{xliv}

These proposals may represent a new way of seeking to apply the GATS to the water sector, where infrastructure is increasingly built using PPPs. These PPPs typically have the format of concessions or build-operate–transfer (BOT) arrangements, where a treatment plant, for example, is constructed by a private company and then operated for a 30 year period during which it is paid for the service and for a return on the initial investment. Such PPPs could be most obviously classified as engineering (and so covered), and then the water operating service attached to it becomes covered as well.

This line of thinking is confirmed by an OECD paper in 2005 which noted the limits of the environmental services definition in the GATS classifications,

‘The EC has also proposed that certain closely associated services could be subject to a special “cluster” or “checklist”, which could be used as an *aide-mémoire* during the other sectoral negotiations, and scheduled in the relevant GATS sectors other than the “core” environmental services categories. The EC proposal in effect updates the classification to better reflect the types of services provided by modern environmental companies and other countries have also used it, or similar, in submitting their offers in the current negotiations.’

The third question raises the relationship between PPPs and procurement rules, which clearly also raises the question how much of this potential trade could be regarded as exempt because of the procurement rule in GATS: the same issue is also a live question within the EU itself.

4.4. Progress on offers and requests

Very little information is published on commitments and none has been voluntarily published on requests to open sectors. The only substantive information on requests is the leaked schedule of requests made by the EU and published by the Canadian Polaris Institute.^{xlv} The World Development Movement (WDM) has published a detailed analysis of these requests.^{xlvi} It shows the requests made, by sector, to 109 members of the WTO. Twelve sectors are listed, including energy.^{xlvii} The EU requested 72 countries out of the 109 to open up the ‘water distribution’ sub sector in the current negotiating round. In 46 cases, the EU requested an opening of the energy sector, lower than most other sectors – for example telecoms (106 out of 109). In respect of low income countries, environmental services was the seventh most mentioned sector, requested in 34% of low income countries; energy was requested for just 15% of low income countries.

Table 2: Summary of GATS 2000 requests from the EU to the 41 low income country WTO Members (World Bank Definition)

Service sector	No. countries where sector has been requested	Percentage (of total no. low income requests)
Professional	21	51
Business	36	88
Telecommunications	38	93
Communication	3	7
Construction	17	41
Distribution	6	15
Environmental	14	34
Education	0	0
Financial	30	73
Health	0	0
Tourism	9	22
Culture	7	17
Transport	26	63
Energy	6	15

Source: WDM, 2003

There was a very poor response to the deadline for ‘offers and requests’.^{xlviii} Only thirty countries submitted requests before the June 30, 2002 deadline. The only full requests in the public domain are the leaked EU documents. Only fifteen member states made offers before the deadline of March 31, 2003^{xlix} and of these only five, Australia, Canada, New Zealand, Norway and the USA, have made their detailed offers public. The submissions of Australiaⁱ, Canada,ⁱⁱ and New Zealandⁱⁱⁱ did not include energy. Only the USAⁱⁱⁱⁱ and Norway^{lv} explicitly offered to open their energy sectors. The EU failed to reach agreement on its offers by the deadline and did not submit an offer until April 29, 2003.^{lv} There was no substantive reference to the energy sector in this document. The delay in reaching agreement between the member states of the European Union on what should go into the offer graphically illustrates that while making a request is a simple decision requiring no commitment, making an offer has far-reaching consequences.

If we look at offers in the energy sector made in the period 1995–9, the WTO database divides commitments on energy into four categories of countries:

- amongst developed countries only the USA and Australia made commitments and Australia’s commitments only covered ‘consultancy’ services,
- amongst developing countries, only the Dominican Republic made a commitment on energy,
- amongst least-developed countries, no commitments were made, and
- amongst transition countries, Hungary, Kyrgyz Republic, Latvia and Slovenia made commitments.

[water: to come. WTO database offline at present]

Comment [JB1]: Still to do

4.5. The Cancún Summit and subsequent developments

There are many interpretations as to what happened at Cancún in September 2003. However, with respect to the energy and water industries of the developing countries, three points are clear:

- No substantive agreements were reached at the Cancún Summit and world trade negotiations are stalled.
- The GATS negotiations are not currently a major battleground in trade negotiations.
- Developing countries showed far greater strength in negotiations than ever before, signalling that developed countries will have to offer much greater concessions than in the past if they are to reach agreement with developing countries.

The immediate sticking point in the negotiations appears to have been the so-called ‘Singapore Issues’, trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation. The Cancún Ministerial Conference ended on 14 September after Chairperson Luis Ernesto

Derbez concluded that despite considerable movement in consultations, members remained entrenched, particularly on the 'Singapore' issues.^{lvi}

Efforts began in October 2003 to re-launch the talks at an informal heads of delegation meeting at WTO headquarters in Geneva. Soon after, it was agreed that Hong Kong would host the next (6th) WTO Ministerial Conference, but no date was set. In November 2003, 12 African countries issued a statement calling for the resumption of trade talks. On December 15, 2003 at a WTO General Council meeting in Geneva, the WTO General Council Chairperson, Carlos Pérez del Castillo, stated:^{lvii}

'Members are willing to restart work in the negotiating groups, but there is still no major breakthrough.'

Since then, no substantive proposals on energy or water have been logged by the WTO.

4.6. EU and USA policies

It is clear that energy has not been a high priority in the GATS negotiations so far, with few countries making any commitments in this sector. However, energy is one of the most economically significant services and is also one of the most vital services in a modern economy. There has also been a strong trend, particularly in the EU and the USA, to accelerate liberalisation and deregulation of the electricity sector. Companies from the EU and the USA have been aggressive in moving into developing country energy markets. As a result, there is a strong movement driven by the USA and the EU, the two strongest trading blocs, to create a separate classification for energy services. This classification would be inclusive, bringing in parts of the electricity value chain such as electricity generation that are not self-evidently 'services'. The EU and the USA are also ideologically committed to a deregulated model for the electricity industry.

The EU in its proposal states:^{lviii}

'The latest steps in the liberalisation process have included the opening up to competition, subject to certain conditions, of the electricity and natural gas markets, which has resulted in significant price reductions for final consumers. The physical characteristics of these energy sources and the level of industrial concentration have led to the establishment of an appropriate regulatory framework, with the objective to avoid distortion of competition in the market. The process of liberalisation of the energy markets has, in particular, created new opportunities for the supply under competitive conditions of a large range of energy services, some of which were previously carried out in-house by the monopoly companies.'

In its proposal of December 2000, the US government states:^{lix}

'Competitive provision of energy services helps ensure that energy consumers have access to efficiently produced, market-priced, reliable energy. The availability of varied sources of energy at competitive prices, including access to supplies transmitted cross-border, contributes to a nation's ability to compete in the world marketplace. Competitive conditions in a nation's energy services markets enhance the competitiveness of domestic energy consumers as well as incentives for foreign investors to invest in both energy services and energy-consuming sectors. They also can benefit residential consumers and social services, as well as employment, through the beneficial impact on energy-dependent services and manufacturing sectors.'

So it is likely that 'electricity services' will be of growing significance in future GATS negotiations and there will be pressure on countries not only to liberalize their existing market structure, but also to deregulate the electricity industry. Given the evident difficulty, if not impossibility, of reversing GATS commitments, this raises the question does the deregulated, liberalized model for the electricity industry work better than the centrally planned monopoly-based structure that it replaces?

