Serving Whose Interests?
The Political Economy of Trade in Services Agreements

Jane Kelsey
Serving Whose Interests?

Services permeate almost every moment of our daily lives, whether they are social services such as education, media and midwifery, or inputs to capitalist production such as finance, transport, energy and telecommunications. Yet they are being purged of their social essence in the name of ‘trade’ and relegated to commodities in an international marketplace. Serving Whose Interests? explores the political economy of ‘trade in services’ agreements from a critical legal perspective.

The complex ‘trade’ regime put in place by the General Agreement on Trade in Services, and a new generation of GATS-compliant bilateral and regional agreements, has the potential to constrain the policy choices of virtually every government in the world. These agreements are exclusively the tools of contemporary global capitalism, yet are represented as the new pathway for development through the seemingly benign medium of international trade law. In an evolving chess game, attempts by the major powers to secure national regulations and policies that boost the profits of their transnational corporations and advance their geopolitical ambitions are being frustrated by reluctant Southern governments and the resistance of social activists. This book draws out the contradictions between the global market model and the intrinsically social nature of services through a combination of theoretical analysis of the legal texts and truly global case studies of the social and political implications, leading the author to question the sustainability of the trade in services regime.

The product of extensive research by an internationally renowned expert in the area, yet written in an accessible manner, Serving Whose Interests? will be of interest to trade specialists, academics, students and activists working in the areas of international trade and international trade law, and other informed readers with interests in the politics and regulation of the global economy.

Professor Jane Kelsey specialises in the political economy of law and policy at the University of Auckland. She has been an academic and activist critic of neoliberal globalisation, especially trade in services, since the early 1990s.
Serving Whose Interests?

The political economy of trade in services agreements

Jane Kelsey
For Upendra Baxi,
sage and friend
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>ix</td>
</tr>
<tr>
<td>Abbreviations</td>
<td>xii</td>
</tr>
<tr>
<td>Introduction: taking services to market</td>
<td>1</td>
</tr>
<tr>
<td>1 Reading the GATS as ideology</td>
<td>22</td>
</tr>
<tr>
<td>Case study 1 GATS 2000: going nowhere in a hurry</td>
<td>42</td>
</tr>
<tr>
<td>Case study 2 FTAs: GATS on steroids</td>
<td>50</td>
</tr>
<tr>
<td>2 How the GATS was won (and lost?)</td>
<td>58</td>
</tr>
<tr>
<td>Case study 3 The ‘services mafia’</td>
<td>76</td>
</tr>
<tr>
<td>Case study 4 Understanding the ‘GATS attack’</td>
<td>82</td>
</tr>
<tr>
<td>3 Trade-related development</td>
<td>89</td>
</tr>
<tr>
<td>Case study 5 The WDR 2004: making services work for rich companies</td>
<td>104</td>
</tr>
<tr>
<td>Case study 6 The closed circuit of summitry</td>
<td>110</td>
</tr>
<tr>
<td>4 The illusion of public services</td>
<td>119</td>
</tr>
<tr>
<td>Case study 7 Accounting for PFIs</td>
<td>137</td>
</tr>
<tr>
<td>Case study 8 Privatising power in the Philippines</td>
<td>144</td>
</tr>
<tr>
<td>5 Ruling the services infrastructure</td>
<td>152</td>
</tr>
<tr>
<td>Case study 9 Gambling on the GATS</td>
<td>174</td>
</tr>
<tr>
<td>Case study 10 Public pensions or corporate welfare?</td>
<td>181</td>
</tr>
<tr>
<td>6 Trade in people</td>
<td>189</td>
</tr>
<tr>
<td>Case study 11 Call centres – the assembly line of the twenty-first century</td>
<td>206</td>
</tr>
<tr>
<td>Case study 12 Taking nurses and soldiers to market</td>
<td>213</td>
</tr>
<tr>
<td>Contents</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>--</td>
</tr>
<tr>
<td>7 Minds and markets</td>
<td>221</td>
</tr>
<tr>
<td><em>Case study 13</em> The higher education supply chain</td>
<td>241</td>
</tr>
<tr>
<td><em>Case study 14</em> A counter-convention on cultural diversity</td>
<td>248</td>
</tr>
<tr>
<td>8 Dominion over the earth</td>
<td>255</td>
</tr>
<tr>
<td><em>Case study 15</em> Wal-Mart rules, OK?</td>
<td>270</td>
</tr>
<tr>
<td><em>Case study 16</em> The real Cancún</td>
<td>276</td>
</tr>
<tr>
<td>9 Energy wars</td>
<td>284</td>
</tr>
<tr>
<td><em>Case study 17</em> Confronting ‘El Diablo’</td>
<td>302</td>
</tr>
<tr>
<td><em>Case study 18</em> Gulf accessions: a legal invasion</td>
<td>310</td>
</tr>
<tr>
<td>Conclusion: serving whose interests?</td>
<td>318</td>
</tr>
<tr>
<td>Notes</td>
<td>327</td>
</tr>
<tr>
<td>Bibliography</td>
<td>353</td>
</tr>
<tr>
<td>Index</td>
<td>375</td>
</tr>
</tbody>
</table>
I was first introduced to the notion that services might be governed by global trade rules at a gathering of several hundred social activists and progressive researchers that ran parallel to the General Agreement on Tariffs and Trade (GATT) Ministerial Conference in Brussels in 1990. At the time I knew little about the Uruguay round, even in the traditional area of trade in goods. The notion of complementary ‘trade’ agreements that locked in the neoliberalisation of services and investment, and US-style intellectual property laws, on an international scale seemed far-fetched. The proposal for a single World Trade Organization (WTO) to oversee such agreements had not yet been tabled.

Yet the General Agreement on Trade in Services (GATS) also seemed a logical next step in the reorganisation of international capital. Since 1984 I had been documenting New Zealand’s role as a laboratory for radical neoliberal policies – the *Economist* magazine dubbed it ‘Chile without the gun’. There was an obvious continuity between our experience of deregulation, liberalisation, privatisation and state sector restructuring and an international agreement on services that could legitimise and embed such changes – even if our trade officials insisted there was no connection between international trade rules and the domestic services regime.

Since that 1990 meeting I have monitored the arcane world of the trade in services agreements, watching the GATS become paralysed by controversy and inertia and spin off in diverse bilateral and regional forms. At the time of writing, the Doha round of negotiations remains moribund and the US President’s Trade Promotion Authority (‘fast track’) has expired. The burgeoning array of new generation free trade agreements is supplanting the GATS as a site for competition between the major powers, ambitious demands by transnational companies, and campaigns of resistance.

This book reflects my dissatisfaction with the level of critical analysis that currently informs the debate around trade in services. Most public engagement with the issues is starkly polarised and expressed through pro- and anti-GATS rhetoric (including my own), which is necessarily simplified and polemical. At the more technical level, the WTO, World
Bank, Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and other international agencies generate a plethora of reports and negotiating proposals, which are supported by pro-liberalisation academic writings. But critical research, with a few notable exceptions, is largely produced by academics who work on specific services sectors or non-government organisations (NGOs) for advocacy purposes.

The following 11 chapters and 18 case studies view the trade in services regime through a political economy lens. Each chapter interrogates one aspect of the ideology, legal content and negotiating history of the GATS and the emerging bilateral and regional agreements. The accompanying case studies offer diverse insights into how trade in services agreements can impact in the real world. While I have attempted to provide a representative coverage of sectors and places, the examples are necessarily selective. I hope they provide enough substance and stimulation for readers to identify additional, different or conflicting examples and fuel a more informed engagement with the issues.

The combination of technical chapters and empirical case studies is designed to bridge the gap between the closed legal discourse of the trade in services agreements and the realities of the people and communities that they seek to redefine. The book also challenges the normative premises of international law by locating the substantive legal content of the agreements within the political economy of globalising capitalism and the history of legal imperialism. It reveals a story of power, profit, poverty and resistance that is diffused through the seductive, but increasingly unstable, medium of international economic law.

The book is full of stories that were gathered on my travels. A mass of information has been obtained through both formal and unorthodox channels. This posed a challenge for referencing. Official documents and informal sources have been recorded in Notes, with formal publications listed in the Bibliography. All monetary amounts have been converted to US dollars.

I have had the privilege of accumulating these insights through many different pathways: as an academic, legal adviser, trade unionist, media commentator, NGO activist in national and international networks, and occasional consultant to governments. A sense of the dynamics and power politics of negotiations was gained from attending many meetings of the WTO and Asia Pacific Economic Cooperation (APEC) as a journalist or NGO representative. I am grateful to all of those who have opened doors for me, especially the Association of University Staff (NZ), Education International, the Action Research and Education Network of Aotearoa, the International Network for Cultural Diversity, various Coalitions for Cultural Diversity, the Pacific Network on Globalisation, Our World is Not for Sale and the Asia Pacific Research Network.
Diplomats, negotiators and officials from many countries and international organisations have been exceedingly generous in sharing their time and views. Special thanks go to SP Shukla, India’s Ambassador to the GATT in the 1980s, Geza Feketekuty, the assistant United States of America Trade Representative (USTR) with responsibility for services from the late 1970s, and Ambassador Oscar Carvallo, representative of the Bolivarian Republic of Venezuela at the WTO, for their frank interviews. The OECD gave me full access to their historical files, which was invaluable to understanding the GATS’ formative years.

An academic book requires a supportive intellectual environment. Since 1979 the University of Auckland has provided me with the freedom to explore critical ideas in both my research and teaching, and supported the completion of this text through a university research fellowship. I remain ever mindful of the privilege and responsibilities of academic freedom and the threat that is posed by market imperatives and a climate of self-censorship. I am, as always, indebted to colleagues and students in the Law School for their intellectual engagement and personal support.

Particular thanks go to colleagues who have provided feedback on the book in its various stages, including Sonny Africa, Raj Bhala, Patrick Bond, Yolinda Chan, Roger Dale, Deborah James, Ted Murphy, Garry Neill, Allyson Pollock, David Price, Vidya Rangan, Susan Robertson, David Robinson, Bill Rosenberg, Jean Shaoul, Claire Slatter and Elisabeth Tuerk. I owe a special debt to Ellen Gould, Sol Picciotto and Amokura Kawharu for their careful comments and thoughtful criticisms. A number of talented and enthusiastic research assistants have helped to locate materials and track down documents, including Philip Hall, Daniel Han, Helen Liava’a and Bonard Metayhsa. Barbara Menzies did her best to tame my grammatical idiosyncrasies. None of the above bears any responsibility for deficiencies in the final text.

Beverley Brown from Cavendish Press originally encouraged me to write the book and was exceptionally patient as several years slipped by. Colin Perrin has maintained that enthusiasm and forbearance on behalf of Routledge. Diane Marther did a masterly job of the index.

Such a major project is impossible without the patient support of family and friends, in particular my mother Peg Kelsey, Rua Rakena and Maxine Gay. They doubtless hope the book will be cathartic and pave the way for life without the GATS – a prospect that seems remote as its successors take on new forms and pose new challenges for critical academics in a troubled and uncertain world.

Jane Kelsey
December 2007
Abbreviations

ACP  African, Caribbean and Pacific
ADB  Asian Development Bank
ADEID  Action pour un Développement Equitable Intégré et Durable, Cameroon
AFAS  ASEAN Framework Agreement on Services
AFL-CIO  American Federation of Labor and Congress of Industrial Organizations
AGOA  African Growth and Opportunity Act
AIG  American International Group
ALBA  Bolivarian Alternative for Latin America and the Caribbean
AMEX  American Express
ANZCERTA  Australia New Zealand Closer Economic Relations Trade Agreement
AoA  (WTO) Agreement on Agriculture
APEC  Asia Pacific Economic Cooperation
ASEAN  Association of Southeast Asian Nations
ATM  automated teller machine
AUSFTA  Australia US Free Trade Agreement
BATF  Bangalore Agenda Task Force
BIS  Bank of International Settlements
BITES  (Bangalore) Board for IT Education Standards
BOT  build-operate-transfer
BPO  Business Process Outsourcing
CAFTA  Central America Free Trade Agreement
CARICOM  Caribbean Community
CARIFORUM  Caribbean Forum of African, Caribbean and Pacific (ACP) States
CEC  Centre for Education and Communication
CEO  Corporate Europe Observatory
CERI  (OECD) Centre for Educational Research and Innovation
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIDSE</td>
<td>Coopération Internationale pour le Développement et la Solidarité</td>
</tr>
<tr>
<td>CIECA</td>
<td>Centro de Investigación Económica para el Caribe, Dominican Republic</td>
</tr>
<tr>
<td>CPC</td>
<td>(UN) Central Product Classification</td>
</tr>
<tr>
<td>CPCprov</td>
<td>(UN) provisional Central Product Classification</td>
</tr>
<tr>
<td>CPC Rev</td>
<td>(UN) revised Central Product Classification</td>
</tr>
<tr>
<td>CSI</td>
<td>(US) Coalition of Services Industries</td>
</tr>
<tr>
<td>CSS</td>
<td>contractual service suppliers</td>
</tr>
<tr>
<td>CTS</td>
<td>(WTO) Council for Trade in Services</td>
</tr>
<tr>
<td>CTS.SS</td>
<td>(WTO) Council for Trade in Services, Special Session</td>
</tr>
<tr>
<td>CTV</td>
<td>Confederation of Venezuelan Workers</td>
</tr>
<tr>
<td>CUSFTA</td>
<td>Canada United States Free Trade Agreement</td>
</tr>
<tr>
<td>DHS</td>
<td>Dairy Herd Service, Jamaica</td>
</tr>
<tr>
<td>DSB</td>
<td>(WTO) Dispute Settlement Body</td>
</tr>
<tr>
<td>DSU</td>
<td>(WTO) Dispute Settlement Understanding</td>
</tr>
<tr>
<td>EBRI</td>
<td>Employee Benefit Research Institute</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECOSOC</td>
<td>(UN) Economic and Social Council</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EI</td>
<td>Education International</td>
</tr>
<tr>
<td>EPA</td>
<td>Economic Partnership Agreement</td>
</tr>
<tr>
<td>EPIRA</td>
<td>(Philippines) Electricity Power Industry Reform Act</td>
</tr>
<tr>
<td>ESF</td>
<td>European Services Forum</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUROSTEP</td>
<td>European Solidarity Towards Equal Participation of People, Belgium</td>
</tr>
<tr>
<td>FCC</td>
<td>(US) Federal Communications Commission</td>
</tr>
<tr>
<td>FNPF</td>
<td>Fiji National Provident Fund</td>
</tr>
<tr>
<td>FTA</td>
<td>free trade agreement</td>
</tr>
<tr>
<td>FTAA</td>
<td>Free Trade Area of the Americas</td>
</tr>
<tr>
<td>GATE</td>
<td>Global Alliance for Transnational Education</td>
</tr>
<tr>
<td>GATS</td>
<td>(WTO) General Agreement on Trade in Services</td>
</tr>
<tr>
<td>GATS 2000</td>
<td>GATS round that began in 2000</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GAWU</td>
<td>Guyana Agricultural and General Workers Union</td>
</tr>
<tr>
<td>GCHQ</td>
<td>(UK) Government Communication Headquarters</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>GE</td>
<td>genetic engineering</td>
</tr>
<tr>
<td>GNS</td>
<td>Group of Negotiations on Services</td>
</tr>
<tr>
<td>GODs</td>
<td>General Obligations and Disciplines</td>
</tr>
<tr>
<td>GRAPAD</td>
<td>Groupe de Recherche et d’Action pour la Promotion de l’Agriculture et de Développement, Benin</td>
</tr>
<tr>
<td>HIPC</td>
<td>Heavily Indebted Poor Countries</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICFTU</td>
<td>International Confederation of Free Trade Unions (to 2006)</td>
</tr>
<tr>
<td>ICTSD</td>
<td>International Centre for Trade and Sustainable Development</td>
</tr>
<tr>
<td>IFC</td>
<td>(World Bank Group) International Finance Corporation</td>
</tr>
<tr>
<td>IFSL</td>
<td>International Financial Services London</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
</tr>
<tr>
<td>ILSA</td>
<td>Iran-Libya Sanctions Act 1996</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>INCD</td>
<td>International Network for Cultural Diversity</td>
</tr>
<tr>
<td>INCP</td>
<td>International Network on Cultural Policy</td>
</tr>
<tr>
<td>IPP</td>
<td>independent power producer</td>
</tr>
<tr>
<td>IPR</td>
<td>intellectual property rights</td>
</tr>
<tr>
<td>ISCO</td>
<td>International Standard Classification of Occupation</td>
</tr>
<tr>
<td>IT</td>
<td>information technology/ies</td>
</tr>
<tr>
<td>ITES</td>
<td>IT-enabled services</td>
</tr>
<tr>
<td>ITU</td>
<td>International Telecommunication Union</td>
</tr>
<tr>
<td>ITUC</td>
<td>International Trade Union Confederation</td>
</tr>
<tr>
<td>IUF</td>
<td>International Union of Foodworkers</td>
</tr>
<tr>
<td>IYE</td>
<td>International Year of Eco-tourism</td>
</tr>
<tr>
<td>JITAP</td>
<td>Joint Integrated Technical Assistance Programme</td>
</tr>
<tr>
<td>JPEPA</td>
<td>Japan-Philippines Economic Partnership Agreement</td>
</tr>
<tr>
<td>KSP</td>
<td>(South Africa) Knowledge Sharing Partnership</td>
</tr>
<tr>
<td>LIBERTAD</td>
<td>Cuban Liberty and Democratic Solidarity Act of 1996</td>
</tr>
<tr>
<td>LOTIS</td>
<td>Liberalisation of Trade in Services Committee of International Financial Services London</td>
</tr>
<tr>
<td>MAI</td>
<td>(OECD) Multilateral Agreement on Investment</td>
</tr>
<tr>
<td>MBA</td>
<td>Master of Business Administration</td>
</tr>
<tr>
<td>MDG</td>
<td>Millennium Development Goal</td>
</tr>
<tr>
<td>MEFTA</td>
<td>(US) Middle East Free Trade Agreement</td>
</tr>
<tr>
<td>MFN</td>
<td>most favoured nation</td>
</tr>
<tr>
<td>MIT</td>
<td>Massachusetts Institute of Technology</td>
</tr>
<tr>
<td>MRA</td>
<td>mutual recognition agreement</td>
</tr>
<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
</tr>
<tr>
<td>NAMA</td>
<td>non-agricultural market access</td>
</tr>
<tr>
<td>NASSCOM</td>
<td>National Association of Software and Service Companies</td>
</tr>
<tr>
<td>NCITE</td>
<td>(US) National Committee for International Trade in Education</td>
</tr>
<tr>
<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
</tr>
<tr>
<td>NGO</td>
<td>non-government organisation</td>
</tr>
<tr>
<td>NHS</td>
<td>(UK) National Health Service</td>
</tr>
<tr>
<td>NPC</td>
<td>National Power Company (or Napocor)</td>
</tr>
<tr>
<td>NZMFAT</td>
<td>New Zealand Ministry of Foreign Affairs and Trade</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Full Form</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OPEC</td>
<td>Organization of Petroleum Exporting Countries</td>
</tr>
<tr>
<td>PACER</td>
<td>Pacific Agreement on Closer Economic Relations</td>
</tr>
<tr>
<td>PDVSA</td>
<td>Petróleos de Venezuela Sociedad Anónima</td>
</tr>
<tr>
<td>PFI</td>
<td>private finance initiative</td>
</tr>
<tr>
<td>PPIAF</td>
<td>Public Private Infrastructure Advisory Facility</td>
</tr>
<tr>
<td>PPP</td>
<td>public-private partnership</td>
</tr>
<tr>
<td>PROGRES</td>
<td>Programme for Research on the Service Economy</td>
</tr>
<tr>
<td>PRSP</td>
<td>Poverty Reduction Strategy Paper</td>
</tr>
<tr>
<td>PSI</td>
<td>Public Services International</td>
</tr>
<tr>
<td>PSIRU</td>
<td>Public Services International Research Unit</td>
</tr>
<tr>
<td>PUK</td>
<td>Partnerships UK</td>
</tr>
<tr>
<td>PUP</td>
<td>public-public partnership</td>
</tr>
<tr>
<td>PWC</td>
<td>Public Warehousing Company</td>
</tr>
<tr>
<td>R&amp;D</td>
<td>Research and development</td>
</tr>
<tr>
<td>RTAs</td>
<td>Regional trade agreements</td>
</tr>
<tr>
<td>SACCCOM</td>
<td>South Africa Contact Centre Community</td>
</tr>
<tr>
<td>SAIC</td>
<td>Science Applications International Corporation</td>
</tr>
<tr>
<td>SAR</td>
<td>Special Administrative Region</td>
</tr>
<tr>
<td>SERPS</td>
<td>(UK) State Earnings-related Pension Scheme</td>
</tr>
<tr>
<td>SPV</td>
<td>special purpose vehicle</td>
</tr>
<tr>
<td>TILMA</td>
<td>Trade, Investment and Labour Mobility Agreement</td>
</tr>
<tr>
<td>TINA</td>
<td>There Is No Alternative</td>
</tr>
<tr>
<td>TRIMS</td>
<td>(WTO) Agreement on Trade-related Investment Measures</td>
</tr>
<tr>
<td>TRIPS</td>
<td>(WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
</tr>
<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
</tr>
<tr>
<td>UNHCR</td>
<td>UN High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNICE</td>
<td>Union of Industrial and Employers’ Confederations of Europe</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
</tr>
<tr>
<td>USTR</td>
<td>United States of America Trade Representative</td>
</tr>
<tr>
<td>W/120</td>
<td>Services Sectoral Classification List</td>
</tr>
<tr>
<td>WBCSD</td>
<td>World Business Council for Sustainable Development</td>
</tr>
<tr>
<td>WBI</td>
<td>World Bank Institute</td>
</tr>
<tr>
<td>WDM</td>
<td>World Development Movement</td>
</tr>
<tr>
<td>WDR</td>
<td>World Development Report</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------------------------</td>
</tr>
<tr>
<td>WHO</td>
<td>World Health Organization</td>
</tr>
<tr>
<td>WPDR</td>
<td>(GATS) Working Party on Domestic Regulation</td>
</tr>
<tr>
<td>WPEC</td>
<td>(WTO) Working Party on Electronic Commerce</td>
</tr>
<tr>
<td>WPGR</td>
<td>(GATS) Working Party on GATS Rules</td>
</tr>
<tr>
<td>WSSD</td>
<td>World Summit on Sustainable Development</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTTC</td>
<td>World Travel and Tourism Council</td>
</tr>
</tbody>
</table>
Introduction
Taking services to market

‘Services’ permeate almost every moment of our daily lives – buses, banks, railways, shops and supermarkets, radio and TV, postal delivery, schools, hospitals, rubbish disposal, water supply, electricity, telephones, old people’s homes, kindergartens, universities, sports clubs, libraries, movie theatres, lawyers, funerals and much more. Their role is intrinsically social, as well as cultural and economic, and often has an environmental dimension.

The form and content of services has varied over time, aided by technology and innovation, but their essence remains unchanged. Services are the glue that binds our multiplicity of daily activities into a social existence. They provide formal and informal employment for over a billion people, livelihoods for many small business owners and dividends for shareholders of larger enterprises. Services infrastructure links us together through transport and communications networks, while water supply, health care and electricity provide the necessities of life. The relationships between those who provide services – teachers, shopkeepers, midwives – and those who use them are often highly personal and spill over into our families and communities. Through cultural and knowledge-based services we engage in dynamic exchanges that stimulate our creativity, innovation and sense of identity, and strengthen the foundations for informed political participation. The quality, affordability and accessibility of services therefore hold the key to social wellbeing, cohesion and stability – and often the sustainability of life itself. Decisions about which services are provided to whom and how they are regulated are at the heart of national and local politics.

At a more theoretical level, the social nature of services is integral to the capitalist economy – even one that purports to be borderless and globalised. As Ben Fine reminds us: ‘Capital is embroiled in social relations, social structures, in social reproduction involving social power and conflict, and is attached to definite economic and social tendencies’ (Fine, 2001, p 33). Services, and the markets through which they are increasingly delivered, shape today’s international division of labour. The quest to extract super-profits through a globally integrated labour market exposes stark class distinctions between managerial and mundane labour and reflects the old
geography of colonisation. Even the idea that ‘services’ constitute a distinct
category oversimplifies their function, as the activities it describes are
inseparable from agricultural and industrial production, which are
themselves intrinsically social activities.

Because social relations and structures involve questions of wealth and
power, the way that services are regulated and the goals of that regulation
are heavily contested. This dynamic is constantly evolving. For much of the
twentieth century, policy and regulation on services was defined nationally.
Governments in various parts of the world adapted the paradigm of a
centrally regulated mixed economy or state socialism to suit their local
conditions, economy, social values and political mandates. Governments or
administrations in colonies or satellites had less autonomy: what is referred
to today as ‘international policy transfer’ (Evans, 2004) was shaped for
them by colonial and imperialist practices or diktats of the politburo.

The resulting regulatory regimes were uneven. In richer industrialised
countries, national and local governments sought to balance a range of
objectives. These included individual wellbeing, education and employment,
infrastructure and communications, community and regional development,
social cohesion, cultural nationalism and economic development. Governments
were guided/constrained by their legal obligations, both within their national
constitutions and under international treaties on human rights, labour and
diverse social and economic activities. In poorer countries, governments and
peoples struggled, sometimes with each other, to achieve similar goals. The
‘Eastern bloc’ delivered near-universal access to very basic services.

The crisis of industrial capitalism in the 1960s and 1970s generated
a new driving imperative: to enhance the ability of capital to harness
innovative technologies and expand the emerging ‘services economy’ on
an international scale. The market-oriented approach to the regulation of
services from the late 1970s was an integral element of a new hegemonic
ideology of ‘neoliberalism’. David Harvey describes neoliberalism as

> a theory of political economic practices that proposes that human
wellbeing can best be advanced by liberating individual entrepreneurial
freedoms and skills within an institutional framework characterized
by strong private property rights, free markets, and free trade. The role
of the state is to create and preserve an institutional framework
appropriate to such practices.

(Harvey, 2005, p 2)

Neoliberalism meant replacing a social paradigm of services with one based
on reified and commodified market relations. This pitted the economic
imperative to regulate in ways that facilitate capital accumulation against
the social imperatives of human wellbeing, just distribution and complex
democracy (Baker, 2002). In legal and policy terms, that transition combined the liberalisation, privatisation and market-oriented regulation of services at the national level with binding and enforceable international treaties that could complement, legitimise and lock in the new paradigm.

The standard bearer for that supranational regime is the General Agreement on Trade in Services (GATS). This multilateral treaty sets the ideological parameters and minimum legal content for a plethora of bilateral and regional agreements that have overtaken it in recent years.

The GATS was adopted in Marrakech, Morocco in April 1994 as part of a stable of agreements to be overseen by a new World Trade Organization (WTO). The champions of the WTO hailed the new trade regime as a catalyst for global economic policy making that could sustain a dynamic and prosperous globalising economy. This was the era of TINA (There Is No Alternative). Neoliberal globalisation was in its ascendancy. Capitalism had recovered from the crisis of the 1970s, the recession of the early 1980s and the stock market crash of 1987. The Cold War was over and the Berlin Wall had gone. Perestroika had unravelled the Soviet Union and China’s communist party leaders were experimenting with ‘market socialism’. The Third World solidarity of the 1960s and 1970s was fractured and fragile. Even the historically recalcitrant Indian government had embraced the market. The Asian tigers posed an economic challenge to the ascendancy of the US, its allies and their associated capital, but not to their geopolitical or ideological hegemony.

The euphoria that surrounded the launch of the GATS and WTO in 1995 was a far cry from the anxious mood almost twenty years earlier when the idea of ‘international trade in services’ was born. During the late 1970s and early 1980s the US needed to restore its flagging economy and ascendancy, address the chronic merchandise trade deficit and create new jobs to replace those being lost in manufacturing. Its trade officials gradually convinced other, less enthusiastic, industrialised countries to support the creation of binding international rules that could secure unfettered access for transnational corporations to the foreign services markets that were being constructed around the world.

At one level, the GATS and its successors have met that ambition. In the words of the European Commission, the GATS is ‘not just something that exists between Governments. It is first and foremost an instrument for the benefit of business.’ Trade in services agreements aim to provide transnational corporations with security and certainty of business-friendly regulation in rapidly expanding international markets. These assurances take the form of enforceable guarantees that the current wave of neoliberal policies will not be reversed. According to the WTO Secretariat, ‘bindings undertaken in the GATS have the effect of protecting liberalization policies, regardless of their underlying rationale, from slippages and reversals and, thus, improve domestic conditions for investment, trade and growth’.
The GATS was never about ‘trade’ as it is traditionally understood, because services are socially embedded, intangible and have traditionally been consumed in the same place they are produced. The primary targets of the trade in services agreements are the laws, policies and regulations that govern services behind the national border and that foreign firms view as barriers to their expansion and profitability. As the WTO Secretariat observes, the aim of the GATS is to discipline the regulatory choices available to governments: ‘because such a large share of trade in services takes place inside national economies . . . its requirements will from the beginning necessarily influence national domestic laws and regulations in a way that has only been true of the GATT in recent years’.  

Former WTO Director-General Renato Ruggiero confirmed the profound intrusion of the GATS on the state’s regulatory autonomy, noting that it reaches ‘into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments’. Indeed, the implications of trade in services agreements for future policies and regulations are literally unknowable. Existing rules and commitments can take on new and previously unimagined meanings through shifts in a government’s policy, interpretations by the WTO’s dispute tribunals, or their automatic extension to new technologies for delivering a service.

Since the late 1990s, free trade agreements at regional and bilateral levels have overtaken the multilateral regime. The services components of such agreements are required to be both GATS-compatible and ‘GATS-plus’ by taking liberalisation further. A majority of these agreements involve the major powers and reflect their competing geopolitical objectives: US trade policy has become explicitly subordinated to its foreign policy, while the European Union (EU) is reorganising its historical trade relationships to consolidate its regional and strategic interests. The entry of Japan, China, India and, potentially, Russia into this arena foreshadows new and unpredictable dynamics. All these agreements are premised on the neoliberal services paradigm; but they are also generating a ‘spaghetti bowl’ of pragmatic, uneven and inconsistent rules and commitments, and fuelling geopolitical competition for resources and influence.

This complex trade in services regime has the potential to impose pro-market disciplines on the policy choices of virtually every country in the world, in relation to over 160 services sub-sectors. Yet, instead of constituting an invincible edifice, the negotiations to extend the GATS, which began in 2000, became paralysed. Many of the bilateral and regional negotiations are hotly contested and outcomes that are coerced seem unsustainable.

This book argues that the high ambitions of the corporate lobbyists and their patron states are falling victim to two fatal self-delusions: that a global services market that is governed exclusively by pro-business regulation can displace the social essence that infuses services, and that simply by embedding
that illusion in a legal treaty they can change the course of politics, law, culture and social relations around the world. The contradictions this creates are one element of a broader crisis facing neoliberal globalisation.

In adopting a political economy perspective, the book draws on Stephen Gill’s differentiation between the ‘social structures of accumulation’ and the ‘regime of accumulation’ that facilitates and stabilises those structures (Gill, 2003). The ‘social structures of accumulation’ take the form of a globalising economy where economic activity is driven by new technologies and transacted increasingly in the form of commodified services. This transformation brings with it a new international division of labour that perpetuates old class and colonial asymmetries. These social structures of accumulation are both material and have normative or disciplinary effects through capital flows and market power.

Gill’s ‘regime of accumulation’ describes a new hegemony that dissolves, weakens or reconfigures the state-centred regime that had sustained industrial capitalism during the twentieth century. Trade in services agreements are one part of that new regime. By claiming to be a neutral rules-based system, they legitimise pro-market regulation and aim to consolidate the lucrative new international markets in tradeable services. In practice, the resilience of the social essence of services, the negative impacts of market regulation on people’s lives, and resistance to a new form of imperialism make trade in services agreements highly politicised and therefore unstable.

With specific reference to the political economy of law, the book interrogates the negotiating dynamics, legal content and application of international trade in services agreements in the following terms:

The crucial questions about the origins of law always relate to the power bloc behind the [treaty], the nature of the problem this bloc wants to solve, the ideologies in which this problem is perceived and understood, and the political opposition to the proposed [treaty]. Law is a hybrid phenomenon of politics and ideology: a politico-ideological artifact that is produced in a form of political practice, that practice geared to the creation, definition and maintenance of power relations.

(Sumner, 1979, p 268)

Those power relations are ultimately embedded in what Tony Anghie describes as the imperialist project of international law (Anghie, 2005).

The remainder of this Introduction lays the foundations for such an enquiry. It begins by examining the social structures of accumulation, with the emergence of the international ‘services economy’ since the 1970s, accompanied by a new international division of labour. It then analyses the steps that were necessary to construct a supportive regime – conceptualising the novelty of ‘international trade in services’ and advancing that concept within national and international policy communities to the point of
concluding a trade in services treaty. The final section locates the new legal regime in the historical context of international law as a vehicle for imperialism.

**Taking services to market**

The ‘services economy’ is a proxy term for the transformation of capitalism in the later twentieth century. By the 1960s the golden age of industrial capitalism was in decline. Twenty years later it was over. The rise of a service-driven economy was hailed as the path to salvation for advanced capitalist countries, in particular to extract the US from an economic quagmire and chronic trade deficit (Drakich *et al.*, 2002, pp 250–1; Hauknes, 2000; cf. Madrick, 2001).

The unravelling of the industrial era was rapid and dramatic. The decline in profitability of the Fordist assembly line in the 1960s saw large manufacturers from the US and other advanced industrialised countries relocate the low-value parts of their production to selected low-cost countries. This was aided by the advent of container ships, the jumbo jet and advances in telecommunications and data transfer. The fragmentation of production intensified during the 1970s in response to successive oil shocks and a loss of US and European competitiveness to Asia. Industrial production continued to integrate both vertically and internationally to take the best advantage of raw materials, technology, low labour costs and proximity to markets. Importers began to use ‘just in time’ inventories. A number of Asian countries, in particular, developed the technological capacity to respond.

Strategic corporate alliances, mergers and acquisitions, mainly within OECD countries, dwarfed greenfield investments. Transnational corporations took on myriad forms through subsidiaries, branches, partnerships, joint ventures, franchises, licences and subcontracting, and spread across a vast economic and physical geography. The growth of internationally integrated production and supply chains that operated through networked firms became a defining feature of a globalising economy, to the point where

> the core activities of production, consumption, and circulation, as well as their components (capital, labor, raw materials, management, information, technology, markets) are organized on a global scale, either directly or through a network of linkages between economic agents.  
> (Castells, 2000, p 77)

The reorganisation of production transformed the function and form of services and their economic significance. Different stages of transnationally dispersed manufacturing required a vast range of intangible services, including ground, air and sea transportation, data exchange and management, financial and technology transfers, warehousing, and wholesale and retail
sales. Internationally integrated supply chains made the traditional economic and legal distinction between trade in goods or agricultural commodities and services increasingly anachronistic (Chapter 8). Michael Hardt and Antonio Negri observe how the value of tangible goods came to rest more on the branding and consumer appeal that is created by advertising and marketing services than on the practical utility of a product. This encouraged a new managerial imperative to ‘treat manufacturing as a service’ (Hardt and Negri, 2000, pp 285–6).

Material production and intangible services are integrated in a second, related way. In 1984 Jagdish Bhagwati observed how the services transactions performed within an industrial firm were traditionally treated as value added in the goods sector (Bhagwati, 1984). The same transactions were described as ‘services’ when provided by separate firms. He predicted, correctly, that as outsourcing of intra-firm services became more common and specialised and economies of scale developed, the services market would grow and become more technologically progressive. Inter-firm services transactions would form a distinct and growing services sector of the economy.

Similar ‘splintering’ was likely within existing private services sectors, such as retail, finance and banking, and transport. Bhagwati contrasted this dynamic transformation with public services, which he characterised as technologically unprogressive because they lacked incentives and were subject to bureaucratic and political factors. More recently, neoliberal restructuring of the public sector has generated a parallel trend of splintering and outsourcing of government functions and social services. That phenomenon, along with the unbundling and partial or full privatisation of energy, telecommunications and transport utilities, postal delivery and financial services, has generated new private sector activities in what were previously defined as public services.

Bhagwati also predicted that the rapid emergence of information technologies (IT) would increase the potential for ‘splintering’. A service that was initially embodied in the person who provided it and required their physical presence at the time of use could become disembodied and delivered ‘over the wire’. He argued that this would open opportunities for developing countries to establish a comparative advantage in delivering low-cost services from offshore. That proved partially correct: the rapid growth of cross-border supply and offshore outsourcing in a number of Southern countries has become an outstanding feature of the current services landscape.

Large scale and internationally mobile capital was a prerequisite for the internationally dispersed production of goods, food and services. That requirement gave the big transnational corporations an intrinsic advantage over national capital, especially from weaker countries. The mobility of capital, in turn, fostered a new rentier bloc of financiers. Their quest for
short-term profits increasingly displaced the longer-term focus of investors on real production under industrial capitalism. The dynamic expansion of transnational production and financial markets increased the pressure on governments to lift capital controls, and to liberalise and deregulate their domestic financial markets – and then to re-regulate them within sympathetic international forums that could minimise state intrusion.

Globally integrated financial markets quickly emerged. The floating of currencies and the flush of petrodollars in the 1970s created new risks and uncertainties for importers, exporters and investors and new opportunities for the financial sector. Banks moved to mediate the risks; risks required insurance and insurers required re-insurance. As financial markets expanded, so did their products. Consultancies boomed, especially around corporate restructuring, privatisations, mergers and acquisitions. Share markets became larger, more sophisticated, interconnected and eventually privatised. Derivatives and futures markets that developed around currencies and debt spawned a vast array of fictitious financial products that became tradeable internationally. Subsequently, booming private equity and pension funds have invested trillions of dollars around the world, often in highly leveraged buy-outs. All these activities require credit ratings, financial analysts and brokers, and other finance-related services. The resulting global financial services markets have come to operate as if they are detached from material reality.

The transnational economy also required a sophisticated and reliable technological infrastructure that could circulate information and communications. The IT revolution grew out of groundbreaking advances in the micro-electronics industry. Major manufacturers such as General Electric, General Motors and Boeing, and financial institutions such as Citibank and Merrill Lynch, developed their own capacity and recouped their development costs (and more) by selling those services to others. Manuel Castells describes the gradual progression of these technologies from the original sites of techno-economic change – the high-tech firms and financial sector – into manufacturing at large, and then into business services, ‘gradually to reach miscellaneous service activities, where there are lower incentives for the diffusion of technology and greater resistance to organizational change’ (Castells, 2000, p 90).

By the late 1990s the term ‘knowledge economy’ had largely superseded the ‘services economy’ in the globalisation lexicon. Telecommunications were now as pivotal to global capitalism as finance: they provided the infrastructure for production and delivery of other commercial services, and were lucrative products in their own right. The burgeoning IT market generated a wealth of high-value business and professional services, including consultancy, software research, engineering and design, as well as foreign employment opportunities for IT personnel. At the same time, the ability of cross-border data transfer to de-link the suppliers and consumers of lower-
value services encouraged the offshore outsourcing of services work to ‘virtual’ migrants in cheap labour zones.

The compression of time and space did not depend solely on technology. An abundance of cheap energy literally fuelled the geographical dispersal of production and consumption. The global food production and supply chains came to rely on ground, air and sea transport to fill the supermarket shelves, as did the construction services industry for the delivery of foreign-sourced materials and labour. Likewise, mass tourism, the world’s largest services export industry, assumed an affordable and inexhaustible supply of oil to move people around.

The traditional professions responded to globalisation by reinventing themselves. As production dispersed, the major law, accountancy, finance and management firms expanded offshore to service their traditional clients on an international scale. Public sector restructuring and privatisation added governments to their client base. The professions became self-interested advocates and beneficiaries of neoliberal restructuring. The ‘Big Six’ accountancy firms spread through foreign direct investment and partnerships with local firms, then consolidated back to the four firms that dominate accounting-cum-consultancy services internationally. Advances in IT meant that professional services could also be ‘exported’ from one centralised location. As these activities became harder to regulate, the powerful professional bodies generated their own international standards for the recognition of professional qualifications, licensing and conduct. Academic accountants remark on the accompanying erosion of the profession’s public interest responsibilities, which include protecting the integrity of a country’s tax base (Newberry, 2003, p 6).

This brief survey of the ‘services economy’ shows why the lobby groups of large transnational corporations wanted an international regime that could regulate services markets in their interest. It also explains why the sectoral studies that were conducted during the Uruguay round focused on telecommunications, construction/engineering, tourism, transport, financial services and professional services. Public and social services, such as education, health care and household water supply, which dominate contemporary campaigns against the GATS, were relatively peripheral during the Uruguay round. Although their commercial significance has increased, they are still not a priority in most trade in services negotiations.

**The international services economy**

The lack of reliable statistics makes it very difficult to track the international services economy. This dearth of data was especially marked during the later 1970s and 1980s when the idea of a multilateral agreement on trade in services was first promoted. While services enjoyed a growing economic visibility, this was primarily as domestic activity. The most common
measure was the proportion of services in Gross Domestic Product (GDP). Most of that involved social and public services that were supplied locally and were not, or were only partly, marketised. Health and education were by far the largest sectors. The vast bulk of private sector services jobs in both the US (United States of America) and Europe were in wholesale and retail trade, hotels and restaurants. Significantly, growth in the services economy was not in banking, insurance, business and construction, the sectors whose transnational companies were pushing for a trade in services agreement.

Historically, ‘international trade in services’ was not recorded as a distinct economic activity. Services were treated as a residual category: what was not included in primary and secondary production. The economic assumption was that production and consumption of services had to occur in the same location, which made their cross-border trade literally inconceivable. The most relevant international statistics were those prepared for International Monetary Fund (IMF) balance of payments purposes, in which services (primarily capital transactions) were treated as ‘invisibles’. The definition of services used in those accounts was much less detailed than the classification system subsequently adapted for the GATS. Moreover, the data was based on international transactions between residents and non-residents. This excluded services provided by foreign investors within the country’s borders – transactions that the advocates of international rules wanted to define as ‘trade’. Only the US collected data that was based on foreign sales by the foreign subsidiaries of its companies and that was notoriously subject to accounting devices that distorted their income and profit estimates.

The lack of a clear statistical base remains a fraught issue. In 2002 veteran Indian journalist Chakravarthi Raghavan described the unresolved quest for data that would enable poorer countries to assess the impacts of the GATS and inform their negotiating positions as ‘chasing a black cat in a dark room, blindfolded’ (Raghavan, 2002).

In 2005 the WTO drew on balance of payments figures to produce a very rough estimate of the value of international trade in ‘commercial services’, which it put at over $1,700 billion. The dollar value of exports over the first decade of the GATS (with no proven causal connection) had doubled. The figure leapt exponentially for the US, Europe and India once e-services came on-stream: exports of ‘other commercial services’ rose from 37 per cent of the total in 1990 to 44 per cent in 2000 and 48 per cent in 2005. The distribution of the services transactions confirms the overwhelming dominance of US and European transnationals. The EU claimed a massive 27.1 per cent of commercial services exports, not counting trade between its members. The UK (United Kingdom), Germany and France contributed two-thirds of that. The US share was 14.7 per cent. Next, but far behind, came Japan, the People’s Republic of China (post-WTO accession), Hong Kong China Special Administrative Region (SAR), India and Canada. The EU and the US were also the largest importers of commercial services.
It is not surprising that these governments are committed to expanding the markets for their corporations. Yet they sponsor different models of the ‘service economy’. Hardt and Negri contrast the ‘service industry model’, led by the US, the UK and Canada, with the ‘info-industrial model’ that is typified by Germany and Japan (Hardt and Negri, 2000, p 286). Both reflect the heightened importance of production flows and networks and increased employment in post-industrial services. But they centre on different kinds of services and relationships between services and manufacturing. The Anglo-American model is notable for the rapid decline in manufacturing and its replacement by services, with a dominant role for financial services that manage the internationalisation of capital. The more managed economies in continental Europe and Japan show a slower decline in manufacturing, with an emphasis on the integration of information into industrial production. A third hybrid has emerged in countries such as India, China and Brazil where sophisticated production networks and IT-enhanced services markets sit alongside subsistence agriculture and fragile industries. These divergent models generate different offensive and defensive priorities in the GATS and bilateral agreements.

The distribution of services transactions reveals an international division of labour within the ‘global’ services/knowledge economy that is sharply delineated by physical and social geography. The spatial distribution mirrors historical North/South divisions. Some countries or regions have changed their position within that hierarchy. Newly industrialised countries in East and South East Asia who seized the chance for upward mobility in the 1960s and 1970s have benefited most from the outsourcing of manufacturing, although some struggled to survive the 1997 financial crisis. India embraced the market model in 1991 and carved out a niche in IT-enabled services. China is rapidly enhancing its IT capacity and expanding its commercial services markets, especially since its WTO accession in 2001. These countries all have internal labour markets that are delineated by class and/or migration.

But these ascendant countries are exceptions. Ankie Hoogvelt depicts a map of the global economy that is shrinking (Hoogvelt, 2001). Shifts in world trade and flows of foreign direct investment and capital are unevenly spread. Many Southern countries remain submerged by a combination of resource rents that date back to colonialism, technological rents that were incurred through import substitution, and debt peonage from reckless lending by foreign institutions for ill-conceived projects that lined the pockets of corrupt national élites. The (poor quality) data that is available reveals a thickening network of economic exchanges within the core, a significant redistribution of trade participation within the core, the graduation of a small number of peripheral nations within a comparatively small population base to ‘core’ status, but above all to a declining economic
interaction between core and periphery, both relative to aggregate world trade and to total populations participating in the network.

(Hoogvelt, 2001, p 76)

The social geography of the services/knowledge economy reveals a widening gap in wealth and income. This trend is equally a feature of rich capitalist countries in the global North, middle-income semi-peripheral countries, and the impoverished global South. The nature of labour itself in the post-industrial era has shifted away from manual to mental labour, especially in richer countries. Hardt and Negri use the term ‘immaterial labour’ that produces an immaterial service, cultural product, knowledge or communication (Hardt and Negri, 2000, pp 290–3). Because the labour content in services is greater than that in tangible commodities, it is even more directly determinative of productivity and profit. The informational and immaterial nature of services, and the mobility of capital, fuel international competition among workers. ‘Flexibilised’ labour markets become increasingly precarious and erode the collective bargaining power of nationally organised labour. The worker becomes disposable, at the same time as the social wage is redefined as a personal responsibility (Harvey, 2005, p 168). The more explicitly social character of services labour also heightens the importance of its fetishisation from the social relations in which the service is embedded – as embodied in the designation of the temporary movement of natural persons for the supply of trade in services such as ‘mode 4’.

Hardt and Negri identify three categories of immaterial labour, whose class nature and function resonate with the trade in services regime. The first category involves work in informationalised industrial production, where manufacturing and agriculture are themselves regarded as a service. In GATS terms, this corresponds to services related to manufacturing, mining, forestry, fisheries and agriculture, the placement and supply of personnel in activities such as construction, and supply chain operations such as transport and distribution (Chapters 6 and 8, Case study 14).

The second category is labour that performs analytical and symbolic tasks, which Hardt and Negri further divide between creative and intelligent manipulation and routine tasks. The distinction between the managerial class and ‘unskilled’ workers reflects a trend to valorise and differentiate labour on the basis of knowledge content and status. That class differentiation has a distinct geopolitics, which infuses the trade in services negotiations over ‘mode 4’ for the supply of services through the temporary movement of services personnel (Chapter 6, Case Study 11).

The third group of ‘affective labour’ engages in human contact and interaction; examples are caregivers, teachers, health professionals, hotel workers, educators and creative artists, who may deliver services in a physical or virtual form (Chapters 4 and 7, Case Study 12). Again, differential treatment in the GATS reflects a combination of social class and national origin.
The regime of accumulation

A globalising services/knowledge economy requires a supportive legal regime that will facilitate its expansion and legitimise its inequalities. Trade in services agreements are an example of what Bronwyn Morgan calls ‘meta-regulation’: by regulating the process of regulation itself, they institutionalise the presumption of pro-market governance and embed it within everyday routines of governmental policymaking (Morgan, 2003). They contain ‘constitution-like’ characteristics that pre-commit governments to maintain a regime of embedded neoliberalism (Schneiderman, 2000), depriving themselves and their successors of the autonomy to explore alternative ways of regulating their countries’ services. From a neoliberal perspective, governments emulate Ulysses by tying ‘themselves to the mast to escape the siren-like calls of pressure groups’ (Hoekman and Kostecki, 1995, p 25).

In the mid-1970s US financial corporations, led by American International Group (AIG) and American Express (AMEX), began pressing their government to develop such an agreement. They had two goals: to pre-empt regulation of the technologies that were beginning to revolutionise the cross-border movement of capital, data and related services; and to secure a multilateral agreement on investment (Feketekuty, 1988). These guarantees had to be binding and enforceable, yet generic and sufficiently flexible to apply to the as-yet unknown.

The most analogous legal concepts were to be found in the General Agreement on Tariffs and Trade (GATT). ‘Most favoured nation’ (MFN) treatment could prevent discrimination against US transnationals by putting them on legal par with firms from all other countries, secure in the knowledge that their market power would enable them to dominate. Legally binding rights of ‘market access’ could guarantee the right to compete in existing and emerging services markets. Ideally, that right would extend to the entry of foreign investment and the managerial élite. ‘National treatment’ would require foreign governments not to favour their domestic providers of comparable services.

However, services would need to be radically reconceptualised before they could be subjected to an ‘international trade’ regime.

First, and most fundamentally, services can only be traded through contractual relationships between purchasers and suppliers for valuable consideration if they are commodified and have an exchange value. This requires an ideological transition that detaches services from the context and social relations in which they are embedded and subjects them to a form and language that is ‘more marketized, individualized and linked to commodity logic’ (Gill, 2003, p 117).

The advocates of trade in services agreements assumed this transition could be achieved by technocratic means. Social regulation of services at the national level would be transformed by neoliberalism. States would then
entrench that new paradigm through a supranational regime that functions as enabler, catalyst and enforcer of open international services markets. All non-market dimensions would be stripped away or redefined within the market paradigm. William Drake and Kalypso Nicolaidis describe this as a process of ‘socio-regulatory adjustment’:

A boundary line between illegitimate [non-tariff barriers] and legitimate regulations was required. Wherever that line could be drawn, services liberalization would necessarily involve the extensive restructuring of what were once thought of as purely domestic regulations. This required a sea change in social purpose. . . . Both the intellectual frameworks in which services industries were visualized and the vast array of social interests and institutions related to regulations would now have to be judged according to the narrow commercial criterion of whether they impeded trade.

(Drake and Nicolaidis, 1992, p 63)

The notion of ‘socio-regulatory adjustment’ confronts a number of deep-seated and resilient social interests, values and institutions. This is most obvious in state provision of public goods that benefit the wider society. When services are reduced to market transactions between individual sellers and consumers, their public good dimensions are redefined as ‘externalities’. Yet almost all governments have legal obligations to provide public goods under domestic law or as rights enshrined in their national constitutions and international human rights instruments. Such guarantees had been hard fought for; technocrats apparently assumed they would either be surrendered or subsumed.

‘Socio-regulatory adjustment’ is equally contentious in other domains. The social services activities of central and local government, churches, charities and local groups commonly reflect their commitment to the collective wellbeing of their communities, rather than ‘narrow commercial criteria’. Culture and education are widely seen as the conduits of identity, human development and nation building. People’s interactions with dentists, lawyers, childminders and other professionals rely primarily on trust and relational, not transactional, contracts. These more explicitly social dimensions of services were not the initial targets of the GATS; but the logic of a trade in services agreement requires the process of ‘socio-regulatory adjustment’ to apply across the board.

A second prerequisite for international trade in services is a multiplicity of open, competitive and mutually compatible national services markets. Those markets were constructed from the early 1980s in accordance with what became known as the Washington Consensus template (Williamson, 1994). This transition followed complementary policy pathways in richer countries through the auspices of the Organization for Economic
Cooperation and Development (OECD) and in most of the global South under the tutelage of the IMF and World Bank. As the OECD Trade Committee reflected in 1991: ‘There is virtually complete parallelism between adjustment policies and the objectives set at international level for trade policies.’

Third, the application of generic trade rules to services requires a commonality across seemingly disparate services activities. Commodification abstracts each service from its socially embedded context. Money provides the means for exchanging these commodities within a services market. But regulatory equivalence across sectors cannot be achieved so long as individual services are defined by their unique characteristics and social functions. New legal concepts and formats are needed to fetishise these commodities as a class of comparable products, which can then be governed by a uniform set of principles and rules that facilitate market exchange. The United Nations Central Product Classification (CPC) provided the mechanism for redefining services to reflect the commercial activity of the supplier. Midwives became business services, cruise ships became maritime transport and supermarkets became distribution services. All services could potentially be defined as CPCs and reduced to a four-digit figure in a country’s schedule of trade in services commitments.

The premise of a level playing field for international trade in services also requires parity between service providers – a natural person and a transnational corporation, a national and a foreigner. This enables foreign corporations to assert the right of non-discriminatory access to a country’s market and the infrastructure they need to operate, and to demand the removal of impediments to foreign competition. Among the discriminatory barriers to be dismantled are rules for vetting of foreign investment, preferential subsidies and government procurement practices, local content rules, differential tax laws, restrictive licensing restrictions and distinctive qualification requirements.

The transactions that constitute international trade in services must also be defined to include the commercial activities that are most profitable for transnational services companies. This again pushed the traditional boundaries. The most direct analogy to trade in goods is cross-border transactions where the buyer and seller of services are physically located in different countries. However, in the 1970s cross-border service delivery through the post or ‘over the wire’ was relatively uncommon, and the computerised delivery of most services was not considered technically feasible – although those possibilities now seem almost limitless. The most lucrative international transactions in services involved foreign direct investment through the cross-border movement of capital and short-term migration of managerial personnel and professionals. These highly sensitive areas of domestic policy had to be redefined as international ‘trade’ and then fetishised as abstract ‘modes’ of supplying services.
To achieve such a radical paradigm shift the role and objectives of those
government agencies that made policy for, and regulated, services also had
to be transformed. Defining services as a generic ‘trade’ issue made them
the business of the trade bureaucracy. The international nature of those
services activities and the general application of trade rules took them out
of the hands of sectoral ministries that had responsibility for domestic policy
and regulation of specific services.

The reallocation of regulatory responsibility had its parallel in the
international arena. Long-established agencies with broad international
membership, such as the International Telecommunications Union, the
Universal Postal Union and the International Air Transport Association, had
a tradition of promoting co-operative cross-border regulation, rather than
international market competition. By contrast, an international organisation
such as the OECD, whose mandate was to expand the international economy,
could foster a pro-market consensus among the rich industrialised countries.
A redistribution of influence within the OECD would enable its trade committee
to bypass other committees that were serviced by national bureaucracies and
sectoral ministers, and encourage trade officials and ministers to integrate their
thinking on services with their other trade responsibilities.

The OECD, having acted as an incubator, would pass the baton to the
GATT as the only international institution that could provide comprehensive
coverage and enforceability of trade in services rules. The final challenge was
therefore to reinvent the GATT. The advanced capitalist countries considered
the agreement was nearing its use-by date as a forum for the liberalisation
of trade in goods. Negotiations on trade in services under GATT auspices
could open new economic frontiers and provide negotiating leverage to fend
off demands from Southern states for negotiations in sensitive areas, such as
textiles, voluntary export restraints and dumping. Once inside the GATT,
services could be treated exclusively as a ‘trade’ concern.

The GATS as legal imperialism

As Chapter 2 explains in more detail, the GATS was a project devised
and executed by the US with the support of OECD allies. Along with the
intellectual property agreement, it was the crowning achievement of the
Uruguay round. Former US trade official Jules Katz, a senior negotiator in
the round, boasted that: ‘The WTO was created in the image of the US.
We are responsible for its strengths and weaknesses’ (quoted in Jones, 1997).
In geopolitical terms, this achievement symbolised the ‘hierarchy of inter-
state power with the USA at its apex, along with its G7 partners, and an
increasingly global system of political economy that serves to redistribute
power and intensify inequality’ (Gill, 2003, p 189).

India’s GATT Ambassador from 1984 to 1989, SP Shukla, described the
battle over the creation of the GATS as a proxy struggle over the regulation
of the new phase of international capitalism. The US objectives reflected
the prevailing geopolitical and economic (dis)equilibrium: ‘the continuing
need for expansion on the one hand and, on the other, the built-in tendency
to pass the relevant costs of adjustment onto its weaker constituents’
(Shukla, 2000, p 10). Raghavan depicted the demand for a trade in services
agreement as the North’s counter to the South’s post-colonial vision of a
New International Economic Order:

If the US succeeds in its efforts, it would enable the US to rewrite some
of the postwar rules and principles of international economic relations.
And instead of the world moving towards a New World Order, it would
be moving towards a Transnational World Order. In economic terms
the US would then have succeeded in giving the Third World a rollback
to its days under the colonial era, when the role of the State was only
to keep law and order, and keep the natives quiet for the benefit of
‘entrepreneurs’ from the metropolitan centres.7

The standard riposte to depictions of the GATS as a tool of imperialism is
that sovereign states chose to adopt it as the normative system of rules for
regulating international services transactions. Such arguments obscure
the centrality of power in international law. Over centuries, rules for the
distribution of wealth and power in favour of historically dominant Western
states have become embedded through international treaties, and rendered
natural in ways that detach them from claims about morality and justice
or race, gender and culture. The legal concepts, institutions and agreements
through which this occurs are periodically reinvented in response to
changing geopolitical and economic imperatives, and to resistance.

Trade in services agreements are a contemporary manifestation of that
trend. As Chapters 1 and 2 show, the GATS is an ideological artifice. It
was systematically constructed between 1979 and 1993. In 1994 it became
‘law’, an expression of objective rationality and an abstract normative
instrument that contained general principles, rules and technical terms. The
legal form confers legitimacy on power through the imagery of neutrality
and independence. Legal concepts reify real transactions and players into
a technocratic realm. When disputes arise, these rules are applied to an
abstract problem that involves disembodied parties using positive legal
reasoning to produce a decision that purports to be objective.

The self-referencing nature of trade in services agreements leaves no space
for the possibility of policy or market failure or its own displacement by a
new orthodoxy. Commenting on similar processes in the context of rights,
Valerie Kerruish observes: ‘This quality, in the legal norm, gives it a capacity
to replace fact with fiction, to close the door on further inquiry and so to
be that which we cannot go beyond in our legal understanding’ (Kerruish,
1991, p 124). The process of exclusion works ‘to silence certain critical
modes of demanding justice, particularly those that rely on moral or distributive values' (Morgan, 2003, p 491). That is not to suggest that its self-limiting nature allows the legal domain to go uncontested. But a challenge to the trade in services paradigm itself can only occur outside the ‘legitimate’ discourse established by the agreements.

The form of a treaty under international law has additional ideological characteristics. Once sovereign states completed the formal requirements of treaty making in 1994 the strategic, political and economic interests of the major powers and the corporations that drove the creation of the GATS were obliterated from the legal discourse. Its principles and rules that privilege capital became intrinsically valid and indisputable: in the time-honoured words of Frederic Engels, ‘the juristic form is, in consequence, made everything and the economic content nothing’ (Engels quoted in Hunt, 1993, p 19).

The pivotal ideological claim of international law is its universality. In practice, the states that write the script construct a fictitious legal universe that reflects their own image and interests. The rest of the world is excluded from international society, then readmitted on positivist terms that subordinate and disempower them, reshaping their legal, political and economic systems according to Western norms (Anghie, 2005, p 60). In Gayatri Spivak’s words, ‘the coloniser constructs himself as he constructs the colony’ (quoted by Anghie, 2005, p 1). Societies allegedly consent to this subordination through the state’s exercise of its executive treaty-making powers, even when that conflicts with the national constitution, domestic laws or other international treaty obligations. International law conceals the underlying paradox: sovereign states represent the people who are presumed to have consented to rules that conflict with domestic laws to which they are also presumed to have consented. The formal equality of sovereign states under international law also disguises their substantive inequality. Relatively powerless states employ whatever institutional vehicles and technical arguments they can to leverage their position and vent their opposition within the predetermined framework – as seen constantly in the trade in services context.

International law legitimises this hierarchy through the binary of the universal/civilised/developed versus the particular/uncivilised/undeveloped. Tony Anghie provides the geopolitical and historical context for understanding this hierarchy and the institutions and instruments of international law that perpetuate it.

Trade rules have been integral to the ‘civilising mission’ ever since the invasion of the Americas and the granting of the East India Company’s charter in the sixteenth century. Anghie observes that ‘non-European sovereignty suffered – and continues to suffer – a particular vulnerability that arises from the system of economic power into which it was integrated even as it became sovereign’ (Anghie, 2005, p 195). The subordination of
colonial economies to the metropole continued through the mandate system of tutelage after the First World War, which posited integration into the international economy as the best development option.

After the Second World War, the Bretton Woods institutions of the IMF and International Bank for Reconstruction and Development (the World Bank) became the successors to the mandate era. As creatures of the major powers, they ensured an economic structure that replicated colonial and comprador relations both with and within newly independent states. That power was legitimised by a new discourse based on economics. ‘Uncivilised’ societies became ‘developing’ states that were urged by the international financial institutions to become the agents of their own development. The end-goal was a market economy that promised a win-win outcome. ‘Development’ financing from those institutions was complemented by the neutral rules of non-discrimination and market access for the export of goods inscribed within the GATT – a treaty described by RH Snape as being constructed ‘out of the old trade agreement lumber ready at hand’ (quoted in Shukla, 2000, p 2). The political hierarchy of imperial powers and former colonies became redefined as abstract contractual relations between the multilateral lending institutions and their state clients, and among Contracting Parties to the GATT:

The old international law of conquest created the inequalities that the new international law of contracts perpetuates, legalises and substantiates when it ‘neutrally’ enforces the agreements, however one-sided, entered into by sovereign Third World states.

(Anghie, 2005, p 241)

The Bretton Woods version of ‘development’ was confronted by the desire of most newly independent countries to match their juridical sovereignty with genuine economic and political self-determination. Achieving this meant breaking free of the resource bondage that ‘legally’ transferred the economic surplus from the colonial periphery to the imperial centre. The Group of 77 and the Non-Aligned Movement emerged as the collective voices of what became known as the Third World. However, rather than jettison a system of international law whose hostile premises they had played no role in formulating, their intellectuals sought to frame an anti-colonial position within its institutional and intellectual boundaries.

Using their numerical majority within the United Nations (UN), Third World states moved to assert the doctrine of state responsibility over Western-established protections for foreign investments, and to claw back unconscionable foreign concessions to exploit their minerals (Schrijver, 1997). In 1974–5 the New International Economic Order spelt out a platform for restitution and the realignment of North–South relations through stable commodity prices, infant industry protection and preferential access to First
World markets. The United Nations Conference on Trade and Development (UNCTAD), first convened in 1964, generated momentum for the inclusion of Part IV: Development in the GATT. UNCTAD came to be seen as the institutional vehicle through which the Third World could find its voice, but still within the economic parameters set by the Western powers. The OECD was formed in 1961 as the institutional vehicle for the industrialised powers to develop a collective position that would reinforce the economic agenda of the IMF, World Bank and GATT and neutralise the emergent Third World bloc within the UN. The OECD became the direct counterfoil to UNCTAD after 1964, a role it maintained during the gestation and negotiation of the GATS.

International economic law now assumed a new form that blended public and private spheres. Multinational companies were imbued with legal personality and a quasi-sovereign status to enforce contractual and property rights in international legal forums. Over time, the blend of international law and private behaviour generated an ‘increasing interdependence in which political, legal and economic governance mechanisms clash and mesh at multiple levels’ (Shaffer, 2003, p 8). That privileged relationship was central to the Uruguay round negotiations on services and intellectual property and became normative through the resulting texts.

By the 1990s the new pathway to ‘civilisation’ was the participation of ‘developing countries’ in the emerging global economy through free markets and trade liberalisation agreements. Case study 3 describes how a self-styled ‘epistemic community’ assumed the mantle of enlightened evangelists who preached the virtue of liberalising policies and pro-market regulations to govern services (Drake and Nicolaidis, 1992). ‘Developing’ and ‘least developed’ countries were promised a share of the gains from increased global welfare, provided they participated with self-discipline and enthusiasm and abandoned the failed beliefs, practices and institutions of the past.

The negotiation of the GATS during the Uruguay round heralded a new assault on the regulatory sovereignty of Southern governments, or to use the current euphemism, their ‘policy space’. Enduring asymmetries between North and South pervaded the new international division of labour. Since 1994, the GATS has expanded into a multilayered trade in services regime that, this book concludes, is ultimately unsustainable. The globally integrated, services-driven economy is vulnerable to systemic crises, politically unstable because it generates inequalities of wealth and power that provoke resistance and ecologically untenable because it cannibalises nature’s scarce resources. At an ideological level, the social paradigm of services has remained resilient in the face of neoliberalism, as has the expectation that national governments will regulate for social objectives. Those fractures are symptomatic of the deeper contradictions that infect neoliberal globalisation.

The first four chapters examine the trade in services regime itself. Chapter 1 provides a critical and contextual reading of the legal texts. Chapter 2

Serving whose interests?
recounts the contested origins of the GATS, which are echoed in the North/South tensions that paralysed the Doha round and the GATS 2000 negotiations. Chapter 3 links these developments to the role of the IMF, World Bank and WTO in advancing the ideological, institutional, policy and operational ‘coherence’ of neoliberalism. Chapter 4 explains the failure of the technocratic project of ‘socio-regulatory transformation’ to suppress the traditional notions of public services, and the iconic status of water in the campaigns against the trade in services agreements.

Chapters 5 and 6 focus on the factors of production in the transnational services markets: financial services (the brain), telecommunications (the highway) and people (the labour). The commodification and reification of these factors through trade in services agreements disguise the profound asymmetries and instabilities in the global services economy, and screen out the social impacts of pro-market regulation on workers, businesses and communities. Chapter 7 contrasts the treatment of culture and higher education in trade in services agreements as static commodities with the dialogical understanding of cultural and knowledge exchange as the foundations of complex democracy.

Chapter 8 integrates the legal texts on trade in services, agriculture, goods and investment measures to reveal their systemic impacts on social and environmental sustainability. It then traces how the GATS (rather than the Agreement on Agriculture) operates to entrench the control of agribusinesses and mega-retailers over the global food production and supply chain. Chapter 9 draws disturbing links between energy services, national security, militarisation and peak oil, and highlights the emerging counter-hegemonic role of oil-rich Southern countries, notably Venezuela.

Each of these chapters is brought to life with two case studies that provide an alternative entry point for readers who struggle with the technicalities. The stories they tell range from call centres in Bangalore, the tourist zone in Cancún and privatised pensions in Chile and Britain to the global empires of Wal-Mart and Carrefour and the incendiary potential of the WTO accession for Iran and Iraq. More institutionally focused case studies document how the corporate lobby launched the GATS in the 1980s, and their eclipse by the anti-GATS campaigners since 2000, and explain the crippled state of the GATS 2000 negotiations and the rise of ‘competitive imperialism’ among the major powers through new generation free trade agreements (FTAs) (Bhala, 2007). The conclusion reflects on where these dynamics and contradictions might lead the trade in services regime in the coming decades.
Economic regulation in the twenty-first century involves a complex, overlapping and often incoherent web of state-sponsored market mechanisms and industry self-regulation. This regulatory network criss-crosses the multilateral, regional and national domains (Picciotto, 1996). Trade in services agreements form one small part of this rapidly expanding and rather chaotic regulatory geography. While the GATS 1994 provides the main reference point for legal analysis, its structure and content have been reorganised, refined and expanded in diverse and sometimes inconsistent ways through bilateral and regional agreements.

At one level, these treaties have to be treated as legal texts. At a deeper level, the GATS and the new generation of agreements need to be understood as hegemonic constructs: their role is to reshape economic and social relations in ways that reflect the contemporary requirements of transnational corporations. This chapter offers a critical and contextual reading of the legal texts. Case study 1 examines how the major powers have attempted to address the dysfunctions of the GATS on behalf of their corporations in the GATS 2000 negotiations, while Case study 2 locates the services component of the bilateral and regional agreements in their geopolitical context.

The GATS as legal text
The GATS 1994 began as a US proposal for a set of multilateral rules that would govern all services (Chapter 2). The text that finally emerged has multiple layers of horizontal disciplines, sector-specific rules, annexes and country schedules of sectoral commitments, which are complemented by ministerial decisions.

The schedules of commitments made by each member state under Part III form part of the legal text.

The rules and obligations of the GATS apply to ‘measures’ by a ‘Member’ ‘affecting’ ‘trade in services’. These four elements are defined in Articles I:2 and XVIII.
GENERAL AGREEMENT ON TRADE IN SERVICES

PART I  SCOPE AND DEFINITION
Article I  Scope and Definition

PART II  GENERAL OBLIGATIONS AND DISCIPLINES
Article II  Most-Favoured-Nation Treatment
Article III  Transparency
Article III bis  Disclosure of Confidential Information
Article IV  Increasing Participation of Developing Countries
Article V  Economic Integration
Article V bis  Labour Markets Integration Agreements
Article VI  Domestic Regulation
Article VII  Recognition
Article VIII  Monopolies and Exclusive Service Suppliers
Article IX  Business Practices
Article X  Emergency Safeguard Measures
Article XI  Payments and Transfers
Article XII  Restrictions to Safeguard the Balance of Payments
Article XIII  Government Procurement
Article XIV  General Exceptions
Article XIV bis  Security Exceptions
Article XV  Subsidies

PART III  SPECIFIC COMMITMENTS
Article XVI  Market Access
Article XVII  National Treatment
Article XVIII  Additional Commitments

PART IV  PROGRESSIVE LIBERALIZATION
Article XIX  Negotiation of Specific Commitments
Article XX  Schedules of Specific Commitments
Article XXI  Modification of Schedules

PART V  INSTITUTIONAL PROVISIONS
Article XXII  Consultation
Article XXIII  Dispute Settlement and Enforcement
Article XXIV  Council for Trade in Services
Article XXV  Technical Cooperation
Article XXVI  Relationship with Other International Organizations
Measures encompass every activity that governments employ to regulate services: ‘a law, regulation, rule, procedure, decision, administrative action, or any other form’. This alone takes the GATS into the heartland of domestic governance and state sovereignty.

Members refers to all WTO member states, who are automatically signatories to the GATS. A state’s obligations extend beyond central government. It must ‘take such reasonable measures as may be available’ to ensure observance of its obligations and commitments by regional and local governments, and by non-governmental bodies exercising delegated powers. The GATS therefore binds national legislatures, sub-federal states and provinces, local authorities, and licensing or professional bodies. There is obvious potential for the state’s multilateral obligations to collide with sub-national powers. States or provinces in federal jurisdictions commonly exercise constitutional authority over specific services, such as education or gambling. Even in unitary states, local governments enjoy an increasing level of statutory authority through devolution. Self-regulatory bodies have always been a feature of professions and are increasingly common across services industries, such as construction or real estate, given the trend to light-handed regulation.

This tension is mitigated by the requirement on the state only to take ‘reasonable measures available’ to ensure compliance. Because ‘reasonable measures’ has not been defined, the provision has a potential chilling effect on subordinate regulatory bodies. The political and social ramifications of the sub-national application of GATS rules are illustrated in Case study 9, which discusses the challenge by Antigua and Barbuda (Antigua) to US state and federal laws on internet gambling, and in Case study 15 in relation to local government regulation of supermarkets.
The GATS net is thrown wider still by the reference in Article XVIII(c) to measures affecting trade in services. ‘Affecting’ explicitly includes government policies and regulations ‘in respect of’ the purchase, payments and use of a service. It also extends to measures ‘in respect of’ access to and use of services that are needed to supply a service that must be offered to the general public and ‘in respect of’ the presence of a foreign person or investment to supply a service. In the Bananas dispute brought by the US and other members against the EU (Chapter 8), the WTO’s Appellate Body concluded that ‘the use of the term “affecting” reflects the intent of the drafters to give a broad reach to the GATS’ and is equivalent to ‘have an effect on’ (EU-Bananas, 1997b, para 220).

Trade in services itself is defined in terms of the cross-border movement of factors of production – information, capital and labour. These activities are characterised in Article I:2 as four modes of supply. As the Introduction explained, this disembodied and disaggregated discourse divests the transaction of any human dimension. Relational discourses of services that reflect the experience of people and communities in providing and using services are displaced by a transactional description that reflects the production of services by foreign corporations or personnel. Services ‘exports’ are understood in terms of the nationality of the service provider and services ‘imports’ by reference to that of the consumer. This approach frees the supplier and consumer from having to be located in their country of origin when the transaction takes place.

The service itself is the subject of the first two modes:

(a) mode 1, the supply of the service across the territorial border (for example, by the internet); and

(b) mode 2, consumption of the service abroad (for example, by a tourist).

The other two modes refer to the supplier:

(c) mode 3, establishing a commercial presence (foreign direct investment); and

(d) mode 4, the temporary presence of foreign personnel to deliver a service (e.g. a consultant).

The ‘trade’ rubric disguises more controversial ways of understanding these activities. The clearest example is mode 3. The GATS is, in part, a multilateral agreement to liberalise foreign direct investment in relation to services. The services pathway has become especially important since moves to secure a Multilateral Agreement on Investment (MAI) at the OECD were rebuffed in 1998, and demands from the EU for negotiations on ‘new issues’, including investment, in the WTO were rejected in 2003. Many bilateral and regional treaties have abandoned the pretence that mode 3 involves trade in services.
and integrated it into chapters on the establishment and protection of foreign investment. That approach confers broader rights on investors. For example, the North American Free Trade Agreement (NAFTA) and many subsequent US bilateral agreements allow foreign investors in services from one party to seek damages for ‘measures tantamount to expropriation’ directly from another state party through an arbitral tribunal.

Since the late 1990s both the global balance of services exports across these modes and the political dynamics of services negotiations have shifted dramatically. This shift reflects the growing importance of physical and ‘virtual’ migration (e-services) for countries that are the major sources, mainly in the South, and to destinations, mainly in the North. Most attention is focused on mode 4, which facilitates the cross-border movement of the labour factor in the production of services. While the GATS Annex on Movement of Natural Persons asserts that every member retains the right to regulate entry and temporary stay in its territory, such measures must not be applied in ways that nullify or impair the member’s scheduled commitments. Hence, mode 4 commitments can constrain immigration laws and policies (Chapter 6).

Legally, the four modes are unconnected. Organically, modes 3 and 4 are essential to transnational corporate expansion. Most Northern governments therefore seek commitments that link the two modes. Although the Annex and the definition of mode 4 cover all categories of services workers, Northern governments also routinely treat the GATS as conferring rights on intra-corporate transferees, professionals and other elite personnel, and reject equivalent rights for lower strata services workers. This limited coverage is often more explicit in bilateral agreements.

Conversely, the governments of many Southern countries are reluctant to make binding commitments under mode 3; but they see mode 4 as providing a way to secure temporary access to foreign labour markets for their semi- and unskilled service workers. Governments in countries such as India view mode 4 (especially movement of IT professionals) and mode 1 (which covers back office operations and call centres) as complementary sources of comparative advantage in the international services economy.

Further complexities over the modes arise when considering e-commerce transactions, which for legal purposes must take place in one jurisdiction. These can be viewed from the location of the purchaser as mode 1 (in which fewer commitments have been made) or the supplier as mode 2 (which has many more commitments). The US-Gambling case appears to have settled that question in favour of mode 1 (Case study 9) (Mattoo and Wunsch, 2004, p 11).

‘Trade in services’ is defined in terms of the supply of services through these four modes. Article XXVIII defines ‘supply’ as including the ‘production, distribution, marketing, sale and delivery’ of a service, a description that incorporates almost every step in the service supply chain.
(Chapter 8) and potentially overlaps with other discrete services sectors, such as distribution or advertising. Footnote 9 to Article XVI: Market Access says a commitment does not cover measures that limit ‘inputs’ for the supply of services. However, there is no clear boundary between inputs and the various elements of ‘supply’. Moreover, that caveat only applies to market access limits in Article XVI(c); some commentators argue that quantitative limits on inputs to services, such as water to hotels, could breach other market access categories (Ostrovsky et al., 2003, pp 33–4).

These expansively defined ‘measures of a Member affecting trade in services’ are subject to (largely) horizontal disciplines in Part II and sector specific commitments on market access, national treatment and other commitments in Part III.

**General obligations and disciplines**

The organising principles of the GATS are partly adapted from the GATT and partly experimental. The South/North divisions that pervaded the Uruguay round, as discussed in Chapter 2, are translated into the text through the principles of development and progressive liberalisation, respectively.

The Preamble acknowledges there is an imbalance between the global North and South in national and international services markets:

*Desiring* to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness; [and]

*Taking* particular account of the serious difficulty of the least developed countries in view of their special economic situation and their development, trade and financial needs; . . .

This recognition was hard won. Yet it is largely hortatory, because the references to development in the text are weak. Article IV: *Increasing Participation of Developing Countries* repeats the preambular commitment to enhance the capacity, effectiveness and competitiveness of services exports from developing and least developed countries. But instead of enforceable rights, it merely creates expectations on developed countries to schedule their commitments with beneficent intentions. There is no reference to ‘special and differential treatment’ for developing countries, only to facilitating their participation in the global services economy.

There is little room to interpret the text creatively. The Preamble describes the objective of establishing a framework of multilateral principles and rules as ‘the expansion of [trade in services] under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries’
However, the potential to interpret ‘and’ disjunctively is neutralised by the subsequent objective of ‘early achievement of progressively higher levels of liberalization through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations’. Part IV: Progressive Liberalization sets the mechanisms for securing this goal, effectively subsuming development within the process of progressive liberalisation. Although the development rhetoric lacks legal potency, it has nevertheless been important strategically as a basis for advocacy and passive resistance by Southern governments.

Progressive liberalisation emerges from the text as the overriding objective. It is to be advanced in two ways. The first, through future rounds of negotiations, is discussed below. The second is through regional (including bilateral) trade agreements that involve a WTO member (Case study 2). Under Article V: Economic Integration any Regional Trade Agreement (RTA) must deepen the existing levels of liberalisation of members by reducing or removing discrimination between the parties across a ‘substantial’ range of sectors, with no a priori exclusions. In other words, they must be ‘GATS-plus’ in content, and can be ‘GATS-minus’ by removing flexibilities that restrict liberalisation. Unlike the comparable provisions in Article XXIV of the GATT, developing countries are allowed some greater flexibility, particularly in the degree of liberalisation and the time frame for implementation. What that means remains to be tested and is hostage to the power politics of bilateral and regional negotiations. There is additional leeway for labour integration agreements under Article V bis because they are assumed to deal with entry to employment markets, whereas mode 4 of delivering trade in services purports to provide for temporary entry by natural persons into a country’s services markets (Chapter 6).

The GATS framework imports the primary GATT pillar of non-discrimination through Article II: Most Favoured Nation and Article XVII National Treatment. The MFN provision requires service providers and services from all WTO members to be given equally favourable treatment; national treatment requires foreign providers and services to be treated at least as favourably as their domestic equivalent. The concept of ‘non-discrimination’ is imbued with the virtuous human rights discourse of equality and equity. Contextualised, MFN and national treatment intrinsically benefit the transnational enterprises that enjoy the advantages of scale, technology, research and development capacity, access to capital, distribution networks, marketing and brand recognition, combined with the patronage of major powers. Articles II and XVII guarantee those corporations the right to compete on an equal footing with local services firms and less endowed competitors from poorer countries. The deep digital divide heightens their advantage, as very few Southern governments can genuinely...
compete in providing, or survive against, cheaper cross-border delivery of services (Case studies 9 and 11).

Non-discrimination appeals to negotiators as an organising principle when it applies to others, but is problematic for sensitive sectors at home. Annex II permits the service ‘importing’ country to lodge exemptions to MFN. There was only one opportunity to do so, in 1994. These exemptions were, in principle, to run for a maximum of 10 years to 2005; however, most remain. The adoption of a ‘positive list’ approach to schedules in the GATS allows members to limit their exposure to national treatment, as discussed below.

Disciplines on domestic regulation are often represented as the GATS equivalent of disciplines on non-tariff barriers to trade in goods. The Preamble recognises ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives’. However, Article VI: Domestic Regulation restricts the right of governments to choose how they regulate. This reaches far beyond any traditional notion of ‘trade’ into a government’s core responsibilities. A member cannot limit the application of Article VI in its schedule of sectoral commitments.

Article VI relates to three forms of domestic regulation: qualification requirements (for example, nursing or teaching); licensing requirements (for example, to run taxis, casinos or rubbish tips, or to work as a surveyor or lawyer); and technical standards (for example, water purity or building codes). These regulations are required to be ‘based on objective and transparent criteria, such as competence and the ability to supply the service’ and to be ‘not more burdensome than necessary to ensure the quality of the service’. Strong resistance to this incursion on regulatory sovereignty meant the rules were initially restricted under Article VI:5 to services on which a government made a market access and/or national treatment commitment and where the measure in question could reasonably have been anticipated at the time that commitment was made.

A further general obligation in Article VIII: Monopolies and Exclusive Service Supplier requires members to ensure that these kinds of operations do not undermine their commitments through the cross-subsidisation of activities in competitive markets. The underlying aim is to promote the unbundling of monopolies and open the more profitable aspects of the operations to competition and foreign ownership. As one prominent financial sector lobby group observed: ‘Opening service markets to foreign providers is self-evidently inconsistent with maintaining public monopolies’ (IFSL (International Financial Services London), 2003, p 4). The Article VIII obligation is not enforceable but only subject to requests for information. Basic telecommunications monopolies are governed by their own reference paper, which was interpreted expansively in the Mexico-Telecommunications litigation (Chapter 5).
Sectoral commitments

Part III of the GATS contains three articles that apply only in relation to services committed in country-specific schedules.

Article XVI: Market Access proscribes the policy tools that a government can legitimately use to shape its services markets in the sectors that it commits in its schedule, subject to any explicit limitations. The reason the ‘measures’ are targeted is not because they are discriminatory. Article XVI prohibits quantitative or qualitative restrictions on the number of operators, operations or consumers, whether the suppliers are foreign or national. The objective is to liberalise domestic services markets, on the rationale that such restrictions are likely to impede foreign access.

The article provides a closed list of prohibited measures. Governments that make a full market access commitment cannot apply numerical quotas that restrict the number of firms or outputs, or the value of services, or impose limitations through monopolies or exclusive service suppliers. They cannot prescribe the legal form of suppliers, such as joint ventures, or limit foreign shareholding. Nor can they impose economic needs tests, which would effectively limit the market. Contextualised, Article XVI could prohibit local content quotas for television, limitations on the number of hotels or rubbish dumps in a sensitive locale, restrictions on the floor size of big box department stores, requirements that foreign universities operate through joint ventures, or conditions that allow temporary entry for foreign professionals only where there is proven economic need.

Article XVII: National Treatment prohibits discrimination between national and foreign services providers of ‘like’ services and suppliers. ‘Likeness’ could be interpreted broadly or narrowly. It is uncertain, for example, whether the supply of a library service or medical diagnosis by internet and in person would be considered ‘like’, based on the principle of ‘technological neutrality’.

One of the most controversial aspects of national treatment is its application to subsidies. Taxpayer subsidies represent a collective investment at national and local levels in social objectives, such as universal access to essential services, community cohesion, cultural diversity, regional development and employment. Neoliberal policies have eroded direct universal subsidies in favour of targeted vouchers, user charges, and ‘co-payments’ to public and private providers. Despite (or because of) that shift, there is still strong resistance in many countries to paying public subsidies to foreign firms, especially offshore. The GATS negotiating guidelines in both 1993 and 2001 say national treatment ‘applies to subsidies in the same way that it applies to all other measures’, meaning ‘any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article.’

A number of countries, such as Australia
and Canada, scheduled such reservations. Others, such as New Zealand, have argued that the status of subsidies is ambiguous – in their case, probably to cover for a scheduling error made in 1994 (Kelsey, 2003, p 20).

It is arguable, however, that national treatment does not apply to subsidies under mode 1. The guidelines say:

There is no obligation in the GATS which requires a Member to take measures outside its jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member.

This is only a guideline to negotiators. The same assurance is not stated in the Agreement itself or in any formal interpretation by the WTO Council for Trade in Services. GATS defenders commonly argue that no government would test this through a dispute, as it would endanger their own subsidies regimes and intensify opposition to the agreements. That may be true, but it can still have a chilling effect on government decisions.

The third limb of Part III, Article XVIII: Additional Commitments provides for the scheduling of other measures affecting trade in services. This primarily refers to domestic regulations. For example, this column in the schedule is where a government records its acceptance of, and limitations on, the Reference Paper on Basic Telecommunications concluded in 1998 (Chapter 5). This is also where the GATS-plus commitments made by acceding members as the price of entry to the WTO, such as promises to privatise, are recorded (Chapter 4).

Commitments under these three articles are inscribed in members’ schedules. Article XX: Schedules of Specific Commitments in Part IV: Progressive Liberalization mandated a positive list approach, which gives governments the right not to schedule a particular service and to retain some limitations when they do. Making a commitment binds them to maintain the specified level of liberalisation. However, the positive listing of sectoral commitments applies only to the rules in Part III of the agreement. It provides no protection from rules on recognition of qualifications (Article VII), monopolies and exclusive service suppliers (Article VIII), restrictive business practices (Article IX), international transfers and payments (Article XI) and aspects of domestic regulation (Article VI). The negotiating guidelines and procedures adopted during the Uruguay round established a process of bilateral negotiations based on requests and offers between individual governments. What they agreed to was then multilateralised and recorded in the member’s schedule.

The use of a negative list in many bilateral agreements vastly reduces the flexibility available to governments and correspondingly increases the scheduling risks. Negative lists typically involve two annexes, one listing
all sectors exempted permanently and the second reserving specific measures at their current level of liberalisation (‘standstill’). Future governments find their hands tied by their predecessors, with a presumption of further liberalisation, whether a positive or negative list is used.

Services exporters complain that the combination of the GATS text, appendices and schedules ‘are not user friendly and are somewhat opaque’ (Feketekuty, 1999). It is equally difficult for national policy makers, government regulators and local authorities to assess what constraints will apply to their current and prospective ‘measures’ – let alone for a local firm, trade union or community to understand them. It takes considerable technical skill to deconstruct the complex architecture of market access, national treatment and additional commitments in the four modes of supply, across the 11 sectors and more than 160 sub-sectors of services that are defined by product classification, and supplemented by horizontal commitments and limitations that apply across all services. An extract from the US schedule is provided in Case study 9. The terminology of the schedules is counter-intuitive: the entry ‘none’ means there are no limitations on the member’s commitment of that service sub-sector in that particular mode and sub-sector, rather than no commitments.

Such complexities create the risk of unintended commitments. An analysis by the WTO secretariat in 1999 concluded that 1,420 of 7,040 market access commitments in GATS schedules appeared to be mis-scheduled. Even major powers have incurred obligations they did not foresee. The EU failed to list an MFN exception for distribution services in the case of banana imports from the African, Caribbean and Pacific (ACP) states under the Lomé agreements (Chapter 8). In its report on the internet gambling case, the WTO Appellate Body accepted that the US probably never intended to make commitments on gambling, but found it was bound nevertheless (Case study 9). There is a much higher risk of error by poor countries with minimal resources. Moreover, the implications of commitments are literally impossible to predict. The US-Gambling case applied the principle of ‘technological neutrality’ so that a new means of delivering a service within a particular mode of supply is automatically covered by a commitment, even if the technology did not exist when the commitment was made.

Services are identified in the schedules using the Services Sectoral Classification List, known as W/120. The list is based on the United Nations Central Product Classification. CPCs are the ultimate symbol of fetishisation – ‘the substitution of one thing for another, together with a loss or lack of awareness, a forgetting, that the substitution has taken place’ (Kerruish, 1991, p 166). The term ‘product’ classification and identification by letters and numerals denote a commodity that is devoid of social content or context. Dentistry is a business service, postal delivery a communications service, rubbish dumps and sanitation are environmental services, water pipelines are transportation, and pensions are financial services.
W/120 has 11 categories and over 160 sub-sectors. So services are not only abstracted, they are also fragmented. A unitary and integrated service as experienced by a family or community spans a number of sub-sectors. As Chapter 7 explains, a social phenomenon such as cultural exchange is reconstituted through categories that include: Business: publishing, printing, translating; Audio-visual: projecting, production, broadcasting; Cultural services: entertainment, libraries, archives, museums; Distribution: retail. When a government privatises or unbundles a previously integrated public service, the relevant activities may also be dispersed across a broad range of seemingly unconnected sub-categories. Private finance initiatives (PFIs) that operate schools, hospitals or railways typically involve consortia of construction, finance and facilities management companies, with multiple sub-contracts in services such as catering, building maintenance, cleaning, databases and technical testing (Case study 7).

This fragmentation, and the uneven level of commitments by members across various sectors and between countries, is also counter-productive for corporations – just what the adoption of generic trade rules was intended to overcome. That effect is compounded because the W/120 classifications are based on the first provisional UN CPC dated 1993. The CPC has been updated twice: CPC1.0 in 1998 elaborated on services; and CPC1.1 in 2002 included telemarketing, payroll services and business support services (Mattoo and Wunsch, 2004, p 12, fn 37). A further update was planned for 2007. However, W/120 is still based on the 1993 version. Its static nature renders it partly obsolete. Updating it would create new inconsistencies and potentially alter the meaning of original commitments. In a further complication, W/120 is not mandatory, and some countries, notably the US, have made up their own classifications.

The US did secure more commercially relevant classifications on financial services and basic telecommunications in negotiations that continued after the Uruguay round (Chapter 5). Attempts were made to extend that approach to other sectors during the GATS 2000 negotiations. Proposals included the clustering of sub-sectors in ways that reflect the functional operations of corporations in particular activities, model schedules for broadly defined sectors, and horizontal commitments for particular modes of supply. These approaches formed the basis of the (so far unmet) plurilateral requests tabled in February 2006. The greater flexibility of bilateral negotiations has seen the adoption of updated classifications and model schedules that better reflect the commercial realities of their services industries. But, in doing so, they add to the overall incoherence between the various agreements.

Article XXI: Modification of Schedules permitted a government to modify or withdraw its GATS commitments, on notice, after 1998. But retracting a liberalisation commitment is considered a retrograde step, so it is extremely difficult and costly to amend a schedule. A government has to negotiate a compensatory adjustment with any affected member(s) who object that the
change would alter the existing ‘mutually advantageous’ balance of commitments. The adjustment would involve the liberalisation of services to an equivalent value of the loss demonstrated by the member who objects. That new concession would then be multilateralised. Disagreements can be referred to the dispute settlement process.

This complex mechanism has been used only twice. The EC took three years to negotiate adjustments to the schedules of its newly acceded members. The US Trade Representative (USTR) announced in May 2007 that the US would amend the commitment on ‘recreational services’ that was the subject of the adverse ruling in US-Gambling, rather than bring its domestic laws into compliance. The USTR insisted that no, or minimal, compensation was warranted because no government could realistically have believed the US intended to make a commitment that conflicted with its domestic law (Case study 9). At the same time, the US wants to minimise the risk of creating a precedent, if other members come under domestic pressure to ‘clarify’ their schedules by effectively withdrawing commitments.

Article XIX: Negotiation of Specific Commitments mandates successive rounds of market access negotiations, to begin no later than 2000 and periodically thereafter. The negotiating process could be ‘bilateral, plurilateral or multilateral’. The Council for Trade in Services is required to conduct an ‘assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the Agreement’, including those on development. This must be done before guidelines and procedures are established – a prerequisite that was effectively bypassed in the GATS 2000 round.

The overriding objective of further negotiations is to achieve ‘a progressively higher level of liberalization’. The comfort language promises ‘due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors’, and to ‘promot[e] the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations’. But permissible national policy objectives are intrinsically constrained by the trade liberalisation paradigm itself. Moreover, the virtue of maintaining the existing balance is misleading unless it is contextualised in terms of market and negotiating power.

Exclusions

The GATS appears to establish a number of carve-outs. Two provisions are held out as excluding the coverage of ‘public services’. Their meaning is the subject of heated disagreement, as discussed in Chapter 4.

Article I.3(b) of the GATS, repeated in most bilaterals, excludes ‘services supplied in the exercise of governmental authority’, but only where they are supplied on a non-commercial and non-competitive basis. This reflects the neoliberal premise that all services that have a commercial dimension
should be subject to market disciplines that maximise transparency, efficiency and competition, whether they are provided by or through the state or in the private sector. The application of corporatisation, privatisation, outsourcing, public-private partnerships (PPPs) and PFIs to what are traditionally considered public services has severely limited the scope of this exception. As a result, governments are constrained in their ability to regulate such services in the way they consider most appropriate to achieve their objectives, such as social cohesion, or universal access, or to meet their international and constitutional obligations.

Some mechanisms for providing publicly funded services, such as PPPs and PFIs arguably fall within the second, temporary exclusion under Article XIII: Government Procurement. Again, that provides only a partial carve-out. It does not extend to government purchases ‘with a view to commercial resale or with a view to use in the supply of services for commercial sale’. The exclusion also applies only to the MFN, market access and national treatment rules. As noted, PFIs generally operate through special purpose vehicles with multiple layers of subcontracting; this makes it unclear where the procurement relationship ends and commercial contracts cut in (Case study 7).

Where services fall outside these exemptions, governments must rely on the limited range of general exceptions. Measures that breach a member’s obligations can be justified under three provisions.

The language of Article XIV: General Exceptions broadly mirrors the GATT Article XX. The specific grounds for the exception must be met; this includes a ‘necessity’ test, which means convincing a tribunal of trade experts that the particular measure adopted was not ‘unnecessarily’ restrictive of foreign suppliers. The chapeau then ensures the primacy of the liberalisation objective by requiring that such ‘measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’.

However, the grounds specified in Article XIV are narrower than its GATT counterpart in ways that significantly limit the scope to protect societal interests. It maintains the exceptions ‘to protect public morals or to maintain public order’ and ‘to protect human, animal or plant life or health’. But it omits the potential under the GATT to adopt measures that are ‘(f) imposed for the protection of national treasures of artistic, historic or archaeological value’ and ‘(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption’, or where services are ‘(e) products of prison labour’. As with the GATT, there is no reference to ‘human rights’, ‘indigenous treaty obligations’ or even ‘consumer protection’. The argument that minimal exceptions are needed because the positive list approach to sectoral commitments provides states with sufficient protection is illogical, as that rationale would militate against any exceptions.
Some states have used bilateral and regional agreements to extend or introduce exceptions that they failed to secure in the Uruguay round (especially on culture) or to appease domestic pressures (for example, on indigenous rights). Under the Vienna Convention on the Law of Treaties 1969 these subsequent treaties supersede the comparable commitments between those parties in the GATS, but cannot affect their obligations to other WTO members.

A second, complex exception is Article XIII: Security Exceptions. Its wording is subtly different from the equivalent GATT Article XX. Nevertheless, both provisions can be read as recognising the ultimate authority of states to take measures they deem necessary in their essential security interest, and effectively withhold that action from WTO review. The US has gone beyond this exclusion in some of its bilateral agreements to make trade concessions conditional on consistency with US national security policies. These issues are examined in detail in Chapter 9.

The third exception allows a member to adopt temporary and non-discriminatory measures under Article XII in the event of serious balance of payments difficulties, including restrictions on payments or transfers. Such interventions are subject to ex post approval based on an assessment by the IMF and following consultations with the WTO Committee on Balance of Payments Restrictions. Raghavan objects that the technical hurdle of compliance with IMF requirements is compounded in many poorer countries by a lack of objective data and human capacity (Raghavan, 2002, p 30).

The balance of payments exception is even more important than its equivalent in the GATT because the GATS introduces enforceable rules on capital movements, although the implications for capital account convertibility are unclear (Sorsa, 1997, p 9). Under footnote 8 to Article XVI: Market Access members who make sectoral commitments on cross-border transactions (mode 1) must allow an unrestricted inflow and outflow of capital, where that movement is an ‘essential part of the service itself’ – a term that is undefined. Countries making commitments on foreign investment (mode 3) must ensure at least a free inflow of capital. In addition, Article XI: Payments and Transfers precludes members from imposing restrictions on transfers and payments for current transactions relating to their specific commitments. US bilateral agreements, beginning with Singapore and Chile, have gone much further by imposing a blanket prohibition on capital restrictions, even for temporary stabilisation purposes during economic and financial crises (Siegel, 2004).

**Unfinished business**

Four rules remained incomplete in the Uruguay round.

From a trade liberalisation perspective, subsidising local firms can distort the competitive services market. Article XV: Subsidies mandates the
development of any ‘necessary’ disciplines on subsidies that have ‘distortive effects on trade’. The analogous term in the WTO Agreement on Agriculture distinguishes between subsidies that seriously distort the competitive operation of world agricultural markets and those with less distorting effects. The borderline is subjective and controversial. No progress has been made in the GATS context.

Similarly, the negotiations authorised under Article XIII to bring government procurement under the GATS were supposed to conclude in 1997, but have made negligible progress (Chapter 5). Again, many bilateral agreements have circumvented this impasse by binding government procurement of both goods and services above a threshold, subject to schedules using positive or negative lists.

The third piece of unfinished business involves Article X: Emergency Safeguard Measures. A three-year deadline was originally set for concluding negotiations on safeguard provisions; that passed, as did two extensions. While Southern governments consider an emergency safeguard mechanism is a pre-requisite for further liberalisation, the major powers insist it is neither necessary nor technically feasible. Eight Asian governments tabled a paper in March 2007 that drew on the GATT safeguard provisions. They proposed, as a threshold test, the situation where ‘domestic service suppliers experience market conditions that result or are likely to result in serious injury to these suppliers or seriously threaten the viability of the domestic industry’. The GATT analogy is problematic, because the GATS includes foreign investments that could be the cause of such conditions and/or their potential victims (Lee, 1999). The safeguard mechanism also remains trapped within the GATS logic. Any non-complying measure would be temporary and could not discriminate between local and foreign, or different foreign, providers. Moreover, Article X limits the relevant considerations to the impact on local producers and production, and excludes interventions to address a crisis in the social function of service.

More progress has been made on the mandate, under Article VI:4, for the Council for Trade in Services to develop any ‘necessary’ disciplines ‘to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services’. The placement of Article VI: Domestic Regulation in Part II: General Obligations and Disciplines and its broad wording suggest these disciplines were ultimately intended to apply to all services, not just to those committed in a country’s schedule.

Some commentators have drawn sharp lines between the domestic regulation disciplines in Article VI and prohibited restrictions on market access in Article XVI (discussed above). Joost Pauwelyn argues that domestic regulations are only prohibited where they are discriminatory or more trade restrictive than necessary, whereas the rules that apply to non-discriminatory market access restrictions are more onerous. The greater deference that is
given to domestic regulation reflects the fact that it often ‘goes to the social and political heart of a country’s sovereignty’. He suggests that this boundary was breached in the decision on US-Gambling: by treating the US ban on internet gambling as a ‘zero quota’ and governed by market access rules, rather than a domestic regulation, the WTO risked intruding into the regulatory freedom of members ‘far beyond what was originally agreed to in the WTO Treaty’ (Pauwelyn, 2005, p 133).

However, Pauwelyn overstates the distinction. Both provisions are highly intrusive. Article VI seeks to embed a market regime for regulating services that is based on criteria of quality, competence and ability, and that screens out broader social criteria, although it is currently restricted in the kinds of regulations and sectors to which that applies. Article XVI likewise extends beyond discriminatory ‘trade’ considerations, although its scope is limited by a closed, rather than illustrative, list of prohibited measures and the positive list approach to schedules. This point is reinforced by the prospect of more comprehensive disciplines of general application to domestic regulation under Article VI:4 and the GATS accountancy disciplines.

During the Uruguay round the US Coalition of Services Industries (CSI), including the big accountancy firms, and the LOTIS (Liberalisation of Trade in Services Committee of International Financial Services London) financial services lobby in Britain had pressed unsuccessfully for a special annex on accountancy services (Arnold undated). To compensate, the Decision on Professional Services in March 1995 required a Working Part to prioritise accountancy in the development of domestic regulation disciplines.

The Disciplines on Domestic Regulation in the Accountancy Sector were adopted in December 1998.6 They contain light-handed, industry-driven rules to govern private and public sector accounts on a global scale. Critical accountants describe them as ‘Enron-style’ rules (Newberry, 2003), and point out that Arthur Andersen had a major hand in writing them.7 They contain a ‘necessity test’ that requires governments to take a least trade restrictive approach to regulating the accountancy profession and lists only a limited number of (non-social) regulatory objectives that are accepted as ‘legitimate’. These are described as ‘inter alia, the protection of consumers, the quality of the service, professional competence, and the integrity of the profession’.8 The disciplines do not become operative until the GATS 2000 negotiations conclude. Until then, governments are required to apply a standstill that means they cannot strengthen their existing regulations without violating the disciplines.

The Working Party on Professional Services was succeeded by a broader Working Party on Domestic Regulation (WPDR) with a mandate to develop generally applicable disciplines. This raised the prospect that the accountancy standards could be replicated for lawyers, health providers or engineers. Among the most controversial proposals was one from Australia for a non-exhaustive list of ‘legitimate objectives’ for domestic regulation, and
requirements that new regulations be ‘necessary’, meaning the least trade restrictive option to achieve those ‘legitimate’ objectives. These disciplines would apply to all services. Governments would also ‘endeavour’ to provide the opportunity for potentially affected foreign firms to comment on proposed new measures that would significantly affect trade in services.\textsuperscript{9} At the other end of the spectrum, disciplines proposed by a cluster of Southern governments would apply only to scheduled services, were sensitive to the regulatory capacity of developing countries, and aimed to reduce restrictive regulations affecting the temporary stay of natural persons.\textsuperscript{10}

In April 2007, the working party chair proposed a compromise.\textsuperscript{11} This omitted an explicit reference to ‘legitimate objectives’ and a ‘necessity’ test. The disciplines would also apply only to scheduled services. However, the paper proposed criteria of ‘objectivity’ and ‘relevance’, which provided a back door for arguments on legitimate objectives. Further, governments should make ‘best endeavours’ to provide corporations with reasonable opportunities to comment on proposed new measures and respond in writing to their substantive concerns (Chapter 4). Although these negotiations were legally distinct from the GATS 2000, the two had become so integrated that further advances on both were likely to depend on significant movement in the Doha round.

The GATS 1994 contained three substantive annexes, which reflected the US unsatisfied ambitions for the Uruguay round (Chapter 5). The Annex on Financial Services took account of national sensitivities in matters of public finance and prudential regulation. At the same time, it established a broad definition of financial services that went beyond the W/120 classifications to include virtually every aspect of the expanding financial services industry. The 1994 text was also supported by an ‘understanding’ on commitments in financial services that was drafted by, and primarily for, the major powers. A second Annex on Financial Services mandated ongoing sectoral negotiations on financial services. The Fifth Protocol to the GATS, which contained members’ revised schedules, was agreed to in November 1997.

The Annex on Telecommunications established rights of access for foreign service providers to every member’s public telecommunications network. A further Annex on Negotiations on Basic Telecommunications mandated ongoing negotiations on basic, as opposed to value-added, telecommunications. Again, that resulted in 1997 in revised schedules of commitments, plus a Reference Paper on Basic Telecommunications that was modelled on the US domestic telecommunications regime. WTO member governments came under heavy pressure to adopt the reference paper by amending the ‘additional commitments’ column of their schedules.

Pierre Sauvé and James Gillespie describe these post-Uruguay round outcomes as ‘imparting a welfare-enhancing, economy-wide “user” dynamic to services trade and investment liberalization’ (Sauvé and Gillespie, 2000, p 424).
Institutional arrangements

The institutional arrangements for the GATS are found in the *Agreement Establishing the World Trade Organization*. Responsibility for governance rests with all members, constituted as the Council for Trade in Services, under the ultimate authority of the Ministerial Conference. In theory, they operate by a convention of consensus. In practice, the major powers, supported by the WTO Secretariat, dominate a process that ultimately relies on exclusion and coercion (Kwa, 2003).

Mechanisms and rules for enforcement are set out in the Dispute Settlement Understanding (DSU). The sovereignty of member states is formally recognised by requiring decisions to be adopted by the collective membership, constituted as the Dispute Settlement Body (DSB). In contrast to the disputes process under the GATT 1947, where the transgressor could veto enforcement of an adverse ruling, a decision can only be rejected by a consensus of WTO members. The logic of enforcement is premised on the integrity of the multilateral contract and aims to ‘preserve the rights and obligations of members’. The first step is consultation over an alleged breach to achieve a mutually acceptable outcome. If that fails, the matter can proceed to a hearing before an ad hoc dispute panel and, on appeal, to the standing Appellate Body.

Under Article 22 of the DSU a member found in breach is expected to withdraw the offending measure. An offer of compensation is considered a temporary, voluntary resolution. Where parties fail to agree on what constitutes compliance, the DSB can authorise the suspension of concessions to a value equivalent to commitments nullified by the breach. Where possible these concessions are to be drawn from the same service sector and, failing that, from other services. Where it is not practicable or effective to do so with respect to services, and circumstances are considered serious enough, members may seek approval to cross-retaliate in goods, agriculture or intellectual property. Such authorisation is rare. In December 2007, Antigua was granted the right to suspend aspects of its intellectual property obligations in response to the US failure to comply with the ruling on internet gambling, on the grounds that it could not effectively retaliate in services (Case study 9). This potentially provided Antigua with added leverage in its ongoing attempts to secure compliance or more significant compensation.

The dispute process is intrinsically problematic. The role of panels and the Appellate Body is circumscribed by Article 3.2 of the DSU, which restricts them to ‘clarification’ of the legal text, albeit ‘in accordance with customary rules of interpretation of public international law’. The power of ‘interpretation’ rests exclusively with state parties under Article IX:2 of the Agreement Establishing the WTO. Southern governments are adamant about this, because they believe that the dispute mechanism is biased in favour of the major powers and ineffectual in providing redress (Raghavan, 2000).
Yet the distinction between clarification and interpretation is illusory. The GATS text is so porous that any tribunal has to engage in judicial law making. The original agreement was the product of political compromise. Many of its ideological constructs were experimental, at least in their application to services. Deliberate ambiguities and imprecision reflect matters that could not be resolved in negotiations. When these become subject to dispute, the adjudicators have to ‘find’ the true meaning. The panel in the *Mexico–Telecommunications* case remarked:

WTO negotiators sometimes praise the political wisdom of resorting to ‘constructive ambiguity’ as a diplomatic means of enabling consensus on WTO rules. The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the ‘ordinary meaning’ of the WTO provisions concerned ‘in their context’ and in light of the ‘object and purpose’ of the agreement. (*Mexico–Telecommunications*, 2004, p 140)

The ‘ordinary meaning’, ‘context’, ‘object and purpose’ of the GATS intrinsically privilege the interests of transnational services corporations, who become the legitimate, yet invisible, beneficiaries of the trade in services regime. This plays out in a dynamic way, as Greg Shaffer explains:

WTO law, while formally a domain of public international law, profits and prejudices private parties. . . . Private parties – particularly well-connected, wealthier, and better-organized ones – attempt to use the WTO legal system to advance their commercial ambitions. A more effective WTO public law incites U.S. and European private legal strategies, which in turn yield further WTO public law. WTO law thereby becomes ‘harder’ law through which private actors exercise influence in its shadow. (Shaffer, 2003, p 3)

Paradoxically, the partisan nature of the dispute settlement process undermines its legitimacy. When domestic courts ‘interpret’ legislation or ‘apply’ precedents they have considerable flexibility to defuse tensions between competing interests. Sol Picciotto suggests the failure of the WTO disputes panel and the Appellate Body to cast their net more widely has undermined their ability to replicate such practices and enhance their legitimacy (Picciotto, 2005). Yet their legal mandate is severely constrained. Moreover, the members of the panel and Appellate Body lack the knowledge or empathy to engage with broader social and environmental considerations. The DSU requires that they are drawn from the ranks of former trade diplomats, negotiators and officials, or academics and other ‘experts’ with a track record of effective conduct within the trade liberalisation paradigm.
The reasoning in the first two disputes that dealt exclusively with the GATS, *Mexico-Telecommunications* and *US-Gambling*, suggests that judicial activism is likely to operate in a pro-liberalisation direction (Chapters 5 and Case study 9). It could be argued that the decision of the Appellate Body in *US-Gambling* to overturn the panel finding and allow the US to invoke the exception for the protection of public morals was prompted by external factors, primarily to avoid a showdown with the US; but that is quite distinct from empathy with human rights or environmental concerns.

The relationship of the GATS to other legal instruments is a further source of controversy. There is a clear hierarchy among international organisations that reflects their ideological synergy (Chapter 3). The *Agreement Establishing the World Trade Organization* mandates the WTO to cooperate with the IMF and World Bank to achieve ‘greater coherence in global economic policymaking’. Article XXVI: *Relations with Other International Organizations* authorises ‘appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services’. But the GATS provides no ideological space for organisations or treaties that impose conflicting obligations on WTO member states (Chapters 3 and 4). While the formal rules of the Vienna Convention seek to order and reconcile international legal instruments, they are effectively irrelevant in this context. The self-contained enforcement mechanisms of the WTO and bilateral agreements confer supremacy on trade rules over other instruments. Although the DSU recognises the application of customary international law, the GATT jurisprudence in cases of conflicting multilateral environmental agreements reveals the way in which the trade texts effectively subordinate other treaties to the liberalisation paradigm (Pauwelyn, 2001, pp 576–7).

In theory, the GATS text itself can be amended. In practice, that would require the consent or acquiescence of 151 fractious governments. The new generation of bilateral and regional agreements is an easier route for the major powers to address those dysfunctions, in the process spawning their own cycle of political compromises, inconsistencies and pragmatism.

---

**CASE STUDY 1  GATS 2000: GOING NOWHERE IN A HURRY**

The GATS Article XIX: *Negotiation of Specific Commitments* mandated a new round of market access negotiations to begin by 2000 ‘with a view to achieving a progressively higher level of liberalization’.

The champions of the GATS maintained an air of optimism, and foreshadowed seemingly endless possibilities for addressing its imperfections, as they prepared for GATS 2000. The extended negotiations on financial
services and basic telecommunications showed that more extensive commitments and stronger rules were both achievable. Even the failure to launch a ‘Millennium round’ of negotiations at Seattle in 1999 did little to dent their confidence.

Governments encouraged, and even initiated, corporate lobbies. In 1998 European Trade Commissioner Leon Brittan sponsored the creation of the European Services Forum (ESF) to represent powerful corporate export interests in sectors such as finance, telecommunications, water and maritime services. Leading advocates Pierre Sauvé and James Gillespie applauded the financial services lobby’s role in the post-Uruguay round negotiations, urging them to marshal their shared transatlantic vision for GATS 2000 and make it contagious. This would encourage a greater overall dynamic of liberalization within the WTO system as a whole and ensure that the GATS (and the WTO more broadly) remains an efficient means of ‘civilizing’ the growing integration of national economies in an orderly, predictable, fair, and transparent manner.

(Sauvé and Gillespie, 2000, pp 424–5)

Unfortunately for them, not all governments wanted to be ‘civilised’ in this way. As with the Uruguay round, the GATS 2000 negotiations followed a largely North/South fault-line: services exporters, mainly from the North, sought to revise the GATS and secure new liberalisation, while Southern governments insisted on flexibility, policy space and support for development. However, the leadership of the two blocs had changed. The EU, which now dominated international trade in commercial services, assumed the mantle of lead demandeur from the US, India and Brazil continued their pro-development stance from the Uruguay round, but India had its own offensive interests and both became much more muted after they joined the inner circle of the WTO post-2003. Venezuela and Cuba took over the vanguard role, while other Southern governments maintained various levels active and a passive resistance.

It soon became clear that the development promises in the GATS 1994 text were a sham. Northern governments said the best way to meet their development obligations was to help developing countries to liberalise and participate effectively in the new negotiations. According to the US, the best approach for developing countries was to make sure their consumers had access to affordable, high-quality, innovative services through cross-border supply and by reducing restrictions on foreign investment. It pointed to those countries who acceded after 1995 as proof that high GATS commitments were not incompatible with developing country status (omitting the fact that the US had extracted those commitments under threat of veto), and applauded them for demonstrating ‘great leadership for the direction of the next GATS round’.12
Before formal negotiating guidelines and procedures were adopted, the Council for Trade in Services was required under Article XIX to conduct an assessment of trade in services, overall and sectorally, with reference to the objectives of the agreement, specifically including Article IV on development. The nature of, and process for, those assessments were not specified.

The WTO Secretariat started the preparatory process with an exchange of information in mid-1998. Staff produced 15 background notes on the economic potential, barriers and current commitments in different services sectors. The Northern members argued that this satisfied the Article XIX requirement, as there was ample evidence to show the economic benefits to consumers and suppliers of having open and, where necessary, well-regulated services markets. Southern governments countered that, without proper assessments, ‘it would be difficult to conclude that developing countries have gained from the GATS so far’. Poor statistics and problems in conducting their own assessments would make it difficult for them to participate effectively. India wanted UNCTAD involved and argued for an ongoing monitoring mechanism.

The North won. Assessment became a parallel process. A ‘road map’ that set out a political understanding of a work programme for the new negotiations was agreed in May 2000. The negotiating guidelines and procedures were adopted in March 2001. A number of individual countries, including China, Mauritius, Argentina, Zambia, Korea and Costa Rica, subsequently attempted to assess the impact on them of liberalisation in specific sectors, often with assistance from UNCTAD (Mashayekhi and Julsaint, 2002, pp 28–34). The question of assessments was revisited in 2006, when Cuba proposed that an updated compilation of these analyses should form the basis for an overall assessment. As a compromise, an UNCTAD paper that drew on many of the previous studies was tabled and the assessments themselves were made more readily available.

Article XIX:3 also contained a nebulous provision that the negotiating guidelines should include ‘modalities for the treatment of liberalization undertaken autonomously’ since 1994. Southern governments argued they should receive ‘credit’ for opening their markets (often implemented under debt conditionality), without having to bind that liberalisation through GATS commitments. India largely agreed, but was prepared to consider binding its liberalisation of services such as telecommunications and education to advance its export aspirations in mode 4. The US countered that it would consider prior acknowledgement of recent liberalisation, provided that liberalisation was subsequently bound into countries’ schedules. As of 2007, that argument remained unresolved.

These were skirmishes. The real battles centred on the ‘modalities’ that were inherited from the Uruguay round, especially the request and offer style of negotiations, positive listing of commitments, W/120 classification list and use of inconsistent terminology in schedules.
The US interpreted the Article XIX requirement for progressive liberalisation to mean that every member should open its markets in ‘a significant portion’ of its economy. While the GATS 1994 was accepted as a basic framework, the US complained that descriptions used in countries’ schedules were imprecise and incomplete, members’ commitments were inconsistent and incoherent, and there was confusion between different modes of supply. The W/120 classification was obsolete and inadequate in the face of new technologies. Classifications and commitments would have to change if they were going to ‘reflect commercial realities [and] accurately and fully capture the service activities of our private sectors’.  

As far back as June 1998 Australia, followed by the European Commission (EC) and the US, had begun tabling far-reaching proposals for generic or formula approaches, such as model schedules or guidelines. Their proposals were actively supported by Chile, New Zealand, Hong Kong China SAR, Switzerland and (a slightly reserved) Japan. Among the options they suggested were horizontal commitments across all sectors or an entire mode of supply (such as foreign investment), and clusters of sub-sectors that spanned numerous W/120 categories.

Argentina, Uruguay, Turkey and Brazil reflected the views of virtually all Southern governments when they insisted that the existing architecture and the request and offer approach to negotiations were essential to maintain flexibility and respect for national policy objectives. They pointed to the Article XIX:2 guarantee of ‘flexibility for individual developing countries for opening fewer sectors, liberalizing fewer types of transactions, . . .’. Moreover, the liberalisation process was required to show due respect for national policy objectives ‘and the level of development of individual Members’. This complemented the promise in Article IV of market access in sectors and modes of export interest to developing countries.

The South initially prevailed on the vital question of modalities. Guidelines and Procedures for the Negotiations were adopted in March 2001, along with guidelines for scheduling of sectoral commitments. The negotiating guidelines reiterated the need to respect the existing GATS structure and principles, and the right of members to specify commitments in sectors and modes, with ‘appropriate flexibilities’ for developing and least developed countries. The request-offer approach would be the main method for negotiation. However, the supplementary phrase that ‘liberalization shall be advanced through bilateral, plurilateral or multilateral negotiations’, which was drawn directly from Article XIX:4 and the Uruguay round negotiating guidelines, would later be used to justify an assault on the bilateral request and offer process.

The GATS 2000 began as negotiations over market access for services. Once the Doha round was launched in late 2001, it was folded into the ‘single undertaking’ that created a triangular linkage of agriculture, non-agricultural market access (NAMA) and services. The Doha work programme set
deadlines of 30 June 2002 for members to submit initial GATS requests and 31 March 2003 for tabling initial offers. The round was supposed to conclude no later than 1 January 2005.

These dates focused the minds of both the negotiators and the GATS critics. The requests were treated as confidential and shrouded in secrecy. However, in April 2002 the EC’s entire package of requests was leaked. This generated a furor that intensified the pressure on governments not to make commitments. Around 10 countries met the March 2003 deadline. More offers trickled in ahead of the WTO ministerial conference in Cancún in September 2003. That meeting collapsed after different coalitions of Southern governments held out over agriculture and the ‘new issues’ of investment, competition, government procurement and trade facilitation.

Although the GATS barely featured at Cancún, the politics of the ministerial changed the dynamics of the services negotiations. Brazil and India, as leaders of the new Group of 20 agricultural exporting countries, joined the US and EU in the ‘new Quad’ of members that now drove the Doha negotiations. The paralysis that enveloped the Doha round post-Cancún infected the already troubled GATS 2000 negotiations. The EC insisted it could not make concessions on agriculture without some compensation for its transnationals on services. Most developing countries said they could not move on services without knowing the outcome on such critical issues as US cotton subsidies, export subsidies on agriculture, the erosion of trade preferences and concerns over implementation. India demanded increased mode 4 access for contract workers and IT specialists before making concessions on agriculture and NAMA. Brazil was aggressive on agriculture and more ambivalent on services.

In August 2004 the chair of the Trade Negotiations Committee attempted to revive the Doha round by unilaterally issuing a ‘July package’. The section on services set a deadline of May 2005 for tabling revised GATS offers. The chair of the services negotiations, Chilean Ambassador Alejandro Jara, reported that only 48 initial offers had been tabled by October 2004. When May 2005 arrived, 52 initial offers (representing 76 members) had been received; this left 40 outstanding, not counting least developed countries. The demandeurs and their corporate lobbies complained there were too few offers of too poor quality.

As the services negotiations limped along, the main demandeurs became increasingly impatient. A group of OECD governments (including the EC, the US, Japan, Australia, Switzerland, South Korea, Taiwan and New Zealand) began floating the idea of ‘complementary approaches’ to advance their offensive interests and keep the EU actively engaged in the Doha round. Despite objections, they continued meeting behind the scenes with the support of Jara, and facilitated by the Secretariat.

Their informal papers suggested a two-tier process. ‘Quantitative’ targets would set minimum levels of commitments. ‘Qualitative’ targets would
promote 'commercially meaningful' liberalisation (rather than simply locking in the status quo) and model schedules or checklists for particular sectors or modes of supply. Their goal was to create a critical mass of commitments in key sectors and increase transparency. This approach would also make negotiations more time and resource efficient.

The most radical quantitative proposal was to create minimum 'benchmarks'. The EU circulated a non-paper in June 2005, depicting a crisis that justified drastic measures. They wanted every member to commit a minimum number of sectors in all modes of supply. Sensitivity to development would be reflected in different ‘levels of ambition’ for developed and developing countries. Australia supported the Europeans. Others contributed complicated proposals for calculating the value of existing and new commitments. In October 2005 the EC put numbers to the benchmarks: developed countries should make new or improved commitments in 139 of the 163 services sub-sectors, and developing countries in at least 93, including the removal of all restrictions on foreign investment in those subsectors. Least developed countries would be encouraged, but not required, to make commitments. The EC claimed that benchmarks maintained flexibility because governments could choose which sectors to commit.

The idea that countries would be compelled to make GATS commitments sparked outrage. Brazil, Malaysia, South Africa and India objected that the benchmarks aimed to marginalise, rather than complement, the request-offer process. Worse, the rich countries would gain credit for their 1994 commitments; most of the new commitments would come from the South, giving the developed countries a ‘round for free’. Transnational corporations would intensify their control over international services markets and squeeze out small local services providers in poorer countries. Speaking from its new position of strength, Brazil took the hardest line on benchmarks, warning that departure from agreed processes could derail, rather than energise, the negotiations (Khor, 2005).

A second ‘complementary approach’ sought to create a critical mass of support for particular sectors through model schedules. Groups of like-minded (services exporting) countries would design ambitious schedules on priority sectors, which they would invite others (mainly developing and least developed countries) to adopt. Because the idea of benchmarks was so outrageous, and the negotiating guidelines referred to plurilateral methodologies, this proposal attracted fewer objections. Brazil was uncomfortable, but as part of the ‘new Quad’ was prepared to acquiesce. India saw possible gains from a plurilateral approach to mode 4. Critics, including Venezuela and Cuba, warned that model schedules could become the new benchmarks of ambition. In the intensely secretive and unequal negotiating process of the GATS, they could be hard to resist, especially when accompanied by direct or indirect threats to other trade access or aid.
Unlike the Doha and Cancún ministerial meetings, services were shaping up as a major issue for the WTO’s conference in Hong Kong in December 2005. The new chair of the services negotiations, Mexican Ambassador Fernando de Mateo, unilaterally produced a draft text for the ministerial, dated 20 October. This contained a statement of principle that the basic architecture of the GATS and the request-offer process would remain the main method of negotiation. But it also allowed for sector- or mode-specific plurilateral negotiations, multilateral approaches that could include qualitative parameters, and numerical targets and indicators. Mateo said the latter, highly contested modalities could only be removed by consensus. A curt statement from 14 developing countries (including Argentina, Brazil, Cuba, Dominican Republic, Guatemala, Kenya, Indonesia, Malaysia, Paraguay, the Philippines, Thailand, Uruguay and Venezuela) reminded him that any complementary approaches had to be compatible with the GATS and the negotiating guidelines. The proposals on the table for quantitative or qualitative mandatory targets were not compatible. Therefore, no such reference should be included in the Hong Kong Ministerial Declaration.24

The final text of the draft declaration that was forwarded to the conference omitted the reference to benchmarks. But it referred to an Annex C on services, under which members would be required to consider any plurilateral requests they received. The reference to ‘Annex C’ was in square brackets, indicating disagreement. Cuba and Venezuela, initially supported by Kenya, the Philippines, Indonesia and South Africa, mounted a vigorous campaign to have the words ‘Annex C’ – and hence the annex itself – removed. India and Brazil applied enormous pressure to break down that opposition. Only Venezuela and Cuba held out to the end. Annex C was included in the ‘consensus’ declaration, with the protests of Cuba and Venezuela ‘noted’.25 Their ambassadors later tabled a formal memorandum that documented the abuses of process that occurred before and during the ministerial.26

The Hong Kong declaration cleared the way for groups of ‘friends’ of different sectors to develop plurilateral requests and submit them by 28 February 2006. By the time the services negotiating ‘cluster’ was held in March–April 2006 more than 20 plurilateral requests had been submitted, including sectoral requests on: air transport; architecture and engineering; audio-visual services; computer related; construction; distribution; (private) education; energy; environmental; express delivery; financial; legal; logistics; maritime; post and courier; telecommunications; plus modes 1, 3 and 4. The collective nature of the drafting process restrained some of the more aggressive demandeurs. Other requests were extremely ambitious. Yet others were cautious or vague.

The major players participated in almost all of the plurilaterals. Notable exceptions reflected their areas of sensitivity, such as maritime and mode 4 for the Americans and audio-visual for the Europeans. Neither the texts nor
the list of recipients was formally made public. However, each plurilateral was typically directed at 20 to 25 predominantly developing countries. The main targets were Argentina, Brazil, Chile, Colombia, Egypt, Kenya, Morocco, Nigeria, South Africa, the Association of Southeast Asian Nations (ASEAN) countries, China, India and South Korea. The mainly developed country members who made the requests were also deemed recipients.

Mateo declared 2006 to be the ‘hunting season’ for services. His goal was to ensure that final offers were sufficiently ambitious to help bring the Doha round to a conclusion. But just two days before the deadline of 31 July 2006 for tabling revised offers, the Doha negotiations were suspended. While the round went into hibernation, the pressure continued. The US President’s fast track authority was due to expire on 30 June 2007. The US and EC identified ‘breakthrough’ sectors without which the US would not actively press for Congress to renew fast track and the EC would not make concessions on agriculture. A small circle of developed countries set up what they called the ‘really good friends of services’. They were supported by Mateo, who launched what he dubbed the ‘Enchilada talks’ with the aim of engaging the larger developing countries of Brazil, India, China and the big four ASEAN markets of Indonesia, Malaysia, the Philippines and Thailand.

Despite these efforts, only 69 initial offers (EC is one) had been tabled by the time that fast track (and potentially the Doha round) expired; 30 of these were revised offers. Telecommunications and financial services attracted the most offers; education, environmental and health had comparatively few.

There was still a chance that a sudden breakthrough on agriculture and NAMA would trigger an immediate movement in the services negotiations and require rapid political decisions by ministers. The major demandeurs therefore proposed the convening of an invitation-only ‘pledging conference’ of trade ministers from the most significant services importing and exporting countries. By making this a mini-ministerial, they could exclude obstructive governments such as Venezuela and Cuba, and peripheral developing countries that were making demands for unskilled workers in mode 4. However, that meeting would be not convened until there was enough movement in agriculture and NAMA to bring pressure for a deal on services. Even a face-saving compromise on domestic regulation disciplines seemed unlikely without progress in the broader round.

The major demandeurs maintained the pressure to at least produce a draft text on services to parallel those on agriculture and NAMA. Fraught discussions continued in the November 2007 services meetings on whether there should be a text beyond Annex C, by when and its possible elements. The US, supported by the EC, Canada, Japan and New Zealand, ‘upped the ante’ by demanding an equal level of ambition for services as for the other two pillars. New ‘guidelines’ should instruct members to respond
positively to multilateral and bilateral requests and to commit at least their existing levels of liberalisation, while removing further barriers. Brazil and nine other members, including India, China and South Africa, tabled their own room document that reasserted the essence of Annex C. Brazil argued that Annex C, which it had helped to broker at Hong Kong, was already ‘a very thin compromise’, and challenged the US and others for being unwilling to liberalise in agriculture or NAMA in the way they were demanding for services. Venezuela and Cuba opposed any new text, raising the question of whether they could or would ultimately veto any outcome.

By the end of 2007, it still seemed that the GATS 2000 might sink along with the Doha round. However, even if a GATS deal was eventually struck, the rules and commitments in the new generation bilateral and regional agreements were already leaving the multilateral arena far behind.

**CASE STUDY 2  FTAS: GATS ON STEROIDS**

Bilateral and regional trade agreements that involve even one WTO member must follow WTO, and hence GATS, rules. As the record confirms, GATS-compatible agreements produce GATS-plus commitments and GATS-minus flexibilities (Roy et al., 2006). The result is ‘GATS on steroids’.

The South Centre’s Director Yash Tandon identifies three types of contemporary Regional Trade Agreements (RTAs) (the term used by the WTO): (1) ‘integrative partnerships’ where partners have compatible interests and work on the principles of solidarity and subsidiarity to benefit the weakest members; (2) ‘enforced partnerships’ where one side dictates the terms and the other side either has to ‘take it or leave it’; and (3) ‘structured regionalism’ where the partnership is enforced and located in structures that are linked to historical relationships (Shashikant and Tayob, 2007).

WTO researchers reported that by 2005 every member except Mongolia was party to at least one of the 200-plus RTAs. Almost all followed Tandon’s second or third typology. Aggressive services liberalisers, such as the US, the EU, Singapore and Chile, routinely sought to push the boundaries beyond what could be achieved in the WTO. At the same time, the major powers avoided new openings of their own services markets to each other – only one agreement since 2000, the Australia US Free Trade Agreement (AUSFTA), was between developed countries. The rest were North/South or less commonly, South/South (Roy et al., 2006, pp 6–8).

These agreements have emerged in several waves, each at a critical juncture for multilateral trade negotiations. Each wave also coincided with the US President’s ‘fast track’ negotiating authority, whereby the US Congress agrees to vote a trade treaty up or down without picking the deal apart.
As Chapter 2 explains, the inclusion of services in bilateral trade treaties began in 1987 with the Canada US Free Trade Agreement (CUSFTA) and the services annex to the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). All these governments were champions of the GATS and used the bilateral negotiations to develop proposals for the Uruguay round. Both the CUSFTA and ANZCERTA went further in content and architecture than the compromise that finally emerged as the GATS 1994.

The second wave coincided with the paralysis in the Uruguay round in the late 1980s and predictions that the international trading system could divide on three axes: the Americas, Europe and Asia (Africa was considered irrelevant).

The US and Canada launched negotiations with Mexico in 1991 to extend the CUSFTA to create the North America Free Trade Agreement (NAFTA). That agreement was concluded in 1993, as President Clinton’s fast track authority was about to expire. The US hailed NAFTA as a state-of-the-art alternative to the emergent GATS: it used a negative list approach; specialist chapters dealt with finance, telecommunications and energy; services and investment were both contained in Part 5; and the investment chapter covered goods and services, with rights for investors to initiate disputes for ‘takings’ – measures that were considered tantamount to expropriation.

Across the Atlantic, the member states of the European Community approved the Maastricht Treaty in 1991. When it came into force in 1993, the new European Union constituted a massive internal market with free movement of goods, persons, services and capital and with the potential to expand its membership and deepen its integration.

Australia, New Zealand and Japan feared being left behind. In 1989 Australia initiated meetings of trade ministers that included those from Japan and ASEAN and (after pressure) the US and Canada. In 1994 the Asia Pacific Economic Cooperation (APEC) forum of trade ministers adopted the voluntary and non-binding ‘Bogor goal’ of free trade and investment in goods and services among the richer ‘economies’ of the region by 2010 and the remainder by 2020.

These developments were followed by a lull in the mid-1990s as the WTO became established and the US and the EC focused on the continuing GATS negotiations on telecommunications and financial services. The US Congress refused to renew President Clinton’s fast track authority after it expired in 1993. Latin American governments, under growing pressure from their social movements, blocked progress on a Free Trade Area of the Americas (FTAA). The Europeans signed many bilaterals, but these were mainly preconditioning Eastern European countries for accession to the EU. APEC expanded to include the three Chinas, Russia and parts of Latin America before adopting a moratorium on new members, and was mockingly dubbed ‘Aging Politicians Enjoying Cocktails’.
The real tidal wave of bilateral negotiations began in the later 1990s, spurred on by the East Asian financial crisis and pessimism following the collapse of the WTO ministerial in Seattle. Back in 1990, there had been just 16 FTAs operating internationally; most were concentrated in Europe. By 1997 there were 72, spread more widely across Europe, the Americas, Asia Pacific and parts of Africa. By 2003, as the Doha round floundered, a staggering 162 had been signed, with a huge increase in the number that crossed geographical regions. Many more were being negotiated or proposed (Dent, 2006, p 3).

The diversity of these FTAs reveals the complex range of economic and strategic interests and stark power dynamics that increasingly paralysed the multilateral level and shifted attention to the bilateral and regional arenas. Some of these FTAs are standard liberalisation instruments, driven by widely varying motives. For states that dominate at a regional level, such as Singapore, South Africa and Chile, bilaterals offer a means to establish their credentials as a regional hub and the entry point for foreign investors. Ideologically driven free traders, such as New Zealand, initially embraced bilaterals for their ‘demonstration effect’ in bolstering trade liberalisation. As the number of FTAs grew they, along with developing countries such as Indonesia and Thailand, have courted agreements with their main export partners from fear that their competitors were securing privileged access to important markets (Gibbs and Wagle, 2005).

A growing number of developing countries have embraced South/South agreements, viewing regional integration as a stepping-stone towards, or bulwark against, globalisation. These agreements notionally fall within Tandon’s category of ‘integrative partnerships’. But they nevertheless remain vehicles for liberalisation that must comply with GATT and GATS rules, albeit on less onerous terms. South/South arrangements are often neoliberal adaptations of groupings that were created in a different era. ASEAN is a classic example. It was created in 1967 primarily as a sub-regional security alliance. An ASEAN Free Trade Area was adopted in 1992 and the ASEAN Framework Agreement on Services (AFAS) in 1995. A decade later, an assessment prepared for ASEAN reported poor progress towards GATS-plus levels of bound liberalisation and regional integration (Thanh and Bartlett, 2006, p 6).

South/South agreements are often promoted as an antidote to the asymmetrical bilateralism of North/South FTAs. But they also have their own internal power dynamics and are subject to external influence. The New Partnership for Africa’s Development (NEPAD), for example, is dominated by South Africa and widely viewed as a vehicle designed by the international financial institutions to impose their post-Washington Consensus on Africa (Bond, 2006b, pp 107–31).

The most potent of the contemporary FTAs are the products of competitive bilateralism, currently dominated by the US and the EU. As Tandon observes,
the Americans and Europeans treat bilaterals as instruments of geopolitical power (Shashikant and Tayob, 2007). In 2007 Raj Bhala described an emerging ‘paradigm of competitive imperialism’ in which ‘free trade is subservient to the goal of projecting influence to another country or throughout a region, and checking actual or perceived reciprocal efforts by another power’ (Bhala, 2007, p 104).

Poorer countries are treated as pawns in this global chess game, as the major powers compete to reshape the world in their interests and image. The EC’s Global Europe strategy adopted in 2007 takes a two-track approach to advancing the interests of its capital through a neoliberal regime of integration that is internally and externally coherent. The Commission insists that increasing the EU’s external competitiveness requires domestic reform and greater competition, deregulation and flexibility within Europe. The Seattle to Brussels Network of NGOs describes the EC’s strategy as ‘more competition, more flexibilisation, more deregulation. Good-bye European model, here is globalisation for all’.

At the same time, the European model of regional economic and political integration is exported through ‘development partnerships’ that expand the ‘trade’ agenda to encompass a broad menu of economic policies and prescriptions for ‘good governance’. The alignment of trade with aid through ‘technical assistance’ and ‘capacity building’ creates favourable policies and opportunities for European transnationals (Chapter 4).

In classic ‘development’ double-speak, the EU has insisted on replacing the historic trade preferences for former colonies in Africa and the ACP with broad-reaching, reciprocal Economic Partnership Agreements (EPAs) (EC, 1996). In a blatant exercise of divide and rule it dictated a regional approach that split the ACP into sub-regions, ignoring criticism that this would destabilise existing South/South regional initiatives. By ‘consent’, the Cotonou Agreement 2000 included provisions on ‘new issues’, notably competition and investment, which the ACP states had successfully fought to keep out of the WTO (South Centre, 2006).

The EC insisted that these EPAs must provide for liberalisation of services, even though Article 41 of the Cotonou Agreement said this should occur only ‘after they have acquired some experience in applying MFN treatment under the GATS’. Most ACP countries have minimal GATS commitments. Many are least developed countries. Some are not even WTO members. Yet draft services chapters that the EC presented to the Pacific and Caribbean negotiators sought aggressive GATS-plus commitments and were described as a ‘not-to-be-missed opportunity’ for ACP states ‘to foster the development of their own services’ (quoted at Kelsey, 2005a: 31).

The Commission took a uniformly ruthless approach to all the EPA negotiations. It initially insisted that comprehensive agreements must be concluded by the deadline of 31 December 2007, when a WTO waiver for the ACP preferences on trade in goods expired. Extensive documentation
prepared by NGO researchers, which showed that reciprocal free trade agreements were likely to cripple most ACP economies, was swept aside (for example, GAWU et al., 2004; ActionAid, 2004). In late 2007 the EC reluctantly accepted to a two-stage outcome: initial agreements on goods would be concluded by December 2007, and negotiations on services, investment and other issues would continue into 2008.

The exception was the negotiations with CARIFORUM Caribbean Forum of African, Caribbean and Pacific (ACP) States, comprising the Caribbean Community (CARICOM) and the Dominican Republic. A comprehensive agreement was initialled on 16 December 2007 that included virtually every negotiating proposal on services and investment that the EC had argued for unsuccessfully in the WTO. The resulting EPA contains WTO-plus obligations and WTO-minus flexibilities that exceed even the usurious terms that are demanded in the WTO accession process. This radical new text will become the template for future FTA and EPA negotiations.

The US took a different approach to achieve its strategic goals. The USTR became more active on bilaterals around 2000, out of concern that new trade and investment regimes were being created over which it had no control. The first free trade agreement after NAFTA was a politically motivated deal with Jordan in 2000. When USTR Robert Zoellick supported renewal of ‘fast track’ authority for President George W. Bush in 2002 he warned Congress that ‘each [bilateral] agreement made without us may set new rules for . . . countless . . . areas of the modern, integrated global economy – rules that will be made without taking account of American interests’ (quoted Dent, 2006, p 233). Zoellick responded to the EU’s rapprochement with Africa by threatening that the US ‘will seek to level the playing field in areas where US exporters are disadvantaged’ by such agreements. One African commentator drew parallels with ‘the 1884 Berlin conference, where developed nations scrambled for African resources and markets’ (Kamidza, 2004, p 16).

Backed by fast track between 2002 and 2007, the USTR pushed the boundaries with sufficient success that FTAs overtook the GATS as the preferred negotiating avenue for the US. This blended seamlessly with the growing preoccupation with security. Bilaterals became important vehicles for strategic alliances through which the US could reward its allies and entrench its geopolitical supremacy in diverse parts of the world. From 1993, when NAFTA was signed, to the start of negotiations with South Korea in June 2006, US negotiating partners collectively accounted for less than 10 per cent of total US trade.

After ‘9/11’ the use of ‘security alliance diplomacy’ intensified. Zoellick described an FTA as a privilege, not a right, for which the US seeks ‘cooperation – or better – on foreign policy and security’. US allies seemed eager to prove their fidelity by matching military sacrifice with economic surrender. This trend, and the new wave of US imperialism in Latin America and the Gulf, is discussed in Chapter 9. Closer to home, a ‘deep integration’
project across the US, Canada and Mexico (euphemistically called the Security and Prosperity Partnership) was launched in 2005, with the aim of creating a common internal regulatory regime and a common security border to the outside.\textsuperscript{34}

While the motivations of the major powers are increasingly geopolitical, the bilateral process also allows their negotiations to tailor the legal texts in ways that are impossible in the GATS. The only legal constraint on the trade in services aspects of these agreements is Article V of the GATS. RTAs that involve a WTO member must have (undefined) ‘substantial’ sectoral coverage; eliminate, phase out or prevent the introduction of ‘substantially all discrimination’ (also undefined) in those sectors; and be implemented immediately or within an (undefined) ‘reasonable time-frame’. Barriers to non-parties cannot be raised ‘overall’. Developing countries enjoy greater, but again undefined, ‘flexibility’, principally in the degree of liberalisation and in implementation.

Parties are required to notify the Council for Trade in Services so it can investigate and report on compliance and to provide periodic reports on implementation. This requirement is largely academic. As of 2006 only 36 services agreements had been notified. Not one report had been forwarded from the Council to the WTO, reflecting the inability or reluctance of members to agree on an interpretation. The Doha work programme mandated a review to clarify and improve disciplines and procedures relating to RTAs. This resulted in provisional rules for notification and review of goods and services agreements, but not on interpretation.\textsuperscript{35} As of March 2007, the interpretation of GATS Article V had apparently never been discussed (Shashikant and Tayob, 2007).

The GATS sets minima, not maxima, for RTAs. Although the rules are vague they ensure that agreements are neoliberal and contain GATS-plus elements. Because they relate only to goods and services, more powerful parties are free to demand that agreements follow their preferred structure and include a range of non-WTO issues, notably investment and government procurement, as well as foreign policy and good governance conditionalities. Occasionally, governments also use the bilaterals to claw back previous commitments on politically sensitive issues, such as audio-visuals and culture, or indigenous rights, or attach side agreements or exchanges of letters to placate domestic pressure on labour and environmental standards.

A WTO study of the services content of bilaterals published in 2006 identified three different types of architecture: the standard GATS model; the NAFTA approach; and a hybrid that seeks to apply the same rules to all investments and all modes of services supply (Roy et al., 2006). The new frameworks cut across different WTO agreements. Sector specific chapters and disciplines were becoming more common, variously covering air transport, movement of persons, financial services and telecommunications, energy, e-commerce and government procurement.
The review examined the mode 1 and 3 commitments of 29 WTO members in 28 RTAs signed since 2000. It reported that the number of commitments in bilaterals for all sectors, except for health, was higher than even in the GATS 2000 offers. First time and ‘improved’ commitments were made in key infrastructure areas, such as financial services and telecommunications, and in the traditionally sensitive areas of education and audio-visual. Those commitments often matched or exceeded the GATS 2000 plurilateral requests made in 2006. There was some evidence of ‘new liberalisations’, most of which involved phasing out of laws and regulations by specified dates.

The US agreements contain the broadest and deepest commitments: ‘the US, a key services demandeur and also signatory to many [RTAs], has gotten very significant access in various services where its industry sees particular interest, e.g., financial services, express delivery, distribution, audiovisual’ (Roy et al., 2006, p 54). Agreements that use negative lists – primarily those involving the US – are more likely to lock in the parties’ existing levels of liberalisation. They also pre-empt new, more restrictive regulation, including of currently unregulated service activities such as digital technologies. Smaller, especially developing, countries tend to make the deepest commitments. Developed countries make fewer new commitments and their sensitive areas remain protected.

Almost every item on the corporate shopping list for a GATS-plus agreement has been included in at least one bilateral: WTO-plus coverage of investment, government procurement, competition and e-commerce; negative list commitments to a standstill of existing measures and rollback of reservations; commitments to new liberalisation; a ratchet to lock in further liberalisation automatically; blending of services and investment chapters, including protections for investors against expropriation; adoption of comprehensive, uniform model schedules and clusters of ‘high quality’ commitments; updated reclassifications of services; ‘necessity’ tests for domestic regulation and requirements to consult foreign firms about proposed regulations; and inbuilt rounds of negotiations to achieve further liberalisation.

The technical and political complexity of the FTAs militates against their subsequent consolidation or reincorporation into the GATS. Many pro-liberalisation commentators have fretted about the implications of this for multilateralism (for example, Panagariya, 1999; Mattoo and Fink, 2002). The 10-year review of the WTO echoed a growing concern that the negotiation of a ‘spaghetti bowl’ of inconsistent, overlapping and partial agreements would be inefficient and undermine multilateralism (WTO, 2005). Other WTO commentators have offered a more positive spin, suggesting that bilaterals can act ‘as laboratories for change and innovation and may provide guidance for the adoption of new trade disciplines at the multilateral level’ (Crawford and Fiorentino, 2005, p 16).
The WTO’s 2006 study on services was ambivalent. The GATS-plus outcomes suggested that services exporters were more easily convinced about the gains from FTAs than from the GATS. Their endorsement could give political impetus to bilateral negotiations and help governments to overcome domestic and institutional resistance. However, governments might also be holding back from making GATS 2000 offers so they could maximise their bargaining coin in the bilaterals. Given the absence of North/North agreements, the researchers concluded that the GATS was likely to remain an important arena for liberalisation commitments between the major powers. At the same time, if the US got what it wanted through bilaterals, its diminishing appetite for the GATS could reduce the scope for trade offs in the broader Doha round.

These commentaries address only one dimension of the challenge posed by the FTAs. Bilateral and regional trade agreements are not simply technical instruments of liberalisation; they reflect the competing hegemonic aspirations of the larger powers to advance divergent models of capitalist expansion. Moreover, this new form of competitive imperialism is playing out in an increasingly crowded arena. The new economic powerhouses of China and India have begun strategically exploring their options through bilaterals. Japan has negotiated EPAs within Asia and beyond that contain concessions that would never be made to the US. It remains to be seen how a US president of whatever political party, and the Congress, will respond if competing powers secure deals that leave the US behind. An equally critical question is whether the counter-hegemonic alternatives being sponsored by Venezuela, Cuba and Bolivia, discussed in the conclusion, can provide an antidote to competitive imperialism, and how the existing and emerging hegemons will respond if they do. All these factors make the future direction of trade in services agreements impossible to predict, except that it appears to lie primarily outside the multilateral domain.
The story of ‘how the GATS was won’ in 1994 is, at one level, about a contest between the US, as the superpower of the global North, and India and Brazil as the lead advocates for the global South. At a more profound level it documents the transition from one hegemonic regime to another. The US, at the apex of a bloc of leading industrialised countries, used its structural power to rewrite the rules for the domestic regulation of services. The project was supported by corporate and intellectual élites whose role was to develop strategies and propose the mechanisms to achieve that goal. The process of constructing the new regime under the conditions that prevailed at that time was much easier than sustaining it in the new millennium.

A matter of perspective

There are two versions of the genesis of the GATS, which reflect the perspectives of the victor (the US) and of the purportedly vanquished (India and Brazil).

The standard US version depicts the GATS as a child of America’s corporate/political intimacy that matured under their joint custody. Between the mid-1970s and 1993 the Office of the USTR, in collaboration with large and powerful services corporations, evolved a vision and strategy to create a binding and enforceable treaty that could restore the country’s economic supremacy. The US administration used its dominant presence in the OECD to build a critical mass of support among wealthy countries for the inclusion of trade in services in a new round of GATT negotiations. Potentially obstructive forums, especially UNCTAD, were marginalised.

US trade strategists then set out to ‘divide and rule’ the increasingly fragile Third World bloc. The US’s adversaries, led by India and Brazil, tried to resist by fighting from within the GATT and were progressively sucked into the vortex. Every concession became an advance that consolidated the US position. Their final capitulation was secured in 1989 after the US employed its ultimate trade-negotiating weapon of unilateral sanctions against Brazil and then India. Opposition to the creation of a services agreement had been reduced to a lopsided contest over its legal content.
Success was achieved using threats and incentives. In the approving words of US commentator Jon Aronson: ‘The world ultimately acquiesced to US persistence and a skilful US campaign to alter nations’ perceptions of the stakes involved.’ Part of the campaign ‘was to convince developing countries that the United States was willing to “pay” for a new GATT round but would punish other countries if there were no round’. The ‘carrots’ included re-engineering of debt arrangements, and reducing US interest rates and the value of the dollar. The ‘threats’ were to engage in bilateral negotiations or plurilateral arrangements that limited MFN treatment to those who co-operated. ‘The final task was to divide the developing countries on services’ (Aronson, 1988, p 21).

The inevitable political compromises meant the GATS 1994 text and commitments fell short of the ambitious objectives of the USTR and corporate lobby. The critical infrastructure of telecommunications and financial services was held back for ongoing negotiations that produced more state-of-the-art outcomes. A pre-commitment to ‘progressive liberalisation’ of market access to countries’ services was built into the text, with a further round of negotiations set for 2000. Negotiations to tighten the disciplines on domestic regulations and other rules would start before then. The parallel tracks of regional, sub-regional and bilateral agreements, combined with unilateral sanctions, meant the US could choose how to pursue its strategic offensives with, or against, countries of geopolitical and economic significance.

The alternative version starts with the same understanding of US objectives. In the words of India’s then Ambassador to the GATT, SP Shukla:

The services issue was at the core of the American trade agenda, not only because the US occupied the dominating position in this area, but also because this issue was the key to the transformation of the GATT. The issue of services, transcending the narrow confines of cross-border transactions, . . . had the potential of rendering [the GATT] into an effective instrument to support and promote the activities of the transnational corporations.

(Shukla, 2000, p 14)

Shukla vigorously rejects any suggestion that Southern governments were unaware of the stakes:

There is a misconception that developing countries did not understand what was being suggested and that’s why many things happened. That is farthest from the truth. They were totally aware of the game. They did their best. It is a different matter the political choices [their national] governments made. . . . The point is that no other round in the GATT was preceded by such a long gestation period and such acute labour pains. That is precisely because the developing countries saw through the game.1
Both versions agree that India and Brazil were pivotal. But the received wisdom is that the ‘gang of 5’ (including Egypt, Argentina and Yugoslavia) overplayed their hands. Their intransigence created the space for a moderate proposal that allowed services negotiations to proceed. Shukla recounts a different story of much greater intrigue. During 1985 and 1986 India and Brazil held secret meetings with the European ambassador to develop a fallback position, unbeknown to either the other rejectionists or the US. The three ambassadors agreed on a ‘common platform’ that would keep services negotiations on a separate track from the GATT, with clearly specified development parameters. Their proposal was tabled – in a final twist, by Canada – after the ministerial conference at Punta del Este had already run over time. That platform set the basis for negotiating the GATS parallel to the GATT. In the early years of the Uruguay round, India and Brazil led a unified Southern bloc in restraining the scope of the services negotiations. The situation changed in 1989, when both governments capitulated under a combination of US unilateral sanctions and domestic political changes. The Brazilian and Indian ambassadors who had fronted the hard line approach were replaced by more acquiescent representatives.

From Shukla’s perspective, the battles of the 1980s left an indelible mark on the GATS 1994 text. A positive list structure specified which sectors would be governed by key rules. That allowed the developing countries to limit their exposure and bought more time for education, research and building of alliances that would strengthen their position. Promises to promote development, and the requirement for an impact assessment before any future negotiations, provided hooks on which to hang their future resistance. Even though the Indian government later changed sides, other Southern governments relied on these hard-won flexibilities in their own passive subversion of the GATS 2000 negotiations. This time, their (in)action was complemented by national, regional and sectoral social movements, activists and think tanks whose campaigns largely neutralised the corporate lobby that had dominated the services agenda in the 1970s and 1980s, and paralysed the multilateral negotiations. Similar campaigns against the new generation of bilateral and regional agreements in some cases mitigated their impact and in others brought those negotiations to a standstill.

These two versions are flip sides of the same coin. This chapter analyses how the dynamics of the Uruguay round shaped the rise, stalemate and increasing marginalisation of the GATS. It draws on primary documents of the OECD and GATT/WTO and personal accounts from the key players, Geza Feketekuty, the assistant USTR responsible for services during the Uruguay round, and SP Shukla, India’s ambassador to the GATT from March 1984 to February 1989. Case study 3 examines the successful strategy of the trade policy activists that gave birth to the GATS. The counter-hegemonic campaign that featured from the later 1990s is the subject of Case study 4.
Creating a constituency

The seeds of the GATS were sown between 1972 and 1979 during a turbulent decade of oil shocks, recession and restructuring. What in retrospect looks like a systematic strategy began in an ad hoc fashion. The first tentative step was the handiwork of policy entrepreneurs connected to a newly established Trade Policy Research Centre in London. In 1972 the Secretary General of the OECD appointed a High Level Group on Trade and Related Problems to stimulate longer-term thinking by member governments ahead of the Tokyo round of the GATT. The resulting Rey report contained a short Chapter IV on ‘international trade in services’ (OECD, 1972). It focused mainly on ‘invisibles’ in tourism and on remittances and transfers of investment income. The committee recommended that ‘action should be taken by the developed countries to ensure liberalization and non-discrimination in the services sector’ (Feketekuty, 1988, p 298). Although there was no explicit proposal that this action should take place through the GATT, it was interpreted as supporting future negotiations outside the OECD. This one-off, top down approach fell into a void. The OECD did not revisit ‘trade in services’ for another six years.

The US services corporations, organised by Pan American Airlines and AIG, took up the cudgels in 1974 as the Congress (belatedly) debated the US President’s negotiating mandate for the Tokyo round. As a result, the US Trade Act 1974 contained three innovations. First, the President was required to negotiate for the removal of non-tariff barriers to international trade in goods and services. This set in train a dynamic process: the USTR had to report annually to Congress on progress in the Tokyo round and beyond, which meant US trade officials had to give meaning to the concept of ‘non-tariff barriers to trade in services’ and deliver something concrete. Second, a new section 301 authorised unilateral trade sanctions against countries whose ‘unfair trade practices’ burdened US commerce, which was defined to include services associated with international trade. The US capacity to alternate between unilateralism and multilateralism gave it extraordinary power and was later used to break India and Brazil’s resistance to the GATS. Third, a new Advisory Committee for Trade Negotiations included services industry representatives.

The success of the lobbyists prompted a more ambitious corporate strategy led by AIG and AMEX from within the US Chamber of Commerce. A seamless relationship developed with the trade bureaucracy. The Department of Commerce commissioned and published a report in 1976 on offshore ‘barriers’ faced by US services companies. The Trade and Tariff Act 1979 created a new Industry Sector Advisory Committee for Services and a Services Policy Advisory Committee to the USTR. The campaign gained momentum when Geza Feketekuty was appointed Assistant USTR in 1978 and assumed full responsibility for policy on services in 1979. At this time, Feketekuty
says they were still working out what 'trade in services' meant. Most of their initiatives were ad hoc and designed to get the 'pushy' chair of AIG, Hank Greenberg, off the USTR’s back.4

One option was to utilise the OECD Trade Committee, where Feketekuty represented the USTR. In retrospect, the pre-cooking of a trade in services agreement in the OECD seems an obvious strategy. The US could build a political consensus among the major capital exporting countries and use the OECD’s resources and expertise to do the basic conceptual and technical work, prior to a push in the GATT. This would exclude the South-dominated UN bodies such as UNCTAD and bypass the specialist international sectoral agencies, such as the International Telecommunication Union (ITU), which took an interventionist approach to services regulation.

Feketekuty says the original proposal to conduct a study on trade in services that built on the earlier US industry study was impromptu. Over time, however, a sophisticated game plan emerged. Each incremental concession by other OECD members consolidated the US position. Feketekuty tabled a short paper entitled ‘World Trade in Services: The Need for Analysis’ at the OECD Trade Committee in October 1978.5 This recast services within a trade liberalisation discourse and treated the establishment of foreign investments related to services as ‘trade’. It pointed to a dearth of research and analysis on the barriers that were impeding the rapidly growing international services economy. The paper’s indicative list of barriers reached into the heart of domestic policy: ownership requirements, personnel and employment restrictions, taxes, intellectual property, government controls and regulations including licensing, the absence of international standards and procedures, imposition of duties and quotas, the restrictive rules on government procurement of services, and more.

The paper proposed a programme of sectoral studies that coincided with the active membership of the US Chamber of Commerce’s new committee on services.

According to Feketekuty, other governments initially responded with incredulity. As trade representatives, they viewed services as invisibles that were covered by the OECD’s Code of Liberalisation of Current Invisible Operations and were the responsibility of the OECD Committee on Financial and Fiscal Affairs. Nevertheless, the (then) European Economic Community (EEC) and Finland persuaded the committee to agree to a discussion. Feketekuty speculates that they were trying to humour the US and help the administration to secure support for the Tokyo round package from its services industries, as a counter to the increasingly protectionist US manufacturing sector.

The OECD Secretariat prepared a lengthy note for discussion that highlighted three conceptual concerns.6 First, there was no a priori definition of trade in services, especially whether it was limited to cross-border transactions or extended to the hugely contentious issue of foreign
investment. Second, the US goal to develop generic rules simply assumed that services such as maritime transport, insurance and construction had features in common, aside from being intangible. A third dilemma was the lack of national and comparative data or any agreed system for classification. In addition, the secretariat pointed out that numerous international entities, such as the ITU, the Universal Postal Union, the International Aviation Travel Association and the UNCTAD (through the Shipping Liners Code), were charged with addressing the international regulation of these sectors.

The next incremental success for the US was the decision to establish an OECD working party on trade in services. This was the catalyst for a more concerted campaign. Feketekuty describes working ‘in co-operation with a loose international coalition of about a dozen key business executives and government officials’ to develop a comprehensive strategy (Feketekuty, 1988, p 306). Working through the OECD Trade Committee had the advantage that trade officials and diplomats would get up to speed in preparation for eventual GATT negotiations on services. In late 1980 Feketekuty tabled a US ‘inventory’ on barriers to trade in services. This was based on a survey of US firms that, according to Jon Aronson, was commissioned from the US Chamber of Commerce behind the backs of other government agencies (Aronson, 1988, p 16). The categories of ‘barriers’ were aligned as far as possible to trade in goods. The inventory did not, by definition, include US barriers. That gave other services exporting governments a greater incentive to conduct their own surveys.

By this time, Feketekuty had secured almost unanimous agreement to progress the issue, but not on how to do so. The US, supported by Japan, Australia and Norway, wanted a generic analysis of the problems that services industries faced and mechanisms to eliminate them. This cross-sectoral approach would avoid the risk of becoming bogged down in lengthy discussions of specific sectors and micro-management through regulations. Other governments were sceptical and preferred a sectoral approach with pilot studies. Only the United Kingdom (UK) actively opposed the idea, saying it ‘did not want the Committee to do anything at all in the services area as it would be a waste of resources and would come to nothing’. (Once Thatcherism penetrated the UK trade ministry in 1980, it became the most enthusiastic European advocate, especially on behalf of its financial services industry.) As a compromise, the trade committee adopted a parallel process, without prejudice to what happened next. Governments who wished to prepare US-style studies could do so. The committee itself would conduct two pilot studies.

A combination of political determination, negotiating savvy, corporate pressure and positive noise was slowly bearing fruit. The ‘trade in services’ discourse had become normalised among OECD trade officials. They began developing more sophisticated analogies to GATT rules on unfair trade practices, non-tariff barriers and protectionism. The intention to use ‘trade
in services’ disciplines to curb national services policies and regulatory autonomy was spelt out in a lengthy secretariat paper in early 1981:

While some barriers are deliberate measures designed to shield existing firms from external competition, many are the result of a variety of measures designed to achieve social, economic, cultural and national security objectives. . . . Any liberalisation effort in the service sector would have to take due account of the legitimate objectives of many of the measures seen as obstacles to trade or competition in the service industries. Our goal should not be to remove all barriers, i.e. complete de-regulation and elimination of all subsidies; but, rather, as is the case currently in the GATT with respect to trade in goods, there should be an assumption of free trade but with recognised exceptions for accepted reasons. Regulations designed to achieve legitimate social goals should be adopted and implemented in a manner which is least distorting of trade and least costly in terms of efficiency. This suggests the need for the development of international rules and procedures [that] could focus on the extra territorial effects of domestic actions . . .

Conceptual frameworks and legal rules for international trade were seen as a ‘natural complement’ to the OECD’s work on ‘positive adjustment’ policies, code for its emerging neoliberal policy agenda. The officials speculated that the OECD might address these issues in parallel. Another document suggested that trade ministries could be encouraged to work with services firms to bypass obstructive parts of their bureaucracy:

Tactically, US and, more recently, UK, service sector firms are seeing that progress on liberalisation requires them to get the attention and support of governmental trade policy-makers as they are getting nowhere through the industry specific approach. . . . The trade policy approach requires government trade policy makers to be willing to work in the services area against the resistance of industry-specific regulatory bodies.

**Moving to the GATT**

In two short years the artifice of ‘trade in services’ had become part of the OECD’s policy platform. The time had come for the US to increase pressure for a new GATT round on services. In April 1981 Feketekuty prepared a statement on US objectives for trade in services negotiations and announced plans to seek the political endorsement of OECD ministers.

The support of the EEC was crucial. Officials were familiar with the general concept – the Treaty of Rome 1957 envisaged ‘an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital’. But, as noted in
the Introduction, the emerging ‘services economy’ in Europe centred on the integration of services and industry. It was also embedded in a very different policy environment. The federal nature of European governance, the multi-layered structure for decisions on trade negotiations and the (then consensus on the Commission’s trade mandate meant it was impossible to promote an overly ambitious agenda.

Moreover, the national bureaucracy of each member state was responsible for regulating services. Those officials were also represented on, and committed to, the sectoral committees of the OECD and unlikely to support initiatives that undermined those programmes or their own regulatory authority. The Commission’s officials lacked the resources, corporate pressure and mandate to push services within the OECD Trade Committee, where its member states were also represented. They therefore preferred a gradual building of consensus through existing legal and institutional mechanisms, with the possibility of eventual negotiations in the GATT. Their continued ambivalence towards GATT negotiations was influenced largely by the implications of a new round for agriculture and sensitivities about domestic regulation of services, especially affecting culture.

The OECD ministers adopted a muted position on services at their June 1981 meeting. Likewise, a tense meeting of GATT parties in November 1981 agreed only to reconvene a year later to prepare a draft work programme for a new round. By the time they met again in November 1982 Feketekuty enjoyed the full support of the recently elected President Ronald Reagan and his appointee as USTR, William Brock. On the eve of the ministerial an article in Brock’s name entitled ‘A Simple Plan for Negotiating Trade in Services’ was published in *The World Economy* (Brock, 1982). The meeting was held in tense circumstances, barely three months after Mexico had defaulted on its debt repayments, signalling a Third World debt crisis. The developing countries, led by India, insisted that they would not consider any new negotiations before the commitments on development that had been made in both the Tokyo round and the GATT Work Programme for the 1980s were implemented. Moreover, the GATT’s legal mandate related only to trade in goods, not services. Brock claims to have threatened India that ‘hell would be dappled with little icebergs before India got anything out of the United States if they continued to act that way’ and ‘relations between the American and Indian delegations were “less contentious the next day”’ (quoted in Dryden, 1991).

The US secured a concession at the 1982 meeting that Shukla describes as a ‘turning point in the history of the GATT’ (Shukla, 2000, p 15). The ministerial declaration set out a two-year programme. Contracting Parties who had an interest in services should conduct national examinations of the issues and exchange information, using a standard format where possible. The results, along with information and comments from relevant international organisations, would be reviewed at the next GATT ministerial
‘to consider whether any multilateral action in these matters is appropriate and desirable’.14

Trade in services was still a low priority for most OECD governments. In 1982 Canada, Norway and the UK had small bureaucracies working on the area. The EEC had just appointed one person to work full time on services. Even the USTR had only six staff and one computer for the services work.15 The proponents remained dependent on the OECD’s small trade bureaucracy to co-ordinate the programme and undertake the complex and difficult conceptual work. That was not without its tensions. OECD officials engaged in preferential dialogue with Feketekuty. But the domineering approach of the US aggravated the international bureaucrats and other governments. Minor turf wars erupted within the OECD as the proposed trade rules were seen to usurp the OECD’s own codes. One internal memo reveals jealousies over potential competition from the GATT, and predicted the potential for subversion by certain (unnamed) governments:

It is useful to underline that among those who tend to privilege the GATT rather than the OECD as a proper forum for discussions on trade in services, some do it on the basis of high ambitions and hopes as to the scope and timing of future GATT activities, while others do it for the opposite reasons, expecting that discussions would draw out much longer in GATT before conducing to concrete results, thus allowing them to delay such results without having to appear opposing the exercise.16

The US was impatient. In May 1983 it proposed a new GATT round including services, investment and trade in counterfeit and high-tech goods. If developing countries wanted to see their concerns over industrials, textiles and agriculture addressed they would have to offer compensatory liberalisation on the ‘new issues’ (Shukla, 2000, p 15). In November, the US signalled through the media that it was about to deliver a national study on trade in services to the GATT Secretariat, which listed over 900 restrictions in 102 countries covering 16 services sectors.17 The US study was submitted in December 1983.18 Eventually, 16 developed countries followed suit.

**Crossing swords with the South**

The 1982 GATT ministerial had alerted the Southern governments to what the US was doing in the OECD. Those who were advancing an alternative post-colonial economic agenda saw the inclusion of services in the GATT as a make or break issue. Their opposition, according to Shukla, ‘was, at one level, rooted in their collective memory of the colonial period’ (Shukla, 2000, p 15). Egypt drew parallels between an agreement on trade in services and denationalising the Suez Canal.
Shukla arrived in Geneva as India’s ambassador in March 1984. India, Brazil, Yugoslavia, Egypt, Nigeria, Tanzania and Argentina began working to build a GATT equivalent of the Group of 77 developing country bloc in the UN. The sixth UNCTAD in 1983 asked the Secretariat to study the role of services in development. This turned into a general study on services (Drake and Nicolaidis, 1992, p 58). A comprehensive report, including case studies, was released in August 1984. Its inter-disciplinary approach was in stark contrast to the OECD’s. So was UNCTAD’s assertion that regulating services to advance cultural, strategic and social objectives, and to address economic and social externalities, was necessary and in the public interest. The report challenged the validity of transposing concepts of deregulation and liberalisation from trade in goods to services. Consistent with UNCTAD’s work on a Code of Conduct for Transnational Corporations, it advocated the active regulation of corporations whose centralised service operations were compounding the dependency of the South.

The UNCTAD report also made a veiled attack on a small number of rich countries for conducting discussions on services within a narrow policy framework at the OECD. OECD members had shown little compunction about designing an agreement that advanced their own economic and corporate agendas, with the intention of binding poorer countries that were, by definition, excluded from its preparatory activities. In August 1984 an UNCTAD official asked the OECD secretariat to brief developing countries on their work. A file note described this as a ‘highly political matter . . . at a time when some OECD countries are hesitant to discuss it even at GATT and also when practically all OECD members are reluctant to take it up at UNCTAD’. Given ‘the rivalry between UNCTAD and GATT on this issue’ there could be a ‘risk that informing developing countries on our work, in the UNCTAD, could be seen as a lack of neutrality especially as our work is closer to what the GATT role may be than to that of the UNCTAD’.

The officials preferred to offer an informal session jointly sponsored by UNCTAD and the GATT. This attitude echoed earlier advice from within the secretariat that OECD governments should ensure no further ground was lost in UNCTAD while they developed a common position and objectives for services negotiations in ‘other global fora’. By the time of the GATT General Council meeting in November 1984, this informal group of developing countries unanimously rejected ‘trade in services’ as a fiction that was designed to liberalise foreign investment and open their countries to transnational corporations. Deeper dependence on US transnationals would squeeze their nascent domestic services and regulatory regimes. If a new round did proceed, they predicted the US would demand commitments on services as the price for complying with its existing obligations on goods and textiles. All the agreements would then be linked to justify cross-retaliation under the GATT and the US’s section 301 powers. Their technical opposition was that the mandate of
the GATT covered only trade in goods; negotiations on services would require a formal amendment. This lack of mandate also meant the GATT Secretariat could not organise any formal discussions on services.

The 1984 meeting ended in an impasse. But it was agreed that governments could organise an exchange of information on services. Whether a multilateral framework on services was desirable and appropriate could be considered in 1985. This posed a dilemma for those opponents who insisted that the GATT lacked jurisdiction. By requiring these meetings to remain informal and without minutes they deprived themselves of information, and by absenting themselves they were unable to influence the discussions. By June 1985 the rejectionist core was down to 24. Shukla considered it was only possible to stall a new GATT round for so long. In November 1985 a formal preparatory committee was established to make recommendations *inter alia* on the subject matter of the new round in mid-1986. GATT Secretary-General Arthur Dunkel chaired it. Services were neither explicitly included or excluded.

The battle entered a new phase. India, Brazil and their allies were determined to prevent the Preparatory Committee from making any recommendation on the ‘new issues’. But the US was playing hardball, using threats, incentives and disinformation to leverage its influence bilaterally in Latin America and South East Asia. In November 1985 it announced a section 301 investigation of Brazil’s law on informatics products, including in relation to investment and services. Shukla quotes USTR Clayton Yeutter as declaring that:

> We simply cannot afford to have a handful of nations with less than 5 per cent of world trade dictating the international trading destiny of nations which conduct 95 per cent or more of international commerce in this world. . . . Services in particular must be in the round, or we are just not going to have a new GATT round . . . and we will have to confront those issues in a different way – plurilaterally or multilaterally. (Shukla, 2000, p 16, fn 14)

Rumours of a US walkout (a familiar strategy used by the US repeatedly in GATS negotiations) prompted OECD officials to speculate:

> If Washington ends up being disappointed by the discussions in GATT, they may choose to have recourse to a new initiative e.g. launching a series of bilateral discussions with major partners (as is presently being done with Japan, Canada and incidentally Israel, but without major damage to multilateralism until now as the results are not discriminatory) or promoting a new ad hoc international forum for services (we have already heard of ideas in this direction and the name GATS was mentioned).
Colombian Ambassador Jaramillo convened a senior officials’ group in late 1985 to clear the way for a preparatory committee mandate. India formally withheld its consent to the inclusion of services. By now, solidarity among the South was faltering in the face of the ongoing debt crisis in Latin America, the onset of IMF and World Bank structural adjustment programmes and the marginalisation of UNCTAD. Governments who were desperate for relief from oppressive US trade practices feared that unilateralism would intensify and that the US would disengage from negotiations. Raghavan reported in March 1986 how

under intense political and other pressures, mounted by the US at capitals, some of the US allies have either remained silent or have been giving support of sorts to the US. But a number of Third World countries – including Argentina, Brazil, Cuba, Egypt, India, Kuwait, Nicaragua, Nigeria, Pakistan, Peru, Sri Lanka, Uganda and Yugoslavia – have continued to voice their opposition, with varying nuances.29

Fears that a services agreement would bring structural adjustment policies under the GATT umbrella sharpened in April 1986 when Secretary-General Dunkel suggested a basic objective of the new round should be ‘to promote worldwide the structural adjustment needed for growth’. The US concurred. The EC argued that services and investment were vital to structural adjustment and stressed the potential for shifting resources into services as a source of new jobs to replace those lost in traditional industries. Brazil vigorously objected that

after being discriminated against for decades in certain sectors where they enjoyed comparative advantage, developing countries were now being asked to put at risk the fundamental development goal of diversifying their economies and providing remunerative employment for their rapidly growing populations in order to help improve the overall adjustment process in developed economies entering a post-industrial phase.30

The recalcitrants from the South were not the US’s only problem. In January 1986, OECD officials considered there was still only tentative consensus within its own members about what a services agreement might cover.31 The US, with likely support from the UK, seemed to favour a quick, generic agreement for all service activities that left sectoral details to be filled in later. France and Switzerland preferred a more sectoral approach. The EEC was likely to insist on reciprocity. Not all sectors would be on the table, either. Most OECD governments, especially their treasuries, were reluctant to include financial and banking services. Priority sectors for the US, such as computer and information services and telecommunications, were precisely those that the Europeans had reservations about. The US
itself would want to keep out maritime services. Developing countries were expected to seek access for migrant workers, which OECD countries would oppose.

By June 1986, with the GATT ministerial conference looming in December, a hard core of ten Southern governments was still holding out. The USTR proposed a draft text for the ministerial declaration that set priorities on agriculture, services, informatics and investment.\(^\text{32}\) A services agreement should be based on GATT principles of market access, national treatment and transparency. It would take into account the ‘legitimate objectives’ of regulation, such as national security, cultural sovereignty and consumer protection. Transparency obligations would require governments to notify all their proposed regulations on services and justify their reasonableness if required, with an exception for consular affairs, such as immigration.

According to the semi-official history of the Uruguay round, the stand-off ended when the Group of 10 over-played their hand by refusing to budge on services (Croome, 1995, pp 29–30; also Singh, 2003). A group of nine smaller OECD members, led by Switzerland, tabled a draft negotiating mandate. Twenty Southern countries, led by Colombia and Jamaica, joined them as ‘friends of the negotiations’. In discussions with the US, Japan and the EEC, they produced the ‘café au lait’ proposal (denoting Colombia plus Switzerland) that called for multilateral liberalisation of services ‘with due regard for development concerns’ (Drake and Nicolaidis, 1992, pp 66–7). The proposal purportedly acknowledged many of the South’s issues: development, technology transfer, the legitimacy of government regulation, phasing in of commitments, the risks of cross-linkages in negotiations and cross-retaliation in enforcement, and even the possibility of free labour movements. The EEC did not endorse the proposed declaration formally; John Croome suggests this was because of the implications for agriculture (Croome, 1995, p 30). Three competing texts were forwarded to the Uruguay chair of the ministerial meeting in Punta del Este – the text rejecting the ‘new issues’, the café au lait proposal, and a modification on the latter from Argentina.\(^\text{33}\) After prolonged discussions using many channels, India was successfully isolated and forced to capitulate (Winham, 1989, p 300). The meeting ended with a detailed procedural agreement that ensured coverage of all areas, but compartmentalised the negotiations.

Shukla tells a different story. The Europeans were always lukewarm about a new round that could see services traded off for agriculture and herald a US cultural invasion. From late 1984 or early 1985, Shukla and Brazil’s Ambassador Paulo Bautista had begun meeting secretly with the EEC Ambassador to the GATT Tran Van-Thanh to develop a fall back option in the expectation that there would have to be some negotiations. They settled on five key elements for a ‘common working platform’: legal separation of negotiations on goods and services; a mandate based on development and growth, and not liberalisation per se; respect for national laws and
regulations; no guaranteed trade offs between goods and services; and inclusion of work underway in relevant international organisations.

These secret discussions ran parallel to the official talks. Even the others in the ‘tight five’ did not know. Nor did the US. Indeed, the Europeans also participated in the café au lait discussions. In the lead up to Punta del Este, the USTR apparently became concerned about Ambassador Tran’s position. Yeutter wrote to the European Commissioner for External Relations Willy de Clerq asking him to join in isolating India and Brazil; de Clerq replied that a new round should start with consensus. US pressure continued at the ministerial itself. Yeutter told the plenary: ‘We cannot envision – nor agree to – comprehensive new trade negotiations that do not include these four issues’, being agriculture, services, investment and intellectual property.India’s finance minister VP Singh countered with a strident rejection of services negotiations within the GATT, saying he could not return home with shackles on his hands:

> When I say so I express the will of 700 million people of my country who constitute one of the largest potential markets in the world economy. They rightfully ask that after their long struggle against colonial rule towards freedom, after having built bit-by-bit a strong and sound economy on the strength of their own toil and talent, whether their national aspirations are now to be condemned as ‘obstacles’ to trade?

The US denounced this speech as a ‘door slammer’ and threatened to leave. An informal meeting of all delegates began as the ministerial meeting passed its deadline. Shukla, Bautista and Tran had previously decided that their proposal should not be tabled until midnight or it would not survive. When the time came, a typed and unattributed version of the common platform was distributed selectively. The Canadian foreign minister took it up. The US could only suggest minor changes to the wording. At the press conference at around 5.30 a.m. all the developing countries, including Uruguay and Colombia, applauded the Indian and Brazilian delegations.

### The Uruguay round

The final Ministerial Declaration that launched the Uruguay round in September 1986 contained a short part on services that was separate from trade in goods. It read:

> Ministers also decide, as part of the Multilateral Trade Negotiations, to launch negotiations on trade in services. Negotiations in this area shall aim to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines for individual sectors, with a view to expansion of
such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national laws and regulations applying to services and shall take into account the work of relevant international organizations.37

Operationally, the same ministers would conduct both streams of negotiations through the GATT Secretariat. Legally, however, services were on a separate track. The formal separation of services frustrated US ambitions to use trade-offs with goods to leverage a comprehensive multilateral investment agreement. References to development, respect for national policy objectives, and recognition of other organisations (such as UNCTAD) would provide the foundations for subsequent contests over the content and architecture of the GATS.

India and Brazil’s ambassadors spent the next two years slowing the negotiations. They insisted on a sequenced approach. First, an adequate statistical basis for assessing the potential implications and identifying negotiating positions had to be developed. While the US argued that the definition should form part of the negotiations, India and Brazil insisted it was not possible to negotiate something that was not defined. The critical definitional questions involved foreign investment and labour. Once the definitions were settled a generic framework could be discussed, with its application to sectors left for subsequent negotiations. A five-point work programme was eventually agreed, addressing definitional and statistical issues, concepts and principles, sectoral coverage, existing international instruments, and policies for expanding or limiting trade in services.

By the Montreal ‘mid-round’ ministerial meeting in December 1988 the South was again being sidelined, with claims that there was not enough time to address most of their suggestions. The argument over services was both strengthened and eclipsed by a confrontation between the US and Brazil and India over the proposed Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Stand-offs over intellectual property and agriculture dominated the Montreal ministerial. But just five months later, both the Indian and Brazilian governments had backed down. The US imposed unilateral section 301 sanctions on Brazil in October 1988 over its intellectual property law. India was threatened with similar sanctions over insurance and financial services and was formally listed on the section 301 watchlist in May 1989. These coercive measures by the US coincided with major domestic changes: India’s national politics were in turmoil and Brazil was in transition from a military junta to a democracy.

Once the TRIPS battle was lost, the vanguard on services lacked the willpower, trust and co-ordination that had made it so effective. This marked
what Shukla describes as ‘the end of developing countries’ resistance that had been voiced since the 1982 ministerial meeting’ (Shukla, 2000, p 21). Ambassadors Bautista and Shukla were both recalled in 1989; the former was posted to New York, the latter returned to New Delhi to work on family welfare policies. North/South divisions continued throughout the services negotiations, but they were now about ‘levels of ambition’ and increasingly overshadowed by division among OECD countries (Croome, 1995, pp 312–15, 355–8).

The technical discussions moved slowly. In March 1987 the OECD circulated among its members a conceptual framework for a services agreement, which it continued revising into 1989. New Zealand and Australia circulated the services annex to ANZCERTA, signed in August 1988, among the negotiating parties. By June 1989 there was still no agreement on key issues. One issue was the inclusion of investment. A second was the use of a negative or a positive list. Most Southern governments wanted a positive list and lengthy time frames for implementation. They also wanted active support for development of their infant services capacity. Canada and the EEC also favoured a positive list approach, largely because they wanted developing countries to sign the agreement and a negative list would be too onerous for them. At that time, there was no proposal for a world trade organisation whose members would automatically become parties to a raft of agreements; it was assumed that individual states would choose whether to sign and ratify a trade in services treaty.

Some governments were especially aggressive. In September 1989, New Zealand tabled a detailed proposal for the structure and mechanisms of an agreement. ‘Trade’ was defined as the cross-border movement of payments, consumers, providers and knowledge, plus commercial presence. A framework of general rules should include MFN, transparency, market access, national treatment, safeguards and subsidies. Countries would have two schedules: a negative list of reservations that identified (temporary) exclusions, and a schedule of positive bindings that would be multilateralised. Intending signatories would pay an ‘entry fee’, meaning the quality of their of commitments was subject to acceptance. Different levels of development would be recognised. The treaty would include an inbuilt mechanism for progressive liberalisation through regular multilateral rounds.

The US tabled its first comprehensive draft in October 1989. ‘Trade’ would include rights of commercial establishment and temporary entry for senior management. The parties would assume obligations in relation to a universe of services that were listed in an annex, unless specifically excluded in a negative list. Governments could take reservations on market access, national treatment or government aid with respect to existing legislation or service sectors. The removal of these reservations would be subject to negotiation. There would be free movement of payments and transfers
relating to services, unless countries maintained restrictions that conformed
to IMF obligations. ‘Transparency’ would require prior notification of
proposed new measures, with an opportunity for comment. Significantly,
any party could withhold MFN status from any other at the time of
signing the agreement. Countries could negotiate annexes to clarify matters
of interpretation (the US used the example of access to telecommunications
networks). Protocols for expanded sectoral liberalisation (such as mutual
recognition of professional qualifications) and special agreements for services
not otherwise covered would not be subject to MFN.

A number of Latin American countries responded in February 1990 with
their own framework text. They emphasised MFN obligations, with a
principle of ‘relative reciprocity’ that benefitted the South and imposed strong
development obligations on the North. National policies and laws would
be respected and the application of rules to foreign direct investment would
be limited.\footnote{42}

The enthusiasm of the US was waning in the lead-up to the Brussels
ministerial meeting in 1990. Its corporations looked unlikely to gain any
new access and the government would have to guarantee entry to its largest
foreign competitors on an MFN basis. Domestic regulators, especially the
Treasury and Federal Reserve, became concerned about the economic
implications at home and abroad. Smaller US firms felt vulnerable, as did
larger transnationals who were becoming less competitive in the face of
international competition. The USTR announced the US would not agree
to the coverage of shipping, civil aviation and basic telecommunications
unless it could derogate from MFN. The US Coalition of Services Industries
denounced the text, saying the US could wield more direct influence
unilaterally or through regional measures, such as CUSFTA (Singh, 2003,
pp 22–3).

The chair of the negotiations produced a draft framework for discussion
in July 1990.\footnote{43} By November, the text that was forwarded to the ministerial,
on his own initiative, was full of square brackets. It combined a positive list
for the binding of sectors and sub-sectors on market access and national
treatment, and a negative list of limitations on those bindings. The critical
points of dispute were the refusal of the US to commit to MFN, and the status
of sectoral annexes that were proposed for telecommunications, maritime and
road transport, audio-visual, financial services and labour mobility.\footnote{44}

The Brussels ministerial collapsed over agriculture. New deadlines were
set for services, and missed. Gradually, a framework agreement took shape.
Once the discussions moved to a sectoral level, disagreements between the
US and EEC, as the dominant services exporters, intensified. Two issues
dominated. The reluctance of the US and its industries to accord MFN
status in telecommunications and financial services was resolved by allowing
a schedule for MFN exceptions. The problem of sensitive sectors, notably
maritime and direct taxation for the US and audio-visual for the Europeans,
was addressed by a two-tiered structure. Generic principles and rules would apply across the board. Market access and national treatment would only apply to a positive list of country-specific sectoral commitments, which would be negotiated through a bilateral ‘request and offer’ process and multilateralised. The mechanisms for this were established in negotiating guidelines that were adopted in 1991.45

In December 1991, the GATT Secretary-General unilaterally produced a draft final text that included a proposed WTO. Any departure from this non-consensual ‘Dunkel’ text was said to require consensus. Only the major players had enough leverage to secure changes after that. In their final power plays, the Europeans made a further unsuccessful push for an annex on audio-visual services. The US opposition to ‘free riding’ through the multilateralisation of financial services commitments created a risk that other countries would unwind their schedules. It was agreed that MFN on financial services would be retained, subject to the right of governments to withdraw those offers within six months. Meanwhile, negotiations on financial services would continue.

The Final Act of the Uruguay round was adopted on 15 April 1994 and came into effect on 1 January 1995. All members of the new WTO were automatically parties to the GATS. Article XIX mandated a new round of negotiations to begin within five years to advance the goal of progressive liberalisation.

A number of obstacles stood in the way of that vision. The first was structural. As Chapter 1 explained, the GATS fell well short of the original ambition of a generic set of rules that would open services markets and dismantle domestic regulatory barriers. The positive list had been institutionalised and it would be almost impossible to secure the consensus needed to make comprehensive architectural changes.

Second, the ideological climate had shifted. In the early 1980s a nascent neoliberalism was being championed by Reagan, Thatcher and Pinochet and the World Bank was launching its structural adjustment programmes. By 2000 neoliberal globalisation was being blamed for financial instability, economic collapse, social misery and deepening inequality.

Third, the shifting geopolitics of trade negotiations, already discussed in Case studies 1 and 2, created new alliances, fractures and sources of active and passive resistance. A letter from newly elected Bolivian President Evo Morales to the WTO in March 2006 withdrawing his government’s initial and revised GATS 2000 offers signalled how far the tide had turned.46

Fourth, the corporate lobby struggled to maintain its dominance, despite massive resources and privileged political relationships. Its critics successfully pilloried the GATS as a supranational bill of rights for transnational corporations that disabled sovereign governments and disenfranchised ordinary citizens.
Finally, the WTO was facing its own crisis of legitimacy. The second ministerial meeting in Geneva in 1998 was besieged by demonstrations. The Seattle summit in 1999 collapsed in the face of internal dissent and external protest; with it went plans for a new Millennium round. The 2003 ministerial conference in Cancún also failed. A veneer of consensus rescued the Hong Kong ministerial in 2005. In between, a new round of WTO negotiations had been launched at the Doha ministerial meeting in 2001. As former USTR Charlene Barshefsky concedes, this outcome was only possible because of the leverage provided by ‘9/11’. The ‘Doha Development Agenda’ was quickly subsumed by conflicts over content and process, largely on North/South lines. Once GATS 2000 was incorporated into the Doha round, services became hostage to the fraught negotiations on agriculture and industrials and a long period of paralysis set in.

CASE STUDY 3 THE ‘SERVICES MAFIA’

New multilateral trade agreements do not just happen because the most powerful government in the world thinks it is a good idea. Laying the foundations takes time and a focused and effective strategy.

The GATS is a textbook example of trade policy activism. Sometimes its achievement is attributed to just one man, Geza Feketekuty, the Assistant USTR responsible for services. One admirer asks: ‘How can a single individual working almost without allies generate support and momentum to make trade in services a US policy and to get trade in services onto the GATT agenda?’ (Aronson, 1988, p 1). Feketekuty casts the net slightly wider in his own ‘History of a Campaign’:

How do you sell a new concept such as trade negotiations on services to the world community? . . . Undoubtedly the time was ripe for a new approach to services. . . . At the same time if it had not been for the foresight and determined leadership of a small group of individuals, it would not have happened in 1986 and it might not have emerged in a trade framework.