Water has also been the subject principally of discussions on classification, centred on the EC proposals for redefinition to explicitly include water supply. This has failed to command any general support, and the latest joint proposal from the EC and others implies that a different approach is now being adopted centred on the potential of PPPs. This reflects the general trend in water globally, where the multinational companies are now less interested in concessions for water supply services and more in various forms of management contracts or BOT contracts. It remains however a major potential market for the multinationals and so continued pressure can be expected from the EC in particular.

5. GATS and the reforms in electricity and water

5.1. Reforms to the electricity sector

Worldwide, there has been a strong trend in the past two decades for governments to carry out major reforms to the electricity sector. These reforms are described variously and often inaccurately as privatisation,

liberalisation and deregulation. In fact, these three terms describe three separate, potentially entirely separable processes and it is important to be clear what these three processes entail.

Privatisation involves the transfer of part or all of the ownership of the electricity from public to private ownership. Privatisation is also often used to describe the 'corporatisation' of electricity when the body providing the electricity service is changed from being a department of government to a commercial company, albeit still 100 per cent publicly owned.

Liberalisation generally involves the breaking of the monopoly in the sector to allow new companies in. In practice, this applies mostly to the generation part of the sector. In some cases, liberalisation is accompanied by the introduction of some form of competition so that generators have to compete with each other to sell their power, but competition is not a necessary part of liberalisation. For example, some countries of Europe of Europe, such as Germany, have passed so-called 'feed-in' laws for renewable power sources, which mean that companies can build renewable facilities and are guaranteed that the output will be purchased at a pre-determined price.^{lx}

De-regulation is generally used to mean a process that involves the introduction of competition to the generation part of the business and in some cases to the retail sector allowing some or all final consumers to choose their electricity supplier. The term de-regulation is used because prices should be set by the market rather than by regulatory authorities. Transmission (use of the high voltage national or regional network) and distribution (use of the local low voltage distribution network) invariably remain regulated monopolies. De-regulation is a misleading term because this process is often seen as requiring a more formal style of regulation and the markets created lead to their own regulatory requirements. 'Deregulation' is often accompanied by an increase in regulatory activity, so re-regulation would generally be a more appropriate term.

Liberalisation is a necessary pre-condition to de-regulation but liberalisation does not inevitably require deregulation. Privatisation is an entirely separate process with no necessary connection to liberalisation or de-regulation. For example, the Nordic electricity market covering Finland, Norway, Sweden and Denmark is widely acknowledged as the most successful competitive electricity market in the World, yet there has been little change in ownership with public ownership, at a local, regional and national level still the dominant mode. Equally, there has been strong criticism of Germany for its failure to introduce effective competition, yet the industry has always been dominated by private companies.

To examine the implications of GATS on electricity, it is useful to examine privatisation, liberalisation and de-regulation separately.

5.1.1. Privatisation

While the WTO is at pains to stress that 'the GATS does not require the privatisation or deregulation of any service', the intense pressure from the International Financial Institutions (IFIs) such as the World Bank is often irresistible, especially where loans essential for the local economy are conditional on privatisation. The effective irreversibility

However, even the World Bank acknowledges serious problems with its privatisation policies which it now acknowledges. In June 2004, the World Bank's chief economist, François Bourguignon, admitted "there was probably some 'irrational exuberance' in recent years on the potential benefits of privatisation"^{lxix}.

There are at least three specific problems with privatisation:

Difficulties of regulation.

Clearly a more formal and much tougher style of regulation is required than for a publicly owned company. This is to ensure that a private profit-maximising company, most likely foreign-owned does not exploit regulatory weakness to earn excessive profits. However, few developing countries have any culture of independent regulation and for many countries establishing such a body would divert valuable local resources from more productive uses. The World Bank blames many of the failures of privatisation on inadequate regulation: 'Regulatory weaknesses explain most failed attempts at infrastructure reform and privatisation in developing countries.'^{lxxii} Yet it acknowledges that for many developing countries establishing an effective regulatory body will be very difficult: this 'is likely to be a problem in environments with weak governance --as in most developing and transition economies.'^{lxxiii}

Lack of investors

For a privatisation policy to be successful, there must be a competitive field of companies with strong skills in the electricity sector. This will not only help ensure that the sector is in the hands of a competent company, but should also help ensure that the price received for privatisation is a fair one. However, the past five years has seen the withdrawal of almost all the US companies from overseas markets, while most of the European companies are not attempting to expand outside their home markets. This leaves a very small field of potential buyers for any attempted privatisation. The promise that privatisation would result in the electricity sector being operated by strong skilled companies with easy access to investment funds now seems hard to justify

Public unpopularity

The World Bank acknowledges that privatisation is now very unpopular in many developing countries (disapproval rates in excess of 80 per cent in some regions) but makes the presumptuous assumption that this is because of regulatory weakness ('This dissatisfaction with privatized utilities is not due to their ownership structure, but rather to the weakness of institutions charged with regulating them.'^{ixiv}).

The World Bank even tacitly acknowledges that consumers should not expect lower prices as the result of privatisation. Michael Klein, Vice President for the joint World Bank/IFC Private Sector Development department and IFC Chief Economist says: 'Many countries can benefit from careful privatisation of services if they do things right and don't oversell the benefits.'^{ixv}

5.1.2. Liberalisation

Liberalisation was the preferred policy of the World Bank in the 1980s and early 1990s for enabling developing countries to expand generation through providing loans to independent power producers (IPPs). This was based on experience in the USA with the 1978 PURPA (Public Utilities Regulatory Policy Act). This required that utilities buy power from small generators and from generators using renewable energy sources at the 'avoided' generation cost: in other words, the cost they would have had to pay if the power had come from their own power plants. Experience with this act seemed to show that independent generators could often provide power more cheaply than traditional utilities and seemed to show benefits in breaking the absolute generation monopoly of traditional generation utilities. Superficially, this policy was attractive to developing countries, especially those that had difficulty raising the money to finance new investments through their existing generation company. It targeted the money at the main priority and provided the money to western companies who should have been efficient. In practice, IPPs require binding power purchase agreements (PPAs) from the local utility, usually to buy all the output of the IPP at a pre-determined price, usually in dollar terms.

This requires the existence of a strong local utility that can incorporate the output of the IPP into its output, providing the flexible power plants, to ensure demand is met. The inflexibility of IPP PPAs means that IPPs can only be a marginal source of power. The indexation to western hard currency has left many utilities from countries where the value of the local currency has declined steeply, in a position of being forced to buy the output of an IPP even when the utility's own plants could generate at a small fraction of the cost of the PPA. In some cases, western companies have exploited the weakness of local regulation. The 'currency risk' is not something that can be avoided and the cost will inevitably be borne by final consumers. If the cost of the PPA is in dollars, they will pay directly in the cost of power, while if the PPA is not denominated in dollars, it will appear as a risk premium on the cost of borrowing for the investment (the loan to the IPP will be at higher interest rates to reflect the extra risk the developer and hence the financier is bearing).

As these problems became clearer, the possibility of de-regulating the electricity industry using the 'British Model' (see below) became apparent and the World Bank's focus changed from promoting IPPs to a much more radical reform package. Nevertheless, IPPs are still financed and given the problems now being experienced with de-regulation may assume a more important role in the World Bank's policies in future. As with privatisation, the withdrawal of the European and US utilities from markets outside their home or contiguous territories means that IPPs are not a practical option in most cases.