(Feketekuty, 1988, p 295)

David Hartridge, the top WTO official responsible for the agreement in its early days, attributes the birth of the GATS to the corporate beneficiaries:

Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement and therefore perhaps no Uruguay Round and no WTO.48
Numerous other commentaries celebrate the success of a small cadre of policy entrepreneurs, corporate executives, academics, politicians, journalists, business lobby groups and think tanks in developing an orchestrated game plan to seed the GATS and see it to fruition. This is rather ironic, given the fashion for public choice theory among neoliberal intellectuals who vehemently denounce the capture of the policy machinery by vested interests (Buchanan, 1978). That apparent contradiction is explained away by the notion of an ‘epistemic community’. Members of this community are said to be bound together by ‘normative and causal beliefs’ and a common policy enterprise. Their uniquely ‘principled’ approach makes them a qualitatively different breed of policy maker, purportedly immune from the failings of their self-serving counterparts. When members of these communities become influential at the national and international levels, they increase the likelihood of convergent state behaviour and international policy co-ordination. To the extent to which an epistemic community consolidates bureaucratic power within national administrations and international secretariats, it stands to institutionalise its influence and insinuate its views into broader international politics’ (Haas, 1992, p 4).

William Drake and Kalypso Nicolaidis have applied this notion to the genesis of the GATS. Writing as the Uruguay round neared completion, they identified a two-tiered epistemic community (Drake and Nicolaidis, 1992, p 39). The first tier comprised the hands-on players from governments, corporations and international institutions. It was their collective role to think ahead, establish alliances of influence and steer a path through the obstacles. The second tier of academics, researchers, journalists, lawyers and other ‘experts’ worked behind the scenes. Their role was to construct a new legitimising discourse that depoliticised the services issue and translated it into an abstract conceptual framework and technicist language that was capable of becoming law.

The campaign was led by executives of transnational corporations with the resources, influence and connections to create a groundswell of noise and maintain pressure on politicians and governments. In 1974 Ronald K Shelp, the newly appointed government relations executive for insurance group AIG, believed the services industries deserved more support than they were getting. Drawing on connections he made when working on international trade issues for the US Chamber of Commerce, Shelp rallied executives from the air transport, marine insurers, merchant shipping and construction sectors to give evidence to the Senate Finance Committee on the Trade Act 1974. AIG’s politically powerful chief executive ‘Hank’ Greenberg was appointed as the services industry representative on the Presidential Advisory Committee for Trade Negotiations that was established by the 1974 Act.

Shelp from AIG joined forces with Harry Freeman of AMEX, formerly of Bechtel. Theirs was hardly a disinterested normative project. Both recognised there were huge potential profits from new technologies,
deregulation and the globalisation of markets through the cross-border transfer of information and money. The AIG parent company had listed publicly in 1969 and just established the AIG Data Center to service its offshore affiliates and subsidiaries. It was eager to secure an early foothold and pre-empt the application of new regulations to its activities. AMEX planned an aggressive diversification through offshore acquisitions.

The hard core of activists expanded through multiple, mutually reinforcing corporate lobbies. In 1976 the US Chamber of Commerce established an International Service Industries Committee, chaired by Shelp. A White House Inter-Agency Task Force on services and the multilateral trade negotiations was established. The US Department of Commerce commissioned a study from private consultants. The Trade and Tariff Act of 1979 expanded the influence of the ‘services mafia’ (Aronson, 1988, p 6). Shelp was appointed to chair a new Industry Sector Advisory Committee for Services. The Chairman of AMEX James Robinson became the chair of a Services Policy Advisory Committee to the USTR and was succeeded by John S Reed, the Chairman of Citicorp (Aronson, 1988, p 12). According to Freeman, they had an unlimited budget that funded lobbyists in Brussels, Tokyo and numerous US cities (Freeman, 2000, p 456). The ‘services mafia’ attended every biennial GATT meeting of ministers from 1980 and worked the media and their political connections relentlessly.

The US Coalition of Service Industries (CSI) was formed in 1982 at the instigation of AMEX ‘to ensure that US trade in services . . . would become a central goal of future trade liberalization initiatives’. Key players included Citicorp, AT&T and Merrill Lynch. Freeman was the chair. The Coalition distributed a monthly newsletter that outlined developments during the lead-up to the Uruguay round. It remained the major lobbying force for the GATS throughout the 1980s and beyond, advocating on behalf of US transnational corporations in insurance, banking, construction, transport, telecommunications and data processing, audio-visual, tourism and professional services. Influential US bodies also came on board, including the US Council for International Business, the National Foreign Trade Council, US Council for Foreign Relations, the Committee for Economic Development, the Center for Strategic and International Studies and the American Enterprise Institute.

The corporations’ influence reached beyond the border. In May 1981 Freeman told the OECD Secretary General he was ‘extremely pleased’ the organisation had taken up the issue. Freeman reported growing interest in Europe, especially from ‘more modern’ companies. In Germany, there was greater interest from the banks, insurance and reinsurance. In France, it came from the airlines and travel sector. Both the UK government and private sources were now on board. In the professions, there was support from accountancy, law and hospital management. Global consulting and construction companies Fluour and Bechtel were also interested.
The most important non-US player was the Trade Policy Research Centre in London. Australian expatriate economist Hugh Corbet established the Centre in 1968. Its backroom influence accounts for the reference to trade in services in the OECD’s Rey report in 1972. By 1979 Corbet was a consultant on trade policy to the International Chamber of Commerce (ICC) in Paris and special trade adviser to the Tory parliamentary opposition in Britain. In the mid-1970s he commissioned and published a book entitled *Invisible Barriers to Invisibles Trade*. The Centre also began publishing *The World Economy*, which provided an academic outlet for articles that seeded the concept of ‘trade in services’ (Feketekuty, 1988, p 296). It published Jagdish Bhagwati’s pivotal article on ‘splintering’ in 1984 (Bhagwati, 1984).

Sympathetic media in the US and UK reported on conferences, published opinion pieces by key players and signalled US intentions at strategic times. Some blurred the line between media and lobbyists. The Trade Policy Research Centre and the *Financial Times* co-hosted a two-day conference in March 1979 to focus attention on the need for a multilateral services framework. Martin Wolf, a former World Bank economist, became the Centre’s Director of Studies in 1981. Wolf joined the *Financial Times* in 1987. He served as adviser and rapporteur to the Eminent Persons Group on World Trade in 1990 and was principal author of its report, *Meeting the World Trade Deadline: Path to a Successful Uruguay Round*.

The Centre hosted seminars, colloquiums, conferences and private meetings to boost the profile of trade in services. It also facilitated unofficial discussions between staff from the OECD, officials from sympathetic governments, business executives and academics. As the US push intensified, the Centre established a High-Level Group on Services, holding its first meeting at Ditchley Park, Oxfordshire in April 1983 around the time the USTR announced the goal of full-blown multilateral negotiations on services under the GATT. It organised eight annual ‘informal’ round tables of ministers, diplomats, trade officials, business leaders and non-government experts during the Uruguay round, hosted successively by the Australian, British, Korean, German, Spanish, Japanese and Indonesian governments.

Other international players joined the campaign. The ICC created a (US-driven) services working group in 1981 and began preparing reports. As Thatcherism took root, British corporate lobby groups emerged. Lloyd’s of London (alone among the British insurers) was instrumental in establishing a London-based Liberalisation of Trade in Services Committee (LOTIS) in 1982 to work alongside the US CSI to secure the inclusion of services in the GATT round. In 1986 LOTIS became a working committee of the newly created British Invisibles (later the International Financial Services, London), holding regular informal meetings with key British officials. The International Association for the Study of Insurance Economics set up a Programme for Research on the Service Economy (PROGRES) in 1983 to facilitate informal debate on regulation, trade and services in Geneva. The programme initiated
an annual forum for some 60 inter-disciplinary specialists from the private sector, experts from representative organisations, academics and officials from government and intergovernmental organisations.

Other significant corporate lobbies emerged alongside the Uruguay round. A Services World Forum was established in Geneva in 1986 to facilitate interaction among governments, private sector and international institutions. A Financial Leaders Group from US and Europe played a pivotal role in the financial services negotiations after the Uruguay round. Significantly, the European Services Forum was not launched until 1999, at the instigation of European Trade Commissioner Leon Brittan.

The US activists viewed these various international lobbies as support players. Freeman boasted in 2000 that US corporations had almost single-handedly conceived of and driven the GATS project:

The US private sector on trade in services is probably the most powerful trade lobby, not only in the United States but also in the world. . . . At the close of the Uruguay Round, we lobbied and lobbied. We had about 400 people from the US private sector. There were perhaps four Canadians and nobody from any other private sector. The private sector advocacy operations in the US government are radically different from those in every other government in the world.

(Freeman, 2000, p 458)

Freeman voiced his concern that there was no similar momentum to drive the GATS 2000 negotiations.

The corporate cheerleaders could orchestrate and fund the campaign, but they could not make the negotiations happen. That depended on a strategically placed policy entrepreneur with the intellect, strategic skills, drive, charisma, connections and authority to seed the idea, co-ordinate the strategy, dominate the debate, generate momentum and reach a successful conclusion. They found an ideal champion in Geza Feketekuty. His career before joining the USTR in 1974 included work as a finance and trade economist at Citicorp and for the Council of Economic Advisers. He became Assistant USTR in 1978, Senior Assistant USTR in 1982 and Counsellor to the USTR from 1985 to 1990. In the early 1980s Feketekuty had full responsibility for policy on trade in services. He was the US representative on the OECD Trade Committee, which he chaired from 1992 to 1995. His office produced a steady stream of papers and initiated a regular newsletter designed to build an external constituency.

Feketekuty relied, in turn, on political patronage from the highest levels of the President and successive US Trade Representatives. That backing was implicitly understood in all international institutions and trade negotiations. Where necessary it was explicit, expressed through demands, inducements and threats. The USTR in the crucial early 1980s, William Brock, became
a trade in services enthusiast. While in office he oversaw the negotiation of a symbolic agreement with Israel and began talks on the substantive free trade agreement with Canada. Brock relied heavily on Feketekuty who, in turn, praised Brock ‘as a kind of quiet “revolutionary” who wanted to “shake up” people’s conventional ideas about what trade policy was’ (quoted in Dryden, 1991).

These insights reveal how a cadre of beneficiaries, theorists and trade policy practitioners were able to capture national governments and international organisations to secure a legal instrument that conformed to their world view. Drake and Nicolaidis make the extraordinary assertion that this ‘epistemic community’ these agents derived their authority from ‘their articulation of causal beliefs that appear to external policymakers to be “scientifically objective” and susceptible to truth tests and also appear to benefit the international community as a whole’ (Drake and Nicolaidis, 2000, p 39). They conclude that ‘these ideas would not have enjoyed legitimacy or served as the basis of consensual interest redefinition if they were recognizably biased and intended only to benefit one set of players over another’ (Drake and Nicolaidis, 2000, p 40).

These rather astonishing claims ignore the fact that there was no opportunity for contest. Participation was by invitation. Most of the background studies were unpublished and most publications were in advocacy journals that targeted a narrow constituency. The pre-negotiations phase of the GATS was conducted in the rich countries’ club of the OECD, while the South’s counterpart UNCTAD was marginalised. The Uruguay round negotiations were an equally private arena from which most non-trade officials and international institutions were excluded. Only a privileged few sympathetic academics and commentators had access – the dissident voice of Indian journalist Chakravarthi Raghavan being a rare exception.

This dynamic is not unique to the GATS. In Information Feudalism Peter Drahos and John Braithwaite relate an almost identical story about the genesis of TRIPS in the Uruguay round, an achievement that effectively globalised US intellectual property laws:

Put starkly, the intellectual property rights regime we have today largely represents the failure of democratic processes, both nationally and internationally. A small number of US companies, which were established players in the knowledge game . . . captured the US trade-agenda-setting process and then, in partnership with European and Japanese multinationals, drafted intellectual property principles that became the blueprint for TRIPS. . . . The resistance of developing countries was crushed through trade power.

(Drahos and Braithwaite, 2003, p 12)

The anodyne explanatory tool of ‘epistemic communities’ screens out the power relations that were central to these strategies. It seems more
appropriate to describe their architects as ‘organic intellectuals of capital’, a term coined by Gramsci to describe those who act as ‘constructor, organiser, “permanent persuader”’ as they seek to establish a new hegemony around a particular form of capital and accompanying set of ideas (Hoare and Smith, 1971, p 195). Their intellectual discourse seeks to replace, re-articulate and reorder existing concepts in ways that privilege the new forms of capital that they champion.

The concept of organic intellectuals also helps to explain why those agents and ideas emerged at that particular economic, social and political conjuncture. Treating trade in services as part of a hegemonic project recognises there are other intellectuals who will resist being displaced and seek to defend their alternative ideas and values, and that factional internal contests will also occur. Significantly, this more dialectical understanding also recognises the potential for a crisis of hegemony if they fail to win over and sustain a sufficient constituency for their ideas.

CASE STUDY 4 UNDERSTANDING THE ‘GATS ATTACK’

While the transnational corporate lobby dominated the genesis of the GATS, their adversaries have heavily influenced the fate of the GATS 2000 negotiations. The intensity and success of the ‘GATS attack’ stunned the WTO leadership, who responded with considerable vitriol. In February 2001, the Guardian published a column from an incensed WTO Director-General Mike Moore, who was never one to pull his punches:

WTO critics have always taken liberties with the truth. But the lies and distortions they are peddling about the WTO’s services agreement, Gats, are astounding. . . . Those talks, and the WTO’s existing services agreement, do not threaten governments’ ability to provide public services, their right to regulate, or their scope to impose restrictions on public investment.

Moore went on to recite a catalogue of virtues that are commonly claimed for the GATS: boosting global economic growth; access for poor countries to new technology and capital investment; flexibility for governments to choose what commitments to make; and protection of their right to regulate.

That same month the WTO Secretariat took the extraordinary step of publishing a booklet on its website entitled ‘GATS – Fact and Fiction’, in response to a short critique entitled ‘GATS – How the World Trade Organization’s New “Services” Negotiations Threaten Democracy’ (Sinclair 2000). The WTO’s opening paragraphs protested that ‘the negotiations and the GATS itself have become the subject of ill-informed and hostile
criticism. Scare stories are invented and unquestioningly repeated, however implausible. The booklet went on to create numerous straw men that it then cut down. That approach added fuel to the fire by inciting a tit-for-tat response from various critical commentators (e.g. World Development Movement (WDM), 2001; Gould, 2001). The tendency of the Secretariat’s rebuttal to tell only half the story did not help its cause.

As resistance to the GATS intensified, Reuters offered to help out with ‘Anti-GATS Counter-measures’. Its representative at one LOTIS meeting in 2001 asked how the business case for the GATS could best be communicated to the media and ‘[i]n this respect, his company would be most willing to give them publicity’ (Wesselius, 2001).

In May 2002, the US and OECD convened a forum to counter a sustained critique of the GATS from the educational sector (Chapter 7). Leading GATS advocate Pierre Sauvé, from the OECD Trade Secretariat, presented a paper ‘What’s In, What’s Out, What’s All the Fuss About?’. In it he attacked ‘a number of key misunderstandings and fallacies that have tended to cloud a rational discussion of the possible effects of the GATS’ (Sauvé, 2002, p 51). Sauvé portrayed the critics as confused, as much as mischievous: ‘Novelty, complexity and variable geometry all too easily lead to misrepresentation and/or over-interpretation’ (Sauvé, 2002, p 48). He acknowledged the impact that the opposition was having on the GATS 2000 negotiations, noting these were taking place not only against the backdrop of a weak initial harvest of liberalisation commitments in the sector. They are also proceeding with significant regulatory and political precaution, and in the midst of a growing anti-GATS campaign, of which public sector unions in the educational field are active players, especially in OECD countries, together with students sensitive to the anti-globalisation movement.

(Sauvé, 2002, p 49)

The substantive arguments made in these and other counter-offensives are addressed elsewhere in this book. The point of this case study is that the champions of the GATS and their adversaries occupy irreconcilable positions that reflect the contradictions of the trade in services paradigm. The trade discourse closes off the intellectual space to conceive of, let alone engage with, a critique that is premised on services as social phenomena that should be regulated for social objectives within a vibrant democratic polity. Those are the very factors that the agreement seeks to expel. The champions and the critics appeal to rival constituencies with conflicting objectives: one prioritises the needs of capital, especially transnational companies; the other espouses economic redistribution, social justice and self-determination. The two ‘sides’ are therefore destined to talk past each other.
The previous case study described the architects of the GATS as ‘organic intellectuals of capital’, organising the political, economic and intellectual élites of the major powers, and later in some Southern countries, to construct a novel legal artifice. Opponents of trade in services agreements play a classic counter-hegemonic role as organic intellectuals of resistance. In Gramscian terms, they aim to connect the ‘elementary passions of the people’ dialectically with knowledge – in concrete terms, to make the connection between the struggles of real people in their daily lives and the arcane world of trade in services. ‘One cannot make politics-history without this passion, without this sentimental connection between intellectuals and people-nation’ (Hoare and Nowell Smith, 1971, p 418). To continue the Gramscian theme, the activism that results from this engagement is part of a ‘war of movement’ that seeks to shift the power dynamics of international trade in services negotiations back in favour of the national, the local and the social.

The critics are not a monolithic, NGO equivalent of the Global Services Network,56 or a bunch of ‘network guerrillas’ as Financial Times journalist Guy de Jonquières famously described the campaigners against the OECD MAI.57 The resistance to trade in services agreements involves a disparate, fluid, geographically dispersed, often disconnected, and sometimes conflicted, coalescence of activists and activities. Most of this opposition is organic and arises out of national, local or sectoral campaigns that have their own unique histories and contemporary concerns. The GATS and bilateral agreements are just one of many focal points.

Opposition in the global South has often emerged from grass-roots campaigns to defend people’s livelihoods as indigenous peoples, peasants and workers, and basic rights that are threatened by collaboration between national élites and foreign corporations. Their politics is sourced in historical struggles for political independence, long-standing resistance to US and European imperialism and more recent rejection of neoliberal structural adjustment programmes. Aspirations are expressed in terms of social justice, constitutional rights and people’s sovereignty.

In the Philippines, opposition to trade in services agreements finds its touchstone in defence of the 1986 ‘people power’ Constitution. Popular mobilisations against privatisation, corruption and US imperialism treat the GATS and bilateral agreements, the Asian Development Bank (ADB) and the World Bank, and the Arroyo administration as manifestations of the same repressive elements (Case study 8). In South Africa, the GATS symbolises the enduring greed of transnational corporations and national élites that deny people the constitutionally guaranteed right to basic services, such as water or electricity, and obstruct the redistribution of social, economic and political power. The rejection of the GATS in India began with a small group of activists and academics that supported Shukla in the battle over the Uruguay round mandate. Today, that opposition is part of a broad-based movement against a neoliberal vision of India Shining that
privileges an aspirant middle class over the impoverished rural and urban masses. In Thailand, a proposed FTA with the US was one of the catalysts for a popular mobilisation that saw the military remove Prime Minister Thaksin Shinawatra from power and later generated amendments to the Constitution that aimed to fetter the executive treaty-making authority of future governments.

Resistance from indigenous peoples to trade in services agreements is integral to their enduring struggle for self-determination over land, food, biodiversity, water, culture and livelihoods. The Zapatista rebellion in Chiapas, Mexico was launched symbolically on 1 January 1994, the day that NAFTA came into force. Indigenous-led movements in Bolivia, Peru and Ecuador have mobilised against the US Andean free trade agreement as the latest vehicle for the legalised rape of their natural resources by foreign corporations and corrupt elites, and their endemic poverty and disempowerment.

Regional alliances of mass-based social movements in Brazil, Argentina, Venezuela and elsewhere in Latin America have rallied against US plans for hemispheric domination through the FTAA. The pressure brought by the hemispheric alliance of social movements on their governments has been pivotal to maintaining a stalemate in those negotiations. Likewise, regional networks of activists in Asia and the Pacific Rim have targeted APEC and ASEAN, worked together against the MAI, and developed strategies to oppose the GATS and other free trade agreements. Sometimes these alliances span continents – African networks working together with European development advocates ran a sustained campaign against the EU’s attempt to impose EPAs on the ACP countries.

While social movements favour mass mobilisations and political campaigns, NGOs rely more on lobbying, technical analysis and education to pressure their governments. The social movements are mainly located in the global South, and the NGOs are largely Northern, but that is not always so. Often there are fertile collaborations between them. But there are also tensions over what is perceived as ‘NGO imperialism’, especially from transnational corporate NGOs that seem intent on growing their brand and international influence.

Some of the most aggressive Northern governments have been forced to take defensive positions on services at home, while maintaining their offensive offshore. The Canadian trade in services campaigns began in the 1980s when trade unions, feminists and democracy activists opposed the CUSFTA, then NAFTA and the MAI. Their Australian counterparts have mounted vigorous campaigns against the GATS, MAI, AUSFTA and APEC, highlighting the links between the embrace of economic rationalism by successive governments and their hard-line services export agenda. Likewise, New Zealand activists condemn trade in services agreements as devices that lock in the socially destructive neoliberal experiment that began in 1984. The Hong Kong ministerial conference in 2005 provided a rare platform
for the Hong Kong People’s Alliance to learn about and then challenge GATS offers that would reinforce the privatisation and deregulation agenda of mainland China’s Administration.

Those living in the ‘belly of the beast’ play a different role again. US activists have relentlessly lobbied the Congress in campaigns against the renewal of the President’s fast track authority and the ratification of bilateral agreements. They have successfully mobilised state legislators to challenge the administration’s actions that erode their constitutional authority. Constant exposés of bullying tactics of US politicians and officials, and of corporate intimacy with political power, fuel the politics of embarrassment and provide campaign tools in the US and abroad. European groups engage in multi-level regional, national and local campaigns against the corporate-led integration agenda for Europe and the anti-development strategy of the EU towards the South.

In a sometimes uncomfortable accommodation, Geneva-based specialists maintain networks across government delegations, the WTO Secretariat, UNCTAD and other international organisations, the media, NGO networks and social movements. Their constant flow of information on the GATS negotiations provides outsiders, including many delegations from the South, with analysis and interpretation from an otherwise secret world. These specialists are complemented by academics, research-based NGOs and specialist advocacy groups that are located in each continent, who have created a library of resources that range from the populist to the academically arcane.

Sectoral organisations that focus on environment, labour, women, water, public services and culture mainly work with their own constituencies. Some are active participants in broader cross-sectoral networks. The exemplar is the coalition of South Korean farmers, students, workers and cultural activists who waged a militant struggle for years against the WTO and a proposed US bilateral investment treaty, and more recently against the US and EU Korea FTAs. Other sectors take an isolationist approach. The International Confederation of Free Trade Unions (now the International Trade Union Congress) has been notable for its reluctance to join cross-sectoral alliances that take an oppositional position on the trade in services agreements. Despite this, international federations of trade unions in education, public services and food, and numerous national union bodies, have played a leading role in anti-GATS campaigns.

While GATS advocates reach out to a commercial constituency, the critics have found their own influential allies. International organisations, including within the UN system, have produced powerful reports. Ministers of culture and education publicly denounced trade agreements that intrude on their responsibilities; state and provincial governments likewise challenge the encroachment of services agreements on their jurisdiction. Local bodies in several countries have declared their neighbourhoods
‘GATS-free zones’. Professional bodies, such as doctors, librarians and university vice-chancellors, have challenged the marketisation of public goods through trade in services treaties.

The development of the internet and the World Wide Web has enabled information, documents and analysis about these agreements to flow more widely and rapidly than the gestetnered newsletters that Raghavan and others produced during the Uruguay round. Virtual archives and list-serves provide invaluable resources that are not otherwise available, although access is selective: technologies require reliable and affordable telecommunications and these are often only in English. Detailed legal, technical and political analyses of multilateral, regional and bilateral negotiations are widely available and shared, especially ahead of ministerial meetings and negotiating deadlines. This knowledge exchange builds on skills that were developed following the leaks of the MAI text in 1997 and the EC GATS requests in April 2002. With the growth of bilateralism, local experiences in one country or region have become invaluable for campaigns in another. Relationships among campaigners are strengthened by face-to-face strategy meetings – gatherings in Geneva in late 2001 and March 2004 were pivotal to building and strengthening opposition at critical moments. Side meetings are organised at key events, such as the WTO ministerials, regional ministers’ meetings, and the world or regional social forums, although these too have problems of exclusivity (de Sousa Santos, 2006, Chapter 5).

The process of analysis, networking and coalition building takes place behind the scenes. The public face of opposition to the GATS is the protests on the streets at the ministerial meetings. These moments are important, as they send an international message through the media and act as a moral boost and reminder to delegations inside the meetings – although those meetings are so securely quarantined that delegates are often unaware of the demonstrations except for the media reports. But protests do not bring about the collapse of international institutions and treaties. The governments determine what decisions, if any, are taken in negotiations. The main lesson from the MAI campaign was that negotiations collapse for a combination of political and technical reasons: political pressure on individual governments induces caution that undermines confidence, slows the process and generates a technical quagmire. Some governments are more important strategic targets than others. Equally, some services sectors or issues are more ripe for ‘monkey wrenching’ to jam up the works – hence the focus on public and social services rather than telecommunications and financial services, in campaigns against the GATS.

This brief survey conveys a sense of the diversity of participants, strategies, motives and geographies of those who oppose the trade in services agreements. It describes a dynamic that is genuinely organic, evolving and self-determining, and is intrinsically local. It can be facilitated, but not centrally co-ordinated, orchestrated or manipulated. Collapsing the trade
in services negotiations is not an end in itself for those who oppose the agreements. They are driven by a shared commitment to core values of deliberative democracy, distributive social justice and self-determination that are sourced in local realities. In the battle for hearts and minds, those who are committed to expanding capital accumulation will always struggle to understand, let alone win over, those who are motivated by social transformation.
With remarkable prescience, Upendra Baxi observed in 1994 the ‘emergence of a market-friendly (or specifically trade-related) human rights paradigm’ (Baxi, 1994). In an embryonic ‘post-Dunkel’ world, states were becoming more the enablers of capital than the representatives of their citizens. Transnational corporations were the new recipients of internationally guaranteed and enforceable rights, with no corresponding legal obligations.

The paradigm shift from a social to a market conception of human rights and development confronted the Western-derived norms and moral language that had dominated the twentieth century. Perhaps the starkest collision involves the Declaration on the Right to Development,1 agreed to by UN member states in 1986 just as the Uruguay round began. The Declaration confers the right and duty on states to formulate appropriate national development policies that will continuously improve the wellbeing of their general population and all individuals. The people have the corresponding right to participate actively, freely and meaningfully in their own development and to a fair distribution of the resulting benefits. The Declaration requires states to formulate policies in the international arena that facilitate the full realisation of this right and to ensure that new treaty obligations do not disproportionately reduce their capacity to set and implement national development policy. Such priorities, processes and outcomes are antithetical to the primacy that trade in services agreements require states to accord to the economic interests of foreign corporations.

When norms, instruments and institutional mandates conflict like this, they must be left to co-exist in an uncomfortable disjuncture or be reconciled by subordinating one to another. From the mid-1990s, the ‘human’ rights and development discourse was progressively co-opted and displaced by the ‘trade-related’ rights and development paradigm. The former has not disappeared. It has been reinvented through the medium of the Millennium Development Goals (MDGs) and the ‘pro-poor’ policies prescribed by the IMF and World Bank as Poverty Reduction Strategies, within a WTO-compatible model of development.
The triumvirate of the Bretton Woods institutions and the WTO effectively trumps any international organisation that champions the old paradigm. Their hegemonic project of ‘global economic policymaking’ is advanced under the rubric of ‘coherence’. This chapter interrogates the ideological, institutional, policy and operational layers of ‘coherence’ to reveal their distinct, yet synergistic, functions. Although the institutions rarely collaborate actively across these levels, the cumulative effect is a seemingly impregnable edifice. Despite this appearance, they have failed to drown out the dissident voices of the disempowered and dispossessed who demand alternatives to neoliberalism or to subdue those international organisations that continue to insist that services are inescapably social.

The analysis in Case study 5 of the World Bank’s World Development Report *Making Services Work for Poor People* reveals how the World Bank and the GATS complement each other organically, without the need for active collaboration. Case study 6 traces how this hegemony was advanced through an integrated circuit of UN-sponsored summits on trade, finance and sustainable development that began in 1995 and intensified between 2001 and 2003.

**Ideological coherence**

The GATS assumed a successful ‘socio-regulatory adjustment’ from old discourses of human rights and development to new norms that celebrate the market as the vehicle for development. Beginning in 1995, and especially after the collapse of the Seattle ministerial meeting in 1999, the major powers set out to capture every significant international summit as an ideological platform – from the early iterations of the market model at the Copenhagen Summit on Social Development in 1995 to the UN Millennium Summit in 2000, through a rapid succession of further summits on trade (Doha in November 2001), finance for development (Monterrey in July 2002) and sustainable development (Johannesburg in August 2002). This strategy is analysed in depth in Case study 6.

These summits served four important functions. First, a decade-worth of cross-referenced, mutually reinforcing international declarations from (almost) all the world’s leaders amounted to a consensus endorsement of neoliberalism. Each summit was the site of diplomatic contest by some participating governments and more trenchant opposition from external critics. Yet the final declarations invariably reflected the agendas of the major powers and recited the new mantra of trade-driven development in an integrated global economy. Southern governments were promised rewards of debt cancellation and new loans for adopting these policies. Deviant states that displayed ‘bad governance’ were marginalised or denied debt relief and trade preferences. The seriously recalcitrant were demonised as a threat to the integrity of the global economy and freedom loving people everywhere.
Second, these summits were hosted by the UN – the institutional home
of the old human rights and development paradigm. Each declaration
reinforced the need for coherence: horizontally across the UN agencies, the
Bretton Woods institutions and WTO; and vertically by ‘mainstreaming’
neoliberalism, especially trade liberalisation, within countries’ national
development plans and Poverty Reduction Strategy Papers (PRSPs), and in
their trade agreements.

Third, the declarations deployed a depoliticised discourse. Neutral terms
such as ‘coherence’, ‘partnership’, ‘stakeholders’, ‘safety nets’ and ‘sound’
economic policies implemented within an ‘enabling’ environment disguised
the structural disparities of power. Likewise, the epithets of ‘civil society’
and ‘non-state actors’ portrayed the corporate lobbies, transnational NGOs,
more activist NGOs and transformative social movements as one harmonious
and depoliticised entity. Their contrasting social locations were exposed at
the summits themselves. Transnational corporate NGOs who wanted a seat
at the table alongside the Fortune 500 companies were given recognition
and sometimes funding. The ‘uncivil society’, whose popular struggles
challenged neoliberalism and the geopolitical ambitions of the major
powers, was excluded or boycotted the events.

Fourth, the summits consolidated the MDGs, endorsed by the UN
Millennium Summit in 2000, as the normative reference point for trade-
driven development – and its source of virtue. Sweeping commitments were
made to halve the number of people living in poverty, reduce child and
maternal mortality and the incidence of HIV/AIDS, and dramatically improve
the provision of education and safe drinking water by 2015. These goals
were bound together by MDG8, which made government/corporate
partnerships and trade liberalisation the primary means for achieving them.
Situated trade-driven development amidst goals on poverty and pandemics
conferred an unearned legitimacy on free markets and free trade. It also
made the IMF, World Bank and WTO the primary institutions through
which the goals should be achieved (WDM, 2005). Even though there was
no explicit reference to the GATS, trade in services agreements were one
legal vehicle for ‘enabling’ public–private partnerships and private firms to
deliver health care, education, water and other essentials of life.

Institutional (in)coherence

The legal mandates of the Bretton Woods institutions and the WTO provide
the platform for their role as hegemonic vehicles of neoliberal globalisation.
Article III:5 of the Agreement Establishing the World Trade Organization
reads:

With a view to achieving greater coherence in global economic
policymaking, the WTO shall cooperate, as appropriate, with the
International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.\(^2\)

Article I of the IMF’s Articles of Agreement lists as one of its purposes: ‘to facilitate the expansion and balanced growth of international trade’. Likewise, the purposes set out in Article 1(iii) of the Articles of Agreement of the International Bank for Reconstruction and Development (the World Bank) include ‘to promote the long-range balanced growth of international trade . . . by encouraging international investment for the development of the productive resources of members’.

The three institutions formally agreed in 1996 to hold regular high-level consultations and to grant reciprocal observer status at key meetings and communicate on matters of mutual interest. They would also establish protocols for co-operation and communications between staff.\(^3\) Giving effect to these commitments has not been easy (Sampson, 1998, p 258).\(^4\) The World Bank and IMF occupy adjacent complexes in downtown Washington. They maintain a minimal presence in Geneva to service the WTO and other international agencies. While they have vastly greater resources than the WTO Secretariat, their specialist trade departments are relatively small. The Bank’s trade directorate was strengthened after 2000 by employing several former WTO economists, including GATS specialist Aaditya Mattoo (Case study 5).

Their divergent governance structures also affect how the institutions interrelate. Finance ministers govern the Bank and Fund, trade ministers the WTO. Finance ministers have more power and view trade liberalisation as one consideration among many. The Bretton Woods institutions hold joint executive meetings where the major powers, as the majority shareholders, control the decisions. While the IMF has a centralised and rigidly hierarchical bureaucracy and the World Bank is more amorphous, the staff of both institutions produce only documents that they know the board will approve. By contrast, the formal governance arrangements of the WTO involve one-country-one-vote, which means the major powers have to rely on the less predictable methods of back-room deals, persuasion and coercion. The WTO Secretariat is authorised only to perform the will of the members, although it is frequently accused of actively promoting the North’s agenda (Hilary, 2004).

The objectives and priorities of each organisation necessarily reflect their distinctive mandate. Trade policies espoused by the World Bank have to be consistent with the IMF’s macro-economic framework, while the Fund’s trade liberalisation conditionalities have traditionally depended on aspects of the Bank’s structural adjustment programmes (Sampson, 1998, p 260). The WTO’s activities are defined solely with reference to its legal texts. At times the mandates of the institutions compete. The WTO texts defer to the IMF’s assessment of a member’s balance of payments situation when
considering measures under Article XV of GATT and XII of GATS, but a senior legal adviser at the IMF has noted the potential for jurisdictional, substantive and institutional tensions in the IMF/WTO relationship (Siegel, 2002).

These practical difficulties and institutional differences are overcome by their underlying ideological convergence. The World Bank’s World Development Report 2004 shows it is not necessary for the institutions to collaborate actively to achieve a synergy of both ideology and policy (Case study 5). Conversely, the circuit of international summitry shows how all three institutions and the major powers can and do join forces to suppress a challenge to their hegemony (Case study 6).

This common cause is also apparent in their relationships with UN agencies that continue to espouse a ‘human’ human rights and development paradigm. Back in 1995 the Programme of Action from the Copenhagen Summit on Social Development had proposed strengthening inter-institutional co-ordination in economic and social development programmes, including joint meetings at the UN Economic and Social Council (ECOSOC). The first ECOSOC session for that year included a ‘high level economic policy dialogue’. The newly appointed World Bank President James Wolfensohn bluntly distinguished between (acceptable) co-operation and (unacceptable) guidance and co-ordination: ‘I have a job to do and I don’t want . . . to carry out my business according to some resolution made at the UN’. At the same meeting the Director General of the newly established WTO, Renato Ruggiero, pointed to his organisation’s mandate to improve policy coherence with the Bretton Woods institutions, and stressed the WTO’s reliance on their policy analysis and research. He did not mention the UN. Ruggiero also insisted that the WTO’s contractual nature meant it could only discuss what the members had agreed was its mandate. That was confined to trade, including the promotion of development through progressive liberalisation. Other dimensions of development were beyond its purview (Khor, 1995).

All the UN agencies came under intense pressure to conform. The primary target was UNCTAD, whose role as a partisan for the South before and during the Uruguay round had seen it marginalised and starved of resources. Trade ministers of larger Southern governments are said to have pressured UNCTAD’s research staff in recent years to abandon any leftist positions. The appointment of former WTO Director General Supachai Panitchpakdi as Secretary-General of UNCTAD in 2005 was expected to bring any dissident elements to heel.

It was partly to gill the gap left by UNCTAD that the South Centre was established in 1990 as a think tank to provide research support and promote South/South co-operation in Geneva. In 2006, the South Centre submitted a report entitled ‘Reinventing UNCTAD’ to the Panel of Eminent Persons on Enhancing UNCTAD’s Impact. It pulled no punches, asserting that a ‘concerted effort by major economic powers to deprive the United Nations
of its Charter functions in the economic field and whittling down its role and authority’ had reduced inter-governmental deliberations in UNCTAD to a charade and its research and policy analysis work had lost its earlier élan, punch and distinctiveness. . . . In the name of coherence, [UNCTAD] is being required to conform to the mainstream views espoused by developed countries and their preferred international organizations . . . and is not being allowed to question the existing world order or to bring out its inequalities and imbalances.

(South Centre, 2006, p 5)

The South Centre blamed the ‘Partnership for Development’ (endorsed at UNCTAD IX in 1994, at the end of the Uruguay round) for de-emphasising the organisation’s focus on the role of governments and policy measures, and converting it into a more pragmatic and action-oriented institution that primarily delivered donor-driven technical assistance. Some ground had been recovered at the UNCTAD X and UNCTAD XI, which followed the collapse of the Seattle and Cancún WTO ministerials respectively, when Southern governments had used UNCTAD to voice their critiques of the WTO. The promotion of the concept of ‘policy space’ had opened the possibilities for a more pluralist approach, even though ‘certain powerful countries refuse any reference to the concept in UNCTAD’ (South Centre, 2006, p 10).

The hostility of the major powers to UNCTAD was readily apparent in discussions on ‘coherence’ in the WTO Working Party on Trade, Debt and Finance. The committee had been established under paragraph 36 of the Doha Work Programme. It was empowered to explore broader trade and development debates and produce recommendations ‘within the mandate and competence of the WTO’ that would contribute to a durable solution to the external indebtedness of developing countries and ‘safeguard the multilateral trading system from the effects of financial and monetary instability’. The committee was perpetually split on North/South lines (ICTSD [International Centre for Trade and Sustainable Development], 2004). The US and its allies blocked a proposal to ask the Hong Kong ministerial meeting in 2005 to establish a permanent committee with an explicit mandate that would have authorised UNCTAD to play a more active role (ICTSD, 2005, p 36).

The organisation still publishes several flagship reports. Their orientations vary according to which division produces them. The annual World Investment Report is the work of the Division on Investment, Technology and Enterprise Development. Its 2004 report The Shift Towards Services documented the uneven distribution of trade in services, noting that most poor countries had fallen further behind as the major powers had accumulated greater control through their transnational corporations (UNCTAD, 2004). In what has become UNCTAD’s standard line, the report promoted foreign direct investment in services in countries that had effective
regulatory regimes, provided they could preserve the flexibility to pursue their national objectives.

Other divisions of UNCTAD pushed the boundaries of what the major powers would tolerate. The 2006 *Trade and Development Report* produced by the Division on Globalization and Development Strategies was, paradoxically, published under Supachai’s signature. It was replete with references to ‘pragmatic’ policy approaches, ‘strategic trade integration’, ‘flexibility’ that requires an ‘appropriate balance between national policy space and international disciplines and commitments’ (UNCTAD, 2006, pp XI–XX). It criticised the prevailing macro-economic orthodoxy of the international financial institutions, and the attempt to establish a homogenous regulatory framework under the WTO, as being unlikely to take adequate account of asymmetries between rich and poor countries. Moreover, the proliferation of free trade agreements had widened the gap between legal equality and equality of economic constraints. The report floated the possibility that an individual party might opt out of commitments for a limited time under agreement-specific criteria. Taking a swipe at the anti-democratic practices of the WTO, it remarked that a fully inclusive process, and flexibility to reflect the needs of all members, would be necessary to avoid a deadlock in the Doha negotiations.

The US expressed ‘regret’ at recommendations that ran counter to the ‘foundations of sound economic and trade policy’ and the research of other international organisations, and ‘disappointment’ that trade issues were presented as a North/South dichotomy ‘at odds with the economic reality of modern global trade’. An aggregated concept of ‘policy space’ fostered the harmful perception that all developing countries wanted to opt out of their international commitments. Too little had been said about the importance of liberalising infrastructure services, while the multilateral setting of a trade negotiation ‘is simply not the place to try to solve the complicated issues related to international migration and labor’.  

Regional offices of UNCTAD play a pro-South, but pro-liberalisation role. For example, UNCTAD India embarked on joint venture with the UK’s Department for International Development and the WTO to strengthen the capacity and commitment of India’s Ministry of Commerce to participate positively in the Doha round. From June to August 2005 they conducted a series of ‘stakeholder consultations’, including on services (UNCTAD India, 2005). One of the two NGOs invited to speak observed that the published account had been massaged to endorse India’s pro-liberalisation position on modes 1, 2 and 4 and to downplay their criticisms.

The UN’s other main economic development agency, the UN Development Programme (UNDP), periodically questioned the trade-driven agenda for services. Its Human Development Report for 2003 promoted a human rights approach to policies on the private provision of health, education and water (UNDP, 2003). The same year the UNDP’s Socio-economic Development
Group published a review that was critical of MDG8. The authors said the assumption that trade increased economic growth, which in turn reduced poverty, had mostly failed the poor. Their position on the GATS was carefully worded: ‘From a human development perspective, it is vital that countries preserve adequate policy space for sequencing the progressive liberalisation of basic public services such as water, health, education and social protection.’ Liberalisation of those services should not be imposed as ‘a blank prescription’. The potential application of the dispute settlement and cross-retaliation mechanisms of the GATS were inappropriate for the liberalisation of such basic services. Concerns about the private management of utilities, especially water in Latin America, showed the need for caution (Vandemoortele et al., 2003, p 8).

The UN’s human rights institutions that adhered to the social paradigm of services were also marginalised. A preliminary report on trade and human rights from the UN Sub-commission on the Promotion and Protection of Human Rights in June 2000 referred to the WTO as a ‘nightmare’ for human rights, provoking a furious response from the WTO (quoted in Picciotto, 2007, fn 3). In 2002 the Sub-commission produced another, more diplomatically phrased report on ‘Liberalisation of Trade in Services and Human Rights’. The authors argued for a human rights approach to trade through which ‘these two processes – progressive realization of human rights and progressive trade liberalization – can be implemented simultaneously and coherently’. They would have been well aware that affording human rights equal status to, let alone primacy over, trade liberalisation would negate the core principles and objectives of the GATS.

The report reiterated the state’s role as the primary duty bearer for the implementation of human rights. Moreover: ‘The adoption of any deliberately retrogressive measure in the liberalization process that reduces the extent to which any human rights is protected constitutes a violation of human rights.’ While not opposing liberalisation, they argued for evidence-based assessments to determine its right form and pace. States should ‘undertake public, independent and transparent human rights assessments of the impact of liberalization policies – both past policies and future options – on the enjoyment of human rights, through a participatory and consultative process with concerned individuals and groups’. If assessments were not available, governments should take a cautious approach to new commitments. ‘Where assessments indicate negative effects of past liberalization policies on the enjoyment of human rights’ other WTO members should allow those governments the maximum flexibility to withdraw their liberalisation commitments. This report passed comparatively unremarked in the WTO.

By contrast, a contemporaneous study that was co-authored by the World Health Organisation (WHO) and WTO was profiled on the WTO website. The report spent relatively little time on the GATS, stressing the voluntary
nature of commitments and potential gains for developing countries from exporting health services. It concluded that WTO agreements are sensitive to health issues, which can take precedence where necessary. The primary recommendation was for closer national and international co-operation so that ‘health and trade policy-makers can . . . ensure coherence between their different areas of responsibilities’ (WHO, 2002, p 22).

Policy coherence

A coherent ideology and institutional synergies have to be translated into concrete policies. The neoliberal literature talks of a two-phase process for securing a new paradigm: initiation of radical policy change followed by a period of consolidation that normalises and embeds the new regime (Haggard and Kaufman, 1992). The initiation phase in the South rested primarily with the Bretton Woods institutions. Initially, this was pursued through the crude Washington Consensus template of fiscal austerity, anti-inflationary monetary policy, capital account liberalisation, light-handed regulation, trade and foreign investment liberalisation, privatisation, labour market deregulation and consumption-based taxation.

By the 1990s there was abundant evidence that the Washington Consensus prescription had failed poor countries; so had the radical laissez-faire approach foisted on Eastern Europe in the early 1990s (Hellinger, 2001; Stiglitz, 2002; Henisz et al., 2005). That dismal record had been compounded by major financial crises in East Asia and elsewhere. What Robert Wade calls the ‘High Command’ of world finance then shifted the consensus ‘from “liberalize the market” to “standardize the market” on a global scale’. The ‘Post-Washington Consensus Consensus’ entailed ‘a big increase in government and supranational “intervention”’ in order to homogenise market institutions (Wade, 2007, p 2). This regulatory focus was especially evident in the post-Uruguay round GATS negotiations on financial services, telecommunications and the accountancy profession.

At the same time, both the IMF and World Bank began rebranding their structural adjustment programmes. They announced a joint decision in late 1999 that lending would be re-aligned to centre on poverty reduction, including the effective provision of social services. The centrepiece would be national development strategies that were designed and owned by the debtor nations themselves and set out in PRSPs. Each institution established new programmes: the IMF created a Poverty Growth Reduction Facility and a Finance Programming Framework; the World Bank introduced Country Policy and Institutional Assessments that fed into its Country Assistance Strategies.

Their major shareholders endorsed an ‘enhanced’ version of the discredited Heavily Indebted Poor Countries (HIPC) initiative for debt cancellation in least developed countries, which they had created in 1996. To qualify,
governments had to demonstrate a ‘good reform performance’ and prove they would use the freed resources to reduce poverty. This would be evidenced by their PRSPs, effectively making them new conditionalities.

In theory, these PRSPs were going to be generated and ‘owned’ locally through the widespread participation of civil society – in contrast to the top-down structural adjustment programmes and onerous conditionalities of the original HIPC scheme. Each Poverty Reduction Strategy would reflect the key principles of being country-driven with broad based participation; comprehensive and results-oriented; take a medium- to long-term perspective; and be partnership-oriented (IMF/World Bank, 2003).

Between 2000 and 2005 a number of independent reviews showed the PRSPs were still being designed to meet the imperatives of the institutions and the donors (Abougre, 2000; Marshall and Woodroffe, 2001; Chavez Malaluan and Guttal, 2002; de Barra, 2004; Hermele, 2005). They followed a pre-prepared format with instructions set out in a 1,000-page source book. Mandatory policy matrices that were annexed to the Interim PRSP were almost identical to past structural adjustment agreements. The annexes, not the cover document, were what really counted. Because the papers had to be approved by the IMF and World Bank boards as a pre-requisite to securing debt relief and other funding, senior officials would not submit advice to the board that might be rejected. Their ‘advice’ to governments became tantamount to directives and overrode any more informed insights from staff on the ground (Chavez Malaluan and Guttal, 2002, pp 2–5). There was no space to analyse the causes of poverty that fell outside the authorised diagnosis and remedies. Problems in providing education, health care, clean drinking water, sanitation, and energy were attributed, in market-speak, to scarcity, inefficiency, poor quality political decisions and lack of market disciplines. An IMF/World Bank document entitled ‘Poverty Reduction Strategy Paper – Operational Issues’ in December 1999 maintained:

> The impediments to faster sustainable growth should be identified and policies agreed to promote more rapid growth: such as structural reforms to create free and more open markets, including trade liberalisation, privatisation and tax reform and policies that create a stable and predictable environment for private sector activity.

(quoted in Chavez Malaluan and Guttal, 2002, p 10)

An evaluation by Coopération Internationale pour le Développement et la Solidarité (CIDSE)/Caritas International described the Poverty Reduction Strategy as preoccupied with process, providing a theatre in which actors fulfil their roles to get the funding or meet ‘best donor practice’ while the real policy discussions happen offstage (de Barra, 2004, p 7). Even where citizens placed priority on improved access to high quality services during their country’s PRSP consultations, the formal documents almost always
proposed the same recipe: competitive markets, reduced subsidies and social entitlements, user charges at market rates with targeted exemptions, privatisation through long-term concessions or Build Operate and Transfer ‘partnerships’, and private property rights over natural resources, including water.

Another study, this time of Vietnam’s PRSP in 2002, records the World Bank’s own estimate that 400,000 workers would become unemployed following the corporatisation of state enterprises. More job losses were expected from trade liberalisation under the ASEAN Free Trade Agreement. Yet the Bank made no meaningful recommendations to protect social services for the unemployed, or even to provide safety nets, because (applying neo-classical theory) these changes were predicted to create more jobs and have little net impact on employment (Chavez Malaluan and Guttal, 2002, p 11).

When PRSPs did have a poverty focus their content rarely flowed through to national budgets and policies, which were more likely to be driven by competitive export strategies. Paradoxically, the PRSPs were also of marginal relevance to the lenders. The main determinant for IMF loans was its Poverty Reduction Growth Facility, which relied on briefing papers that were drafted secretly in Washington and subject to minimal negotiation. Similarly, the World Bank’s own secret scorecard, the Country Policy and Institutional Assessments, triggered lending under the Country Assistance Strategy and Poverty Reduction Support Credits (de Barra, 2004, pp 9–10). Those facilities were complemented by the Bank’s private sector lending agency, the International Finance Corporation, whose promotion of private education provision is discussed in Chapter 7.

Even the institutions’ own independent evaluation agencies found the PRSPs wanting. The IMF review concluded that actual achievements fell ‘considerably short of the potential’, essentially because there was little change in how the IMF was operating. Donors, including the Bank and Fund, were often unwilling to treat country strategies and domestic processes as the basis for ‘partnership’ and to increase the scope for treating countries differently (IMF, 2004; see also World Bank, 2004). Perhaps predictably, the joint internal review by the World Bank and IMF in 2005 was largely uncritical, except of debtor governments. There were, it concluded, no magic bullets, so the institutions should build on ‘best practice’ and continue to tailor the process towards the needs of individual countries (IMF/World Bank, 2005).

The institutions perceive ‘success’ as the introduction of the neoliberal prescription, not its positive outcomes. This ideological closure excludes the authentic voices of people whose aspirations are still framed by the language and concepts of human rights, social justice and self-determination. The persistence of those voices and the risk of further policy failures require a more coercive mechanism to secure the new orthodoxy. This is where the
trade in services agreements come in. Their role is to lock in and expand
the liberalisation process and consolidate the markets that the Bretton Woods
institutions have initiated.

To date, the GATS has failed to fulfil its potential as a tool of consolidation.
The current GATS schedules were signed off in 1994. The level of services
liberalisation in the mid-2000s far exceeds those commitments, so Southern
governments face intense pressure to commit their new ‘status quo’ in the
GATS 2000 negotiations. Some have been encouraged by the seductive, but
legally meaningless, possibility in the GATS Article XIX:3 to seek ‘credit’ for
making their liberalisation policies irreversible. Others remain very reticent,
insisting that the GATS guarantees them flexibility about what commitments
they make, if any.

There is one major instance in which the GATS has been effective – the
pernicious process of accession by some of the world’s poorest states to
the WTO (Adhikari and Dahal, undated; Charveriat and Kirkbride,
2003; Oxfam, 2005). To accede, an applicant must secure the consensus
endorsement of a self-appointed working party of existing WTO members.
Each participating member has an effective power of veto. Virtually every
accession package sets a progressively higher threshold for countries that
follow. The major powers consistently seek to establish ‘high quality’
precedents and avoid low-level commitments, so they can bolster their
demands in the WTO negotiations and the accession of significant countries,
such as Russia (or previously China). The US is notorious for demanding
an extensive list of services commitments (Grynberg et al., 2002). Such
practices continue, despite a decision of the WTO General Council in
December 2002 in which members pledged their sensitivity to development
objectives and mutual self-restraint towards least developing countries.10

The World Bank Institute (WBI) confirms that the commitments made
by countries that acceded to the WTO since 1995 are wider and deeper
than those made by existing WTO members during the Uruguay round.
Many acceding countries have also committed to new liberalisation, unlike
most existing members (WBI/WTO, 2006, p v). A comparative analysis of
the services schedules of WTO members and acceding countries published
in 2006 exposes the shocking extent of these disparities (Grynberg et al.,
2006). Six of the twenty new members were least developed countries. While
GATS 1994 commitments are generally higher for higher income WTO
members, the acceding members’ commitments were higher still:

At the most aggregate level, while WTO members have on average
taken up some kind of commitment in six sectors out of a maximum
of 12, the comparable figure for acceding countries is 11. At the 2-digit
level, acceding countries took commitments in 36 sectors, compared
to only 14 for WTO members. Finally, at the most disaggregated level,
acceding countries have made commitments in more than twice as many sectors as WTO members: 100 as against only 42.  
(Grynberg et al., 2006, p ix)

The lower the national income, the greater the disparity is between original members and acceding countries. Acceding least developed countries took, on average, 183 commitments at the most disaggregated level, compared to 20 by original least developed country members.

Accessions also routinely include GATS-plus obligations. For example, OECD countries commonly insist on commitments to privatise utilities and services, and require periodic reports on the progress of privatisation (Grynberg et al., 2006, p 5). The legal justification for this is that Article 30 of the Treaty of Vienna provides that a subsequent treaty, such as a bilateral agreement reached during accession negotiations, supersedes its predecessor (Grynberg et al., 2006, p 4).

The World Bank promotes universal WTO membership and provides research, advice and advocacy to countries undergoing accession. The main rationale for accession is that developing countries gain improved market access, protection against discriminatory practices and access to dispute resolution (Evenett and Primo Braga, 2005). Accession is also said to attract foreign investment by providing evidence of a government’s commitment to maintaining pro-market economic policies. These claims are highly contestable (Gay and Joy, undated; Kelsey, 2005b). Because the accession process is conducted in secret, and commitments are not revealed until the working party report is signed off, it is impossible to provide strong empirical counter-arguments (unless the working party report is leaked).

The standard riposte is that states choose to join the WTO. Yet there is suspicion that the international financial institutions may impose accession as debt conditionality. That is hard to prove, given the confidentiality of the loan contracts. However, there some evidence to support the suspicion. Vanuatu, a small South Pacific island and a least developed country, signed a Comprehensive Reform Programme with the Asian Development Bank in 1998. A key element required the government to encourage private sector-led growth through a more open economy, in part by forming regional trade blocs and acceding to the WTO. Vanuatu signed off its working party report in November 2001. After unconscionable pressure from the US, supported by the WTO Secretariat, it had made fifty specific commitments in ten services, far higher than neighbouring Pacific Island WTO members.

Vanuatu was to have been the first least developed country to accede to the WTO at Doha in 2001. Days before, the government realised the implications of its GATS schedule and suspended its accession ‘for technical reasons’ (Gay and Joy, undated). In 2004 Vanuatu’s trade minister wrote to the USTR seeking to reopen the accession package and withdraw commitments to foreign investment in health, education, environment,
audio-visual, wholesale and retail services. The US eventually replied that it was prepared to revisit the schedule – on the terms of Article XXI that required Vanuatu to negotiate compensatory concessions for any adjustments.\(^{11}\)

While the GATS has had a limited impact at a multilateral level, Case study 2 revealed a much greater level of commitments and GATS-plus rules in bilateral agreements where political pressure can be applied more directly and less publicly on weaker governments. The use of negative lists increases the potential for governments to make extensive ‘standstill’ and ‘rollback’ commitments, with a corresponding risk where negotiators have a poor understanding of the implications or simply make an error.

Some of these agreements, notably those involving the EU, also subordinate aid to trade. This is a central platform of the Cotonou Agreement 2000, which commits ACP states to negotiate EPAs with the EU by December 2007. The EU Water Facility that has provided €500 million to help ACP countries achieve MDG7 (Ensure Environmental Sustainability), and the EU’s insistence that ACP states include services and investment liberalisation in their EPAs, is a classic example of ‘coherence’.\(^{12}\)

**Operational coherence**

Ultimately, it is national governments that decide whether or not to sign up to and implement neoliberal policies and trade in services commitments. However, the institutions and donor states provide them with every encouragement in the name of ‘capacity building’ and ‘technical assistance’, and this is often linked directly or indirectly to a loan. Because the WTO-compliant parameters have been so firmly established, there is a much more catholic approach to inter-agency co-operation at the operational level.

The most prominent initiative is the Integrated Framework for Trade-related Technical Assistance to Least-developed Countries.\(^{13}\) The Integrated Framework was created at the Singapore WTO ministerial meeting in 1996 and involves the IMF, World Bank, International Trade Centre (a WTO–UNCTAD entity), WTO, UNDP and UNCTAD. The framework has two objectives: to ‘mainstream’ trade into national development plans and/or Poverty Reduction Strategies; and to deliver trade-related technical assistance. A least developed country must be committed to trade integration, be starting its PSRP process and have a ‘conducive operational country environment’. The government asks for a ‘diagnostic trade integration study’ to assess the economy and identify sectors that have actual or potential for trade. The outcomes are then incorporated into an action matrix.\(^{14}\)

This programme has been repeatedly ‘enhanced’ in response to criticisms. A 2003 review found anecdotal evidence that the institutions had improved their coherence and consistency in promoting ‘mainstreaming’, but the goal had ‘yet to be fully embraced at the national level’ (Capra, 2003, p 10). A further internal review concluded in 2006 that ‘trade is inadequately seen,
by both donors and recipients, as an integral aspect of economic development and poverty reduction, so does not feature high enough on their priorities'. Yet another 'enhancement' was made to complement the 'aid for trade' package brokered at the Hong Kong ministerial in 2005. By the mid-2007, 43 countries were involved in the framework, 25 of which had completed 'diagnostic studies'. Many were least developed countries engaged in accession.

The Joint Integrated Technical Assistance Programme (JITAP) is designed to speed up the integration of African countries into the multilateral trading system. Established in 1998, JITAP's second phase ran from 2003 into 2007. It is described as a multi-stakeholder 'partnership' involving the International Trade Centre, WTO and UNCTAD and is funded by the major powers. The Centre developed generic tool kits for six developing countries and 10 least developed countries from Africa who had demonstrated their commitment to 'mainstreaming of trade as an engine for poverty reduction'. The African Union asked for the continuation and extension of JITAP past 2007, but also wanted the current and potential participants to be involved in conceptualising JITAP III.

Most international organisations also have their own initiatives. The WTO runs an Institute for Training and Technical Cooperation, which was subject to a relatively critical independent strategic review in 2006. The Secretariat replied to the suggestion that their 'neutrality' approach to assistance and training might appear to some participants as 'pro-liberalisation' by saying that advocating liberalisation was the WTO's core function and was supported by economic and empirical evidence.

The World Bank sponsors its own forums to catalyse country or regional discussions. The WBI provides training courses and seminars on trade policy, sometimes with the WTO. Countries in accession receive special attention. More academic-oriented programmes are run jointly with high-profile university centres. The regional development banks in Africa, Latin America, Asia and Eastern Europe undertake similar activities. The World Bank Trade Research Group produces regular Trade Notes and working papers on particular trade issues. The Bank's country economists also produce country specific reports, often on request.

All these institutions have taken a special interest in mode 4. Institutional collaboration enables the WTO to be involved in exploring an otherwise partisan issue. The World Bank and WTO organised a seminar on mode 4 in October 2002. The International Organization for Migration (a non-UN intergovernmental body), the World Bank and OECD co-sponsored a seminar on trade and migration in late 2003. The WTO replaced the OECD as co-sponsor of a follow-up session on regulation of temporary worker schemes in 2004. UNCTAD has also actively promoted mode 4.

Some view UNCTAD's role in technical assistance and capacity building, especially on WTO accession, as an important counter-balance to the rest.
An independent review in 2006 praised its ‘objective, evidence-based and development focused support’, despite its overstretched resources. In the view of the South Centre, however, ‘UNCTAD’s foray into technical assistance has been a negative development . . . at the cost of its negotiating role and research and analysis work [and] has given the donors the leverage to drastically remould UNCTAD’s other functions in the direction of their interest’ (South Centre, 2006, p 19).

This observation highlights the lack of an institutional counter-weight to the ‘triumphal triumvirate’ of the IMF, the World Bank and the WTO. At one level, the mutually reinforcing layers of ideological, institutional, policy and operational coherence represent a totalising hegemony. The essential social function of services that was expressed during the twentieth century through human rights and development discourse has been formally subordinated to a neoliberal paradigm that redefines ‘services’ as ‘tradeable commodities’, ‘rights’ as ‘goals’, and state ‘obligations’ as ‘aspirations’ to be achieved through globalised markets.

Yet there are also signs of fragility. Rhetorical appeals to MDGs, development partnerships, ‘pro-poor’ PRSPs and trade-driven development, combined with legal artifices such as the GATS or bilateral ‘trade’ agreements, have not been able to purge services of their social essence or conceal the deep disparities that are perpetuated through globalised services markets. Strategies of exclusion have failed to silence dissenting voices, whether they are expressed as the aspirations of people during cosmetic consultations over PRSPs, the continued assertion of ‘human’ human rights by marginalised UN agencies, or the resistance of mass movements on the streets during the steady stream of international summits.

CASE STUDY 5 THE WDR 2004: MAKING SERVICES WORK FOR RICH COMPANIES

The World Bank’s flagship, the annual World Development Report (WDR), provides an unofficial exposition of its thinking on current issues. Starting with the 1991 report The Challenge of Development, which was produced during a long period of paralysis in the Uruguay round, the reports have consistently promoted an open trade regime as a key strategy for development (World Bank, 1999/2000, p 22). As with most economic and policy discussions, the reports’ notion of ‘trade’ has been limited to the traditional categories of goods and agriculture. Although the reports also continually advance the commercialisation and market delivery of services, there has been almost no reference to ‘trade in services’.

In 1993, Investing in Health urged governments to adopt ‘cost-effective’ approaches to health care, especially through targeted provision and decentralised public private partnerships. In 1994, Infrastructure for
Development focused on improving infrastructure efficiency through commercial management, by which it meant privatisation and public private partnerships. (In contrast to the later neocorporatist version, these reports treated public private partnerships as purely commercial arrangements within a laissez faire economy.) The 1995 report *Workers in an Integrating World* stressed the creation of institutional support for the private sector through private property rights, contracts, foreign investment and privatisation.


The most significant WDR from the perspective of services was the 2004 report entitled *Making Services Work for Poor People* (World Bank, 2003). The report focused on health, education, water and sanitation services, with peripheral references to energy and transport. The consistent refrain was that governments need to rely on the private sector, or at least a private sector model, to deliver their development goals. A consultation draft of the report asserted that governments had ‘failed poor people’ by not meeting their basic needs, and public service workers were inefficient and ill-disciplined. Specifically:

> Public funds are often spent on the wrong services and people; are sucked away by corruption; and, when they are not, reach teachers and health workers mired in a system where they have little incentive to do their jobs.\(^{21}\)

The preferred private sector model required the creation of services markets, which in turn required payments to providers that were channelled through government contracts and/or user charges. The very title of the report – making services work *for poor people* – heralded the replacement of universal services with a two-tiered system based on targeted subsidies or full cost recovery. Consumer choice displaced human rights as the founding principle. Competition became the driver of quality. A ‘partnership’ approach was said to place the client (consumers and their advocates) at the centre of services provision. Competitive markets would ensure they
had choice and voice to secure the services that satisfied their diverse needs and to hold providers accountable. Governments would have further choices over financing, regulation, production and monitoring arrangements, as well as provision. They had a wide range of delivery options, including public provision, contracting out, decentralisation, community-based and private delivery, with or without subsidies. Governments could select from this menu of providers to suit particular contexts and circumstances.

For this model to work, traditional state provision of services had to be ‘unbundled’ in several ways. First, the previously integrated elements of each service had to be separated and sourced independently. Second, the different actors or ‘stakeholders’ within the services chain – clients, providers (public or private) and policy makers – had to be disaggregated so each could respond to specific incentives. Because many poorer countries could not afford to fund these services themselves, they had to engage with a further set of stakeholders, the donors, who had their own incentives.

The abstract concept of ‘services markets’ that were inhabited by neutral stakeholders ignored the realities of power. Markets that offered significant rates of return would be dominated by the likes of (then) Vivendi, Nestlé and Enron, whose practices, and in some cases proven corruption, were quarantined from World Bank scrutiny. The report made great play of the potential for local community co-operatives and empowerment projects to become service providers. It failed to explain that community co-operatives often only survive where the new services market is not profitable enough to attract the corporations. Some co-operatives and non-profit providers might then thrive. But others would struggle to repay their set-up loans while meeting the expectations of their communities and the requirements of their contracts to provide quality, access and affordable services.

Making Services Work for Poor People came three years into the GATS 2000 negotiations. The World Bank and the GATS share the same basic premise: private firms operating in competitive markets are the best means to guarantee access to efficient, affordable and accessible services in (rich and) poor countries. For critics of the GATS, the link to the WDR seemed obvious. They vigorously attacked the draft during the Bank’s consultation process (initiated following claims of undue pressure on the authors of previous reports (Wade, 2001)). A flood of responses condemned the report for promoting the privatisation of essential social and public services for the benefit of transnational corporations, who could then secure enforceable rights of market access, national treatment and business-friendly regulation under the GATS (for example, Bretton Woods Project, 2002). Some developing countries reportedly raised their concerns in the Special Session of the Council for Trade in Services. They suggested the Bank was undermining their negotiating positions in the GATS 2000 by arguing for competition in service sectors, which would remove the protection for ‘public services’ under Article I:3 (Bretton Woods Project, 2002).
The report’s authors say this reaction took them by surprise. In their view, the GATS is ill defined, has a limited impact and is basically about foreign investment and temporary migration. Moreover, the WTO is not concerned with the question of whether the poor have access to services. They originally did not intend mentioning the GATS; there was no reference to it in either the October 2002 outline released for comment or the March 2003 draft.

Because of the fuss made by the NGOs, the final report included a one-page box headed ‘Is the GATS a help or a hindrance?’. According to reports’ authors, this was prepared on the advice of a WHO/WTO liaison officer, and with limited input from the WTO. Although the text was reportedly drafted in January 2003, it was not released until late April (Bretton Woods Project, 2003). This is the only reference to the GATS in the 288-page document.

The World Bank’s trade economist and GATS specialist Aaditya Mattoo wrote the text. Mattoo had been one of the early advocates of the GATS, and published a number of papers recommending ways to make the agreement more far reaching. He has argued in favour of imposing a ‘necessity’ test on all services regulations, which would make them violations of the GATS if they were deemed ‘unnecessarily’ trade restrictive; ‘technological neutrality’, so that existing commitments apply to technologies that did not exist when the commitments were made; and negotiating approaches that are intended to increase the pressure to liberalise, such as model schedules and standardised sets of commitments (Low and Mattoo, 2000).

In the text box, Mattoo notes a sharp polarisation of views about the GATS: it is either a source of pro-poor reform or a threat to regulatory sovereignty and pro-poor policies (World Bank, 2003, p 105, Box 6.9). He implicitly discards the latter by endorsing the efficiency-driven market ideology that is the primary target of the critique. Mattoo then posits three questions that provide straw men for him to strike down, without attempting to address the widely published counter-arguments. The questions, the report’s response, and the critique are set out below:

Q1: How much market opening has happened so far under the GATS?

WDR: The GATS coverage is broad reaching, but the rules are flexible and most only apply to sectors that governments have committed. Most existing commitments have entailed little liberalisation beyond prevailing government practice. Relatively few governments, especially of developing countries, made commitments on primary education or hospital services, and none on water distribution.

Critique: Some of the world’s poorest countries have been required to make commitments that involve extensive new liberalisation, including in
health and education, during their WTO accessions. GATS commitments by other developing countries commonly lock in the liberalisation of services that the IMF and World Bank have previously required through loan conditionalities. While this reflects the status quo, such commitments are almost impossible to reverse when markets fail or a new government is elected with a democratic mandate to restore a modicum of social regulation to the provision of services. Governments of developing countries face intense political pressure to liberalise further in the GATS 2000 negotiations and in FTAs.

Q2: Does the agreement prevent recourse to the complementary policies needed to ensure that the poor have access to essential services in liberalized markets?

WDR: Arguments that the GATS threatens public services, outlaws universal service obligations and subsidies, and undermines effective regulation are ‘not well founded’ because:

a ‘services supplied in the exercise of governmental authority’ are excluded, although the meaning of services that are offered neither on a commercial basis nor competitively ‘offers scope for clarification’;

b governments can still pursue domestic policy objectives, including subsidies and universal services obligations, even where sectors are open to full competition, so long as they do not discriminate against foreign suppliers;

c the GATS recognises the right to regulate to meet national policy objectives, and the rules on domestic regulation ‘are hardly intrusive’.

Concerns about what the GATS might become can be addressed by ‘informed debate [that] would undoubtedly help ensure that future GATS rules and commitments reflect broader development concerns and not just the dictates of domestic political economy or external negotiating pressure’.

Critique: These explanations of the GATS text are simplistic and misleading:

a The Bank’s own commercialisation agenda increasingly takes services outside the scope of the exception for ‘services supplied in the exercise of governmental authority’.

b The report, like the Bank’s own policy, ignores the sound reasons that governments may have to discriminate against foreign investors, such as: denying taxpayer subsidies to foreign firms that are more likely to repatriate than reinvest them; requiring joint ventures that can facilitate the transfer of technology and skills and retain some domestic capacity;
or setting foreign equity thresholds that restrict foreign control and asset stripping of key infrastructure.

The GATS does limit the ways in which governments are allowed to regulate by denying the sovereign right to choose the measures they believe can best achieve their national objectives. The accountancy disciplines take this further by specifying a narrow indicative category of ‘legitimate’ policy objectives and applying a ‘necessity’ (least trade restrictive) test to regulating the accountancy profession. Some governments in the Article VI:4 negotiations on domestic regulation want this to apply to all domestic regulation of all services, a proposal Mattoo himself has made.

Even if one believed that the market paradigm of services could ever be ‘pro-poor’, the suggestion that informed debate can advance those priorities in the GATS ignores the effective veto that major powers exercise over any meaningful new initiatives.

Q3: Could the GATS process lead to premature liberalisation before necessary reforms are implemented, and how can this be prevented?

WDR: There is a legitimate concern that the GATS ‘does not – indeed cannot – ensure the complementary action that is needed to deliver pro-poor liberalization’. This is a problem of partial or inappropriate sequencing, for example, not introducing competition policies to restrain private monopolies or developing regulatory frameworks before markets are opened. Binding legal commitments in the GATS make ‘inappropriate policy choices’ difficult to reverse. Developing countries therefore need better research into ‘the elements of successful reforms’ and ‘enhanced technical and financial assistance to improve the regulatory environment and pro-poor policies’.

Critique: The very concept of ‘pro-poor liberalisation’ is an oxymoron, as shown by the experience in many countries where liberalisation has been imposed. The liberalisation model consolidates transnational corporate power and erects new barriers to poor people gaining access to appropriate, affordable, quality services. If it is impossible to reverse commitments that reflect ‘inappropriate policy choices’, it is better for governments never to make those commitments and for the institutions to stop imposing the conditionalities that result in such policy ‘choices’.

In summary, the text box demonstrates how the World Bank and GATS complement each other organically: the Bank makes services ‘free trade ready’, while the GATS and other trade in services agreements lock them in and create pressure for further liberalisation. The claim that the authors
did not think this connection was relevant seems rather extraordinary. Mattoo was a former WTO official and in regular contact with the WTO Secretariat, and has authored many papers on the GATS. Indeed, he published a more detailed version of the text box as a World Bank Trade Note on services in the Doha round in September 2003 (Mattoo, 2003). Yet, that lacuna also shows that active collaboration is not necessary to deliver a high degree of coherence when the institutions of the World Bank and WTO operate within a common neoliberal paradigm.

**CASE STUDY 6  THE CLOSED CIRCUIT OF SUMMITRY**

Three months after the WTO, and hence the GATS, came into being on 1 January 1995 a UN Summit on Social Development was convened in Copenhagen. In the opening paragraph of the Copenhagen Declaration the assembled heads of state and ministers promised to ‘promote dynamic, open, free markets, while recognizing the need to intervene in markets’, and committed their governments to full implementation of the Uruguay round agreements. While the governments resolved in paragraph 9(q) to ‘monitor the impact of trade liberalization on the progress made in developing countries to meet basic human needs’, they would pay ‘particular attention to new initiatives to expand their access to international markets’.

Social development was being turned on its head. The future of even the world’s poorest people in Africa and other continents would now be tied to free trade and free markets, including for social development, and the fostering of international co-operation on macro-economic policies. This pro-market approach to social development was still embedded in the comforting, but increasingly empty, rhetoric of human rights, social solidarity and people-centred development. Human rights advocates were outraged. What they were witnessing was the first step in a mutually reinforcing circuit of summitry that within seven years would have realigned ‘the social’ within the primacy of ‘the market’ (Bond, 2006a).

The groundswell of so-called ‘anti-globalisation’ protests gave added urgency to the neoliberal project. Trade ministers attending the WTO’s second ministerial meeting in Geneva in May 1998 celebrated the GATT’s fiftieth birthday protected by barbed wire and water cannons. The UN Secretary General (via his emissary) warned the ministers that: ‘No-one should be fooled by the festive atmosphere of these celebrations. Outside there is anguish and fear, insecurity about jobs and what Thoreau described as a “life of quiet desperation”.’ Protests engulfed meetings of the World Bank and the IMF in Washington and Prague, the ADB in Chiang Mai, the Group of Seven/Eight major powers in Birmingham and Okinawa, and the World Economic Forum gatherings in Melbourne and Davos. The humiliating
collapse of the WTO ministerial meeting in Seattle in November 1999 made
the major powers even more determined to close ranks behind the
organisation and counteract the mounting critique from the WTO’s dissident
Southern members, and less well-behaved elements of civil society.

**United Nations Millennium Development Summit,**
**September 2000**

The preparatory process for the UN Millennium Summit in September
2000 was carefully managed. Most of the accredited ‘NGO Partners’ invited
to the Millennium Forum obligingly concentrated on special pleadings
or reforms that stopped short of questioning the WTO’s legitimacy
(Chossudovsky, 1999). The final Summit Declaration recited the customary
commitments to development and poverty eradication, noting in paragraph
13 that success in achieving this ‘depends, inter alia, on good governance.
. . . We are committed to an open, equitable, rule-based, predictable and
non-discriminatory multilateral trading and financial system’.27

The centrepiece of the Summit was the adoption of eight Millennium
Development Goals. The first seven goals aim to deliver the most basic
services to some of the world’s poorest people by 2015. They are motherhood
statements that no one can easily object to, except to say they are not
ambitious enough. Goal 7 is to halve by 2015 the proportion of people
without sustainable access to safe drinking water. Goals 2 and 3 aim to
ensure that all boys and girls complete a full course of primary schooling
and to eliminate gender disparity in primary and secondary education. Goals
4, 5 and 6 target child and maternal mortality and the incidence of HIV/AIDS.
The headline Goal 1 is to halve the proportion of the world’s people living
in poverty by 2015. In a devastating critique, ethicist Thomas Pogge exposes
the manipulation of criteria for achieving MDG1. The actual reduction
of people living in extreme poverty in 2015 is likely to be less than 20
per cent, from 1,094 million to 883.5 million (Pogge, 2004, p 329). This
deception allows

most citizens of the affluent countries [to] take comfort in the asserted
decline of global poverty, thinking of themselves as benefactors of the
global poor in the belief that the global institutional order they impose
kills and scars fewer people each year. They should instead take intense
discomfort in the fact that a feasible alternative global order could have
avoided most life-threatening poverty and its associated evils.

(Pogge, 2004, pp 334–5)

All seven substantive MDGs are couched in aspirational language that
Amin describes as ‘a litany of pious hopes [that] commits no-one’. Those
aspirations are accompanied by conditions that essentially eliminate the possibility of their becoming reality’ and have the potential to produce ‘apartheid on a world scale, reproducing and deepening global polarization’ (Amin, 2006). The conditions he refers to are contained in MDG8:

Goal 8: Develop a global partnership for development
Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system. Includes a commitment to good governance, development, and poverty reduction – both nationally and internationally.
Target 13: Address the special needs of the least developed countries. Includes tariff- and quota-free access for exports . . .

This is the only goal that sets out the mechanisms for achieving the other seven.

A social justice paradigm might have focused on cancellation of unpayable and unconscionable debts, thus liberating money that nations could apply towards achieving these goals. Beyond that, affluent countries could have assumed moral responsibility for redressing the legacy of colonialism and helping to recover the stolen fortunes of corrupt rulers whom the major powers maintained in office. Instead, as Pogge records, ‘the growing reluctance to spend money on reducing world hunger is associated with the increasingly popular idea that this goal is best achieved through investment rather than aid. Hunger will be erased through globalization and free markets’ (Pogge, 2000, p 39). Thanks to the MDGs, donor governments could now insist on coherence across aid, finance, trade and governance.

The MDGs were successfully marketed as the response of enlightened world leaders to calls from the South and the development community for ‘pro-poor’, ‘pro-development’ initiatives. According to Amin’s account of the preparatory process, they were actively promoted by the European, US and Japanese governments, co-sponsored by the IMF, the World Bank and the OECD, and drafted by a former consultant to the US Central Intelligence Agency (Amin, 2006). One critic describes them as a ‘Major Distraction Gimmick’ that has co-opted the corporate NGOs, who have adopted the MDGs as their central platform, and undermined the campaigns of genuine anti-poverty activists (quoted in Bond, 2006a). By abstracting the goals from their social, political and economic context, the major powers also sidelonged the question of how governments that were weakened by the combination of neoliberalism and trade liberalisation could possibly achieve those objectives.

The stage was set for the ensuing circuit of summits by the promise in paragraph 14 to ensure the success of the UN Summit on Financing for Development in 2002.
The Fourth WTO Ministerial Conference in Doha, Qatar, October 2001

Rescuing the WTO from the debacle of Seattle depended on a successful launch of a comprehensive new round of negotiations at the fourth WTO Ministerial Conference in Doha, Qatar. It took place in October 2001, less than a month after the September 11 attacks in the US. A ‘consensus’ outcome was required, at any price. The major powers bullied, bribed and threatened Southern governments, even implying that those who opposed a new round would be siding with terrorists (Kwa, 2003, pp 30–2). The Doha round was indeed launched. But it proved a fragile foundation on which to expand an already dysfunctional organisation.

Developing countries were promised that their needs and interests would be ‘at the heart’ of the Doha Work Programme. Paragraph 2 of the Ministerial Declaration affirmed that: ‘International trade can play a major role in the promotion of economic development and the alleviation of poverty.’ Southern governments rejected attempts by the EC to officially name an agenda that had been written by, and for, the major powers the ‘Doha Development Round’. That did not stop European Trade Commissioner Pascal Lamy and successive WTO Directors General from constantly referring to the Doha ‘development agenda’. The term was later explicitly incorporated into the General Council Decision of 1 August 2004 (generally referred to as the ‘July package’). Southern governments increasingly owned that description as a basis for pressing the major powers to deliver on their rhetoric. In 2007 Charlene Barshefsky, the USTR at the time of Doha, conceded that:

The round was launched on essentially false pretenses, in two respects. First, it was launched almost immediately in the aftermath of 9/11. I believe that but for 9/11, it almost certainly would not have been launched. As the six-year delay since then shows, but for 9/11 there was almost no enthusiasm for the round. 9/11 changed that. Countries believed that they needed to show solidarity with the United States and make a statement about the global economy and the importance of economic growth. So the round was launched.

Second, the round was called a development round. Again, as the six-year delay shows, there may have been the broad intention on the part of the wealthy nations to make this a development round, but their ability to execute has always, in important respects, been absent, something clear from the outset, rhetoric aside. At the end of this process, what will undoubtedly be portrayed as an important victory will, I believe, be far less than what it should have been had the wealthy nations genuinely pursued a development round.

While development issues have been addressed in a number of ways in the negotiations, naming the round the ‘Doha Development Agenda’
does seem to overstate the case a bit. For the most part this round has been like any other, with the focus being on the market access concerns of the major trading powers. While large developing countries like Brazil, China and India now play a greater role in trade talks, the interests of the poorest countries still seem to be an afterthought in many ways.\textsuperscript{32}

The focus at Doha was primarily on liberalisation of industrial and agricultural trade. The GATS 2000 negotiations were folded into the ‘single undertaking’ that authorised trade-offs across agriculture, NAMA, services, intellectual property and implementation issues.

**UN Conference on Financing for Development, Monterrey, Mexico, March 2002**

Five months after the Doha ministerial came the UN Conference on Financing for Development, held in Monterrey, Mexico. The idea of the summit began as an initiative of the Group of 77 poorer countries to address global economic governance and democratise the international financial institutions. The US threatened to boycott the conference if the Declaration sought to tinker with the Bretton Woods institutions and the WTO (Haffajee, 2002) (and if Fidel Castro attended).\textsuperscript{33} Proposals for creative financing initiatives and institutional reforms were accordingly purged from the text, which was reduced to a list of platitudes on development.\textsuperscript{34} Paragraph 11 on ‘good governance for sustainable development’ blended respect for human rights, including the right to development, with implementation of market-oriented policies.

The MDGs provided the formal reference point, to be achieved through ‘policy and programme coordination of international institutions and coherence at international and operational levels’ (paragraph 52). Trade-led economic growth, supported by aid and foreign direct investment, were confirmed as the drivers of development. Southern governments made multiple commitments to implement ‘sound’ pro-market economic policies, demonstrate ‘good governance’ and apply the rule of law. Not one specific obligation, target or deadline was imposed on Northern governments. The US ruled out cancellation of unpayable and unconscionable debt and insisted that private sector provision of services was essential to achieve the MDGs. There would be no new or additional funding to address the critical issues of disaster relief, aid and debt cancellation beyond the much-criticised HIPC initiative.

The two key themes of the so-called Monterrey Consensus legitimised the market model of services, without referring to the GATS. The first theme endorsed multiple layers of ‘development partnerships’: between developed and developing countries; donors and recipients; private sector and governments; local and foreign businesses; and different agencies within
national governments. These partnerships were premised upon the illusion of apolitical stakeholders who co-operate to produce a fully inclusive and equitable global economic system. The inequality that pervades the main avenues of development financing, being aid, debt and trade, was effectively submerged.

The second theme, ‘coherence for development’, aimed to ensure consistent policies and co-operation within and across national and international domains and agencies (in paragraphs 4, 52 and 69). Governments (in this context, of the South) promised in paragraph 10 to create an enabling environment for markets and regulatory frameworks to promote and protect investment. The section on trade focused almost exclusively on agriculture and industrial tariffs and reiterated the development rhetoric of the Doha round. The solutions to problems of social infrastructure, identified in paragraph 16, centred on ‘effective partnerships’ between donors and recipients through ‘nationally owned paths of reform’, including PRSPs (paragraphs 40, 43 and 56).35

Venezuelan President Hugo Chavez was spokesperson for the Group of 77 plus China; but his call for ‘actions, not words’ and for governments from the South to take control of their destinies fell on deaf ears. Most Southern governments conformed to the North’s agenda and focused on increasing the available funding and loosening the strings of conditionality. Only Cuba’s Fidel Castro refused to sign the final Declaration, which he condemned as ‘a project of consensus that has been imposed upon us by the masters of the world . . . in which we resign ourselves to humiliating, conditional and interventionist handouts’ (Cevallos, 2002, p 13). By contrast, Germany’s Third Way government hailed the summit for replacing ‘market rule’ with ‘partnerships for development’. Social activists denounced the outcome as the ‘Washington Consensus in a sombrero’ (Haffajee, 2002, p 12).

**World Summit for Sustainable Development, Johannesburg, August 2002**

Hot on the heels of Monterrey came the UN-sponsored World Summit on Sustainable Development (WSSD) in Johannesburg. Those who recalled the Earth Summit in Rio de Janeiro some 10 years before might have expected another talkfest on traditional ‘green’ issues of deforestation, biodiversity, animal conservation and fisheries, and ‘brown’ issues such as rights of access to health, water and sanitation. Instead, the preparatory phases and the Summit itself became a further contest over which institutional regime would shape the world’s social, environment and development agenda.

Once again, the Summit was dominated by the major powers. What became known as the Juscanz group (led by the US with Japan, US, Canada, Australia and New Zealand), supported by numerous corporate lobbies,
insisted that the Johannesburg Declaration echoed the assertion in the WTO’s founding document that trade liberalisation enhances sustainable development. Their attempt to insert wording that explicitly subordinated development and environment measures to the requirement of WTO consistency was defeated after a pitched battle on the plenary floor. One critic noted the irony that the UN was being asked to ‘commit suicide by adopting a declaration that depletes itself of its own power and willingly hands it over to the WTO’ (quoted in Khor, 2002).

The Summit’s Political Declaration and the Plan for Implementation promised to deliver on ‘Agenda 21’ of the Rio Summit and on the MDGs. But paragraph 9 of the declaration left no doubt about the parameters:

Between Rio and Johannesburg, the world’s nations have met in several major conferences under the auspices of the United Nations, including the International Conference on Financing for Development, as well as the Doha Ministerial Conference. These conferences defined for the world a comprehensive vision for the future of humanity.36 (Emphasis added.)

That ‘comprehensive vision’ pervaded the Implementation Plan. Referring back to the Monterrey Consensus, paragraph 3 asserted that what became known as ‘Type II Public Private Partnerships’ between governments of the global North and South and (cryptically) between ‘governments and major groups’ were ‘key to pursuing sustainable development in a globalizing world’. The text was replete with the familiar catch cries of ‘sound environmental, social and economic policies’ and a ‘dynamic and enabling international economic environment’, particularly in the areas of finance, technology transfer, debt and trade. WTO compatibility was a defining feature of the three ‘interdependent and mutually reinforcing pillars’ of sustainable development identified in paragraph 2, being economic development, social development and environmental protection.

The pivotal, and most controversial, part of the Plan was ‘Section V: Sustainable Development in a Globalizing World’ (Khor, 2002). The final text committed governments to complement their pursuit of the Doha Work Programme by undertaking further action at the national, regional and international levels ‘to enhance the benefits for developing countries, as well as for countries with economies in transition, from trade liberalisation, including through public/private partnerships’ (paragraph 96). The trade in services agreements, although never mentioned, would be a primary vehicle for achieving the synergy between trade liberalisation and a new contractual form of ‘stakeholder partnerships’ between the private sector, governments and selected (corporate-friendly) NGOs.

The transnational corporations had invested heavily in achieving this outcome. The Summit Star news-sheet recorded the presence of more than
700 business executives, 200 companies and more than 100 chief executives. And ‘why would corporations not come out in full force’, asked the Thai-based Focus on the Global South, ‘when the UN’s priorities have shifted from poverty eradication and environmental preservation to achieving sustainable development via “public-private partnerships” or as Kofi Annan calls it, The Global Compact’ (Malig, 2002)?

The corporate lobbyists had rebranded themselves as the World Business Council for Sustainable Development (WBCSD), Business Action for Sustainable Development, and the Mining, Minerals and Sustainable Development project, among others. The prime movers in the WBCSD, the chairmen of DuPont, Shell and Anova Holdings, launched a report *Walking the Talk: The Business Case for Sustainable Development* (Holliday, 2002) to showcase their ‘social responsibility’. The case studies profiled some of the most notorious corporate perpetrators of economic and social harm: Rio Tinto, Cargill Dow, Nestlé, Du Pont and Suez. The book’s promotional material argued that

not only is sustainable development good for business, the solving of environmental and social problems is essential for future growth... [A] global partnership – between governments, business and civil society – is essential, if accelerating moves towards globalization are to maximize opportunities for all – especially the world’s poor. The solution provided by *Walking the Talk* is to mobilize markets in favour of sustainability, leveraging the power of innovation and global markets for the benefits of everyone – not just the developed world. This means a further liberalization of the market – a move that would be condemned by anti-globalization protestors.37

The location of the Summit in post-apartheid Johannesburg underscored precisely that paradox (Shiva, 2006). Days before the official opening, South African police arrested more than 70 peaceful protestors from the National Land Council and the Landless People’s Movement. Later in the Summit some 20,000 people who marched from the depressed township of Alexandra to the summit venue at élit Sandton were met by 8,000 police officers, plus tanks, helicopters and barricades. This march was not simply a showpiece for the international media. Local community groups were fighting a life and death battle with the post-apartheid government over policies of corporatisation and privatisation that had seen water and electricity services to poor households terminated for non-payment and associated outbreaks of lethal disease, such as cholera.

The Johannesburg Summit effectively privatised the Rio agenda, transforming ‘Rio + 10’ into ‘Doha + 10’ (Shiva, 2006). Government representatives from the South and critics outside the summit demanded enforceable international rules to regulate the activities of transnational corporations. Their challenges
were swept aside. Instead, corporate responsibility became a code word for greater corporate control over resources and services through the privatised financing, delivery and regulation of environmental and social services. The new pathways to sustainable development of energy, housing and food, and for meeting MDG targets for clean drinking water and sanitation, would be market-driven and WTO-compatible – dovetailing neatly with the GATS 2000 negotiations and emergence of more extensive regional and bilateral agreements.
The illusion of public services

When capitalism is under stress it needs to find unexploited markets and prise them open. The public services that dominated welfare states and state socialism for much of the twentieth century were an enticing expanse of virgin territory. Since the early 1980s, these services have been progressively transformed into market commodities that abstract them from their social nature and function, often taking novel and complex legal forms.

‘Orthodox’ public policy – or more specifically the international institutions, academics and consultancy industry that propagate theories of new public management, public choice and new institutional economics – insisted that markets could deliver higher quality services and greater choice more efficiently than the state. The crude asset sales programmes of the 1980s and early 1990s gave way to more subtle ‘partnerships’ where the state was encouraged to construct markets and align itself with corporations. Since 2000, the MDGs have conferred a powerful legitimacy on this model. The main policy instruments for privatisation now include corporatisation, asset sales, outsourcing, unbundling, deregulation, competition, PPPs and PFIs. This menu continues to expand, despite evidence from all over the world that marketised public services often fail, sometimes with tragic human consequences.

How this transformation of public services relates to trade in services agreements is hotly contested. Aside from public utilities and financial and audio-visual services, ‘public services’ were largely off the radar during the Uruguay round. Its early architects say they never envisaged the wide-ranging application of the GATS to more explicitly social services such as sanitation, schools or hospitals, which were considered the domain of national governments.1 Since then, however, almost every conceivable state activity, from airports, sewage systems and water supply to schools, prisons and even public policy advice itself, has been opened to the market. Their complex commercial operations and legal forms bring them squarely within the domain of trade in services agreements.

Critics fear that these agreements will lock in the control of transnational corporations over these services at the expense of social priorities and
democratic accountability, and override the responsibility of governments
to regulate for social objectives. The WTO’s booklet *GATS – Fact and
Fiction* vehemently refuted claims:

that the right to maintain public services and the power to enforce
health and safety standards are under threat, though both are explicitly
safeguarded under the GATS. How have serious people come to believe
what is, on the face of it, out of the question? Why should any
Government, let alone over 140 Governments, agree to allow themselves
to be forced, or force each other, to surrender or compromise powers
which are important to them, and to all of us?²

This chapter addresses precisely that question. What the WTO claims is
obvious, on the face of things, is much more complex and threatening
when analysed through a political economy lens. Case study 7 shows how
the provision of public hospitals through multi-faceted PFI consortia and
complex chains of sub-contracts can become subject to commitments in a
range of CPCs that are unrelated to hospitals as popularly conceived. Case
study 8 on privatisation in the Philippines reveals how ‘constitutionalism’
competes at the national and supranational levels, and the political and
social ramifications of that conflict.

**Creating public services markets**

The battle between the defenders and critics of the GATS over public services
is driven by a contest of world views. The stand-off is complicated by the
difficulty of reducing ‘public services’ to a precise analytical category. It
was hard enough to define ‘public services’ before neoliberalism. The terms
‘public’, ‘social’ and ‘community-based non-profit’ services were often
used interchangeably. Sometimes people meant the basic rights to services
that are recognised in their national constitutions or under international
human rights instruments. Economists applied the term ‘public goods’ to
‘non-rivalrous’ and ‘non-excludable’ services that the market cannot be relied
on to deliver. In many cases, public services were simply those services that
people regard as essential to their daily lives or that governments have
traditionally provided on a universal basis.

The neoliberal restructuring of the state assailed ‘public services’ in all
these senses. Colin Leys identifies four pre-requisites for the successful
creation of markets in public services: ‘the reconfiguration of services into
commodities, the creation of a demand for the commodities, the conversion
of the public servants concerned into profit-oriented workforces, and the
underwriting of risk’ (Leys, 2003, p 214).

The commodification of services and creation of markets were discussed
earlier. The policy of ‘corporatisation’ made state businesses, such as banks
and airlines, and state assets such as forests and mines, ready for sale at taxpayers’ expense, usually with mass layoffs. Public monopolies in areas such as telecommunications or railways were broken up or became private monopolies.

Privatisation provided lucrative investment opportunities for transnational companies, backed by a new breed of private consultants and investment bankers. Foreign investment rules were liberalised, currency controls lifted and pro-business competition policies introduced to ease the foreign acquisition of state assets. Labour market deregulation promoted flexibility and competition, which in turn de-unionised the workforce and eroded employment protections. The initial wave of corporatisation and privatisation of state-owned commercial operations coincided with the Uruguay round, making the public infrastructure of electricity, telecommunications, finance and transport key targets for the GATS demandeurs.

A less visible and more systemic form of privatisation affected governments’ non-commercial activities. Advocates of public choice and new public management theories urged governments to separate their policy, regulation and delivery functions. The unbundling of government services was commonly accompanied by a ‘funder-provider split’ that created a contractualised commercial relationship between ministers and their departments, and required government agencies to substitute the social value of specific activities with a market price. Public finance regimes required these contracts to specify measurable performance outcomes. Those outcomes were often further disaggregated into commodified ‘outputs’. Once they were monetised, services could be opened to competitive tender.

An overlay of ‘fiscal responsibility’ encouraged governments to give priority to budgetary targets over their social, cultural or environmental responsibilities. The drive to achieve short-term efficiencies encouraged outsourcing or abandoning of activities to the private sector. Imposing a capital charge on the assets owned by public agencies made off-budget financing increasingly attractive and created a constituency for deferred expenditure, such as PFI s. Citizens were differentiated into classes of consumers, as taxpayer funded universal services gave way to user charges and euphemistically termed ‘co-payments’, and to targeted subsidies or vouchers that could be redeemed by the deserving poor for services that were supplied competitively by public or private providers.

Public sector labour markets were deregulated to increase productivity and maintain the competitiveness between state and private providers. The special legal status of state employees as public servants was removed and they were integrated into the private sector workforce. Deprofessionalised and de-unionised, they became the equivalent of waged workers in a multiplicity of services industries.

Privatisation of non-commercial services assumed a ‘socio-regulatory adjustment’ of attitudes and values (Drake and Nicolaidis, 1992, p 63).
As the quality and accessibility of state-provided services deteriorated, and they were constantly denigrated as inefficient, people were encouraged to lower their expectations and to devalue the social and collective characteristics of publicly provided services. Commercially marketed services emerged as the desirable substitute.

Over time, states, communities and workers have become more dependent on the market. Its scale and products expanded, creating ever more commercial opportunities. Secondary service industries, from small businesses to transnational consultancies, added new voices and vested interests that crowded out those who sought to defend a decaying public sector. The wealthier retreated to the higher quality, more tailored private market – a development praised by privatisers as necessary to relieve the burden on struggling state services and budgets. New technologies further blurred the boundaries of public and private, national and transnational.

This process was vigorously contested almost everywhere it occurred. Indeed, the raw impact and failures of the crude privatisation approach of the 1980s and early 1990s seriously undermined the legitimacy of neoliberalism. The backlash against it revealed the depth of popular attachment to socially imbued public services. The neoliberal project was rescued and consolidated by more sophisticated variants – the Third Way espoused by a new wave of social democratic governments (Giddens, 2000) and the post-Washington Consensus of the international financial institutions.

Bob Jessop distinguishes between ‘neocorporatist’ and ‘neostatist’ strands of latter-day neoliberalism (Jessop, 2002, pp 261–3). Neocorporatism promises to balance competition and co-operation through ‘stakeholder partnerships’. The state’s role is to implement these ‘negotiated’ outcomes. The stakeholders are defined as ‘civil society’ or ‘non-state actors’ in an apolitical agglomeration of contradictory interests. In practice, business ‘partnerships’ take precedence over those with unions, local government or other organised voices. The uncivil elements of civil society that raise questions of politics, power, exploitation and imperialism are excluded.

Neostatism promotes a more active role for central and local government in guiding the development of market forces, promoting innovation and providing a business-friendly environment. Declining manufacturing industries are restructured and new services industries fostered. Governments retain the responsibility for infrastructure such as roads, schools, hospitals and water, but provide these through PPPs and PFIs. Wherever possible, the responsibility for delivering social services is contracted out to private business. The ‘enabling state’ demonstrates its ‘good governance’ by implementing ‘sound’ (neoliberal) economic policies, private property rights and the (Western) rule of law, and eliminating corruption.

These overlapping notions of partnership and the enabling state are found equally in Tony Blair’s Britain and Thabo Mbeke’s post-apartheid South
Africa (Bond, 2006b), pervade the contemporary of the international financial institutions and are the designated means for achieving the MDGs.

Echoing Leys, Jessop argues that the success of this strategy depends on a new social compromise where people identify their fate with the success of global capitalism and accommodate themselves to rising inequality, exploitation of the environment and dominance by a few corporations and capitalist powers. Buy-in becomes more likely when workers’ pension plans are invested in the international share market; producers and small businesses depend on favourable global commodity markets, exchange rates and foreign investments; professionals look overseas for better-paid jobs to support their families or pay off student loans; or people just accommodate themselves to inferior conditions of paid work to supplement their dwindling social wage. The strategy also assumes the structural inequality of an internationalised labour market can be managed through competition and self-interest.

The notion of ‘socio-regulatory adjustment’ assumes that this accommodation will be linear and inevitable. But competitive markets are incapable of delivering the ‘positive externalities’ of social coherence and equitable participation that are the defining objective of ‘public goods’. These services, and the markets in which they now operate, remain rooted in social and material reality. Deteriorating infrastructure, widening inequality and unmet needs, and the resilience of the social conception of ‘public services’, have fuelled demands that governments resume their previous responsibilities or at least restore the primacy of social objectives to domestic regulation.

Managing that fallout is problematic enough when governments can inject some pragmatism and flexibility into how they regulate socio-economic relations under neoliberal globalisation. The dilemma posed by meta-regulation through trade in services agreements is its singular imperative: to promote capital accumulation by expanding the reach of private markets and profitability of corporations. This impedes the capacity of governments to respond – hence, the backlash against the trade in services agreements. The stand-off between advocates of the social and market paradigms is further complicated by the fetishisation of public services: disaggregated commercial activities and complex legal forms are inscribed in schedules of services commitments, and subjected to the norms and disciplines of trade in services agreements, in ways that render ‘public services’ unrecognisable.

**Defining public services, GATS-style**

The defenders of the GATS deny such linkages. Leading pro-GATS commentator Pierre Sauvé, for example, insists that the GATS does not require governments to privatise or deregulate a service. Indeed, it has played little, if any, role in the transformation of public services and ‘is not likely to be a driving force or even a major consideration behind such changes’ (Sauvé, 2002, p 49). That claim is largely true of the GATS 1994. Its main
effect was to normalise and lock in the domestic neoliberal agenda. As Sauvé himself observed, ‘the GATS can play a useful complementary role in accompanying and imparting greater credibility and permanency to ongoing policy changes . . . (but only to the extent that WTO Members choose to assign it such a role)’ (Sauvé, 2002, p 49).

Since 1994, however, privatisation and deregulation have become routine requirements in countries’ accession packages, and governments’ public sector policies are commonly examined during Trade Policy Reviews. Trade in services commitments have also entrenched the new modes of privatisation, such as PPPs, and competitive markets in unbundled public services that are delivered through complex services supply chains across seemingly unrelated CPC categories. Sauvé’s assurances are further undermined by the offensives that the major powers have launched on many ‘public services’ during the GATS 2000 and bilateral negotiations.

A second line of defence used by Sauvé and others is that public services are carved out through Article I:3 of the GATS. However, this does not refer to ‘public services’ – the very concept would be alien to an instrument that conceives of the world in terms of private services markets. Article I:3(b) refers to ‘services supplied in the exercise of governmental authority’, defined in paragraph (c) as ‘any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers’. The same wording is routinely imported into bilateral agreements. The defining features of the exclusion are the government as authorising agent and the market nature of the activity; the social function of the service is irrelevant.

The initial phrasing that was proposed in the 1990 draft GATS text read: ‘except services supplied in the exercise of governmental functions’ (quoted in Krajewski, 2001, p 16). That phrase appeared in square brackets, indicating no consensus. Austria apparently suggested the term ‘public functions’; but ‘government functions’ was used in the Dunkel Draft text in 1991, along with a footnote that the terms of exclusion for such services would be subject to review. It is not clear why ‘functions’ was later replaced with ‘authority’, although the shift makes sense ideologically, as the latter implies the separation of authorisation from performance. The Corporate Europe Observatory (CEO) suggests that term was drawn from Article 45 of the EU Treaty, which reads: ‘The provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority’.† The CEO also noted that, as of 2001, eight cases had been taken to the European Court of Justice challenging attempts by member states to rely on that article, and every challenge had succeeded (CEO, 2001).

Whether ‘commercial basis’ and ‘competition’ are to be given a broad or narrow meaning is critical to determining what services are carved out under Article I:3. However, there is no WTO jurisprudence to guide the
interpretation. The only clear-cut exclusion is for non-commercial state monopoly activities. In a highly liberalised and deregulated environment, very few services fit within that narrow window.

A close legal reading of the GATS text by Markus Krajewski, based on the Vienna Convention’s interpretative rules and the publicly available material, concludes that both ‘commercial’ and ‘competition’ can be read broadly (Krajewski, 2001, p 17). That would result in a narrow reading of the exception and allow the GATS rules to intrude into highly sensitivity areas of public policy. Krajewski points out that ‘supplied on a commercial basis’ refers to the modality of supply, irrespective of whether the supplier is a public or private entity. Assuming that ‘commercial’ requires a monetary price, it is unclear whether that is a full market price or includes not-for-profit cost recovery or a partial user charge. Likewise, whether ‘competition’ requires suppliers to be targeting the same customers or market segments may depend on the context, such as market size and the extent of government provision, including a universal supply obligation (Krajewski, 2001, pp 7–12).

The background notes prepared by the WTO Secretariat on various services sectors in 1998 identified possible limitations on the scope of the exception, but provided no systematic analysis of the provision. The note on postal services assumes they are usually commercial and covered by the agreement. This would subject them to the Article VIII:2 restriction on cross-subsidisation by monopolies. The note on legal services treats services that involve the administration of justice as excluded, except where they are provided by non-civil servants, such as notaries. The Secretariat was ambivalent about when environmental services would have a ‘commercial basis’, but implied this basis would apply to public and private suppliers. The background paper on health and social services noted:

The hospital sector in many countries, however, is made up of government- and privately-owned entities which both operate on a commercial basis, charging the patient or his insurance for the treatment provided. Supplementary subsidies may be granted for social, regional and similar policy purposes. It seems unrealistic in such cases to argue for continued application of Article I:3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services. In scheduled sectors, this suggests that subsidies and any similar economic benefits conferred on one group would be subject to the national treatment obligation under Article XVII.4

Krajewski quotes a later contradictory statement in a Secretariat study in 2001: ‘It seems clear that the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as “governmental services”’ (Krajewski, 2001, p 8, fn 14).
Sauvé advocates an alternative reading of Article I:3 that would see ‘economic activities carried out on a not for profit basis’ covered by the carve-out. In other words, cost-recovery services would be protected (although what that means is also difficult to define). Yet he chooses his language carefully when he discusses the application of Article I:3 to compulsory education:

GATS negotiators understand this to cover ‘public services’ broadly (if somewhat loosely) defined, including public health and education services. But public/private frontiers are inherently murky, vary significantly across countries and sectors, and are subject to change as markets, political dynamics and technology evolve. Governments have, to date, chosen not to clarify the scope of the GATS’ public services carve-out. But if one were to ask any services negotiator in Geneva, the latter would be prone to regard primary and secondary schooling as lying outside the scope of the GATS.

(Sauvé, 2002, p 48)

On Sauvé’s narrow reading, state and private not-for-profit primary and secondary education would be exempted. Only private for-profit schools would be subject to GATS rules. But even this would have implications for public provision of education. The instructions to negotiators on scheduling make it clear that national treatment obligations apply to subsidies unless limitations are listed. It is increasingly common for state subsidies to be applied on a neutral basis across public and private, profit and non-profit providers. If a government made market access commitments that prevent it from limiting the number of private schools, and national treatment commitments that require it to extend subsidies to them all, its public education system could become fiscally unsustainable. It would then have to seek to withdraw its GATS commitment or terminate its subsidies.

Where services are not covered by Article I:3 but involve direct government funding through contracts or tenders, they could fall within the more limited category of exceptions under Article XIII: Government procurement. This carve-out purports to protect the common and highly sensitive use of central and local government purchasing power to support domestic firms, workers, economies and local communities. Again, the exclusion is only partial. The wording is based on GATT Article III:8(a) and requires services to be ‘purchased for governmental purposes’ and ‘not with a view to commercial resale or with a view to use in the supply of services for commercial sale’. Paragraph 2 of Article XIII authorised further multilateral negotiations on government procurement, during which the EU proposed a comprehensive Annex on Government Procurement. However, these negotiations never progressed far, despite attempts by the EU to keep them moving after its proposals for negotiations on transparency in government procurement were rebuffed at the Cancún ministerial in 2003.6
There is no formal definition of what constitutes ‘government procurement’ for the purposes of the GATS. An UNCTAD paper in 2006 discusses whether concession contracts, build-operate-transfer arrangements or management contracts should be considered government procurement. It suggests there is some convergence of opinion that concession contracts should not be covered, but treats the other two categories as more complex. Again, the term ‘commercial sale’ or ‘resale’ in Article XIII is determinative and unclear. A contract for public transport or rubbish dumps awarded by a central or local government through competitive tenders is clearly procurement. Those contracts would seem to constitute a commercial resale where they permit cost-plus charges for use of the services, but whether that extends to full cost recovery and user part-charges is uncertain. Case study 7 discusses the implications for PFIs, where the bulk of spending involves layers of sub-contracting by the consortium that has the primary contract with the government. Many bilateral agreements avoid these issues by combining government procurement of goods and services in a separate chapter, with a minimum qualifying threshold and a negative list of exclusions. Their definitions are agreement specific.

The GATS government procurement exclusion applies only to the MFN, market access and national treatment rules. The Article VI rules on domestic regulation for licensing, qualifications and standards still apply where the relevant sectors have been committed, which is critical in areas such as environmental services. There is also still an obligation on members under Article VIII to ensure that monopolies and exclusive service suppliers do not undermine a member’s commitments through cross-subsidisation of activities outside the monopoly, although this is only subject to requests for information. (As Chapter 5 shows, the Annex and Reference Paper on Basic Telecommunications provide a more potent means for preventing cross-subsidisation.) Again, stricter disciplines on monopolies are often found in the bilaterals.

Where services fall outside the limited exemptions provided by Articles I:3 and XIII, governments need to rely on the much more limited Article XIV: General Exceptions. These relate, for example, to public order or human and plant life or health. Article XIV requires the particular measure to meet restrictive criteria that it is ‘necessary’ to achieve the permitted objective and does not constitute unjustifiable or arbitrary discrimination or a disguised restriction on trade (Chapter 1).

Krajewski canvasses a range of options for clarifying the meaning of Article 1:3: an amendment to the GATS, an interpretative understanding that does not reopen the language itself, and a non-binding statement (Krajewski, 2001, pp 19–20). But the major powers would have to support such a move. Any tightening of the rules would fetter their corporations, and any weakening of the exception would fuel the anti-GATS campaign. Submitting the provision to interpretation through a dispute would be equally
inflammatory, especially given the pro-liberalisation approach of adjudicators in the *Mexico-Telecommunications* and *US-Gambling* cases. As none of these options appears likely, the controversy over the exception will continue.

**Trading in midwife services**

International trade in services applies equally to ‘public services’ that are provided by independent professionals. The commodification of those services – and of the professionals themselves – and the replacement of social regulation with pro-market disciplines encompasses a further radical transformation of social relations, identities and roles. Take, for instance, the iconic midwife: life giver, holistic carer, trusted friend, renegade, threat to the male medicalised monopoly. Under the GATS W/120 services classification she is Business Service 1.A.j, designated by CPC 9312 sub-sector 93191 Medical, Dentistry and Midwifery Services. The WTO Secretariat’s note on Health and Social Services in 1998 complained that too few members had made commitments in this category:

> While 49 Members have undertaken commitments on Medical and Dental Services, only 39 Members have committed on Hospital Services ... Medical and Dental Services, as well as Hospital Services have drawn significantly more commitments than, for example, Services Provided by Midwives, Nurses etc. (CPC 93191) or Social Services (CPC 933).\(^8\)

It seems surprising that *any* governments decided to include midwives in their GATS 1994 schedules. Making a GATS commitment would have meant redefining the deeply personal and cultural relationship between midwife, mother, family and community as a disaggregated, disembodied contractual arrangement that operates exclusively as a market transaction. That transaction would be regulated from the perspective of the commercial midwife – and not just any commercial midwife, but the foreign provider who sought non-discriminatory entry into the local ‘market’. Any exception under Article XIV to protect human life or health would have to satisfy a ‘necessity’ (least trade restrictive) test, and constitute neither arbitrary or unjustifiable discrimination nor a disguised restriction on trade in midwife services. It would have been equally difficult in 1994 to envisage this transnational midwife operating through all four modes of delivery: cross-border supply, consumption abroad, foreign investment or temporary presence of services personnel.

By scheduling full commitments on CPC 93191 a state would have agreed not to deny foreign suppliers access to its midwifery ‘market’. The government could not maintain discriminatory measures that favoured local midwives, for example paying taxpayer subsidies only to community-based
practitioners. Nor could the local health authority require foreign suppliers of midwifery services to operate through joint ventures with their local counterparts or limit the total number of outlets or practitioners that were licensed to supply midwife services in their region to ensure effective oversight.

Further, any professional qualifications, licensing or standards would have to be ‘objective, transparent and the least burdensome necessary to achieve quality’. Hypothetically, a WTO panel of trade experts could strike down a regulation that required a midwife to understand obligations to indigenous peoples under a historic treaty or live in the local community or country for a minimum number of years, if it considered that those requirements exceeded what was strictly necessary to ensure quality. The central government would be required to ‘take such reasonable measures available’ to ensure that the responsible professional body or local health authority brought its domestic regulations into line with the GATS rules. If it failed to do so the country’s exports in professional or other services, or even in industrial goods or agriculture, could face retaliatory sanctions for so long as the breach continued. Whether a WTO member would ever bring such a dispute is immaterial. The state would be legally bound to comply with its GATS obligations. Under the principle of ‘technological neutrality’ these commitments would automatically extend to new technological means for delivering the midwifery service.

By the time of the GATS 2000 round, the notion of ‘midwife services’ had broadened and the potential range of activities had expanded dramatically. New information technologies created exciting opportunities for those practicing and using midwife services. The International Alliance of Midwives, for example, used its website to promote activities ‘designed to revitalize your midwifery soul’ and strengthen the social identity and international community of traditional midwives.9 ‘Midwives online’ was a more commercialised venture that promised ‘a world-class web-based portal’ for midwives in the UK and internationally, and an around-the-clock service for new parents. At the same time, it was an advertising outlet for transnational corporations such as Procter & Gamble, offering them ‘instant access to a worldwide audience of health professionals, parents and parents-to-be where click-through capability brings these highly targeted prospects directly to the point of purchase – your site!’10 Indeed, the IT-enabled global midwifery market was open to any telemedicine or marketing company that wanted to establish a purely profit driven web-based advisory service – or a fly-by-night operator touting dangerous advice and unsafe products.

This expansion of midwife services posed new and immensely difficult regulatory challenges for governments, professional bodies and communities that wanted to maximise the opportunities and minimise the dangers. Trade in services commitments in CPC 93191 would add to those constraints and
subject the social practices of midwives to ‘trade’ rules whose scope and implications are literally unknowable.

**A clash of legal obligations**

The collision between the GATS and public services has been engaged at many levels. One of the most significant, in terms of international law, has involved those UN institutions whose mandate, philosophy and legal instruments require the state to play a primary and active role in providing public services, as either human rights or public goods.

In a forthright report on the liberalisation of trade in services in 2002, the UN High Commissioner for Human Rights insisted that human rights cannot be left to the whim of markets. While states are not the sole provider, they ‘must guarantee the availability, accessibility, acceptability and adaptability of essential services including their supply, especially to the poor, vulnerable and marginalized’.\(^1\) It was not enough to say, as the World Bank and WTO did, that governments have a *right* to regulate. States have an *obligation* under international human rights law to promote and protect human rights. This includes making sure that private entities or individuals, including transnational corporations, do not deprive people of their economic, social and cultural rights. Moreover, the duty of states to adopt measures to protect the right to life and the right to health should be central objectives of the GATS, not merely permissible exceptions.

The right to public services, such as health (including the right to drinking water) and education, were considered especially important. The report made particular reference to the special UN rapporteur on education who, having noted the influence of exporters of education on the tone of education policy, had questioned ‘whether education is heading toward progressive liberalization of trade in education services or progressive realization of the right to education’.\(^\phantom{1}2\)

The High Commissioner’s report dissected the implications of each GATS mode for rights to health services. While cross-border supply (mode 1) can promote better access and lower costs, lack of infrastructure can also exacerbate existing inequalities and remote delivery makes it difficult to regulate for quality and content. Travelling overseas to study or for medical treatment (mode 2) can provide benefits to individuals; but it can also create dual market structures and aggravate existing inequalities of service supply in both the source and destination countries. Foreign direct investment (mode 3) can upgrade a nation’s infrastructure, introduce new technologies, provide employment and reduce the burden on the government; but user fees and internal brain drain across to the private sector also risk creating ‘a two-tiered service supply with a corporate segment focused on the healthy and wealthy and an underfinanced public sector focusing on the poor and sick’. Ensuring universal access can become problematic, especially when

---

\(^1\) [Vladimir Ivanovich](https://example.com/vi)

\(^2\) [Jessica](https://example.com/j)

---
an increasingly large and powerful private sector can also threaten the
Government’s role as primary duty bearer for human rights, [and] subvert
health systems through political pressure and “regulatory capture”.
Mode 4 offers significant opportunities for migrants; but the poorest countries
bear the greatest burden of brain drain, and their governments find it hard
to protect the rights of their workers offshore.

The generic GATS rules raised further concerns. A government that faced
an immediate shortage of health workers and entered a bilateral agreement
to recruit from a preferred country could be held in breach of its MFN
obligations. Domestic regimes for cross-subsidisation to provide access to
essential services for the poor and marginalised could also be challenged.
A government that was required to spread its subsidies across all ‘like’
service providers might withdraw them instead.

The report’s powerful underlying message posed a direct challenge to the
trade in services regime: the state’s human rights obligations must not be
subordinated to trade rules; nor should states be subject to sanctions for
taking action to protect human rights.

As a practical strategy, the High Commissioner called for open and
participatory assessments of the human rights impacts of trade in services
agreements. The National Human Rights Commission of Thailand responded
to this call by conducting an assessment of the implications of the proposed
US Thailand FTA for socio-economic, community and public health rights
that were guaranteed in the 1997 Constitution. The Commission’s report
in January 2007 (post-coup) warned that the intellectual property chapter
and the negative list approach to services and investment could undermine
the management of Thailand’s public health system. As neither the legislative
assembly nor the public had been given the opportunity to participate in the
process, ‘accepting the terms and conditions imposed by the United States
would amount to recognizing the US sovereignty over our own’.

The UNCTAD Secretariat also intervened in the public services debate,
producing a note on universal access to services in September 2006. It
approached health care, education, water, telecommunications, energy
supply and financial services as public or merit goods that are essential to life
and have positive impacts on competitiveness and efficiency. The Secretariat
noted that all these services face problems of unequal and inequitable
provision, and it is difficult to develop strategies for accurate targeting and
adequate pricing. Because of this, the public sector plays an important role
as a regulator, as a provider of universal access to these services, or both.
Some governments prefer to provide universal access through monopolies.
Others set minimum social policy obligations, or rely on competition that
is subject to government intervention through supply-side initiatives or
demand-side stimulus. Complex trade-offs are involved. Because these
decisions need to be both country- and sector-specific, governments must
retain the policy space to develop an integrated, holistic and adaptable approach that is appropriate to their national conditions.

The Secretariat agreed that privatisation of services could be a viable option and that it had succeeded in some countries. Whether it did so depended largely on political feasibility, regulatory considerations and social issues. At the same time, there were many questions about how effectively, for example, the public-good nature of water services had been addressed by private operators who were not publicly accountable. The note concluded that: ‘Evidence of the impacts of various universal access policies remains limited and – where available – results have been mixed.’ More research was needed; meanwhile governments should be cautious about trade in services commitments.

As Chapter 3 explained, neither the views of the High Commissioner on Human Rights nor of the UNCTAD Secretariat was likely to have any direct impact inside the WTO. But their interventions provided important advocacy tools for GATS critics and defensive governments, and were uncomfortable reminders to services demandeurs of the state’s conflicting obligations under international law.

**GATS and the water war**

International campaigns often rally around an iconic cause that is threatened by a powerful foe. For the GATS, this was the EU’s assault on people’s right to water.

Europe is headquarters for nine of the ten largest transnational water companies. The biggest, Suez, describes its mission as ‘delivering the essentials of life’ (Public Citizen, 2005). According to an EC document in 2003: ‘European companies are, in most areas (water-related services, waste management, air pollution control, etc.) internationally leading. . . . The case for encouraging private sector participation in the provision of water related, and in particular water distribution services, is a strong one’ (quoted in Deckwirth, 2006). The EC trade directorate sought input from the leading water corporations to develop a negotiating position that would deliver them ‘real and meaningful’ market access through the GATS.

Given these commercial interests, it is also not surprising that the EU is the largest water donor in the world, including support for private sector water management. The EU launched a €1.4 billion European Union Water Initiative at the Johannesburg Summit for Sustainable Development in 2002. The initiative has given priority to attracting new private finance rather than supporting public water and sanitation projects. The Water Initiative was closely linked to a controversial report presented by former IMF Executive Director Michael Camdessus to the Kyoto World Water Forum in 2003, which supported the use of aid money to subsidise the expansion
of private water corporations in poor countries. Suez, Thames Water and Vivendi (later Veolia) were active in designing both documents (CEO, 2003). In 2007 the EC launched a new Private Sector Enabling Environmental Facility with a €20 ($27) million budget to provide technical assistance to ACP governments to promote PPPs and privatisation in the environmental sector (CEO, 2007).

It seems ironic, in retrospect, that the WTO’s pamphlet ‘GATS – Fact and Fiction’ stated so emphatically in early 2001: ‘It is of course inconceivable that any Government would agree to surrender the right to regulate water supplies, and WTO members have not done so.’ There were zero GATS commitments on water distribution in GATS 1994. Even if commitments had been made, it insisted they would not affect the rights of member governments to set quality, price, safety or other policy objectives.

It is true that water services were not an issue in the Uruguay round. Indeed, the W/120 classification makes no reference to water. It is not explicitly excluded, either. Category 6: Environmental Services in W/120 has four subheadings: sewage services (sewage removal, treatment and disposal); refuse disposal services (collection, transport and disposal); sanitation and similar services; other (pollution, landscape protection, natural disaster assessment). The WTO Secretariat reported in 1998 that some 38 WTO members had made commitments on at least one of these sub-sectors (counting the EU as one): 29 of these were on sewage, refuse disposal and other environmental services, 30 on sanitation and similar services, and slightly fewer on individual segments of other environmental services.

The EU was not happy with that outcome. In 1999 the Commission tabled a paper that proposed a reclassification for ‘purely’ environmental services. It suggested reorganising the environmental services sub-groups around environmental mediums: protection of ambient air and climate; water for human use and wastewater management; solid/hazardous waste management; remediation and cleanup of soil and water; noise and vibration abatement; protection of biodiversity and landscape; and other environmental and ancillary services. The water sub-sector would be divided between wastewater services and water distribution involving ‘potable water treatment, purification and distribution including monitoring’. Commitments under this new classification could be complemented by other sectors from W/120 during negotiations on a broader services cluster.

At the Doha ministerial in 2001, the EC insisted that a specific mandate for negotiations on environmental goods and services was included in the Doha Work Programme. This potentially provided a parallel forum through which the EU could push its interests in water services, but it made little headway.

Social activists defending the right to water were alarmed by these developments. Then, in April 2002, the EC’s GATS 2000 requests were leaked. The Europeans had asked 72 countries to open up environmental
services, including ‘water for human use and wastewater management’. Requests for water distribution for human consumption were made to 63 developing countries. The targets included seven least developed countries and 14 low-income countries, among them the hotspots of failed water privatisations, Bolivia and South Africa. The requests were reportedly based on input from the major water companies, including Suez, Vivendi, Aqua Mundo and Thames Water. Their main interest was in urban mains supplies, which implied the reduction of cross-subsidisation that could fund rural distribution. Information obtained by the International Union of Food-workers (IUF) showed the Commission had identified public water corporations in Brazil, Bolivia, Botswana, Bangladesh, Tunisia and Honduras as barriers to be removed.

The leak ignited an already vigorous international campaign. Members of the European Parliament, municipal and local governments, unions and development agencies condemned the EU’s attempt to exploit the water crisis that was engulfing developing countries. The World Water Forum in Kyoto in 2003 became a focal point for exposing failed water privatisations in Manila and Argentina, and deaths that were attributed to terminations of household supply for non-payment under South Africa’s corporatised water regime (Stoppard, 2002). One EC official dismissed the critics as ‘emotional’ and ‘muddled’ in their linking of privatisation to the GATS. This description paled against the reported remark of Pascal Kerneis, the managing director of the European Services Forum: ‘I would say they are criminals . . . They have not counted the people who are dying because they don’t have any clean water because there are no companies coming into their countries to invest and give them clean water’ (quoted in Deckwirth, 2006).

The Commission worked assiduously with the water companies to progress their demands. Revised requests on water services in January 2005 added advisory and consulting services through mode 1, reflecting the massive sums being paid to transnational consultancy firms for policy advice, including on privatisation (Deckwirth, 2006). In some other respects the request appeared to have narrowed. It recognised that governments could retain ‘exclusive rights’, although the EU would enjoy full market access where this was not listed as a limitation. Where governments awarded exclusive rights through tenders, the Europeans expected rights of national treatment to apply. This request was essentially a back door into government procurement, and would have allowed large European firms that had an intrinsic competitive advantage to squeeze local public and private bidders out of the contract market.

Following the adoption of Annex C at the Hong Kong ministerial the ‘friends of environment services’ (Australia, Canada, Japan, Korea, Norway, Switzerland, Taiwan, the US and led by the EC) developed a plurilateral request on environmental services. This largely followed the W/120 classifications, rather than the EC’s proposal, and was explicit that ‘water
for human use is not included’. The non-European demandeurs had no desire to lay themselves open to an attack over water. Indeed, the Norwegian government had withdrawn its own request on water just before the 2005 ministerial (Deckwirth, 2006). The EC itself announced it would not participate in any plurilateral request on audio-visual and cultural, education or health services ‘or water for human use, or in any request that could more generally impact on the operation of public services’.26

But any claim to victory was premature. The EC did not withdraw its earlier bilateral requests on water. Further, GATS commitments on construction, distribution, consultancy, management consulting, technical testing, pipeline transport, logistics, energy, integrated engineering, financing and billing systems could still give its transnational companies effective control of a country’s water infrastructure. The EU would also pursue its objectives outside the GATS through the ‘coherence’ of water-focused aid and Economic Partnership Agreements.

Viewed from within the logic of the GATS, the EC was simply doing its job on behalf of its companies. Suez and Veolia (formerly Vivendi) formed a privatisation lobby in 2006 called the International Federation of Private Water Operators (AquaFed), which set up offices directly opposite the EC’s Brussels headquarters.27 But the political ramifications of a strategy that was patently anti-development began intruding on the ‘trade’ agenda. Several EU members, including the UK and Belgium, tried to distance themselves from the water requests. Even the German conglomerate RWE Thames Water expressed discomfort and declined to join AquaFed.

The EU’s strategies, and the associated privatised water contracts, drew on the MDGs for legitimacy: MDG7 proposed halving the number of people without potable water or sanitation by 2015 (which still left 500 million and 1 billion people without), and MDG8 endorsed public private partnerships and trade liberalisation. At the same time their strategy was delegitimised by a stream of reports that documented the monumental failures of private water concessions and PPPs in the US, Indonesia, the Philippines, Argentina, Bolivia, South Africa and many other countries (see for example IBON, 2003, Public Citizen, 2005; Cann and Jones, 2006; Bond, 2006b). While the negative social impacts identified in these studies are common to other privatisations, they are life threatening when they involve water. Poor households frequently face massive increases in their water bills; those who cannot pay are often disconnected, with associated risks of waterborne diseases such as cholera and typhoid.

The corporations responsible for these tragedies are shielded for accountability. They commonly skim off the most lucrative client base, leaving poor areas under-serviced. ‘Efficiency gains’ through job cuts affect the quality of services and erode local expertise. More profits are exported that reinvested. As foreign investors, these concessionaries commonly seek
sovereign guarantees to reduce the cost of private sector borrowing, backed by bilateral investment treaties that provide supranational legal recourse if the contracts are cancelled. The state therefore retains most of the risk. When the contracts fail, or companies find them less profitable or more troublesome than expected and walk away, governments have to resume control.

Reversing failed water privatisations is difficult enough without those policies being locked in through international treaties. Bolivia became the exemplar of that dilemma; but it also showed how social movements could reclaim control by facing down the companies that tried to invoke the agreements. Mass mobilisations of the people of Cochabamba in 2000 forced the cancellation of the water privatisation contract with a consortium that was led by US utilities giant Bechtel. Similar mobilisations in El Alto led to the termination of the water contract with Suez – ironically one of the ‘partnerships’ that was profiled as a success story in the Business Council for Sustainable Development’s showcase publication *Walking the Talk* (Holliday *et al.*, 2002, pp 164–5).

Bechtel’s pursuit of a $50 million claim to recover damages through a Bolivia/Netherlands bilateral investment treaty created such a furore that the consortium finally settled for a symbolic payment of thirty cents.28 If Bolivia had made GATS commitments on water services, as the EU has requested, the Cochabamba and El Alto privatisations could also have become a GATS issue. There is no safeguard mechanism in the GATS that would have allowed the government to respond to what became an acute social and political crisis. Equally, the general exceptions provision for measures to protect ‘public life or health’ or ‘public order’ were subject to ‘necessity’ and non-discrimination tests. While lodging a dispute at the WTO would have compounded the legitimacy crisis facing the GATS, the EU must have intended such commitments to be enforceable when it made its requests on water in 2002.

As of 2007, no WTO member, including the EU, has offered water services in the GATS. The election of Evo Morales as President of Bolivia has come to symbolise the moral victory of the water campaign. In a communication dated 17 March 2006, the Bolivian representative to the WTO drew the attention of the Director General

to one of the key issues for the new Government . . . which is to reaffirm the sovereign right of each country to regulate their water resources, in all their uses and services, as part of an integrated and sustainable policy, in order to guarantee the human right of access to water to all the population.29

The letter asked Lamy to ‘suspend any negotiations that involve drinking water in the GATS and withdraw the sector of drinking water from the 155 services that have been categorized by the WTO’.30
Bolivia’s Minister of Water Abel Mamani, who helped lead the fight against Suez, called for an alternative vision:

With a resource that is essential for life, it is unacceptable to talk about profit. In Bolivia, we were promised that privatization would resolve problems of water access but it has failed and caused great harm. We hope our public, participative, social and ecological vision will be shared by all those who want clear drinking water to be delivered to all.\textsuperscript{31}

The ‘water wars’ exposed the deep contradictions that infuse the trade in services agreements. Despite several decades of neoliberalism, the old paradigm of ‘public services’ has proved remarkably durable. Those services lie at the heart of social and human existence. National governments remain ultimately responsible for their delivery, especially when policies and markets fail. The inability of trade in services agreements to recognise that reality ensures that public services will remain a focal point for opposition.

---

**CASE STUDY 7 ACCOUNTING FOR PFIS**

By the late 1990s most viable state trading enterprises in most countries had been sold. A more politically discreet and commercially attractive option was needed to privatise other public services. One favoured mechanism was to break down the distinction between public and private through public-private partnerships (PPPs) and private finance initiatives (PFIs). Although these terms are often used interchangeably they take different forms: PFIs involve a contract for private firms to design, finance, construct, and operate facilities for public use; PPPs describe joint state and private ownership of facilities. In addition, free-standing concessions or franchises grant private sector rights to operate facilities for fixed periods, supported by user charges.

These second phase privatisations have been applied to almost every conceivable government activity, from hospitals, schools and roads to waste facilities, courts and even the UK Government Communication Headquarters (GCHQ). Within a decade, such schemes enjoyed broad international currency across the global North and South. International policy transfer through the OECD and the World Bank was reinforced by the ‘partnership’ rhetoric of the Monterrey and Johannesburg summits and the MDGs (Case study 6).

This hybridised approach to privatisation makes it difficult to predict when services are covered by public and administrative law, which assets are on public or private balance sheets (who owns what), who the beneficiaries are and what underpins their entitlement. The complex web of private parties also exposes public facilities to GATS obligations in unanticipated
ways. The commercial structure of PFIs means the relevant services classifications are not health, education or transport, but construction, finance and facilities management, plus a plethora of ancillary services. A PFI hospital, for example, would involve a minimum of 60 of the W/120 sub-sectors within the categories of Professional; Computer and related; Real Estate; Rental leasing without operators; Other Business; Communications: Construction related; Distribution; Environmental; Tourism related; Health-related and social; and Financial Services. Many of these classifications attract little attention in negotiations, and very few governments making commitments would connect them to their core public services or even to PFIs. This case study uses the experience of the UK to tease out the complexities and implications of the PFIs.

The British government was an early evangelist for PFIs and eager to secure international opportunities to exploit the ‘comparative advantage’ of its maturing industry. The Conservative government launched the concept in 1992. Since then, it has been periodically reinvented with new rationale to replace those that public policy analysts have discredited. The original justification was that PFIs could give the government access to much needed new finance that was off the public sector balance sheet for national accounts purposes and could thereby evade the EU’s new Maastricht rules on public debt. The PFIs would also generate large contracts for construction companies and new investment opportunities for finance capital. It became British government policy from 1994 that no capital project would be approved unless private financing had been explored. However, the uptake of PFIs was slow and mainly for transport infrastructure.

The policy gained momentum under Tony Blair’s New Labour government in 1997. The PFIs were misleadingly rebranded as public private partnerships, symbolising Blair’s Third Way strategy of government/business collaboration. The government made it clear that ‘partnerships’ would be the only source of funding for health and education infrastructure (Whitfield, 2001, pp 91–4). The policy was supported by a new rationale: the higher costs for private finance were outweighed by procurement efficiencies not available in the public sector. Approval would be based on ‘value for money’. The formula assumed that the cost over the lifetime of the contract was less than that for traditional procurement of the service, largely because the private sector would carry some of the risks and costs and their much-vaunted greater efficiency. Public health analysts produced a powerful critique of both the ‘public service benchmark’ that was used to assess ‘value for money’ and the contractors’ performance (Gaffney and Pollock, 1997).

In 2003 the rationale shifted once again, to the private sector’s superior performance on time and budget. The UK Treasury claimed to have research that showed 88 per cent of PFIs came in on time or early, with no cost overruns on construction being borne by the public sector. This compared to over 70 per cent of public projects that were delivered late or over budget.
(UK Treasury, 2003). The Treasury issued a revised Green Book for the appraisal and evaluation of government expenditure based on a report commissioned from Mott MacDonald, a major PFI contractor. The new rules introduced an ‘optimism bias’ on the costs and duration of construction that were projected by the public sector. Public health academics once more discredited the research on which the Treasury relied as irrelevant or, in the case of Mott MacDonald, lacking in methodological integrity (Pollock et al., 2007).

The UK’s PFI industry became huge in less than a decade. In 2001 it created its own PPP Forum as a public advocacy and political lobby group. By 2007 the forum boasted 118 members: 35 corporate, 47 financial and 36 professional, including all the big players. Even the government agency established to accelerate uptake of the schemes, Partnerships UK (PUK), was a joint venture private company between ‘the very corporations that are closely involved as owners, financiers and subcontractors in such projects’ and the government, which was a minority shareholder (Shaoul et al., 2007, p 485).

A Channel 4 television documentary in 2006 cited estimates from the UK Treasury that the industry received 10 to 15 per cent of total government investment; academic analysts suggest the figures are much higher (Pollock et al., 2004, p 4, fn 3). According to the British PFI industry, over 700 contracts to deliver infrastructure investment had been signed between 1992 and 2006, with a capital value over £49 ($98) billion. These covered more than 20 sectors of activity and involved over 100 procuring authorities. More than 500 PFIs were fully operational, including 185 new or refurbished health facilities, 230 new or refurbished schools and 43 transport projects. That was before a new policy push was launched in 2006. One little-known company, Innisfree, alone had shares in 280 schools and 26 hospitals in 2007, covering over 140,000 pupils and 12,000 hospital beds – more than anyone but the British state. Innisfree’s other PFI projects spanned transport, waste to energy, the Ministry of Defence, courts and water treatment. More than one third of Innisfree’s shareholders were outside the UK.

The standard PFI involves a contract for provision of specified infrastructure and services. Contractors and financiers are commonly ‘comforted’ by implicit guarantees and letters of support for recovery of their costs. They also typically get to own and manage the facilities, generate income from third party use, and benefit from a 25 to 35 year repairs and maintenance contract. Beyond that, they can negotiate which other support services they would like to provide. Often, but not always, the assets will be transferred to the state at the end of the contract term. Lower labour costs are achieved through staff cuts, deskilling and casualisation of the core workforce, while the ‘flexible workers’ (e.g. orderlies), catering and transport staff are transferred from the public sector to private sub-contractors (Lister, 2003).

Most PFI consortia create special purpose vehicles (SPVs) for individual projects that limit their liability. SPVs are usually shell companies that consist
of finance, construction and facilities-management arms that have no recourse
to their parent companies when things go wrong. The SPV is supported by
established banks, equity and pension funds, and insurance companies. The
construction and management arms have their own retinue of architects,
legal, financial and other advisers, either in-house or on retainers. Most
construction work is contracted to subsidiaries. Service level agreements set
the standards for facilities management, estates, maintenance, ‘flexible
support’ (cleaning, etc.), catering, laundry, waste management, supplies, car
parking and security. These, too, are sub-contracted. In the past, contracts
have required even minor repairs to be organised through the SPV and its
chain of subcontractors.

The contracts are a civil arrangement between purchasing agencies
and the consortium, and remain commercially confidential. This makes
it impossible to assess the real costs over the life of the contract or the
profits taken by the consortium. It also prevents effective accountability.
As a private company PUK is not subject to the United Kingdom’s Freedom
of Information Act, and PFI contracts are commonly withheld by the
purchasing public agencies on the grounds of commercial confidentiality
(Shaoul et al., 2006, p 260).

The PFI is a deceptive piece of creative accounting. The justification for
keeping the transaction off the public sector balance sheet is that PFIs transfer
the risk from government to the private consortium. In theory, the contractor
absorbs some of the costs of construction overruns, adaptation to new
technologies, repairs and maintenance. In practice, it is the government who
retains the political or reputational risk as provider of last resort. If contracts
collapse, or if companies go bankrupt or abandon an unprofitable project,
the state is expected to step back in. Because the contracts also guarantee
payments for their entire term, or require compensation for early termination,
the private provider is protected against the risk that hospitals or schools
become redundant if people move or policies change. Varying the contracts
is difficult and expensive.

The claim that private infrastructure providers are cheaper than the state
is also misleading. The rent paid over the life of PFI contracts in Britain is
estimated at four or five times the cost of construction. This reflects higher
interest rates for private sector borrowing, even when backed by guaranteed
income, and the payment of dividends.37 Contracts that commit public
bodies to payments from government revenue for 25 to 35 years create new
inter-generational burdens that do not appear in the public accounts. In
most cases, these payments have first call on the public purse, irrespective
of other priorities. An article in the Financial Times on 17 July 1997 spelt
out the longer-term implications:

The future cash outflows under PFI/PPP contracts are analogous to future
debt service requirements under the national debt, and, potentially, more
onerous since they commit the public sector to procuring a specified service and over a long period of time when it may well have changed its views on how or whether to provide certain core services of the welfare state.\textsuperscript{38}

As of 2006, the UK government’s aggregate forward commitments for 2006 to 2032 was £155 ($310) billion.\textsuperscript{39}

The scope for profiteering from PFIs is staggering. Contracts routinely include rights to profit from third party use of the facilities and from the sale of surplus assets that are usually controlled by a separate legal vehicle. Companies claim tax losses by generating massive income against which they offset equally massive operating expenditure, described as a ‘management fee’ paid to the parent company. In a study of PFI roads Jean Shaoul \textit{et al.} report a claim from the Major Contractors Group that its members expected to make between three and ten times as much on their PFI stakes as on their traditional contracts (Shaoul \textit{et al.}, 2006, p 269). When the profits of subsidiaries, intra-firm financing, third-party income from user charges for car parking, canteens and TV/telephones, and the gains from refinancing, land sales, disposal of equity stakes investments and unrealised increases in investment value are added, the real return to shareholders is vastly greater.

The risky part of the contract is construction, which is usually completed after 18 months. It is common then to refinance, with cheaper borrowing that reflects the very low post-construction risk. Larger loans spread over a longer period allow the initial loan to be repaid, with windfall sums that can be used by the parent companies at no cost to themselves. Contract lengths for some PFIs have been extended to 60-plus years to accommodate this, extending the cost to the hospitals and the risk to the public sector if the contract is terminated. This refinancing windfall was initially governed by a voluntary code, which was ignored. Eventually the Treasury required some of the gain to be shared. The UK National Audit Office reported in 2006 that the taxpayer received only £137 ($274) million of a total £264 ($528) million made from refinancing.\textsuperscript{40} The Parliamentary Public Accounts committee described a windfall of some £80 ($160) million from refinancing the Norfolk and Norwich University, when the local National Health Service (NHS) trust faced a £15 ($30) million deficit, as the ‘unacceptable face of capitalism’.\textsuperscript{41}

Beyond the projects themselves, PFIs offer a lucrative new commodity for the financial services industry. For example, HSBC Infrastructure Company, incorporated in the Guernsey tax haven, trades shares in PFIs. This increases the incentives to reduce costs and maximise returns. There is also a thriving secondary market in the contracts themselves. In 2006 the City of London predicted that the sale of equity stakes in PFI contracts could reach £1.5 ($3) billion by the end of 2007. These attract a 30 per
cent capital gains tax, but not if they are sold offshore. The purchasers profit from the regular fixed income from government at no risk, but also have incentives to ‘sweat the assets and labour’ to cut expenditure. The Secondary Market Infrastructure Fund is the largest asset management firm in the UK PPP/PFI market. Its assets include the GCHQ, several prisons, schools, hospitals and the M40 motorway.\textsuperscript{42} Two of the three core investors are the Bank of Scotland and AMP Capital Investments. There is no regulation of those secondary market sales and profits.

The PFIs are a classic instance of public policies designed by the transnational accountancy-cum-consultancy industry for its own benefit. For a single PFI contract the University College London NHS trust retained separate professional advisers on capital finance, accounting, legal, property, healthcare strategy and planning, quantity surveying, survey engineering, architecture and facilities management.\textsuperscript{43} Shaoul et al also point to the huge potential for conflicts of interest. The roles played by the Big Four (PriceWaterhouseCoopers, KPMG, Ernst & Young, and Deloitte & Touche) include:

providing advice on policy and projects via staff, whom they second or loan to the government; writing reports on financial methodologies and policy evaluation; advising the private sector that tender for PFI contracts; acting as advisors on public bodies; and sponsoring research on PFI/PPP. . . . Furthermore, in some cases, the firms or their sister companies are equity stakeholders or major subcontractors in PFI contracts.

(Shaoul \textit{et al.}, 2007, p 481; see also Newberry, 2003)

Despite the obvious conflict, the UK government routinely contracts the Big Four to conduct the initial evaluation of whether public dollars would be better spent on PFIs or projects delivered through the public sector.

With ‘partnership’ now in vogue across the world, the potential export market for PFIs, franchises and concessions, and other ‘partnerships’ is enormous. It is part of PUK’s mandate to promote PFIs in the world market. The UK and Japanese governments sponsored a World Bank Public Private Infrastructure Advisory Facility (PPIAF) to ‘help developing countries improve the quality of their infrastructure through private sector involvement’.\textsuperscript{44} The technical assistance facility operates through generously paid consultants and supports only privatisation options (CEO, 2007). Their activities include policy and legislative reforms that make countries PFI-ready, and propaganda campaigns of ‘consensus building’ to overcome domestic resistance. The focal sectors are energy, telecommunications, transport and water. The main regional focus has been sub-Saharan Africa, commonly building on PRSPs and debt conditionalities. Cambodia and China are other target markets. The management of the EC’s own Private
Sector Enabling Environment Programme (BizClim) is contracted to a London-based consultancy firm that, in turn, contracts its projects to third party consultants from a preferred provider list (CEO, 2007).

While the corporations, their patron states and international institutions aggressively promote the PFIs, governments are beginning to re-regulate. Sustained union criticism in the UK has resulted in new regulations to protect workers affected by transfers of undertakings. Regular monitoring by the UK Select Committee on Public Accounts has generated greater transparency and more active regulation. There are similar pressures in Australia and Canada. Elsewhere, local authorities and communities have embraced alternatives, such as public-public partnerships (PUPs) between several public sector agencies, or a municipality and a non-profit organisation, with the aim of more efficient and effective service delivery but without a financial profit. Under PUPs, the public agency remains the service authority, responsible for regulation, setting tariffs, planning and monitoring. Trade in services commitments have the potential to prevent governments from adopting either stronger regulation or PUPs, even when PFI privatisations go wrong.

The commercial and competitive nature of PFIs takes them outside the Article I:3 exemption and its bilateral equivalents. The primary contract might be categorised as government procurement under Article XIII, but only for those services that do not involve commercial re-sale. The exemption does not apply for those governments that made government procurement commitments in their accession packages or in bilateral agreements. It is also unclear how far down the PFI chain the definition of government procurement would apply, because the GATS does not define procurement.

The international PFI market is dominated by a core of transnational construction, finance and management firms that can squeeze out local public and private competitors. Market access commitments prevent a government from imposing economic needs tests, restricting the legal form of consortia, limiting foreign shareholdings or requiring joint ventures, including with public enterprises. National treatment would exclude nationality requirements for directors or the ability to give favourable treatment to local firms, again including public agencies. Depending on how ‘like’ services are defined, foreign consortia could demand the same subsidies as ‘competing’ local community facilities and equivalent underwriting of risks. Technical standards for a wide range of services, including laboratory testing or nutritional content of school meals, could be subject to the existing or proposed domestic regulation disciplines.

The major accountancy firms have their own interests in securing GATS commitments for professional services in modes 1, 3 and 4. If the accountancy disciplines eventually come into effect, governments would be unable to regulate the profession’s PFI activities in ways that serve legitimate social objectives. The Big Four will also profit from any mutual recognition agreements (MRAs), and uniform standards, licensing and qualification requirements that would enhance their PFI activities.
Perhaps the most ominous risk is in those bilateral agreements that have integrated mode 3 on services with investment rules, which potentially expose governments to multi-million dollar expropriation claims through investor-initiated arbitration if they resume control of failed PFIs contracts. Bolivia’s experience with its water concessions is a warning to all.

**CASE STUDY 8 PRIVATISING POWER IN THE PHILIPPINES**

The ‘people power’ revolution that overthrew Philippine dictator Ferdinand Marcos in February 1986 proclaimed an end to crony capitalism, US imperialism and the plunder of the nation’s patrimony by corrupt élites and foreign corporations. Twenty years later, local commentators suggest that little has changed: ‘The basic problems of the country are foreign domination, factionalism of élite politics, bad governance and feudal bondage’ (Yu, 2005, p 8). In 2006, the Transparency International Corruption Perceptions Index gave the Philippines a score of 2.5 out of 10, where ‘5’ marks the borderline for countries with a serious corruption problem. Former presidents Marcos and Joseph Estrada (impeached in 2000 and ousted in January 2001) were judged the second and tenth most corrupt leaders of the past two decades.47

The short history of privatisation in the Philippines reflects this state of affairs. Policies prescribed by the international financial institutions were implemented by corrupt administrations. This created lucrative financial opportunities that were exploited by national élites and transnational corporations who urged the government to remove any remaining fetters on their profit taking. Periodic waves of ‘people power’ have sought to unseat successive presidents who were accused of betraying the nation. They, in turn, resorted to emergency powers and suppression of human rights that fuelled instability and further popular resistance.

One rallying point for these mobilisations is the 1987 post-Marcos Constitution, which enshrines the principles of patriotism, nationalism, social justice and participatory democracy.48 Economic nationalism and people’s sovereignty are deeply intertwined. Section 19 of Article II: *Declaration of Principles and State Policies* requires the state to ‘develop a self-reliant and independent national economy effectively controlled by Filipinos’. Section 10 of Article XII: *National Economy and Patrimony* mandates measures that encourage locally owned enterprises and give preference to Filipinos in grants of rights, privileges and concessions. Section 12 requires the state to promote the preferential use of Filipino labour, domestic materials and locally produced goods. No private person can own public land or rights over geothermal, hydroelectric or other natural resources. Only Filipino citizens, or corporations with at least 60 per cent national ownership, can own land other than public lands or lease public lands. Foreign investors
can only lease private-owned lands for a maximum of 75 years. Under Section 1 of Article XIII: Social Justice the state must
give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities and remove cultural inequities by equitably diffusing wealth and political power for the common good.
To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

These nationalist protections have been eroded to the point of impotence in the wake of neoliberalism, privatisation and free trade commitments. Yet the Constitution remains the legal touchstone for Filipino opposition to neoliberal globalisation.

In December 1994, 20 politicians and civil leaders asked the Supreme Court of the Philippines to declare unconstitutional the Senate’s motion to ratify the accession to the WTO. By the time the court finally delivered its judgement in May 1997, the WTO had been operating for two years with the Philippines as a member; President Fidel Ramos had internalised the IMF/World Bank-mandated privatisation strategy through his Medium-Term Philippine Development Plan, known as Philippines 2000; and the country had been hailed as an emerging new regional tiger at the APEC leaders’ meeting in Manila in 1996.

The Supreme Court upheld the ratification. Despite an opening flourish that quoted Peter Drucker on the virtues of globalisation, Justice Panganiban insisted that the court’s role was simply to decide whether there had been a gross abuse of discretion, not to ‘wade into the unchartered ocean of social and economic policy making’. The nationalist goals of the Constitution had to be understood in the context of Section 13 of Part XII that requires the state to ‘pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity’, and of section 1 to promote industries that are competitive in both domestic and foreign markets. The WTO agreements espoused those principles, with built in protection for weak and developing countries. Therefore:

Notwithstanding objections against possible limitations on national sovereignty, the WTO remains as the only viable structure for multilateral trading and the veritable forum for the development of international trade law. The alternative to WTO is isolation, stagnation, if not economic self-destruction. Duly enriched with original membership, keenly aware of the advantages and disadvantages of globalisation with its on-line experience, and endowed with a vision of the future, the Philippines now straddles the crossroads of an international strategy for economic
prosperity and stability in the new millennium. Let the people, through their duly authorized elected officers, make their free choice. This judicial rhetoric that extolled the democratic choice of the Filipino people seemed particularly poignant 10 years later as the administration of President Gloria Macapagal Arroyo sought undemocratically, and unsuccessfully, to remove the formal barriers to foreign investment in privatisations, and to free trade agreements, from the Constitution. By that time, a succession of failed privatisations had reinforced the stark disparity between the privileged and the masses.

The vast bulk of the post-Marcos privatisations, worth over $4 billion, involved public utilities, primarily banking, petroleum, airline, electricity and water. The sector examined here is electricity. The framework for privatisation was laid, under IMF instruction, in the terminal days of the Marcos regime and centred initially on the traditional form of asset sales. The key themes of the IMF/World Bank economic rescue package for President Cory Aquino were fiscal austerity and trade and investment liberalisation. The Committee on Privatization and the Asset Privatization Trust were established.

The policy proceeded by fits and starts. Four factors contributed to this uneven implementation. First, privatisation was a conditionality for loans from the IMF and World Bank made to finance the odious debts incurred by Marcos and subsequent bailouts of the economy. That produced hasty and ill-considered policies. Second, competing interests within the domestic political, bureaucratic and business hierarchies variously hastened, delayed and derailed the programme. Third, the Philippines lacked the necessary capital markets to fund privatisation from within; yet constitutional restrictions on foreign investments in land and utilities constrained the sale of assets to foreigners. The focus for natural resource privatisations, such as water and power, therefore took the form of build-operate-transfer (BOT) contracts involving ‘partnerships’ between foreign corporations and domestic élites. The tendering process for BOTs invited corruption. Fourth, the failure of privatised services and repeated exposés of corrupt practices fuelled the anti-privatisation campaigns of opposition parties and popular movements.

The National Power Company (NPC or Napocor) had been established in 1936 to generate and transmit energy; distribution was left to the private sector. Instead of developing an energy plan to address the country’s long-term needs, Aquino adopted a deregulated market model of power generation. The first contract was let in 1988. In 1990 a law on BOTs allowed the private sector to finance, construct, operate and maintain infrastructure projects. Ramos, elected in 1992, picked up the pace, spurred on by the international financial institutions and daily electricity outages across most of the country. Again, there was no long-term plan. The Power Crisis Act
1993 allowed the President to fast track the authorisation of independent power producers (IPP). When that Act expired in 1994, an updated BOT law allowed approval of unsolicited bids for a range of projects, including IPPs (IBON Databank and Research Center, 2003, pp 82–3).

Most of the private power projects were financed by foreign players, including the World Bank’s International Finance Corporation. The legal form of BOTs was especially attractive because the element of ‘transfer’ made them eligible for sovereign guarantees. The concessions operated through power supply contracts for between 10 and 25 years. They were effectively risk-free investments, aside from the costs of construction and operation. The government, through Napocor, assumed the market risk through ‘take or pay’ obligations to buy between 70 and 100 per cent of total capacity, whether or not the power was consumed or even produced, plus a fuel-cost guarantee. It also bore the foreign exchange risk (Rimban and Samonte-Pesayco, 2002).

In just four years foreign direct investment in the Philippines multiplied eightfold, mainly by the fast tracking of IPPs. Ramos approved at least 28 contracts valued at $7.4 billion. Over 90 per cent of new power capacity in the 1990s came from foreign-owned IPPs, led by El Paso, Enron, Mirant, Intergen, CalEnergy, Covanta, Chevron, and some Asian utilities, in conjunction with national capital. This ad hoc, untransparent environment was linked to insider deals, bribes and other kickbacks (Andaquig, 2003). The result was a private electricity system that even the World Bank warned was overcapacity, overpriced and unaccountable (cited in Woodhouse, 2005, p 10).

The IPPs provided almost half of the Philippines’ power. Although their contracts became unsustainable when the Asian financial crisis hit, the corrupt Estrada administration chose to honour them. The debt-ridden state company Napocor was crippled by its ‘take or pay’ obligations. These and other costs were passed on to consumers, adding 30 to 50 per cent to the average power bill.

Following Estrada’s removal, former Vice-President Arroyo responded to the crisis with a more-market response, restructuring the state owned monopoly into ‘an unbundled, privatized merchant system (in which electricity is sold and traded in a wholesale market at fluctuating spot market prices)’ (Woodhouse, 2005, p 1). The Electricity Power Industry Reform Act (EPIRA) was rushed through in 2001 to secure the release of Asian Development Bank funding for power sector restructuring and an IMF rehabilitation loan. All Napocor’s 31 generating plants would be transferred to a management corporation and sold. So would a 25-year concession to run the National Transmission Company Transco, renewable for a further 25 years, although the state company would remain Transco’s owner and default provider. Power would be sold through bilateral contracts or into a new spot market. While Transco was subject to restrictions on foreign
and cross-ownership, and Congress had to approve the franchise, the power
generators would be largely unregulated (IBON Databank and Research
Center, 2003, pp 88–9).

The asset sale process was a debacle. The only sale in 2005 was to a Filipino-
Australian SPV with no relevant documented experience. The company
contracted to pay $561 million; yet its paid up capital was just $11,938
and its maximum capitalisation was $191,021. The payment was never
made. The government’s target date for selling the assets was extended
to 2007; again the process limped along.

The EPIRA had mandated an independent review of the IPPs. That was
completed in July 2002, but never released publicly. Informed reports reveal
that only six of the 35 contracts were considered ‘clean’ (IBON Databank
and Research Center, 2003, p 84). Most had legal and financial defects.
Five were deemed onerous, contributing to Napocor’s P500 ($10) billion
in outstanding debt and P1.5 trillion ($30 billion) in stranded liabilities.
Three of these five contracts were supported by the export credit agencies
of the US, the UK and Japan. Faced with warnings from the IMF and others
that terminating the onerous contracts would risk a crisis of investor
confidence, the Arroyo government asked the firms to accept voluntary
adjustments.

One of the most notorious of those contracts involved American electricity
giant Mirant Corporation. Mirant declared bankruptcy in the US in 2003,
but continued to earn huge profits from its Philippine subsidiaries that
supplied 30 per cent of the national grid requirements. In 2006, following
new allegations of tax avoidance using offshore financing, the company
decided to cash up and quit the country (IBON Databank and Research
Center, 2003, pp 86–7). Given the privileges enjoyed by companies such
as Mirant, it is not surprising that most IPP investors were reported to be
‘quietly satisfied with their experience’ (Woodhouse, 2005, p 25).

The generation, transmission and distribution of electricity in the
Philippines has progressively passed from the public sector to national élites
and foreign corporations that operate as unaccountable, and often corrupt,
oligopolies with no effective regulation. Even pro-privatisation analysts are
highly critical:

With more than a decade of experience with private power generation,
the Philippines should be in a position to reap the benefits of extremely
competitive contracting. However, the combination of the Asian
financial crisis, re-politicization of electricity prices shortly thereafter,
and the headlong leap into an ambitious reform program, has once
again put the Philippines into a delicate position. Uncertainty in the
new market structure has induced a gridlock for new investment, and
investors’ perception of risk is high.

(Woodhouse, 2005, p 26)
For the Filipino masses, power privatisation has been a disaster, leaving them with an overpriced, unreliable service and no guarantee of affordable long-term supply. The Asian People’s Tribunal on Poverty and Debt reported in 2006 that electricity rates were the second highest in Asia. Power bills for residential consumers in metro Manila rose 211 per cent from 1993 to 2006, with households paying about 20 per cent of their monthly income for electricity.\(^5\) Government debt obligations multiplied with every failed new experiment. Debt servicing, in turn, depressed social spending on health, education and poverty-focused programmes.

Trade in services agreements are blind to such precarious situations. The privatised electricity regime would fall outside the GATS Article I.3 exemption for government services. Although W/120 has no formal classification for energy services, electricity generation, transmission, distribution and supply are covered by a vast number of relevant CPCs (see Chapter 9). Extensive commitments by the Philippines government in those sectors would make the failed privatisations very difficult to wind back, especially in bilateral agreements that also protected foreign investments.

Like most developing countries, the Philippines made very few commitments under GATS 1994. These related to transport, communications (courier and telecommunications), tourism and financial services. All are subject to horizontal limitations that reflect the constitutional constraints on foreign ownership of land and natural resources, the nationality of board members and executives, and economic needs tests.

The Philippine government remained reluctant to make commitments during the GATS 2000 negotiations. Its negotiators strongly resisted proposed disciplines on domestic regulation and took a long time to table an initial offer, despite enormous pressure.\(^5\) The EC’s leaked request to the Philippines contained the standard disclaimer that it was ‘not seeking the dismantling of public services or the privatization of state owned companies’.\(^6\) Yet the request targeted the two major areas of Philippines’ privatisation: environmental services, including water collection, purification, distribution, treatment and remediation; and energy services, ranging across construction, transport, transmission and distribution, wholesale trade, brokering of network energy products, and production management consulting. The EC’s horizontal request for the Philippines to eliminate restrictions on foreign direct investment, nationality of management and executives, and foreign ownership of land would have required major amendments to the Constitution.

The government finally tabled its offer in May 2004. Its proposed new commitments reportedly included aspects of services relating to electricity privatisation, notably the construction of power plants. The Philippines was the target of every plurilateral request in 2006, and a watchful participant in the ‘Enchilada’ talks in 2007. Some Manila-based officials apparently supported the binding of BOTs within a revised offer.\(^5\)
The government was also more cautious at the regional level than many of its ASEAN neighbours. Its ‘voluntary and non-binding’ Individual Action Plans under APEC were minimalist. The Philippines was a party to the ASEAN Framework Agreement on Services (AFAS) 1995 but that progressed very slowly (Thanh and Bartlett, 2006, p 6). The Philippines government came under more pressure as established and emerging powers courted ASEAN. In 2002 and 2003 ASEAN members signed a succession of framework agreements that committed them to negotiate bilateral trade agreements on goods, services and investment with China and Japan, both to be established by 2012, and with India, to be concluded by 2007. Despite comfort words on flexibility, reciprocity and sensitivity (mainly directed to the newer ASEAN members) all three agreements required GATS-plus liberalisation of services with substantial sectoral coverage, and progressive liberalisation of investment regimes that included investor protection. The US launched its own Enterprise for ASEAN Initiative in 2002, as it concluded bilaterals with Singapore and Australia. By 2005 this had become the US–ASEAN Enhanced Partnership. One year later, the US goal of a common vision across a full range of economic, political and security issues had been realised and an initial five-year Plan of Action had given birth to a US–ASEAN Trade and Investment Framework Agreement.

In addition to these regional negotiations, many of its ASEAN partners had jumped on the bilateral bandwagon. Again, the Philippines was initially reserved. A report by analysts from the Philippine Institute for Development Studies in 2004 concluded that the government had not identified its priorities and sensitivities and had no clear strategy, set of objectives or preferences about the form and scope of FTAs. They urged the administration to map out a trade negotiations strategy that complemented its neoliberal domestic industry and competitiveness objectives, and develop clear criteria for choosing bilateral partners. It identified Japan and the US as prime candidates, within stronger frameworks for regional cooperation and integration (Medalla and Lazaro, 2004). The Philippines Chamber of Commerce and Industry also warned that the country was being left behind, as the US was already negotiating with South Korea, Thailand and Malaysia. The government appeared to heed that advice and commissioned a study on the prospects for an FTA with the US (Medalla and Balboa, 2006). The expiry of the US President’s fast track authority put that initiative on hold.

The Japan-Philippines Economic Partnership Agreement (JPEPA), signed in September 2006, was seen as a practice run by the Philippines and an early step in Japan’s bilateral programme. The agreement was cautious. But it nevertheless contained commitments on energy services, disciplines on domestic regulation and investor protections that all conflicted with the Philippines Constitution. In particular, Article 4 required each party to examine the possibility of amending or repealing laws that pertain to the implementation and operation of the agreement, where the circumstances
or objectives that gave rise to them no longer existed or could be addressed in a less trade-restrictive manner. The JPEPA was condemned by the political and popular opposition as ‘destructive and unequal’, and its ratification became stalled in the Senate.\textsuperscript{65}

Negotiations for a Philippines US FTA were expected to provoke a much more militant response. The Philippines has long been a client state of the US, militarily and economically. US transnationals have major interests in privatised electricity, gas and water, as well as agribusiness, mining and finance. In 2003 their corporate lobby established a Philippines Energy Ad Hoc Working Group.\textsuperscript{66} The USTR’s annual survey of trade barriers has routinely targeted the Philippines’ threshold for foreign investment in exploration and utilisation of natural resources, the ban on foreign ownership of land, limits on foreign ownership of utilities and preferences for government procurement.\textsuperscript{67} A bilateral that satisfied the US would, therefore, require substantial amendment to the 1987 Constitution.

Proposals for amending the Constitution date back to the Ramos administration in the 1990s, and were revisited by Estrada and Arroyo. A Committee of the House of Representatives produced a draft in 2006 that aimed to consolidate the political power of the Arroyo administration and make the Constitution free-trade friendly. The draft left most of the existing provisions untouched, but added a catch-all caveat that potentially negated all the nationalist protections:

\begin{verbatim}
Section 12: Notwithstanding the provisions of Sec. 2 and 11 hereof, citizenship restrictions are hereby lifted relative to the ownership and lease of alienable lands of the public domain which include agricultural, residential, commercial and reclaimed lands, development of natural resources, ownership of franchises and advertising unless otherwise provided by law. Parliament shall provide for limited foreign ownership in regard to franchises granted to corporations involving public utilities of large scale.\textsuperscript{68}
\end{verbatim}

A backlash forced the Arroyo government to abandon undemocratic moves to secure these and other changes in December 2006. But this was a temporary setback. The prospects for a showdown over constitutional change and an FTA with the US loom large in a country where mass mobilisations have unseated two presidents and ‘Down with US Imperialism’ is an everyday part of the political lexicon.
Behind the hyperbole of a borderless global economy and the liberating potential of the internet are the stark realities of power. Those who control the infrastructure of finance capital and information flows wield determinative power over the evolving international services/knowledge economy.

The financial system can be likened to the ‘brain’ of the international economy, because it is the allocator of capital resources. Hardt and Negri observe how the denationalisation of financial markets has been accompanied by a monetary re-territorialisation, which is concentrated at the political and financial centres of Empire, the global cities, from whence the globalised networks of finance and production are managed (Hardt and Negri, 2000, p 297). In similar vein, they quote an adviser to the US Federal Communications Commission (FCC) who depicted the new IT highway as establishing ‘the conditions and terms of global production and government just as road construction did for the Roman Empire’ (quoted in Hardt and Negri, 2000, p 298).

The role of trade in services agreements is to construct a normative and disciplinary regime of meta-regulation for this rapidly evolving infrastructure, in the image and interests of ‘empire’. Paradoxically, the artifice of a ‘trade’ treaty, with its sclerotic classifications and architecture, has frustrated those ambitions. The mega-corporations demand the right to extend their operations in ways that the new technologies make possible, but the GATS text cannot deliver. The new generation of bilateral treaties provides an opportunity to rewrite the script and compounds the legal complexities.

As with other sectors, the techniques of commodification and fetishisation erase the social relations and normalise the structural inequalities that are intrinsic to contemporary financial and telecommunications markets. Equally, the combination of liberalisation and pro-market regulation that is demanded by trade in services agreements is de-linked from the systemic instabilities in the global financial system that re-surfaced so vividly in the wake of the subprime mortgage crisis in late 2007. Case study 9 uses Antigua’s challenge to the US ban on internet gambling to challenge the claim that trade in services agreements empower small and poor countries
to harness new technologies and compete as equals in the international services economy. Case study 10 examines the social implications when pension policy falls captive to the pension industry supply chain and trade in services rules, especially in such a turbulent environment.

This chapter also sets the platform for the subsequent examination of downstream services that rely on the financial and IT infrastructure, such as globally integrated food chains (Chapter 8), e-education (Case study 13), cultural exchanges (Chapter 7) and call centres (Case study 11). The potential for a foreign company to turn off the economic lifeblood of an entire economy at the flick of a switch and foment political chaos, as occurred in Venezuela in 2002, is the subject of Case study 17.

**Infrastructure as a social phenomenon**

It seems perverse that trade in services agreements aim to provide long-term political stability to corporations, not to societies or even economies. It seems perverse that trade in services agreements aim to provide long-term political stability to corporations, not to societies or even economies. The domino effects of the subprime mortgage crisis confirmed the fragility of an integrated global financial system whose regulation is designed largely by and for the financial services industry. The latest turmoil was utterly predictable. The East Asian financial crisis showed the systemic risks of the neoliberal ‘orthodoxy’ that was advanced by the IMF, World Bank and OECD in the 1980s and 1990s (see Kapstein, 1994; Krugman, 1994; Wade, 2007) and how rapidly contagion can spread from country to region and beyond, leaving devastation in its wake (Bullard et al., 1998; Stiglitz, 2002). Malaysia’s ‘unorthodox’ imposition of currency controls in 1997 reinforced the importance of governments retaining their full regulatory autonomy and exercising it prudently, despite the condemnation of the institutionalized ‘voices of capital’. A study of Thailand’s experience of the financial crisis, conducted in 2002 as one of the few assessments of the GATS pursuant to Article XIX, described how

the rapidly growing banking system and the influx of short-term foreign capital proved to be too much and too fast for the authorities to catch-up on [the] regulatory front. The problems were further aggravated by new technologies that enabled transfer of capital to be as easy as ‘a click away’. New financial and debt instruments were created that made surveillance and devising appropriate regulation almost impossible. The result was that a lot of short-term capitals [sic] that came to Thailand ended up in sectors like construction and real estate developments, contributing very little in real term[s]. And in the end, they became the major source of non-performing loans that are currently besetting the whole banking system. Perhaps the regulatory, supervisory and prudential regimes were somewhat lax but they were never intended to be so.\(^1\)
The authors concluded that ‘the global economic environment coupled with
new technological development has greater tendency to unravel many
economies than before’. Developing countries face particular difficulties in
devising a regulatory framework that can ‘catch up with globalisation’.
While the study endorsed liberalisation, it advised caution: ‘If [devising a
regulatory framework] is too difficult to achieve, then perhaps the pace of
liberalization that a country plans to implement may have to be adjusted
so that its supervisory and regulatory capability will not be compromised’.

However, once a government has made commitments on financial services
through the trade in services agreements they may have no ‘policy space’
to address these challenges, and no GATS-compliant alternatives. Further,
members who take a mode 1 commitment automatically guarantee a free
inflow and outflow of capital that is an ‘essential part’ of that service, while
a mode 3 commitment prevents them from restricting incoming capital flows
related to the investment. Parties to US free trade agreements, such as Chile
and Singapore, have even abandoned their right to suspend commitments
temporarily in balance of payments emergencies.

The systemic implications of the GATS for telecommunications are seen
more in the concentration of corporate power. There are valid arguments
that many old state-owned telecommunications monopolies failed to provide
adequate quality and access, and that they lacked the capital and incentives
to meet the challenges of the IT revolution. Privatisation and unbundling
were promoted as solutions that would generate competition, improve
efficiency, lower prices and broaden coverage. However, privatisation has
often simply transformed old state monopolies into dominant price gouging
private monopolies and oligopolies.

Corporate power over telecommunications is concentrated overwhelmingly
in US and European ‘telcos’, who have established this dominance through
century of monopoly control over the telecommunications networks of the
world’s largest industrialised economies. Those traditional public monopolies,
or in the case of the US a private oligopoly, were formally dismantled during
the 1980s and 1990s, but their power remains intact. The US government
broke up the Bell Telephone System in 1984. The Telecommunications Act
1996 further promoted competition by unbundling the local networks. Despite
these measures, AT&T has re-established its dominance through a series of
mergers and acquisitions (Braithwaite and Drahos, 2000, pp 322–6). In
Europe a more neoliberal model of privatisation and competition slowly
spread from the UK in the 1980s. A pro-competitive regime was harmonised
through the EU directive on competition in 1990 and other regulations. Instead
of enhanced competition, a continuous cycle of acquisitions and mergers across
Europe has generated oligopolies that dominate the integrated networks of
telephone, radio, television, computing and information services that are
enabled by satellite and cable.
The GATS expands the international dominance of these telcos as governments privatise, deregulate and liberalise their domestic telecommunications systems. A report for the World Bank observed, approvingly, in 2005 that:

The GATS can be viewed as a multilateral investment agreement, granting rights to the service suppliers of other WTO members, and allowing foreign ownership and control in telecommunications, a sector of the economy often seen as having particular political and strategic importance. For developing countries, this investment agreement often results in foreign ownership and/or the transfer of control of the incumbent carrier due to lack of domestic capital.

(Bressie et al., 2005, p 5)

The authors of that report hailed the potential for binding commitments by developing countries to anchor their far-reaching telecommunications reforms and to reassure investors by providing safeguards against policy reversal (Bressie et al., 2005). They applauded 11 countries that they said had ‘voluntarily’ made telecommunications commitments during their accession process and sent a signal to investors by locking in their domestic reforms.

The global reach of foreign telcos feeds the risk of a growing digital apartheid. The commercialisation and mass expansion of the internet from 1991 transformed the IT environment. C Edwin Baker rightly warns against overstating the potential for the internet and worldwide web to displace other forms of social communication (Baker, 2002, p 298). However, access to the telecommunications infrastructure does determine which countries, and which segments of their economies and societies, can choose to interact through this form of communications. It also determines which of them can participate in IT-enabled services and electronic commerce (the production, advertising, sale and distribution of products via electronic networks), such as financial transactions, tourism, e-education or call centres.

These globally integrated financial and telecommunications markets have direct social impacts. The report for the World Bank cited above implied a positive relationship between the GATS commitments of selected low-income countries and regions and the penetration of fixed-lines and mobile phones. However, it chose not to examine other, more socially relevant, statistics, such as levels of reinvestment by foreign firms or the social distribution of the services in terms of access and affordability. Nor did it address the fate of universal service obligations.

By contrast, Hardt and Negri argue that: ‘The new communications technologies, which hold out the promise of a new democracy and a new social equality, have in fact created new lines of inequality and exclusion, both within the dominant countries and especially outside them’ (Hardt and Negri, 2000, p 300). Even in richer countries, cost remains the most
significant barrier to access for lower-income, older and minority households (Cooper, 2000; Reddick et al., 2000; EKOS Research Associates Inc, 2001). A growing digital divide within and between countries would have ‘profound impacts not just on economies, but on politics, societies and cultures’ with potential for political backlash (Taylor and Jussawalla 1998, p 2). Yet, as explained below, social regulation to mitigate that risk is treated as a trade barrier in the GATS.

Financial services liberalisation has comparable impacts on local communities and small businesses. Transnational banks generally enter countries through mergers and acquisitions (under mode 3) that concentrate market power in fewer, foreign hands. Recent history shows a high level of foreign ownership once state banks are privatised and foreign investment in financial markets is liberalised: 90 per cent of banks in Mexico in 2002 were foreign controlled, up from 19 per cent in 1999; Eastern Europe is similar, with 97 per cent foreign ownership in Estonia in 2004; in Tanzania foreign banks had about 70 per cent of market share (vander Stichele, 2006).

The ability of transnational banks to offer higher quality services and technology allows them to skim off the profitable commercial operations and shed the custom of higher cost, low-value rural communities, small businesses and the poor. As a result, local businesses, small farmers and households face a credit squeeze that can disable the local economy and employment (Chapter 8). The wealthy frequently respond to domestic instability by shifting money into offshore accounts, which further depletes the national investment base. Second-tier, third-tier and underground markets in high-risk lending may emerge, within minimal protections for borrowers or investors. Banks that remain locally owned are often expected to maintain universal services, and may take unwise risks simply to survive. When they close or are taken over the market becomes even more concentrated. There is nothing to stop foreign firms from maximising their returns and moving on to greener pastures, leaving the local financial services sector depleted and destabilised. These risks are greatest where domestic regulations are weak and governments have fully lifted their capital controls (as required under mode 1).

These dimensions of trade in services agreements often go unremarked. Few people, including politicians, know if their governments have signed away the autonomy to regulate the infrastructure that drives their economies. Fewer still know that this might extend to their right to exercise capital controls. The areas of financial services, telecommunications and e-commerce have attracted equally little attention from the GATS critics (vander Stichele, 2005). The services themselves and the related trade rules are complex, specialised and technology-centred. For campaigners, the real world impacts often seem less obvious than in education, health or water and are harder to mobilise around. Yet it is small businesses, workers and communities in the real economy that ultimately bear the consequences of financial market failure and technological exclusion.
**Uruguay round negotiations**

These systemic and social considerations were far from the minds of US negotiators when they demanded the inclusion of services in the Uruguay round. They had two primary targets. The first was to secure guaranteed rights to access and consolidate control over the world’s emerging financial and telecommunications markets. The less obvious long-term objective was to pre-empt the regulation of new technologies through which capital and data would flow. As Case study 3 recounts, the corporate activists who pushed for the GATS came from AMEX, AIG, Citicorp and later AT&T, with support from the British financial services lobby LOTIS. Geza Feketekuty explains their motivation:

More than anything what drove [the GATS] was telecom, both telecom deregulation and the shift in the market structure in telecom. The two are so inter-related, the regulatory stuff and the technology on the other side. . . . The key people from the industry came to me and said: ‘look, what we really want out of this, bottom line, is to stop any pressure within governments to establish restrictive regulations on the information transfer side. Yes, we’re interested in liberalised access in some of the traditional regulated areas, but we know that’s going to take a long time.’ None of the people who were really driving the liberalization of services were really that gung ho on deregulation globally, with the partial exception of telecom. What they were really interested in was what they called the ‘new services’, from consulting to data processing to information services. That’s what they were wanting, and they were keen to make sure that governments didn’t look at this and say ‘gee, here’s a new service, this new thing called international data processing, international value-added telecom services. It needs to be regulated just like all the other services that we regulate’ . . . out of gut reaction without thinking why it needs to be regulated. [They said . . .] ‘That’s what we want you to do. We want you to come up with a regime that stops governments from just willy-nilly coming in and regulating things and building up new restrictions in what is potentially a tremendous growth area’.³

The financial services corporations recognised a clear synergy between their interests and the regime governing of telecommunications. AMEX and Bank of America orchestrated the creation of a powerful International Telecommunications Users Group in Europe in 1974 as the voice of corporate consumers (Braithwaite and Drahos, 2000, p 342). The group’s membership expanded internationally by sponsorship of national bodies and the recruitment of major corporations and influential individuals. Feketekuty says the financial services firms were primarily concerned to
secure cheap and reliable access to basic telecommunications networks, especially the use of leased lines for intra-firm communications:

Even the insurance people said ‘what we’re openly interested in is the insurance transactions that could easily take place over the net’. The financial services people were [also] more interested in the information transfers and data. They had their banks abroad and, yes, it would be nice to get some more branches, but that wasn’t what they really wanted. They wanted to be able to do business globally. . . . As they said ‘when we provide cash management services for some of the big companies we’ve got to be able to move cash around’. That’s what was driving it. Or the insurance companies saying the same thing, ‘we’ve got to be able to manage our cash flow so we’ve got to be able to move information, we’ve got to be able to move the money’.4

The power of the US services lobby explains the inclusion of trade in telecommunications as a US negotiating priority in the Omnibus Trade Act 1988, Part 4 of which was the Telecommunications Trade Act 1988. Indeed, the US refused to sign off on either the financial services or telecommunications negotiations until it had pushed the boundaries as far as possible, several years beyond the end of the Uruguay round. Both negotiations ran in parallel, with similar specific goals: to maximise commitments to binding liberalisation in members’ schedules; to achieve international adherence to a common pro-corporate regulatory regime; and to recover some of the procedural ground conceded to the South during the Uruguay round. The demandeurs attacked a similar raft of ‘barriers’ – restrictions on foreign investment, economic needs tests, limits on the range of services provided, restrictions on foreign exchange movements, local monopolies, tax concessions and licensing processes. However, the outcome in each sector reflected its unique characteristics and regulatory history.

**Meta-regulation of financial services**

The GATS 1994 contains several special provisions on financial services. The first is an Annex on Financial Services, which drew heavily on the landmark chapter on financial services in the CUSFTA (Raworth, 2005, pp 196–216). This Annex contains defensive and offensive elements. The defensive provisions were crucial to securing the support of sceptical financial regulators. A broad prudential carve-out allows governments to use non-conforming measures to safeguard the integrity of their financial system or protect consumers. Such measures must not be used to avoid commitments or obligations – a matter that can be subject to a dispute, although the panel hearing the complaint must include relevant financial expertise.
The Annex also contains a special definition of ‘services supplied in the exercise of governmental authority’ that parallels Article I:3. Activities conducted in pursuit of monetary and exchange rate policies are totally exempt, whether they are carried out by a central bank, monetary authority or public entity authorised to do so. The exclusion also covers a country’s statutory system of social security or public retirement plans, and the activities of a public entity that is backed by a government guarantee or uses public finance. However, these activities are subject to full GATS disciplines if they are conducted in competition with a public entity or a private financial service supplier (Case study 9).

The Annex has a second, offensive aspect. It expands the definition of financial services beyond W/120 to cover ‘any service of a financial nature offered by a financial service supplier’ (paragraph 5:1). This opens the way for market access, national treatment and additional commitments across a vast spectrum of insurance and banking activities, trade in foreign exchange and derivatives, trade in all kinds of securities, securities underwriting, money broking, asset management, settlement and clearing services, provision and transfer of financial information, and advisory and other auxiliary financial services. Sauvé and Gillespie suggest this breadth was partly a strategy to avoid capture of the negotiations by any part of the financial services industry that was opposed to foreign competition (Sauvé and Gillespie, 2000, p 432).

The Annex was accompanied by a model schedule entitled the Understanding on Commitments in Financial Services. Governments adopting the Understanding must specify, and later endeavour to reduce or eliminate, existing monopoly rights; this includes monopoly financial services that are supplied in the exercise of governmental authority, except those relating to monetary and exchange rate policy or statutory systems of social security and public pensions. Foreign financial services suppliers have a right to establish and expand their commercial presence, including by acquiring existing enterprises, and entry for their senior management and specialists, subject to specified terms and conditions. National treatment and MFN apply to the procurement of financial services. Governments must not prevent data transfer and processing that is necessary for the conduct of ordinary business, except to protect privacy and confidentiality. Any new financial service that is not already supplied in the member’s territory would automatically be allowed, whatever the means of delivery. The Understanding only has legal force when it is incorporated within a member’s schedule. A government that adopts the Understanding binds itself to a standstill of its existing non-conforming measures. It can qualify any other commitments.

The aim of the Understanding was to secure a critical mass of commitments (a forerunner to the plurilateral of the GATS 2000 negotiations). It is a wish list of commitments designed by a select group of OECD governments to achieve deep liberalization of financial services. The fact that it became a...
formal addendum to the GATS is remarkable, given the lack of any input into its drafting from non-OECD governments. Its origins pre-date the proposal to establish a WTO and reflected the legally separate nature of the proposed services treaty. An OECD note in 1990 reports that US and Japanese treasury officials favoured a financial services agreement that was separate from the GATS, whereas the EEC wanted them linked and hoped that 10 to 15 developing countries would sign, in addition to OECD members.\(^5\)

The Understanding was adopted in 1994 by mainly OECD states that have advanced financial systems. The Europeans and North Americans had already integrated their financial markets through the EU Single Market and NAFTA, respectively. Most other OECD members were committed to these policies through the OECD codes on capital movements. As at 1994 those industrialised countries accounted for some 80 per cent of the world banking assets, 76 per cent of international bond issues and most of the world stock market capitalisation (Sorsa, 1997, p 13).

The GATS 1994 text also introduced enforceable rules on capital account liberalisation. The logic was simple: cross-border transactions (mode 1) require an unrestricted inflow and outflow of capital where that is an ‘essential part’ of the service itself, and foreign investment (mode 3) requires at least a free inflow of capital. Footnote 8 to Article XVI on Market Access attaches those requirements to mode 1 and 3 commitments, respectively. However, ‘essential part’ is not defined, making it unclear if and how far the mode 1 obligation extends beyond financial services. Article XI also precludes members from imposing restrictions on international transfers and payments that are inconsistent with their sectoral commitments, subject to the exception for balance of payments emergencies.

The sum of the Annex, Understanding and capital account rules confirmed the extraordinary influence of the financial services industry over the Uruguay round. However, the US was not satisfied with the commitments originally proposed by the larger developing countries in the emerging markets in Asia and Latin America, whose high savings rates and demand for investment made them potential honey pots after further privatisation and liberalisation.

Late in the round, the US announced it would withhold MFN treatment from countries that did not give reciprocal rights to its financial services firms. To prevent the request and offer process unravelling at the last minute a Ministerial Decision and a Second Annex on Financial Services extended the negotiations. This allowed WTO members six months after the GATS came into force to improve, modify or withdraw their scheduled commitments and list additional MFN exemptions. The USTR again rejected the package that was proposed in July 1995. The negotiations were finally signed off in December 1997 – and only then, according to some commentators, because of the damaging effect of another missed deadline (Sauvé and Gillespie, 2000, p 430). Difficulties in implementation meant the
Fifth Protocol to the GATS containing the new schedules only entered into force on March 1999 – nine months before the GATS 2000 negotiations were due to begin.

The finance industry maintained a shadowy presence throughout the extended negotiations. In mid-1996 a Financial Leaders Group comprised exclusively of chief executives and chairs of the major finance corporations was formed to advise the US and EC on principles, barriers and target countries. A lower level Financial Leaders Working Group did the legwork. The senior group played a leading role in the final hours of the negotiations in Geneva in December 1997 (Wesselius, 2003).

The timing of the Agreement on Financial Services could hardly have been less auspicious. The fallout from the East Asian financial crisis showed the systemic risks of rapid financial liberalisation and footloose speculative capital. Ironically, IMF analyst Piritta Sorsa remarked, in an assessment of the interim offers tabled prior to the crisis, that ‘hasty opening of unsound banking sectors to foreign competition can lead to costly systemic failures or hamper macroeconomic management’ (Sorsa, 1997, p 5). She noted the rule of thumb that ‘financial sector reforms tend to succeed better if they are preceded by macroeconomic stabilization and supported by evolving prudential measures’ (Sorsa, 1997, p 20). The Malaysian government, which had bucked IMF strictures and introduced capital controls to stabilise its economy, was the last to sign the agreement and did so under enormous US pressure. According to Raghavan, WTO Director General Ruggiero thanked the IMF and World Bank for bringing the financial services talks and agreement to a conclusion through pressure on the South, both in Geneva and the capitals (Raghavan, 2002, p 84).

In the end, more commitments were made in financial services than in any sector except tourism. A total of 56 schedules for 70 countries were annexed to the Fifth Protocol of the GATS. Most covered the three core areas of insurance, banking and securities. However, few governments went beyond their existing levels of liberalisation and many stopped short of that. There were also numerous limitations; 80 per cent of those were on banking and other non-insurance sectors, especially retail banking. The majority of commitments were in mode 3, and contained limitations on foreign equity participation and discretionary licensing that protected domestic institutions. Governments, including those from the OECD, seemed especially nervous about mode 1 – presumably because this would remove their capacity to employ capital controls.

A detailed assessment of the outcome by Mattoo argues that financial services commitments still compared unfavourably with basic telecommunications (Mattoo, 2000, p 376). He speculates that governments might have held back during the sector-specific negotiations to maintain more bargaining chips in future multi-sectoral negotiations, although it is unclear why the same reasoning would not apply to telecommunications.
Regulating telecommunications

The focus of the telecommunications negotiations was not so much on liberalisation as on the regulatory regime that would govern the networks. Telecommunication services are supplied through an infrastructure that consists of ‘equipment, sites, lines, circuits, software and other transmission apparatus that permits these services to be delivered between and among defined network termination points’ (Raworth, 2005, p 299). They cater to the public, non-public user groups, and private intra-corporate communications. Basic telecommunications involve end-to-end transmission of customer-supplied information between two or more points where the information is not altered. Value-added telecommunications enhance the information or provide for its storage, but generally still require access to the networks.

As with financial services, the GATS 1994 included specific provisions on telecommunications. The Annex on Telecommunications Services imposed new obligations on every WTO member, whether or not they made sectoral commitments on telecommunications. These obligations relate to all public and private telecommunications services across the border and through foreign investment, except measures affecting cable and broadcast distribution of radio or television programmes. Every government is required to provide access to, and use of, its public telecommunications transport network and services on a ‘reasonable and non-discriminatory’ basis to enable the electronic supply of any service it has committed in its schedule. For example, a government that has made cross-border and national treatment commitments on financial services must provide access to its public telephone network for a foreign firm that wants to provide those services through an ATM (automated teller machine) (Bressie et al., 2005, p 6). All governments must also provide foreign firms with access to any available services to move information within corporations and access stored data; these services include private leased circuits that connect two or more customer premises for their exclusive use. Developing countries were allowed to ‘place reasonable conditions on access to and use of public telecommunications transport networks and services’ in their schedules for the purpose of strengthening their domestic and international trade capacity (paragraph 5(g)).

Even though it secured this exceptional annex, the US was not prepared to accept the level of commitments that some larger developing countries had proposed on basic telecommunications. A Declaration of Ministers, supported by an Annex on Negotiations on Basic Telecommunications, authorised voluntary (and hence plurilateral) negotiations on basic telecommunications to continue until April 1996. Governments that participated were committed to a standstill from April 1994, which prevented them from adopting measures that would improve their negotiating position. By the cut-off date, 47 countries had submitted offers on basic telecommunications, but only eleven promised full commitments. Under US pressure, the deadline was extended again to February 1997. Finally, new
schedules of commitments from 69 governments (in 55 schedules) were annexed to the Fourth Protocol to the GATS. This was dated 15 April 1997 and entered into force on 5 February 1998. By that time, a total of 86 WTO members had taken commitments, 80 on basic and 69 on value-added telecommunications. This accounted for 95 per cent of an estimated $600 billion in global telecommunications revenues (Rohlfs and Sidak, 2002, p 317).