5.1.3. Deregulation

The reforms undertaken to the British electricity industry in 1990, which themselves owed something to reforms to the Chilean electricity industry, were quickly seen as highly successful and a model to emulate in almost all circumstances. While the prestige of the British reforms is still high, an in-depth analysis of the new system suggests that the benefits have been seriously over-stated and that in the long-term, the ideals of the British Model are not sustainable or even achievable.^{ixvi} The main criticisms are that wholesale markets

will not provide long-term security of supply; that retail competition will disadvantage small consumers; and that the costs of competition will be greater than any benefits.

The three main elements of the British Model are:

- Introduction of a wholesale market. In the British case, this was a universal market that all generators had to sell their power through;
- Introduction of retail competition so that at least some final consumers could choose their electricity retailer;
- Setting up an independent regulatory body to oversee the operation of the markets and to set the prices for the remaining monopoly parts of the business, transmission and distribution; and
- Unbundling of the network so that the owners of the network were independent of the companies generating power and retailing to final consumers and would therefore be expected to provide non-discriminatory access to the networks to all competing generators and retailers.

One other element, privatisation of publicly owned companies was, as argued above, an entirely independent change, but was invariably part of any World Bank reform package. The British Model seemed to provide a flexibility that the IPP model did not and was portrayed as allowing developing countries to take advantage of the skills and access to finance that the large Western utilities could provide. In some cases, such as Brazil, Colombia and Ukraine, the World Bank facilitated the use of consultants (Coopers & Lybrand) to recommend a structure and mechanisms.

In practice, the competitive elements of the model were generally highly diluted. Generators were given long-term contracts and retail competition was extended at most to only the largest industrial consumers. Regulatory bodies also struggled to come to terms with international players such as Enron, who clearly placed a much higher priority on maximising their profits than on providing a good service to the countries involved. Privatisation was also often not possible where utilities had significant debts or where the commercial prospects seemed poor. Many of the World Bank inspired reforms ended up as a travesty of the British Model.^{lxvii}

As with privatisation and liberalisation, the withdrawal of the European and US utilities from markets outside their home or contiguous territories means that introducing the British Model, where it requires privatisation, is not a practical option in most cases.

5.2. Reforms in the water sector

The 1990s was the decade of water privatisation which was expected to bring greater efficiency and lower prices, attract greater volumes of investment, especially in developing countries, and extend water and sanitation to the unconnected poor. The expansion of the private water companies in the 1990s was supported by the World Bank and other international institutions as part of policies to transform developing and transition countries into more market-oriented economies.

It entered the transition countries of eastern Europe with a wave of water concessions: in the Czech republic and Hungary; in Latin America, especially Argentina, where a series of major cities were privatised, including the “flagship” concession of Aguas Argentinas in Buenos Aires; in Asia, including the privatisation of two major cities, Manila and Jakarta; and in Africa, where concessions were obtained in former French colonies, notably Cote d’Ivoire, as well as a few towns in South Africa. By the time of the World Water Forum at The Hague in 2000, senior World Bank officials were presenting water privatisation as historically inevitable, using the phrase “there is no alternative”.

Privatisation of water supplies and sanitation has taken various forms but has the constant element of transferring control and management of operations to private companies, thus making them sources of profit for private capital. Complete sale of the water system to private companies has been introduced in the UK, but elsewhere the form of privatisation promoted has been based on privatisation through concessions, leases or management contracts (or special forms of concession for treatment plants or reservoirs, known as “build-operate-transfer” schemes (BOTs)). The precise form has been dictated by the private companies; in the early 1990s, concessions were the favoured form but, since 2000, companies have preferred the less risky options of leases or management contracts. Variations on these themes include joint ventures with public authorities, which have to be structured to provide the private partner with the necessary freedom to achieve returns, and so are invariably controlled by the private partner. Other phrases – including “public-private partnerships” (PPPs) and “private sector participation” (PSP) – avoid the word “privatisation”, which has

become an increasingly unpopular concept, but they still refer to the same kinds of contractual relationship with the private sector.

The unpopularity of the concept of privatisation has been caused largely by experience of the results, which have been different from what was promised. Companies have failed to invest as much as was hoped; private investments in infrastructure were falling by the end of the 1990s and investment by development banks was also decreasing. Prices have risen to reflect the returns on capital required by companies. When targets specified in contracts have not been met, contracts have been revised rather than enforced. Regulators have lacked the authority and competence to control companies' behaviour. The contradictions have been made more acute by currency movements and economic crises: the privatised water operations in Argentina are now bankrupt.

Despite all the attention and support given to private water concessions in Latin America, they performed no better than public sector operators in terms of expanding services to the poor. Manila and Jakarta, two large Asian cities with private operators, have worse levels of water loss than the large majority of cities where water is publicly managed. Finally, there is strong and growing opposition to water privatisation in developing countries, from consumers, workers, environmentalists, other civil society groups and political parties.

Faced with poor returns, unexpected risks, and political opposition, water multinationals have decided to cut their losses. In January 2003, Suez, the largest multinational, announced it would withdraw from one third of its existing investments in developing countries, and Veolia and Thames Water are also withdrawing from contracts. All three are using political and legal action to recoup losses and claim anticipated profits.

The theory of PPPs in the water sector relies on the reform of governance, for example through the introduction of regulation of prices and outputs or the monitoring by local government retaining a shareholding in the operating company. In practice, regulation does not meet the expectations because of unequal capacity of public authorities. This asymmetry of capacity can be observed not only in developing countries but in France itself, the home of the PSP model and the dominant multinational companies. In 1997, a report by French audit body Cour des Comptes^{lxviii} repeatedly emphasised the disparity between the local authorities and the three giant companies dominating the national water market, which resulted in inadequate monitoring of privatised operations. Le Monde commented that the French system of delegated management "left elected councillors on their own, without support, to deal with conglomerates wielding immense political, economic and financial power"^{lxix}. A study on the PPP set up in Cartagena (Colombia) by Suez concluded that: "The Municipality of Cartagena lacks the minimal technical support in its negotiations within the joint venture. To all intents and purpose it is a "sleeping" partner. However, by wilfully neglecting capacity building for its own organisation, the municipality is running the risk of very negative consequences for the long-term sustainability of the partnership"^{lxx}.

There have been a number of convictions for bribery to obtain water contracts, involving executives of subsidiaries of both Suez (formerly Lyonnaise des Eaux) and Veolia (formerly Générale des Eaux). These convictions have happened in developed countries, where institutional strength and the available resources allow corporate corruption to be tackled more effectively than in poorer countries.

This experience means that in 2005 there is little enthusiasm for water privatisation – and liberalisation in the water supply sector is not meaningful.

6. Other mechanisms for liberalisation and privatisation of water and electricity

Apart from the GATS negotiations, there are an increasing number of other mechanisms through which countries enter into commitments, or are subject to pressures, which affect trade, liberalisation and privatisation in these sectors. These include the legal framework of the European Union (EU), which is mandatory for all 25 member states and those in the accession process; the EU's neighbourhood policy, which creates a series of trade agreements with 17 countries on the borders of the EU; the continued conditionalities attached to international aid; and the pressures exerted by the multinational companies in these sectors. There are also potential impacts from a number of regional trade agreements such as North American Free Trade agreement (NAFTA) and proposed agreements such as the Free Trade Agreement of the Americas (FTAA).