The Fourth Protocol was accompanied by a Reference Paper on Regulatory Principles for Basic Telecommunications. Its obligations extend far beyond the Article VI: *Domestic Regulation* disciplines by positively requiring governments to adopt pro-market telecommunications regulations. Members were invited to incorporate the Reference Paper in whole or part through the ‘additional commitments’ column of their schedules. The relatively brief instrument addresses six areas. Three of them are procedural: governments must maintain an impartial and independent regulatory body; the criteria and reasons for licensing decisions must be made available; and the allocation of scarce resources, such as numbers or frequencies, must be objective, timely, transparent and non-discriminatory.

The other three areas are substantive. First, the right of governments to define the kind of universal service obligations they want to maintain is circumscribed by the requirement that these measures are non-discriminatory and not more burdensome than necessary to achieve that kind of service. Second, governments have an obligation to prevent the major supplier(s) from engaging in ‘anti-competitive practices’, especially through cross-subsidisation or by manipulating the supply and use of information (paragraph 1.1). Third, a government must ensure interconnection for foreign carriers at ‘cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided’ (paragraph 2.2). A process for independent dispute resolution must be provided.

The key substantive provisions mirror the US Telecommunications Act 1996. Not surprisingly, the chair of the FCC greeted the Reference Paper as the ‘gold standard for pro-competitive deregulation’ (quoted in Rohlfs and Sidak, 2002, p 327), while USTR Barshefsky boasted that ‘United States companies are the most competitive telecommunications providers in the world; they are in the best position to compete and win under this agreement’ (quoted in Taylor and Jussawalla 1998, p 6). By contrast, academic critics of the US telecommunications policy objected that the FCC was now setting the domestic telecommunications policy of other countries (Sidak and Singer, 2004, p 4). Indeed, the US routinely requires the full adoption of the Reference Paper by acceding states, including least developed countries.

Following the conclusion of the telecommunications negotiations the US split its efforts between enforcement, the emerging topic of e-commerce, and the GATS 2000 round.
The first dispute that dealt exclusively with the GATS was brought by the US against Mexico on telecommunications. The Mexican government had deregulated the monopoly of Teléfonos de México (Telmex) over long-distance and international telecommunications services in 1997 to allow multiple Mexican carriers. Telmex maintained a monopoly on local services until 2025, which carried with it specific service obligations, and remained the carrier of last resort.

By 2003 there were 27 long-distance carriers, including eleven international gateway operators. Two of the biggest, Alestra and Avantel, were part owned by US giants AT&T and WorldCom, respectively. Telmex remained the largest, although its share of revenue had declined from over 98 per cent to 64.6 per cent by 2002 (Sidak and Singer, 2004, p 35). Mexico's regulations applied a uniform settlement rate to each long-distance call. The rate had to be negotiated for each country by the operator that had the greatest market share. Incoming calls were distributed among the operators in proportion to their share of outgoing calls to that country.

The Mexican government had made full national treatment commitments on basic telecommunications, and market access commitments for all but non-facilities-based services. The US complained in April 2002 that Mexico had breached its obligations under paragraphs 1.1 and 2.2 of the Reference Paper to provide cost-oriented rates and to prevent anti-competitive practices by a major supplier. Further, the US said Mexico had denied ‘reasonable and non-discriminatory’ access for US-owned Mexican companies to the public telecommunications networks and services, as required under the Annex.

Two years later a panel upheld almost all aspects of the US complaint. It adopted a narrow interpretation of ‘cost-oriented rates’ that excluded recovery of the costs to Telmex of meeting its universal service obligations. The decision opened the door for US corporations to cream skim Mexico’s profitable operations without having to contribute to the infrastructure from which they benefitted (Gould, 2004b). Applied more broadly, the ruling means that governments who sign on to the Reference Paper without making reservations cannot cross-subsidise from their more profitable activities to meet their social goals, including affordable access to poor neighbourhoods or expansion into remote regions. With no apparent sense of the irony, the USTR effectively argued that if Mexico had wanted to protect its universal service regime it should have entered a reservation when it adopted the reference paper – as the US had done (Gould, 2004b)!

The Mexican government expressed strong concern over some of the findings, but did not appeal. The legislature amended the law in August, 2005. Foreign companies were now allowed to establish wholly owned telecommunications providers. The legislation also repealed the provisions relating to proportional return, uniform tariff and settlement of the outgoing
rate by the carrier with the greatest share of traffic. The US agreed that Mexico could retain restrictions on International Simple Resale – the use of leased lines to carry calls across the border – for security reasons. The US had secured a market worth over $2 billion for its corporations.

Telecommunications economists Gregory Sidak and Hal Singer have slated the panel’s approach, accusing the WTO of assuming ‘a new role as a highly specialized, global regulator of domestic telecommunications policy’ that usurps the domain of domestic regulatory authorities and is beyond its competency (Sidak and Singer, 2004, p 3). The panel’s lengthy report ‘reveals a startlingly low level of economic sophistication’ that fails to ‘cite – much less rely upon – any scholarly work on telecommunications regulation, industrial organization, antitrust policy, international trade, or any other branch of economics’. Instead, the ‘overwhelmingly lexical’ reasoning accepted, uncritically, the US argument and made nonsense of the right of governments to regulate (Sidak and Singer, 2004, p 7).

According to Sidak and Singer, the Mexican government had legitimate social policy objectives to ensure universal access, minimum quality standards of service and regional pricing. Telmex was their ‘carrier of last resort’. The government made a deliberate policy decision not to create a universal services fund, but to allow Telmex to use the international settlement rate to recover the costs of maintaining a reserve capacity and fixed domestic prices. Nothing in the Annex or the Reference Paper prevents this approach.

The panel rejected the Mexican government’s argument that the ‘economic feasibility’ of rates should be interpreted with reference to the need for developing countries to develop their infrastructure and achieve universal service. It adopted a literal reading of the recognition in both the Reference Paper and Annex of the right of countries to define their own universal service obligation. The GATS ‘development’ rhetoric received short shrift from the panel. It said any conditions imposed by developing countries on access to and use of their public telecommunications networks, pursuant to paragraph 5(g) of the Annex, must be inscribed in the member’s schedule (Mexico-Telecommunications, 2004, para 7.388). Moreover, the development sensitivities espoused in the GATS preamble and Article IV merely ‘describe the types of commitments that Members should make with respect to developing country Members; they do not provide an interpretation of commitments already made by those developing country Members’ (Mexico-Telecommunications, 2004, para 7.214).

A further feature of the dispute was the use of the GATS to subordinate the ITU. Section 7 of the Annex explicitly recognises the role of the ITU and requires appropriate arrangements for consulting it on matters that involve implementation. Mexico had complied with the target rates set by the ITU for the relevant category of teledensity; indeed, the prices set for interconnection to Mexico’s telecommunications infrastructure were within
the lowest 20 per cent of that grouping. Instead, the panel effectively required Mexico to implement US regulatory principles and do so immediately (Sidak and Singer, 2004, p 21). Sidak points out that 19 years after the divestiture of AT&T those principles remained contested and incomplete in the US itself, and had given rise to the largest ever fraud in the telecommunications industry (Sidak, 2003).

Sidak and Singer reject the claim that the US litigation was in the interests of US consumers, saying the real objective was to advance the interests of US telcos. From 1990 to 2002 the international settlement rate that Mexican operators charged to US long distance carriers had fallen by 91 per cent in real terms, from $1.04 to $0.09 per minute. Over much the same period, the US companies increased their margins for carrying the calls from 16 per cent to 163 per cent. The equivalent Canadian margin was around 40 per cent (Sidak and Singer, 2004, p 24). During 1999 and 2000, some 90 per cent of calls from the US to Mexico had been controlled by two US companies, AT&T and WorldCom (Sidak and Singer, 2004, p 45). Sidak and Singer interpret these figures as evidence of imperfect markets, if not tacit or explicit collusion (Sidak and Singer, 2004, p 33). They conclude that:

The policies advocated by the U.S. government before the WTO advanced the private interests of AT&T, Sprint and WorldCom while depriving U.S. consumers of a more ubiquitous telecommunications network in North America. Those policies successfully overturned the informed judgements of an independent regulatory authority in Mexico that, consistent with principles of the WTO agreement and its associated Reference Paper, had based its decisions on expertise and detailed knowledge concerning the industry that it regulates.

(Sidak and Singer, 2004, p 48)

The consequences for the politically influential and still-dominant Telmex, which is owned by Mexico’s richest man, might evoke little sympathy. However, the case has far reaching social and regulatory implications. The Mexican government was left with a dilemma over its universal service obligations. If Telmex lost further market share, either the company would have to offset that loss through revenue gained elsewhere and slow the expansion in more remote parts of Mexico, or the government would have to find another means of ensuring universal service or abandon its social objectives.

This dispute is only one example of US pressure on telecommunications. Other developing countries have fallen into line to avoid prolonged WTO litigation. In 2003 the USTR complained to the government of Antigua that the delay in granting a mobile telecommunications licence to AT&T breached its GATS obligations. The Antigua government then fast-tracked the licence. It later complained in its submission to the WTO panel on
internet gambling that AT&T operates largely from the US and contributes little to Antigua’s employment or government revenue. The indigenous operators cannot match its prices, and AT&T’s largest competitor, which does employ local people, was being driven out of business. The government predicted that prices would then rise, compounding the existing outflow of foreign exchange to settle subscribers’ accounts. In 2002, the USTR also reportedly used the implied threat of trade sanctions to influence Japanese policy on the price of access to the unbundled parts of its local network (Rohlfs and Sidak, 2002, pp 330–2).

According to the academic critics, these developments reflect a trend where the US seeks ‘to wrest decision making power from foreign regulators and give it to the USTR itself . . . to satisfy American political purposes’ (Rohlfs and Sidak, 2002, p 356). They question whether the USTR has ‘the detailed knowledge, the expertise and the proper incentives to negotiate trade agreements on interconnection pricing’, and the propriety of attempting to influence the domestic regulatory policy of another country on such complex issues (Rohlfs and Sidak, 2002, p 318).

Challenges of the digital age

The US developed a second limb to its telecommunications strategy as technological innovation liberated the potential for cross-border delivery of services. By the mid-1990s the Group of 7 (richest) countries had embraced a US-led initiative on the ‘information economy’ that was premised on the liberalisation of telecommunications, increased market access, strong intellectual property laws and privacy protection. The second WTO ministerial conference in Geneva in May 1998 agreed to a moratorium on customs duties on e-commerce transactions in goods (rumoured to be the price set for President Clinton to attend the meeting). An accompanying Work Programme on E-commerce was established to examine issues relating to the ‘production, distribution, marketing, sale or delivery of goods and services by electronic means’. The work programme soon became moribund; it was not formally extended at either the Doha or Cancún ministerial conferences in 2001 and 2003 respectively, although it was endorsed again at Hong Kong in 2005 (Wunsch-Vincent, 2005, p 8–9).

E-commerce did not fit the existing ‘trade’ categories. Governments could not even agree on whether e-products were goods covered by the GATT or services under the GATS (Barker et al., 2001, p 7–8). This makes a difference: the GATT provides corporations with stronger generic protections through MFN, quantitative restraints, subsidies and antidumping rules, whereas the GATS has exceptions and limitations. The US argued, with some support from Japan, that e-products should be classified as goods and subject to GATT disciplines. The EC contended that all products
that are delivered electronically, not physically, are services. This approach would preserve the regulatory space for EU content restrictions, such as Television without Frontiers (Chapter 7), and constrain the dominance of US e-commerce firms.\textsuperscript{14}

The WTO Secretariat struggled to find a legal resolution.\textsuperscript{15} The principles of ‘technological neutrality’ and ‘progressive liberalisation’ suggested a preference for the stronger GATT rules; yet some e-commerce commitments were already contained within the GATS. The Secretariat distinguished three kinds of cross-border electronic provision that needed to be considered: commercial access to the internet itself; electronic delivery of digitised products; and electronic distribution of non-electronic products. The first two were considered clearly to be services.

By 1999 it was ‘generally agreed’ that at least electronic delivery of services was covered by the GATS.\textsuperscript{16} But that raised its own complications. First, should the internet be classified under basic or value-added telecommunications? If the former, the Annex and Reference Paper on Basic Telecommunications would apply, including provisions on anti-competitive behaviour. That outcome would be unacceptable to the US, because it would impose an obligation on the government to regulate and the US is opposed to regulation of e-commerce, even of a market-friendly kind. The US therefore insisted that the internet was a value-added service, while Australia and the EC argued that it was covered by basic telecommunications.

A second complication is that 3C: Telecommunications in the W/120 classifications does not distinguish between basic and value-added telecommunications. A note on the WTO website says ‘basic telecommunications’ includes ‘all telecommunications services, both public and private that involve end-to-end transmission of customer supplier information’ (equated to categories 3C: a to g); ‘value added’ are ‘telecommunications for which suppliers “add value” to the customer’s information by enhancing its form or content or by providing for its storage or retrieval’ (equated to 3C: h to o).\textsuperscript{17} However, the Secretariat’s note has no legal standing.

The rapid expansion of e-commerce posed a third, unresolved set of questions about classifications. Should bundles of services that are delivered by the internet be classified in just one primary telecommunications sub-sector or also by reference to their associated content? Does a product such as on-line video games come under value-added telecommunications, computer based services or audio-visual services (Wunsch-Vincent, 2005, p 8)? Where are ‘new’ services, such as application service providers, data warehousing, on-line shopping, website hosting, on-line chatrooms and multimedia services, to be covered (Wunsch-Vincent, 2004, p 103)?

A fourth uncertainty relates to modes of supply (Wunsch-Vincent, 2005, p 14). E-services could be considered mode 1, based on the seller’s location, in which case the barriers are those that restrict supply from abroad, or
mode 2, reflecting the location of the buyer, where barriers limit their ability to purchase services offshore. Again, this matters because countries have made far more extensive mode 2 commitments. The US initially argued that the consumer ‘visits’ the website, hence mode 2 applies. However, the parties and adjudicators in *US-Gambling* applied mode 1.

Finally, e-commerce poses unique regulatory dilemmas. How can abuses of market power by major private internet providers be addressed effectively when the US has refused to designate internet access as a telecommunications service that is subject to legislative and regulatory obligations on common carriers, and is intent on exporting that position? How might consumers be protected when they are not mentioned as a ground for a general exception under Article XIV? What might be considered a ‘reasonable’ and ‘not more burdensome than necessary’ approach to domestic regulation when applied to the complex and fluid sphere of e-commerce?

Drake and Nicolaidis have canvassed four ways to resolve the dilemmas posed by global e-commerce (Drake and Nicolaidis, 2000). The first would rely on the current GATS disciplines, using clearer scheduling of commitments and supplemented by clarification through dispute settlement. Second, there could be a selective revision of the General Obligations and Disciplines (GODs) to provide greater clarity, although detailed language could introduce new rigidities. A third option was a new annex or a reference paper on electronic commerce that provided more relevant principles and rules. The most ambitious path was to devise new disciplines that ‘horizontally revamped’ the instruments on goods, services, investment and intellectual property into a coherent set of disciplines. The authors conceded that each approach had its problems. The fallback position was the undesirable prospect of leaving the dispute settlement system to effectively legislate on highly sensitive issues – an approach that could threaten the legitimacy of, and support for, the WTO.

The obvious target for such a dispute was China’s internet firewall. Search engines that are operated from within China are only licensed to operate through the state provider. The firewall was used, for example, in 2002 to block access from within China to Google’s search engine, which was operated from outside the country. China’s accession package included full market access and national treatment commitments on 1.B. *Computer and Related Services*: CPC 843 data processing, which is arguably the classification most applicable to a search engine.18

The firewall could fall foul of various GATS provisions. First, the refusal to disclose the criteria for censoring a foreign internet site could breach Article III: *Transparency*. Second, a de facto ban could be considered a zero quota in breach of market access commitments, although that stretches the bow even further than the *US-Gambling* decision (Case study 9). Third, assuming the firewall is considered a domestic regulation, Article VI:1
requires it to be administered in a reasonable, objective and impartial manner. If application of the regulation is considered an administrative decision, China must provide a mechanism for impartial review. If the regulation were deemed to involve the application of a technical standard, it would have to be transparent and not more burdensome than necessary to achieve quality. In any such dispute, China could be expected to invoke Article XI: General Exceptions for measures to protect ‘public morals and public order’. But that would be subject to a ‘necessity’ test and the requirement not to be a disguised barrier to trade that in part protects its local service providers.

The economic incentives for challenging the firewall are enormous: China has the world’s fastest internet growth rate, rising from 17 million in 2000 to 87 million in 2004 (Kluver, 2005, p 84). The geopolitical fallout from pursuing such a dispute could be equally huge.

**GATS 2000**

The GATS 2000 negotiations were seen as a unique opportunity to bring telecommunications, e-commerce and financial services into the internet age (Sauvé and Gillespie, 2000, p 438). An agenda that was genuinely infused with concerns for development would have actively addressed the digital divide and the proven instability of liberalised financial flows. That was literally inconceivable for the GATS. Instead, academic commentators and major power demandeurs contended that rich and poor countries would benefit by further liberalisation of services and pro-business revisions of the rules.

The negotiations followed several overlapping tracks. On e-commerce, the US and EC both proposed clusters of internet-enabled services that reflected their priorities and sensitivities (Wunsch-Vincent, 2004, p 80). The US looked beyond basic and value-added telecommunications to complementary services (distribution, express delivery, computer, advertising and certain financial services). The Europeans had a different package – telecommunications, computer, some distribution, advertising and some banking services. However, the e-commerce track went nowhere, especially as India had begun advancing the objectives of its own IT industry (Chapter 6).

On the telecommunications front, the USTR stressed the convergence of carriage and content, supported by the principle of ‘technological neutrality’. The US tabled a brief paper in 1998, and a detailed version in 2000, which argued for new classifications to provide clearer and more predictable international rules. Some technologies were not currently covered by any CPC; these included satellite or digital networks, wireless cable systems, and ‘converged’ transmission services that transmit data, voice or communications services. Revised classifications should be accompanied by more extensive sectoral commitments.
The Europeans proposed an alternative classification that advanced their own offensive interests in carriage, while defending the cultural exception (Chapter 7). In February 2005 the EC suggested using the carrier-based classification in the Annex on Telecommunications, being ‘transmission and reception of signals by any electro-magnetic means’ to resolve the uncertainty about existing and potential commitments. Value-added telecommunications could be dealt with under ‘computer and related services’. Services whose content required telecommunications for delivery would be better covered by content-specific sectors. Regulatory issues should be addressed by adopting the Reference Paper. This position was reflected in the EC’s revised offer, which adapted the W/120 ‘Telecommunications’ classifications (excluding broadcasting) with a textual annotation that read: ‘Telecommunications services do not cover the economic activity consisting of the provision of content services which require telecommunications services for their transport.’ Meanwhile, the EC asked all members to make commitments in modes 1, 2 and 3 without restrictions, and on the movement of élite personnel, as well as adopting the Reference Paper. It was prepared to consider ‘flexibility’ for the least developed countries.

The US responded to the EC proposal by insisting that ‘value-added’ was an essential part of telecommunications and already recognised in the W/120 classification. The Europeans’ approach would limit the scope of the sector, increase uncertainty and diminish existing telecommunications commitments on value-added services. The US produced a model schedule that proposed an alternative, explicit classification that was premised on technological neutrality: ‘All services consisting of the transmission and reception of signals by any electromagnetic means, alone or in combination with enhancing, storing, forwarding, retrieving, or processing functions added to the transmission and reception of signals’ (original emphasis). If there was no consensus on the adoption of this classification, the US said members should still choose it for the purposes of their schedules. If not, they should stick with W/120.

Southern governments were relative bystanders in this exchange. Mexico, already subject to the US complaint, stressed the right of governments to address their national policy needs and determine their accounting rates. Cuba again called for an assessment of the impacts of the GATS and sought to protect telecommunications accounting rates from challenge.

The sectoral negotiations on financial services also struggled, as governments remained cautious about rapid financial market liberalisation. A paper by GATS advocates Sauvé and Gillespie sought to dispel that reticence. They predicted that the new round of negotiations would be highly differentiated, with the focus on commitments in modes 1 and 2 from OECD countries and in mode 3 from the South (Sauvé and Gillespie, 2000, Table 3). They urged developing countries whose financial markets had collapsed to use the round to lend credibility to their liberalisation programmes (Sauvé
and Gillespie, 2000, p 445). While governments might be wary of allowing in new foreign competitors until they had strengthened their domestic industry, they should at least make pre-commitments to a credible deadline, which would contribute to greater stability. This would also give their regulators a timetable for developing prudential regulation and supervision. There were, they argued, ample protections available to governments through the prudential carve-out, flexibility, balance of payments safeguard, and right to exercise governmental authority over monetary policy and exchange rates. They suggested that offering developing countries an emergency safeguard mechanism might make them more inclined to buy in, as had worked with Mexico for NAFTA.

Writing in 2000, Sauvé and Gillespie were already proposing the use of clusters to maximise liberalisation and economise on negotiating resources. They also suggested enshrining the right to supply services without having to establish a commercial presence (‘non-establishment’), as in NAFTA. Remarkably, given recent history, they even proposed that measures adopted by governments for prudential concerns should be governed by a least trade restrictive test.

Switzerland took the lead in the GATS 2000 negotiations on financial services, promoting the harmonisation of mode 1 and 2 commitments and a free flow of financial information, data processing and auxiliary services across the border.\(^2\) The EC asked all members to adopt the Understanding, and made specific requests to 75 developing countries, including 24 least developed countries, relating to mode 3 and cross-border transfer of financial information and advisory services.\(^2\) US demands are not publicly available.

The shift to plurilateral modalities after the Hong Kong ministerial produced revised requests in both telecommunications and financial services. The telecommunications request was a compromise, led by Singapore along with the US, EC and others.\(^3\) It was directed mainly at large Southern markets. The demandeurs sought ‘commercially meaningful’ commitments, especially for voice and data transmission and leased circuits, based on the principle of technological neutrality. Their main goal was to remove restrictions on foreign investment and limitations in modes 1 to 3 for all value-added services. Target countries were urged to commit to all provisions of the Reference Paper and remove all MFN exemptions.

The plurilateral request on financial services came from 10 mainly Northern governments to at least 21 developing countries.\(^4\) It was short and comprehensive, and applied to the broad spectrum of financial services activities. The principal market access demand sought very broad commitments in mode 3 for non-insurance and some insurance services, including the right to establish and acquire investments as wholly owned subsidiaries, joint ventures and branches. This reflected the preference of
foreign banks to use investment vehicles that can be supervised from their home states, most of which take a light-handed approach to regulation. They also wanted the removal of economic needs tests, quotas and monopolies across all modes. In mode 1, they sought commitments in some insurance, financial advisory and data management services. The request relating to national treatment covered modes 1, 2 and 3. Transparency obligations would apply to both developing and applying new regulations. A government that agreed to this request in its entirety would effectively sign away control over its country’s domestic financial services industry.

By 2007, the GATS route had been overtaken by the bilateral agreements, except as between the major powers. The US Congress made the removal of barriers to the digital trading environment a central tenet of the President’s Trade Promotion Authority in 2002 and required the USTR to report on progress. The integrated package was tailored to the delivery of digital products through ‘elimination of tariffs on physical media carrier, the liberalisation of trade in telecommunication, computer, entertainment and other electronically deliverable services, free trade chapters on ecommerce, and a strong protection of intellectual property rights (IPRs) – especially copyrights – in an online environment’ (Wunsch-Vincent, 2003, p 9). Consistent with this requirement, US FTAs routinely reclassify telecommunications as including digital content, a fraught issue that is revisited in Chapter 7.

The EU’s agenda was framed by the Framework Directive on Telecommunications adopted in 2002. The Directive sets a number of core principles, being ‘proportionality to objectives’, technological neutrality, promoting competition, development of the internal market, and protection of end-user interests. Social cohesion and consumer protection are subordinate concerns (Raworth, 2005, p 327). This domestic regime informs the EU’s negotiating template. The standard architecture of European EPAs blends services, investment and e-commerce into a single chapter, while maintaining a proviso that keeps audio-visual content quarantined.

By 2007, the original US goal to re-regulate the infrastructure for international services transactions to secure the long-term dominance of the trans-Atlantic finance industry and telecommunications had largely been achieved. Yet the sclerotic nature of the GATS left the rising tide of e-commerce and e-services dependent on bilateral and regional treaties that were both complementary and divergent. It remains to be seen whether governments will consider themselves bound to maintain the liberalisation of financial services and capital flows during a sustained financial meltdown, and whether transnational telcos will face moves to re-regulate them for social objectives to address a deepening digital divide.
When a WTO panel upheld the challenge by Antigua and Barbuda (Antigua) to a US ban on internet gambling in 2004 it sent shock waves through the trade policy community. The panel defined the ban as a ‘zero quota’, held it was subject to market access commitments that the US insisted it never made, and concluded that the US had not satisfied the requirements for the ban to be treated as an exception to the GATS. Warnings that the GATS could strip governments of their sovereign right to regulate could no longer be dismissed as the scaremongering of anti-GATS activists (Gould, 2004a, p 1). In the words of the WTO panel itself:

Members’ regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other Members under the GATS are impaired.

(US-Gambling, 2004, para 6.316)

USTR Robert Zoellick denounced the panel report as ‘absolutely outrageous’ (quoted in Gould, 2004a). In April 2005 the Appellate Body upheld the panel’s interpretation of the US commitments. In doing so, it also confirmed the potential for unaccountable trade adjudicators to interpret the GATS creatively in ways that WTO members can only reject by a unanimous veto. The Appellate Body partly defused the anticipated furore by allowing the US to invoke the general exception for public morals, aside from a horseracing law that discriminated between US and foreign internet providers. The US decided it was unable to make the required changes. In mid-2007 the USTR announced the extraordinary step of withdrawing the gambling commitment – further undermining a treaty that it had originally sponsored so that foreign investors would gain market access and legal certainty.

In a legal sense, the case set far-reaching precedents. First, the reasoning of both the panel and the Appellate Body not only breached the exclusive right of members to interpret the WTO texts; these bodies actively filled in the gaps to make the GATS a more effective vehicle for liberalisation.

Second, the US was bound to commitments on gambling that it insists were never intended. The W/120 list of classifications refers to the 1991 UN CPCprov classification ((UN) provisional Central Product Classification). However, its use was not mandatory. The US had followed the CPC categories closely when compiling its schedule for GATS 1994, but did not refer to them explicitly (Gould, 2004a, p 4). The schedule listed a commitment on ‘other recreational services (except sporting)’ as follows:
Antigua pointed to CPCprov Group 964,\textsuperscript{33} where ‘9641: sporting services’ is separate from ‘9649: other recreational services’. The breakdown of the latter includes ‘96492: gambling and betting services’:

**CPCprov code 964**
Section 9 – Community, social and personal services
Division: 96 – Recreational, cultural and sporting services
Group: 964 – Sporting and other recreational services

**Breakdown:**
This Group is divided into the following Classes:
* 9641 – Sporting services
* 9649 – Other recreational services

\begin{table}[h]
\centering
\begin{tabular}{lccc}
\hline
Sector or sub-sector & Limitations on market access & Limitations on national treatment & Additional commitments \\
\hline
II. SECTOR-SPECIFIC COMMITMENTS \ldots & \ldots & \ldots & \\
10. RECREATIONAL, CULTURAL, & 1) None & 1) None & \\
& & & \\
& & & \\
& & & \\
& & & \\
D. OTHER RECREATIONAL SERVICES (except sporting) & 1) None & 1) None & \\
& 2) None & 2) None & \\
& 3) The number of concessions available for commercial operations in federal, state and local facilities is limited. & 3) None & \\
& 4) Unbound, except as indicated in the horizontal section & 4) None & \\
\hline
\end{tabular}
\end{table}
Breakdown:
This Class is divided into the following Subclasses:
96491 – Recreation park and beach services
96492 – Gambling and betting services
96499 – Other recreational services n.e.c.

The US rejected the application of the CPCs definition and argued that an ordinary dictionary meaning of ‘sporting’ includes gambling. The Appellate Body found for Antigua, using W/120 and the CPCs as aids to interpreting the ambiguous language of the schedule (based on Article 32 of the Vienna Convention) (Trachtman, 2005, p 862). It laid the onus on any member that does not use the CPCs to be explicit about the meaning of its commitments. The panel accepted that the US probably did not intend to schedule a commitment on gambling services, but said that was irrelevant (US-Gambling, 2004, para 6.136). Antigua rejected the US claim as disingenuous, pointing to 10 other members who had explicitly excluded cross-border gambling services. While that is true, it is still difficult to explain why the US would have consciously made such a commitment.

The implications of this outcome are alarming. If the US with all its vast resources could be caught out, the risk of poorly resourced countries making unintended commitments is so much greater. It is higher still with the negative listing of services used in many bilateral negotiations and the clusters and model schedules that they are being pressured to adopt in the GATS 2000 negotiations.

Even if the US had intended to commit mode 1 in gambling, it adopted that schedule in 1994. The first internet gambling site was not launched until 1996 (although Antigua argues there was a longstanding practice of telephone gambling in the US and across borders). The panel and Appellate Body both applied a principle of ‘technological neutrality’ that ties the commitment to the attributes of the service, not the technology used to deliver it. So all means of delivering services across the border are treated alike. Hence, a mode 1 commitment covers the existing means of cross-border supply and all means as yet unknown (US-Gambling, 2004, paras 6.285–7). Further, when there are a number of means for delivering gambling services across the border, a restriction on any one of those would breach a full mode 1 commitment, even if all other means within that mode were unrestricted.

At the least, a full mode 1 commitment deprives governments of the right to assess the risks, and then limit the impacts, of technologies that they could not foresee when it was made. One way to avoid that situation is not to make any commitments, especially in mode 1. But it is too late for the GATS 1994 schedules and difficult in bilateral negotiations, especially when the major powers insist on an e-commerce chapter or define telecommunications to include digital content. In theory, governments can amend their schedules later if problems arise. This has been considered
hypothetical for most countries, because of the requirement to compensate other states for lost markets. The US proposal to do so in this case seems unlikely to make it any easier for them.

Next, the panel and Appellate Body considered whether certain US laws that prohibited cross-border internet gambling breached Article XVI: Market Access, paragraph 2 of which reads:

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas . . . ;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas . . . ;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas . . . .

The US described their prohibitions as a restriction on the character, not quantity, of the activity. However, both the panel and Appellate Body conceptualised the ban as a ‘zero quota’. That seems inconsistent with the words ‘in the form of numerical’, although the explanatory note for scheduling of GATS commitments in 1993 did give as one example of market access: ‘nationality requirements for suppliers of services (equivalent to zero quota)’. 34

Most commentators have treated this reasoning as an exercise of judicial activism. Joel Trachtman attributes the interpretation to a concern about possible gaps in the coverage of the GATS, which adjudicators ‘sought to fill . . . despite the limits of the text itself’ (Trachtman, 2005, p 865). 35 As discussed in Chapter 1, prominent academic commentator and former WTO official Joost Pauwelyn argues that the reasoning has dangerously blurred the distinction between prohibited market access measures and less onerous disciplines on domestic regulation, and warns that it ‘risked WTO intrusion into the regulatory freedom of WTO Members far beyond what was originally agreed to in the WTO treaty’ (Pauwelyn, 2005, p 133).

US-Gambling was also the first case to apply GATS Article XIV: General Exceptions. The Appellate Body adopted the two-tier approach developed in GATT jurisprudence (US-Gambling, 2005, para 292). First, the US had to satisfy one of the closed list of permitted policy objectives. In this case it cited concerns over organised crime, money laundering, fraud and underage gambling to bring the ban under Article XIV(a) ‘to protect public morals’. The US also had to show a ban was ‘necessary’ to provide that protection. The panel held that the US should have consulted Antigua about
less restrictive alternatives. The Appellate Body disagreed, putting the onus on the US to show that a ban was the least trade restrictive of the alternatives that were reasonably available, including any identified by Antigua. However, it did not have to identify all possible alternatives or hold consultations with Antigua. Having brought the ban within the paragraph, the US then had to show it was ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’. The application of the Interstate Horseracing Act, which allowed internet gambling only within the US, was held to be discriminatory.

Defenders of the beleaguered WTO have portrayed this case as a David and Goliath victory for Antigua over the US (Trachtman, 2005, p 862). Many small and impoverished countries such as Antigua have embraced the opportunity to diversify their economies by developing niche markets in IT-enabled services. One of these opportunities was the burgeoning multibillion-dollar on-line gambling business. The number of gaming websites had exploded from 250 in 1998 to around 2,300 in 2004; the industry estimated international turnover at $90 billion and anticipated that revenue would reach $200 billion by 2008. The US was the largest national market, despite the ban, although the Asian market was rapidly expanding (Ranade et al., 2006, p 10). Because executives of internet gambling companies faced arrest on racketeering charges within the US, these sites had to operate offshore.

By 2005, some 85 jurisdictions regulated remote gambling. Almost four-fifths of the sites were licensed by just four states: Antigua, Costa Rica, Kahnawake Mohawk (Canada) and Curacao. Britain and Gibraltar were also major players (Ranade et al., 2006, p 9), giving the EC an economic and political interest in the GATS litigation.

Antigua became one of the first countries to legalise and license on-line gambling in 1996. The industry provided a vital, if unsavoury, economic lifeline. By 1999 there were 119 licensed operators on the islands and 3,000 of the 68,000 locals were employed in the industry. Economically, it generated one-tenth of the country’s GDP and $7.4 million in licence fees. Finance and trust companies had also developed, until pressure from the US and Britain for stronger money laundering laws forced many of them to close, costing Antigua jobs and revenue. By 2003, the number of licensed operators had fallen to 28 with just 500 employees. Licensing revenue was down to $1.8 million. Part of the reason, according to the Antiguan government’s submission to the WTO panel, was ‘an increasingly aggressive strategy’ that included the arrest of executives of companies that operated out of Antigua when they passed through the US (Pauwelyn, 2005, p 132).36

The GATS challenge in March 2003 was a matter of economic life and death for Antigua. But it was not acting alone. The high-powered and very expensive legal team came from American and European firms with strong
links to the gaming industry (Gould, 2004a, p 1). The British government reportedly ‘sponsored’ the original WTO challenge in the interests of its high-value gambling companies.\(^{37}\) The litigation offered a way for non-US companies to break down barriers to the US market and create a precedent, and for giant US gambling companies to deregulate their domestic market so they could operate from within the US and stem the flow of gaming money out of the country. After the panel report a spokesperson for MGM Mirage remarked that he was ‘going to send Antigua a thank you note’.\(^{38}\)

Although the dispute itself was quite limited in scope it had much broader ramifications. The Appellate Body restricted the case to three federal laws on technical grounds;\(^{39}\) but the reasoning applies equally to state and local government measures, such as state monopolies over lottery services, or exclusive licences to certain groups, such as first nations or charities (Gould, 2004a, p 5). The US gambling commitments also guaranteed full national treatment in all four modes. Antigua’s challenge involved only internet services (mode 1). A similar ruling on mode 3 would be potentially far-reaching, although it would require expensive new litigation.

Under WTO rules the US had until April 2006 to amend the horseracing law. The Bush administration remained as belligerent as it was when the case began. This reflected a convergence of pressures from different constituencies. The domestic gambling industry, especially for horseracing, is enormously powerful and state governments depend on lottery revenues. The ban was a talisman for neoconservative ‘family values’ – gambling is even unconstitutional in the deeply religious state of Utah. In addition, the chief legal officers from 29 states urged the USTR to withdraw the GATS commitment and defend the flexibility and sovereign authority of states to determine their gambling laws ‘without second-guessing by WTO tribunals’.\(^{40}\)

Far from being penitent, the US ‘upped the ante’. In July and September 2006, executives of two large British companies, Sportingbet and Party-Gaming, which operated sites out of Antigua, were arrested on warrants issued by the Louisiana state, where it is illegal to bet through the internet. In October, one month before the mid-term congressional elections, the Republicans attached an Unlawful Internet Gambling Enforcement Act onto a new law dealing with port security. The law basically prohibited credit card and financial institutions from sending payment to gambling sites. The Internet Gambling Council objected that anyone who opposed the measure risked being labelled soft on national security. The new ban affected players on sites that were run from Antigua, who could only bet from money they deposited in an account. The law immediately wiped £4 ($8) billion off the sector’s stock market value.\(^{41}\)

Antigua’s allies attacked the US move. Britain’s culture secretary (who was responsible for the gambling industry) suggested it would make unregulated offshore sites the ‘modern equivalent of speakeasies’.\(^{42}\) However,
Britain could only act in the WTO through the EC. Although the EU Internal Market Commissioner labelled the US Act ‘protectionist’, the Commission would not directly challenge the US laws because its own member states were not agreed about the issue. Antigua’s lawyer anticipated the Europeans would instead ‘add support’ to their case. Antigua’s lawyer anticipated the Europeans would instead ‘add support’ to their case.43 The gaming firms also talked of ‘joining forces’ with Antigua.44 But unless a major power was a formal party to the dispute, the US could continue to treat Antigua with contempt, knowing that it had little economic capacity to retaliate. Each phase of enforcement and any new GATS challenge could be strung out interminably. When Antigua sought a ruling on compliance the USTR simply tabled several paragraphs from an anonymous Justice Department official claiming the law was, and always had been, GATS compatible. In March 2007 Antigua ‘won’ that phase of the litigation. But it was not much further forward.

Antigua then sought authority to impose $3.4 billion in commercial sanctions against the US for losses incurred. This was partly in communication services, but primarily through cross-retaliation by non-compliance with parts of the TRIPS agreement – previously uncharted territory for the GATS and rare within the WTO (ICTSD, 2007).45 The USTR rejected the sum as ‘patently excessive’, and unnecessary because it had announced it intended to ‘clarify’ its commitment on recreational services.46 Her deputy argued that no member could have reasonably believed that the US would make commitments that directly conflicted with its laws, so there was no basis to require compensation.

At the arbitration hearing the US pushed for compensation of only $500,000. The lengthy judgment awarded Antigua a claim of only $21 million, although it was authorised to recover this largely by suspension of recognition of US copyright and trademark laws to an equivalent value. The amount reflected the arbiter’s assessment of the ‘counterfactual’ case, concluding that even in an amicable agreement the US would never have allowed Antigua unrestricted access to all on-line gambling markets, but only to markets related to horseracing that were subject to the adverse finding.

Eight members (understood to be Antigua, Australia, Canada, Costa Rica, India, Macao, Japan and the EC) served notice that they would seek billions of dollars of compensation from the US for lost potential revenues from withdrawal of its gambling commitment.47 Under GATS Article XXI, the US could agree to provide compensatory liberalisation on an MFN basis, which would have little benefit for Antigua or the international gambling industry. If the US refused compensation or the level of loss was disputed, any of those objectors could take the matter to arbitration. The US would be required to implement the outcome before it could withdraw (or ‘clarify’) its commitment. Failure to do so would allow those members who sought arbitration to withdraw an equivalent value of GATS concessions to the US.

In December 2007, the US and EC agreed on compensatory access to US postal and courier, research and development, and storage and warehouse
sectors, to the dismay of its gambling firms and the delight of Dutch mail carrier TNT.\textsuperscript{48} Canada, Japan and Australia also reportedly settled. Within days the USTR had clarified that it was simply binding existing liberalisation and sensitive sectors would remain closed.\textsuperscript{49} Moreover, the US President could not unilaterally change the US GATS commitments and would require the approval of Congress. Discussions with India, Costa Rica and Macao continued as the sectors being offered by the US had no commercial value to them. Costa Rica and Antigua subsequently filed for another round of arbitration.

Antigua won a pyrrhic victory, at best. An industry that had earned Antigua close to $1 billion seven years earlier was now generating revenue of around $130 million as a result of systematic attacks from the US. Its future was far from assured. The internet gambling industry is dispersed, fluid, opaque and parasitic. With low barriers to entry and exit, Antigua’s industry is a prime target for deregulatory arbitrage, including from Britain and Australia (Ranade \textit{et al.}, 2006, p 9, 22–3). Europe is the second largest internet gambling market, and the Asia-Pacific market is growing rapidly. Unlike Antigua, the big gambling companies could survive a long-term US ban. Neither they, nor the USTR, had any interest in the fate of Antigua’s industry, economy or people.

**CASE STUDY 10  PUBLIC PENSIONS OR CORPORATE WELFARE?**

One hallmark of a civilised society is the way it supports its elderly – not just supplying the individual’s need for a basic income, but also as a collective commitment to human dignity, social cohesion and inter-generational obligation.

That ideal was encapsulated for most of the twentieth century by universal public pensions. For neoliberals, this epitomised the dead hand of the state on economic growth and the denial of individual choice and responsibility. Their critique intersected with the phenomenon of aging populations in much of the world and a mobile workforce in irregular employment. Public pension schemes were considered to be unaffordable by governments that faced pressure to cut government spending and taxes. A burgeoning financial sector was eager for a lucrative new commercial opportunity.

The solution was to deliver retirement income through the market. Governments were urged to delegate or divest their responsibility for the financial wellbeing of the elderly to private financial institutions, which would invest the contributions from individuals and the state in ways that fuelled economic growth and enhanced income security. The subtext was that states would now subsidise private schemes through contributions, tax
write-offs and deductions, while remaining morally, if not legally, responsible for bailouts or safety nets if pension funds failed.

The classic exposition of this policy was the World Bank’s report in 1994 *Averting the Old Age Crisis*. The Bank advocated three pillars: first, a tax-financed, publicly managed system that would redistribute public revenue to alleviate poverty among the aged through means-tested benefits, a guaranteed minimum pension or a modest universal entitlement; second, individualised occupational pension plans or personal savings accounts that were mandatory and transportable, to be operated competitively by the private sector; and third, voluntary savings (World Bank, 1994, pp 17–19). The first pillar was considered a safety net and the third depended on surplus personal income. The second pillar of compulsory private schemes, if successful, would reduce the demands on the safety net.

The Bank argued that the changing nature of employment justified a shift away from ‘defined benefit’ schemes where guaranteed sums were paid out to long-term employees on their retirement to ‘defined contribution’ schemes that were portable and where workers bore the risk of investment and their own longevity. Allowing individuals to choose between different providers and schemes was expected to promote competition and efficiency, although the problem of information asymmetry would require governments to regulate carefully. Privately managed funds were assumed to be superior to their public counterparts. Workers would ‘rarely’ be required to accept below-market returns and could fall back on the safety net (World Bank, 1994, pp 21–2). The pre-funding (as opposed to pay-as-you-go) approach to pensions was also supposed to boost capital accumulation and financial market development. Enhanced economic growth would make it easier for governments to finance the public pillar.

The shift from state to private pensions would require many countries to develop a more sophisticated financial services infrastructure. The Bank suggested that young low-income countries in Africa and South Asia should begin by creating an ‘enabling environment’. Young, but rapidly aging economies in East Asia should start developing regulatory regimes and markets. Older countries with large public pillars, found across the OECD, Eastern Europe and parts of Latin America, were urged to raise their retirement age, eliminate rewards for early retirement, cut benefit levels and tax rates; in addition, they should reallocate state contributions to the second mandatory private pillar.

The same three pillars – public retirement benefits, private pensions and household savings – formed the basis of a report from the Bank of International Settlements (BIS), IMF and OECD that was endorsed by the ‘Group of 10’ finance ministers from Europe, North America and Japan in 1998 (BIS, 1998). They stressed the need for ‘strengthening the financial infrastructure, encouraging financial transparency, enhancing financial supervision and eliminating barriers to international capital flows’ (BIS, 1998, p 1). Rules that
unnecessarily’ inhibit broader, deeper and more diversified financial markets and risk management should be eliminated (BIS, 1998, p 3).

As reliance on pre-funded pensions has grown in the global North and South, staggeringly large pools of investment capital have been generated. Institutional pension funds in the 11 major pension markets doubled in a decade to total $23 trillion by 2006, and grew from 58 to 81 per cent of the GDP in those countries (Watson Wyatt, 2007). Retirement plan assets in the US alone in 2005 were over $14 trillion (EBRI (Employee Benefit Research Institute), 2007, p 8). In the US and UK, private pension funds became the largest institutional holders of company shares, and owned over 30 per cent of their respective share markets. About 12 per cent of investment was made outside the country of origin (Minns and Sexton, 2006, p 5).

The BIS report shows how the private pension funds depend on, and create demand for, liberalised international financial markets and diverse financial products that can be traded across borders. The industry makes its money from giving investment advice, managing funds, trading assets and charging fees. The main assets are equities traded on the international stock exchanges, supplemented by a wide variety of investments. An OECD report on pensions in 2005 revealed a self-perpetuating dynamic: the promotion and expansion of pension funds creates risks that require further products, such as pensions insurance and very long-dated index-linked government bonds, that spread the risk and minimise the potential for disruption to international financial markets (OECD, 2005). The specialised ‘pension fund food chain’ (Watson Wyatt, 2006) comprises consultants, investment advisers, brokers, credit rating agencies, management firms, performance assessors and share markets. Many fund operators are also part of the pension privatisation industry; sometimes the firm’s consultancy and underwriting divisions receive astronomical fees from pension and assets privatisations, while their funds managers invest in the commercial opportunities the consultants create. The nature of the industry has led some critics conclude that pension markets are ‘not really about pensions at all, but about extending capital markets and the free movement of capital and changing the role of the state’ (Minns and Sexton, 2006, p 35).

The pension fund supply chain is a prime beneficiary of the GATS. The definition of financial services in Article 5(a) of the Annex applies asset management, including pension funds, and the various ancillary services. The exemption for services supplied in the exercise of government authority applies to ‘activities forming part of a statutory system of social security or public retirement plans’. However, this only applies where those services are not conducted by the government’s financial services suppliers in competition with a public entity or private financial services supplier. A government that made a commitment on financial services when it operated a universal state pension may well find that privatising the management of its pensions brings the new scheme under the GATS disciplines. A choice
between the state pension and a subsidised contributory scheme run by private firms, or competition between a state-run and private schemes, would clearly fall outside the exception.

Once the GATS rules apply, the entire pension industry chain, from the fund managers, advisers and derivatives traders to the credit rating agencies and auditors, benefit from its regime of light-handed regulation. The sheer size of these foreign operators is likely to crowd out most domestic providers in conditions of open competition. Market access rules aim to prohibit governments from requiring joint ventures or limiting foreign shareholding or the number of operators. Full national treatment commitments prevent governments from reserving part of the subsidised market for local firms. Governments that adopt the Understanding must maintain a standstill to existing non-confirming measure. In a defined contribution scheme without a government guarantee, people’s pensions become fully exposed to the risks of mega-fraud or systemic meltdown in a highly interconnected global financial market place. The subprime crisis shows how billions of dollars can be wiped off pension funds in a matter of months. Unwinding this exposure through re-regulation is problematic and even fiduciary measures are potentially subject to challenge as an attempt to avoid commitments or obligations under the GATS.

The EC’s GATS 2000 requests targeted pension fund management as part of its wish list of financial services based on the Understanding. These services spanned the entire pension supply chain. One ‘essential prerequisite’ was an ‘appropriate regulatory structure’ that was ‘proportionate and necessary’ – code words for severe restrictions on the government’s choice of (re-)regulatory instruments. The plurilateral request on financial services built on a June 2005 paper from 12 members and reiterated that the definition included asset management, pension funds, financial advisory and information, and other financial services. Their preferred transparency obligation would require governments to consult the global pension fund industry before introducing regulations that were designed to discipline their activities, such as highly leveraged buyouts, require a greater proportion of investments in government securities, or increase protections for the rights of retirees. Even basic measures, such as capital controls to restrict cross-border trading in currency, requirements that pension funds hold greater reserves, or stricter accountancy standards, could be considered ‘more burdensome than necessary’ (vander Stichele, 2005, Chapter 6).

There is enough evidence of the social harm caused by ideologically driven or poorly conceived pension reforms to show why governments need to retain their capacity to re-regulate or partly renationalise private pensions markets. The OECD acknowledged in 2005 that changes in pensions policies, especially the move from defined benefit to defined contribution schemes, ‘have resulted in a shift of risk bearing from the government and corporate sectors to individuals’ (OECD, 2005, p 11).
That risk is not shared equally. It is still generally assumed that husbands will provide for the needs of elderly women, despite social trends, women’s greater longevity and the human right to equality. Contribution based pensions are especially gender biased. Women commonly live longer, but they are typically low waged workers in insecure employment, informal work or households. For example, over half the women in Chile, Bolivia, Colombia, El Salvador, Argentina and Brazil will never receive a pension because they have never been in paid employment. One estimate suggests that paid women workers in Chile who are employed only during the harvest season would need to work 80 years to accumulate a minimum pension (Minns and Sexton, 2006, p 26).

Increased state support for private pension schemes is also regressive and, consequently, racialised. According to a Financial Times report in 2006 around 45 per cent of pension-related tax relief in the United Kingdom went to 2.5 million higher rate taxpayers (predominantly white and male), and 55 per cent went to 13 million lower rate taxpayers. Some 9 million people received nothing because they were not saving into a pension scheme. The lowest paid, women and minorities lost out (Minns and Sexton, 2006, p 18, fn 38). In addition, there are risks of pension failure. Where schemes are not backed by a government guarantee, workers may find the company or private fund manager cannot deliver when the pension falls due. In 2005 pension funds worldwide were estimated to be 20 per cent underfunded, amounting to some $1.5 to $2 trillion (Minns and Sexton, 2006, p 25). This improved significantly in 2006, but the risk of failure remains and falls most heavily on the poor.

The experiences of pension privatisation in Chile and Britain illustrate the social and government risks from the combination of poorly thought out pension schemes and a highly liberalised pension fund industry.

The Pinochet dictatorship (largely) privatised Chile’s pay-as-you-go state pension in 1981. Existing workers were induced to shift to a contribution-based scheme where their individual accounts would be managed by the private sector. Workers employed after 1981 had no choice (Riesco, 2005). The state’s contribution, through a ‘recognition bond’, was set during a recessionary period. That low level was compounded by high unemployment and low wages for much of the next decade. Labour market deregulation encouraged churning between paid work, unemployment and subsistence self-employment. As a result, 70 per cent of the workforce contributed into the pension accounts for less than half of each year, with women and the poorest most vulnerable. Despite an economic recovery in the 1990s, the gap remained. According to government studies in 2000, between half and two-thirds of the contributors could never save enough in their pension accounts by retirement to fund even the minimum pension (Riesco, 2005, p 1). They were not entitled to the state’s non-contributory safety net pension because that was only available to the very poor. Workers who had stayed
with the pre-1981 state scheme were twice as well off as those who transferred; the latter became known as the victims of ‘pension damage’.

The winners in Chile were the fund managers and commissioned agents. Some firms that administered the private pension scheme failed. Those who succeeded became consolidated into a handful of companies, whose boards were stacked with ex-Cabinet ministers from the Pinochet era. They became the most profitable industry in Chile, with an average return on assets from 1999 to 2003 of over 50 per cent. In 1990 operating costs had accounted for 15.4 per cent of annual contributions and represented 2.3 per cent of assets. By 2000, half the contributions made by Chilean workers who retired that year went to (government determined) management fees (Minns and Sexton, 2006, p 18). In addition, the companies received the state contributions. Manuel Riesco points out that public expenditure on pensions had remained around 6 per cent of GDP since 1981, absorbing over one third of the government budget and over 42 per cent of public social expenditures – enough to fund a decent universal base pension for retirees, with a reformed private system that provided a solid, complementary second tier (Riesco, 2005, p 3).

A World Bank report in 2004 conceded that Chile’s scheme, emulated by eleven other Latin American countries, had failed to extend formal financial protection for old age to a broader segment of society (Gill et al., 2004). In 2007 the government of Argentina responded to its pension crisis by introducing a five-yearly option to contract back from individual accounts into the state’s pay-as-you-go defined benefit pension.53

Britain introduced a two-tier system of a flat rate basic pension and a top-up State Earnings-related Pension Scheme (SERPS) in 1978.54 Both were funded by National Insurance contributions. Workers could opt out of the SERPS scheme and invest part of their own and the employer’s contribution in an employer-sponsored private pension. That option was initially limited to defined benefit schemes that guaranteed a pension at least as good as SERPS. In 1986 the Thatcher government sought to cut the government’s pension spending and encouraged workers, through propaganda and generous tax breaks, to apply part of their contributions to buy defined contribution ‘Appropriate Personal Pensions’ from a private insurer. This triggered the ‘mis-selling scandal’: commission-based financial advisers used high-pressure tactics to convince many members of defined benefit plans to transfer to unsuitable pensions that had high exit fees. Even market cheerleader Martin Wolf condemned the scheme in the Financial Times as a ‘shameful confidence trick’ (quoted in Minns and Sexton, 2006, p 38).

In 1991, the discovery that the late Robert Maxwell had stolen £450 ($908) million from his company’s pension fund turned the spotlight on the problem of under-funding of private pension schemes. The Pensions Act 1995 introduced new requirements for minimum pension funding and asset levels. Stronger accounting requirements for companies to disclose their
under-funding of pensions had the unintended consequence of prompting many to abandon defined benefit schemes in favour of defined contributions. While this facilitated portability, it was effectively a pay cut for those workers who remained with their employers until retirement. Many defined benefit schemes closed because of insolvency, although some did so to reduce the company’s pension liability. By 2001 major firms such as BT, Lloyds TSB and Unilever were still running huge pension fund deficits, compounded by accounting requirements to incorporate the collapse of international share prices into their company accounts. A new Pensions Act 2004 introduced a Pension Protection Fund paid for by an industry levy and a Financial Assistance Scheme for those affected by earlier fund failures (but not for schemes wound up by a solvent employer). The regulator also required companies to shore up the deficit in their pension funds before making new investments or distributing dividends to shareholders.

The defined benefit schemes took years to wind up, leaving both old and new retirees without recourse. In March 2006, the Parliamentary Ombudsman tabled a damning report on the process from 1997 to 2004 (UK House of Commons, 2006a). She invoked the exceptional power to report in cases where complainants had suffered from maladministration leading to injustice ‘and the injustice has not been, or will not be, remedied’. A bipartisan parliamentary select committee agreed that the publicity material produced by the government to promote private pension schemes had failed to alert people to the risks. An estimated 125,000 people had been affected; some lost 85 to 90 per cent of their entitlements (UK House of Commons, 2006b, p 21). The government rejected the findings and said the £15 ($30) billion cost of restoring the lost benefits would be prohibitive (UK House of Commons, 2006b, p 24). The select committee objected that the government could not simply abandon people: ‘we want a response which is not about defensiveness and denial, it is about constructive engagement and putting things right’ (UK House of Commons, 2006b, p 33). The committee concurred with the Ombudsman that the government’s refusal to accept and act on the findings raised serious constitutional issues (UK House of Commons, 2006b, pp 25–32).

In both Chile and Britain ideologically driven policies failed to provide a workable balance between public and private pensions that met people’s basic social needs. In a comprehensive review of pension policy in 2005 a World Bank report conceded that lessons had been learned; they expanded the three pillars to five, incorporating ‘informal intrafamily’ support and a basic non-contributory (so-called ‘zero’) pillar to protect the lifelong poor (Holzmann and Hinz, 2005, pp 2–3). Yet Southern governments that experienced policy failure after implementing the Bank’s 1994 version were caught between social and political imperatives to step back in, and countervailing pressures from the pension fund industry, financial markets, the international institutions and GATS signatories to promote investor-friendly regulation and maintain ‘investor confidence’.
As commentators stress, the economic and social implications of pension policy choices play out over very long time periods (Myles and Pierson, 2000). Given recent history, it seems reckless to encourage governments to lock in the ‘autonomous liberalisation’ of their pension schemes, immediately and permanently. The proposal in the GATS 2000 plurilateral request that new regulation should be subject to privileged consultation with the international industry is already being transposed into FTAs. The resulting pressure from the international financial services industry could seriously undermine the kind of rational policy debate that is needed to achieve an appropriate balance between state and private provision of pensions for the social, fiscal and economic realities of each country.
Colonisation is an economic enterprise built largely on the exploitation of people. Its most repugnant genocidal practice was human slavery, the trade in human beings. Today, the GATS has revived talk of trade in people. Again human beings are reduced to commodities that are traded across borders in international markets, but the politics and language are considerably more nuanced.

The introduction discussed the relationship between the new international division of labour and the globalising services-driven economy in terms of Hardt and Negri’s three categories of immaterial labour: labour for informationalised industrial production; labour that performs analytical and symbolic tasks, which is subdivided between creative and intelligent manipulation and routine work; and affective labour. These categories are infused with class relations. At one level, transnational corporations require international mobility for their executives, managers and specialists, and for associated professionals. At the same time, they seek to minimise the cost of the mundane labour component of services, whatever the mode of delivery – remotely across the border (call centre operators); to visiting foreign consumers (hotel workers); by contractors for foreign-owned enterprises (cleaners); or through temporary migrants (construction labourers or domestic servants). While these practices are variations on a historic theme, the capacity of new technologies ‘to link together different groups of labour power in real time across the world has led to furious and unrestrained competition among workers’ (Hardt and Negri, 2000, p 337).

It is common to equate ‘GATS and labour’ with modes 1 and 4. These are ideologically constructed legal spaces, devoid of people, workers or citizens. The physical ‘space’ between places of origin and places of consumption is reconstituted as a de-territorialised and dehumanised global services market. Neither the economic forces that impel participants into these markets nor how people experience them is considered relevant. This narrow focus on ‘modes’ also begs the prior question of how trade in services, and trade liberalisation more generally, redefined people’s life opportunities. The push and pull factors that shape today’s international division of labour,
including the trend to migration for remittances, have been socially and politically constructed within the paradigm of neoliberalism. As Mariama Williams consistently points out, the stylised assumptions and beliefs about societies and economies that underpin structural adjustment and trade liberalisation are careless of the real consequences for national economies, let alone for meso-levels of local markets and the micro-level of households (Williams, 2003).

This chapter locates the labour dimension of trade in services within that structural context. As an old class struggle takes new forms, the objectives and strategies defined by traditional Western-dominated international labour organisations are also found wanting. Social movements of workers from the global South and North struggle to protect their rights and livelihoods within the new international division of labour, while maintaining national and international solidarity.

Case study 11 puts a human face to call centres in Bangalore, dubbed the assembly lines of the twenty-first century, and the complexities of ‘virtual’ migration. Case study 12 examines the social implications of defining migration-for-remittances as a trade issue – in the case of Fiji through the export of women nurses to developed countries and male security workers to the Iraqi war zone.

**Services workers as tradeable commodities**

Services are by definition labour intensive. Corporations that seek to maximise their profitability and competitiveness in a globalising economy require a workforce that is mobile, flexible and compliant. From a class perspective, that means a further redistribution of wealth from labour to capital. For millions of individual workers it means gaining or losing an often-precarious livelihood. The term ‘labour flexibilisation’ serves as code for the erosion of hard fought laws on job security, minimum working hours, collective bargaining, rights to unionise, minimum wages and penalty rates, pension and health insurance schemes, work and safety regulations, and much more. Those protections were among the earliest targets of neoliberals, who condemned them as relics of the bygone era of social regulation and corporatism. The trinity of deregulation, liberalisation and privatisation produced a dual labour market for services whose inequalities are segmented by class, gender and race: typically, a white male-dominated professional and managerial élite engages in high skilled, well paid, sometimes insecure, but usually substitutable work; and a largely feminised, often non-white proletariat undertake low paid, temporary, part-time or casual work, with minimal job security or associated entitlements.

As services markets became more transnational, the labour market reflected the political geographies of neo-colonialism. Ankie Hoogvelt notes how widening income inequalities across the global North and South both
transcend and replicate historical boundaries (Hoogvelt, 2001). This is symbolised by the call centres, which bridge the ‘old divide between core and periphery in new ways, linking marginal workers and localities with global networks of capital while at the same time reinscribing hierarchies of place and identity’ (Buchanan, 2002, p 49).

The growth of migration-for-remittances and offshore outsourcing is deeply embedded in the international labour hierarchy and the broader political economy of trade liberalisation. As Saskia Sassen observes: ‘Migrations do not just happen: they are one outcome or one systemic tendency in a more general dynamic of change’ (Sassen, 1998, p 116). People who migrate for remittances are impelled by local economic conditions to leave their families and communities to work abroad. Eman Villaneuva, the secretary general of United Filipinos in Hong Kong, observed at the time of the sixth WTO ministerial conference in 2005 that ‘even without GATS we are already affected by the WTO because other agreements are actually destroying the livelihood and the economy and the environment of the countries we come from.’ Their households increasingly depend on their new livelihoods. So do their countries.

The very concept of mode 4 takes the fetishisation of contract labour to a new, depersonalised level ‘as if the migrant service workers are devoid of feelings and emotions and that they are not geographically transported away from their homes’ (Lindio-McGovern, 2004, p 222). The majority of temporary migrants are women. The label ‘unskilled’ is a misnomer; many are highly qualified professionals who, tragically, can earn more as low status service workers in a foreign country. Most women are engaged in a services supply chain that involves a ‘two-tiered transfer of reproductive labor – women in developed countries pass the work on to women migrants from developing countries, who in turn, pass it on to other women in their countries of origin – women migrants form the crucial link’ (Asis, 2003, p 3). This signifies what Sassen calls a return of the ‘serving classes’, composed largely of immigrant and migrant women within a racialised political geography (Sassen, 2000, p 510).

The mass of male migrant workers are clustered in construction, manufacturing and manual labour. Human Rights Watch estimates that over half a million construction workers are employed in Dubai alone, mostly semi-literate men from South Asia (Human Rights Watch, 2006, pp 6–7). They are paid (or not paid) pitiful wages and are often deeply indebted to unscrupulous recruiters. Their sometimes deadly high-rise work sites are the glitzy showpieces of Dubai’s construction boom. Labour laws are not enforced. Employers frequently withhold workers’ passports to keep them captive as modern day slaves.

The treatment of male and female migrant workers is itself gendered. The highest proportion of foreign workers in Asia is in Singapore, where they comprise around 30 per cent of total employment. There are at least
180,000 male construction workers, mainly from Bangladesh, Thailand and China, and many thousands of female domestic servants. Most are considered ‘unskilled’. Temporary migrants are kept on short-term permits that allow easy repatriation, are forbidden to bring their families or marry locals, and are subject to constant surveillance. Yet Shirlena Huang and Brenda Yeoh have documented the differential as between women and men, in terms of ‘the differential access to legal protection; the differential effects of state medical surveillance of their bodies; the different ways in which their ‘skills’ are valorised; as well as differences in the efforts invested into the social control of these workers in public space’ (Huang and Yeoh, 2003, p 83).

Southern governments bought into the ‘trade’ paradigm for services workers during the Uruguay round when they demanded that factors of production received equivalent treatment: if trade in services was to cover free movement of capital and ideas, it also had to include labour. Eventually it did, just not most developing countries’ labour. Nevertheless, the ‘trade in services’ discourse has gained such currency that many Southern governments’ negotiations treat services workers as dehumanised input factors in the quest to exploit their comparative advantage and as a potential trade-off for concessions in other services, agriculture and industrials.

This ‘trade’ abstraction applies equally to ‘virtual’ and actual migrant labour. Outsourcing is presented as a win-win for North and South, although the hierarchy between them remains intact. Jagdish Bhagwati et al. argued in 2004 that ‘outsourcing is just fundamentally a trade phenomenon’ to which standard neoclassical assumptions apply. As the US loses jobs in low wage services, which it then imports, it can expand in high-wage services that it exports. ‘On balance, therefore, ... the expansion of trade in Mode 1 services seems likely to offer America a transition to high-value jobs’ (Bhagwati et al., 2004, p 110). The US Department of Commerce proffered the more politically sensitive opinion that offshoring is likely to affect relatively few workers, and raise living standards for the average American, although ‘all of us must be troubled when American workers lose their jobs, whatever the reason’ (US Government Accountability Office, 2005, p 69).

In a paper for the South Centre in 2004, Indian economist Rupa Chanda applied the same comparative advantage rationale to mode 4. She argued that high cost, delays and restrictions that apply to visas and work permits constitute barriers to trade. The requirement that temporary migrants must pay social security taxes while they are denied access to benefits is a form of double taxation ‘akin to a trade tax or disguised tariff that erodes his [sic] earnings’ (Chanda, 2004, p 14). The regulations that govern the recognition of professional and technical qualifications are legitimate when they are designed to satisfy public policy purposes, quality and consumer protection; but when combined with delays, costs and untransparent discretions, they become protectionist trade restrictions.
These aspects of Chanda’s trade-based argument can be transposed without much difficulty into a rights-based advocacy for migrant workers. But the next step in her reasoning cannot. Chanda points to rules on temporary migration in the US that require employers to obtain information from authorities or other sources on the prevailing wage, and pay at least 95 per cent of that rate to foreign candidates. Similar parity requirements apply when wages in the European Economic Area are covered by collective agreements. Those requirements are justified from a traditional labour relations paradigm as protecting the jobs and working conditions of both nationals and migrants (ironically, the US and EU object to such ‘economic needs’ and ‘labour market’ tests in other contexts). However, they are incompatible with Chanda’s trade paradigm:

the principle underlying the wage parity requirement is that overseas nationals are to be hired to address the shortage of suitably qualified service providers in the host country and not to save money by hiring cheap labour from abroad. However, the wage parity requirement also acts to negate the cost-based advantage of many developing countries in exporting labour-intensive services and works against the very concept of comparative advantage based on cost differentials.

(Chanda, 2004, pp 9–10)

As Chanda’s argument starkly reveals, reconceptualising labour in terms of comparative advantage can strip away hard-won historic compromises and allow the state to disengage from the role of mediating between capital and labour.

Mode 4: temporary movement of services personnel

When it comes to international mobility, there is nothing new about privileges for managerial over proletarian labour, the former usually being European and the latter being ‘other’. Those privileges were previously advanced through idiosyncratic and discretionary national immigration laws; they are now legitimised through ‘market access’ commitments on trade in services. This transition relies on several sleights of hand. First, to substitute a ‘trade’ for a ‘labour’ paradigm, the ‘market’ that is being accessed must be reclassified as the services market of the purchaser, instead of the employment market of the host state (at least for those professionals, executives and skilled workers that inhabit the privileged tier in the international labour market). Second, the argument that mode 4 ‘conceptually does not fall under the administrative machinery applicable to permanent migration’ (Chanda, 2004, p 1) rests on a sharp, objective and illusory distinction between foreign workers engaged in services and non-service activities, and between short-term and longer-term foreign services workers.
Many Southern governments have embraced the artifice of mode 4 because it potentially offers them a vehicle through which to pursue a previously unattainable goal. Temporary emigration can help to soak up unemployment, provide income to struggling communities and alleviate the balance of payments deficit. Most Southern governments therefore prefer to export their lower skilled and unemployed, rather than their professionals. The idea that governments of rich industrialised countries would grant legally enforceable rights of access for such workers on a multilateral basis was unthinkable so long as it was framed in terms of labour and immigration policy. Hence the attraction of the ‘trade’ discourse.

The prospect of a cheap, docile and dispensable workforce is also attractive for wealthier destination states that face shortages in both the skilled and professional workforce and in less appealing services jobs. However, they prefer to cherry pick the executive, professional and educated migrants, often allowing entry on a semi-permanent basis. The ‘trade’ discourse absolves them of any moral responsibility if that results in brain drain, loss of educational investment or stunted economic and social development in the ‘exporting’ countries. Services workers with fewer skills are kept on a short leash or out altogether. By insisting that the latter are treated as temporary migrants, destination governments retain the discretion and flexibility to respond to their domestic labour needs, manage anti-immigration sentiments and limit their exposure to social security obligations. Downward pressure on the labour market from an underclass of migrants also strengthens their policies of labour flexibility and de-unionisation. Conversely, by maintaining the distinctive categories of ‘trade’ and migration, Northern governments can seek greater mobility for executives, managers, specialists and professionals that are linked to their transnational companies.

India is a special case. Its human exports are professionals, IT specialists and skilled contractors who are not necessarily associated with corporations and are eager to work temporarily in the US or Europe. The Indian government bargains hard for guaranteed access on their behalf. The primary beneficiaries are not the workers themselves, but the employing firms who are able to minimise their costs and maximise their profits and competitive positioning. Yet there is enough of a win-win for both the educated élites and the government of India for mode 4 to play a central role in the vision of India Shining, and drive India’s negotiating position in the Doha round and emerging bilaterals. Indian negotiators reject criticism that their focus on white-collar educated workers ignores the priorities of poorer countries to gain access for their lower skilled workers, as a matter of political realism.

Both source and destination states rely on, and facilitate, a secondary industry that has grown up around the ‘trade’ in services labour. Sometimes state agencies oversee the temporary export of their citizens. The Philippines government has done so since 1982 through the Philippine Overseas Employment Administration. Increasingly, private sector operators are linked
in transnational supply chains of immigration consultants, personnel agencies, training providers, lenders and money brokers. During the 2005 WTO ministerial conference in Hong Kong the Indonesian, Thai and Filipino domestic workers described the payment of agency fees as ‘debt bondage’. Others have condemned the recruitment of private security workers for Iraq by similar agencies as a twenty-first-century form of ‘blackbirding’. These supply chains are embedded within ‘recruitment geographies’, where they ‘sculpt the labor force and shuttle workers into different employment niches that reflect ideologies of gender, race, class, and civilisation’ (Mahler and Pessar, 2006, p 49). Even when their activities are formally regulated, governments that depend on remittance revenue often turn a blind eye to the exploitative practices of public agencies and private recruitment firms.

The GATS and the bilaterals operate to stabilise, expand and globalise these sectoral and geographical markets through commitments across multiple CPCs. The worker is integral to each stage in the migration-for-remittance chain, at the same time as the ‘trade in services’ discourse renders her invisible (Kurian, 2004).

**Mode 1: cross-border supply of services**

Services offshoring was a logical step in the continuum of restructuring that saw the outsourcing of industrial production in the 1960s and 1970s. The splintering of services from manufacturing (Bhagwati, 1984), and the subsequent privatisation and unbundling of public services, prepared the way for contracting out to local firms. New information technologies and market regulation of telecommunications expanded the possibilities for remote delivery of services, especially across the border. Companies such as EDS, IBM and Accenture (formerly Arthur Andersen Consulting) developed their outsourcing operations domestically, then expanded offshore.

Offshore outsourcing meant large, and subsequently medium sized, businesses could concentrate on their core strengths and outsource non-core activities. This offered the services equivalent of just-in-time offshore industrial production with benefits of lower costs, higher profits and quicker delivery. Firms enjoyed access to compliant services workers and reduced liability and social security costs, without the responsibilities of employers. New possibilities constantly emerged. IT advice desks could provide different levels of in-house and customer support around the clock. Staggered time zones meant back office operations could process airline tickets and insurance claims, read X-rays, and prepare medical transcriptions or legal documents overnight, ready for business the next day. Call centres could deliver customer support for banks, credit card or finance companies ‘24/7’. As with temporary migration, this attracted a secondary industry of training providers, recruitment agencies, real estate developers, business consultancies, market analysts and more (Case study 12).
This form of labour is described as ‘virtual migration’ because the disembodied production of services is divided between two or more geographically distant sites and received without the physical presence of the worker (Upadhya and Vasavi, 2006, p 7). That degree of spatial dispersion is possible because control is primarily exercised over mental, not physical, labour.

By the late 1990s offshore outsourcing had become a multi-billion dollar business. Despite some market differentiation on quality and function, most outsourcing was driven by price. Governments in the North and South competed to attract the industry and associated jobs. Most governments adopted an ‘enabling’ role by offering high quality infrastructure, tax breaks and other privileges. ‘Public private partnerships’ were common. A ‘pro-business environment’ also required ‘competitive labour costs’ through labour market flexibility and low unionisation.

Ireland and India were the first governments to market themselves as outsourcing destinations. Contrary to popular mythology, India’s IT revolution was not a triumph of free enterprise. Sociologists Carol Upadhya and AR Vasavi recount how it was systematically constructed through federal and state intervention (Upadhya and Vasavi, 2006, pp 7–15). Rajiv Ghandi began the liberalisation project and push to technological modernisation in the 1980s, capitalising on India’s legacy of state-sponsored scientific and industrial experience and English language proficiency. This fostered an indigenous middle class of entrepreneurs, who complemented the growing wealth and influence of a generation of non-resident Indian engineers who had emigrated to the US in the 1970s. The National Association of Software and Service Companies (NASSCOM) was formed in 1988 and worked in partnership with transnational IT pioneers, notably Texas Instruments.

The Indian government embraced the IT sector as a source of foreign exchange during the balance of payments crisis of the late 1980s. By the early 1990s, IT offered the government a sink for India’s educated unemployed after the liberalisation programme had failed to produce the anticipated economic expansion. A decade later, the services sector contributed over half of India’s GDP. In 2003, revenue from Business Process Outsourcing (BPO) alone was $3.6 billion. The fastest growing sectors of customer care and finance increased by 100 per cent and 70 per cent, respectively, in 2002/3 (Jha, 2006, p 154).

South Africa and countries in Eastern Europe and Asia generated a second wave of IT-enabled outsourcing of services in the early 2000s. They marketed themselves in terms of investment incentives, technological infrastructure, geography, sectoral clustering and a compliant and available labour force. But they essentially competed on price in a crowded, peripatetic and increasingly politicised market. In supply terms, China had the potential to displace them all before long. Demand was also heavily dependent on US firms. The US had welcomed onshore outsourcing when it generated local

The employment impacts of offshoring in the US are hotly contested. There are no reliable figures. Economists have claimed the numbers are small relative to job losses in total, and specifically in manufacturing, and argue that offshoring would boost the economy and net job growth. Trade unions countered that gross job losses have been significant and are likely to grow, and disproportionately affected workers and communities that were already marginalised. The US Congress is sensitive to growing fears about declining domestic competitiveness, job losses, privacy and security: in 2003 four bills sought to restrict offshoring; a further 40 federal and 200 state bills were introduced in 2004. Effective bans were initially limited to the offshoring of government procurement, but there was nothing to stop them being extended to other areas (Jha, 2006, p 155).

India faces its own internal dilemmas. The government heralded the rapid growth of IT-enabled services as a payoff for its investment in education and high-tech infrastructure and a platform for long-term economic development. The primary objectives were to increase export revenue and employment for its educated, but largely unemployed middle class. By 2004/5 remittances through mode 4 financed most of India’s trade deficit, while over half of the country’s trade in services involved IT-enabled services and BPO (Jha, 2006, p 160). But even enthusiasts for the GATS strategy conceded that the IT revolution had not produced the expected employment benefits. During the decade of the 1990s, the share of services in India’s employment statistics actually decreased around 1 per cent (Jha, 2006, p 150). Upadhya and Vasavi warn of a false dawn: ‘While the IT industry is widely regarded as a model for India’s development, due to its concentration on the export of software and IT-enabled services, it is largely an enclave economy that is closely linked to the global economy, but has few substantial linkages to local, regional and national economies’ (Upadhya and Vasavi, 2006, p i).

**GATS 1994**

The transformation of services labour was at an early stage during the Uruguay round. Mode 1 had the most unbound commitments, many for lack of technical feasibility. (Its coverage in the GATS 1994 text was therefore experimental and problematic.) That situation had changed by GATS 2000, as new technologies and the principle of ‘technological neutrality’ opened almost limitless possibilities for cross-border trade in services.

The primary focus in the Uruguay round was on mode 4, defined in Article 1:2(d) as the supply of a service ‘by a service supplier of one Member,
through presence of natural persons of a [not that] Member in the territory of any other Member’. The Annex on Movement of Natural Persons Supplying Services sought to differentiate entry and temporary presence from employment and permanent migration: ‘The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.’

The definition envisages several situations: an independent service provider from one country who sells their services directly to a company or individual in the host country; a national who is employed by their home company or by a third country company that is established in the host country; or a national who is contracted out by a company of their home or a third country to provide services to a company in the host country. Technically, nationals of one country who are imported as employees of a company of the host country seem to fall outside the definition – yet that is the nature of the US H-1B visas for which India and other governments are requesting guaranteed quotas under mode 4. As a further complication, Chanda points out that host countries often require contractors to be employees for the purpose of their local labour laws (Chanda, 2004, pp 15–16).

Paragraph 1 of the Annex refers to ‘entry and temporary stay’, while paragraph 2 is negatively worded to exclude permanent migration. ‘Temporary’ is not defined. Only one-third of the 1994 schedules specified time frames. These ranged from three months maximum for most business visitors to between two and five years for intra-corporate transferees. This inconsistency underscores the fuzzy boundary between mode 4 and medium-term migration and makes it impossible to determine objectively when a foreign national enters the local labour market and falls outside the legal scope of mode 4. To compound the confusion, both the US and Australia took commitments that apply to short-term employees.

The relationship to immigration rules is also unclear. The Annex reserves the right of countries to regulate entry and stay in their territory, provided these measures do not nullify or impair the benefits expected from their commitments. Interpretive Note 14 says ‘the sole fact’ of requiring a visa for only some natural persons does not constitute discrimination that nullifies or impairs specific commitments. This wording implies that, in some unspecified circumstances, visa requirements combined with other factors might be discriminatory. Some governments believe this could apply to limitations that are susceptible to discriminatory or arbitrary interpretation, such as vague references to economic needs tests (Chanda, 2004, p 19).

Sensitivity to the competing demands of the Northern and Southern governments meant that neither the text nor the Annex referred to a level of skill. This militated against the formal adoption of occupational specifications, such as the ILO (International Labour Organization) International Standard Classification of Occupation, known as ISCO-88. Consequently, the
categories used in schedules are vague and inconsistent. There are also familiar problems with the static, obsolete and ambiguous nature of W/120 classifications. It is uncertain, for example, whether a hospital call centre that provides medical transcriptions should come under a ‘health service’, a ‘business service’ or ‘telephone answering services’. A mode 4 commitment on ‘services incidental to’ agriculture, mining, forestry or fishing (CPCs 881 and 882) could cover seasonal workers or contract labourers, while the combination of mode 1 and the broad definition of ‘supply’ of a service could apply to a spectrum of cross-border activities.

In addition to the muddled state of the GATS 1994 schedules, some of the horizontal rules have largely been ignored. Article VII: Mutual Recognition provides that ‘a member may recognize education, experience, licensing and certification of a foreign provider’ through harmonisation, mutual recognition or autonomously. This allows governments to deviate from MFN provided the standards or criteria are not discriminatory or disguised restrictions against other members. Non-parties must have the opportunity to negotiate to accede to those agreements or reach similar agreements. As of 2004, there had been only 39 notifications by 19 WTO members, far fewer than the total number of mutual recognition agreements signed. No notifications involved pending negotiations (Chanda, 2004, p 35). Comprehensive Guidelines on Mutual Recognition Agreements developed in relation to the accountancy sector have not been replicated for other disciplines.

Other rules are ambiguous. Article VI:1 Domestic Regulation requires that measures of general application that affect trade in services in sectors that a government has committed are administered in a ‘reasonable, objective and impartial manner’. This applies to visas and work permits, which are notoriously discretionary. Members who have made sectoral commitments must have adequate procedures to verify the competence of the relevant professionals of any other member to deliver those services, and must ensure that their licensing procedures, professional certification and technical standards are not more burdensome than necessary to achieve quality. However, this only applies where the measures are not covered by national treatment or market access. Some licensing systems have elements, such as residency requirements, that fall into each category.

A review of the initial GATS 1994 schedules by the WTO Secretariat reported few meaningful commitments under Mode 4. At the end of the Uruguay round, members were given until July 1996 to improve their initial mode 4 commitments (this appears to have been a concession to the South to balance the extension of negotiations in financial services and telecommunications). That extension produced ‘modest results’, which were attached as the Third Protocol to the GATS. Most sectoral entries remained ‘unbound’ for mode 4 except as provided in the horizontal commitments. One hundred members made horizontal commitments, commonly using the
phrase ‘unbound, except for’ specified categories of personnel or purposes for the visit. Most commitments were limited to higher-skill categories, such as executives or intra-corporate transferees. These were organically or explicitly linked to mode 3, reflecting the requirements of transnational firms for their executives, managers and specialists to work internationally. Only 17 per cent of horizontal entries potentially covered low-skilled personnel; this included 15 per cent that referred to Contractual Service Suppliers, most of whom would be contractual employees of a foreign firm.

These commitments carried a wide range of limitations and restrictions that variously applied to: categories of personnel; duration of stay; pre-employment requirements; economic needs tests; quantitative restrictions; requirements for technology and skill transfer; discriminatory tax treatment; government approval; work permits, residency and citizenship; and recognition of professional qualifications. Almost 50 members reserved the application of domestic minimum wage legislation, often coupled with limitations on conditions of work, work hours and social security – even though such requirements fell outside the market access and national treatment rules. Twenty-two countries reserved the right to suspend commitments in labour/management disputes.

**GATS 2000**

By the time of GATS 2000, almost all Southern governments had identified labour as their major, and often only, source of ‘comparative advantage’. But India’s new role in the international division of labour, and subsequently in the WTO, saw it focus on IT professionals and skilled contractors to the exclusion of less skilled labour. The conflict between India’s offensive interests under modes 1 and 4, and the desire of the US and EU to secure greater market access in modes 3 and 4 while defending their own labour markets, became a major undercurrent of the negotiations.

Early proposals were tabled by two developing (India and Colombia) and four developed countries (the US, EC, Japan and Canada). They covered the same issues, but with contrasting emphases. All wanted greater clarity and predictability in mode 4 by using common definitions, more information about restrictions on movement, improved administrative procedures for entry and greater transparency. As negotiations moved into the request and offer phase a number of other developing countries and least developed countries submitted proposals, individually and collectively. They wanted fewer horizontal restrictions on access and mode 4 de-linked from mode 3. Specifically, they asked for longer permitted periods of stay, expanded categories of services workers and new sectoral commitments.

India led the charge. On mode 1 it sought horizontal commitments covering all services supplied across the border, supported by specific commitments on IT and IT-enabled services/BPO. India’s paper on mode
4 proposed horizontal commitments for a new category of independent professionals, including middle and lower levels, de-linked from mode 3. National immigration frameworks should either recognise a ‘GATS visa’ for scheduled categories of services workers or adopt special administrative rules and procedures. It also suggested super-imposing ILO occupational classifications on existing categories in members’ schedules.5

India is widely understood to have demanded from the US a guaranteed quota of 100,000 H-1B visas. The US Congress created that visa category for ‘guest workers’ in 1990 to alleviate labour shortages by allowing entry to a modest number of professionals and technicians. The level of the quota fluctuated from 65,000, which the US committed in its GATS 1994 schedule, to 115,000 for 1999/2000 and 195,000 for 2001/3. The total was cut back to 65,000 for fiscal year 2004 in response to a US economic downturn. In April 2005, USTR Peter Allegra, named mode 4 as a ‘critical pillar’ to successful Doha negotiations (Anderson, 2005). However, under the US Constitution the Congress has plenary power over immigration policy, including the level of H-1B visas (Wallach and Tucker, 2006). The USTR created a furore when maximum quotas of 1,400 and 5,400 H-1B visas were reserved in the US/Chile and US/Singapore free trade agreements, respectively. These agreements had been subject to the fast track approval process. Congress warned successive USTRs not to negotiate any further immigration provisions in trade agreements that would restrict its plenary power and prevent Congress from making future adjustments in response to changing national circumstances.6

India was prepared to lock in its autonomous liberalisation in sectors such as telecommunications to achieve its goals in modes 1 and 4. It also sought to leverage its position as part of the ‘new Quad’ by making concessions on industrials and agriculture conditional on commitments in services. After a detailed examination of India’s negotiating options in 2005, UNCTAD India urged a careful assessment of the implications of this strategy for future regulation and a ‘degree of caution in making binding commitments where significant regulatory experimentation is still underway’ (Jha, 2006, pp 218–19). Obviously advertsing to IT, the report noted there were risks when liberalisation was concentrated in a few sectors that were highly vulnerable to competition and had produced largely jobless growth. While it concluded that liberalisation would have positive effects, the authors warned: ‘There is a greater need to ensure that liberalisation does not lead to market failures and other socio-economic problems’ (Jha, 2006, p 219). This caveat had no visible impact on India’s negotiating position.

A chorus of international agencies (primarily the World Bank, UNCTAD, and the South Centre) theorised, constructed and reinforced India’s mode 1 and 4 proposals, which they depicted as central to a Doha ‘development’ round (e.g. Chanda, 2004; Mattoo and Wunsch, 2004). They generated two creative, and impossibly ambitious, ideas.
The first was a Service Provider Visa (originally called a GATS visa). The working paper produced by Rupa Chanda for the South Centre in May 2004, discussed earlier, proposed a special arrangement that was distinct from usual immigration visas and ‘would cover natural persons with professional skills and a specified minimum level of educational and other qualifications, including intra-company transferees, establishment based and independent CSS [contractual services suppliers], but excluding employment-based movement’ (Chanda, 2004, p x). Multiple entry visas would run for three years, with any one visit limited to one year. Penalties would apply to their abuse. The requirement for wage parity would not apply (Chanda, 2004, p 26).

Chanda also considered how to extend the proposal further down the skill chain. She suggested the CSS category could be expanded or split to provide for temporary contract workers whose demonstrated experience was certified through a government-designated recruitment or manpower agency. That agency (not the worker) would be the party to the cross-border contract with the foreign employer. This category of CSS workers would face more restrictive conditions of entry and stay than their professional counterparts, possibly including an economic needs test. Quantitative restrictions and minimum wages might apply, both for the workers’ own protection and to reduce objections about labour displacement (Chanda, 2004, pp 30–2, 42). WTO members would be asked to complement the visa by adopting model horizontal schedules for mode 1 and 4, plus sectoral commitments. Various versions of the model schedule were already circulating, based on a 2003 version that had been endorsed by the US Coalition of Services Industries and the European Services Forum (Chaudhuri et al., 2004, p 48). Chanda argued that linkages across modes 4, 1 and 3 were critical.

The second proposal addressed the problem that comprehensive GATS coverage for mode 1 was not achievable using positive list schedules. No classification scheme could keep up with changes in technology, business practices and skills, or anticipate new services that would be traded. Further, the request and offer process was costly, with unequal bargaining power and free riders.

World Bank economists Aaditya Mattoo and Sacha Wunsch first examined the possibility of a model schedule of full market access and national treatment commitments based on a positive list of IT and BPO related services at 2–3-digit level, using the updated CPC 1.1 classification. They concluded that this would still produce a static schedule and only cover standard IT and BPO. Their preferred option was a plurilateral approach where a critical mass of members made commitments to remove restrictions on cross border trade, except for a narrow and closed list of services (Mattoo and Wunsch, 2004, pp 24–5). Governments would also sign away the right to introduce new restrictions.
Mattoo and Wunsch were frank that the purpose of a model schedule was to lock in the current state of openness and pre-empt a backlash against offshoring, and pressures for trade barriers, in the US. They argued that a lock-in would put the responsibility for adjustment costs onto US domestic policy, instead of creating barriers to trade. While this departed from the GATS tradition of flexibility, they said it was justified by the ‘obvious protectionist danger from countries retaining the freedom to impose restrictions on cross-border trade’. Developing countries would also need to shed their ‘aversion to giving up policy discretion and overcome domestic opposition’ to opening their domestic markets to international competition (Mattoo and Wunsch, 2004, pp 30–1). The authors suggested the US and EU might be persuaded to agree because it would guarantee market access for their companies and affirm the ‘development’ dimension of the Doha round.

Chanda proposed a complementary raft of stricter rules on regulatory transparency, domestic regulation and mutual recognition (Chanda, 2004, pp 35–41). The guidelines on mutual recognition agreements for accountancy could be adapted to other professions and provide the basis for a legally binding multilateral agreement on recognition. Obligations to ensure transparency, objectivity and least burdensome requirements for recognition could be scheduled as ‘other commitments’ under Article XVIII, although this would still leave problems for occupations such as construction that had no paper qualifications, and for countries without advanced accreditation systems. Removal of the limitations on domestic regulation disciplines contained in Article VI:4 could be included in the proposed schedule of horizontal mode 4 commitments.

All these proposals were totally unrealistic. The 40-odd initial offers on mode 4 (EC as 1) showed very limited movement, most of which reflected members’ own offensive interests. The US made no improvements on GATS 1994. Chanda complained that: ‘There is still no clear separation of mode 4 from immigration rules and procedures and the distinction between permanent and temporary movement is still not evident from the commitments’ (Chanda, 2004, p 23). In other words, destination governments were not buying into the legal artifice and remained protective of their immigration policies.

Annex C of the Hong Kong Ministerial Declaration, which was brokered between India, Brazil and the developed countries, offered nothing to Southern governments in lower skilled services categories. It identified specific objectives for ‘new and improved’ commitments in mode 1, primarily to lock in existing levels of market access, and in mode 4 that aimed to remove or reduce economic needs tests for contractual service suppliers, independent professionals, intra-corporate transferees and business visitors. Both should be de-linked from commercial presence.

The model schedule on mode 4 re-emerged in a diluted form in the 2006 plurilateral request, led by India on behalf of larger developing countries and
made to nine other members. The request apparently attracted little response. The plurilateral request on cross-border services was also led by India. Despite their interest in e-commerce, neither the US nor the EC were parties. The request combined modes 1 and 2, seeking parallel commitments in both modes to avoid uncertainties over the classification of electronic delivery. The demandeurs sought the removal of limitations on mode 1 for ‘technical infeasibility’ and requirements of associated commercial presence. They also requested full national treatment on a long list of sub-sectors across business, telecommunications, distribution, financial, tourism, recreation and culture, and transport services. Commitments on computer related services at the two-digit classification level would accommodate rapid technological changes, and other commitments should use the new (but uncertain) category of CPC Rev. 1.1 Other Business Services: Other Support Services.

The bilateral challenge

As with most other sectors, the stalemate on modes 1 and 4 in GATS 2000 shifted attention to the regional and bilateral levels. This built on existing arrangements to produce a complex spectrum of approaches to temporary migration (Chanda, 2004, p 7). The EU, the European Economic Area, and the ANZCERTA provide for full mobility of labour and all service suppliers. NAFTA and CARICOM guarantee mobility for certain categories and occupations. The US/Jordan FTA and ASEAN FTA contain GATS-plus liberalisation using the GATS architecture. An APEC Business Travel Card facilitates entry for temporary business visitors among APEC members. The US/Chile and US/Singapore FTAs reserve visa quotas for entry to the US. The NZ/Thailand Closer Economic Partnership Agreement has no services chapter, but includes limited and specific provisions on labour mobility. ACP governments demanded mode 4 commitments at lower skills levels in their EPA negotiations with the EC; the EC responded that immigration was a matter for its member states. The CARIFORUM-EC EPA contained a chapter that applied only to key managerial and specialist personnel, graduate trainees, business services sellers, contractual services suppliers and independent professionals.

The shift of focus to the bilateral level also increased the opportunities for trade unions to exert direct political pressure. Conceptually and politically, trade in services agreements strike at the heart of the corporatist compromises that were reached between labour, capital and the state during the twentieth century. In place of tripartism, these agreements only recognise commercial service suppliers and states and are negotiated in arenas to which capital has privileged access and labour is excluded. The growing importance of this form of meta-regulation compounds the narrowing of the political space for organised labour to influence national policy and regulation under neoliberalism.
The driving ambition of the International Confederation of Free Trade Unions (ICFTU) (now the International Trade Union Confederation (ITUC)), which the European and American unions have traditionally dominated, has been to gain a seat alongside capital at the WTO table. There is no remote prospect of that ever being agreed to. At the first WTO ministerial meeting in Singapore in 1996, reiterated at every subsequent ministerial, Southern governments have insisted that trade and labour is a matter for the ILO. The dogged commitment of the ICFTU/ITUC to their engagement strategy has precluded a more critical stance that confronts the political economy of trade liberalisation. Even if trade unions were at the WTO table, they would be impotent to protect the basic rights and needs of their members because there is no legal or ideological space for their issues to be heard. The raison d’être of the WTO, including the GATS, is progressive liberalisation that removes barriers to the profitability of international capital; trade unions are intrinsically one such barrier.

A second, enduring goal of the ICFTU/ITUC is to inscribe the core ILO labour standards relating to the right to organise and bargain collectively, non-discrimination and child labour in all trade treaties. That would require a consensus of WTO members that will never be achieved. There is a greater prospect for success at the bilateral and regional level, where the inclusion of labour side-agreements or social chapters depends largely on political disposition, union strength and the balance of power between the negotiating parties. In 2007, for example, the Democratic Party majority in the US Congress insisted there must be stronger labour provisions in the US free trade agreements with Panama and Peru before it would ratify them. Peru complied: the US–Peru Trade Promotion Agreement approved by Congress in November 2007 contains a number of labour-related obligations, including a requirement for each party to ‘adopt and maintain’ core labour rights in its laws and practices. President of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) John Sweeney reflected on the turbulent history of labour provisions, noting that the Peru agreement:

represents major progress over the Jordan FTA, which required only that countries ‘strive to ensure’ that their laws recognise and protect the core labour standards. It is an enormous improvement over all the agreements previously negotiated by the Bush administration (Chile, Singapore, Morocco, Australia, Bahrain, DR-CAFTA, and Oman), which required only that countries enforce their own domestic labor laws. . . . [But] we are justifiably skeptical about whether the Bush Administration will faithfully enforce the newly negotiated labor and environment protections . . .

As with their engagement strategy, the preoccupation of peak union bodies with the social clause diverts their attention from more systemic issues.
Trade in services agreements threaten the livelihoods of workers through competitive deregulation, foreign investment liberalisation, removal of domestic preferences, elimination of labour market tests and other core demands. Trade liberalisation in agriculture, industry and natural resources contributes to the push and pull factors that impel workers to migrate internally and offshore, often into highly exploitative services industries. These threats to workers are not matters of core labour standards; they are endemic to a free trade paradigm that perpetuates a grossly unequal international division of labour that is still delineated on traditional social class and North/South lines and denies human beings the fundamental rights to livelihoods, security, voice and dignity.

**CASE STUDY 11 CALL CENTRES – THE ASSEMBLY LINE OF THE TWENTY-FIRST CENTURY**

When the international call centre phenomenon took off in the late 1990s, it spawned a new pejorative: to be ‘Bangalored’. This colonial-infused imagery refers to ‘people who have been laid off from a multinational because their job has been moved to India’. American academics Kate Bronfenbrenner and Stephanie Luce urge a more sophisticated understanding that offshore outsourcing ‘is not a story of good jobs being stolen by low-wage workers in Latin America and Asia’, but rather a search by the world’s largest multinationals ‘for ever-cheaper production costs . . . and the flexibility that comes from diverse supply chains in a volatile global economic and political climate’ (Bronfenbrenner and Luce, 2004, pp 78–9).

The call centre story reveals what the abstract ‘mode 1: cross-border trade in services’ obscures: that outsourcing redistributes power and wealth from labour to capital, whether in the US, Canada, Shanghai or Bangalore. The influential outsourcing industry lobbies hard for this outcome. Accenture, a reincarnation of Arthur Andersen Consulting, employed over 158,000 people in 49 countries in 2007 with net revenues of $16.65 billion. An active promoter of privatisation, it led the expansion of call centres into public utilities in the US and Canada, and specialises in providing outsourced social services for governments. Although it is registered in Bermuda, Accenture has been active in both the European Services Forum and the US Coalition of Service Industries. Another major player in the call centre business is Convergys, which grew out of Cincinnati Bell. Convergys reported total revenue in 2006 of ‘just’ $2.8 billion. It claims more than 74,000 employees servicing customers in over 70 countries using 35 languages.

Both firms have a major presence in India. But they do not wield the political clout of India’s home-grown transnationals. Wipro and Infosys are India’s oldest, and most influential, IT firms respectively. Wipro began as a factory making cooking oil and laundry soap in 1945 and entered the IT
industry when IBM quit India in 1977. By 2007 the company had 30 offices and 50,000 employees worldwide, including a ‘nearshoring’ facility in Romania.\footnote{15} Infosys set up in India in 1981 and the US in 1987. In 2006 it crossed the $2 billion revenue threshold. With 66,000 employees in 44 countries, Infosys has become the icon of the Indian IT industry and arguably its most powerful player.\footnote{16}

The industry’s promoters promise massive gains for buyers and sellers from offshoring their IT-enabled services (ITES), especially BPO, and flow-on benefits to local and national economies. The global consultancy firms that provide these ‘independent’ reports, often jointly with the local industry association, are themselves key players in the outsourcing game. They are also major advocates and beneficiaries of the GATS.

Their projections are seductive and treated as factual, even though their assumptions and methodology are questionable. The most consistently influential analyst is the McKinsey Global Institute, an ‘independent think tank’ within McKinsey & Company. Its staff are primarily consultants seconded from the parent firm’s outsourcing/BPO division. One of the most quoted McKinsey reports, produced in 2004, claimed that every dollar US companies transfer to India through outsourcing creates as much as $1.46 in new wealth. Of that $1.46, India receives 33 cents. The US economy captures the remaining $1.13 through cost savings, increased exports, repatriated earnings and $0.45–$0.47 in ‘additional economic output created when US workers are reemployed in other jobs’ (Agrawal and Farrell, 2003). Offshoring clearly does produce substantial cost savings and improved profits for some US firms. However, critics object that the benefits for individual firms cannot simply be projected onto the US economy as a whole. Further, aggregated gains to firms, or the wider economy, hide the redistribution of wealth from workers to capital, and not all displaced workers find new jobs (Bivens, 2005).

McKinsey is everywhere. In a 2004 report they argued that Germany was missing out on similar gains to the US because hiring and firing was too difficult, and the wage floor provided by collective bargaining and social protections inhibited those workers who lost their jobs from taking lower paid re-employment:

> Germany’s labor laws and product market regulations were designed to achieve important social objectives, such as protecting workers’ incomes and preserving employment. But over the past two decades, one lesson has become clear: mixing social and economic policy reduces employment and slows growth. By decoupling these policies, Germany could boost economic growth and employ more people and thus be better able to finance its social agenda.

(Farrell, 2004, p 13)
In 2005, the South African government received a Business Process Outsourcing and Offshoring strategy prepared by McKinsey. The government had created a public private partnership with its Business Trust and the newly created South Africa Contact Centre Community (Sacccom), a business lobby for the call centre and BPO industry. The McKinsey strategy aimed to attract R1.4 billion ($200 million) in foreign investment by 2008 and create 100,000 jobs. Achieving that would require 40,000 to 60,000 personnel to be trained each year, mainly at managerial level. But to be competitive South Africa would have to cut operating (mainly labour) costs by around 25 per cent. Business sources said the departments of Labour and Trade and Industry were committed to the strategy, including new flexible labour laws (Robinson, 2005).

Such grand projections are premised on, but gloss over, the fact that offshore outsourcing is highly competitive, differentiated and itinerant. One industry survey in 2006 suggested ‘[t]he IT Outsourcing boom appears to be over, onshore providers are facing new pressures, and companies are outsourcing more selectively’ (DiamondCluster International Inc., 2006). While 75 per cent of respondents currently outsourced to India, China had rapidly appeared on their horizon and a majority of Indian providers planned to invest there. Canada was relatively effective at marketing the benefits of language, culture and time zone to the US, but Eastern Europe, Ireland and Latin America were finding it hard to generate demand.

When governments gamble on outsourcing and fail, it is their workers and communities who pay the price. A public relations drive in the US and Canada promoted call centres as an opportunity to fill the unemployment vacuum faced by small towns. These onshore call centres are the most vulnerable. For example, the Sykes Corporation, which runs call centres for Microsoft and SBC, began operating in economically depressed American communities in the late 1990s, lured by tax incentives. In 2004 the company began closing these operations to move offshore. Some 1,800 workers were laid off. Their devastated communities were left with the fiscal deficit from the incentives, and no alternative income to keep the local economy afloat. The same pattern was evident in the UK. Official sources reported in 2001 that one-third of new jobs created were in call centres. By 2004, communities devastated once by outsourcing of their major manufacturing plant were facing a second wave of offshoring of their replacement jobs (Bronfenbrenner and Luce, 2004, p 74).

The unparalleled success story appears to be India. Bangalore, Mumbai, Delhi and several other cities cashed in early on the outsourcing boom. By 2004/5 India had captured 65 per cent of the global market for offshore IT services and 46 per cent of global BPO. The software and services industry generated $13.5 billion in earnings that year, including $10 billion in exports. The ITES-BPO sector grew by 37 per cent in 2006, faster than the software sector, with exports reaching $4.6 billion. The two largest activities were
customer interaction services and finance and accounting (Upadhya and Vasavi, 2006, p 8). The Indian government celebrated the IT revolution as the pathway to a resurgent India Shining. A NASSCOM McKinsey report in 2005 projected a massive $60 billion in export revenues from IT and ITES in the next five years, with 2.3 million people in direct employment and ‘indirect and induced employment’ for another 6.5 million workers (NASSCOM, 2005, p 19).

Karnataka (whose capital is Bangalore) was the first state to develop an IT policy, in 1997. Within two years, the state had vested planning authority in a new Bangalore Agenda Task Force (BATF), headed by the managing director of Infosys. In 2002, the government adopted a Millennium BPO Policy, developed with McKinsey, which aimed to create one million jobs by 2010. Firms were promised an ‘investor-friendly’ environment, with fiscal incentives such as exemptions from import tax on computer hardware and capital goods, other tax holidays, free or subsidised infrastructure and land, priority power connections and exemptions from power cuts. A Single Window clearance mechanism provided fast-tracked approvals that bypassed other departments and local bodies. The Karnataka Industries (Facilitation) Bill 2002 simplified the regulatory framework. Bangalore was run by and for the IT industry. A World Bank senior adviser remarked approvingly in 2004: ‘The story of growth in Bangalore is unique because it is being led by private entrepreneurs from the IT industry. The BATF model of civil society being involved in all aspects of city planning can be a model to other cities in other countries.’ The controversial BATF office was eventually closed down, but the IT sector continued to drive the Bangalore Development Authority’s decisions.

Bangalore became known as the Silicon Valley of India. The city’s website celebrates its (undated) UNDP ranking as the fourth best technology hub in the world. By 2004, the IT sector accounted for 50 per cent of total transactions in the central business district and 97 per cent in the suburbs. The number of registered IT companies more than doubled over six years, although the majority were very small. The largest were ‘captive units’ of transnational companies or niche third party providers.

A secondary industry of property developers has emerged, promoting new office complexes, gated residential colonies, shopping malls, gyms, colleges, a railway station, helipads and more. Demand boosted land prices from Rs2,203 ($50) per hectare in 1982 to Rs8,747,501 ($206,000) in 2004. The potential profits are staggering: a 10-year Royal Garden City project into which the Vancouver-based Royal Indian Raj International Corporation invested $2.9 billion had an estimated ultimate retail value of $8.9 billion.

As the IT industry increasingly colonises the neighbouring semi-urban and rural areas, local farmers are forced to sell their lands to the government, or at a slight premium to speculators. Village panchayats have no control.
Arkavarthi, the Bangalore Development Authority’s biggest residential layout with 20,000 proposed sites, extends over 16 villages. Local villagers successfully challenged the plan in court, but lost on appeal and could not afford a prolonged Supreme Court hearing in New Delhi. A large police presence was deployed to quell their continued protests. One villager describes the impact on local people and livelihoods:

Our entire land was rich in agriculture and we used to grow mangoes, coconut, grapes, flowers, brinjal and many other vegetables. Everything has been destroyed. I had 20,000 flower bushes on which 300 labourers used to work. I will get some compensation but what about these 300 workers? They never figure in any compensation proposals and are the worst affected.20

Some of those displaced had already taken up jobs as cleaners, drivers and servants in nearby plush apartment complexes.

Everything in Bangalore is now designed to service the IT sector. The state government has poured money into IT parks, an outer ring road and flyovers, a metro system, an international airport and an 8,000-hectare IT corridor. All this feeds into a jammed city that faces a deepening crisis in roads, water, sanitation, sewerage and public transport. Poor maintenance and broken pipes leave local people dependent on public fountains with contaminated water. In 2005, the 75,000 residents in Dodallpuru town received 10 minutes of water every five days. Short cuts and poor planning have caused unprecedented floods. French consultants prepared a Comprehensive Development Plan in 2005 that redefined Bangalore’s slums as ‘shadow areas’ – they encompass 48 per cent of the population. Despite its privileges, the industry constantly complains about poor infrastructure and threatens to leave.21

The state’s rationale for the IT strategy was to create employment. A Board for IT Education Standards (BITES) was given the job of removing bottlenecks in Karanataka’s ‘Human Resource Bank’ through programmes across schools, colleges and professional training. To ‘create an optimal environment for growth’ in the sector, Karnataka ‘simplified’ its labour laws by removing ‘barriers’ to employing women at night, flexi-working hours and mandatory weekly days off.22 Direct IT employment in Bangalore exploded from 20,000 in 1999 to an estimated 200,000 to 250,000 of the city’s nearly 7 million in 2005 (Upadhya and Vasavi, 2006, p 15). About two-thirds of those workers came from outside Bangalore. Some 35 per cent of the BPO jobs in Bangalore in 2005 involved low-end customer care such as ticketing, payroll, telemarketing by phone and internet.

Ruth Buchanan describes call centres as a new kind of work for a new class of ‘faceless and placeless’ workers who animate the scripts of the post-industrial economy (Buchanan, 2002, p 47). The production process is both
highly Fordist – tasks are geographically and conceptually segmented from the centre of the enterprise – and Taylorist with ‘very exact, rigid, and “panoptical” systems of monitoring, measurement, and management, using sophisticated computer and telecommunication systems that bind the human worker tightly to the machine’ (Upadhya and Vasavi, 2006, p 139). Buchanan quotes the self-perception of Rosa, a call centre worker in New Brunswick: ‘you are standing waiting until that call comes in to use you to make money. And you are simply another part of that machine’ (Buchanan, 2002, p 62).

Comparative studies of call centre workers in the US and India document many similar experiences (CEC (Centre for Education and Communication) et al., 2006; Upadhya and Vasavi, 2006). The centres have their own gendered hierarchies, with men predominating in technical and financial sectors, and women at the monotonous, low-skilled bottom end. The employer has absolute power over the working relationship through performance metrics, electronic monitoring, scripted texts and productivity targets. The work is allocated by Automatic Call Distributors and Predictive Dialling. Workers face contradictory obligations to maximise efficiency while maintaining customer orientation, including deference to abusive customers. High levels of job-related stress contribute to significant health problems, with Indian workers in one survey reporting high levels of stomach disorders (CEC et al., 2006, p 80).

Cost-cutting drives the call centre industry, which means it is intrinsically anti-union. Significantly, two-thirds of 249 call centre workers surveyed in three Indian cities agreed that a union was required; when asked their preferred kind of employee association, 38 per cent again said a union (CEC et al., 2006, p 88). Fledgling attempts to unionise have been stifled and workers who persist are terminated. When unions announced plans to organise the call centres following the rape and murder of a young woman worker in Bangalore in December 2005, the reaction of NASSCOM and employers was hostile. Unionised call centres in the US appear to be particular targets for offshore outsourcing, even though in-house unionised call centres generally have the best-trained and most stable workforce, with the best reputation and customer satisfaction ratings (Bronfenbrenner and Luce, 2004, pp 36–8). Indian labour organisers and US unions have responded to these common challenges by developing collaborative research, exchanges and strategies (CEC et al., 2006).

However, there are also significant cross-national differences. Bangalore’s call centre workers are better qualified than their US counterparts: 92 per cent in one study were graduates and 18 per cent had postgraduate degrees. Yet their main recruitment criteria are ‘soft skills’ of fluency in English, language skills and ‘cultural capital’. The Indian workers are paid around six times less than their US counterparts; adjustments for purchasing power parity reduce the wage gap to around 25 per cent (CEC et al., 2006, p 89).
Actual salaries in India are highly discretionary and confidential. They are based on quantitative and qualitative performance metrics that include subjective parameters such as tone of voice, language (grammar), accent, problem solving and customer satisfaction. Firms balance the benefits of retaining and churning the workforce: one firm calculated it needed 270 days to cover costs of recruitment, induction and training; after two years workers became too expensive and ‘anti-retention’ strategies kicked in. Around a quarter are contract workers, which give the employer added flexibility (Upadhya and Vasavi, 2006, pp 133–5).

Indian workers also face higher levels of work intensity than their US counterparts. One study reported that an employer required workers to be engaged in calls for 94 per cent of work time, demanding near-impossible levels of concentration. Efficiencies and self-discipline are achieved through individual monitoring, team-based competitions and peer pressure. Night shifts that coincide with US time zones and six-day working weeks create social isolation and family tensions. Caller hostility and racism are emotionally demanding. So is maintaining a cultural pretence. While most clients are content with ‘accent neutralisation’, some specify assumed accents and identities in their Service Level Agreements (Upadhya and Vasavi, 2006, p 130).

Call centre workers everywhere complain that the work is monotonous and high stress. Celebrated author Arundhati Roy has described the centres as glorified sweatshops producing ‘cybercoolies’. Despite the stressful conditions, three-quarters of workers in one Indian study described the work as challenging or satisfying and nearly 60 per cent saw it as a career option (CEC et al., 2006, pp 58–9). This paradox can be attributed to the success of ‘soft management’ techniques. The socialisation process begins at the initial training: ‘army-style “boot camp” techniques are aimed at producing fully socialised and indoctrinated service workers, incorporating them into the company’s culture and its philosophy of customer service, and retaining them through social bonding’ (Upadhya and Vasavi, 2006, p 131).

An illusion of status is created through designations as customer relations executives or customer service associates. Whereas US call centres usually have four levels of hierarchy, in India there are 10. Most centres have specialist departments for rewards and recognition, and invest in creating a ‘fun’ workplace for their young, largely unmarried workforce (Upadhya and Vasavi, 2006, p 147). Competition and high stress are mitigated by the ‘hip’ work environment, loud rock music and hedonistic intra-firm socialising that many outsiders view as being not quite respectable. Dubbed ‘Zippets’ and ‘Liberatisation’s Children’, call centre workers represent the new post-colonial youth culture of conspicuous consumption that is emerging in large Indian cities. India Shining is symbolised by shopping malls, chic bar-cafés and designer brand clothes. While some critics see the phenomenon as cultural imperialism, sociologists Upadhya and Vasavi urge a more nuanced interpretation:
Rather than understanding the BPO phenomenon as representing a straightforward ‘cultural invasion’ by the West, it must be situated within the political economy of outsourcing, which has produced a new kind of labour force that is managed (like the IT workforce) through culture as much as through computerised surveillance systems. . . . Like any system of cultural control or domination, there is always scope for agency, resistance, and critique by workers.

(Upadhya and Vasavi, 2006, pp 154–5)

Their subversion takes passive as well as active forms, including embryonic moves to organise workers within individual companies on a transnational basis.

The more pressing question for Upadhya and Vasavi, among others, is whether the IT-driven strategy for India Shining, which in turn drives its GATS strategy, is economically, socially and culturally sustainable. The old compromise between the state and middle class under the Nehruvian disposition is being replaced by a new relationship between the political élite and the IT industry. As the state becomes embedded within private and global capital, those interests divert the formation of policy across education, infrastructure, investment and social development from addressing the endemic poverty of the rural and urban masses. Existing class and caste divisions intensify. Upadhya and Vasavi describe the IT sector as ‘an outpost of global capital within a largely agrarian and still industrialising economy’ (Upadhya and Vasavi, 2006, p 8). Call centres offer a high wage, but low quality option to a small section of young, educated unemployed within the politically powerful middle class. Even 1 million IT workers would amount to just one quarter of 1 per cent of all India’s workers.

India’s preoccupation with IT also ignores the vulnerability of an export-oriented industry that is skewed towards low-value, low-cost services that are outsourced from the US. The industry could be plunged into a steep decline by declining competitiveness, especially relative to China, a recession in the global economy, and a deepening political backlash in the US.

**CASE STUDY 12 TAKING NURSES AND SOLDIERS TO MARKET**

On 11 December 2005, Hong Kong’s Victoria Park was filled with Filipina, Thai and Indonesian maids on their day off. That was nothing unusual; thousands gather there every Sunday. What marked this occasion was their leading role in the opening mobilisation to oppose the sixth WTO ministerial conference being hosted by the Hong Kong government. This action was
the culmination of workshops, education forums and demonstrations held throughout 2005, which built on their (relatively) successful protests over proposed cuts to their wages and contract conditions from 2001 to 2003.\(^{26}\)

Many of these domestic workers are college-educated nurses or teachers who have not seen their children for several years, having left them at home in the care of family members or paid caregivers. Some are now ‘illegals’, trapped in a foreign land where they have no status and are exploited and often abused but that they cannot afford to leave. Their stories, as portrayed in speeches, placards and street theatre, brought to life the social realities of mode 4. Two kilometres away, their governments were seeking to expand guaranteed access for temporary migrants, as a trade-off for deeper liberalisation of their agriculture, industry, natural resources and services – the very policies the women blame for forcing them to leave their homes and families.

The Hong Kong mobilisations were the public and politicised face of a rapidly growing and highly gendered global industry built around remittances. For 30 years the Philippines has dominated this ‘trade’ (Lindio-McGovern, 2004; Choy, 2003). In the past decade, the export of women’s and men’s labour from the global South has intensified. The World Bank estimates that over $250 billion was remitted from overseas workers to developing countries in 2005 through official and informal channels, up 60 per cent in four years (Ratha and Shaw, 2006). Faced with deepening poverty, and the prospect of earning over 20 times more than at home, temporary migration-for-remittances has become a worldwide strategy for household survival. A complex institutional and commercial infrastructure has emerged to facilitate and profit from this cross-border trade in people and associated capital flows.

What rational choice theorists portray as personal choice is embedded in the structural inequality of global capitalism. The Pacific island of Fiji is a classic example. The Fijian government has dutifully pursued the goal of a competitive export-driven economy through a disabling combination of structural adjustment and trade liberalisation (Slatter, 2006b). Fiji’s fragile export economy depends on eroding trade preferences for sugar and garments. The former are now WTO-illegal, and drove the grossly inequitable EPA negotiations on goods that were concluded with the EC in November 2007; the latter are subject to periodic short-term renegotiation with Australia. Public sector restructuring failed to deliver an end of corruption and left Fiji’s physical and social infrastructure in disarray. Even subsistence lifestyles at village level are severely stressed in an increasingly cash-based consumer economy.

Fiji’s economy took a further hit in December 2006 when the country suffered its third military-led coup in 20 years. Each coup has impacted heavily on tourism, Fiji’s other major foreign exchange earner, and on the broader economy. The coups have also prompted the exodus of a range of skilled professional and trades people, who can gain entry into countries...
such as Australia, New Zealand and Canada. Reflecting the ethnically
carged nature of the coups, the majority of these migrants are Fiji islanders
of Indian descent.²⁷

There has also been an upsurge in temporary migration. For years, Fijian
women have sought better paid work in Australia and New Zealand, the
US and the Gulf states, mainly as nurses, caregivers and teachers. Men
from the regular army and the reserves have signed up for well-paid UN
peacekeeping duties or, along with civilians, joined the British Army.
New ‘market opportunities’ have emerged since 2000 with the chronic
international shortage of nurses and care givers, and the wars in Afghanistan
and Iraq. By 2006 official remittances comprised the country’s second largest
foreign exchange earner after tourism; informal remittances would make
the figure much higher.

Faced with a cumulative crisis in unemployment, poverty and balance of
payments, and encouraged by both the World Bank and Asian Development
Bank (Connell and Brown, 2005; World Bank, 2006), the Fiji government
embraced remittances as a positive development strategy. By redefining
migration-for-remittances as mode 4 of trade in services, the government
hoped to circumvent the racism that historically attaches to migration from
the Pacific. Using the ‘trade’ discourse, the government argued that mode
4 market access in categories such as teaching, nursing, tourism and security
would allow the island to capitalise on its comparative advantage and
encourage temporary, rather than permanent, migration.²⁸

This rationale informed Fiji’s requests in the GATS 2000 and the EPA
negotiations with the EC. In return for a guaranteed entry quota, Fiji was
willing to consider further liberalisation of agriculture, goods, services and
investment – a trade-off that would deepen the economy’s remittance
dependency. The prospect of concessions in mode 4 was also a stated
prerequisite for negotiations with Australia and New Zealand for regional
economic integration agreement under the Pacific Agreement on Closer
Economic Relations (PACER).

By mid-2007 there was no prospect that Fiji would achieve significant
new access under mode 4 from anywhere.²⁹ Yet migration for remittances
continued to grow as a socio-economic response to push and pull factors.
Australia and New Zealand were happy to continue sucking out nurses and
teachers, trained at Fijian taxpayer expense or with aid funding, to
compensate for their own loss of skilled workers, failed health policies and
under-investment in training and social services. The demand for security
workers in Iraq and other conflict zones also seemed, tragically, insatiable.
The Fijian government rationalised this organic outflow as part of its trade
strategy, a fiction that absolved it from examining the broader economic,
social, cultural and development implications. The combination of remittance
dependency, Fiji’s weak regulatory capacity and the trade rubric allowed
foreign and local commercial interests to exploit this ‘twenty-first century
form of blackbirding’ without effective constraints.³⁰
In economic terms, the outflow of ‘human capital’ from Fiji each year has been estimated to cost the economy, directly and indirectly, some F$44.5 ($28) million a year, with nursing migration being a significant factor (Reddy et al., 2004; Storey, 2005, pp 11–12). Between 1999 and 2001, the net outflow of Fijian nurses exceeded the number trained. Political instability was a factor in this, with a reported exodus of Indo-Fijian nurses following the 2000 coup. There was little incentive for expatriate nurses to bring their skills home. One survey showed Fijian nurses were paid an average A$9,322 ($7,866) as migrants and A$3,080 ($2,600) on their return, just A$560 ($472) more than non-migrant nurses (Brown and Connell, 2006, p 159). The same authors predicted in 2004 that the ‘skill drain is likely to continue, where there have been structural reforms that reduce public sector employment, wages and salaries remain unequal, working conditions are difficult and hierarchical, international recruitment intensifies and many kin are overseas’ (Brown and Connell, 2004, p 208).

The exodus of nurses had slowed in 2003 and 2004, but began rising again in 2005. The government was under pressure to increase the numbers of nurses trained, both to fill the gap created by those who leave and to capitalise on opportunities for work offshore. Around 2,000 Fijians, mainly women, had been applying for public nurse training each year but as of 2006 only 120 to 140 places were available. The course used to be fully subsidised, with a three-year bond. While this helped retain newly trained nurses, it meant the more experienced nurses went offshore, depleting the small pool of nursing expertise and undermining the public health service. A ‘cost-sharing’ alternative allowed nurses to pay a fee to avoid the bond. Most students funded this by advances on their (parents’) Fiji National Provident Fund (FNPF) pension.

Limited access to training in the public system created a market for private health and caregiver courses, primarily geared for export. These full fee courses were also eligible for advances on the provident fund. Other students borrowed from relatives, village trusts or church funds, raised loans, or relied on remittances from their parents or relatives. The nature and quality of private health care educators varied enormously. A respected local charitable trust (Sangam) opened a government-licensed private nursing college in 2004 and charged $F5,000 ($3,137) a year. The government denied similar accreditation to a private tertiary education company that mainly offered franchised Australian business studies qualifications, for which ‘graduates’ received 40 of the 100 immigration points they required to migrate to Australia. That private provider then established a two-year childcare training course that cost $F9,000 ($5,647), the bulk of which went to the Australian franchiser. Again, fees could be paid from the FNPF. Despite a high drop-out rate, there were no refunds. Several former migrant nurses also established basic, small-scale, lower cost courses for care givers; these attracted no foreign recognition or immigration points,
but were used by recruitment agencies as evidence of skills training for immigration purposes.

Private recruitment agencies, often acting as brokers for further layers of personnel agencies and sub-contractors, have descended like parasites on the remittance industry. Some are shysters. A World Bank report on remittances in 2006 cites the example of a US recruiter who collected $1,200 payments from Fijian nurses without providing jobs (World Bank, 2006, p 131). Women with unrecognised caregiver qualifications, and who have no possibility of migrating permanently, are the most vulnerable.

The Fijian Ministry of Labour conceded in 2006 that its process for vetting the contracts of its offshore workers was ineffectual. One New Zealand temping agency became renowned for short, unannounced recruitment blitzes. It ignored the ministry’s complaints about such tactics. The agency targeted women with any health-based training that did not require occupational registration. According to Fijian sources, it charged F$8,000 ($5,000) for married women and F$6,000 ($3,700) for unmarried women to join its register. The contractual relationship was with the agency, and each work assignment was separate. The hourly rate it paid for a ‘clinical assistant’ in the private or public sector was marginally above New Zealand’s minimum wage, with some provision for penal rates. However, the ‘assistant’ had to be available to work any hour of the day, any day of the week. There was no guarantee of work, only ‘the opportunity to undertake assignments for a client’. Cost, time and uncertain work hours limited the opportunities to upgrade existing qualifications, meaning that de-skilling, rather than up-skilling, could well occur. If a worker signed the contract after leaving Fiji, the Ministry of Labour said it had no authority to monitor or enforce its conditions.

The international literature on remittance migrants who work as nurses and caregivers confirms their vulnerability to abuse and exploitation. Recruitment agencies commonly keep the women isolated and de-unionised (Manchester, 2005, p 12). The more private the workplace, the greater the risk. This applies even where governments, such as the Philippines, operate the programme. As ‘guest workers’ these women have no direct access to the labour market, no prospect of permanent employment, no job security, and no guarantee of a living weekly income. As migrants, they have no entitlement to social security benefits and are liable to sudden changes in regulations. As women, they face intrusion on their privacy and even their bodies. Constitutionally, they have no access to permanent residence or citizenship in the destination country, and can become disenfranchised citizens at home. If they overstay, they become criminals; children born to them can fall into a stateless void. The ‘trade’ discourse makes these human costs invisible.

The Fiji government’s national export design strategy group on labour mobility concluded in 2006 that a strategy to train nurses for export was
premature. It would be feasible in the medium term (five years), provided an appropriate regulatory regime, mutual recognition arrangements and incentives for retention were in place.\textsuperscript{34}

Fiji’s more dominant human export is security workers to conflict zones. By 2006, an estimated 3000 Fijian men were working in Iraq as private contractors or soldiers with the British Army. Fiji’s politics, economy and culture are highly militarised. The army offers attractive job options, primarily for indigenous Fijian men. Teresia Teaiwa cites unofficial estimates of the standing army of regular and territorial forces in 2005 as 10,000 ‘making Fiji the most militarized independent nation in the Pacific’ (Teaiwa, 2005, p 202). The men can earn double their Fijian wages as UN peacekeepers. Other soldiers and civilians sell their skills to offshore armies, even straight from school. One former Fijian officer working with the British said: ‘In these modern days, our warriors cannot find the resources to look after their families. If there is a greener pasture there, they will automatically resign and try for it.’ In similar vein, the local spokesman for transnational recruitment agency Global Risk observed: ‘My pool can never run dry.’\textsuperscript{35}

The ‘reconstruction and relief contracts’ in post-invasion Iraq have generated a massive demand for foreign security workers to guard bases, energy infrastructure and commercial premises, or to drive and escort convoys. These are privatised military operations that depend on well-disciplined workers who are willing to risk their lives for high returns. In 2006, a ‘quartermaster’ conducting guard and escort duties was paid $2,000 a month;\textsuperscript{36} the estimated poverty wage in Fiji was $115 a month.

The lead contracts are awarded to companies of US coalition partners or ‘contributing nations’ and operate through a complex chain of subcontractors across many countries. In Fiji, most recruitment firms are subsidiaries of major British and US contractors, such as Homeland Security, ArmorGroup, Global Risk Security and Control Risk. All are headed by former Fijian military or police officers who can exploit the deep bonds among the powerful élite of politicians, bureaucrats and military.

By February 2005, Global Risk had reportedly sent 1,000 men to Iraq.\textsuperscript{37} These foreign-owned firms have standard contracts that are formally checked by Fiji’s Ministry of Labour. A typical contract employs each man as an independent security consultant.\textsuperscript{38} He is encouraged to adopt ‘efficient working methods’, including longer working hours and sub-contracting. There is no employment relationship. The contract states in three separate places that the men are assuming personal risk and liability. The minimum payment for accidental death is £85,000 ($172,000), but there is no compensation for death or injury not caused on the job. The men must pay for their own private sickness insurance. This does not cover long-term health problems and trauma when they return home. Those who stay for a further term may spend several months before receiving new contracts, during which time they are presumably not insured.
The locally owned recruitment firm Meridian achieved particular notoriety. It provided workers for Kuwait-based Public Warehousing Company (PWC), a privatised state enterprise that specialises in warehousing and supply chain services. By May 2005 Meridian had recruited an estimated 20,000 mainly non-military indigenous Fijians directly from their villages. Administration fees to Meridian reportedly totalled F$3.5 ($2.15) million in three months. Some were paid by village trust funds and the Methodist church. Months later most recruits still had no contracts. Only 400 men initially went offshore. Many of those later complained of not being paid (Maclellan, 2007, p 52).

Meridian’s boss left Fiji to avoid a police inquiry and set up a new head office in Kuwait. Recruits who left for Iraq signed ‘invitations to contract’ with Meridian’s Suva agency, which bypassed vetting by the local Ministry of Labour. Their formal contracts were governed by Kuwaiti law and payments were in Kuwaiti dinars. There is no accurate record of how many men Meridian sent to Iraq via Kuwait, but many of the 18 Fijian contractors killed in Iraq by mid-2007 were initially with Meridian. In addition, 11 Fijian soldiers with the British Army were killed.40

The government initially welcomed the economic opportunity to capitalise on the country’s military capacity. The acting head of the Ministry of Labour said:

We are very happy, because it helps to solve our unemployment problem and brings in remittances . . . We are adopting an open market policy. But we are advising people, instead of sending money home every week, to invest it wisely so they will have a more long-term future.41

The Great Council of Chiefs also rejected concerns, saying only a small percentage of Fiji’s 216,000 men were affected. The foreign exchange they earned was equivalent to 45 per cent of the national budget, almost double the earnings from sugar.42 After the Meridian scandal, the Cabinet approved an overseas recruitment policy for the licensing of local agents, which required bonds to be lodged as security for wages and various employment protections.43 It seems that this was not enforced. By mid-2006, the unregulated remittance market was becoming a political liability. Local Fijian media reported that ‘[f]amilies of dead guards can be and have been left with little or nothing in the way of compensation for the simple reason that their employers cannot be traced’.44 In one case, the wrong body was sent back to Fiji (Maclellan, 2006). The government said it had no legal responsibilities for the casualties.45

In June 2006, then Prime Minister Qarase called on Fijian ex-servicemen to return to farm their land; a spokesperson for the Iraqi workers blamed the government for failing to provide the funds so they could do so.46 The UN Working Group on the use of mercenaries expressed concern at the
end of their visit to Fiji in May 2007 about the absence of national legislation
and measures to protect security workers from exploitive treatment and
human rights violations, and to reintegrate them safely into their communities
on their return.47

The spectre of more deaths hangs over a remittance economy that has
become dependent on war and a society that becomes ever more militarised.
Fijian women and men will continue to seek temporary work offshore to
sustain their families and communities, whether or not Fiji secures mode 4
commitments for nurses, caregivers and security workers. The trade discourse
has allowed the government to eschew a whole-of-government approach
that addresses the long-term economic, social or cultural impacts on
villages, urban communities and the country, and to divest its responsibility
to explore alternative development strategies.

Avelina Rokoduru describes ‘almost a conspiracy of silence about
workers’ rights, in the rush to establish worker mobility in the interests of
the ‘market’ and the ‘big players’ (Rokoduru, 2004, p 225). As the ultimate
manifestation of the new international division of labour it also allows
destinations – and their occupying powers – to ignore the deep structural
divide that impels people to risk their lives in someone else’s war.
The fractious battle for ‘minds over markets’ reflects profoundly different perceptions of knowledge and culture: one, as a dynamic process of ‘discourse and dialogue’, the other as a static and commodified form of ‘content and artefact’ (Baker, 2002, pp 249–51). Trade in services agreements recognise only the latter. International market exchange requires products that are asocial, ubiquitous and substitutable; government measures that defend and promote the social, particular and unique are condemned as ‘protectionist’.

Defenders of the dialogical ideal insist that it is progressive and dynamic, the antithesis of backward looking protectionism. They perceive public domains of knowledge and culture as unique and contestable arenas for social communication in which people affirm, critique and transform their individual and collective identities and visions for the future. The media’s role as the fourth estate of democratic government is mirrored by the quasi-constitutional role of universities to expand the horizons of knowledge, excite the intellect, and engage critically and independently with the pressing questions of the time.

As these paradigms collide, they expose a contradiction that reaches far beyond either trade in services agreements or culture and education in their specific sense. The ‘regime of accumulation’, to recall Gill’s term, reduces citizens to consumers who are governed by a spectator democracy that is, in turn, subject to supranational disciplines. Yet attempts to embed this redefinition through meta-regulation have failed to dislodge people’s understanding of themselves as social beings, or their commitment to sovereignty and self-determination through complex, participatory and contested polities.

This chapter challenges the application of neoclassical trade theory to exchanges of culture and knowledge and the consequences for a vibrant, complex democracy. A review of OECD and World Bank sponsored neoliberal policies across both domains reveals an awkward hybrid of public goods and dynamic international markets. Pressure from the formidable US entertainment industry to secure control over those markets through trade in services commitments initially focused on audio-visual services. Those
ambitions were largely unfulfilled in the Uruguay round. Renewed attempts in the GATS 2000 negotiations, coupled with increasingly assertive public and private sector ‘edupreneurs’, have (so far) been stymied by intense national and international campaigns in defence of the dialogical paradigm of knowledge and cultural exchange.

As with public services, however, claims to ‘victory’ would be misleading. The global markets in these services are multifaceted. The production and exchange of knowledge and cultural ‘products’ increasingly depends on the infrastructure of telecommunications and finance and is conducted through digital platforms and e-commerce. The new generation of bilateral agreements provides the opportunity to secure deeper and more diverse commitments that reflect the complex entertainment and higher education industries. Case study 13 shows how commitments on trade in services can strengthen the international education supply chain and entrench the hybridised public/private form of contemporary higher education. Case study 14 recounts how the US successfully subverted moves to develop an antidote to trade in services agreements through a United Nations Educational, Scientific and Cultural Organization (UNESCO) convention on cultural diversity – an outcome that also served the interests of those developed countries that championed the convention.

A theoretical misfit

In Media, Markets and Democracy, C Edwin Baker argues that the basic premises of neoclassical trade theory are deeply flawed, at least in relation to culture (Baker, 2002, Chapter 10). The producers of cultural products in larger and wealthier countries, especially the US, have very large budgets. The ‘first copy’ costs of production for a Hollywood film, CNN news item or Warner music product are very high. The costs of adding a marginal consumer are negligible. So the export costs for producers with large domestic markets are low. They also have the resources to diversify by using different windows to access multiple markets at differential prices. It is this massive potential for export earnings that tilts American cultural content towards factors of universal appeal – action, violence, sex and slick production qualities. That content is discursively simplistic and lacks cultural complexity.

By contrast, local producers who cater for unique local interests have far smaller audiences and limited potential demand. Their viability is threatened by the low cost, high production quality and universality of US products. Claims that this is an expression of consumer sovereignty ignore the likelihood that these imports squeeze out local productions that have culturally and socially relevant content and are highly valued, but unprofitable. Markets only register consumer preferences that are expressed through commercial transactions. People’s political choices may favour
content that the market does not produce, such as political salience, local languages or indigenous culture. Local cultural discourses are not simply substitutable by a foreign product – showing *Harry Potter and the Sorcerer’s Stone* does not engage a young Mapuche woman in Chile on the place of the shaman in her cultural world. Individual consumers may not even know what they are missing when the market is dominated by homogenous imports.

Baker further argues that cultural markets have significant negative and positive externalities, beyond the individual consumer (Baker, 2002, Chapter 11). The national structures and legal frameworks within which individuals exercise their preferences are decided collectively and are often robustly contested. The entire populace benefits from a well-functioning democracy; it is harmed by ignorance or the social consequences of exclusion or illiteracy. Hence:

a country’s own domestic media products potentially better provide (or provide in ways not duplicated by imports) domestic content that people need for a democratic political process to function well and, more generally, for their cultural discourses of identity, meaning, and value. In this regard, domestic media can have tremendous positive externalities not supplied by the imports that threaten to replace them.

(Baker, 2002, p 237)

Baker argues that governments should not negotiate away the prerogative to regulate in ways that ensure that their people can hear their own voices and engage in the development of their communities.

This does not imply a closed door and suffocating introspection. Exposure to cultural diversity and potentially transformative values and perspectives are, using economic terminology, ‘positive externalities’. Speaking in opposition to the US South Korea Free Trade Agreement, the Director of South Korea’s Coalition for Diversity in Moving Images Gi Hwan Yang described losing one’s culture as ‘tantamount to losing one’s language and soul. . . . No culture should disappear from the face of this earth because it lacked market competitiveness’. The struggle, he said, is to open borders, not to close them. Achieving that requires an end to market-led cultural invasion and a truly balanced exchange among cultures so that diversity and self-determination are able to thrive. Genuine diversity militates against narrow nationalist protections. But to achieve diversity, balance and welfare-maximising results, both locally and internationally, requires the potential for ‘governmental interventions, including local subsidies and possibly well-designed trade restraints’ (Baker, 2002, p 238). Such strategic interventions are not permissible under free trade.

Baker’s critique of neoclassical economics applies equally to international trade in education, where universalised curriculum and digitised materials
are marketed through franchises or e-education. Knowledge is reduced to information that, by necessity, is ubiquitous, sanitised and monolingual. Access is governed by price and technology, while ownership is locked up through intellectual property laws. Corporations that have the scale and technological platforms to dominate the education export market assume asymmetrical power over knowledge exchange. Universities in many Southern countries struggle to compete with slickly packaged international qualifications that bear famous academic brand names, especially when those qualifications also facilitate migration. The premium on IT, English language and businesses courses can crowd out the study of physical and social sciences and humanities that are infused with local knowledge and culture. The anodyne content of mix-and-match modules stifles the critical thought and scholarship that is integral to genuine education. National universities in poor countries or regions become ghettoised. Scholars who remain in them are generally excluded from the ‘knowledge-driven’ global economy, and their potential to catalyse a vibrant polity is undermined. As with cultural practitioners, educationalists who seek to sustain the viability of their national universities are the opposite of protectionists or isolationists – they believe their intellectual mission is enriched through the ‘deep internationalisation’ of people and ideas that sustain a ‘global knowledge commons’ (Duke, 2002, p 97).

Information technologies heighten the potential for positive and negative externalities, in both cultural and knowledge exchange. On one hand, they can enhance access and provide opportunities for interaction that overcome distance and isolation. They can also foster creative new pedagogies, research strategies and interactive communications. Visual and audio technologies can break down barriers between languages, cultures, geographies and social class. Yet the dominance of transnational corporations over both carriage and content risks a new form of information imperialism that erodes local control, capacity and substance, especially in poorer countries, and deepens the existing technological divide.

**Shifting paradigms**

The power to shape minds and culture is at the heart of any hegemonic project. For much of the twentieth century, the governments of richer countries shaped their knowledge creation and cultural policies to serve multiple objectives: to enhance capital accumulation and social reproduction, manage social stability and maintain their own political legitimacy. How they did so varied with time, place and context. The democratic and egalitarian ideals that were used to justify state ownership and/or social regulation of media, culture and higher education were often not present in practice. State directed approaches could be stultifying and repressive. But they were constantly challenged for that, confirming their essential function as ‘both a
primary means and central result of democratic participation’ (Baker, 2002, p 252).

Control over culture and knowledge was equally pivotal to the colonial project and created an enduring legacy. The policies and practices of colonialism towards indigenous peoples were overtly malign. Cultural imperialism was often genocidal. Universities were a rarity and colonial powers used higher education as a means to socialise and reward élites, often by sending them to the metropole. Independence posed challenges for people and governments in the South to reconcile their desire for authentic decolonisation within post-colonial realities.

These complex dynamics were profoundly ruptured with the onset of neoliberalism.

**Marketising knowledge**

The dialogical vision of knowledge creation and exchange is encapsulated in the UNESCO World Declaration on Higher Education for the Twenty-First Century: Vision and Action, adopted by UNESCO members as recently as 1998. The Declaration affirmed the ‘core mission and values of higher education [that] should be preserved, reinforced and further expanded’. The long list included educating highly qualified graduates to meet the needs of all sectors of human activity; advancing, creating and disseminating knowledge through research; interpreting, preserving and promoting cultures in the context of cultural pluralism and diversity; providing opportunities for higher learning throughout life; contributing to the development and improvement of education at all levels; and protecting and enhancing civil society by training young people in the values that form the basis of democratic citizenship, and by providing critical and detached perspectives in the discussion of strategic choices facing society.3

This mission had a particular poignancy in the post-independence South, as people and governments espoused a nationalist development agenda. Their higher education systems were heavily dependent on Western knowledge and intellectuals, and the patronage that was bestowed by one or other superpower as coinage in the battle for Cold War ascendancy. At the same time, higher education offered the prospect of genuine development – even though it was often (but not always) still the domain of the élite. The experiences of countries varied. Under-resourced and isolated universities battled to survive in many, but not all, parts of Africa (Mihyo, 2004). Long-established and new universities in the Indian subcontinent flourished, but remained captive of what Dinesh Abrol calls the ‘eternal triangle of quantity, quality and equity’ (Abrol, 2006, p 123). In Latin America the Córdoba reform movement, begun by students in Argentina in 1918, espoused a ‘commitment to accessibility, social justice, academic freedom and institutional autonomy’ (Schugurensky and Davidson-Harden, 2003,
Soviet investment in the intellectual infrastructure of Eastern European countries laid the platform for vibrant post-communist revivals in some former satellites; that same dependency devastated higher education and research in others, which collapsed when the economic resources and political patronage were abruptly terminated (Ginsberg et al., 2003).

By the 1990s the public system of higher education and research was under pressure across the global North and South. The radical re-organisation of capital and the associated growth in services and intellectual property had created new imperatives. ‘Massification’ and ‘flexible lifelong-learning’ were pre-requisites for an internationally integrated labour market. The dynamic redundancy of products, skill sets and jobs meant that workers had to be continually retrained. Just-in-time (or just-for-me) education created a new demand for disaggregated units and fragmented courses that could be easily marketed, sold and delivered by instructors (rather than educators) to disembodied consumers anywhere in the world. Education to think was replaced by training that shed the pretence of ‘meaning making’ and was designed and delivered solely with end-users in mind.

Transnational firms pressured wealthier states to reinvent their higher education systems to serve the new economy. The European voice of big business, the Union of Industrial and Employers’ Confederations of Europe (UNICE), complained that the social and cultural values that influenced government policies and regulatory frameworks were major obstacles to corporate competitiveness, and that collaboration between industry and universities was ineffective (CEO, 2000). Yet those market approaches to higher education and research had to be superimposed on the existing structures, operations and personnel.

The OECD’s Centre for Educational Research and Innovation (CERI) championed an education reform strategy for its members that required higher education institutions to refocus on efficiency, accountability, competition and cost recovery. Competitive pressures intensified as governments cut real per capita subsidies, mandated private tuition fees and authorised public or private loan schemes. University income increasingly depended on effective marketing and performance rankings. Polytechnics sought to emulate the universities, and both diversified their offerings in response to common consumer demand. The outreach programmes of public institutions competed with private education companies for local and foreign students who sought training in English language and IT. As students assumed the identity of customers, their approach to learning also became more instrumentalist. The student body was increasingly depoliticised and the curriculum gradually sanitised. University governance became managerialist. Academic labour was explicitly proletarianised and preferably de-unionised, with tenure giving way to more flexible employment that enabled quicker adjustment to shifting demand.
This transformation involved a ‘systematic reduction of the historically hard-won social institution of education to a commodity for private purchase and sale’ (McMurtry 1991, p 216). Yet attempting to graft the new onto the old generated complexity and resistance. Determined governments forced the pace by reorienting their policies and resources towards the private providers that were rapidly expanding to meet, and stimulate, a seemingly infinite demand for credentials. The tertiary education market spawned a new industry of para-education services including student recruitment, franchises, surveys and rankings, education databases, loan schemes and education investment analysts (Case study 13).

While higher education was devalued, postgraduate research degrees and university research enjoyed an elevated status. The corporations required constant innovation, but were not willing to pay the huge costs of research. Basic research conducted by mainly US-based academics, and funded by the state, had laid the foundations for the dynamic IT revolution in the 1970s and 1980s. By the 1990s, OECD governments were under intense pressure to harness the research capacity of their universities to advance the competitiveness of their country and its firms (Castells, 2000, p 126). Governments became more strategic, providing incentives for universities to focus on high-end, high-quality postgraduate education to produce the next generation of innovators. Publicly funded research was tied to science, technology and industry, often through private sector partnerships. Universities became preoccupied with patenting their intellectual property, creating in-house commercial ventures and spin-off businesses to capitalise on their competitive advantage. As with teaching, the reorientation of research marginalised the social sciences, humanities and cultural disciplines, and threatened the fundamental tenets of academic freedom and critical and independent scholarly inquiry.

The responses of Northern governments varied in ways that reflected their academic traditions, social values and the grip of neoliberalism: in 2007 Norway was still not charging fees to foreign students, whereas New Zealand, which treated foreign students as ‘cheques on legs’ (Duke, 2002, p 100), struggled to rein in a dysfunctional competitive market that depended on volatile ‘export education’ earnings. In the research arena, states and universities with the biggest budgets began a bidding war that undermined the research base of others.

In a parallel transition, private education markets were superimposed on public higher education in the South. In the 1980s structural adjustment programmes cut the budgets of many universities that were already struggling. The loss of funding and post-graduate opportunities after the demise of the Soviet Union deepened the crisis. During the 1990s, the World Bank came to dominate the higher education policies of Southern countries, even though it funded only a miniscule proportion of their spending. This disproportionate influence was felt through policy advice, consultants,
offshore training of officials and partisan reports, as well as debt conditionalities.\textsuperscript{4}

The Bank’s initial strategy was to redirect resources to primary and secondary education, and to commercialise tertiary education. By 2002, the Bank decided that higher education was important after all, and advocated ‘lifelong learning’ as the means to integrate poor countries and people into the knowledge-driven global economy. Governments were now urged to create an enabling framework that used market mechanisms to encourage innovation and responsiveness by public and private providers (World Bank, 2002, p vi). By 2006, Bank officials were stressing the need to harness information technologies for ‘asynchronous’ distance learning and digital resources, such as textbooks (Salmi, 2006, p 7). Potential partners for these ‘enabling’ governments included franchise and corporate universities, media companies, electronic libraries and education brokers.\textsuperscript{5}

The Bank’s policies were financed with assistance from its private sector lending agency, the International Finance Corporation (IFC). The IFC began targeting private tertiary education and vocational training intensively in 2000. It professed a balanced commitment to business, development and poverty alleviation. But all investments had to meet the required rate of return, and be made in a policy environment that reduced or eliminated restrictive regulations on the education market (IFC, 2001, p 11 and Annex 4). Investment priorities identified by the IFC focused on creating markets for para-education services, such as technology based education companies and projects, financing of student loans, and ancillary services such as cross-border accreditation and IT development.

This strategy promoted a higher education system for most of the South that was neocolonial and grossly asymmetrical. Quality programmes from credible Northern education institutions could and did contribute positively to filling some of the voids in poorer countries. However, societies that desperately needed external support to develop their higher-end science and technology capacity often experienced a super-saturation of basic courses they could already supply. Modules, courses and degrees that were mass-produced on a commercial scale crowded out indigenous norms, values, culture, language, pedagogy and knowledge. Paschal Mihyo describes the impact in Africa as ‘intellectual dumping’ (Mihyo, 2004, p 15). Foreign competitors created ‘wage havens’ for the best local academics and encouraged internal migration that depleted the public university sector, with long-term consequences. National governments had no representation on the governing boards of these companies, making it impossible to regulate content in ways that promoted local development and objectives. Nor were the companies subject to national audit and accountability mechanisms.

As with the North, this scenario played out in different ways. The people of Argentina staunchly defended the centuries old University of Buenos Aires against the World Bank prescription. By contrast, the Romanian government
unofficially began to transform its university system during the socialist era under IMF tutelage. This was formalised through a World Bank higher education reform package from 1996 to 2002 (Ginsberg et al., 2003, pp 424–7). Governments in Chile during and after the Pinochet regime, and the Cardoso administration in Brazil, embraced the neoliberal model voluntarily (Ginsberg et al., 2003, pp 416–18). Some Southern governments marketed themselves as regional education hubs, usually in collaboration with private foreign companies – Chile into Latin America, Romania into Eastern Europe, Egypt into the Arabic speaking world (Altbach, 2004, p 8). In India, the commercialisation and privatisation of higher education to cater for the massive demand for technical education from the middle classes ‘damaged the agenda of equity as well as quality of education and aggravated the crisis in higher education in India’ (Abrol, 2006, p 121).

The story was just as diverse for research. Late industrialising states, such as Singapore, South Korea and Taiwan, had been strategically building their technological research capacity for some years. India invested belatedly, but heavily, in IT research and expertise and secured a niche market for its firms and professionals (Case study 11). China’s rapid catch-up strategy threatened to eclipse the rest. Other countries that lacked capital, basic infrastructure, research facilities and expertise faced exclusion.

**Marketising culture**

The transformation of cultural policy followed a similar path. The twentieth century Western ideal of national culture is encapsulated in Northrop Frye’s famous typology of popular lifestyle, traditional ideology and creative powers (Kertzer, 2004/5, p 570). However, the heavy hand of the state was a mixed blessing. National policies were designed to serve diverse commercial, aesthetic, advocacy, propaganda and ‘nation building’ functions. Laws mandated state ownership of radio and television, libraries, galleries, museums and archives as public services that delivered public goods. Tax-payer subsidies represented a collective investment in orchestras, ballet and writing, and limited the intrusion of advertising and commercialism in public broadcasting. Regulation of the media promoted local content and ‘balanced’ (often conservative) reporting and censorship during ‘national emergencies’. Private, foreign and cross-media ownership were strictly limited. Telecommunications were state owned, regulated and subsidised to provide a balance of investment, access and affordability. Intellectual property laws recognised both the moral rights of authors and common access to creative works, while they guaranteed commercial returns. Material support for musicians, poets, artists, dancers, filmmakers, writers and actors was provided through direct employment in public services and protected local industries; others benefited from state subsidies, local community grants and government procurement.
Once the global South was liberated from colonial rule, the indigenous cultures that re-emerged were hybrids of the traditional, occidental and national (Sreberny, 2000). Governments often displayed a nationalist fervour that was itself culturally and politically intolerant. Yet culture provided a vital organising tool for political resistance against both colonial and authoritarian regimes (Comfort, 2002; Santiago, 2002).

Neoliberalism had a dramatic impact on this cultural landscape. Policies and laws that privileged or protected local culture and practitioners gave way to light-handed regulation that fostered liberalised markets and international competition (Street, 2001, Chapter 8). Privatisation of many aspects of broadcasting and the easing of restrictions on movements of capital and foreign investment generated a rush of mergers and acquisitions in the news media. Mega-corporations became vertically and horizontally integrated. Corporate empires spanned an ever-widening range of activities: newspaper production, magazine and book publishing, music, film and television production, pay television, information technology, software development, satellite transmission, e-commerce, retail, advertising, public relations, sports promotion, events management, star management, leisure facilities, museum franchising, intellectual property, brand marketing, financing and much more. Privatisation, outsourcing and cuts to state support made the livelihoods of creative artists more precarious. Professionals, such as journalists, teachers, librarians, archivists, technicians, actors, musicians and visual artists faced the added pressure of labour market deregulation and foreign ownership.

These changes generated new market dynamics across the global North and South. Countries such as India, Brazil, China and some Arabic states had the scale and investment capacity to dominate their regional markets and create (limited) reverse flows of cultural products into the US and Europe (Sreberny, 2000, p 113). Some mega-entertainment companies exploited what David Harvey calls the ‘collective symbolic capital’ of such locations as Rwanda or Vietnam whose name, places or events make them exotic and potentially profitable. This investment in the local created new sources of revenue, employment and skills for some Southern countries in ways that appear antagonistic to globalisation (Harvey, 2002, p 101). But the international division of labour still operated through the Eurocentric bias of corporate ownership, customer base, language, cultural norms, and race and gender stereotypes.

Information technologies also opened new doors. Creators, professionals and countries benefited from economies of scope and scale, lower-cost technologies and real-time co-production. Niche markets emerged in outsourcing, and in cultural products that targeted the young and affluent. However, initiatives that succeeded were often taken over once they became lucrative or too competitive. Again, all these initiatives were located in an economic architecture and infrastructural terrain that was laid by, and for, the mega-transnationals.
The battle of the GATS

The dialogical traditions in both the universities and the culture sector sustained a stubborn resistance, which slowed the neoliberal advance and generated complex and contradictory hybrids of the public and private. At the same time, the commercial industries were demanding greater control of the regulatory agenda. Media and entertainment giant Time Warner objected that: ‘The cultural issue is appearing with alarming frequency in the international marketplace, and must be roundly rejected’ (quoted in Sreberny, 2000, p 102). The European Roundtable of Industrialists complained that: ‘All too often the education process is entrusted to people who appear to have no understanding of industry and the path of progress. . . . The provision of education is a market opportunity and should be treated as such’ (quoted in Monbiot, 2001, p 334). These polarised positions translated into prolonged battles over the GATS.

Trade and culture: phase 1

Conflicts over trade and culture have a long pedigree (Bernier, 2005, p 748). The US has always been the demandeur on behalf of its powerful entertainment industry. Canada and France have usually led the resistance. The early arguments focused on cross-border trade in tangible goods, primarily books, movies, records, artefacts and art works. An uneasy accommodation was reached in the GATT 1947, where it was accepted that films were sufficiently threatened by international competition to justify a unique carve-out in Article IV. The American motion picture industry never stopped objecting to such ‘protectionism’. These tensions carried over to the CUSFTA, signed in 1988. The Canadian government secured a limited exemption from the obligations of the agreement for national cultural industries (Article 2005). This nevertheless allowed the US to retaliate to an equal commercial value if the Canadian measures were otherwise inconsistent with the Agreement.

Canada’s exception was imported into NAFTA in 1993. Mexico’s pro-US, pro-liberalisation government led by President Carlos Salinas did not seek a similar provision (Acheson and Maule, 1998, p 4). His government had already begun privatising the network of state cinemas that had guaranteed the exhibition of Mexican films. Over the next few years, many local theatres closed and were replaced by Canadian and US multiplexes. US firms came to dominate both film distribution and exhibition. The two state-supported distribution chains went into bankruptcy. US productions in Mexico ceased. The US entertainment industry had the support of NAFTA’s investment and services chapters as they pushed for further liberalisation of Mexico’s cultural regulation. As of 1992, half of the movies shown in Mexican theatres had to be local, with a ceiling on ticket prices of three pesos; by 1997 the quota was down to 10 per cent and the price
cap raised (Sánchez-Ruiz, 2001, p 93). US studios had captured 80 per cent of the film market when in 2003 the Mexican government announced plans to sell the national news agency, the National Cinematographic Institute and various studios and workshops. The proposal provoked a massive outcry and was abandoned. Although local film production continued, US control over distribution meant very few of them were shown in Mexico.

The CUSFTA and NAFTA negotiations coincided with the Uruguay round. The ‘friends of culture’ led by the EU, France and Canada argued unsuccessfully for an annex on audio-visual services in the GATS. The EC then sought a cultural exception along the lines of CUSFTA. The US resolutely refused (Bernier, 2005, p 749). Despite the broad scope of the cultural industries by the 1990s, their sights remained narrowly focused on film and television, as in the GATT.

At the end of the Uruguay round, very few commitments were made on audio-visual services (covering production, distribution, exhibition and broadcasting). By 1998, only 19 members had made market access commitments. Four were developed countries (the US, Japan, New Zealand and Israel). Fifteen were developing countries, six of which had made commitments under pressure from the US during their accessions. Most commitments were subject to limitations. Some 33 members (the EC as one) had lodged exceptions to MFN treatment, mostly for co-production agreements.

New Zealand’s commitments became something of a cause célèbre for the GATS critics (Kelsey, 2006). The government had signed off its schedule in 1993 in the midst of a radical neoliberal programme that included the deregulation, corporatisation and partial privatisation of public broadcasting (Kelsey, 1997, pp 112–13; Murdock, 1998). Trade officials warned the Cabinet that the proposed market access and national treatment commitments on audio-visual services would prevent New Zealand from reinstating specific restrictions on foreign investment in broadcasting or introducing local content quotas, unless it negotiated adequate compensatory adjustments. Cabinet confirmed the negotiating instructions. New Zealand’s offer was hailed by the US as exemplary.

Both Australia and New Zealand made similar commitments using a negative list on services in the ANZCERTA in 1988. In 1996, a New Zealand industry coalition successfully took the Australian Broadcasting Authority to court in Australia to force them to treat New Zealand productions as local content.

By 1999, the level of New Zealand content on television was the lowest in the OECD. A Labour government was elected with a mandate to introduce compulsory local content quotas for radio and free-to-air television, as part of its Third Way ‘nation building’ strategy. The Prime Minister, who was also the Minister of Culture, responded to official advice that quotas would breach New Zealand’s GATS commitments by saying:
We have unilaterally disarmed ourselves on trade but very few others have been so foolish. We’re now left with perfectly legitimate calls for local content and people saying ‘You can’t do that because of Gats’. This seems a bit ridiculous so we’re just working out the best way to handle it.\textsuperscript{10}

Ultimately, New Zealand’s commitment to being an exemplary WTO citizen in the interests its agricultural sector held sway. The government set voluntary targets for free-to-air television networks, backed by a threat to legislate if necessary.\textsuperscript{11} The USTR objected even to that.\textsuperscript{12}

Cultural policies could be caught by WTO rules even without services commitments, as the prolonged dispute between the US and Canada over split-run magazines showed. Canadian editions of US titles, such as Time Warner’s \textit{Sports Illustrated Canada}, contained mostly US content, but with Canadian advertising. The Canadian culture industry objected that split-run magazines were capturing the advertising dollar and reducing the viability of local publications. The Canadian federal government imposed an excise tax on advertising in magazines that originated abroad. Canada had not made any commitments on advertising services under the GATS, and the government apparently assumed the tax was covered by protections for cultural industries that were grandfathered under NAFTA (\textit{Canada-Periodicals}, 1996, p 6).

The US complained to the WTO that the measure was unlawful discrimination under the GATT, arguing that the US and Canadian magazines were directly competing or substitutable products. The Appellate Body agreed, saying that neither the GATT nor the GATS took precedence: ‘a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product – the periodical itself’ (\textit{Canada-Periodicals}, 1996, p 17). Specific aspects of each transaction could be assessed under different rules. Hence, activities that were permitted by one WTO agreement could be struck down through another.\textsuperscript{13} Even if Canada had won the WTO dispute, it could still have faced a challenge under its commitment on advertising services in NAFTA.

The Canadian government repealed the offending law. It also removed other support measures, notably the tariff on imported split-run magazines and a postal subsidy that reduced the distribution costs for Canadian periodicals. These were replaced by the Foreign Publishers Advertising Services Act 1999 that prohibited Canadian advertisers from placing advertisements in foreign magazines. A foreign publisher who breached the law could be fined. After sustained US objections, the Act was limited to publications that contained a level of Canadian advertising that would almost never be reached.\textsuperscript{14}
Trade and education

Unlike cultural services, education remained below the radar during the Uruguay round. For most governments education was a public good. ‘Export education’ was still a novelty: what later became the biggest education company in the US, Apollo Group, was only established in 1993 and publicly listed in 1994. Some 30 members made initial commitments across the five W/120 categories in 5: Education Services (primary, secondary, higher, adult and other), the fewest after energy services. The largest proportion related to mode 2, which related to restrictions on nationals studying abroad. By 2002, accessions had boosted the number of members with education commitments to 42 out of 144; 34 were from the South (Mundy and Iga, 2003, p 290).

By the time of GATS 2000, neoliberal policies had cut deeply into national education systems. The export education industry had grown exponentially, thanks to both massive demand from China and the internet and World Wide Web. The US was the largest exporter. Other leading players were Australia and New Zealand, whose industry was largely comprised of state tertiary institutions that had become hybridised under neoliberalism.

The WTO Secretariat’s background note in 1998 documented the economic importance of the education sector, the changing structure of the market and emerging ‘trade’ issues. It listed ‘barriers’ that ranged from immigration and currency restrictions to limits on licensing, nationality requirements and economic needs tests.15

The prospect of embedding the education export industry through the GATS was highly controversial. The European Regional Ministers for Culture and Education, speaking as the ‘democratically accountable providers of public services’, issued the Brixen Declaration in 2002 in which they demanded the exclusion of ‘democratically supported services in education, culture and media . . . from further GATS involvement’.16

Academics and their unions in Australia, New Zealand, Canada, the UK, India, Argentina, South Africa and elsewhere rallied to defend the public domain. Their campaigns gained momentum when the global trade union federations of Education International (EI) and Public Services International (PSI) published a joint critique of the GATS in 1999 (EI/PSI, 1999). High-profile institutions also voiced their concerns, individually and collectively. The peak bodies of some 5,000 degree-granting universities and colleges across Canada, Europe and the US issued a joint statement in 2001 that said:

Higher education exists to serve the public interest and is not a ‘commodity’, a fact which WTO Member States have recognised through UNESCO and other international or multilateral bodies, conventions and declarations. . . . Given this public mandate, authority to regulate higher education must remain in the hands of competent
bodies as designated by any given country. Nothing in international trade agreements should restrict or limit this authority in any way.  

Academics applied their tools of trade to produce a deluge of critical commentary. Scholars from the political economy tradition pointed out that reducing the capacity of the state to use higher education to manage the conditions that are necessary for the expansion of capital, and to absorb its contradictions, was potentially counter-productive for capitalism (Robertson et al., 2002, p 493). Others condemned the GATS ‘as a neo-colonial instrument which has the potential to continue the cycles of imperialism which have subdued Latin American countries’ development since the time of colonisation’ (Schugurensky and Davidson-Harden, 2003, p 333). Speaking for the Association of African Universities, Mihyo highlighted the risks for poor or small African countries of opening their education systems on an MFN basis, instead of selectively. A proliferation of shorter, lower cost courses could force national universities to close or dilute their public offerings. Because the GATS has no emergency safeguard mechanism, a government could not suspend its commitments, even temporarily, if the survival of its only national university was threatened. The GATS rules on monopolies would operate in the interests of foreign edupreneurs and compound the dominance of transnational companies over the infrastructure of education, especially information technologies and finance (Mihyo, 2004).

Trade officials and ministers had little interest in the substance of such arguments. But they could not ignore the mounting fallout. Claims and counter-claims by academics, unions, NGOs, the industry, governments, the OECD and WTO catapulted education services into the forefront of the GATS debate (for example: Barblan, 2002; Knight, 2002a; Knight, 2002b; Larsen et al., 2002). Aside from the disingenuous argument that Article I:3 protected public services (Chapter 4), the standard defence was that all governments recognised the importance of public education, so none would bring a dispute that challenged another’s national education policies. This ignored the effect of the GATS in normalising market-driven higher education and the chilling effect of commitments, especially when governments came under pressure from an aggressive education export industry. Such arguments also assumed that WTO members who were making and responding to requests on education services in GATS 2000 did not intend to enforce them.

The three leading demandeurs were the US, Australia and New Zealand. Each tabled an early negotiating paper. All were defensive in tone, acknowledging the public and social role of education and the right to regulate – protestations that were largely addressed to their critics at home. Japan, and much later Switzerland, also tabled papers; the former took an ambivalent position, while the latter tried (unconvincingly) to distinguish public from private education, again probably for domestic reasons.
The US was first to present its paper, in December 2000. Education services were then the fifth largest US services export. It was still the world’s largest education exporter, although its market dominance had declined. Early policy had aimed to attract bright foreign students, mainly from Asia, to study in the US. With growing security concerns and tighter immigration laws, the export focus had shifted to distance education (mode 1) and foreign investment (mode 3). The paper drew on a 1998 US industry survey to identify a long list of ‘obstacles’. These included restrictions on foreign investments and accreditation to grant degrees; delays in licensing and authorisations; economic needs tests; discriminatory treatment of joint-ventures and franchises; untransparent subsidies; ‘inappropriate’ restrictions on electronic transmission of course materials; limits on entry and employment of foreign specialist personnel; ‘excessive’ taxes on licensing or royalty payments; and ‘excessive’ costs in repatriating earnings.

The US’s own offer was confined to adult and other education. The imbalance partly reflected the complexities of federal/state jurisdiction over education and the growing US preference for bilaterals. But the main influence on the offer was the National Committee for International Trade in Education (NCITE), an affiliate to the US Coalition of Services Industries. The industry lobby enjoyed a direct line to the USTR’s office and played a crucial role in the Forum on Trade in Education Services that the USTR convened with the OECD and World Bank in 2002 to defuse growing agitation over the GATS and education. While NCITE wanted market openings in other countries, the industry was concerned that US commitments could jeopardise its share of public subsidies (Mundy and Iga, 2003, pp 301–2).

Karen Mundy and Mika Iga describe the US position as that of a ‘hegemonic free rider’ (Mundy and Iga, 2003, p 311). But the real issue, as Philip Altbach observes, is the underlying asymmetry of the global market. The US would never be a major export destination even if it did make extensive commitments, for a combination of reasons: the size, quality and diversification of the domestic sector, US dominance of technology and ancillary services, and cultural introspection (Altbach, 2003). Even foreign niche operators would struggle to succeed in the US.

Mundy and Iga note that Japan also requested the liberalisation of education services, while offering very little itself. As of 2003 no foreign affiliated higher education institution was officially recognised in Japan, although the Koizumi government had made proposals to liberalise. The authors speculated that Japan’s reticence might dissolve if the government saw services commitments on education as a way to justify domestic reforms, and to keep the US and EU interested in the WTO (Mundy and Iga, 2003, p 308). But, as with the US, the actual impact of higher education commitments on Japan’s national education system would be limited by culture, language, customer preference and commercial practices.
By contrast New Zealand and Australia were consistent in taking an aggressive approach to domestic liberalisation, GATS demands and their own commitments (Kelsey, 1998; McBurnie and Ziguras, 2003). New Zealand made the most far-reaching education commitments in the Uruguay round, including (possibly by error) national treatment for public subsidies (Kelsey, 2003, pp 20–1). Australia’s commitments were almost as extensive. These were the only two OECD members to reduce their per capita spending on tertiary education in the 1990s. Both governments promoted ‘education exports’ as a foreign exchange earner and a substitute for public education funding. Encouraging ambitious outcomes on services was also intended to advance their overriding objectives in agriculture.  

Both governments tabled strong negotiating positions in 2001, insisting they were only targeting private education. New Zealand was especially active, reflecting the dependence of its education system on foreign student fees and its limited range of services export opportunities. Trade officials in Geneva participated energetically in the discussions on ‘complementary strategies’ in 2005 to break the impasse in negotiations. But they expressed concern back in the capital that quantitative benchmarks or the pre-selection of sectors for plurilateral negotiations would encourage ‘cherry-picking’ that was likely to preclude the sensitive ‘niche’ market of education services. Because the plurilateral requests were expected to emanate from sector-based ‘friends’ groups of WTO members, and there was only an ‘education contact group’, New Zealand initiated the ‘friends of private education’.

The plurilateral request for ‘a meaningful commitment’ in private higher and/or other education services was submitted by New Zealand in April 2006. Only four other members participated: Australia, Chinese Taipei, Malaysia and the US. The EC declined to join, as did others, such as Canada, which had initially made requests on education. The 22 target countries remain secret, but are understood to focus on Latin America, the Arab states and Asia.

Both the content and tone of the request were strikingly defensive. The scope was restricted to private higher education and ‘other education’. It eschewed the need to differentiate between public and private education by suggesting that education should be treated like other services that have public and private elements, such as postal, telecommunications, medical and environmental services; members could describe only that part of education services that they wished to commit. Governments were also free to limit the coverage of government funding to students or institutions.

The request was couched in an educational rationale. If ‘properly regulated, increased trade in education opens the door to great economic, social, cultural and political benefits’. Cross-border education can boost students’ understanding of their subjects and ‘helps to level the playing field in a knowledge-driven economy’ by providing students with access to subjects or world leaders that would otherwise not be available. There was
even an attachment of questions and answers, which reassured recipients that ‘[t]he requesting members recognise that education does, and should, enjoy a special status in society’ and that definitions of public and private education differ between countries.

The minuscule number of demandeurs and the equally minimalist response suggest that the twentieth-century paradigm still prevails. The symbolic equivalent of Bolivia’s intervention on the GATS and water was the condemnation by South Africa’s Education Minister Kader Asmal of the inclusion of education in the GATS. Breaking the secrecy surrounding the GATS requests in 2003, he attacked Norway, the US, Kenya and New Zealand for making education requests (although South Africa’s trade minister was simultaneously trying to market the sector). Treating education as a tradeable service would compromise quality at South Africa’s public universities and derail the complex transformation of universities that were products of apartheid. The internationalisation of higher education was more appropriately addressed using conventions and agreements outside a trade policy regime.\(^{27}\) The Norwegian development community expressed dismay at the request and apologised. Initially, Norway’s trade negotiators stood by their position, arguing that trade rules provided protection for weaker countries (Sørenson, 2005). In 2005, a new government withdrew all Norway’s education requests. Not so the US or New Zealand.

\textit{Trade and culture revisited}

‘Audio-visual services’ suffered a similar fate to education in GATS 2000. The US had shifted its focus to digital media and the convergence of technology and content through cross-border transmission and extraterrestrial technologies. Papers tabled in 1998, and again at the start of GATS 2000, argued that new technologies were providing worldwide access for cultural consumers and stimulating new and cheaper distribution options for locally based content producers.\(^{28}\) It rejected an ‘all-or-nothing’ approach to audio-visual services, arguing that other services also had unique social policy objectives and that GATS rules and schedules provided adequate flexibility. While the principle of technological neutrality was essential to ensure that commitments remained relevant, there was also a need for clearer sectoral classifications that recognised the blending of content and carriage. In an attempt to find allies, the US paper in 2000 attached a list of firms from other countries ‘whose converging functions and technologies transport a wide range of content, including films, music, news, games, and other forms of entertainment and information to customers’.\(^{29}\) Switzerland also tabled a paper advocating liberalisation.\(^{30}\) The plurilateral request on audio-visual services was submitted by Taiwan on behalf of five other governments to 27 members.\(^{31}\) There was apparently a negligible response.
However, the audio-visual CPC was no longer the primary target. The declared objective of the US movie industry was ‘to keep digital networks free of cultural protectionism’ through trade commitments on the new technologies (quoted in Bernier, 2004, p. 235). In 1994, embryonic digital technologies had been covered by CPC 8790: ‘other telecommunications services’. The Annex on Telecommunications guaranteed foreign firms would have ‘reasonable and non-discriminatory’ access to, and use of, public telecommunications networks that are necessary to provide the services that a host government has committed in its schedule. However, the Annex excludes measures affecting cable or broadcast distribution of radio or television programmes. As noted in Chapter 5, the US proposed a reclassification that would include content within telecommunications. The EC agreed there was a need to rethink the telecommunications classification; but it was determined to protect its regionally integrated market under ‘Television Without Frontiers’, and avoid a confrontation with France over the EU’s policy of ‘cultural exception’.

The USTR also targeted services whose connection to culture is less obvious. The production and supply chain for cultural services falls within a range of generic services CPCs, such as retail, franchising, distribution, information technology, consultancy, business and financial services, telecommunications and e-commerce. The market power of Wal-Mart, for example, means it can dictate which music, books, magazines and videos it will sell, and hence how an artist will fare. It also censors the content of those products: major music companies supply Wal-Mart with sanitised versions of the raunchy CDs they provide to radio stations, while magazines and book titles are vetted to meet the corporation’s self-defined ethical code. Wal-Mart’s international reach, including into China, makes it a central player in the culture industry. The company’s submission to the USTR on GATS 2000 did not mention audio-visual; it sought commitments in ‘information technology services, consolidation and deconsolidation of merchandise, marketing, advertising, telecommunications, financial services and insurance’.

The GATS 2000 negotiations were always going to be sub-optimal for the entertainment industry. Regional and bilateral agreements offered more creative opportunities. The US agreement with Chile in 2003 grandfathered the latter’s existing protections for cultural sectors (a ‘standstill’). But it gave the US full guarantees of access, non-discrimination and market-driven regulation in the digital sphere, despite protests from the Chilean Coalition for Cultural Diversity. The e-commerce chapter was drafted so broadly that all products traded or delivered digitally, including cultural services, were covered. The US hailed that as ‘a breakthrough in achieving certainty and predictability for market access of products such as computer programs, video images, sound recordings and other digitally encoded products’.
The Australian Coalition for Cultural Diversity strenuously resisted similar proposals during the negotiation of the AUSFTA in 2004. They objected, unsuccessfully, that a Chilean-style standstill would tie the hands of Australian governments in adopting any innovative new policies, including strategies to promote digital cultural industries, and effective outsource the creation of Australian cultural policies to Hollywood (Duffy, 2003). The agreement imposed onerous standstill requirements. It made no exception for public broadcasting, aside from a general exclusion for grants and subsidies. The USTR summarised the obligations on new media as calling ‘for each government to adopt state-of-the-art protection for digital products such as software, music, text, and videos, and encourages adoption of measures to promote trade through electronic commerce’. 

The US refused to accept an equivalent of the Annex that Australia had attached to its bilateral agreement with Singapore. That had reserved Australia’s right in relation to broadcasting, audio-visual, entertainment, and cultural services to adopt or maintain any measure with respect to the creative arts, cultural heritage and other cultural industries, including audiovisual services, entertainment services and libraries, archives, museums and other cultural services; broadcasting and audiovisual services, including measures with respect to planning, licensing and spectrum management, and including services offered in Australia [and] international services originating from Australia.

‘Creative arts’ and ‘culture heritage’ were extensively defined in Annex 4II(A), with the former including ‘digital interactive media and hybrid arts work which uses new technologies to transcend artform divisions’. The Annex was largely symbolic, and was effectively superseded by the AUSFTA.

The biggest showdown over culture in the US bilaterals centred on South Korea’s movie screen quotas. The US had been challenging the quotas since 1998 in its negotiations with South Korea for a bilateral investment agreement. The quotas were legal under the GATT, which allows governments to reserve screen time for films of national origin. South Korean theatres were required to screen local movies at least 146 days a year. The quota was introduced in 1966, but only enforced from 1993. Between then and 2005 the market share in South Korea for local films grew from 16 to 47 per cent, attendance rose from 48 million to 105 million and export earnings dramatically increased. The US insisted on abolition of the quotas as a precondition for any bilateral agreement. The South Korean film industry mounted a successful campaign of lobbying, public education and street protests, including a 63-day sit-down strike. Negotiations stalled and domestic legislation to open the culture sector was defeated in 2001.
The US (and other countries) maintained intense pressure on the South
Korean government during GATS 2000, including a request for liberalisation
of audio-visual services.\textsuperscript{40} Frustrated South Korean trade officials claimed
the industry was now robust, so the quotas should be sacrificed for the
benefit of the country and consumer choice. The filmmakers maintained
their opposition, with militant support from students, farmers, educationists
and trade unions. In January 2006 the government announced the screen
quotas would be cut by 50 per cent. Within days the USTR announced
negotiations for a US–Korea FTA. Despite ongoing protests, the agreement
was finalised as the guillotine fell on the US President’s fast track authority.
The Democratic majority then stalled the agreement in the US Congress,
but for very different reasons.

The controversy that has surrounded attempts to subject higher education
and audio-visual services to the disciplines of trade in services reflects a
contradiction that is intrinsic to the broader project: the technocratic strategy
of ‘socio-regulatory adjustment’ (Drake and Nicolaidis, 1992, p 63) has
failed to displace the deep-seated commitment of people and governments
around the world to the dialogical paradigm of knowledge and cultural
exchange. Their resistance is not intellectual or abstract, but is socially and
politically grounded. At the same time, however, the forms, practices
and institutions through which that paradigm traditionally operated have
been significantly transformed, if not superseded, by neoliberal policies,
internationalised markets and new technologies. Those changes are
embedded in successive layers of trade in services agreements. Two conflicting
paradigms now co-exist within an uneasy dialectic.

\textbf{CASE STUDY 13 THE HIGHER EDUCATION SUPPLY CHAIN}

Most critics of the incursion of the GATS into higher education focus on
W/120 category 5: \textit{Education Services}, especially 5.C: \textit{Higher Education}.
This seems obvious. But it overlooks the structural changes that have
overtaken the public education system since the early 1990s with the growth
of hybrid public/private universities and the blurred borderline between
genuine education and commercial enterprise. This case study provides a
snapshot of selected aspects of the global supply chain, and confirms Chris
Duke’s prediction that:

The higher education ‘system’ may soon also come to mean virtual
consortia, including broadcasters and carriers, software producers,
publishing houses, and speculative investors as well as established public
and private universities and new private and for-profit universities.

(Duke, 2002, p 109)
As of 2007, ‘mode 2: consumption abroad’ by foreign fee-paying students is the predominant form of ‘education exports’. The mass market for foreign students began in most education exporting countries in the private sector. Public institutions gradually accepted small numbers of fee-paying international students to top up their government subsidies. As the fees regime spread to domestic students, and with it a customer-centred ethos, international students became an integral part of the higher education system. Private providers were often licensed to compete with the state institutions for domestic and international student fee income, sometimes receiving equal subsidies.

An OECD paper conservatively estimated the market value of income from international students in its member countries in 1999 at $30 billion (Larsen et al., 2002, p 858). The initial customer base was the expanding middle class of the global South, who sought English language, IT skills and business courses and internationally portable qualifications that assist immigration. The market exploded once demand within China outstripped local supply and the Chinese government relaxed its restrictions on the movement of people and capital.

Today, public and private ‘edupreneurs’ compete aggressively for international and domestic customers by appealing to brand name, brand loyalty, culture, location, scale, price, end-use and/or immigration opportunities for students and their families. The ‘services suppliers’ occupy different levels of a highly stratified international market. Entry to the quality end of the industry carries high costs in investment, infrastructure and expertise. Prestigious universities, usually from rich countries, enjoy a strong competitive position and can spread the risk by diversifying their catchments. Most are solicitous about the control of quality, content and delivery to protect their investment and reputation. Less attractive countries and providers largely compete on cost and face significant risks from volatile markets, competition and crises in their primary source country or region. Exploiting foreign students as ‘cash cows’ also carries the potential for reputational fallout in international markets, disgruntled customers, and an often-racist backlash from domestic students and inundated local communities.

As the market has matured it has spread across all four GATS modes of delivery. The providers themselves cover a broad spectrum of ownership structures, legal forms and market niches. The top tier universities prefer to establish offshore satellites or joint ventures, run their own e-education programmes or deliver courses through visiting academics/instructors. Most are state-owned education enterprises that struggle to accommodate traditional governance structures, public good responsibilities, obligations to deliver research-informed teaching and protection of academic freedom. Less prestigious state institutions increasingly supplement their income from domestic and international fee-paying students through subsidiaries, joint ventures and franchises. Their incentives for self-regulation are weaker and
quality control is generally less rigorous. The borderline with private education providers often blurs, as offshore firms deliver their pre-packaged and franchised courses, sometimes as overpriced qualifications to students who are desperate to emigrate.

Many private providers operate as companies that are accountable primarily to their shareholders and subject to the requirements of company law rather than educational regulation. A prominent example is US-based Apollo Group, which claims to be the world’s largest educator. Apollo began as a company that provided training and ‘life-long learning’ for students in the US and Latin America, but has expanded through joint ventures into China and India.

Other private companies service a lucrative market in internet-based corporate training that makes little claim to genuine education. Mega-firms such as IBM and franchise operations such as Dale Carnegie respond to mass demand for credentials by tailoring courses for particular occupations or packaging training modules for firms. At the far end of the spectrum, a transnational such as McDonald’s delivers standardised in-house corporate programmes to its branches throughout the world.

Maintaining the idealised bright line between public and private education services becomes even more difficult because public universities from the North are among the most active ‘edupreneurs’. The University of Melbourne is a prime example. In 1998 it established a fully owned limited liability company called Melbourne University Private. The subsidiary offered ‘client-focused corporate education programs and advanced professional English language training’, while still proclaiming a commitment to academic freedom and the highest possible standards of teaching and research. All programmes were developed to meet the specific needs of a corporate or government client or industry sector. They included a Master of Public Private Partnerships, later renamed a Master of Public Infrastructure, delivered through the School of Enterprise. The School of International Development offered Masters and PhD degrees and ran development projects in various parts of Asia. Melbourne University Private also owned a network of franchised Hawthorn English language centres in Melbourne, Vancouver, Edinburgh, Muscat, Singapore and Auckland – the latter being owned by the Lion Nathan School of Business Ltd, a subsidiary of an Australasian wine and beer conglomerate.

These ventures were fully commercial, which means they carried financial risks. By 2005 Melbourne University Private was only one-quarter of the way to achieving its target of 2,500 students by 2008 and had lost A$20 ($18) million over eight years. It was ‘merged’ back into the parent University of Melbourne. The University’s Vice-Chancellor nevertheless proclaimed it a success for ideological reasons: the enterprise had fostered competition and introduced domestic fee-paying students at Australia’s public universities.
Critics described it as a fiasco that diverted public university money to prop up an inappropriate business model of education.\textsuperscript{42}

Melbourne University (public) also championed the idea of the ‘virtual university’ that could sell educational products on-line to under-serviced locations, mainly into richer developing countries and China. The experiment bears out the warnings of an OECD review of e-learning in 2001 about the exaggerated potential of virtual universities and the risk that ‘cyperbole and market ambition’ will drown out questions as to what really works (Duke, 2002, p 110).

Universitas 21 Global was the brainchild of former University of Melbourne Vice-Chancellor Alan Gilbert. The original proposal involved a joint venture between the Universitas 21 (U21) consortium of 18 second-tier universities from 10 countries and Rupert Murdoch’s News Corporation. An outcry from academics in many U21 universities saw Murdoch replaced by Thomson Learning, the education and training services arm of Canadian media conglomerate Thomson Corporation.

U21Global was eventually established as a subsidiary of U21 in 2001. Two universities, Toronto and Michigan, declined to participate in the venture. Its qualifications carry the brand names of the shareholding universities who receive a licensing fee in return. However, the students have no guarantee that their qualification will be recognised internationally. Courseware design is contracted out, not necessarily to academics from the share-holding universities. A quasi-independent body Universitas 21 Pedagogica (U21Pedagogica), comprising one academic from each participating university, was established to oversee quality control. That body initially rejected all five of the first courses referred to it.\textsuperscript{43}

As of 2007, U21Global’s secretariat is based in Singapore and headed by the former president of IBM India. It offers an on-line Master of Business Administration (MBA) degree and joint masters degrees in information systems management and tourism and travel management with the University of Nottingham. A postgraduate certificate in Entrepreneurship and Family Enterprise was launched in 2006 conjunction with the Indian Institute of Management in Bangalore.\textsuperscript{44}

The original U21Global Business Plan said the shareholding universities would recoup the total initial investment of $50 million in six to nine years.\textsuperscript{45} However, the projected 5,000 students by 2004 did not materialise. As of mid-2005 some 600 students from India, Singapore and the Middle East were enrolled; each paid fees of up to $12,000.\textsuperscript{46} The Chinese government had not yet granted permission to operate there. U21 shareholders were asked for a further multi-million dollar injection, knowing that if they refused, a high-profile venture that bears their brand names might fail. By 2007, the U21Global website still claimed only 3,000 students in 60 countries, well short of the 10,000 it reportedly needed to break even (Walker, 2005, p 30).
A tentative valuation of the company by KPMG in 2005 at between $41 million and $144 million seems remarkable given this background.\textsuperscript{47}

In addition to exporting their courses, public universities have created new market opportunities in education-related services by unbundling and outsourcing other parts of their operations (Roberts, 2001). Outsourcing began with ancillary services, such as cleaning, printing or the internal post. It subsequently extended to core activities, such as management, cataloguing and referencing of library collections and management of library services (Carter, 1997, p 3). A review of these developments in North America found there was some negative impact on staff and some on service quality, but that out-sourcing also provided financial relief. A deeper concern was the displacement of qualified professionals, whose ethical obligation is to maintain the responsibility of libraries as one of the ‘building blocks of democracy’ (Spires and Hill, 2005).

Media and publishing interests, such as Thomson Learning or Pearson plc, and IT firms, such as Microsoft, have become integral contributors to the supply chain by providing access to information through e-publishing of courseware, materials and journals. Their technological and market dominance, mass purchasing power, and global reach increasingly allows them to decide what knowledge is made available and to whom. The World Bank and IFC urge universities in developing countries to embrace this option. Those who do, and find the pre-packaged deals are unsuitable or unaffordable, are left with a void in one of their most critical educational resources. The Bank gives no equivalent support to progressive alternatives, such as the 10-year commitment of Massachusetts Institute of Technology (MIT) to provide open courseware, which reflects MIT’s belief that ‘the syllabus and lecture notes are not an education, the education is what you do with the materials’ (Steven Lerman quoted in Noble, 2002, p 38).

Both providers and consumers in these complex international markets need credible accreditation and quality assurance agencies. Most commentators concede that it would be impossible for one global agency to operate across diverse countries and providers. Even the negotiation of MRAs, which is explicitly encouraged in GATS Article VII, has been very slow (Jung, 2005).

Attempts to develop commercial accreditation agencies have highlighted the obvious pitfalls. The most infamous is the Global Alliance for Transnational Education (GATE), which was an active participant in meetings of the US Coalition of Services Industries on the GATS. The enterprise was established in 1995 by Glenn R Jones, the owner of US software and education company Jones International, which also owned the first fully on-line, regionally accredited US university. GATE was profiled as ‘a new international alliance of business, higher education and government dedicated to principled advocacy for transnational educational programs’ (Lenn, 1997). For several years it enjoyed considerable credibility and was
promoted by the World Bank (Observatory on Borderless Higher Education, 2003, pp 2–3). Jones provoked allegations of conflicts of interest when he sought to advance his commercial interests by asserting greater control over GATE and most of its credible affiliates withdrew. In August 2003, Jones International Ltd announced it was ‘donating’ GATE to the United States Distance Learning Association, a private non-profit US entity.48

As the higher education supply chain expanded, it generated a commercial demand for diverse para-education services, such as education and information brokers, consultancies, public relations firms, hard copy and on-line publishers, rating and ranking agencies, franchising operations, book rental companies, education stock brokers and analysts. The IFC operates its own EdInvest facility to promote private investment and public/private partnerships around the world through its consultancy, research, training, conferences and information services.49

One of the largest para-education enterprises is the Observatory on Borderless Higher Education, which describes itself as ‘an environmental scanning facility on higher education issues’.50 Its international advisory group comprises mainly senior managers from leading public UK universities. The Observatory began in 2001 as an initiative of the Association of Commonwealth Universities and Universities UK, with seed funding from the Higher Education Funding Council for England. It later became fully funded through subscriptions and consultancies. In 2007, the Observatory claimed over 130 institutional subscribers from more than 20 countries. Its subscriber service provides access to surveys and benchmarking, while its consultancy services specialise in e-learning, market research, institutional strategic planning, and inquiries into particular institutions, countries or initiatives.

The privatised higher education market has become a profitable niche for financial services firms. Robert W Baird & Co describes itself as an 80-year-old ‘employee-owned, international wealth management, capital markets, private equity and asset management firm’.51 It produces a weekly e-newsletter entitled ‘Class Notes: Weekly Insights on the Education Industry’, which canvases business, market and investment developments in education.52 The firm maintains an education composite of listed stocks. In addition to the latest movements in share prices, the newsletter gives detailed accounts of changes in US policy and regulations, firm-specific investment and personnel decisions, granting or withdrawal of accreditation, international market developments and general scuttlebutt.

Perhaps the most lucrative, but least remarked on, link in the supply chain involves higher education financing. Again, these firms are strongest in the US, but many of them process on-line student loan applications in association with international loan guarantee agencies and lenders.53 Among the largest and most prominent are Citigroup and SLM corporation (known as Sallie Mae). The latter was set up in 1972 as a US government-sponsored
enterprise. ‘Privatised’ in 2005 with a virtual government guarantee, it runs a secondary market in student loans. In April 2007 a private equity consortium including JP Morgan Chase and Bank of America announced it would acquire Sallie Mae for $25 billion – double the price at which the shares were being traded. Six months later they backed off, following ethical scandals and proposals from the US Congress to cut subsidies for student loans.

Mapping the tertiary education supply chain onto the GATS and W/120 classifications reveals coverage in every mode of supply – mode 1: cross-border e-education and para-education services; mode 2: foreign fee paying students; mode 3: offshore campuses and education-related enterprises; mode 4: short-term presence of foreign teachers, administrators, accreditors or consultants. It also spans multiple CPCs:

1. **B Computer and Related Services**: 1.B.c data processing, 1.B.d data base, 1.B.e other;

1. **C Research and Development Services**: 1.C.a R&D (Research and Development) services on natural sciences, 1.C.b R&D services on social sciences and humanities, 1.C.c interdisciplinary R&D services;

1. **F Other Business Services**: 1.F.a advertising, 1.F.b market research, 1.F.c management consulting and related, 1.F.k placement and supply of personnel, 1.F.m related science and technical consulting, 1.F.r printing/publishing, 1.F.s convention, 1.F.t other;

2. **C Telecommunications Services**: 2.C.j e-mail, on-line information and data base retrieval, 2.C.n on-line information and data base processing, 2.C.o other;


5. **Educational Services**: 5.C higher, 5.D adult, 5.E other;

7. **B Financial Services**: 7.B.b lending of all types, 7.B.e guarantees and commitments, 7.B.k advisory or other auxiliary services, 7.C other;

8. **C Health Related and Social Services**: 8.C social services; and

10. **Recreational, Cultural and Sporting Services**: 10.B news agency services, 10.C libraries, archives, museums and other cultural services, 10.D sporting and other recreational services.