6.1. Electricity and water in the EU

Electricity and gas supply in the EU is liberalized under EU laws introduced in the 1990s. Under these laws all countries had to unbundle state monopolies, and create a liberalized sector by making wholesale and retail competitive markets.

Water is not the subject of liberalisation directives in the EU. There have been a number of initiatives by the European Commission attempting to introduce liberalisation in various ways. These include most recently the draft Services Directive, which has failed to be approved by the European parliament, which specifically rejected the notion of water privatisation. The EU has also sought to encourage PPPs in the water sector. The great majority of EU countries however retain public sector provision of water.

The ideology of GATS also influences policy-making in general in respect of all public services in the EU. GATS was referred to in the EC's green paper on services of general interest,^{lxxi} as one of four 'policy instruments' which would provide the framework for European public services, possibly through a 'framework directive' on public services.

6.2. EU Neighbourhood policy

The EU neighbourhood policy (ENP) was introduced in 2003. It is intended to formalize relations with neighbouring countries, but without offering the prospect of future full membership. The 17 countries covered by the ENP are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority of the West Bank and Gaza Strip, Russian Federation, Syria, Tunisia, and Ukraine. Under the ENP, the EU develops action plans, with each country. Its objectives include developing EU regional security policies, encouraging good governance, and extending some of the principles of the EU, notably the internal market. The action plans supplement the existing agreements with ENP countries.

Liberalisation of trade in services is already one of the EU's central priorities for the Euromed partnership in developing the Euro med free trade area (EMFTA): "the liberalisation of trade in services and investment constitutes a key priority for regional integration and co-operation in the Mediterranean basin".^{lxxii} In May 2005 the EC view of the priorities of the partnership for the next five years placed the liberalisation of services at the centre of this: "The liberalisation of trade in services and establishment is an objective that is provided for by the Association Agreements with all the EU's Mediterranean partners.....Services liberalisation, in requiring comprehensive domestic reforms, also contributes to domestic economic adjustment and reform....."^{lxxiii} (p.6)

The neighbourhood policy is explicitly seen as a way of getting services liberalisation faster than the GATS negotiations, as well as imposing restructuring of infrastructure sectors. A 2005 paper produced by a joint World Bank-EC project on Private Participation in Mediterranean Infrastructure^{lxxiv} argues that regional trade liberalisation "might be easier to negotiate", allowing progress even if the WTO talks are stalled. Services liberalisation is seen as key, not only for efficiency and growth but also because it demands restructuring of the public sector: "liberalisation of trade in services require very similar reforms as those needed for the sake of domestic economic adjustment (e.g. liberalisation of market access, elimination of red tape, break-up of state-owned monopolies)". The regional initiative is seen as 'topping up' the GATS process in "sectors where the GATS framework is poorly developed (e.g. air transport and electricity)".

A number of the action plans contain commitments to liberalise trade in services, regardless of progress in the GATS negotiations. Obligations are placed on Moldova and Ukraine to deliver "Gradual abolition of restrictions to progressively allow the supply of services between the EU and Moldova/Ukraine in certain sectors, in line with WTO and PCA commitments in Title IV, Chapter III (Cross-border supply of services). Both countries are required to "... to complete a review of national legislation ... so as to identify barriers to the provision of services" – for Moldova "with the aim of abolishing them.....", for the Ukraine, with the "Removal of obstacles identified, taking into account WTO services commitments. The objectives for Morocco also include "La négociation d'un accord de libéralisation des échanges dans le domaine des services"; Tunisia is required to "progressively eliminate restrictions of trade in services between the EU and Tunisia in a significant number of sectors and to negotiate an agreement on liberalisation of trade in services in line with article V of GATS" "and to contribute to the Euromed discussions on services "with the objective of concluding a free trade zone for services in line with article V of GATS".

Other provisions of the action plans concern limits on state aid, and specific sectoral; strategies, especially in energy. Moldova and Ukraine are expected to deliver "Gradual convergence towards the principles of the

EU internal electricity and gas markets". Jordan gets an explicit promise of EIB funding for infrastructure investment, as part of a requirement for sector liberalisation and "interconnection with EU networks....."

6.3. Bilateral treaties and agreements

Since the 1990s there has been a steady growth in Bilateral Investment Treaties (BITs), usually between an OECD country and a developing or transition country, which set out various rules intended to facilitate foreign direct investment and trade. The core provisions of these treaties usually concern basic protection of investors, including their rights to extract profits and to claim compensation, frequently including provision for international arbitration. These legal rights have led to an increasing number of compensation claims: over 50 countries have faced investment treaty claims from foreign investors.^{lxxv}

The agreements may allow investors to claim compensation for various measures taken in the public interest: "There is a real concern that treaty obligations to provide compensation for 'indirect' forms of expropriation might entrap certain legitimate public interest regulations which happen to infringe upon the profitability of a foreign investment."^{lxxvi}

In addition, they may be used to achieve liberalisation of trade that is not achievable through multilateral negotiations (such as GATS), and this is in some cases an explicit objective: for example, Japan states that such free trade agreements "offer a means of strengthening partnerships in areas not covered by the WTO and achieving liberalisation beyond levels attainable under the WTO."^{lxxvii}

Such agreements frequently contain clauses restricting national policies, for example in relation to state aid. This may create serious constraints on government policies in relation to public services and in relation to positive discrimination. In some cases, countries may be able to negotiate a protective clause, such as the case of the BIT between South Africa and the EU where a clause prohibiting state aid that distorts trade is made subject to the exemption for any aid or subsidies which "support a specific public policy objective or objectives of either party"^{lxxviii}. The danger of BITs however is that such a clause negotiated by a relatively strong country may not be replicated in other BITs with weaker countries.

6.4. Conditionalities

As discussed in the section on reforms in water and electricity, conditionalities imposed by international financial institutions and donors remain a crucial driver of liberalisation and privatisation in these sectors.

By the beginning of the 1990s, and ever more so throughout the decade, the World Bank as part of its general movement towards privatisation and liberalisation adopted an increasingly strong position in favour of privatised water and energy. This policy preference was promoted in various ways, through Bank reports, support for joint initiatives (such as the GWP, WWC) with the water multinationals, and through a range of types of conditionalities. For example, the Private Sector Development (PSD) Strategy that was approved in February 2002, makes it clear that the Bank would continue to pressurise countries to privatise through the use of 'policy-based lending'^{lxxix} – a euphemism for conditionality.^{lxxx lxxxi} Loan conditions requiring or encouraging water privatisation and cost recovery have been widely used by international donors, especially in Africa, and in the most indebted developing countries.^{lxxxii} In July 2003 a review of policies on infrastructure^{lxxxiii} acknowledged problems with the WB's focus on private sector in both energy and water, and its lack of attention to the actual needs of countries. World Bank officials said that the bank was now 'agnostic' on water and energy privatisation and engaged in soul-searching.^{lxxxiv}

Despite these acknowledgements, the Bank itself and others continue to pursue policies linking their aid to privatisation and/or liberalisation in these sectors. One clear example is the World Bank's country assistance strategy for India, which was laid down in late 2004.^{lxxxv} This document (based on a formal partnership with the UK development agency, DFID) has investment in infrastructure, including the power sector, as its top priority. The strategy paper confirms that assistance will be provided 'selectively', focussing on states which undertake "comprehensive reforms", and privatisation is a central and recurrent aspect of this selectivity:

"The Bank Group has advocated complementary strategies for the state power sector as follows: Facilitating serious, long-term; private sector involvement in improving and expanding services, which in the next few years means: (i) focusing on the steps which would eventually allow the relatively commercially viable segments of the distribution network to be privatized successfully; (ii) increasing private investment in transmission; and in parallel; (iii) developing alternative strategies for improving services and targeting subsidies in rural areas..... Improving SEB performance, pending privatisation, particularly through: (i) advancing SEB unbundling... " (p.32)

“ Bank engagement in the power sector at the state level is premised on the view that..... its lending... must be linked to real progress in reform - both in terms of improved financial performance, and in terms of irreversible structural and governance changes. Eventually, in states that move forward with well-designed privatisation transactions and the facilitation of new entry - the Bank Group would be able to offer a variety of forms of support, depending on local needs and conditions and the response of private investors.” (p.32)

“The analysis of the Bank Group is that in the power distribution and transmission, road, water and sanitation and solid waste sectors, involvement of the private sector needs to be encouraged through a variety of models including public private partnerships. The Bank Group is well placed to promote PPPs by realizing strong synergies between the Bank and the IFC to support infrastructure development. The Bank can promote policy, regulatory, and institutional reforms in the infrastructure sectors to help create a more enabling environment for private investment. These reforms will be supported through the Bank's state-level adjustment lending and sector investment lending, and should help encourage private entry, mobilize private risk capital and facilitate competition. IFC will support pioneering private or public-private transactions by: i) providing equity and long-term debt ; ii) using guarantees and the B-loan program to mobilize financing from domestic and international lenders; iii) developing the local capital markets by introducing credit enhanced long term bonds and securitisations and iv) assisting domestic and foreign sponsors to pursue opportunities in the infrastructure sector” (Annex 7, p.9)

The ways in which conditionalities are applied are also now more complex. Firstly, aid is increasingly channelled by international mechanisms and institutions, tied to general policies requiring the sectors to be opened to the international business community. This has the effect of moving decision-making to the international level, where the influence of multinational companies is at least as strong as it is on national governments. Democratic accountability is also weaker, because the connection to elected parliamentary representatives is indirect. Secondly, instead of the conditions benefiting companies in one country, the benefit is attached to the international private sector as a whole.

6.5. Multinational pressures

A consistent driving force behind all the other measures is the pressure from multinational companies in these sectors to extend their markets. This extension covers two dimensions: extending into new countries by opening the markets in those countries, and extension into services previously run by public enterprises involves ending public monopolies and encouraging privatisation. Liberalisation of trade is an instrument that helps achieve both goals.

Despite the withdrawal of multinationals from privatisations that have provide too risky and unprofitable, the companies remain committed to finding new ways of restructuring the way services are organized in these sectors in order to create new and reliably profitable forms of these markets. These companies continue to influence international policy-making bodies, including the European Commission, the World Bank, other development banks, the WTO, the OECD, and donor governments. The GATS discussions should thus be seen as just one arena in which this pressure is being exercised.

7. Hong Kong agreement, impact on services, energy targeted by EC.

The GATS and services were not prominent at WTO meeting in Hong Kong in December 2005, but the final declaration stated that “We are determined to intensify the negotiations in accordance with the above principles and the Objectives, Approaches and Timelines set out in Annex C to this document with a view to expanding the sectoral and modal coverage of commitments and improving their quality.”^{lxxxvi} (The text of Annex C is appended to this paper also as an annex)

The most significant element of Annex C is the creation of a mechanism for plurilateral negotiations, whereby groups of countries can establish discussions on sectors in which they are interested: “Any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply” (Annex C, para 7). The text now states “Members to whom such requests have been made shall consider such requests”, instead of earlier versions which made responses obligatory, but this still creates a new vehicle for pressurising countries into discussing commitments in specific services. The Annex (para 12) requires proposals for plurilateral meetings to be submitted by 28th February 2006.

The inclusion of Annex C and the new plurilateral process is seen as a defeat for the ‘G20’ position, which was firmly opposed to plurilaterals. A group of seven countries, including South Africa, Cuba, Indonesia, Kenya, Philippines, and Venezuela stated that the annex could not be a part of the final declaration, but this statement was never circulated.^{lxxxvii} It has been suggested that the inclusion of the annex was one of the

tradeoffs for incorporating Brazil and India into the leading group of decision-making countries at the WTO.^{lxxxviii} A similar view was taken by the Coalition of Service Industries, which represents USA business interests and is dedicated to the reduction of barriers to US services exports. It hailed the outcome on services for providing “a useful new impetus for serious negotiations early next year . . . among like minded countries who want to make progress in sectors like express delivery and logistics services, telecommunications, computer and related services, financial services, energy services, audio visual services, and legal and accounting services . . . The agreement on plurilateral negotiations, and on dates for submitting additional requests and offers, fulfil US stated objectives at the outset of the Ministerial”.^{lxxxix} In mid-February 2006, however, the WTO services division was reported as saying that Hong Kong had brought little progress on services at Hong Kong, pointed out that countries are not obliged to submit any requests or offers, and that “the situation is worrying . . . delegations do not agree on a common denominator: there are very different levels of ambition”.^{xc}

A leaked memo^{xci} includes indications of subsequent events in February 2006, including a new “Statement on services of common interest in the energy sector” from the European Commission, supported by the USA, Canada, and Australia etc. The paper called for “a high level of liberalization in this sector”. The memo says that the EC “hopes that this declaration will become a joint request”. Energy was also one of five sectors on which agreement was reached after a meeting on services.

8. Conclusions

The GATS provisions of the WTO clearly have major potential implications of both sectors. The definitional limitations can be overcome, and there are new ways of ‘invading’ these sectors, e.g. through provisions regarding PPPs or sub-sectors.

However, the GATS is not so far the principle driving force of the liberalization and privatization affecting water or energy. In both sectors, the key drivers are the policies of the IFIs and donors – most crucially the World Bank and other development banks – and the activities of the multinational companies in these sectors.

In developing policy in this area it is therefore appropriate to address the sectoral issues, developments and campaigns not only around GATS but also in the sectors themselves.

8.1. Potential policy arenas for Practical Action

8.1.1. Support for protection of energy, water and public services from GATS

PA could add its support to the other organisations campaigning to ensure that the WTO mechanisms, especially the GATS, are not used to force privatisation or liberalisation in these sectors, or other public services. The most general UK-based coalition focussing on WTO issues in general, including the GATS, is the Trade Justice Movement at <http://www.tjm.org.uk/>, with over 70 members including a full range of NGOs, including Oxfam, Action Aid, WDM, Friends of the Earth, and trade unions including Unison and the TGWU.

8.1.2. Initiatives to develop public sector alternatives

There are some initiatives aimed at developing new policy approaches on these sectors. PA could explore the supporting joint action or projects with these initiatives.