This list reveals how the GATS and other trade in services agreements have the potential to consolidate this booming international higher education market, despite the relatively few commitments in education services per se – and deepen the contradiction that confronts the hybrid public/private education system.
CASE STUDY 14  A COUNTER-CONVENTION ON CULTURAL DIVERSITY

Growing pressure from the US for agreements in which ‘trade trumps culture’ led a number of mainly non-Anglophone governments to join forces with international organisations of creative artists and cultural professionals to sponsor a counter-convention on cultural diversity.

The catalyst for the convention was not so much the GATS as the proposed MAI in the OECD. Both the French and Canadian governments refused to sign that agreement unless ‘cultural sovereignty’ was fully insulated from its standstill, rollback and review provisions. The refusal of the US to accept a cultural carve-out was pivotal to the decision of the French government to pull the rug from the MAI negotiations in October 1998 – although Prime Minister Jospin maintained that investment issues should be addressed in the WTO.  

The Canadian Minister of Heritage called her contemporaries from 47 countries together for a conference on cultural diversity and globalisation in June 1998. The ministers founded an International Network on Cultural Policy (INCP) and agreed to meet annually. In February 1999 the Canadian Cultural Industries Sectoral Advisory Group on International Trade floated the idea of an international instrument that recognised the legitimate role of domestic cultural policies in ensuring cultural diversity. In a classic display of cultural exceptionalism, the group supported the WTO and free trade so long as it did not constrain cultural policy. Their proposal was formally endorsed by the INCP in 2000.

Two lobby groups for the convention emerged. Both were Canadian-led and supported by the Canadian government. They had overlapping memberships, but divergent strategic perspectives. The International Network for Cultural Diversity (INCD) had its origins in a meeting of cultural activists and NGOs that ran parallel to the culture ministers’ meeting in 1998 and was formalised at the time of the mobilisations against the WTO Seattle ministerial in 1999. The network’s broad-based membership was loosely co-ordinated on a regional and international level through an elected steering committee. The Canadian Coalition for Cultural Diversity began in Quebec in 1998. An International Liaison Committee of Coalitions for Cultural Diversity was later formed in 2003 to provide a common voice and promote the establishment of new national chapters. Most coalitions consisted of cultural professionals and had a narrower industry focus than the INCD. Some had close relationships with their governments. Both organisations had members from the global North and South, who had their own political dispositions, perceptions of the challenges facing the culture sector, and strategies for enhancing cultural diversity.

The idea of an alternative legal instrument was endorsed by the Francophone summit, Europe’s ministers for culture and education and
the Organisation of American States. The Convention would broadly promote local culture, international diversity and development. But the relationship to trade agreements was pivotal. The INCP and INCD each developed draft texts that were discussed jointly in Johannesburg in late 2002. Under the ministers’ version, parties who were asked to make commitments in other agreements that might jeopardise the preservation of cultural diversity should consult each other with a view to developing a common approach. They would also refrain from making commitments in other international forums that were contrary to the objectives of the Convention. The Network’s equivalent provision went further:

nothing in this Convention, or any other International Agreement to which it may be a Party, shall be construed to prevent a Party from adopting, maintaining or enforcing measures that accord special, preferential or more favourable treatment to indigenous or national goods and services for the purpose of achieving the objectives of the Convention.

An international convention requires an institutional sponsor. UNESCO was the obvious choice. It had hosted the Stockholm Conference on Cultural Policies for Development in 1998. UNESCO’s General Council had adopted a Universal Declaration on Cultural Diversity in 2001, accompanied by an Action Plan, and resolved to consider ‘the advisability of an international legal instrument’. The decision to ask UNESCO formally to sponsor the initiative was taken at consecutive meetings of the two cultural organisations and the ministers in Paris in February 2003. The proposal was advanced through UNESCO’s Executive Board by the representatives of Canada, France, Germany, Greece, Mexico, Morocco and Senegal. Eight months later, the ministerial meeting of UNESCO adopted a mandate to develop a binding standard-setting convention on the protection of cultural contents and artistic expressions.

The US had quit UNESCO almost 20 years earlier, accusing it inter alia of threatening free speech in its policy proposals on communications (Baker, 2002, pp 271–2). The re-affiliation of the US in October 2003 guaranteed that the Convention would be highly contested. The US delegation made constant and vigorous interventions throughout the drafting process that were designed to subvert the promoters’ objectives, even though the US was unlikely ever to ratify the instrument – a tactic it applied with considerable success in negotiations on numerous environmental and human rights treaties (Stairs, undated).

The preliminary draft prepared by an independent expert group reflected these polarised positions. Article 19: Relationship to Other Instruments offered two options. Under Option A, the Convention would not affect the rights and obligations of any state party deriving from any other existing
international instrument (such as trade in services agreements), ‘except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions’. Option B was a blanket statement that the Convention shall not affect the rights and obligations of parties under other existing international instruments.

Political tensions increased as a group of intergovernmental experts, assisted by a drafting sub-committee, set about refining the draft. They were instructed to take into account the submissions from governments and international organisations, including the WTO. The WTO Director General advised his UNESCO counterpart in October 2004 that members would hold formal discussions at the relevant councils (on services, goods and intellectual property), followed by the General Council. By this time, however, the GATS negotiations were in serious trouble. A major factor was the groundswell of popular opposition, including from cultural activists. Holding a full-blown formal discussion on the Convention in the WTO would provide a platform for the very criticisms that the trade negotiators were seeking to deflate.

At the WTO General Council meeting in October 2004, Australia suggested the Director General might instead hold an informal seminar and invite a representative from UNESCO. This discussion would help WTO delegations to inform their capitals of the issues and encourage a ‘whole-of-government’ approach that ensured coherence and complementarity between the Convention and the WTO agreements. That approach could prevent the kind of inconsistencies that had arisen between the multilateral trade and environmental agreements.

The WTO delegations from the US, Chile, India, Hong Kong China, Taiwan, Japan and Mexico – as self-styled ‘friends of cultural diversity’ – had previously convened a seminar to discuss the issue (Voon, 2006). They supported the Australian proposal. Canada also agreed, seeming to distance itself from the draft Convention then in circulation, and stressed the need for coherence and complementarity. The EC did not oppose Australia’s suggestion. Cuba and Morocco emphasised their commitment to the Convention and their concern that the WTO should not interfere with its drafting or content. All these and other governments wanted to quarantine the Convention from the WTO, but for quite divergent reasons. The WTO held its informal seminar in November 2004 and member states were left to make their interventions at UNESCO.

The original mandate from the UNESCO ministers was to present a preliminary draft Convention to the next biennial General Conference in October 2005. Knowing the US could drag out the negotiations interminably, the INCP governments were determined to present a final text to the 2005 conference. But the stand-off over Article 19 continued. A third approach was floated, whereby no treaty would take precedence and ways would be sought to ensure complementarity. That compromise informed the final
text of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the pivotal article of which read:

Article 20: Relationship to other treaties: mutual supportiveness, complementarity and non-subordination

1. Parties recognise that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty:
   (a) They shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
   (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying the rights and obligations of the Parties under any other treaties to which they are parties. (Emphasis added.)

Article 21 obliged parties to ‘promote the principles and objectives of this Convention in other international forums’, but stopped short of requiring active co-operation or solidarity.

The rapporteur’s account of the final negotiating session recorded a stream of formal objections from the US, and its unsuccessful demand that two texts be forwarded to the General Conference. The final statement from the US delegation described the document as ‘deeply flawed and fundamentally incompatible with UNESCO’s Constitutional obligation to promote the free flow of ideas by word and image’. The US protested that the process, including decisions by voting, had undermined ‘the spirit of consensus’ that normally characterised UNESCO and ‘would weaken its reputation as a responsible, thoughtful international organisation’ (which is ironic, given the travesty of ‘consensus’ that pervades decision making at the WTO). The US also objected that the Convention was not about culture, but about trade, citing as evidence the provision for the participation of the European Commission, which has competency for trade, not culture. ‘Because it is about trade, this convention clearly exceeds the mandate of UNESCO.’ Yet the US had made cultural policy a ‘trade’ issue by its demands for trade commitments that intrude deeply into areas of cultural policy and regulation. The US was now using that re-designation to disqualify the international organisation that had constitutional responsibility to ‘preserve the fruitful diversity of cultures’ from performing its mandate.

The UNESCO Convention was adopted by 148 members in favour, and only the US and Israel opposed. It came into effect on 18 March 2007, three months after the thirtieth instrument of ratification was deposited.
Despite its posturing, the US had largely achieved its objectives. Two years of obstruction had emaciated an already compromised text. Article 20(2) makes it clear that the Convention does not modify rights and obligations under other treaties. It does not even provide a moral justification for withdrawing or amending a trade in services commitment. Moreover, Article 20:1(b) only requires parties to ‘take into account’ the obligations and ‘relevant’ provisions in the Convention when they interpret, apply or negotiate other international obligations. The obligations and provisions this refers to are merely aspirational. Moreover, the Convention only applies to its parties. The US is unlikely ever to ratify and would face no effective restraints even if it did. The Convention is therefore impotent to affect US behaviour or as a basis for resisting US demands, as the indomitable Korean Coalition found when seeking to repel the US assault on Korea’s film quotas in the US Korea FTA.

Other powerful parties might well invoke the Convention in negotiations and disputes between themselves. Articles 20 and 21 might, for example, inhibit one state from lodging a trade dispute against another, such as the EC’s challenge to Canada over film distribution in 1998 (see note 13 of this chapter). Or it could generate moral pressure to settle a dispute through conciliation. But both sides would have to be willing to use the Convention. That is not assured. The EU cannot agree internally on whether its cultural exception should extend to music, let alone to the broad range of culture-related services in which Europe’s corporations have offensive interests and to which the Convention potentially applies. In most situations, these states can already look after themselves, and pick and choose what aspects of culture they protect without needing the Convention.

The critical question was whether the major powers that ratified the Convention would be prepared to invest it with real meaning if it was invoked by developing country signatories. The first test came in the CARIFORUM-EC EPA, initialled in December 2007. Protocol III on Cultural Co-operation draws explicitly on the UNESCO Convention. It contains soft commitments to strengthening cultural industries and diversity that are couched in the aspirational language of ‘aim’, ‘endeavour’, ‘facilitate’ and ‘co-operate’, and ‘without prejudice to the other provisions of this Agreement’. The substance of the services, investment and e-commerce chapters reflect almost verbatim the EC’s negotiating stance on cultural goods and services in the WTO.

The story of the Convention offers broader lessons for those seeking a legal antidote to trade in services agreements. Its so-called ‘mirror’ solution, whereby neither treaty takes precedence, is a mirage. The UNESCO Convention will always occupy a subordinate legal position vis-à-vis the trade treaties. The trade agreements gain their potency from the prevailing hegemony of the market paradigm, their closed text and binding enforcement mechanisms. Complaints that a WTO member’s policy or regulations have breached the trade in services rules are judged by a panel of trade law
experts, and solely with reference to those rules. There is no legal space
to recognise the UNESCO Convention, even if it was an effective legal
instrument. It could hardly qualify as customary international law. Given
that hierarchy, the obligation to ‘foster mutual supportiveness’ will, in
practice, require conformity of the Convention to the ideology and rules of
the WTO in cases where a dispute occurs.

This outcome reflects the contemporary state of international treaties and
international institutions. UNESCO is a post-Second World War creation
of a superseded paradigm. It survives, tenuously, in a hostile international
regulatory arena and is marginalised by governments at the national level.
The soft subjects of culture and education give it much less weight than
even UNCTAD or the UN High Commissioner for Refugees (UNHCR).
The UNESCO Convention was primarily championed by culture ministers
and ministries. Responsibility for the GATS and related agreements rests
with the more powerful trade ministers, ministries and Geneva-based
negotiators. Cultural services are one small part of a multifaceted negotiating
programme where trade-offs are made not only with other services but also
with agriculture, industrial products and intellectual property. At a whole-
of-government level, even governments that strongly supported the
Convention would not privilege their cultural concerns over their strategic
trade objectives.

As the discussions at the WTO General Council confirm, the weak out-
come on ‘trade trumps culture’ was not just the work of the US and ‘friends’;
it also reflected the interests of the Convention’s powerful patrons, notably
France, Canada/Quebec and Spain. They have their own offensive interests
in the WTO. The last thing they wanted was to inflame accusations that
the trade agreements subordinate culture, human rights, social regulation
and democracy. It was important for them to contain the issue within
UNESCO. The final result delivered them a pragmatic balance of cultural
and economic self-interest, within neoliberal parameters.

Where does this leave the two cultural sector lobby groups that fought
so hard for a Convention that would neutralise the trade agreements? Again,
their assessments reflect their different perspectives and goals. The
Coalitions appeared to approach the Convention largely as an end in itself.
They pragmatically hailed the text as a success and urged its adoption. In
September 2007 the 42 national coalitions established a more formal
International Federation of Coalitions for Cultural Diversity whose purposes
were defined exclusively with reference to the Convention.

The INCD saw the Convention more broadly, as one step within a political
strategy to expose, weaken and paralyse trade in services agreements. That
was not always clear to its members, many of whom struggled to understand
the arcane mindset and technicalities of trade law. But it was consistently
reflected in their more critical discourse, the involvement of their members,
alongside other activists, at various WTO protests, and their broader
platform of cultural diversity initiatives. While INCD actively campaigned for the Convention’s ratification, they were realistic about its failings:

If the objective of the new Treaty is to declare the right of States to implement cultural policies and to establish a new foundation for future cooperation, the Treaty has succeeded. If the objective is to carve out cultural goods and services from the trade agreements, the Treaty is inadequate, at least in the short term.69

It is no coincidence that the Canadian government informed the INCD in 2006 that it would fund only one organisation in the future, and that was the Coalition.
Among the largest economic sectors of ‘trade in services’ are those that profit from the exploitation of nature: tourism, food production and distribution, and processing of natural resources such as timber, fisheries and minerals. These industries operate internationally through integrated production and supply chains. Those chains are controlled by oligopolies that are increasingly ‘transnational in their corporate constitution, multinational in their sourcing, international in their labor allocation, and global in their consumer marketing strategies’ (Konefal et al., 2005, p 294).

Natural resources rarely feature in the critique of trade in services. Yet corporate exploitation and often outright plunder pose a grave threat to sustainability in the fully social sense of the term: people’s material needs for food, water, shelter, clothing, transport and energy; the survival of communities that have unique identities, cultures and spiritualities; and the fragile ecosystem in which land, water, plants, forests, fish, animals and humans co-exist. These corporate and social worlds collide in a form of ‘accumulation by dispossession’ that is fragmented and localised (Harvey, 2005, p 178), and has provoked a swath of oppositional movements that are often described as ‘globalisation from below’.

This chapter looks at two dimensions of the threat that trade in services agreements pose to genuine sustainability. It begins by examining three cases where the WTO agreements on agriculture, intellectual property, investment measures and services have intersected in ways that undermine the viability of national and local communities. The first is the landmark dispute over preferential imports of bananas from the ACP countries into the EU (EU-Bananas). The second case, Japan-Distribution Services, involves ‘agreement shopping’ by the US between the GATT and the GATS. What began as a dispute between Kodak and Fuji over photographic paper ended up opening doors for supermarket chains such as Wal-Mart and Carrefour at the expense of Japan’s small shopkeepers, local neighbourhoods and cultural traditions. The third example reveals how the web of obligations under the WTO, including the GATS, traps a resource-rich country, the Solomon Islands, in poverty.
The remainder of the chapter analyses how globally integrated food production and supply chains are disaggregated into W/120 classifications that seem unrelated to the natural resources they consume or the livelihoods they determine. When those CPCs are reassembled and transposed to the real world, they entrench the power of mega-retailers and transnational agribusinesses to determine what food is produced, for both export and domestic consumption, by whom, for what price, and using which technical standards and production techniques. Once more, the corporations complain that the myriad and scattered commitments in the GATS 1994 fail to meet their requirements. Pressure from the US and European services lobbies to have the GATS restructured in ways that reflect the infrastructure of the supply chains has gained little traction in GATS 2000, but may have greater success through the bilaterals.

Two case studies document the social, political and ecological implications of the ‘economy of exploitation’. Case study 15 examines the threat posed by the major supermarket chains to the sustainability of local communities, while Case study 16 reveals the human cost of unsustainable tourism for indigenous peoples and for the local community of Cancún in Mexico.

Reintegrating the trade treaties

Discussions about ‘trade and . . .’ natural resources, environment or sustainability almost never include the trade in services agreements. Tourism, the world’s largest services export industry, is treated as benign and largely ignored. International food production is equated with the WTO Agreement on Agriculture (AoA), with occasional references to non-tariff barriers under the Sanitary and Phytosanitary Agreement, or the patenting of biodiversity and protection of geographical indicators for alcohol and food under the TRIPS agreement. Fisheries, forestry and mining are dealt with variously through the GATT, including the Agreement on Trade-related Investment Measures (TRIMS), and the Doha round negotiations on NAMA and rules on trade-distorting subsidies.

Technically, each of these legal texts is self-contained. When the AoA, NAMA, TRIPS and GATS do appear in the same discussion, it is usually as trade-offs in the ‘single undertaking’ of the Doha round. The reification of legal rules conceals their function as complementary vehicles through which major powers advance the interests of their corporations.

The classic example of complementarity is the case of EC-Bananas (Salas and Jackson, 2000), where a functionally integrated transaction was subjected to the distinctive legal regimes of trade in services and trade in goods. In the early 1990s, the EU harmonised its system of preferential imports of bananas from ACP countries under the Lomé Conventions. The banana growing countries of Latin America made a series of complaints that these preferences were illegal under the GATT. Although successive
GATT panels upheld those complaints, the Europeans vetoed the adoption of the reports. In 1994 the EC offered the Latin American litigants a more generous framework agreement on tariff quotas and import licences for bananas if they would not take action under the new WTO before 2002. The complainants agreed. The world’s largest banana producer, Ecuador, was not a GATT party at the time (Salas and Jackson, 2000, pp 147–50).

Bananas account for about 0.03 per cent of transatlantic trade (Alter and Meunier, 2006, p 363). However, US companies Dole, Chiquita and Del Monte (owned by Heinz since 2002) control two-thirds of the world’s trade in bananas. Most of these are grown in Latin America and marketed internationally. Chiquita had anticipated that the Europeans would be forced to open their banana market after the WTO was formed and invested heavily in banana plantations and shipping equipment. When the Latin American governments made their deal with the EU, Chiquita was left with excess capacity and a massive debt. In September 1994 Chiquita filed a section 301 petition with the USTR, claiming the European banana regime was costing it millions of dollars. The company’s chairman at the time, Carl Lindner, was a major contributor to both the Republican and Democratic parties and an election was only a year away (Alter and Meunier, 2006, pp 369–70, 373–5).

The US administration chose to lodge a dispute with the new WTO rather than act unilaterally. In 1995, the US alleged that the EC had breached its GATS obligations under Article II (MFN), as it had not scheduled an MFN reservation for distribution services in favour of the ACP countries. Further, it said the EC had breached its national treatment commitments on distribution services in modes 1 and 3. The EC schedule of sectoral commitments had used the provisional Central Product Classification (CPCprov) CPC 622 Wholesale Trade Distribution, which has a sub-sector headed ‘wholesale trade services of food, beverages and tobacco’, with a sub-category of that sub-sector for ‘wholesale trade services of fruit and vegetables’. The US was able to invoke mode 3 because the importers and distributors of bananas were European companies that were owned or controlled by Chiquita and Dole. GATS Article XXVIII defines ‘owned’ as a 50 per cent or greater equity ownership, and ‘controlled’ as the power to name a majority of its directors or otherwise legally direct its action.

The WTO panel rejected the EC’s contention that the banana regime involved only trade in goods, not services. The wording in GATS Article I ‘applies to measures affecting trade in services’. That covered both the direct and indirect impact of a measure (EU-Bananas 1997a, paras 7.279–81). The Appellate Body agreed that the same measure can be scrutinised under both agreements: the GATT was concerned with how the measure affects goods; the GATS with how it affects the supply of a service or the service suppliers (EU-Bananas, 1997b). Despite the observation that this should be assessed on a case-by-case basis, it is difficult to see how cross-border
commodity trade would not involve distribution services. A potential dispute would then depend on which companies were involved in what activities.

Latin American banana producing countries that were not subject to the agreement with the EC successfully brought their own complaint only under the GATT. They included Ecuador, which had rushed its WTO accession to participate in the litigation. The Europeans dragged their feet in response. Ecuador sought the right to retaliate against the EU by suspending concessions under TRIPS, where it potentially had more leverage than in goods (Alter and Meunier, 2006, p 376). Meanwhile, the US banana lobby had mobilised through the Congress to demand enforcement of the ruling. In 1998, the USTR responded by announcing 100 per cent retaliatory tariffs on a revolving list of goods imported from Europe (Salas and Jackson, 2000, pp 155–7).

The US gained much more from this case than the Latin American countries that actually produce bananas, thanks to a (controversially) liberal treatment of its standing in the dispute. The biggest losers were the small family producers of bananas in the Caribbean for whom the Lomé preferences were an economic lifeline and who were powerless in this dispute. The ruling gave legitimacy to the plan already floated by the European Union to replace the Lomé preferences with reciprocal trade agreements. The EC secured a temporary waiver for its non-compliance until 1 January 2008, which became the deadline in the Cotonou Agreement 2000 for completion of new EPAs.

EU–Bananas had nothing to do with services in the US. The USTR used the legal fiction that foreign investment is ‘trade’ to advance the interests of US companies that produce bananas in Latin America and sell them in Europe. So the GATS operated as a proxy investment agreement between countries that do not have one. The case also created a precedent for the major powers whose companies dominate the global distribution markets to use the GATS as a back door route to secure changes to other countries’ goods regimes.

The second case illustrates the potential for ‘agreement shopping’ as the US challenged the same law through parallel disputes under the GATT and GATS. In May 1995 Kodak lodged a section 301 complaint with the USTR, claiming Japan’s Large-Scale Retail Law was a barrier to imports of US-made photographic film and paper. For diplomatic reasons, the USTR again chose to pursue the issue under the GATT. The WTO panel rejected the complaint, finding that nothing in Japan’s retail law prevented smaller shops from stocking the imported goods (Japan-Photographic Paper, 1998).

A GATS complaint was seen as a ‘backup option’ that could address other concerns of US firms (Devereaux et al., 2006, p 165). Japan’s retail law required local governments to conduct extensive public hearings and economic, traffic, environmental and other impact assessments before a large retailer could open for business (Bottari and Gould, 2005, p 14). The USTR
argued that these procedural requirements posed a barrier to foreign retailers and distorted competition in favour of Japan’s small shopkeepers (Japan-Distribution Services, 1996). As Japan had taken market access commitments on distribution services in its GATS 1994 schedule, the law allegedly breached its Article III (transparency) and Article XVI (market access) obligations. Consultations with Japan on the GATS dispute continued after the panel had rejected the GATT complaint. Japan agreed to introduce a diluted Large-Scale Retail Store Location Law that required assessments only of the environmental and traffic impacts of a big box department store (Bottari and Gould, 2005, p 15). This eased the entry into Japan’s trillion-dollar retail market for the US’s Wal-Mart and European superstores such as Carrefour, although informal barriers remained.

The local councils, shopkeepers and communities who were directly affected by the case were mere bystanders in a geopolitically motivated settlement between the US and Japan. The absence of an emergency safeguard mechanism in the GATS meant that Japanese central or local governments could not legally reinstate the requirement for comprehensive impact assessments or other constraints if local livelihoods and culture were threatened as a result the new law.

The US succeeded in having the law amended, despite losing one challenge and without a panel ruling on the second. From the perspective of GATS advocates, this is the best possible outcome as voluntary consensual liberalisation is the primary objective of the dispute settlement system. For critics, it illustrates the potential chilling effect of a trade dispute, even between major players. The case also showed the broader liberalising effect of the multilateral system. A complaint that was initiated by Kodak to increase its goods exports had created foreign investment opportunities for retailers from the US and other countries to establish superstores in Japan.

The third example highlights the embedded asymmetry of trade rules that disempower countries that are resource rich, but economically impoverished, and benefit the companies of rich countries that exploit those resources and capture the added value. The Solomon Islands is a least developed country in the South Pacific. It joined the WTO in 1996 and was subject to a WTO Trade Policy Review in 1998. At the time, the government faced major arrears in public debt. Its revenue and export earnings depended largely on log exports to South Korea and Japan. Those exports had been severely hit by the Asian financial crisis and a fall in commodity prices. Unsustainable logging practices had intensified the resulting glut. The world price for the Solomon Islands’ copra exports was also depressed. Its other main export, canned tuna to the UK, depended on Lomé preferences that were threatened in light of the ruling on bananas.

The Solomon Islands government faced a no-win situation. On the one hand, it was being pressured by WTO members to manage its resources sustainably, diversify its export markets, and encourage foreign investment.
Yet it had to generate tax and export receipts to service its debt through exploiting its ‘comparative advantage’ – which meant, in practice, the unsustainable logging and export of timber by foreign companies, largely in the form of unprocessed logs. The Solomon Islands government pointed out during the Trade Policy Review

that the export of unprocessed logs and fish had been the source of nefarious rent-seeking behaviour by private sector participants which weakened governance and subverted the proper functioning of the public sector. Trade malpractice was rampant in the logging industry . . . via transfer pricing, species misidentification by log exporting firms and mismanagement.²

The obvious solution, from the government’s perspective, was to prohibit round log exports and encourage downstream processing. Other WTO members objected that such measures encouraged inefficient domestic industries and were prohibited TRIMS. In a remarkably blasé observation, the chairman of the review body remarked that ‘this was a particularly interesting review’ that raised key questions of

how to reconcile policies of environmental sustainability and the steps necessary to generate foreign earnings (especially in circumstances where a government is coping with significant debt servicing burdens), and also the question of how small economies heavily reliant on a very limited number of products can maximize returns on production.³

Such observations did nothing to reduce the vulnerability of the Solomon Islands economy. Its plight was compounded by a highly volatile domestic political situation and the competition influences of Australia, China and Taiwan. In 1999 a civil war broke out between ethnic groups over land and jobs, leaving almost 100 people dead. In 2000, the government was overthrown in a coup. The new government invited Australia to dispatch what became a highly controversial Regional Assistance Mission to the Solomon Islands. Riots razed the capital’s Chinatown in 2006 after the election of a new pro-China government. Further liberalisation was likely to reignite this tinderbox.

The Solomon Islands had taken a cautious approach to its original GATS schedule. The horizontal limitations included an economic needs test for foreign investment that required consideration of: (a) provision of new services; (b) improvement of the productive structure of the economy; (c) viability of the new project, especially with respect to foreign exchange earnings or savings; and (d) the implications for employment in the Solomon Islands. A further limitation prohibited foreign ownership of land. The EC’s GATS 2000 request to the Solomon Islands on tourism asked for the foreign
investment restriction to be removed. Whether this was a pro forma request, or based on a country-specific assessment, it reveals a contemptuous disregard for the economic and political stability of such a fragile country.\textsuperscript{4} If the EC were to secure commitments on distribution services from the Solomon Islands in its EPA negotiations, the latter would also face the prospect of a ‘bananas’-style link between the GATT and GATS.

It is not clear what requests were made of the Solomon Islands in GATS 2000 by other countries, or what it has offered. One of the most significant risks would be a mode 3 commitment in the seemingly benign CPC 86140 ‘services incidental to forestry and logging’, which would guarantee foreign firms the rights to establish a commercial presence and non-discrimination over services such as felling, cutting, debarking and transport of logs within the forest.

The combined effect of significant services commitments under the GATS or an EPA, and the prohibited investment measures under TRIMS, would be a virtual carte blanche for foreign logging companies. Proposals in the NAMA negotiations to accelerate tariff elimination in forestry would further intensify the commercial pressures that were driving the unsustainable and illegal logging practices in the Solomon Islands.\textsuperscript{5}

Similar stories can be told for mining, fisheries and other natural resources in most parts of the world.

**Global food supply chains**

As explained earlier in this book, trade in services agreements rely on a web of illusions: that all state parties are equal; that the technical rules are applied to isolated commercial transactions that take place between equally endowed buyers and sellers; that massive transnational corporations and small local businesses are equivalent legal persons; and that social and environmental ‘externalities’ should and will be addressed as matters of domestic policy by national governments.

This legal veil facilitates the expansion of transnational corporate control through vertically integrated and multinational production and supply chains, and masks their implications for social and ecological sustainability. The GATS Article XXVIII implicitly recognises the chains of services transactions in each sector when it defines ‘supply’ of a service to include ‘production, distribution, marketing, sale and delivery’. When applied to a full commitment in mode 3, this authorises foreign investors to produce, distribute, market, sell and deliver the scheduled sub-sector without discrimination or restrictions on market access.\textsuperscript{6} Full commitments across numerous sectors and countries therefore have the effect of consolidating corporate power over transnationalised production and related supply chains.

The example used in this chapter is food. Following the Second World War, agriculture became increasingly industrialised, especially in the global
North. Both agribusiness input-manufacturers (covering equipment, fertilisers, pesticides, seeds, etc.) and output-processing firms (covering uplift and storage of farm products, packaging, sale, etc.) consolidated to achieve efficiencies through scale and volume. In the 1970s, major food processors and retailers began responding to the same impulses that drove industrial producers, and disaggregated their operations internationally.

Several decades later, these supply chains take two main forms. Traditional bulk commodity chains rely on spot markets. The resulting price uncertainties have spawned a huge speculative futures market—Bill Vorley from the UK Food Group reports that one bushel of soybeans was produced for every 31 traded in 2000 (Vorley, 2003, p 20). Corporate concentration means an ever-decreasing number of firms control the key elements of production, trade, processing and marketing for each commodity. In 2002, three companies controlled 45 per cent of coffee roasting activities; four controlled 40 per cent of cocoa grinding; three dominated crushing and feed production in soy and livestock food (Vorley, 2003, p 10). Their transnational operations allow them to take advantage of economies of scale in transport, storage and finance. As preferred (and dependent) buyers have become more common, local trading houses and brokers are squeezed out. The producers carry the risk, whether they sell through spot markets or contracts.

The second form, buyer-driven agri-food chains, tends to be highly integrated across producers, suppliers, processors and retailers. The transnational supermarkets dominate these chains so completely that they ‘are largely determining the type and quality of food that most people consume [especially], its cost, and how it is produced’ (Konéfal et al., 2005, p 294). The UNDP Human Development Report for 2005 made the same point from the producer’s perspective: ‘To sell in world markets, especially markets for higher value-added crops, is increasingly to sell to a handful of large supermarket chains’ (UNDP, 2005, p 142). To give these statements a social context, some 2.5 billion people depend on agriculture for their livelihoods, including an estimated 1.3 billion people who work in agriculture (Vorley, 2003, p 14).

These buyer-driven chains rely on sources and outlets all over the world. However, their dynamics are driven by consumer trends in rich countries. Supermarkets have differentiated on price and quality, promoted niche products and constantly innovated in response to intense competition and market saturation. Non-food products are an increasing part of their core business. Loyalty schemes have expanded into rewards for petrol, while many chains provide financing through credit cards and banking. Ethical concerns among more affluent consumers have spawned new commercial opportunities that avoid having to address the underlying asymmetries of power in the agri-system. ‘Fairtrade’ attracts premium prices and bigger retail margins; as demand has expanded, the fair trade production chain has increasingly replicated the old trading structures (Vorley, 2003, p 36).
Similarly, organics are no longer the domain of smaller scale producers. Major suppliers operate parallel conventional and organic production systems within a single supply chain that deals with logistics, quality control and traceability.

Constant innovation has increased the pressure for flexible, short-run production and supply. That process generates pressure for greater cost efficiencies from labour and suppliers. Wal-Mart’s ruthless approach to both allows it to undersell its US competitors by an estimated 14 per cent (Head, 2004, p 3). The massive expansion of ‘own brands’ prompted Unilever, the world’s third largest food group, to adopt a ‘Path to Growth’ strategy in 1999 that reduced the number of brands on offer from 1,600 to a core 400, resulting in 8,000 lost jobs and 30 factory closures worldwide (Burch and Lawrence, 2005, p 10, fn 6). As ‘operational inefficiencies’ are eliminated, suppliers come under more severe pressures. Some supermarkets demand payment for preferred supplier status as well as rebates and retrospective discounts, and charge for promotions, shelf placement and listing of new products. Suppliers’ invoices are routinely paid late (Burch and Lawrence, 2005, p 4–5).

Mega-retailers now largely determine what products enter the agri-food chain. They create, and then respond to, the preoccupation of consumers with appearance by demanding and advertising uniform standards for products, especially perishables such as fruit, vegetables and flowers. The supermarkets argue that standardisation is necessary because supply is so diffused. When consumers respond negatively to the resulting influx of ‘food from nowhere’ with demands for labelling of country origins or genetic engineering (GE) content, the producers face new requirements of traceability. Those demands increase with the growth of niche markets for organics, free range and fair trade products.

The official reference used at the WTO for standard setting by governments on food is the Codex Alimentarius Commission, which is dominated by Northern governments and the agri-food industry (Braithwaite and Drahos, 2000, pp 400–4). But the retail industry’s private standards have become the de facto regulations. In 2001 a consortium of European retailers established EurepGAP, a private standard for food safety and quality that applies from seed to farm gate (and includes some references to labour and environmental impacts). It is operated through third party certification agencies. Within two years, over 10,000 suppliers in 32 countries had been certified. By 2007, EurepGAP had become GlobalGAP and claimed to be working with 100 certification bodies in 70 countries. It euphemistically describes itself as an ‘equal partnership of agricultural producers and retailers’. In practice, many major retailers will only buy from producers who comply. As a result, “[p]roducers in developing countries have become standard takers while retailers in industrialised nations have become standard setters’ (Konefal et al., 2005, p 298).
Again, the cost falls on the producers. Small-scale and poor growers who cannot invest in the necessary equipment and upgrades are unable to export or supply domestically to those stores. Support services, such as technical testing or agronomists’ advice, may enhance the capacity of a country and its producers to participate. But these services, too, are being privatised. When foreign firms provide them, especially through mode 1, there is minimal transfer of technology and knowledge, and high risks of supplier capture and depleted national capacity.

The greatest concentration in the agri-food supply chain is at the buying desks, where large alliances pool their purchasing power (Vorley, 2003, p 28). Some producers are forced to sell below their costs of production—a process of producing more to earn less that Vorley describes as ‘immiserising growth’ (Vorley, 2003, p 15). In a further twist, Lisa Michaels claims that supermarkets have become the main beneficiaries of rich countries’ agricultural subsidies: 50 years ago, farmers in Europe and North America received 45 to 60 per cent of the money consumers spent on food; by 2002 that was 7 per cent in Britain and 3.5 per cent in the US (but still 18 per cent in France) (Michaels, 2002, p 13).

The asymmetries in the supply chain produce ‘insiders’ who can afford the investment, scale and technology to supply the buying desks or establish direct contracts with the retailers, and ‘outsiders’ who cannot (Vorley, 2003, p 9). The impacts of exclusion are most severe for small producers and growers in the global South. In Kenya, for example, small farmers’ share of horticulture exports fell from 70 per cent to under 20 per cent by late 1990s (Reichart and Lines, 2005, p 3).

In addition, the rapid growth in foreign supermarkets that service the expanding middle classes in large developing countries has undermined local farms, small family owned shops, informal markets and street vendors (Case study 15). Domestic markets have started to reflect the characteristics of export markets. Two decades ago, most meat produced from the Amazon was by small-scale ranchers for local slaughterhouses. They have been displaced by massive commercial ranchers that are linked to the supermarkets who supply Brazil and beyond; those ranchers are pushing ever deeper into the Amazon (McMichael, 2004, p 12). Vorley describes this asymmetry as a multi-level process: value is transferred within countries from producers and rural areas to consumers and urban areas; and from commodity producing countries in the global South to consuming countries in the North, which in turn puts pressure on small farmers in those countries.

The just-in-time system of transnational food production requires sophisticated inventories, computer-assisted logistics and state-of-the-art satellite tracking that connects producers, distributors, wholesalers and retailers across many countries. This further increases the costs of participation for poor countries and small producers. The movement of perishables for just-in-time delivery requires cheap and efficient international transport services
that are integrated from farm to retail store. These integrated freight systems span road and rail, inland waterways and airports at both ends. More durable foodstuffs rely on mega-container ships that dock in a small number of deep harbour trans-shipment hubs, from which products are distributed to spoke ports. Both air and sea ports face constant pressures to cut costs, despite rising fuel prices. A primary source of cost efficiencies is the de-unionisation, contracting out and where possible offshoring of engineering, ground support, cargo handling and customs services. Many ports that are still publicly owned for strategic reasons are nevertheless fully commercialised. Increasing privatisation has allowed infrastructure firms and investment funds to consolidate control over key international hubs and multiple modes of transport.

Steps in the buyer-driven food supply chain described up to this point correspond to almost every W/120 classification group. The most obvious is 4. Distribution services: A. commission agents; B. wholesale trade; C. retailing; D. franchising. But a non-exhaustive list also includes: 1.A Professional services: 1.A.i veterinary; 1.B. Computer and related: 1.B.c data processing; 1.B.d data base; 1.E. Rental/Leasing [services relating to] 1.E.a ships; 1.E.b aircraft; 1.E.c other transport equipment; 1F Other Business Services: 1.F. a. advertising; 1.F.b market research; 1.F.e technical testing and analysis; 1.F.f services incidental to agriculture; 1.F.i services incidental to manufacturing; 1.F.m related scientific and technical consulting; 1.F.q packaging; 2.C Telecommunications: 2.C.j. on-line information and data base retrieval; 2.C.k electronic data interchange; 2.C.n on-line information and/or data processing; 2.C.o.01 and 02 terrestrial and satellite based mobile telecommunications; 7.B Banking and Other Financial services: 7.B.f.03 derivative products; 7.B.f.04 exchange rate and interest rate instruments; 7.B.k advisory and other auxiliary financial services; 11.Transport services: 11.A maritime; 11.B internal waterways; 11.C. air transport; 11.E rail transport; 11.F road transport; 11.H.a cargo handling; 11.H.b storage and warehouse; and 11.H.c freight transport agency services.

This is only part of the picture. All aspects of globalised food production – including large production units, up-to-date technology, patented seeds, approved herbicides, testing, storage, marketing and transport – are expensive and require access to credit. Producers often face demands for discounts and delays in payment. If their produce is rejected, their contract is cancelled or product specifications are altered without warning, they have no income and cannot service their debts.

In the past, state-owned producer boards, banks and rural credit facilities compensated for the lack of collateral, and smoothed out commodity price volatility and uneven seasonal incomes. States also helped to cover the costs of insurance, especially for disasters. Most of those state agencies have been dismantled or privatised. Those that remain and seek to cross-subsidise credit from more profitable activities face complaints of anti-competitive
practices. Government guarantees, or subsidies to lenders, risk being challenged during a member’s Trade Policy Review as trade distorting subsidies, even though moves to develop Article XV disciplines on subsidies are moribund. The Institute for Agriculture and Trade Policy notes the precedent set by a European Commission ruling that public guarantees for deposits in local savings banks in Germany constituted an unfair competitive advantage by attracting a higher credit rating and lower borrowing rates in capital markets (Reichert and Lines, 2005, p 7).

Several of the EC’s individual GATS 2000 requests on financial services explicitly affect agricultural financing: for South Korea to remove mandatory lending to small and medium-sized enterprises; for Mexico to permit foreign investment in credit unions, savings and loan companies, and development banks; and for the Philippines to ‘clarify’ why its requirements on lending to small-medium enterprises and agri-business were not in its schedule (Reichert and Lines, 2005, p 7).

Trade in services ideology assumes that foreign financial institutions that receive guaranteed market access and national treatment under W/120 category 9. Banking and Financial Services will fill the gaps created by privatisations or the collapse of uncompetitive local lenders. But the transnational financial industry is not interested in scattered rural clients with low volumes of loans and high transaction costs. They are more likely to shut down operations in the countryside and small towns and focus on higher end, more specialised finance sectors. The same applies to 7.A. Insurance and Insurance-related services.

A further, equally potent threat to sustainable rural livelihoods involves the commercialisation and privatisation of water supply and distribution. The UN World Water Development Report 2003 estimated that 70 per cent of all the fresh water consumed is used for agriculture, 22 per cent for industrial use, and 8 per cent for domestic use (UNESCO, 2003, p 19). Water scarcity is already a problem. The Food and Agriculture Organisation estimated in 2003 that future food production would require a 14 per cent increase in agricultural water withdrawals over the next thirty years (quoted in IUF, 2004, p 3). The agribusinesses saw this crisis as a lucrative new market opportunity and began positioning themselves to profit from water shortages. Vandana Shiva quotes Monsanto executive Robert Farley as saying:

what you are seeing is not just a consolidation of seed companies, it’s really a consolidation of the entire food chain. Since water is as central to food production as seed is, and without water life is not possible, Monsanto is now trying to establish its control over water. During 1999, Monsanto plans to launch a new water business, starting with India and Mexico since both these countries are facing water shortages.
Shiva cites a Monsanto strategy paper that outlined its plans to focus on the resource market for water and land. These are the markets that are most relevant to us as a life sciences company committed to delivering food, health and hope to the world, and these are markets in which there are predictable sustainability challenges and therefore opportunities to create business value.

The company anticipated receiving assistance from ‘non-conventional financing’, such as the World Bank’s IFC. By operating through joint ventures in India, it hoped to secure management control over local operations while avoiding direct liability.

As noted in Chapter 4, the World Bank actively promotes water privatisation and tradeable water rights. Growing competition for water between industry, aquaculture and agriculture is expected to see small operations and poor areas miss out. The International Union of Foodworkers fears that higher input costs will increase the pressure on food producers to cut costs, especially labour, and prompt a shift of production to high return, low water use cash crops rather than staples. Higher user charges will affect access to water for workers and communities, including to wash off pesticides. Services to poor areas may be abandoned once waste water treatment and recycling, and the recovery of polluted rivers, become commercially driven. Similarly, those communities may become sites for environmental dumping of contamination, pesticide stockpiles and tradeable toxic wastes (IUF, 2004, pp 7–9).

The EC’s GATS 2000 requests on water focused on urban main supplies, but such commitments could erode the ability of public utilities and private franchisers to cross subsidise rural distribution, and of governments to insist on universal supply. Water distribution for irrigation is not included in 6. Environmental Services or elsewhere in W/120 (although it is in the (UN) revised Central Product Classification (CPC Rev) 1.1). GATS commitments on urban domestic use could open the door to its inclusion. Other classifications already apply to the water supply infrastructure, notably 1.F.e technical testing and analysis, and 11.G pipeline transportation.

At the input end of the food supply chain, agricultural production is dominated by equally powerful corporations that control knowledge, seed technologies and farming inputs, such as fertilisers, pesticides and insecticides. In 2004 just six agro-chemical transnationals (BASF, Bayer CropScience, Dow AgroSciences, DuPont Crop Protection, Monsanto and Syngenta) controlled about 80 per cent of a world market that had sales of over $32 billion (Dinham, 2005, p 9). While Monsanto accounted for 90 per cent of genetically engineered crops grown world wide, that technology is integral to all six. Their research budgets dwarf the money available for publicly
funded research, especially in developing countries (Dinham, 2005, p 11). Hence, these self-described ‘plant science’, ‘crop science’ or ‘life science’ companies can dictate the direction of agricultural research. Their top-down biotechnology solutions displace the bottom-up participatory approaches that build on farmers’ knowledge. By establishing a presence in different countries, often in ‘partnerships’ with state funded public research bodies and universities, the corporations gain access to local and indigenous knowledge (Paul and Steinbrecher, 2003, pp 130–2). Indigenous genetic material and processes are then patented courtesy of World Intellectual Property Organization’s Union for the Protection of New Varieties of Plants and the WTO’s TRIPS. Full GATS commitments on W/120 category 1.C.a: research and development services on natural sciences, and 5.C: higher education would guarantee unrestricted rights for these corporations to establish a commercial presence and to access public subsidies.

In conjunction with the agreements on agriculture and intellectual property, the GATS has the potential to embed a market model of food security that marginalises traditional farming methods and institutions, and undermines rural livelihoods and food sovereignty.

Vorley concludes that today’s integrated agri-food supply chain is producing three rural worlds, which reflect traditional asymmetries. In the first rural world, a minority of large farmers and entrepreneurs are well connected into the global food economy and become a vital part of agribusiness. The Second World comprises those family farmers and landed peasants who were traditionally the mainstays of the rural economy and are economically and politically subordinated within the agribusiness model. They face declining returns, fluctuating output and lack of access to land and credit, and search for local buyers and niche markets. ‘Rural World 3’ is ‘a struggling underclass that includes almost four-fifths of the world’s hungry’ who try to survive through off-farm work, itinerant farm labour, temporary migration and subsistence agriculture (Vorley, 2003, pp 14–15). These communities are trapped in poverty. The GATS provides no escape route for the second or third rural worlds: the general exceptions provision allows no exceptions for agricultural crises, the loss of food sovereignty or environmental catastrophe; nor is there any emergency safeguard mechanism.

This analysis has focused on food production. The exploitation of forestry, fisheries or mineral resources can be mapped onto the trade in services agreements in similar ways. As Case study 16 shows, tourism has its own supply chain that falls under multiple GATS rules and potentially 144 CPCs.

**GATS 2000**

The companies who control these industries are a major force in the transatlantic services lobbies. They were disappointed by their harvest from GATS 1994. Commitments were partial, fragmented and unevenly spread
across the supply chains. As GATS 2000 approached, the corporations took advantage of their intimate relationship with the US and EC trade negotiators to identify target countries, sectors and barriers. They were not interested in additional piecemeal commitments to CPCs. They wanted comprehensive and coherent commitments that covered the logistics infrastructure from point of origin to point of consumption across multiple sectors and countries. That could never be achieved through the meandering bilateral request and offer process. In the lead-up to the Hong Kong ministerial in 2005, the retailers’ lobby Eurocommerce urged greater priority for services, arguing ‘[n]ow is the time for preparing cross-cutting trade-offs: services/agriculture, services/industrial, market access/industrial’ (Eurocommerce, 2005).

The plurilateral process that was authorised at Hong Kong offered a prime opportunity to push for clear, certain, comparable and coherent coverage of the supply chains. Most of the major demandeurs were involved in most of the relevant plurilateral requests, whose demands often overlapped. However, national sensitivities prevented a unified approach. The Mode 3 request focused on removing horizontal limitations on foreign investment, while that on distribution services sought comprehensive coverage of that sector across modes 1, 2, and 3, with limited exclusions for sensitive services. Air transport targeted ancillary services. Other plurilaterals were more innovative. The logistics request appended a checklist designed to provide a ‘comprehensive picture of all activities relating to the supply chains for freight’. It only detailed four categories covering freight transport and logistics, intending that these would complement other requests. Maritime services built on the EC-promoted Maritime Model Schedule for comprehensive liberalisation, which was designed to enable multimodal transport operators ‘to undertake locally all activities which are necessary for the supply to their customers of a partially or fully integrated transport service, within which the maritime transport constitutes a substantial element’. Because the plurilaterals were also expected to bind the demandeurs, the uptake of these requests would provide a significant consolidation of supply chains across the major economies.

These far-reaching plurilateral proposals were designed to restrict the flexibility that members were guaranteed in Article XIX of the GATS. Ironically, that approach drew legitimacy from the proposal by the Dominican Republic and other developing countries for a ‘coherent’ cluster of commitments on tourism, discussed in Case study 16.

The contribution of the GATS and other trade in services agreements to the consolidation of the agri-food supply chains and control over natural resources has gone largely unremarked by defensive governments and GATS critics. So have the cumulative impacts of ‘trade’ agreements on services, agriculture, NAMA, TRIPS, TRIMS, FTAs and bilateral investment treaties. Yet the impact of what David Harvey calls ‘accumulation by dispossession’
determines the sustainability of physical, social and cultural life for over a billion people (Harvey, 2005, p 178). That pressure will intensify as food staples are diverted to produce agri-fuels. Peasant farmers and agricultural workers, fisher folk, indigenous peoples, and local communities have mobilised in defence of food sovereignty, land rights and self-determination. These local struggles are often connected regionally and internationally. Their actions have had a major influence on Southern governments in the Doha negotiations on agriculture and NAMA and indirectly, therefore, on the advance of the trade in services negotiations.

CASE STUDY 15 WALL-MART RULES, OK?

Mega-supermarkets such as Wal-Mart, Carrefour and Tesco that ‘trade’ through foreign investment (mode 3) are transforming the urban landscape, local communities and traditional lifestyles of millions of people around the world.

Modern supermarkets are creatures of North America and Europe. They date back to the cooperative movement in Britain in the nineteenth century, when they were controlled by their members and sold basic foods at prices that working people could afford. Once retail price maintenance was abolished they expanded rapidly. Container ships and jumbo jets increased their range of product sources and the scale of purchasing. The trend to self-service cut labour costs. Widespread car ownership meant consumers could shop at a distance and in bulk (Michaels, 2002, p 3).

As competition intensified, and profit margins tightened, supermarket owners looked for economies of scale and built larger stores. Ownership was consolidated into chains and became increasingly concentrated. The market differentiated on cost and quality, to the point that most chains began operating stores at every level: hypermarkets, superstores, supermarkets, convenience stores and cash-and-carry. As domestic markets in wealthy countries became more competitive, the major players turned to large Southern countries with a growing middle class of consumers.

The Spinex Resources Top 100 retailers (by sales) for 2005 ranked 42 US firms in the top 100; Britain had 12 and the rest of the EU another 26.11 Wall-Mart dwarfs all its competitors. Its sales for the 2006 financial year were $315 billion, with profits of $11.2 billion from some 6,600 stores. The company was founded in 1962 and only made the Fortune magazine top 500 US companies (ranked by revenue) in 1995 (Semmens, 2006). However, by 2002 Wal-Mart’s revenue had exceeded Exxon Mobil, and it became the first services company to top the Fortune ranking. In 2006, Exxon recovered first place, only to be trumped again by Wal-Mart in 2007.12 The company accounted for one-tenth of total US imports from
China in 2002, and is so pivotal to the US economy that one retail industry expert predicted a national security crisis if Wal-Mart went into a tailspin. France’s Carrefour (Crossroads) came a distant second in the Spinex ranking, with sales in 2005 of ‘only’ $90 billion through 7,003 stores, excluding its franchises. Two other grocery chains, Metro AG of Germany and Royal Dutch Ahold, made the top five retailers on the Spinex list, while Tesco plc came in sixth.

Where trade in services agreements do not open markets to these retailers, they secure and consolidate them. In GATS 1994, 33 members made specific commitments for retail distribution; a majority were developing countries, including the larger markets of Argentina, Brazil, Hong Kong, South Korea and South Africa. By the mid-2000s, the major chains controlled 50 to 60 per cent of the food retail sector in Latin America, compared to 10 to 20 per cent in the early 1990s. Brazil fully opened its distribution services to foreign investment in GATS 1994. In 2000, four of the five biggest Brazilian retail companies were wholly or largely foreign owned. When foreign investment was allowed in China in 1992, a huge migration of consumers to supermarkets began. China’s WTO accession package contained extensive distribution commitments, including the rapid phasing out of investment restrictions. Foreign chain stores soon accounted for 23 per cent of all big new supermarkets (Reichert and Lines, 2005, p 4). Although China’s retail market grew by a massive 13 per cent in 2006, the AT Kearney Retail Development Index 2007 identified Brazil, Mexico and Russia as offering the most attractive market opportunities; China rated only seventh. At a bilateral level, Malaysia’s ban on new hypermarkets in certain areas until 2009 was threatened during its FTA negotiations with the US.

These supermarket chains have no commitment to the uniqueness of ‘place’. Corporate headquarters in the US or Europe aim to remake local communities to suit their operating requirements and design templates. In May 2002, for example, the (then) International Mass Retail Association complained that ‘zoning and store size restrictions, and hours of operation restrictions, although frequently imposed on a national basis, make investment unattractive in some markets. European hours of operation regulations are particularly troublesome’ (quoted in Bottari and Gould, 2005, p 8). If the chains are prevented from reshaping the planning laws, labour practices and consumer habits of one town in one country to meet their profit targets, they can sell up and move on to more compliant locations.

Different firms have different strategies for influencing local government decisions. Wal-Mart, for example, has attempted to mobilise and manipulate consumer activism. In 2003 it hired a specialist petition management company to collect signatures for a petition to overturn an ordinance in Contra Costa County (California) that barred super-size retail centres from opening full-service grocery stores outside the city limits – even though Wal-Mart had no plans to open such a store. It had already secured the repeal
of a similar ordinance in Nevada’s Clark County.\textsuperscript{16} Other mega-retailers rely on lobbying, and direct political influence over central and local government regimes, as George Monbiot details in his passionate exposé of supermarket power in Britain (Monbiot, 2000, pp 162–207).

Corporate leverage is most politically effective on home governments. It rarely opens foreign doors. Trade in services agreements can assist, albeit imperfectly. The kind of ‘measures’ that are subject to rules on market access, national treatment, MFN and domestic regulation range from national statutes and city by-laws to unwritten practices, or even exercises of discretion by planning councils. How deeply these obligations intrude on the core civic responsibilities of local authorities is unclear. The ‘hit list’ of barriers identified by WTO members and their services lobbies to inform the GATS 2000 and domestic regulation negotiations includes many measures that central governments and local bodies commonly use to contain the impact of big box stores – limits on land use, hours of operation and size; social and economic impact assessments on the local community; requirements for buildings to harmonise with the urban landscape and local architecture; bans on large stores in certain areas (which would constitute a ‘zero quota’); limits on the number of formula stores in particular locations; requirements for indemnity bonds; ‘onerous’ documentation requirements; and restrictions on marketing and advertising.\textsuperscript{17}

Many GATS 1994 schedules show that governments were uncertain about the kind and degree of constraints that national treatment and market access commitments impose. Limitations scheduled by governments for mode 3 of retail distribution include many entries for economic needs tests and some for restrictions on store size. A number of governments listed state and local government zoning and land use limitations. Others, including the US, apparently thought it was not necessary to do so (Bottari and Gould, 2005, Appendix 1). This uncertainty sets the stage for a repeat of \textit{US-Gambling} where a government is bound to commitments it says it never intended. That case also shows how US or European retailers could bankroll challenges by other states, or use offshore affiliates, to deregulate their own markets. The case of Japan’s retail law, where a retail market was opened on an MFN basis even without a formal ruling, illustrates the chilling effect that the threat of a dispute can have on regulation.

Some of the proposals for disciplines on domestic regulation would provide further ammunition to deregulate the retail sector. By definition, a ‘necessity’ test or requirement for least trade restrictive regulation would tie the hands of local authorities. In addition, a transparency obligation that required prior consultation with foreign firms over proposed new regulations would stretch the capacity of even a large metropolitan council. These constraints are already being written into bilaterals.

Once market access and national treatment commitments for retail distribution are made, local governments can no longer ensure the sustainability
of their local retail sector. Trade in services agreements have no emergency safeguard provisions that allow those commitments to be suspended when the local communities are threatened, or allow time for local shops to become re-established if the superstore that displaced them closes down. Nor, scandalously, does Article XIV: General exceptions apply to measures that are taken for sound environmental reasons.

Trade agreements can help to remove barriers to the global expansion of superstores. However, they cannot dismantle the cultural barriers. To export their particular brands of Western consumerism, the supermarket chains must succeed in colonising foreign cultures, or at least the minds of target consumers.

Wal-Mart has found this difficult. Because it has been losing market share to competitors in the US, its thousands of overseas stores are increasingly important. But the Wal-Mart formula of selling lowest cost products through sterile big box stores is culturally specific. Wal-Mart found a cultural mesh in Britain. But it could not break through Germany’s tight price regulation, strong labour laws and loyalty to local firms and withdrew at a serious loss. It failed to win over consumers in South Korea and quit there too. Wal-Mart insisted it would stay in Japan, despite losing $465 million in the first six months of 2006, as it struggled to reconcile its standard template with Japanese retail culture.\(^\text{18}\)

China was the ultimate challenge. By late 2006, Wal-Mart had 36,000 workers in 68 stores in China. It paid $1 billion for Trust-Mart, a downscale local chain, to gain access to 20 Chinese provinces. In an attempt to ‘go native’ it swapped dead fish and meat in polystyrene trays for live fish tanks and open meat counters.\(^\text{19}\) It also conceded a long battle over unionisation with the All-China Federation of Trade Unions.\(^\text{20}\) Despite these moves, commentators note that the aspirations of China’s middle class are driven more by social standing than low cost, and Wal-Mart’s success is not assured. Some even suggest the Wal-Mart phenomenon may have peaked.\(^\text{21}\)

Carrefour has been equally itinerant, but arguably more adaptable. Over half of its sales are outside France. As of September 2005, Carrefour operated 10,000 retail outlets in 31 countries, and employed more than 430,000 people. In 2006 it had 35 hypermarkets and hundreds of discounts stores in Brazil. But it, too, sold 32 hypermarkets in South Korea, where it had been the second largest retailer, and quit Japan and Spain to concentrate on China. Carrefour first invested in China in 1995. By 2006 it had established 67 outlets and a Chinese export base for its global operations.\(^\text{22}\)

The GATS guarantees these retailers the fluidity to invest and disinvest, without regard to the consequences for local communities. The impacts in wealthy countries have been dramatic enough. Researchers calculate that two supermarkets will close in the US for each new Wal-Mart that opens, with a loss of jobs and local businesses in the surrounding area.\(^\text{23}\) Back in
1960, small independent retailers in Britain, who tend to source locally, had a 60 per cent share of the food retail market. By 2000, their share was down to 6 per cent. Food sales through supermarkets grew 30 per cent just between 1995 and 2002 (Michaels, 2002, p 17). A 1998 study of 93 stores in Britain found an average net loss of 276 local jobs each time a supermarket opened (Simms et al., 2002, p 15).

This takeover by supermarkets in the North took several decades. The transition in the South has been much more rapid and disruptive, and forms part of a broader food export strategy that Philip McMichael argues has ‘Westernised social diets of newly urbanized customers in industrializing regions of the Third World’ (McMichael, 2004, p 5). As a result the food system has become polarised across class, generational and rural/urban divides. The aspirations of newly affluent consumers, and desires of ‘children of the market’ for Western retail therapy, are pitted against cultural traditions, close-knit neighbourhoods and the livelihoods of small producers and shopkeepers. Wet markets and small local shops tend to be frequented by older generations who prepare traditional foods, while working professionals prefer the efficiency and choice of one-stop superstores. Malls are promoted to consumption-focused urbanites as centres for ‘retailtainment’. Traditional outlets and the informal sector are cannibalised. McMichael draws parallels between the ‘managed construction of the Third World consumer’ and ‘the decimation of peasant agriculture’ (McMichael, 2004, p 5).

These incursions do not go uncontested, as the resistance of local shopkeepers, communities and trade unions in Thailand shows. The impact assessment of the GATS for Thailand in 2002, discussed in Chapter 5 in relation to financial services, included a case study on foreign superstores. The report stressed that Thailand remains an agrarian society, with 60 per cent of the people still engaged in agriculture. Wholesale and retail trade was the second most important sector of the cash economy, after manufacturing, and employed 15 per cent of the total workforce. The sector was split between the traditional wet markets and neighbourhood shops that were locally owned and modern department stores and shopping malls that were mostly owned by foreign chains.

During the 1990s, the government had used light-handed regulation to enhance consumer choice and create forward and backward linkages with the retail sector. But the fire sale of property that followed the 1997 Asian financial crisis had attracted a large number of foreign retailers who offered lower cost items to the now less-affluent Thais. Their sales and outlets rapidly expanded. Several thousand small retailers had closed each year as consumer and lifestyle preferences shifted. According to the report, this created ‘a very hot potato’ for the government. While the government did not plan to halt retail liberalisation completely, it considered some ‘appropriate regulations’ were called for to prevent further impacts on small, traditional retailers and encourage their competitiveness.
Thailand had made no retail distribution services commitments in GATS 1994. The assessment concluded that these experiences have given rise to serious thoughts on having appropriate and sound regulatory framework set before liberalisation is unleashed in a fast and uncontrolled manner. Since that may be hard to come by in realistic terms, it is felt that liberalisation, while desirable, should take place at a pace commensurate to the economic (and perhaps, social) readiness of a country. This is completely congruent with the principles of progressive liberalisation and the right to regulate – the two cornerstones of the GATS.26

The Thai government drafted a new Retail Business Act in co-operation with the Chamber of Commerce. The law aimed to restrict the operations of foreign retailers by regulating their pricing policies, including their advertising budgets and supplier-entrance fees, and restricting capital registration and the expansion of new chains. Tesco, Carrefour and others rushed to beat the new law: more than 40 superstores were approved in 2002.27

In November 2002, the since-disgraced Prime Minister Thaksin suddenly abandoned the proposed law. The Minister of Commerce hinted at foreign pressure: ‘Any enactment of rules of law that are not universally accepted in the international community would affect our future negotiation power over free-trade agreements.’ The spokesperson for a local Chamber of Commerce responded: ‘The prime minister is afraid of upsetting the likes of England, but we would like to ask which country he is the prime minister of?’28 At the time, it was the European chains that dominated Thailand’s markets and the EC’s GATS 2000 requests had sought full commitments in wholesale and retail distribution. But Thaksin’s about-face was also a precursor to the US announcement of free trade negotiations with Thailand in October 2003.

Thailand retained its existing planning rules for zoning and opening hours. The Chamber of Commerce objected that these had never worked and never would. The superstores continued to expand, even as Thailand hit an economic downturn. By September 2005, Carrefour was operating 20 hypermarkets in Thailand, each serving an average 8,000 customers a day, and planned to expand further through supermarkets and franchised convenience stores.

Negotiations on the US–Thailand FTA stalled following the military coup in August 2006. But the retail expansion continued. In October 2006, Thailand’s small shop owners took to the streets in defiance of martial law to protest at Tesco’s plans to double its smaller outlets to 200, alongside the 51 hypermarkets under construction in the provinces. They demanded a five-year moratorium on expansion by foreign retail chains, likening the process to ‘a fire that is burning down local markets across the nation’.29

The saga of the Retail Act, and the use of zoning to contain the expansion
of foreign supermarkets, continued through 2007 as the cabinet, legislative assembly and supreme Council of State disputed the appropriate balance of interests between foreign investors and local shopkeepers. Meanwhile, the legislature had adopted a new section 190 of the Thai Constitution that required the National Assembly to approve the entry into negotiations for any treaty that, inter alia, would have a widespread impact on the country’s economic and social stability, and to the conduct of public hearings prior to signing the treaty.

Several lessons can be drawn from the Thai experience. First, it is possible to attract foreign investment without GATS commitments. Second, it is easier to change policies if you have no binding GATS commitments. Third, the existence of the GATS combined with pressure for bilateral negotiations has a chilling effect on domestic regulation, even without formal commitments. The story also reveals a now familiar dynamic. On one hand, the appeal of Western consumerism, the overwhelming dominance of the supermarket-driven food supply chain, and the relentless quest of mega-retailers for new markets and higher profits are features of global capitalism. On the other, local people will struggle to defend their communities, livelihoods and traditions, and the right to shape their own lives, when they are threatened by GATS obligations or FTA negotiations (Joy and Hardstaff, 2003, p 14).

CASE STUDY 16 THE REAL CANCÚN

Tourism is the fourth largest economic activity in the world, surpassed only by armaments, petroleum and motor vehicles. The World Travel and Tourism Council (WTTC) projected that the industry would generate $1,815 billion in direct economic activity, amounting to 3.6 per cent of world GDP, in 2007 and directly employ 76 million people (WTTC, 2007). The tourism sector is treated in the trade policy arena as harmless and uncontroversial – a view that also reflects its importance as the main source of foreign exchange earnings for 83 per cent of developing countries. UNCTAD has urged those countries to strengthen their tourism capacity and competitiveness.

Despite this benign image, the global market is as chronically skewed for tourism as it is for other services. Indian-based NGO Equations has developed a GATS-Tourism Impact Assessment Framework, which reveals how tourist-source countries dominate the industry and retain the benefits (EED/Equations, 2005). Between 40 and 50 per cent of gross tourism receipts ‘leak’ out of smaller developing country destinations to pay for imported equipment, drink, food and other items. Further ‘export leakage’ occurs as foreign investors in resorts, hotels and other infrastructure take their profits back to their country of origin. The UN Environmental Programme has estimated that only $5 of each $100 spent on a vacation tour by a visitor from a developed country stays in the developing country destination.30
Those figures are not surprising in an industry where just four internet-based global distribution systems (including Amadeus and Pegasus) manage 80 per cent of bookings in the world tourism market. The sector is dominated by household names such as American Express in finance and travel, Intercontinental and Best Western branded hotels and, less obviously, Accenture in IT and outsourcing for airlines, hotels and transportation. E-tourism operators such as Expedia.com (established by Microsoft in 1996 and spun off in 1999) host other mega-players who sponsor placements and links. Small local hotels, tour guides or rental car firms who cannot afford the listings miss out, and traditional landed travel agencies struggle to compete. The world’s major cruise lines (covered under Maritime Transport Services) sell pre-paid packages for sightseeing, culture, shopping and food that exclude smaller local tour guides and entrepreneurs (Slatter, 2006a). The Star Alliance and One World Alliance consortia link together most of the world’s major airlines, marginalising other, often struggling national carriers.

Local communities are left to bear the ‘negative externalities’ of mass tourism. Resorts and tourism zones demand priority access to land, water, energy and high quality infrastructure, which usually means land title registration, privatised services and price rationing. These luxury enclaves displace indigenous peoples and local communities, and remain largely disconnected from the local culture and economy. The impacts of construction, landscaping, leisure facilities and pollution threaten the local bio-diversity. Cruise ships likewise pollute the local fishing grounds and harbours with sewage, fuel leakages and waste. Jobs for locals are clustered in the untrained, low paid activities of construction, hotel work and transport. Many tourism destinations are notorious for the formal and informal exploitation of child and women’s labour, most perilously through sex tourism, entertainment and the souvenir trade.31

The international tourism industry has tried to overcome such criticisms and reinvent itself for the twenty-first century under the banner of ‘sustainable tourism’. But sustainability for them refers to the market, not the lifestyles and livelihoods of those in whose back yards they operate. The WTO secretariat paraphrases the World Tourism Organization’s definition of ‘sustainable tourism’ as ‘meeting of the needs of present tourists and host regions, while protecting and enhancing opportunities for the future’.32

Indeed, the industry has capitalised on challenges to its destructive impacts by creating lucrative niche markets in ‘concept-driven tourism’, including ecotourism, nature tourism, cultural tourism, ethno-tourism, health tourism, cross-border religious tourism and even poverty tourism to visit slums or watch scavenging. Eco-tourism, in particular, has given the industry access to hitherto untouched areas around the world, without having to compromise on profit. The World Tourism Organization portrays ‘eco-tourism’ as
‘responsible travel to natural areas which conserves the environment and improves the welfare of local people’. The International Forum on Indigenous Tourism held in Oaxaca, Mexico, in March 2002 described it very differently:

We have been told that the International Year of Eco-tourism (IYE) is testimony to the importance of ecotourism to conserve lands, protect cultures, and encourage economic development. Yet the realities we are experiencing of ecological degradation and cultural erosion associated with tourism development under the influence of globalisation suggest that the IYE does not go far enough in its review of ecotourism. For centuries, Indigenous Peoples have suffered from displacement and dispossession, and we see the incursion of the profit-driven global tourism industry as well as the rhetoric of ‘sustainable development’ in the IYE as the latest threats to our lands and our communities. . . . Tourism is beneficial for Indigenous communities only when it is based on and enhances our self-determination. . . . An essential component of this is the right to decline tourism development at any point in the development process. So when we talk about ‘Indigenous Tourism’, it is not just another marketing gimmick, but a broad category of distinctive ways in which Indigenous Peoples choose to implement tourism on our own terms.

Trade in services agreements are the antithesis of self-determination. In 1990 the OECD described tourism as ‘remarkably free’ from protectionist and discriminatory practices. The GATS has largely locked in that liberalisation. More governments (112) made commitments on tourism in 1994 than in any other sector. The W/120 Category 8: Trade and travel-related services covers the obvious – hotels and restaurants; travel agencies and tour operators; tourist guides; and other. However, an illustrative list prepared by the WTO in 1990 identified a further 70 tourism-dedicated activities that ranged across real estate, hotel construction, souvenir sales, tourism degree programmes, refuse disposal, travel insurance, nightclubs, tour guides, amusement markets and museums, casinos, rail and bus services, air passenger transport. Then there were another 70 more generic tourism-related activities. These classifications were developed by the World Tourism Organization into a ‘Standard International Classification of Tourism Activities’. An UNCTAD-sponsored experts meeting on tourism in 2000 proposed incorporating these into a tourism cluster for the GATS 2000 negotiations. That formed the basis for a proposal from El Salvador, Honduras, Nicaragua and Panama in 2000 for a ‘coherent’ cluster of commitments on tourism-characteristic services, tourism-connected services and tourism non-specific services (almost everything else). A further paper from Brazil and others
that reviewed progress in the tourism negotiations by September 2004 complained that most offers failed to provide commercially meaningful (new) market access and national treatment commitments.  

The request is, of course, silent about the consequences. Trade in services commitments restrain governments, in the interests of the global tourism industry, from maintaining and adopting policies and regulations across a vast array of activities. Measures that would be considered a breach of market access obligations include limits on the numbers of hotels or resorts in a region, tour groups licensed to operate in a culturally sensitive area, or cruise ships allowed to enter a port, and similarly with restrictions on the number of tourists visiting a site or coaches permitted in a protected area. Reserving jobs for indigenous people as tour guides would violate national treatment. Conditions on licences that require cultural impact assessments or use of recycled building materials could be deemed under Article VI to be ‘more burdensome than necessary’ to achieve ‘quality’.

The International Cancún Declaration of Indigenous Peoples, convened in opposition to the fifth WTO ministerial conference in September 2003, called for an end to the GATS-sponsored monopoly by the international tourism industry over protected areas, parks, forests, waters and ecosystems, and asserted the right to exercise indigenous management practices and control over natural resources.  

The following account was written by the author at that time, and reflects the realities of tourism for the local residents of Cancún. The names of the sources have been changed:

Puerto Juarez is the oldest settlement in Cancún. Past the local fishing boats moored on the stunning white beach, you can see the profile of the hotel zone where the WTO ministerial meeting is about to begin. The contrast is breathtaking.

Cancún was created just 33 years ago. Fishers and their families have been in Puerto Juarez for generations. Many of the traditional families are now being displaced. The locals say that people have no rights, and some have no water, because powerful developers are intent on expelling them from the beach so they can build new hotels in a mirror image of the hotel zone.

Jose owns a small beachfront restaurant and fishing boat. His was the first stop on the tour of ‘real’ Cancún organized for journalists by a number of groups including Friends of the Earth International and the Polaris Institute of Canada, alongside the local organisers of the Comité de Bienvenida de Cancún.

Snr Jose apologized that ‘there are few people around today, because they are afraid’. A few days ago, he had a visit from the local council. They told him that his restaurant licence would not be renewed. Plain clothed officials came to watch over the media tour.
He thought there were two likely reasons. First, the authorities want to close his restaurant down because poor people gather there. They will be unsightly in the proposed new luxury hotel zone. Second, Jose was prepared to talk to the international media about the harsh realities of life for local people in Cancún — a truth that would contradict the claim that foreign investment in tourism is essential to create development and jobs in poor countries. It would also tarnish the image of golden sands, wealth and First World services being lapped up by the WTO delegates, journalists and lobbyists who now occupy Cancún’s hotel zone.

Snr Jose’s message was simple: ‘They promised tourist development that would help indigenous people, help the local people and help the poor people. And we noticed at the beginning of the process that that was lies, that wasn’t the way it was going to be.’ The cruise ships and hotel chains are all foreign controlled. Tourists buy an all-inclusive package, including arts, crafts, restaurants and fishing excursions. Foreign investors now control all development in Cancún. Small businesses simply cannot survive.

‘All the money stays in the hands of the same people. That’s what creates the poverty, alcoholism, vandalism and lack of services. We live day to day. Our livelihoods depend on the weather. If the weather is good, we work. If not, we can’t. The permits we need to purchase to run a business here are too expensive for us and they are turned down for reasons we don’t understand and aren’t told to us. The point seems to be to make sure we can’t continue to exist.’

‘When we can get permits to run the little restaurants and fishing boats it is impossible to compete with the transnational companies that are all backed with foreign money.’

He noted that ‘all this started with NAFTA. In 10 years, there has been no widespread development for the people. Foreign investors take all the money back home. Some 600 families live in this community. Soon they will have no choice but to work for the foreign companies for a pittance, putting on white suits, being people’s servants and taking orders, or set up small tourist stands’.

‘People used to be happy’, he said. ‘Here by the shore on the water there used to be thousands of lobsters, shrimps and clams. People could live from the sea. Just recently a friend was arrested, had his boat confiscated and was sent to jail because he took seven kilogrammes of shrimp. The people of Cancún do not have any part of Cancún for themselves.’
Down the road at the port this perverse form of ‘development’ was also making its mark. A new facility was under construction, designed to cater for 200 to 300 boats. The small operators and co-operatives that ran the old port would shortly be redundant. The new port building had an OXXO convenience store and a McDonald’s that, based on similar experience elsewhere, would soon displace the small shops in the town.

What has this story got to do with this week’s WTO ministerial meeting? A great deal has been invested in the argument made by the IMF, World Bank and WTO that poor countries need foreign direct investment. Negotiation of a new agreement to promote and protect foreign investment tops the list of ‘new issues’ that ministers are required to decide on. This would see the failed negotiations on a Multilateral Agreement on Investment reborn.

Already, foreign investors in services such as tourism, fishing, restaurants, food stores, hotels, leisure services and ports can secure guaranteed rights to set up business and be treated at least as favourably as locals under the GATS. The right to regulate can also be restricted if governments have committed those services to the GATS rules. Under new negotiations launched in 2000, governments are expected to make further services commitments. The European Commission has asked Mexico for extensive new openings in tourism, retail services and environment, including water. The Cancún ministerial is expected to set new deadlines for governments to table their offers in response to such requests.

The water issue is especially sensitive. Numerous World Bank loans to Mexico have contained conditions mandating water privatisation and cost recovery. In 2003, the World Bank approved another loan for Mexico to provide infrastructure services, including water, for eligible states. Conditions for eligibility include economically efficient pricing, self-sufficiency through cost recovery, appropriate competition and regulatory frameworks, and enhancing the participation of the private sector.

Ondeo, the local water company in Cancún, is 50 per cent owned by Suez of France, the world’s largest water company. Suez is a cornerstone member of the European Services Forum that drives the EC’s position in the GATS negotiations. In 2002, Suez secured the contract for Cancún’s water supply from Azurix, a subsidiary of Enron. Suez claimed that this and other Mexican water contracts would earn it $70 million in annual revenue.
The real meaning of water privatisation was evident down the road from Snr Jose’s restaurant. A pumping station provides a relatively clean and reliable water supply to local residents. But not to all of them. A stone’s throw away from the pumping station lives the family of Snra Maria and Snr Jorge. Their house has no water. To have it connected they need papers that show they are legal tenants. They’ve lived in their own house on this land for many years. But they don’t have the paperwork. It got lost at the Council. Each time they try to secure new documentation, that gets lost too. Sometimes, they say, the tanker drivers give them water, out of solidarity.

The landowner was billionaire Carlos Hank Gonzales, former Minister of Agriculture and Minister of Tourism. One of Mexico’s most influential businessmen, Gonzales was implicated in the corruption scandals that surrounded former President Salinas. His local corporate vehicle Trivasa has been linked to an Enron-style corruption scandal. Another of his firms is a co-partner with French water company Suez.

Snr Hank flagged the land where the family lives as the site of a new hotel zone. They were offered 6,000 pesos to move. When they refused, the local authority and landowner came with machines to destroy the house. The municipal government documented their complaint. But those papers were never served and disappeared too. The couple observed that ‘developers have big pockets’.

Some of their neighbours have moved. Three years ago, 17 fishing families were evicted to make way for a hotel development and relocated to a remote but beautiful lagoon at Rio Manati. This was presented as an opportunity to develop their own tourism venture. Accepting the challenge, the families have been developing eco-tourism with a fresh fish restaurant, bird watching, fishing and exploring the rich natural environment nourished by mangroves. They have invested heavily in equipment for tourism and sustainable aquaculture.

Access is a problem – the dirt road would deter all but the most determined tourist. So is the absence of electricity, although they are working on innovative solar energy strategies. Two other threats may spell the death knell for the project and force them to search for yet another livelihood.

The first is a rubbish dump 2 kilometers up the road, right next to the mangroves. The dump receives all the refuse from Cancún, even though it is in the separate municipality of Mujeres. The 24,000 hotel rooms in Cancún generate as much rubbish as the 400,000 residents of Cancún. The toxins from decomposing rubbish leach into the mangroves, polluting the lagoon. This, in turn, kills the fish larvae that
spawn there. As guardians for the environment, the families explain they have been trying to get environmental regulations and restrictions on fishing to safeguard an irreplaceable heritage, to no avail. That is not surprising – they said the dump is owned by connections of Carlos Hank Gonzales. As vultures circle the rubbish tip, our guide quips that ‘we would rather have these vultures than the ones at the WTO’.

Developers are now eyeing the site at Rio Manati as a commercialised tourist venture, displacing the families yet again. In a familiar story, they don’t have the formal paperwork to support their ownership of the land. It disappeared within the offices of the local council. The families are trying to regularise the situation so they cannot be removed. Without those documents, developers can lay claim to the site. Presumably, if they succeed Snr Hank’s associates will be involved, and discover a profitable way to resolve the pollution threat to a lucrative new tourist venture, as well as fixing the road and laying on electricity.

To a large extent NAFTA, which covers both services and investment, has already locked open the doors of Cancún and its surrounds to foreign capital from the US and Canada. Their corporations are ‘free’ to operate in a largely unfettered regulatory environment. The people whose communities they destroy, whose environments they despoil, whose livelihoods they terminate, whose self-determination they violate, and whose dignity they leave in tatters have no legal right to keep them out. Nor, any longer, does the Mexican government.

Extending this ‘free trade zone’ to the world through WTO agreements on investment and the GATS would reduce Mexico, and places such as Cancún, to mere playgrounds for transnational corporations and foreign investors that want to profit from this stunning location. The contrast between a development model that is designed to promote the profits of the world’s transnationals, and one that protects the basic rights of people to safe drinking water, fish from their oceans, a clean environment, a secure income and protection from intimidation, eviction and repression, could hardly be more stark.
Chapter 9

Energy wars

The GATS presents a utopian vision of ever-expanding global markets that is blind to its self-destructive potential. A globally integrated services economy cannot survive without cheap and plentiful energy; nor can the lifestyles of Western consumers and aspirant middle classes in the South.

Global warming, the depletion of energy resources and projections of peak oil (Deffeyes, 2005) herald an intensified rivalry among the major powers. US ascendancy depends on maintaining its prosperity, which in turn depends on oil. The US ‘has 5 per cent of the world’s population, consumes 26 per cent of the world’s oil, but only has 2 per cent of the world’s oil reserves within its boundaries’ (Barnett, 2006, p 7). The US is already competing with the EU and Japan to secure supplies of oil and gas from the Middle East, Africa, Asia and Eastern Europe. China and India have initiated their own economic and strategic alliances to meet their growing demand. A belligerent Russia is sitting on massive energy reserves.

The quest for energy security has invested the trade/energy/security nexus with a new urgency and prompted some GATS critics to predict that trade in services agreements could become the site of ‘the other oil war’ (Menotti, 2006, p 3). This chapter explores that proposition in three complementary contexts.

The first is the push for commitments on energy-related services in the GATS 2000 negotiations and, with that having stalled, through regional and bilateral agreements with energy-rich and/or strategic countries. These agreements provide extensive legal entitlements. Yet attempts to enforce such agreements would, in many cases, risk fuelling an anti-Western or anti-imperialist backlash.

The US is disadvantaged in the race for new treaties so long as the President lacks fast track authority. It is therefore likely to push aggressively on a second track: to secure enforceable access to oil and gas reserves and energy services through WTO accession, including of ‘post-conflict’ Iraq and the former and current enemies of Empire, Libya and Iran. However, as Case study 18 shows, the accession process takes time and carries similar risks of provoking or intensifying internal instability and external hostility.
The third context is the national security exception under GATS Article XIV bis. Here the US plays a double game: it demands extensive services commitments from energy-rich states, while asserting its own absolute sovereignty and right to set aside its trade obligations in the name of national security. The ubiquitous ‘war on terror’ seems to offer limitless potential to do this.

Yet, the US’s adversaries could do the same, individually or collectively. Energy services have an intrinsic foreign policy component. Belligerent OPEC members could follow the example of Venezuela, which has reasserted its ‘full oil sovereignty’ by renationalising its oil and gas fields irrespective of any GATS implications (Case study 17). Attempts to enforce trade in services commitments in this context would provoke a legal, political and ideological confrontation that would become a proxy battle between the prevailing hegemony of neoliberal globalisation and the counter-hegemonic vision of a people’s trade agenda.

**Trade in energy services**

The use of international law by the major Western powers to secure control over energy resources has a long history. Tony Anghie documents a potent combination of unconscionable agreements, duress and legal doctrine that sustained the colonial project and imperial expansion (Anghie, 2005, p 163). The Western liberal notion of the ‘commons’ was used to justify the legal rule that other countries’ resources were accessible to all until private property rights were granted by the ‘civilised’ occupying powers. During the colonial and mandate periods these rights were vested in a small number of vertically integrated, Anglo-American multinational companies, known as the Seven Sisters: Esso, Royal Dutch Shell, British Petroleum, Mobil, Chevron, Gulf Oil and Texaco. An UNCTAD review of ‘Oil, Trade Agreements and Developing Countries’ in 2000 explains the original exclusion of petroleum from the GATT in 1947:

Since the beginning of the twentieth century, petroleum has been recognized to be not just an economic commodity, but also a strategic one. . . . At the time of the early GATT negotiations, most of the petroleum fields, located in North America, the Middle East and South East Asia, were under the control of transnational corporations owned mostly by residents of the United States, the United Kingdom, the Netherlands, and France. Because these countries wanted to avoid new tensions over the control of resources, it seems likely that they decided to exclude from the GATT negotiations the most strategic international commodity at that time. Their concern was that the political and strategic aspect of petroleum would have introduced an undesirable degree of ‘ politicisation’ into the otherwise ‘technical’ nature of the GATT. In
any case, the main petroleum-exporting countries were not contracting parties to the GATT at the time.

(UNCTAD, 2000, pp 14–15)

Newly independent Third World states reasserted their pre-colonial sovereignty over those resources (Anghie, 2005, pp 211–16). Their proposal to review existing claims with a view to nationalisation was a central plank of the New International Economic Order. Western powers insisted there were no remedies in international law for legitimate conquest and dispossession. The rules of international law and the doctrine of state accession (which they had created) had to be respected. Nationalisation required the payment of compensation through internationally determined standards and customary international law (again, as established by themselves). Rights ‘legally’ granted over natural resources by a predecessor state had to be respected by the successor; there was no legal space to re-examine those grants through a post-colonial lens.

Southern states used their numerical ascendancy in the UN to attempt to make new international law. In 1958, against the backdrop of Egypt’s nationalisation of the Suez Canal, the UN established a Commission on Permanent Sovereignty over Natural Resources. In 1962 the General Assembly adopted a Resolution on Permanent Sovereignty of Natural Resources. Paragraph 7 read: ‘Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.’ Article 2 of the 1974 Charter of Economic Rights and Duties of States affirmed the full sovereignty of states over their natural resources. This includes the right to exercise authority over foreign investment according to national laws, and to nationalise, expropriate or transfer ownership from foreign owners, with compensation to be settled under domestic law. No state could be compelled to give preferential treatment to foreign investments.

In a triumph for imperial law, the International Court of Justice ruled in the *Libya Texaco* case that the 1962 resolution did not bind the capital exporting states, because they had opposed the provision. In other words, a majority of newly created states could not change Western international law and it was not relevant that those new states rejected that law. Juridical sovereignty for the Third World lacked substance; permanent sovereignty over their natural resources remained with the imperial powers.

During this period, the conflict between resource-rich countries and the states whose corporations exploited those resources centred on petroleum. Five oil-rich countries – Iran, Iraq, Kuwait, Saudi Arabia and Venezuela – formed the Organization of Petroleum Exporting Countries (OPEC) in 1960. OPEC’s primary aim was to co-ordinate and unify their petroleum policies to safeguard their individual and collective interests. They resolved to ensure
stable prices, having regard to their need for a steady income, a fair return to investors and an efficient, economic and regular system of supply to consumer nations. In 1971 OPEC members moved towards the nationalisation of their oil industries.

In response to the 1973/4 oil crisis the OECD countries set up their own International Energy Agency, and an associated Energy Programme, to co-ordinate their energy security strategies. The US led an unsuccessful attempt to put petroleum export restrictions on the GATT Tokyo round agenda. It tried again to tighten rules on trade in petroleum and related products during the Uruguay round. However, the US did not make the same concerted push on energy services in the GATS as it did on financial services and telecommunications. The technical explanation is that there was no separate comprehensive entry for energy services in the provisional UN CPC, and hence W/120, presumably because most of those services were still provided in-house by the corporations or through vertically integrated state monopolies. The GATS 1994 commitments relating to energy were therefore very thin: 33 in services incidental to mining, eight for services incidental to energy distribution, and only three for pipeline transportation of fuels. Another 46 countries signed up to general construction work for civil engineering services.3

GATS 2000

Preparations for the GATS 2000 negotiations on energy services began in a very different context from the Uruguay round. The size, shape and dynamics of the energy market had been transformed. Social regulation had given way to market-driven competition policy and regulation of natural monopolies. The privatisation of state-owned coalmines and electricity and gas monopolies, and the unbundling of power generation, transmission, wholesale and retail distribution opened new opportunities, primarily for foreign investors (Case study 8). Information technologies enhanced the capacity of transnational energy companies to centralise their data storage in one location from where they could exercise remote control over flows and monitor production. The expansion of private energy markets spawned a growing demand for energy-related services, such as consultancy, engineering design, analysis and testing, and data management. ‘Splintering’ occurred as the major energy corporations outsourced those and other non-core service activities. New energy-related financial services included trading on spot markets and in derivatives and, more recently, carbon credits. Most of these services were generic in nature, and they all could be delivered across the border or by the temporary presence of specialist personnel.

An influential US Energy Services Coalition, founded by Enron and Halliburton and bankrolled largely by Enron, set out to secure binding rights to dominate this broad platform of services. The Coalition’s budget
line for GATS lobbying in 2001 was half a million dollars. Part of this went to retain former USTR Carla Hills as trade counsel. United States negotiators created lobbying opportunities for the coalition, such as a Geneva workshop for WTO delegates and staff at which Enron’s now-infamous president Kenneth Lay pressed its cause.⁴

A second difference from the Uruguay round was the dramatic geopolitical shift within the energy industry. The old Seven Sisters, reduced to four through consolidations,⁵ had been displaced in their dominance of oil and gas production by what the *Financial Times* dubbed the ‘new seven sisters’ from non-OECD countries.⁶ Saudi Aramco, Russia’s Gazprom, CNPC of China, NIOC of Iran, Petróleos de Venezuela Sociedad Anónima (PDVSA) of Venezuela, Petrobras of Brazil and Malaysia’s Petronas controlled almost one-third of the world’s oil and gas production and more than one-third of its reserves. Most of these companies were state owned. Their governments had stopped using production-sharing agreements, and some were taking back control of their major energy fields. The *Financial Times* quoted a prediction from the International Energy Agency that 90 per cent of new supplies would come from developing countries over the next 40 years. This prospect increased the stakes for the Anglo-European demandeurs in both core and non-core energy services. It also strengthened the incentives for Southern oil-rich governments to retain their regulatory autonomy.

A third feature was the expansion of WTO membership since the start of the Uruguay round to include a significant number of OPEC states, including Mexico (1986) and Venezuela (1990). During the early stages of the GATS 2000 negotiations Venezuela’s representatives in Geneva had promoted the interests of the old guard of national capital that then controlled the state oil company PDVSA. As a result, the initial demandeurs on energy services came from the global North and South. All agreed that fragmentation between goods and services was undesirable and the mass of services sub-sectors failed to reflect the corporate realities of integrated production, transportation and distribution of energy resources. The W/120 classification list was considered inadequate and the resulting schedules were unclear and incoherent. The WTO Secretariat noted that Annex 1 to the CPCprov included a compendium of products related to energy, including ‘services incidental to energy distribution’. The later CPC Rev. 1 included ‘energy distribution services’ and ‘gas distribution through mains’. But W/120 had not been updated to include either.⁷

Beyond that common ground, the North/South positions diverged. The US and EC wanted a comprehensive new cluster of classifications and regulatory disciplines. The US staked out its position in an advocacy paper during the information exchange process in 1998. It argued for a transparent and seamless approach that reflected the true nature of commercial activities and covered a broad range of exploration, processing, production, delivery and related activities: ‘the US believes that, in the end, the marketplace
realities regarding energy supply services rather than artificial classification categories should dictate the appropriate scope for future GATS work. In a follow-up paper in 2000 the US developed a draft classification that covered the entire chain of energy services activities and cut horizontally across those in W/120. It proposed five categories – resource development and redevelopment, operation of facilities, energy networks, wholesale markets and retail supply – with 140 specific services. Reflecting the Energy Coalition’s agenda, it even included financial services. Once a comprehensive classification was settled, it said members should set about designing a model schedule and the energy equivalent of the Reference Paper on Basic Telecommunications.

The Europeans endorsed the need for a revised classification list that was neutral as to energy sources, and a pro-competitive regulatory framework that balanced trade, liberalisation and the public policy objectives of regulation. The EC specifically targeted monopolies and exclusive rights, restrictions on legal forms and on foreign direct investment, unclear licensing and approval processes, vague economic needs tests, and residency and nationality requirements.

The practical effect of the US and EC positions would be to limit the flexibility of governments to respond to new technologies, climate change and energy crises. For example, the principle of neutrality across energy sources, technologies, and onshore or offshore delivery would prevent energy-importing countries from excluding environmentally unsound or costly fuels in favour of renewable sources, and could potentially deepen their dependency on traditional fuels. The disciplines in a telecommunications-style reference paper would apply to all WTO members, whether or not they made energy-related commitments. State enterprises or state-authorised monopolies could be prevented from cross-subsidising social access and environmental projects from their more profitable operations. Unbundling, outsourcing and the expansion of secondary markets already made it difficult for governments to regulate. The added constraints of a ‘necessity’ test, or ‘transparency’ requirements to consult with potentially affected transnationals before introducing new regulations, would make it even harder to respond to social need or re-regulate in cases of energy market failure. If governments were obliged to take a non-discriminatory approach to energy-related services they would be left to the mercy of powerful energy transnationals whose first allegiance is to their shareholders and executive bonuses. Energy scarcity and global warming would increase the significance of all these constraints.

Of the other OECD contributors to energy services discussions, Canada supported the existing W/120 classifications, with a possible cluster or checklist as an aide-memoire. Japan urged sensitivity to the need of net energy-importing countries for security and reliability of supply. Venezuela was the main Southern demandeur. Its negotiating proposal in March 2001 urged members to look beyond a trade-related perspective
to ensure that people, industries and businesses had access to energy and so improve their standards of living. They proposed a ‘clear, precise and unambiguous’ classification to bring W/120 more into line with the current reality, but which was limited to energy services and did not alter the balance of rights and obligations established in GATS 1994. Obviously with PDVSA in mind, they noted that monopolies existed for economic and strategic reasons. The paper stressed the right of developing countries under Article IV to meet their national policy objectives and the need for commitments that would strengthen their entrepreneurial and technological capacity. Other development dimensions should include an emergency safeguard mechanism and guaranteed rights for governments to determine their national conditions of access and public services obligations.