- In electricity: The Electricity Governance Initiative is an attempt to develop a systematic way of assessing good, accountable, transparent forms of governance in the electricity sector. It has been developed by the World Resources Institute (WRI) and Indian institutes Prayas and NIFP <http://electricitygovernance.wri.org>
- In water: there are initiatives to build networks of campaigns on water reform issues. These include work by Transnational Institute on reclaiming public water (see www.tni.org), and also efforts to develop partnerships and networks between public sector water operators (contact Antonio da Costa Miranda Neto of Assemæ, the Brazilian water association: amirandaneto@yahoo.com).
- Public services in general: The GAPS campaign is an initiative explicitly aimed at building commitments to public services to counter-balance the drive towards commitments on trade

liberalisation. It is winning support from a number of organisations, including PSI (as part of its own initiative on Quality Public Services). See www.world-psi.org for links to both campaigns.

8.1.3. Resourcing global and local initiatives

There is increasing interest at global level - from civil society, governments and even IFIs - on ways of developing electricity and water as public services and economic infrastructure without necessarily involving the international private sector.

There are a number of cases in developing countries where communities or civil society groups want to develop their own community-based provision of water or electricity, through public authorities or cooperatives. These could benefit from technical and other support.

PA could seek to promote the development of key elements of local public service provision in water and energy, including management of natural resources and environment, developing public authorities with financial capacity, and building technical capacity of local labour. This could be supported either as a general position or through specific projects.

9. Annex: Hong Kong Declaration Annex C on services

Annex C: Services

Objectives

1. In order to achieve a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing country Members, we agree that Members should be guided, to the maximum extent possible, by the following objectives in making their new and improved commitments:

(a) Mode 1

- (i) commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members
- (ii) removal of existing requirements of commercial presence

(b) Mode 2

- (i) commitments at existing levels of market access on a non-discriminatory basis across sectors of interest to Members
- (ii) commitments on mode 2 where commitments on mode 1 exist

(c) Mode 3

- (i) commitments on enhanced levels of foreign equity participation
- (ii) removal or substantial reduction of economic needs tests
- (iii) commitments allowing greater flexibility on the types of legal entity permitted

(d) Mode 4

- (i) new or improved commitments on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect *inter alia*:
 - removal or substantial reduction of economic needs tests
 - indication of prescribed duration of stay and possibility of renewal, if any
- (ii) new or improved commitments on the categories of Intra-corporate Transferees and Business Visitors, to reflect *inter alia*:
 - removal or substantial reduction of economic needs tests
 - indication of prescribed duration of stay and possibility of renewal, if any

(e) MFN Exemptions

- (i) removal or substantial reduction of exemptions from most-favoured-nation (MFN) treatment
- (ii) clarification of remaining MFN exemptions in terms of scope of application and duration

(f) Scheduling of Commitments

- (i) ensuring clarity, certainty, comparability and coherence in the scheduling and classification of commitments through adherence to, *inter alia*, the Scheduling Guidelines pursuant to the Decision of the Council for Trade in Services adopted on 23 March 2001
- (ii) ensuring that scheduling of any remaining economic needs tests adheres to the Scheduling Guidelines pursuant to the Decision of the Council for Trade in Services adopted on 23 March 2001.

2. As a reference for the request-offer negotiations, the sectoral and modal objectives as identified by Members may be considered¹.

3. Members shall pursue full and effective implementation of the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services (LDC Modalities) adopted by the Special Session of the Council for Trade in Services on 3 September 2003, with a view to the beneficial and meaningful integration of LDCs into the multilateral trading system.

4. Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles X, XIII, and XV in accordance with their respective mandates and timelines:

- (a) Members should engage in more focused discussions in connection with the technical and procedural questions relating to the operation and application of any possible emergency safeguard measures in services.
- (b) On government procurement, Members should engage in more focused discussions and in this context put greater emphasis on proposals by Members, in accordance with Article XIII of the GATS.
- (c) On subsidies, Members should intensify their efforts to expedite and fulfil the information exchange required for the purpose of such negotiations, and should engage in more focused discussions on proposals by Members, including the development of a possible working definition of subsidies in services.

5. Members shall develop disciplines on domestic regulation pursuant to the mandate under Article VI:4 of the GATS before the end of the current round of negotiations. We call upon Members to develop text for adoption. In so doing, Members shall consider proposals and the illustrative list of possible elements for Article VI:4 disciplines².

Approaches

6. Pursuant to the principles and objectives above, we agree to intensify and expedite the request-offer negotiations, which shall remain the main method of negotiation, with a view to securing substantial commitments.
7. In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis. These negotiations would be organized in the following manner:
- (a) Any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply.
 - (b) Members to whom such requests have been made shall consider such requests in accordance with paragraphs 2 and 4 of Article XIX of the GATS and paragraph 11 of the Guidelines and Procedures for the Negotiations on Trade in Services.
 - (c) Plurilateral negotiations should be organised with a view to facilitating the participation of all Members, taking into account the limited capacity of developing countries and smaller delegations to participate in such negotiations.
8. Due consideration shall be given to proposals on trade-related concerns of small economies.
9. Members, in the course of negotiations, shall develop methods for the full and effective implementation of the LDC Modalities, including expeditiously:
- (a) Developing appropriate mechanisms for according special priority including to sectors and modes of supply of interest to LDCs in accordance with Article IV:3 of the GATS and paragraph 7 of the LDC Modalities.
 - (b) Undertaking commitments, to the extent possible, in such sectors and modes of supply identified, or to be identified, by LDCs that represent priority in their development policies in accordance with paragraphs 6 and 9 of the LDC Modalities.
 - (c) Assisting LDCs to enable them to identify sectors and modes of supply that represent development priorities.
 - (d) Providing targeted and effective technical assistance and capacity building for LDCs in accordance with the LDC Modalities, particularly paragraphs 8 and 12.
 - (e) Developing a reporting mechanism to facilitate the review requirement in paragraph 13 of the LDC Modalities.
10. Targeted technical assistance should be provided through, *inter alia*, the WTO Secretariat, with a view to enabling developing and least-developed countries to participate effectively in the negotiations. In particular and in accordance with paragraph 51 on Technical Cooperation of this Declaration, targeted technical assistance should be given to all developing countries allowing them to fully engage in the negotiation. In addition, such assistance should be provided on, *inter alia*, compiling and analyzing statistical data on trade in services, assessing interests in and gains from services trade, building regulatory capacity, particularly on those services sectors where liberalization is being undertaken by developing countries.

Timelines

11. Recognizing that an effective timeline is necessary in order to achieve a successful conclusion of the negotiations by [...], we agree that the negotiations shall adhere to the following dates:

- (a) Any outstanding initial offers shall be submitted as soon as possible.
- (b) Groups of Members presenting plurilateral requests to other Members should submit such requests by 28 February 2006 or as soon as possible thereafter.
- (c) A second round of revised offers shall be submitted by 31 July 2006.
- (d) Final draft schedules of commitments shall be submitted by 31 October 2006.
- (e) Members shall strive to complete the requirements in 9(a) before the date in 11(c).

Review of Progress

12. The Special Session of the Council for Trade in Services shall review progress in the negotiations and monitor the implementation of the Objectives, Approaches and Timelines set out in this Annex.

Notes:

- 1. As attached to the Report by the Chairman to the Trade Negotiations Committee on 28 November 2005, contained in document TN/S/23. This attachment has no legal standing.
- 2. As attached to the Report of the Chairman of the Working Party on Domestic Regulation to the Special Session of the Council for Trade in Services on 15 November 2005, contained in document [JOB\(05\)/280](#). [back to text](#)

10. Notes

ⁱ www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

ⁱⁱ It is not clear whether compensation would be paid to the government or to the company affected. The WTO states: 'A country can change its bindings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade.' The text does not state whether the trading partner is the government of the company affected or the company. http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

ⁱⁱⁱ See www.wto.org

^{iv} Previous Ministerial Conferences were held in Singapore (December 1996), Geneva (May, 1998), Seattle (December 1999), and Doha (November, 2001)

^v General Agreement on Trade in Services. http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

^{vi} Guidelines For The Scheduling Of Specific Commitments Under The General Agreement On Trade In Services (Gats) S/L/92 28 March 2001 http://www.wto.org/english/tratop_e/serv_e/sl92.doc

^{vii} www.wto.org/english/tratop_e/serv_e/requests_offers_approach_e.doc

^{viii} For detailed criticisms of GATS, see the World Development Movement website (www.wdm.org.uk/campaign/GATS.htm#GATSreports), the GATSwatch website set up by Corporate Europe Observatory and Transnational Institute (www.gatswatch.org/), and the Seattle to Brussels Network (www.wdm.org.uk/cambriefs/gatsdemo.pdf)

^{ix} The arguments presented are summarized from WTO 'GATS – Fact and fiction', www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf

^x The arguments presented are summarized from World Development Movement 'Stop the GATSastrophe', www.wdm.org.uk/cambriefs/wto/stopgats.pdf

^{xi} http://www.wto.org/english/tratop_e/serv_e/gatsfacts1004_e.pdf

^{xii} Article XIX, General Agreement on Trade in Services http://www.wto.org/english/docs_e/legal_e/26-gats.pdf

^{xiii} http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm

^{xiv} www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm

^{xv} For a full description of the historical development of the classification of electricity, see World Trade Organisation Council for trade in services (1998) 'Energy Services: Background note by the Secretariat' World Trade Organisation, S/C/W/52, 9 September 1998.

^{xvi} World Trade Organisation Council for trade in services (1998) 'Energy Services: Background note by the Secretariat' World Trade Organisation, S/C/W/52, 9 September 1998, p 11.

^{xvii} The right to water and trade in services: Assessing the impact of GATS negotiations on water regulation. Paper presented at the CAT+E Conference "Moving forward from Cancún". Berlin, 30-31 October 2003. Elisabeth Türk and Markus Krajewski http://www.ciel.org/Publications/GATS_WaterHR_28Oct03.pdf

^{xviii} For a list of sectors, see www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc

^{xix} www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm

^{xx} Cossy, Mireille (2005, forthcoming), "Water services at the WTO", in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds.), *Water and International Economic Law*, Oxford University Press, Oxford. Quoted in Ronald Steenblik George Stubbs, Dominique Drouet. Synergies between trade in environmental services and trade in environmental goods. OECD 2005. <http://www.oecd.org/dataoecd/21/48/35161237.pdf>

^{xxi} The UN classifications are: CPC-provisional, at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1>; and CPC 1.1, at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=16&Lg=1&Co=86>

^{xxii} Council for Trade in Services - Special Session - Communication from the European Communities and their Member States - GATS 2000: Environmental Services 22/12/2000 <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W38.doc>

^{xxiii} Constraints with the existing GATS framework and Schedules of Specific Commitments Geneva: 29 April 2005. Aaditya Mattoo (World Bank) Sacha Wunsch-Vincent (OECD)

http://www.wto.org/english/tratop_e/serv_e/sym_april05_e/mattoo_wunschvincent_e.ppt#18

^{xxiv} The ruling is complex and can be found at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

^{xxv} Ellen Gould. How the GATS Undermines the Right to Regulate -Lessons from the US-Gambling Case CCPA Briefing paper Trade and Investment series. Volume 6, Number 4. November 28, 2005 http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/brief6_4_GATS_and_Gambling.pdf

^{xxvi} Michelle Swenarchuk, Canadian Environmental Law Association, "GATS, Water Services and Policy Options," a paper prepared for the International Centre for Trade and Sustainable Development and the World Conservation Union event "Ensuring Access to Water and Sanitation, The Trade Dimension," at the Commission on Sustainable Development, 22 April 2004, New York, available at www.cela.ca.

^{xxvii} The right to water and trade in services: Assessing the impact of GATS negotiations on water regulation. Paper presented at the CAT+E Conference "Moving forward from Cancún". Berlin, 30-31 October 2003. Elisabeth Türk and Markus Krajewski http://www.ciel.org/Publications/GATS_WaterHR_28Oct03.pdf

^{xxviii} See Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions. COM(2004) 327 final. Brussels 30.04.2004 .

http://europa.eu.int/comm/internal_market/publicprocurement/docs/ppp/greenpaper/com-2004-327_en.pdf .

^{xxix} The right to water and trade in services: Assessing the impact of GATS negotiations on water regulation. Paper presented at the CAT+E Conference "Moving forward from Cancún". Berlin , 30-31 October 2003 . Elisabeth Türk and Markus Krajewski http://www.ciel.org/Publications/GATS_WaterHR_28Oct03.pdf

^{xxx} GATS, Water and the Environment: *Implications of the General Agreement on Trade in Services for Water Resources*. CIEL and WWF International Discussion Paper, October 2003. by Aaron Ostrovsky, Robert Speed and Elisabeth Türk. http://www.ciel.org/Publications/GATS_WaterEnv_Nov03.pdf

^{xxxi} Briefing Paper: Water and the GATS: Mapping the Trade - Development Interface October 2005 http://www.odi.org.uk/publications/briefing/bp_oct05_Water_and_GATS.pdf

^{xxxii} Briefing Paper: Water and the GATS: Mapping the Trade - Development Interface October 2005 http://www.odi.org.uk/publications/briefing/bp_oct05_Water_and_GATS.pdf

^{xxxiii} Cho, A. and Dubash, N., Will investment rules shrink policy space for sustainable development? Evidence from the electricity sector, World Resources Institute Working Paper, Washington DC (2003)

^{xxxiv} For an account of the Special Sessions, see www.wto.org/english/tratop_e/serv_e/s_negs_e.htm

^{xxxv} The Documents referred to in the following section are posted at

www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm

^{xxxvi} For a discussion of the US negotiating position, see Griffin Cohen, M., 'From public good to private exploitation: GATS and the restructuring of Canadian electrical utilities', *Canadian-American Public Policy*, Occasional Paper 48, Bangor, USA (2001)

^{xxxvii} 00-5553 S/CSS/W/25 Communication from the United States - Environmental Services

18/12/2000 . <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W25.doc>

^{xxxviii} 00-5633 S/CSS/W/38 Communication from the European Communities and their Member States - GATS 2000:

Environmental Services 22/12/2000 <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W25.doc>

^{xxxix} 01-1407 S/CSS/W/51 Communication from Canada - Initial Negotiating Proposal on Environmental Services

14/03/2001 <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W51.doc>

^{xl} 01-2363 S/CSS/W/76 Communication from Switzerland - GATS 2000: Environmental Services

04/05/2001 . <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W76.doc>

^{xli} 01-4715 S/CSS/W/112 Communication from Australia - Negotiating Proposal for Environmental Services

01/10/2001. <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W112.doc>

^{xlii} 01-6059 S/CSS/W/121 Communication from Colombia - Environmental Services

27/11/2001. <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W121.doc>

^{xliii} 02-1498 S/CSS/W/142 Communication from Cuba - Negotiating Proposal on Environmental Services

22/03/2002. <http://docsonline.wto.org/DDFDocuments/t/S/CSS/W142.doc>

^{xliv} 05-0581 TN/S/W/28 Communication from Australia, the European Communities, Japan, New Zealand, Taiwan

11/02/2005 <http://docsonline.wto.org/DDFDocuments/t/tn/s/W28.doc>

^{xlvi} See: www.polarisinstitute.org/gats/main.html and <http://www.gatswatch.org/requests-offers.html#outgoing>

^{xlvi} Joy, C. & Hardstaff, P. 'Whose development agenda? An analysis of the European Union's GATS requests of developing countries' World Development Movement, London (2003).

^{xlvii} The other sectors are: professional, business, telecommunications, postal and courier services, construction, distribution, environmental, financial, tourism, news agency services, and transport.

^{xlviii} www.gatswatch.org/requests-offers.html

^{xlix} Australia, Bahrain, Canada, Iceland, Japan, Liechtenstein, New Zealand, Norway, Panama, Paraguay, South Korea, Switzerland, Taiwan, the United States and Uruguay

ⁱ www.dfat.gov.au/trade/negotiations/gats_schedule_initial_offer_0303.pdf

ⁱⁱ www.strategis.ic.gc.ca/epic/internet/instp-pcs.nsf/vwGeneratedInterE/sk00079e.html

ⁱⁱⁱ www.gatswatch.org/docs/offreq/offers/NewZealand.pdf

^{liii} www.ustr.gov/sectors/services/2003-03-31-consolidated_offer.pdf

^{liv} www.odin.dep.no/archive/udvedlegg/01/05/wto02057.pdf

^{lv} www.gatswatch.org/docs/offreq/EUoffer/EU-initialoffer.pdf

^{lvi} www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm

^{lvii} This meeting was required by the Ministerial Statement at the end of the Cancún conference which stated (Item 4)

'We therefore instruct our officials to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference. We ask the Chairman of the General Council, working in close co-operation with the Director-General, to co-ordinate this work and to convene a meeting of the General Council at Senior Officials level no later than 15 December 2003 to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations. We shall continue to exercise close personal supervision of this process.'

^{lviii} www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm#energy

^{lix} www.wto.org/english/tratop_e/serv_e/s_propnewnegs_e.htm#energy

^{lx} The additional costs are spread over all consumers so the company that buys the renewable power is not disadvantaged compared to companies that do not buy such power.

^{lxi} World Bank (2004) 'Credible Regulation Vital For Infrastructure Reform To Reduce Poverty, Says World Bank' Press release, June 14, 2004.

^{lxii} World Bank (2004) 'Press Conference on Reforming Infrastructure - Privatisation, Regulation and Competition' Press conference transcript, June 14, 2004, World Bank, Washington (see <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0%2C%2CcontentMDK:20212636~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607%2C00.html>)

^{lxiii} World Bank (2004) 'Credible Regulation Vital For Infrastructure Reform To Reduce Poverty, Says World Bank' Press release, June 14, 2004.

^{lxiv} World Bank (2004) 'Credible Regulation Vital For Infrastructure Reform To Reduce Poverty, Says World Bank' Press release, June 14, 2004.

^{lxv} World Bank (2004) 'Credible Regulation Vital For Infrastructure Reform To Reduce Poverty, Says World Bank', press release, June 14, 2004, World Bank, Washington. (see http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0..contentMDK:20212113~menuPK:34464~pagePK:64003015~piPK:64003012~theSitePK:4607_00.html)

^{lxvi} S Thomas (2006) 'The British Model in Britain: Failing slowly' Energy Policy, vol 34, no 5.

^{lxvii} S Thomas (2006) 'The grin of the Cheshire cat' Energy Policy, details to follow.

^{lxviii} Cour des Comptes (1997) La gestion des services publics locaux d'eau et d'assainissement. Les éditions du Journal, Paris.

^{lxix} Source: *Le Monde*, 28 January 1997.

^{lxx} Nickson, A. (2001a) Establishing and Implementing a Joint Venture - Water and Sanitation Services in Cartagena, Colombia, *Working Paper 442 03* (London, GHK International: January 2001) (<http://www.ghkint.com/downloads/Cartagena.pdf>).

^{lxxi} European Commission, Green Paper On Services Of General Interest COM(2003) 270 Final Europa.Eu.Int/Comm/Secretariat_General/Services_General_Interest/Docs/Com_2003_270_Fi_En.Pdf

^{lxxii} EC Trade website: Euromed. http://europa.eu.int/comm/trade/issues/bilateral/regions/euromed/euromed_en.htm

^{lxxiii} Tenth Anniversary Of The Euro-Mediterranean Partnership: A work programme to meet the challenges of the next five years. European Commission. May 2005.

http://europa.eu.int/comm/external_relations/euromed/barcelona_10/docs/10th_comm_en.pdf. See also: Conclusions For The VIIth Euro-Mediterranean Conference Of Ministers Of Foreign Affairs (Luxembourg, 30-31 May 2005) <http://trade-info.cec.eu.int/doclib/html/124231.htm>

^{lxxiv} "Deeper Integration and Trade in Services in the Euro-Mediterranean Region" Daniel Miller-Jensch 2005.

<http://trade-info.cec.eu.int/doclib/html/124235.htm>

^{lxxv} The Global Governance of Foreign Direct Investment: Madly Off in All Directions. Luke Eric Peterson. FES Occasional paper N° 19 / May 2005

http://www.fes-geneva.org/publications/OccasionalPapersShortSummary/occasional_papers_n_19.htm

^{lxxvi} The Global Governance of Foreign Direct Investment: Madly Off in All Directions. Luke Eric Peterson. FES Occasional paper N° 19 / May 2005

http://www.fes-geneva.org/publications/OccasionalPapersShortSummary/occasional_papers_n_19.htm

^{lxxvii} "Japan's FTA Strategy (Summary)," Economic Affairs Bureau, Ministry of Foreign Affairs, October 2002, available on-line at: <http://mofa.go.jp/policy/economy/fta/strategy0210.html>.

^{lxxviii} Agreement on Trade Development and Cooperation between the EC and its member states and the Republic of South Africa, OJ 1999, L311, Art. 41, quoted in Cremona 2003 p.285

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^{lxxxv} World Bank: India – Country Assistance Strategy. August 2004. http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&cid=000160016_20040920102445

^{lxxxvi} http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm

^{lxxxvii} Susan George <http://www.tni.org/archives/george/hkreflexions.htm>

^{lxxxviii} Walden Bello [Nothing to Gain, Everything to Lose. Developing Country Prospects at the Hong Kong WTO and Beyond](http://www.tni.org/archives/bello/hongkong.htm) Quezon City, Philippines, 25 November 2005 <http://www.tni.org/archives/bello/hongkong.htm>

^{lxxxix} <http://www.uscsi.org/publications/papers/12-18-05.htm>

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^{xc} Circulated via a listserv.