The Venezuelan position was designed to ensure that the national élites could continue to leverage deals between PDVSA and preferred foreign companies, at the same time as opening the energy services markets in other countries. It seems that the US, at some point, indicated it would support the Venezuelan classification, but only as a guide to clarify general commitments and not as the basis for new commitments. This explains an angry memorandum from the Venezuelan delegation in June 2003, which complained that careful and resource intensive deliberations had produced a ‘List of Commercial Reality of Energy Services and Energy Related Services’ that was framed around the continued use of W/120 and accommodated development objectives.

This argument became redundant when loyalists to President Hugo Chávez replaced the old guard of Venezuelan diplomats at the WTO in 2004. They arrived against the backdrop of a failed coup against Chávez and a campaign of oil sabotage led by the management of PDVSA, supported from the US. During 2005 the GATS negotiations became increasingly adversarial as the EC pressed its proposal for benchmarks and plurilateral negotiations. This culminated in the denunciation of Annex C by Venezuela and Cuba during the Hong Kong ministerial (Case study 3). By that time Venezuela’s proposal on energy services had been withdrawn and it played no further part in the energy services negotiations.

The plurilateral request on energy services was presented by the EC and supported by nine other OECD members, including the US and Japan. The only non-OECD demandeur was the recently acceded Saudi Arabia (Case study 18). The targets of the request were unnamed but are understood to include Argentina, Brazil, Brunei, Chile, China, Colombia, Ecuador, Egypt, India, Indonesia, Kuwait, Malaysia, Mexico, Nigeria, Oman, Pakistan, Peru, Philippines, Qatar, South Africa, Thailand, Turkey and United Arab Emirates. Although most, if not all, the recipients were developing countries the request made no reference to development, aside from a peremptory nod to flexibility.
The request proposed a comprehensive, cross-cutting cluster along the lines promoted by the US and EC. It had the potential to include nearly every transaction, from development to delivery, such as upstream oil and gas exploration, mapping, drilling, construction and operation, transportation (through oil tankers at sea and trucks by road, and by pipeline), storage (in tanks), building and maintaining power plants, distribution, marketing, auditing, and metering (Bhala, 2004, p 802). All modes were covered. In mode 1, the demandeurs wanted a substantial reduction of market access limitations and removal of requirements for commercial presence. For mode 3 they sought the removal, or substantial reduction, of foreign equity limits, requirements for joint ventures and joint operations, economic needs tests and discriminatory licensing.

The old imperial powers had once again turned to international law to secure control over resources that were slipping from their grasp. It seems extraordinary to expect the handful of developing countries that now held the balance of power in petroleum production to sign away their ability to strengthen their state companies, set conditions on foreign investors and service providers, require technology transfer and demand a larger share of the profits. Assurances in the plurilateral request that states would retain ownership of their natural resources meant nothing if governments who made energy services commitments could no longer control the chain of activities that governed the exploitation of those resources.

The bilateral pathways

Pessimism that the GATS 2000 negotiations would deliver anything meaningful dictated a multi-track strategy. The US had already begun to address its energy objectives through bilateral negotiations during the Uruguay round. UNCTAD attributes that preference for bilaterals to the sometimes complementary, sometimes competing, objectives that drive US trade negotiations on energy (UNCTAD, 2000, p 104). In economic terms, the US seeks to promote its exports in energy-related goods, services and capital and to secure access to foreign raw materials. In 1998 the US exported $64.3 billion worth of machinery that is commonly used for energy production. Some $91 billion of US capital was invested in foreign petroleum projects, across the world: oil accounted for two-thirds of US investment in Africa, more than one-quarter of its investment in the Middle East, and significant shares of US investment in Canada, Asia, and Europe. While it is a net energy importer, the US also has the largest refinery capacity in the world; in 1998 it supplied 9.9 per cent of global exports of refined petroleum (UNCTAD, 2000, p 125).

However, US security interests require a balance between maintaining reliable supplies of energy and conflicts with some oil-rich states. When tensions arise between export interests and national security, the latter always
prevalence. UNCTAD describes the US Department of Energy as driven by a ‘culture of security’; its priorities are to maintain secure access, limit the leverage that oil producers can use at times of crisis, and cut off oil wealth to current or potentially hostile states (UNCTAD, 2000, p 106).

That priority on security explains a preference for regional agreements that can be tailored to secure a supply of energy resources from friendly countries. The precedent was established in the CUSFTA and reinforced with its extension to Mexico under NAFTA. These agreements contain separate chapters on energy, services and investment (including investor-initiated enforcement), and a narrow national security exception that is specific to energy. There is an explicit national treatment discipline on energy regulation. Both Canada and Mexico insisted on making some limitations. Canada’s restrictions relate mainly to offshore petroleum development. Mexico’s are more extensive: it reserved the right to perform a range of energy-related activities and to refuse investment in basic petrochemicals. This exception reflects Mexico’s national sensitivities and constitutional protections, but it also limits how they might be interpreted.

Canada and Mexico provide over one-quarter of US crude oil imports. NAFTA effectively secures that supply for the US, and severely constrains the regulatory and policy options of the federal and provincial governments in Canada and Mexico to manage their resources. NAFTA also laid the foundations for regulatory harmonisation of energy markets to the US model. It is easy to see why USTR Clayton Yeutter described the energy chapter of CUSFTA as ‘the jewel of the agreement’ (Gold and Leyton-Brown, 1988, p 213).

President Clinton’s fast track authority expired in 1994. For the rest of the 1990s the US trade strategy outside the WTO centred on Latin America and the regional FTAA. When the US reacted to the rise of competitive bilateralism in 2000, its strategy and objectives were driven by national security priorities, as UNCTAD predicted; ‘9/11’ reinforced that. The primary targets were Latin America and the Middle East where foreign policy and energy imperatives merge. Even when there were no direct energy gains, national security still determined who the US negotiated with, on what terms.

United States strategy followed several tracks. One sought to shore up geopolitical alliances by offering selective rewards to long-term friends, especially the ‘coalition of the willing’. Australian Prime Minister John Howard, the self-styled deputy sheriff in the Asia Pacific, was rewarded for his stalwart support for the US-led invasions of Afghanistan and Iraq. When USTR Robert Zoellick proposed an FTA with Australia to the US Senate he talked of ‘strengthening the foundation of our security alliance’. Howard’s government told the Australian Parliament that the FTA ‘would put our economic relationship on a parallel footing with our political relationship’ (quoted in Ranald, 2007, pp 6–7). The Australian negotiations attracted
concerted, but peaceful, opposition. Thai Prime Minister Thaksin fared less well: his support for the war and promotion of a US Thailand FTA contributed to his overthrow in 2006. The US Korea FTA, which reinvigorated the US foothold on the Korean peninsula, was concluded despite militant resistance – only to become stalled in the US Congress.

A second, more coercive, pathway made preferential trade access to the US conditional on US approval of the beneficiary’s economic and security policies. The US offered unilateral trade preferences to 38 impoverished sub-Saharan African countries through the US African Growth and Opportunity Act 2000 (AGOA) (Bhala, 2006). These were conditional on the US certifying that those governments adhered to US foreign policy, US national security policies and US-dictated economic and social policies. These ‘sound’ economic policies would strengthen the hold of US (and other) transnational corporations over Africa’s oil, gold, diamonds and other minerals and metals. The very presence of these companies increased the level of militarisation, as they commonly use US military or mercenaries to guard their operations against civil and military disruption. Critics re-branded AGOA the ‘American Growth and Opportunity Act’ and a vehicle for the re-colonisation of Africa (Mushita, 2001, p 17). Africa’s dependence on preferential trade access to the US would create fertile ground for FTAs that carried similar conditionalities.

A revitalised US regional strategy to secure natural resources in Latin America was set out in the Santa Fe IV document in 2000. Brazilian economist Marcus Arruda describes that project as combining a financial tentacle (the debts), a military tentacle (the war-like policies and expansion of US military bases and intelligence operations in Latin America and the Caribbean), and the economic and commercial tentacles (NAFTA and the FTAA). Brazil, and later Venezuela, led the successful resistance to the FTAA. The US responded by exploiting the dependency of Central American states on their northern neighbour. The US–Dominican Republic-Central America Free Trade Agreement (CAFTA), which binds Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua to the US, took only 12 months to negotiate. It was signed in May 2004, with the Dominican Republic joining in August 2004. One US commentator suggests that CAFTA was ‘the only way the United States can synthesize or orchestrate its non-economic policy objectives south of Mexico’, thereby limiting the expansion of Chinese economic influence. It was also ‘a calculated play for the entrenchment of American interests in a zone of political instability, on par with the invasion of Iraq as an expression of grand strategy’. By the time CAFTA reached the US Congress in mid-2005, the domestic political climate had turned sour: the agreement was approved by the Senate by 54 votes to 45 and with a majority of just one in the House of Representatives. The Costa Rica government faced massive domestic
opposition. The ‘no’ campaign won the right to hold a citizen-initiated referendum on ratification. The government responded by taking over the referendum and scheduled it for October 2007. A document attributed to the President’s close advisers advocated a media campaign based explicitly on fear: “it’s crucial that “yes” be associated with democracy and stability . . . and that “no” be equivalent to violence and disloyalty to democracy. . . . We must rub in all over the place the connection of the “no” campaign with Fidel, Chavez and Ortega, in very strident terms”. The ‘yes’ vote of 51.6 to 48.4 per cent was achieved amidst accusations of electoral fraud and promises of ongoing resistance to the implementation of the agreement.

The US strategy of divide and conquer was most explicit in the Andean sub-region. The Andean Trade Preference Act 1991 provided market access for Colombia, Ecuador, Bolivia and Peru until 2001. Its benefits were subject to yearly reviews against the Act’s political and economic eligibility criteria. The successor, the Andean Trade Promotion and Drug Eradication Act, was due to expire in December 2006. Negotiations began in May 2004 for an US/Andean FTA involving Colombia, Ecuador and Peru, with plans to include Bolivia. In September 2005, the US issued an ultimatum for the governments to sign an agreement before the 2006 elections in all three Andean countries and the expiry of ‘fast track’ in July 2007. Peru signed a deal four months later. Colombia followed in February 2006, despite popular mobilisations, and created a residue of anger at ‘a deep capitulation to US economic and geopolitical interests’. The US suspended talks with the Ecuador government in mid-2006 after the latter cancelled a contract with US company Occidental Petroleum and seized its assets. Bolivia stayed outside the deal. Venezuela objected that the agreement undercut the Andean Community of Nations initiative, from which it then withdrew. Neither the Peru nor Colombia FTA had been endorsed by the US Congress when fast track expired; the administration appealed to Congress not to require their renegotiation, reviving old Cold War rhetoric that portrayed trade ‘as a weapon to block the influence of regimes that seek to promote socialist ideas in Latin America’. Congress approved the Peru FPA in late 2007 but stalled on Colombia.

The Middle East was the biggest prize for US energy-cum-national security objectives. The National Energy Policy generated in 2001 by US Vice President, and former Halliburton chief executive, Dick Cheney identified the Gulf as a primary focus of US international energy policy. Likewise, the US–UK Energy Dialogue, established in 2002, stressed the need to increase oil production capacity from the Gulf. The ‘9/11 Commission’ advised the Bush administration that economic growth through trade liberalisation removes a breeding ground for terrorism. (Muttitt et al., 2005, p 8).

The centrepiece of this ‘trade’ strategy was an umbrella US Middle East FTA (MEFTA) – a corporate-led assault on the region’s energy resources, which Zoellick insisted could help to fight terrorism. In May 2003 President
George W Bush announced the plan to create a MEFTA by 2013. A US–Middle East Free Trade Coalition was established to promote the agreement. Its steering committee in 2006 included AIG, Boeing, Booz Allen Hamilton, ChevronTexaco, Coca-Cola, Dow Chemicals, ExxonMobil, Intel, Motorola and Occidental Petroleum. The official aim of a MEFTA was to support ‘peaceful’ countries joining the WTO. The tactical objective was to expand the web of bilaterals in the region so the US could fragment OPEC and undercut the planned implementation of the Greater Arab Free Trade Area (or Pan-Arab Free Trade Area) by 2007 and the integration efforts of the Gulf Cooperation Council.

The US advocated trade and investment framework agreements as stepping-stones to comprehensive FTAs in the region. By 2007, nine framework agreements had been concluded. Full FTAs were signed with US allies Jordan in 2001, Bahrain in 2004 (after the government assured Washington it no longer supported the Arab League boycott of Israel), and Morocco and Oman in 2006. Negotiations with Egypt and the United Arab Emirates hit temporary obstacles, the latter after a ‘national security’ furore forced Dubai Ports World to divest the US port operations it bought in 2006 (to AIG Investment Group). Neither agreement was concluded before fast track expired.

The EU took its own initiatives on behalf of its energy transnationals in the spirit of what Bhala describes as ‘competitive imperialism’ (Bhala, 2007). By the end of the Uruguay round just 10 companies owned 49 of the 95 refineries in the EU, accounting for 61 per cent of the EU’s crude oil distilling capacity. The same companies also dominated extraction and distribution. Access to oil and gas reserves depended heavily on transportation by pipelines. Three quarters of the world’s gas trade relied on pipelines between Russia and Western Europe, and the US and Canada. The signing of the European Energy Charter between EU member states and Russia and the Eastern European states in 1991 was a strategic move to secure the EU’s interests on energy trade, transit and investment in the post-Soviet era. This initiative formed the basis for the Energy Charter Treaty that was signed in 1994 and came into effect in 1998. The treaty is effectively a multilateral investment agreement on energy and would have guaranteed third-party access to Russia’s pipelines. As of 2007, Russia had not ratified the treaty, presumably because doing so would reduce its negotiating coin in its drawn-out process of WTO accession.

The pursuit of a ‘coherent policy’ to secure Europe’s access to oil and gas reserves is an integral part of the EU’s 2007 Global Europe strategy competitiveness strategy (discussed in Case study 4). Target countries include the six petroleum-producing members of the Gulf Cooperation Council (Kuwait, the United Arab Emirates, Saudi Arabia, Bahrain, Oman and Qatar). The US plan for MEFTA was matched by an EU strategy to convert the Mediterranean basin into a giant free trade zone by 2017. In July 2004,
China and the Gulf Cooperation Council signed a framework of agreement on economic, trade, investment, and technological cooperation and began negotiations on an FTA (Pao-yu Ching, 2007). A commentary on www.bilaterals.org concludes that:

Oil and geopolitics are key factors in all FTAs involving countries of the Middle East. China, the EU and the US are all offering FTAs to Middle East countries and blocs (such as the Gulf Cooperation Council) in order to protect access to energy supplies – and to some extent, to secure access to mineral resources. At the same time, the US and the EU have important geopolitical agendas in the region, revolving around the Israeli-Palestinian conflict and tensions with various Islamist or at least anti-Western governments and regimes. Meanwhile, governments in the region are under subtle and not-so-subtle pressure to conform to US wish lists in trade and investment negotiations (such as the removal of Israeli boycotts in the case of several Gulf countries), reminded of the US’ willingness to resort to military means as it occupies and restructures the shattered Iraq, endorses Israel’s recent assault and occupation of Lebanon, and threatens other nations such as Syria and Iran.27

Ultimately, as Case study 18 shows, the US can invade and rewrite a country’s constitution, appoint a new government, and design national laws to serve its interests, and then attempt to lock in these measures through bilateral agreements or accession to the WTO.

The national security exception

The US and its allies claim the right to behave in this way because they are defending freedom and civilisation. The same rationale justifies them breaching their own trade obligations, by asserting their supreme authority or invoking Article XIV bis. The latter was adapted from Article XXI of the GATT, with some innovations in paragraph 2.

Article XIV bis: Security Exceptions

1. Nothing in this Agreement shall be construed:

   (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

   (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

      (i) relating to the supply of services as carried out directly or indirectly for the purpose of supplying a military establishment;
(ii) relating to fissionable and fusionable materials or the materials from which they are derived;
(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

Legal scholars hold divergent views about the degree of sovereignty that states can exercise under this and the equivalent GATT Article XXI. On one hand, Raj Bhala argues that the opening phrase ‘Nothing in this Agreement’ means no GATT (or GATS) obligation shall be construed to require or prevent the actions described, and comes close to authorising a WTO member to be a ‘cowboy’ (Bhala, 1998, pp 268–9). Realpolitik requires the sovereign prerogative to prevail; to encroach on that would damage the WTO (Bhala, 1998, p 279). In an attempt to rescue some effect for the provision, he suggests that increased co-ordination between the WTO and UN Security Council, perhaps by rendering a non-binding non-precedential opinion, could encourage compliance with the criteria specified in the Article (Bhala, 1998, p 276).

Other commentators seek to invest the provision with greater legal effect, arguing that the drafters specified criteria and chose subtle variations of language intending them to be meaningful. Moreover, a self-judging obligation is no obligation at all (Akande and Williams, 2003, p 383). An extensive academic literature canvasses many permutations of the possible interpretations and applications: which, if any, elements should be justiciable and which should be self-defining; what the criteria in (i) to (iii) might mean; what the word ‘essential’ adds to ‘security interests’; whether a subjective or objective test should apply if a government’s actions are to be reviewed; and the relevance of existing WTO and international law jurisprudence, including the scope for applying international law obligations of good faith and reasonableness (for example, Hahn, 1991; Zillman, 1994; Cann, 2001).

This academic debate assumes that governments seriously consider each element of Article XIV bis in framing actions taken for security purposes, and that it is at least partly justiciable. Even accepting these assumptions, paragraph 1(b) provides extensive scope for breaching GATS rules and scheduled commitments. In paragraph 1(b)(i) the security interest that is affected only has to ‘relate’ to the supply of a service, ‘supply’ being broadly defined as ‘production, distribution, marketing, sale and delivery’. Using the Iraq war as an example, this could allow the US to take retaliatory action if it perceived the policies or regulations of Kuwait were affecting
US bases in Iraq adversely by restricting the transport of people or arms across the border. Because the supply can be ‘directly or indirectly’ for the purpose of provisioning a ‘military establishment’, the exception extends to a secondary or even tertiary supplier to the direct service contractor. A Fijian subsidiary of a company run by a Kuwaiti national whose firm supplies security workers to a sub-contractor of Halliburton to guard US camps might act in ways the US considers contrary to US essential security interests. The nature of a ‘military establishment’ is not defined. The reference to ‘a’, not ‘its’, arguably means that the military establishment could belong to the US or its allies, or to Lebanon or Al-Qaeda.

Article XXI:1(b)(ii) would justify action against a country that asserts the right to possess ‘fissionable materials . . . or the materials from which they are derived’. Bhala notes there is no requirement for the actual production or possession of nuclear weapons, arguing that would be too late for sanctions to have any protective effect (Bhala, 1998, p 275). Nor do the materials have to be for military purposes, which renders irrelevant an Iran-style argument that such materials are intended for peaceful power generation. While Iran may not join the WTO for many years, if at all, the words ‘relating to’ and the silence over the relationship between the possessor of material and the target of the measures would justify secondary sanctions. There is no requirement for consistency, so failure to take parallel action against actual or potential nuclear powers, such as Israel or North Korea, would be immaterial.

Perhaps the most expansive criterion is action taken under (b)(iii) ‘in time of war or other emergency in international relations’. Defining war is problematic enough: one side’s ‘troubles’ or terrorist insurgency is another’s civil war. The phrase ‘other emergency in international relations’ suggests a war-like situation, while ‘emergency’ implies a limited duration. Yet the argument that old forms of warfare have been supplanted by unstructured state-sponsored or stateless terrorism could be used to justify actions taken in the name of Operation Enduring Freedom (originally Operation Infinite Justice). That includes pre-emptive strikes in self-defence – what Anghie terms ‘defensive imperialism’ (Anghie, 2005, p 292). Further, the threat posed in paragraph (iii) need not involve the supply of services. The US could justify actions against services suppliers from OPEC, or individual oil-exporting countries, such as Venezuela, to safeguard the security of its oil supply during an ‘emergency in international relations’.

Paragraphs (b)(i) and (iii) could also justify discrimination, for example by the US and allies in favour of their corporations, including for so-called post-conflict stabilisation and reconstruction. The boundary between military- and civilian-related contracts is becoming ever more blurred. Many activities formerly conducted by the military, such as transport, provisioning, detention facilities and interrogation, are contracted out and many civilian activities have an actual or potentially dual use for military purposes. The
government procurement exception in Article XIII would exclude services not for resale. But those services are more vulnerable in bilateral agreements that contain disciplines on government procurement of services.

Commentators generally treat Article XXI(c) as unproblematic. Bhala optimistically wrote in 1998 that ‘Charter obligations concerning international peace and security will be agreed to by the Security Council, and the problem of unilateral action is unlikely to arise in this context’ (Bhala, 1998, p 278). The invasion of Iraq revealed widely divergent interpretations of the legitimacy of action that states claimed (however disingenuously) was authorised by the Security Council. Every US FTA since that signed with Morocco in 2004 omits the reference to the Security Council. For example, Article 22.2 Essential Security in the Australia US FTA provides an effective carte blanche to both parties:

Nothing in this Agreement shall be construed:
(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
(b) to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

For six decades, the US, EC and allies have successfully avoided a formal GATT or WTO panel investigation of the legitimacy of national security measures that breach their trade obligations.

During the pre-WTO era, various avoidance strategies were employed: refusal to invoke the defence, which deprived the panel of any basis for examining Article XXI; a veto of the establishment of a panel; excluding the relevant questions from the panel’s terms of reference; refusal to submit the state’s substantive actions to a panel review; and vetoing adoption of a panel report (Hahn, 1991; Zillman, 1994). Only the first and fourth strategy are still possible under the WTO. The DSB has compulsory jurisdiction over disputes arising from all provisions in the WTO agreements. There are standard terms of reference for panels and their reports can only be rejected by a consensus.

However, these changes are unlikely to make any difference to the pattern that emerged between 1947 and 1994. Under GATT Article XIX bis paragraph 1(a) a state can refuse to furnish information to justify its actions, if it considers that disclosure conflicts with its essential security interests. If the USTR declined to participate by presenting relevant arguments or information a panel might take the extraordinary step, given the context, of seeking expert opinion or an advisory report from an expert review group under the DSU. Even then, the ‘objective’ information that was available could, at most, constitute a prima facie case of a breach. Some scholars
suggest that the onus of proof should then shift to the US (Akande and Williams, 2003, p 394). But the US is still legally entitled to withhold information. It is politically implausible to think that a WTO panel of trade experts would proceed on that basis to a substantive determination against a major power on a matter of national security.

As of 2007, no WTO panel has heard a dispute involving GATS Article XIV bis or GATT Article XXI. The closest situation involved sanctions imposed by Nicaragua against Colombia and Honduras for a maritime boundary dispute. The DSB agreed to establish a panel but it was never composed. Nicaragua later submitted the dispute to the International Court of Justice. During the DSB discussion, third parties Japan, Canada, the US and Honduras urged caution over resolving political disputes in the WTO (Akande and Williams, 2003, p 377 fn 48). Uncharacteristically, the EC supported Nicaragua’s right to a panel, probably because it had its own dispute brewing with the US over the secondary boycott of Cuba.

The US sanctions against Cuba arise under what is colloquially called the Helms-Burton Act. Formally known the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, this codifies the extension of the US embargo of Cuba to cover foreign companies and individuals. It effectively authorises secondary boycotts against any non-US person who has economic dealings with Cuba, and targets corporations and executives (and their families) that ‘traffic’ in expropriated property in Cuba (Cann, 2001, p 461). This is a domestic US law that operates extra-territorially on the basis of foreigners’ acts or decisions that occur entirely outside the US.  

The Act potentially breaches US obligations under the NAFTA, GATT and GATS. Mexico and Canada introduced domestic legislation to neutralise its effect. In 1996 they also initiated a dispute under NAFTA, but the panel was never established. President Clinton repeatedly deferred the most contentious powers that authorised private legal action against foreign firms under Title III of the Act.

The EU enacted its own blocking and claw-back legislation, but faced pressure from business and political quarters to do more. The Commission lodged a dispute at the WTO claiming breaches of GATS Articles II, III, VI, XVI, XVII and the Annex on Movement of Natural Persons, plus nullification and impairment of anticipated benefits. The US refused to concede the WTO’s mandate, and announced in February 1997 that it would boycott any panel (Dunning, 1999, p 230). Had the US invoked Article XIV bis, the DSB would have either had to deny it the right to determine its own national security measures, and potentially provoke a US walkout from the WTO, or legitimise an exemption for all members from WTO rules for a potentially infinite range of economically, politically, or ideologically motivated extra-territorial measures.

The Europeans chose not to push the US. By April 1997, the two superpowers had signed a Memorandum of Understanding to suspend proceedings and resolve the matter without a panel. Clinton promised the US would
modify the boycott rules, and the EU said it would develop principles for business dealings with Cuba. The panel’s authority lapsed in April 1998. At the G8 summit in May 1998 Clinton agreed to try to persuade the US Congress to waive legal action under Title III indefinitely for European companies (Schloemann and Ohlhoff, 1999, p 430). He introduced a six-month waiver in May 1999 citing ‘US national interest’; this was rolled over several times. President George W Bush continued the waiver, under threat of renewed WTO action.

The US operated parallel sanctions against Iran and Libya. The Iran-Libya Sanctions Act (ILSA) 1996 was described as a measure to combat state support for terrorism and the development of weapons of mass destruction, and to enforce unilaterally the UN Security Council resolutions against Libya. The Act required the US President to impose two of six possible sanctions against investors who made a ‘direct and significant’ contribution to the development of Iranian or Libyan oil resources, or provided Libya with items prohibited under UN resolutions. The targets of sanctions included subsidiaries, parent companies, and affiliates where they had actual knowledge of the activity. A threshold of $20 million annual investment was set to screen out small players. The US determined that targeting investment was preferable to finance or trade sanctions that would impact more directly on US businesses and jobs. The link between foreign policy, oil and economic sanctions was spelt out in section 3 of the Act, which stated US policy with respect to Iran:

The Congress declares that it is the policy of the United States to deny Iran the ability to support acts of international terrorism and to fund the development and acquisition of weapons of mass destruction and the means to deliver them by limiting the development of Iran’s ability to explore for, extract, refine, or transport by pipeline petroleum resources of Iran.30

The legislative history of the Act is even more explicit: ‘Without foreign investment, production in Iran’s oil and gas sector will fall, which will choke off revenue to the government of Iran and thereby deny it resources it employs to threaten the national security interests of the United States.’ (quoted in Bhala, 1998, p 306)

The sanctions had a potentially wide sweep. The definition of investments that might help to develop petroleum and natural gas resources ranged across exploration, extraction, refining and transportation. The kinds of activities affected would include construction contracts for a pipeline, provision of consultancy services, holding an equity interest in any of those services activities, or receipt of associated royalties, earnings or profits. What might constitute a ‘direct and significant’ contribution to developing those investments was unclear. Iran objected that the Act breached the Algiers Declarations of January 1982 in which the US pledged ‘not to intervene
directly or indirectly, politically or militarily, in Iran’s internal affairs’. Iran sought binding arbitration before the Iran-United States Claims Tribunal. The claim has never come to a hearing.

Other states responded to ILSA as they did to Helms-Burton. The EU requested consultations in the WTO and enacted a legislative antidote. Mexico and Canada lodged a dispute under NAFTA but never pursued it. NAFTA’s National Security exemption in Article 2102 allows a party to take ‘any actions that it considers necessary for protection of its essential security interests’. Presumably they reasoned that a NAFTA panel was unlikely to pass judgement on a US assessment of its essential security interests. Even if they won, section 3312 of the US NAFTA Implementation Act provides for US law to prevail in its domestic courts where there is a conflict with NAFTA provisions.

Clinton agreed to another partial waiver, and the EU and Russia agreed to tighten controls over the export of weapons technology to Iran (Cann, 2001, p 461). Congress renewed ILSA in 2001 for five years, despite pressure from US energy firms who had watched their French, Russian and Malaysian counterparts invest an estimated $30 billion in Iran’s petroleum sector. The law was renamed the Iran Sanctions Act in 2006 following the political rehabilitation of Libya, and its term was extended to 2011.

This recent history confirms that geopolitical factors govern the ‘national security’ exception to trade in services agreements, not law. The implications are far-reaching. Harvey Oyer wrote in 1997, before the current wave of security paranoia, that:

more than seventy-five countries are named [in US law] as subject to, or under the threat of, one or more of twenty-one specific sanctions based on twenty-seven target behaviors. Many of these sanctions lack any visible rationale or guiding principle for their existence, and most of the sanctions lack a method for assessing whether the objectives are being achieved and at what cost(s) to other national interests.

(Oyer, 1997, p 433)

While the major powers have been demanding enforceable commitments on energy services through the GATS 2000, the accessions, bilateral negotiations and security exemptions provide them with the political and legal space to secure their own economic and foreign policy objectives. As Case study 17 shows, that space is increasingly contested.

**CASE STUDY 17 CONFRONTING ‘EL DIABLO’**

The official account of the closing session of the WTO’s sixth Ministerial Conference in Hong Kong records, without further explanation that: ‘Cuba
and Venezuela formally expressed their reservations on the texts on non-agricultural market access and services and the meeting noted these.’ It took extraordinary interventions at the final plenary to have even that level of dissent recorded as the chair, Hong Kong’s Commerce Secretary John Tsang, gavotted through the ‘consensual’ Declaration at breakneck speed (Khor, 2005).

The resolute opposition from the Bolivarian Republic of Venezuela and the Republic of Cuba to Annex C on services was noteworthy for three reasons. First, their opposition was based on explicit rejection of the neoliberal paradigm. This continued the challenge that Venezuela had articulated at Cancún in 2003 (and Cuba many times before):

The Bolivarian Government of Venezuela maintains that countries should liberalize their services in accordance with their national development priorities and not because they are required to do so by international treaties. They should keep public those services that are indispensable for the population, as determined by their Constitution and laws. . . . In this Fifth WTO Ministerial Meeting, the Venezuelan delegation will firmly and categorically insist that international agreements cannot limit the authority and the sovereign right of states to regulate, through laws and rules, the distinct service sectors that they consider to be of strategic importance in satisfying the basic and essential necessities of their populations.\(^{31}\)

They said no new commitments should be made in the Doha round until outstanding development issues were resolved. The ‘true obstacles to free trade’ were massive disparities between the rich and poor under an unjust international economic order. Requiring ‘free competition between non-equals can only lead to a strengthening of the strongest and a further weakening of the weakest’. To overcome this imbalance required ‘[a]s much market as possible, and as much state as necessary’.

The second factor was geopolitical. The US was waging, and losing, a hot war in the Middle East and a cold war on its doorstep. The democratic election of charismatic leftist leaders in Latin America, with more in the wings, threatened the already fragile claims of US regional hegemony. Venezuela’s President Hugo Chávez had become the rallying point for anti-imperialism and an alternative to the neoliberal trade paradigm. The Chávez government was convinced that the US administration and corporate interests had backed a failed coup in 2002 and continued to foment economic, social and political instability. Both Venezuela and Cuba believed from bitter experience that extending the power of US (and European) transnational corporations, as the GATS aims to do, would fuel the economic, military and ideological vendettas being waged against them.
The third, decisive factor was the power of energy. As the world’s fifth largest oil producer, Venezuela supplied almost 10 per cent of US petroleum imports in 2007. This made it the fourth largest external source of US petroleum behind Canada, Mexico and Saudi Arabia, although that share was declining. Almost 60 foreign companies, representing fourteen different countries, participated in one or more aspects of Venezuela’s oil sector, including Exxon Mobil, ConocoPhillips and Chevron Texaco. With one of the world’s largest known oil reserves, Venezuela posed an obvious target for services demands that would guarantee both oil supplies and corporate profits to the US and Europe. Equally, the potential for Venezuela to use its oil wealth to create political leverage within and outside the WTO made it a potential threat to a neoliberal trade in services regime and the hegemony of the major powers.

The conflation of national security, oil and covert intervention has long been a feature of US policy towards Venezuela. Historically, the US had relied on the corrupt Venezuelan élite to defend its interests in OPEC. Foreign oil companies battled the Venezuelan government whenever it tried to reassert control over lucrative concessions, and renegotiate the minimal royalties and huge tax breaks. Faced with the expiry of their concessions in 1983 and reversion of the assets, installations and equipment to the state, the companies stopped reinvesting. This prompted the Venezuelan government to speed up the nationalisation of Royal Dutch Shell and other foreign companies’ operations in 1975, following the precedents of Mexico (1938), Indonesia (1965), Algeria (1971), and Iraq and Libya (1973).

However, last-minute changes to the nationalisation law allowed the new state-owned PDVSA to enter fixed-term association agreements with private entities. In practice, the concessions being operated by foreign firms were reinvented as 14 subsidiaries of PDVSA, and remained under the control of their old boards, management and technical experts. By 1986 those 14 companies had reduced to three and were consolidated as arms of PDVSA. Significantly for the GATS story, PDVSA’s technological and administrative expertise in automation was outsourced to a foreign controlled joint venture. This depleted its expertise and created a new vulnerability.

The profligate and deeply indebted government of Carlos Andrés Pérez adopted IMF austerity measures in the late 1980s that widened existing inequalities. A populist mobilisation in 1989, known as the Caracazo, was brutally repressed with hundreds of deaths. In the early 1990s, more extensive IMF conditionalities resulted in the ‘great turn’ and ‘oil opening’, including extensive privatisations. Two civil-military rebellions in 1992, in which Chávez played a key role, brought about the resignation of the corrupt Pérez in 1993, and imposed some constraints on neoliberalism. But they failed to overthrow the government.

These developments coincided with the Uruguay round. Venezuela acceded in 1990 under the relatively relaxed GATT procedures. Its GATS
1994 schedule contained extensive commitments on energy-related services. These included seemingly benign full commitments on computer and related services in modes 1 and 3. The government also guaranteed access under mode 4 for foreign executives, managers and specialists. This was made subject to prevailing labour laws, which at that time required 90 per cent of the firm’s total personnel to be Venezuelan nationals and for them to constitute 80 per cent of the firm’s wage and salary costs. However, exceptions could be made for personnel under contract to the government, which included PDVSA. Full mode 3 commitments were taken in services incidental to mining, in construction and engineering services, and in contracting of works and supply of services for the national petroleum and petrochemical industry. Shortly before Chávez came to power in 1998, the government proposed the privatisation of PDVSA. Had this proceeded, mode 3 commitments would have enabled the international cartels to assert effective control over Venezuela’s oil industry.

Chávez won the presidency in 1998 with the largest electoral majority in the country’s history. His platform appealed to democratic constitutionalism and invoked the name of legendary independence leader Simon Bolivar. A new constitution was drafted and approved by over 71 per cent of the popular vote. The Bolivarian Republic of Venezuela would become a ‘democratic and social state of law and justice’, potentially alongside other Bolivarian-inspired republics. The Constitution’s aspirational rhetoric celebrated social, educational, cultural, economic, indigenous and women’s rights. The state was obliged to promote national industry. Consultative (non-binding) referenda would be required for questions of ‘transcendent importance’, such as free trade agreements.

Ideologically, the Chávista regime sought to replace a neoliberal model of representative government, a limited state and the primacy of the market with a nationalist style of governance based on popular democracy, state ownership and intervention, and the redistribution of wealth, profits and power. Its economic strategy aimed to bolster economic independence by redirecting Venezuela’s oil revenues to restructure and strengthen the domestic non-oil economy, and reduce import dependency. Politically, the new regime pitted a charismatic populist, who claimed support from the impoverished masses and an alliance with Cuba, against a wealthy élite that had plundered the country’s bountiful resources under US patronage for decades.

The state-owned PDVSA held the key. It is the largest company in Latin America with activities that span the exploration, production, refining and exporting oil, and the exploration and production of natural gas. In 2004, the company’s annual revenue was nearly $65 billion and provided about half the government’s income. The Chávez government argued that the old PDVSA had become a ‘state within a state’ during ‘false nationalization’ and designed energy policies to serve foreign interests. The new PDVSA would belong to the people (‘la nueva PDVSA es del pueblo’). The outflow
of oil profits offshore would be stemmed and the company would assume a broader focus by funding social and economic development at home and solidarity abroad.

In November 2001 the Chávez government radically overhauled PDVSA and passed a raft of laws on liquid and gas hydrocarbons, land ownership, the financial system, income taxation and cooperatives. Production royalties were doubled. PDVSA was required to own a majority stake in all joint ventures with foreign companies. Over the next 18 months, the combined forces of the Federation of Chambers of Industry and Commerce (Fedecamaras), the (disputed) leadership of the Confederation of Venezuelan Workers (CTV), the private media, the Democratic Action political party, the top management and white collar workers of PDVSA, and, many believe, the US administration conspired to overthrow Chávez.36

The first stage was a management-led strike-cum-lockout in December 2001. When Chávez subsequently appointed a new company president and board, the officials and employees began a production slowdown. On 8 April 2002, after seven senior executives were sacked, this turned into another strike. Three days later, senior military officers supported a short-lived coup d’état. The head of Fedecom, Pedro Carmona Estanga, was installed as President of a ‘transition government’ that was immediately legitimised by the US administration. Carmona’s first decree was to repeal the new laws, raise oil quotas to their previous levels, and terminate an arrangement to provide oil to Cuba. According to Mexico’s Proceso, the coup leaders acted to privatise PDVSA:

> turning it over to a U.S. company linked to President George Bush and the Spanish company Repsol; plus the sale of CITGO, the US subsidiary of PDVSA, to [mega-entrepreneur and long-time friend of Bush] Gustavo Cisneros and his partners in the north; as well as an end to the Venezuelan government’s exclusive subsoil rights.37

Chávez was restored to office in a display of ‘people power’, helped by international pressure, on 13 April 2002. But PDVSA remained a hotbed of opposition. The state might have owned the oil resource and the company, but it had little effective control over the infrastructure, pipelines, transport, data processing and analysis, shipping, senior executives and specialists, and other important energy-related services. The least obvious, and possibly most potent, weapon in foreign hands was control over PDVSA’s information technology system.

Back in 1996, the old PDVSA had created a joint-venture information services enterprise with the Bermuda subsidiary of Science Applications International Corporation (SAIC), a US company whose board members included former defence department and intelligence agency officials. This occurred under a chief executive who later worked for Shell and as an
energy adviser for the Bush administration. The joint venture company, INTESA, was owned 40 per cent by PDVSA and 60 per cent by SAIC, and it controlled the entire data processing system of PDVSA. The Chávez government alleges that through INTESA information about its deposits, production and capacity that was classified as confidential, and of paramount importance to national security, found its way into the hands of the major companies.\textsuperscript{38}

Moves by the Chávez government to reclaim control over PDVSA and its revenues prompted a prolonged period of ‘oil sabotage’ from late 2002. The management’s strategy was to shut down a large part of the industry and force Chávez out of office by removing his access to oil revenue. INTESA closed off its systems so that all data had to be processed manually. In one prominent case, an official was caught altering the readings of a well in Zulia state: ‘With the change in the readings two things could have happened: the plant’s production was turned off, or an explosion occurred’.\textsuperscript{39} Victor Menotti observes: ‘Although oil still flowed, without the capacity to manage the complex computer systems, PDVSA was unable to sell oil, resulting in the loss of billions of dollars of revenue for the nation’ (Menotti, 2006, p 10). The Attorney General of Venezuela initiated a criminal investigation of INTESA for sabotage, but no charges were laid.\textsuperscript{40}

INTESA’s services agreement expired in June 2002. As a result of an auditor’s report PDVSA sought to renegotiate the contract, through which it claimed SAIC had earned more than $40 million in dividends on a $1200 investment, and an additional $53 million in subcontract fees. The US partner refused. INTESA’s operations were discontinued in January 2003 and PDVSA resumed the management of its automated information flows.\textsuperscript{41}

Remote control of data has been used before to serve US foreign policy interests. In the early 1980s, the head office of Texas energy giant Dresser delivered design information, financial data, personnel files and inventory listings on-line to its offices and construction sites in 100 countries. In March 1983, the Reagan administration moved to enforce sanctions against companies involved in building the Soviet Union’s trans-Siberian pipeline across Western Europe. Dressner’s Dallas office was ordered to terminate engineering services and information flows to its Paris branch, which was manufacturing compressors for the project. With a flick of the switch the branch’s data lifeline was cut off (Bhagwati, 1984, pp 139–40).

The prolonged campaign of oil sabotage by PDVSA’s white-collar employees and its contractors created economic, social and political chaos across Venezuela. Local merchants shut their doors. Domestic manufacturing collapsed. The economy went into deep recession and official unemployment peaked at over 20 per cent. Domestic petrol queues grew as oil was imported. There was no money for social programmes. Chávez responded by dismissing 19,000 PDVSA employees, accusing them of mismanagement and corruption.
The political opposition set about collecting signatures to force a recall referendum. In June 2004 they succeeded. Chávez won with 58 per cent of the vote. The reinvigorated President declared a ‘true nationalization’ policy of ‘full oil sovereignty . . . intended to bring about authentic oil nationalization’. This strategy ‘calls for the reaffirmation of the nation’s property rights over its subterranean deposits of hydrocarbons, as well as the recovery of control of oil activities within its frontiers, from the legal and fiscal perspectives to full control over of the national oil industry’.42

By 2005 Venezuela’s economy had recovered with a GDP growth rate of 9.3 per cent. Despite much higher oil prices, the main contribution was a surge in non-oil domestic activity, notably construction, domestic trade, transportation and manufacturing. Diversification meant oil was now only 14.9 per cent of GDP. Official unemployment was down to 8.9 per cent.43 Chávez won another landslide electoral victory in 2006. The nationalisation of the oil fields was completed in June 2007 when the government reclaimed a minimum 60 per cent shareholding in the lucrative Orinoco River basin projects in El Tigre. All but two of the foreign corporations that ran the projects conformed and received compensation; Exxon Mobil and ConocoPhillips refused.44

This story explains why Venezuela’s new representatives to the WTO in 2004 withdrew an energy services proposal that favoured the national élites. It is also why Venezuela opposed the proposals for GATS benchmarks and plurilaterals and led the resistance to Annex C at the Hong Kong ministerial in 2005. Their stance was not just tactical. ‘True nationalization’ and ‘full oil sovereignty’ constitute a bold challenge to the GATS and a refusal to subordinate this to commitments that were made by a previous corrupt government.

The decision not to renew INTESA’s services contract was not a GATS issue per se. However, it is quite possible that the measures used to reassert control over those services could have breached Venezuela’s market access or national treatment commitments on computer services in modes 1 and 3, and at least nullified and impaired the benefits expected by the US for its company. The fully commercial nature of the service would take it outside the exceptions for governmental services and government procurement. Apparently the US negotiator raised the issue with Venezuela at the time, but it was not pursued.45

The nationalisations also have GATS implications. Requiring all foreign investments to operate through majority-owned joint ventures with the state appears to clash with Venezuela’s mode 3 market access commitments in a number of energy-related services. Again, however, it seems unlikely that the USTR would pursue a dispute that would become a cause célèbre, fuelling anti-GATS sentiment and boosting Venezuela’s kudos. Venezuela could also raise a national security justification that would put the US government’s actions under unwelcome scrutiny.
It is equally clear why Venezuela has resisted an FTAA that contains services and investment guarantees, supported by investor-initiated enforcement. The US joint venture partner in INTESA was apparently paid compensation for expropriation by the US Overseas Protection Insurance Company. In September 2007, Exxon Mobil sought international arbitration at the World Bank’s International Centre for the Settlement of Investment Disputes regarding the 2007 nationalisations, while Conoco-Phillips pursued a negotiated outcome.

When the US succeeded in dividing the Andean Community of Nations through bilateral trade deals, Venezuela cut its ties with the community and sought to join Mercosur instead. As of December 2007, the legislatures of Brazil and Paraguay had delayed Venezuela’s entry. Their domestic constituencies apparently feared that Chávez would oppose the Mercosur FTA with the EU and turn the WTO-compatible regional arrangement into a political vehicle to promote his Bolivarian Alternative for Latin America and the Caribbean (ALBA). ALBA has been described as a socially-oriented trade block [sic] rather than one strictly based on the logic of deregulated profit maximisation [that] appeals to the egalitarian principles of justice and equality that are innate in human beings, the well-being of the most dispossessed sectors of society, and a reinvigorated sense of solidarity toward the underdeveloped countries of the western hemisphere.

Reflecting the principles of ALBA, Chávez also developed creative ways to circumvent the OPEC prohibition on sales at below market value. Venezuela eased the economic blockade of Cuba through a deal that allowed deferred and in-kind payments, notably by health and literacy programmes. Chávez provided oil to crisis-ridden Argentina in 2003/4, and delivered subsidised oil through Sandanista politicians during Nicaragua’s election campaign in 2006. In a move calculated to humiliate George W Bush, he even provided heavily discounted heating oil to flood victims, low-income families and first nations in the US. In a further threat to US hegemony, the government used its oil wealth to repay Venezuela’s IMF loans and proposed a socially democratic regional alternative to the Bretton Woods institutions.

Oil has provided the platform for Venezuela to build alternative alliances, reduce the risk of political isolation and challenge neoliberal globalisation. As the host of OPEC in 2002, Chávez pushed for production limits that increased world oil prices and returns to oil-producing countries. He visited both Saddam Hussein and Gaddafi beforehand. Venezuela has sponsored moves to consolidate petroleum organisations in Latin American and the Caribbean. A strong diplomatic and oil relationship has been established with China, which is now a major investor in Venezuela’s oil industry.
The prospect that Chávez might succeed in creating a viable counter-hegemonic alternative to neoliberal globalisation poses a dilemma for the US. Invading Venezuela is not a political or economic option. As veteran legislator Luis Tascon observed: ‘We could cause a lot of damage to the US economy if our oil was cut off – more than any war.’ Rumours of another coup abound. Short of that, Noam Chomsky predicts the US might support the secession of the rich, largely anti-Chávez, Zulia province that is located on the border of Colombia and home to about 40 per cent of the country’s oil. Privatisation, foreign ownership and long-term preferential or non-discriminatory contracts could then be cemented through a bilateral FTA with the newly created state.

CASE STUDY 18 GULF ACCESSIONS: A LEGAL INVASION

Accession is one of the WTO’s dirtiest little secrets. In the words of experienced commentators: ‘The accession process has no rules, except precedent and power, and is the very antithesis of what the members publicly state to be the intention and design of the WTO.’ Moreover, ‘only those who are extraordinarily naive would believe that the system of accession will be reformed’. The acceding countries have no voice and few powerful allies, while the major players have no incentive to change a process that gives them free rein to pursue their economic and strategic objectives (Grynberg and Joy, 2000, pp 172–3).

States who have embarked on WTO accession fall into four main categories: small, marginal or least developed countries, such as Nepal or Tonga; countries that are emerging from the Sino-Soviet shadow, such as Vietnam and the Kyrgyz Republic; powerful outsiders, notably the former communist states of China and Russia; and states that are oil rich and energy-strategic, mostly from Eastern Europe and the Middle East. Those energy rich or strategic countries that have been or are still involved in WTO accession in 2007 include Afghanistan, Algeria, Azerbaijan, Equatorial Guinea, Ethiopia, Georgia, Iran, Iraq, Jordan, Kazakhstan, Kyrgyz Republic, Lebanon, Libya, Oman, Russia, Sudan, Tajikistan, Uzbekistan and Yemen.

The accession process is always tortuous. Because applicants are not yet WTO members, they have no intrinsic rights. The process of entry does not involve genuine negotiations, because there is no room for trading of concessions. States who join must accept the rules already framed by, and for, the major powers. In theory, governments have some choice about the extent of their country-specific commitments, including in services. But in practice the bargaining is at the margins. The starting price increases with every accession – China’s terms of entry in 2001 fuelled hyperinflation (Bhattasali et al., 2004, pp 117–39). Accession packages routinely contain
‘WTO-plus’ commitments. These relate to policies, such as investment and privatization, which are not governed by WTO agreements, and schedules of commitments on both goods and services that far exceed those of existing members. The terms are also ‘WTO-minus’, with lower thresholds and shorter implementation periods than provided for in the WTO texts (see Chapter 3).

The accession package is decided by a working party on which any WTO member can sit. The US and EC are routinely there. The applicant government presents a memorandum of its trade policies and legal regime. That document is subject to multilateral discussions in the working group, who ‘negotiate’ the rules, disciplines and time lines that will apply. A parallel bilateral process allows each working party member to determine the specific commitments and concessions they require as the price of approving entry. Those bilateral deals are then multilateralized. Once the accession package has been adopted by the working party it is presented, along with the signed Protocol of Accession, to the General Council or Ministerial Conference for adoption. Until that happens, the entire process and proposals are officially secret. The final step in accession is domestic ratification in accordance with the state’s constitutional requirements.

In the process of joining the WTO, acceding countries surrender sovereignty over their economic development strategies. For Islamic states, accession also means replacing economic principles that are deeply embedded in the religious ethos of the people, the country and the constitution with a neoliberal form of capitalism. Their compliance is not a foregone conclusion. There is potential for economic and social upheaval even in Arab states that have relatively liberal economies.

Fortunately for US allies Jordan and Oman, they concluded their accessions in 2000, before the OPEC-induced price hikes began to impact on the international economy and the reality of the oil peak hit home. It was also before the ‘9/11’-induced atmosphere of retribution against Arab states. The next major accession was Saudi Arabia, a country with 25 per cent of the world’s proven oil deposits, and that exports 40 per cent of the world’s petroleum. Saudi Arabia applied to accede in June 1993, during the Uruguay round. The working party was chaired by Pakistan. It included Israel; in 2000, Saudi Arabia agreed to withdraw from the Arab League’s secondary boycott of Israel.

Despite being a US ally, Saudi Arabia faced ever-higher demands from the US, including a WTO-plus commitment on foreign direct investment. The Saudis initially promised to lock in their newly liberalised foreign investment regime. However, they appended a long negative list of exceptions. These included the sensitive areas for Islamic law of finance and insurance and a spectrum of downstream to upstream energy services. Later drafts offered electricity privatisation, natural gas development and services related to mining, but not oil exploration, drilling, extraction and production,
pipelines transportation, and services incidental to electrical energy distribution. In an empathetic commentary, Bhala reports that the Saudi side had intended to eliminate the negative list eventually, including the ‘previously “unthinkable” opening to foreign investment of upstream petroleum services’, such as oil exploration (Bhala, 2004, p 785). But the US was still not satisfied. Bhala observes that US trade law seemed more intent on constraining the Saudi’s comparative advantage in the oil and natural gas sectors than on enhancing it (Bhala, 2004, p 747).

The working party had met 14 times by the time the package was signed off in October 2005. Saudi Arabia formally joined the WTO at the Hong Kong ministerial in 2005. The chair of the US CSI described the final accession package as a ‘high quality’ agreement. In the energy sector, foreign companies had secured non-discriminatory access to energy services in oil and gas exploration and development, pipeline transportation, management consulting, technical testing and analysis, and repair and maintenance of equipment. This would set the minimum threshold for the next energy-strategic countries in the accession process.

The decision to join the WTO was controversial within Saudi Arabia. As of 2004, oil still accounted for 34 per cent of GDP, three-quarters of government revenues and 85 per cent of its export earnings, although those shares were declining. According to Bhala, the pro-accession constituency was supportive of economic liberalisation, believing it could promote greater efficiencies and diversification. But it had genuine concerns about social instability and the adjustment costs of implementing the US demands. The US seemed deaf to their dilemma.

Saudi Arabia also wanted to accede so it could influence the future development of trade rules on the import and export of oil. The OPEC bloc within the WTO was growing. In 2000 UNCTAD calculated that OPEC members of the WTO produced 40 per cent of the world’s oil, possessed around three-quarters of the proven crude oil reserves and exported about 60 per cent of oil that was traded internationally. Eight countries, which collectively represented another 26 per cent of global production, were seeking accession. If all of them joined, net oil exporters that represent over two-thirds of production would be WTO members. The entry of Iran, Iraq and Libya would add another 10 per cent (UNCTAD, 2000, p 114). However, it would be difficult for OPEC members to wield influence in the WTO once they made extensive commitments during their accession process. Their options within OPEC would be similarly constrained, unless they became renegades like Venezuela.

Saudi Arabia (like Russia and Iran) was justifiably concerned that it had no say in the GATS 2000 negotiations that were attempting to write a new road map for the liberalisation of energy services. The US’s proposals aimed to give Bechtel, Exxon and Halliburton the broadest possible access to the widest array of energy services. In particular, the US proposal for a reference
paper on energy services would oblige Saudi Arabia to provide third-party access to pipelines, storage facilities and terminals, and could undermine the pre-eminence of Saudi Aramco. The alternative of Venezuela’s narrowly defined, and later retracted, energy services classification preserved the ‘sovereign right to grant limited market access to a select few foreign industries and companies’ (Bhala, 2004, p 804). But Saudi Arabia signed away that option in its accession. Indeed, in 2006 it joined the EC-led plurilateral request on energy services.

Bhala notes the US claim that ‘trade with the Kingdom is about our security’ (Bhala, 2004, p 810). Reflecting on the paradox that the accession could instead cause profound dislocations he asks: ‘Will resentment in the Kingdom against the United States worsen, as the psychological (if not real) link between globalization and Americanization strengthens?’(Bhala, 2004, p 812). Indeed, ‘in the post-9/11 world, would it have been more in the interests of . . . the American Heartland for American negotiators not to press the Desert Kingdom almost mercilessly for more market access, but rather to emphasize the importance of long-term, trusting trade relationships?’(Bhala, 2004, p 768).

The Saudi accession had wider implications for Islamic states. Bhala notes the unique significance of Saudi Arabia and its experience to all Moslems (Bhala, 2004, p 750). The arrogance of the US, and to a slightly lesser degree its allies, towards the fundamental tenets of Islam established a precedent. As a Kingdom, Saudi Arabia has minimalist constitutional requirements for treaty making and ratification, so there was little scope for legal or political contest. The same or higher demands of Libya, Iraq and Iran had the potential to provoke political mayhem.

Libya was next in line of the Arab states. As soon as Muammar Gaddafi repudiated weapons of mass destruction the US announced it would no longer oppose Libya’s WTO accession. Libya applied in June 2004. The working party, chaired by Spain, was established in July. The US formally ended its trade embargo of Libya in September. That did not make them best friends. Reuters reported in a rare interview in March 2007 that: ‘Gaddafi has criticised the world financial system as a dictatorship based on fear but said Libya’s only pragmatic choice after sanctions was to accept the unfair reality of world trade.’53 Gaddafi complained that Britain and the US had not delivered the promised compensation to Libya for renouncing nuclear weapons, and predicted that countries such as Iran and North Korea would not follow his lead.

Iran was already familiar with US power politics in the WTO. The Iranian government wanted to diversify the economy and escape the discriminatory tariffs on its exports that came from being outside the GATT’s MFN regime. It made its first request for accession to the WTO in July 1996. The US vetoed that and 21 further requests. Talks brokered by the EU sought to trade off Iran’s agreement to discontinue its nuclear programme for security
and trade benefits, including WTO membership. On 25 May 2005 Iran’s representative announced that the country would refrain from developing nuclear weapons. The next day the WTO General Council finally accepted the accession application. However, that was just the first step. The US could still prolong the bilateral negotiations, demand crippling commitments and ultimately veto Iran’s entry without having to give any reasons. If Iran did join on the terms the US demanded, the US could then withhold Iran’s entitlements, supported by GATS Article XIV \textit{bis} and GATT Article XXI that allow countries to suspend their WTO obligations on grounds of national security.

In Iran’s case a Saudi-plus package, and the core ideology and substantive rules of the GATS, would be irreconcilable with the central tenets of its Islamic Constitution:

\textit{Article 3 [State Goals]}

In order to obtain the objectives [of the Foundational Principles] the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals: . . .

5) the complete elimination of imperialism and the prevention of foreign influence; . . .

8) the participation of the entire people in determining their political, economic, social, and cultural destiny; . . .

12) the planning of a correct and just economic system, in accordance with Islamic criteria, in order to create welfare, eliminate poverty, and abolish all forms of deprivation with respect to food, housing, work, health care, and the provision of social insurance for all; . . .

\textit{Article 4 [Islamic Principle]}

All . . . economic . . . and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations . . .

\textit{Article 44 [Sectors]}

2) The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams, and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and administered by the State.

\textit{Article 81 [Foreign Business]}

The granting of concessions to foreigners or the formation of companies or institutions dealing with commerce, industry, agriculture, service, or mineral extraction, is absolutely forbidden.
**Article 82 [Foreign Experts]**
The employment of foreign experts is forbidden, except in cases of necessity and with the approval of the Islamic Consultative Assembly.

**Article 153 [No Foreign Control]**
Any form of agreement resulting in foreign control over the natural resources, economy, army, or culture of the country, as well as other aspects of the national life, is forbidden.

The Iranian President has authority to sign an international treaty, but the Islamic Consultative Assembly must approve it. The Assembly cannot enact laws that are contrary to the official religion of the country or to the Constitution, as determined by the Guardian Council of six religious men and six jurists. While departures from these strictures are not unusual in practice, WTO accession would require a comprehensive formal revision of state policy and law. Rewriting the Constitution would involve, inter alia, a national referendum that would catapult WTO accession onto the centre stage of Iranian politics. Not surprisingly, two years after Iran’s WTO accession working party was approved, no member had agreed to act as its chair.

The story of occupied Iraq is the mirror image of Iran’s. Order number 12 issued by Paul Bremer, the US Director of Reconstruction and Humanitarian Assistance and head of the Coalition Provisional Authority, set February 2004 as the target date for Iraq to join the WTO. Right on schedule, Iraq was granted WTO observer status on 12 February 2004, while still under the rule of the provisional authority. The application progressed rapidly. Colombia was appointed to chair the working party. Iraq’s memorandum of trade legislation was submitted in late 2005, and questions and responses exchanged by November 2006. The bilateral phase was underway by mid-2007, beginning with the EU and US, Brazil and several Arabic states. The US had already signed a trade and investment framework agreement with Iraq in 2005. That agreement laid the groundwork for negotiations on a WTO-plus and WTO-minus bilateral agreement, which the US expected would include investment guarantees, investor-initiated enforcement and foreign policy conditionalities.

The US offered to help Iraq prepare for the accession. According to Herbert Docena:

> The US ordered Bearing Point, the contractor tasked with the economic reconstruction of Iraq, to ‘create a WTO-consistent trade and investment legal framework which will . . . lay the groundwork for greater integration into international financial and trading networks’.
>
> (quoted in Malig, 2006, p 39)
The new Iraqi Constitution produced under the interim administration had been expected to ensure that Iraq was WTO-ready. Instead, a June 2005 draft of the constitution proclaimed that ‘social justice is the basis of building society’. It envisaged a Scandinavian-style welfare system, with the oil wealth spent on social entitlements to education, healthcare, housing and other social services. It also required the state to safeguard Iraq’s oil (Docena, 2005, p 1). That version was superseded by a version that emerged from the backroom constitutional process and purported to combine Islam and neoliberalism. The final Constitution says:\(^5\)

\textbf{Article 2}

\emph{First . . . A:} No law that contradicts the established provisions of Islam may be established.

\textbf{Article 13}

\emph{First:} This constitution is the sublime and supreme law in Iraq and shall be binding in all parts of Iraq without exception.

\emph{Second:} No law shall be enacted that contradicts this constitution. Any text in . . . any other legal text that contradicts it is deemed void.

\textbf{Article 25:}

The State guarantees the reform of the Iraqi economy in accordance with \textit{modern economic principles} to insure the full investment of its resources, diversification of its sources and the encouragement and the development of the private sector.

\textbf{Article 26:}

The state guarantees the encouragement of investments in the various sectors. \textit{This will be organised by law.}

\textbf{Article 27:}

\emph{First:} Public property is sacrosanct, and its protection is the duty of each citizen.

\emph{Second:} The provisions related to the protection of State properties and its management and the conditions for its disposal and the limits under which none of these properties shall be relinquished \textit{shall all be regulated by law.}

\textbf{Article 109: . . .}

\emph{Second:} The federal government with the producing regional and governorate governments shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people \textit{using the most advanced techniques of the market principles and encourages investment.}

[emphasis added]
In the case of oil, the laws and principles that are referred to in Articles 26, 27 and 109 ran roughshod over Article 2 and hence Article 13, but embodied the ‘modern economic principles’ of Article 25. In February 2007, the Iraqi Cabinet approved a draft oil law that would govern the world’s third largest oil reserves. The resource would effectively be privatised through long-term production sharing agreements – a mechanism for legalised extortion that other oil producing countries were eliminating. The oil industry administration and revenues would be split across three internal regions. But the key decisions would be controlled by an ‘advisory’ Federal Oil and Gas Council, which comprised ‘oil experts’ from inside and outside Iraq. Journalist Pepe Escobar reports that:

The law was in essence drafted, behind locked doors, by a US consulting firm hired by the Bush administration and then carefully retouched by Big Oil, the International Monetary Fund, former US deputy defense secretary Paul Wolfowitz’ World Bank, and the United States Agency for International Development. It’s virtually a US law (its original language is English, not Arabic).56

The legislation was to be introduced to the Iraqi parliament in April 2007. The government of Nouri al-Maliki said it would be passed in one or two months. By December 2007 it remained stalled, despite pressure from the US, where President Bush had wanted to use the law to show Congress that his new Iraq strategy was succeeding.

Reflecting the arrogance of imperialism, the US administration assumed that WTO membership, an FTA, a constitution and a foreign investment law could confer legitimacy and security on US economic and foreign policy interests in a country that it had literally torn apart. The trenchant opposition within the parliament and oil industry workers suggests the passage and implementation of the proposed oil law, let alone the WTO accession, will compound the chaos that is the US occupation of Iraq.
Conclusion
Serving whose interests?

The previous chapters and case studies have prised open the arcane world of trade in services agreements to shed light on their socio-economic and geopolitical dimensions. Just as liberal legalism constructs an artificial world that excludes such factors, political economy allows them to be brought back in. The trade in services regime emerges as an ideological construction that is both potent and fragile. There is a vast literature on its potency, much of which is referred to throughout this book. Much less has been written about the factors that make it unsustainable.

Four contradictory forces emerge from this analysis. The future of the trade in services regime will depend on how these contradictions play out within both the broader international ‘trade’ arena and the contested domain of neoliberal globalisation. These concluding reflections suggest that a tentative transformation is already underway.

First, the intrinsically social nature of services remains resilient in the face of agreements that seek to purge them of that very essence and de-link them from the social relations of their production, consumption and exchange. The Bangladeshi construction worker in Dubai who is enslaved by the recruitment agency, loan shark and construction company; the Chilean grandmother with no pension or other income; the impoverished Bolivian family whose water is cut off for non-payment of extortionate user charges are human tragedies that trade in services agreements cannot see. The champions of these agreements assume that reality can be redefined through the legal artifice of a treaty. But the wilful blindness of free trade entrepreneurs, and the closure of the texts they create, does not make this suffering and alienation go away. As a commentary in the International Herald Tribune put it on 5 February 1999: ‘A billion people living in dire poverty alongside a billion in widening splendour on a planet growing ever smaller and more integrated is not a sustainable scenario.’

The resilience of the social plays out through multiple levels of organic and organised resistance. Some societies appear to conform to the prescription of ‘socio-regulatory adjustment’, offering a grumbling acquiescence. Elsewhere, people remain determined to exercise sovereignty over their own
lives, even when their governments have formally abdicated the state’s responsibility. Communities that have little or no consciousness of trade in services agreements mobilise to defend their futures – whether they are small shopkeepers in Thailand, displaced farmers in Bangalore, impoverished South African communities resisting privatisation by the post-apartheid government, or local residents of Cancún who refuse to make way for a new hotel zone. In Australia, Canada or Europe, the internal inequalities and disempowerment associated with neoliberalism have spurred a gentler, yet determined, opposition.

The ‘organic intellectuals of counter-hegemony’ help to articulate the links between the local, the legal and the international. Many activists and social movements focus on empowerment and mobilisation that spans the national, regional and international arenas. Others strategically target the most influential governments and sensitive issues. Specialist NGOs channel their analytical and technical resources to governments who are prepared to engage critically with the process. International institutions that remain wedded to a social paradigm add to the noise and confront member states with their failure to meet their competing legal obligations.

Far from engaging with these challenges, the ‘regime of accumulation’ seeks to embed the neoliberal paradigm for time immemorial through complementary layers of pro-market meta-regulation at the national and supranational levels. It deliberately closes off the ideological and legal space for governments to give priority to social needs and the common good over ‘trade’ commitments, or even to respond to a disabling political crisis. States are relegated to a self-limiting and ‘enabling’ role vis-à-vis capital. That subordination is rationalised on the grounds that states can no longer effectively steer their economies or control capital flows (for example, Giddens, 2000). This, in turn, assumes a sterile spectator-style of democracy where the responsibility to govern is entrusted to political leaders and ‘voices of the market’. Citizens are informed of decisions, often ex post facto, but not actively involved in making them. The secrecy of international trade negotiations and the executive nature of treaty making compound the ‘democratic deficit’ of neoliberalism.

Meta-regulation faces a conundrum: state sovereignty and people’s sovereignty (not always the same thing) are more powerful ideological constructs than ‘trade’ agreements will ever be. States continue to bear the burdens of democracy. SP Shukla observed when reflecting on the Uruguay round and the collapse of the third WTO ministerial meeting in Seattle that the
deeper the process of integration, the more glaring the basic contradiction in the system. . . . Deeper integration carries the process of exclusion much further by excluding people from the law-making process of their own countries. And it transfers the process, in effect, to the invisible hands of the transnational corporations who have vested interests in
the creation of ‘internationally contestable markets’. In this sense, deeper integration is anti-democratic. In terms of the system, the significance of open defiance by a large number of ‘exclusion’ casualties . . . can hardly be exaggerated.

(Shukla, 2000, pp 33–4)

These contradictory dynamics play out differently among national governments. The Fijian government put off dealing with the economic, social and cultural implications of a ‘development’ model that depends on migration-for-remittances by redefining the export of its skilled women and militarised men as mode 4 of trade in services. The Japanese government opted to comply with US demands by voluntarily amending its retail laws and relying more on cultural preferences. India became an aggressive demandeur in the interests of its politically powerful middle class at the expense of its impoverished masses. Other governments have sided with their national elites and superpower allies: the Arroyo governments failed in its attempt to purge the Philippines Constitution of economic nationalism, but the government of Costa Rica successfully subverted a citizen-initiated referendum designed to oppose CAFTA. The South Korean government concluded a free trade agreement with the US despite militant protests from farmers, students, workers and even film stars.

Yet Thailand’s Prime Minister Thaksin was overthrown, in part, because he championed a US free trade agreement. Future Thai governments now face constitutional constraints on their treaty making powers. Centre left governments in Latin America have strengthened their own regional integration, while blocking the US goal of an FTAA. Even the US administration – the initial champion of the GATS – has chosen to withdraw its commitment on gambling rather than amend its domestic laws. That decision opens a Pandora’s box. Other governments will face pressure from their domestic constituencies to do the same – which the US and others will vigorously oppose.

More radical governments have directly challenged the neoliberal paradigm itself. The indigenous-led government of one of world’s poorest countries, Bolivia, withdrew the GATS offers of its predecessor as part of its quest for trade justice. In neighbouring Venezuela the government of Hugo Chávez has prioritised ‘full oil sovereignty’ over the trade in services commitments of a previous administration, and applied the country’s oil wealth to building alliances through barter-style alternatives. In May 2006 Venezuela, Bolivia and Cuba signed a People’s Trade Agreement ‘as a means toward development with social justice in the framework of genuine fraternal Latin American and Caribbean integration’.² This and Chávez-led ALBA represents a conscious counter-hegemonic strategy to confront both the FTAA and neoliberalism more generally. Whether they can be sustained if their political champions, especially Chávez, lose power is questionable.
Venezuela’s bold initiatives are made possible by another paradox – the use of oil wealth as the basis for alternatives. Building on that foundation is itself problematic. The divergent political loyalties of OPEC members make concerted action by oil rich countries most unlikely. Moreover, Venezuela’s leverage that depends on oil wealth sits uncomfortably with the crisis of global warming, especially given its strategic alliance with one of the world’s major energy consumers, China.

These diverse voices, values, tensions and alternatives are part of an evolving dialectic that makes the trade in services regime contested and unstable. When governments cannot regulate in the interests of their people, and dynamic participatory governance is suppressed, there is a risk that social dis-ease will fuel social upheaval. National governments become pincered between the demands of their citizens for social regulation, often reinforced by the state’s constitutional and other international obligations, and the economic imperatives of contemporary capitalism, reflected in the state’s commitments in ‘trade’ treaties to regulate for capital.

These tensions can undermine the political legitimacy of governments and their capacity to govern. They also infect and de-legitimise the trade in services regime itself. Governments of all dispositions become cautious and defensive. The negotiation, implementation and enforcement of the GATS, regional and bilateral agreements, and pro-market regulation at a national level all become technically complex and politically contentious. This suggests that the legal regime of accumulation is potentially unsustainable.

The second fissure reflects the imperialist nature of international law: what purports to be a normative rules-based ‘trade’ regime embeds the historic asymmetries of economic and political power between the global North and South. The GATS was a creation of the 1980s and early 1990s when US hegemony and neoliberal globalisation seemed omnipotent. As Anghie predicted, Southern governments responded to this new challenge by struggling from within. The legal structures and negotiating principles they established have since been used to stall the GATS 2000 process.

As the WTO has become increasingly dysfunctional, both the US and EU have shifted their focus from multilateral liberalisation to a complex of economic and political arrangements at the bilateral and regional levels that Bhala describes as ‘competitive imperialism’ (Bhala, 2007). These inter-state rivalries will intensify as China and India, the previously passive Japan, and a potentially resurgent Russia compete to secure new bilateral and regional alliances.

These new generation agreements combine guaranteed rights over scarce natural resources with increasingly oppressive economic, aid and foreign policy conditionalities. Subversion is both more possible and more difficult for Southern governments in these highly politicised negotiations. The ruthlessness with which the US, EU and others are ‘negotiating’ with some of the world’s poorest states, such as the Andean nations and the ACP
countries, increases the prospects for localised rebellion and international instability. It is ominous that these public displays of raw power go hand in hand with the language of ‘failed states’, the ‘axis of evil’, an ‘arc of instability’, and ‘pre-emptive intervention’. Similar treatment of Arabic states during WTO accession and bilateral negotiations, against the backdrop of actual occupation and threatened invasion, seem destined to foment long-term anti-Western sentiments and resistance among the already disaffected. As Anghie observed, throughout the history of international law ‘these imperial projects inevitably provoke rebellion and opposition’ (Anghie, 2005, p 312).

It is not clear how the US will respond if the President’s fast track authority remains in abeyance for some years and it is left behind by competing hegemons. Already the post-‘9/11’ siege mentality has driven the US to shore up its own neighbourhood through a deep integration process with Canada and Mexico, dubbed the Security and Prosperity Partnership. A corresponding internal consolidation has been promoted within Canada through the Trade, Investment and Labour Mobility Agreement (TILMA) between British Columbia, Alberta and potentially other Canadian provinces. While regionalism is important to the US, the competition to secure ‘trade’ treaties is a proxy battle for control of the world’s increasingly scarce natural, especially energy, resources, and between competing models of capitalism. The US cannot retreat from that global arena – a fact that may foreshadow more overt force and covert aggression.

Nascent counter-hegemonic ventures that aim to replace the neoliberal paradigm with emancipatory alternatives are both promising and fragile. The governments of Hugo Chávez in Venezuela and President Evo Morales in Bolivia symbolise the resistance to US-led imperialism. Morales articulated an alternative vision sourced in indigenous values in his address to the UN on 22 September 2007:

I come here to express the suffering, the product of marginalisation, of exclusion, I come to express above all else, this anti-colonial sentiment of the peoples that struggle for equality and justice. . . . Many countries have the same problems as my country, a country, a nation with so much wealth but also with so much poverty, where the natural resources have historically been stolen, looted, auctioned off by the neoliberal government, handed over to the transnationals. . . . This new millennium, the millennium that we find ourselves in, needs to be a millennium of life, not of war, a millennium of people and not of empire, a millennium of justice and equality and that any economic policy needs to be orientated towards ending, or at least lessening these so-called asymmetric differences between one country and another country, those social inequalities.³

The vanguard role of Venezuela and Bolivia is also its vulnerability. If Chávez and allied leftist leaders are destabilised or removed, those countries that
have embraced their alternatives and become dependent on their resources are at risk of being cut adrift, as occurred after the demise of the Soviet Union. Sustainable alternatives require the use of the emerging economic and political space to de-legitimise the notion of TINA that maintains the bonds of neoliberalism and to create broader networks of local and regional initiatives that allow people and societies to use and trade their own resources to advance their own welfare.

The third contradiction is the intrinsic inability of the GATS and its successors, as legal texts, to meet the needs of the transnational corporations they are intended to serve. As treaties they are expected to provide certainty and security that pro-business laws and policies will be implemented, retained and improved over time. Instead, the political compromises between the North and South, and among the major powers, that gave birth to the GATS 1994 have left a legacy of vague and unfinished rules, and fragmented and partly obsolete schedules of commitments.

The fate of the Doha round is, at the time of writing, unknown. If some deal on agriculture and NAMA is pulled together, however cosmetic, there would be enormous pressure on larger developing countries to adopt extensive new services commitments. Whether they would comply, and whether a dissident such as Venezuela could catalyse others to block a consensus, is pure conjecture. However, even if an ambitious outcome was achieved in the GATS 2000 negotiations it could not remedy the structural deficiencies in the agreement. The positive list and classifications system remain unchanged. Attempts to develop rules and disciplines on government procurement and subsidies have been at standstill virtually since they began.

The partial exception is the Article VI:4 disciplines on domestic regulation. Although these have become embedded in the GATS 2000 round, their proponents have argued for an ‘early harvest’. All WTO members would then face additional constraints on their autonomy to regulate, and poor and small countries would face onerous costs to comply. Yet even these disciplines seem unlikely to go as far as those already agreed for the accountancy profession – which are themselves not effective until the conclusion of a GATS 2000 round.

Alternatively, the Doha round might remain moribund until a new US President secures fast track authority. The relevance of the GATS would depend largely on the dispute settlement process and creative applications of the principle of ‘technological neutrality’ to extend existing commitments to new activities.

By contrast to the faltering multilateral level, the new generation of GATS-plus agreements has succeeded in creating new architectures, classifications, rules and constraints on regulation. The combination of negative list schedules and the principle of technological neutrality make those commitments more responsive to new commercial opportunities. The stand-alone structure of the GATS has given way to integrated legal texts as the boundaries between
agriculture, industry, energy, finance, intellectual property, services and investment are reorganised. In particular, the blending of services and investment chapters has opened the door to investor-initiated disputes.

Before long, the flood of new generation agreements may render the GATS an historical anachronism. From a pro-liberalisation perspective, there would still be two purposes to reviving the GATS 2000 negotiations. First, if the main elements that are currently being resisted have been incorporated into most bilaterals, continued opposition to them in the GATS may become academic. Ideally, a GATS agreement could then smooth out some of the incoherencies across the new generation agreements and apply those commitments on a MFN basis. Second, there is no realistic prospect of bilateral agreements between the US, EU, Japan and China. The major powers therefore need agreement in the GATS to secure access to each other’s markets and provide seamless ‘trade in services’ among the major importing and exporting economies.

Neither purpose appears likely to attract a passive consensus of WTO members. These objectives may only be achieved through plurilateral side agreements. That would fundamentally change the multilateral regime and implicitly recognise the North/South fissure that pervades the ‘global’ services economy.

Over two decades have passed since the Uruguay round began. The original vision of one global set of rules to govern the world’s services markets has given way to a plethora of overlapping, often incoherent and sometimes conflicting treaties. These new agreements contain their own illusions and rigidities. They cannot simply be reintegrated within the WTO domain or with each other. As their purpose and content become more politicised, governments may pay less attention to the demands of the corporations, aside from the crucial sectors of finance, energy and communications.

It is not clear what this bilateral and regional patchwork will actually achieve. Many governments, especially the poor, appear to lack the technical as well as political capacity to comply with all the commitments they are signing on to. Attempts to enforce the rules and extend them through judicial lawmaking in either the WTO or international arbitral tribunals would be fraught with danger. The more disputes that are taken, and the more activist the trade ‘judiciary’ becomes, the greater the likelihood that the agreements will be condemned by governments and people for usurping their sovereignty in the interests of major powers and transnational companies. Treaties that are not enforceable lack potency.

This points to the final, systemic contradiction. When the GATS 2000 round became paralysed and the WTO confronted a crisis of legitimacy, the organic intellectuals of capital reinvented the regime. Yet the new configurations of bilateral and regional agreements perpetuate the same ideological illusions, inequities, asymmetries and instabilities that destabilised the multilateral arena. The internal logic of the ‘regime of accumulation’
becomes self-defeating because the closed ideology of trade in services agreements sees the world only as a market. It cannot recognise, let alone mediate, the structural inequalities and ecological exhaustion that destabilise the globalising services economy. The ‘social structure of accumulation’ faces its own crises as the conditions that are necessary for its survival appear impossible to sustain. The very notion of international trade in services belies the seismic potential of peak oil, climate change or a global meltdown of speculative capital. Yet trade in services agreements contribute in no small way to the potential for financial instability, energy depletion, social upheavals and war to plunge global capitalism into crisis.

As Robert Cox presciently remarked, hegemony represents a particular configuration of ideas, institutions and material forces which people can move with or resist, but not ignore (Cox, 1981, p 135). A hegemonic project requires a modicum of consent or at least acquiescence. It is vulnerable when the conceptual foundations on which it is built are flawed, the objectives are overtly partisan, the activities it mandates are not sustainable, and people retain a strong allegiance to displaced or alternative values. While those who champion the trade in services regime assume that it will endure forever, it is neither irresistible nor eternal.

These sites of contradiction are not presented as linear forces that are driving the trade in services regime specifically, or neoliberal globalisation generally, towards a spectacular meltdown. There is no prediction of Armageddon or a mass revolutionary uprising against global capitalism. What this book reveals is a dialectical struggle that, to answer the question posed in the title, appears to serve the long-term interests of no one.
Notes

Introduction

5 WTO, ‘International Trade Statistics 2006’, Tables A.8, 1.7 and 1.8 and Chart IV.2, online. Available at www.wto.org/english/res_e/statis_e/its2006_e/its06_bysubject_e.htm (accessed 20 September 2007). These figures draw on international service transactions recorded in balance of payments statistics for the categories transport, travel and other commercial services. They do not correspond to the GATS definition, where foreign direct investment is deemed a mode of ‘trade’.
6 OECD, ‘The Trade Committee of the OECD. Thirty Years and a Hundred Meetings’, TD(91)100, p 72.

I Reading the GATS as ideology

3 WTO, ‘Services Sectoral Classification List’, MTN/GNS/W/120, 1 July 1991.
4 Sorsa notes that the role of the WTO committee is unclear and untested as the IMF independently approves restrictions on current account payments (Sorsa, 1997, p 10).


10 WPDR, ‘Communication from Brazil, Colombia, Dominican Republic, the Philippines. Elements for Draft Disciplines on Domestic Regulation’, room document. On file with author.


Case study 1


13 Ibid.


18 Ibid.


21 Council for Trade in Services, Special Section (CTS.SS), ‘Report by the Chairman to the TNC’, TN/7/17, 8 October 2004.


Notes 329


26 Joint statement of Cuba and Venezuela to WTO General Council, ‘Irregularities identified in the negotiation and decision making process at the Sixth WTO ministerial conference’, 8 February 2006. On file with author.


Case study 2

30 ASEAN Framework Agreement on Services, online. Available at www.aseansec.org/6628.htm (accessed 20 September 2007).


2 How the GATS was won (and lost?)

1 Interview with S Picciotto, 8 December 2005, New Delhi.

2 Feketekuty says its origins were serendipitous – a dinner date between the drafter of the legislation and a lobbyist for Pan American Airlines, who complained that the Australian government would not allow Pan Am to deliver the international mail. Interview with author, Washington DC, 3 May 2005.


11 Ibid., p 13.
12 OECD ‘Meeting on Restrictions on International Trade and Investment in Services’, WH Witherell to the Secretary-General, WHW/80.97, 6 June 1980. On file with author.
16 OECD, ‘Some issues on the OECD approach to liberalisation of services’, T Bernes and A Farhi to Secretary General, 14 January 1984. On file with author.
20 This was also a major point of contention in negotiations for the MAI in the OECD from 1995 to 1998 (Khor, 1998).
21 The OECD later engaged with ‘trade and development’ from a pro-liberalisation perspective (OECD, 1989).
25 SP Shukla to author, email correspondence, 6 April 2008. On file with author.
31 OECD, JW Hackett to Secretary-General, JWH(86)10, 9 January 1986. On file with author.
36 Drake and Nicolaidis state that the ‘common working platform’ for a two-track approach was suggested several days before the meeting (Drake and Nicolaidis, 1992, p 68). Singh also suggests the two-track proposal was promoted by the EC before the meeting (Singh, 2003, p 15).
42 GNS, ‘Communication from Brazil [and 10 others]. Structure of a Multilateral Framework for Trade in Services’, MTN.GNS/W/95, 26 February 1990.

Case study 3

50 ‘Record of a Discussion between the Secretary General and Mr Freeman, Senior Vice President, American Express, on 8 May 1981’, File note TJA/111. On file with author.

**Case study 4**

52 ‘Stop the GATS Attack Now’ was the title of the strategy paper and first international sign-on letter initiated by anti-GATS campaigners in 2001.


56 The Global Services Network was formed by the major services lobby groups from the UK, US, Hong Kong, France, Ireland, Canada, Sweden and Argentina in 1998. See www.globalservicesnetwork.com.


**3 Trade-related development**


4 For a critical commentary on Sampson’s views by the Bank’s representative during the Uruguay round see Baneth, 1998.


6 Interview with Vidya Rangan, Equations, Bangalore, 10 December 2006.


8 Ibid., pp 10–11.

9 Ibid., p 30.


12 The language on services is ambiguous. The EC originally insisted that it meant the negotiations on services must begin, and preferably conclude, by the end of 2007. In late 2007 it was agreed that negotiations on services would continue into 2008.


Notes


Case study 5


Case study 6

25 For an official account of these summits see Chasek and Sherman 2004, Chapter 3.
Notes


35 One government pointed to 160 conditions it had to meet to obtain support for its PRSP, Monterrey Consensus, Ch IV, Ministerial roundtable B.2, p 45, para 8.


37 On file with author.

4 The illusion of public services

1 Interview with Mme Marie-Pierre Faudemay, former principal administrator, Trade Directorate, OECD, at Paris, 6 March 2005.


10 Online. Available at www.midwivesonline.com/internationallinks.htm (accessed 20 September 2007). In 2005 this website was freely browsable; in 2007 it required a password to enter.


13 Ibid., p 21.


15 Ibid., p 28.


30 Bolivian Representative to WTO to Pascal Lamy, WTO Director General, 17 March 2006. On file with author.
31 Abel Mamani, speech to Municipal Government of Mexico, 16 March 2006. Translation on file with author.

Case study 7

36 Variants include ‘Design, Build and Finance’, where the state continues to operate the service; and ‘Design, Build and Operate’, where the state finances the project.
43 ‘Full Business Case for Redevelopment of University College, Middlesex Hospital and Associated Hospitals’, 14 August 2000 [University College London NHS Trust], section 10. On file with author.

Case study 8

49 Tanada et al v Angara et al, GR No 118295, 2 May 1997, 272 SCRA 18, per Panganiban J, p 34.
50 Ibid., pp 71–2.
51 An initial wave of privatisations involved assets sequestered from Marcos and his cronies.
That position may have reflected the sensitivities of their Geneva based officials, rather than the Manila government.


5 Ruling the services infrastructure


2 Ibid., p 19.

3 Interview with author, Washington DC, 3 May 2005.
4 Ibid.
7 Non-facilities-based services are where a service supplier does not own transmission capacity but contracts for that capacity from a facilities-based supplier.
11 Personal observations of author.
31 ‘Financial Services Collective Request’, undated. On file with author. Switzerland apparently did not join because the request was not sufficiently ambitious.

Case study 9

35 Even without Article XVI, Antigua could have invoked Article XXIII to say the ban nullified and impaired a benefit it reasonably expected to accrue from the US commitments.
40 ‘Communication from the Chief Legal Officers of the States of Arizona and 28 Other States to Hon Rob Portman, Ambassador, United States Trade Representative’, 31 May 2005. On file with author.
45 Ecuador was granted the right to withdraw commitments to the EU on intellectual property rights in its dispute over bananas, but never actually did so (ICTSD, 2007).


Case study 10


54 This was repackaged in 2002 as the State Second Pension.

6 Trade in people


2 ‘Blackbirding’ is a term applied to the historical practice of enticing indigenous labourers to work in Australia and Fiji sugar plantations, often by trickery or as indentured labourers.

3 CTS, ‘Presence of Natural Persons (Mode 4)’, note by the WTO Secretariat, S/C/W/75, 8 December 1998, pp 12–16.


5 CTS.SS, ‘Communication from India. Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS)’, S/CSS/W/12, 24 November 2000.

6 James, F Sensenbrenner Jr to Hon Peter Allgeier, 3 March 2005. On file with author; Sen Dianne Feinstein to Hon Robert Portman, 5 December 2005, online.


11 Statement by AFL-CIO President John Sweeney on Passage of the Peru Free Trade Agreement, 8 November 2007. On file with author.

Case study 11


18 Quoted in ‘Partnership Shibboleths’, Down To Earth, 15 February 2006, p 41.


20 Quoted in ‘Virtual Realty’, Down To Earth, 15 February 2006, p 44.


24 Quoted in ‘No one saves for a rainy day now’, TimesonLine, 4 February 2004, online. Available at http://www.timesonline.co.uk/tol/life_and_style/article1010410.ece (accessed 20 September 2007).

25 The term ‘Zippies’ denotes young people who walk with a ‘zip in their step’.

Case study 12


27 Around 120,000 Fijian Indians are believed to have migrated from the country since the first coup in 1987. The third coup was expected to exacerbate the situation.

29 Following the 2006 coup Fiji was suspended from the New Zealand Seasonal Workers Scheme that allowed temporary entry to 5,000 seasonal workers from the Pacific Islands.


32 Interview by author with an official from the Fiji Ministry of Labour, May 2006.


39 ‘Who’s Who in the Kuwait Affair’, Islands Business, online. Available at www.islandsbusiness.com/archives/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=4699/overrideSkinName=issueArticle-full.tpl (accessed 20 September 2007).


42 Pareti, S ‘Human Labour; Lucrative Export: Fiji rakes in $m from overseas jobs’, Islands Business (undated), online. Available at www.islandsbusiness.com/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=4977/overrideSkinName=issueArticle-full.tpl (accessed 10 August 2007).

43 ‘Who’s Who in the Kuwait Affair’, Islands Business, online. Available at www.islandsbusiness.com/archives/islands_business/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=4699/overrideSkinName=issueArticle-full.tpl (accessed 20 September 2007).


46 ‘Four Fiji Nationals Killed in Iraq’, Fiji Times online, 21 April 2006; see also ‘Mother Laments Son’s Death in Iraq’, Fiji Times, 14 June 2006. On file with author.

7 Minds and markets

1 The term was coined in a published by the conservative Washington-based Cato Institute (Lips, 2000).
7 Hecht, J ‘Mexican Film Production’, Hollywood Reporter, 19 September 2006, online. Available at www.hollywoodreporter.com/hr/content_display/international/features/e3iCAGp11%2FrC6q3HUNUzcEORQ%3D%3D (accessed 20 September 2007).
10 New Zealand Herald, 10 April 2000. On file with author.
13 Bernier notes that the US complaint against Turkey on taxation of foreign film revenues in 1996 was based on Article III of the GATT (Turkey – Taxation of Foreign Film Revenues) Doc. WT/DS43 (1996)), but the EC complaint against Canada on Measures affecting film distribution services in 1998 was based on Articles II and III of the GATS: Canada – Measures Affecting Film Distribution Services, WT/DS117/1 (1998). The complaint was dropped a few months later when the company at the origin of the case, Polygram, was bought by a Canadian company (Bernier, 2005, p 768, fn 99).


Case study 13


43 University of Glasgow, ‘Court: Minutes of the meeting held in the Senate Room on Wednesday 7 May 2003’, online. Available at www.gla.ac.uk/courtoffice/courtminutes/7may2003.htm (accessed 21 August 2007).

44 U21Global Programmes, online. Available at www.u21global.com/Education/Programmes (accessed 7 August 2007).


Case study 14


8 Dominion over the earth

1 Similar issues arose in Canada-Periodicals, 1996, discussed in Chapter 7.

3 Ibid., para 19.
6 As noted in Chapter 1, GATS footnote 9 says this does not extend to ‘inputs’; however, there is no sharp boundary between inputs and elements of services supply.
7 Every Wal-Mart store manager is issued with ‘A Manager’s Toolbox to Remaining Union Free’, online. Available at reclaimdemocracy.org/walmart/manuals_internal_documents.php (accessed 20 September 2007).
10 Plurilateral requests for Mode 3, Distribution Services, Air Transport Services, Logistics, and Maritime Services. On file with the author.

Case study 15

25 Ibid., p 12.
26 Ibid., p 14.

Case study 16

31 Online. Available at www.ecpat.net/eng/ecpat_inter/projects/sex_tourism/sex_tourism.asp.
33 Ibid., p 8.

9 Energy wars

1 For a discussion of the terms of accession of Mexico (1986) and Venezuela (1990) see UNCTAD, 2000, p 20.
5 Exxon Mobil and Chevron from the US, BP and Royal Dutch Shell from Europe.
17 The first investor-initiated dispute by a US firm was lodged within a year of ratification. It claimed $65 million from the Guatemalan government, which had reasserted its authority over the failing railways that were subject to a 50 year concession.


26 Several non-European signatories included Japan and Australia.


28 Southern states have rarely invoked the national security justification. A notable exception was Ghana’s restriction of trade with Portugal, based on the threat posed to peace in the African continent by the conflict in Angola, which was noted in Portugal’s 1961 accession instrument. See Hahn, 1991, p 571.

29 Ironically, US law prohibits US companies from complying with secondary boycotts imposed by other states.


Case study 17


Notes 351


Case study 18

56 Escobar, P ‘US’s Iraq Oil Grab is a Done Deal’, Asia Times, 28 February 2007, online. Available at www.atimes.com/atimes/Middle_East/IB28Ak01.html (accessed 4 August 2007).

Conclusion

2 ‘Back Bolivia’s People’s Trade Agreement’, Movimiento Boliviano por la Soberanía y la Integración solidaria de los pueblos: Contra el TLC y el ALCA, 1 June 2006, online. Available at www.boliviasoberana.org/blog/English (accessed 20 September 2007).


Danaher K (ed.), *50 Years is Enough. The Case Against the World Bank and the International Monetary Fund*, 1994, Boston MA: South End Press.


EED (Evangelischer Entwicklungsdienst)/Equations, A WTO-GATS-Tourism Impact Assessment Framework for Developing Countries, 2005, India: Church Development Service and EQUATIONS.

EI/PSI, The WTO and the Millennium Round. What is at Stake for Public Education? Common Concerns for Workers in Education and the Public Sector, 1999, Brussels: EI.


6111036760280958836315f3793v1.doc (accessed 10 August 2007).


TRADE/Resources/Pubs/TradeNote22.pdf (accessed 4 September 2007).


GAWU, DHS, CIECA, ADEID, GRAPAD and EUROSTEP, New ACP-EU Trade Arrangements: New Barriers to Eradicating Poverty?, 2004, Brussels: EUROSTEP.
——, Ognivtsev, V and Razzaque, MA, Paying the Price for Joining the WTO: A Comparative Assessment of Services Sector Commitments by WTO Members and


Hoare, Q and Nowell Smith, G (eds), Selections From the Prison Notebooks of Antonio Gramsci, 1971, London: Lawrence & Wishart.


Japan-Distribution Services, Japan – Measures Affecting Distribution Services, 1996, WTO Complaint by the United States, WT/DS45, 13 June.


——, Trade in Services and Developing Countries, 1989, Paris: OECD.


—, Developing Countries and Services Trade: Chasing a Black Cat in a Dark Room, Blindfolded, 2002, Penang: Third World Network.


Storey, D, Pacific Migration and Development Desk Study, 2005, Wellington: NZAID.


Thanh, VT and Bartlett, P, ‘Ten Years of ASEAN Framework Agreement on Services (ASAF): An Assessment’, 2006, REPSF Project No. 05/004, Final Report, Jakarta: ASEAN Secretariat.


UNCTAD India, Stakeholders Speak on India’s Negotiating Options at the WTO, 2005, New Delhi: UNCTAD India.


Vandemoortele, J, Malhotra, K and Lim, J, Is MDG8 on Track as a Global Deal for Human Development?, 2003, New York: UNDP.


Index

Abrol, D 225, 229
Abugre, C 98
Accenture 195, 206, 277; see also Arthur
Andersen
accountancy 9, 38, 97, 109, 143, 199
accumulation: by dispossession 255, 270;
regime of 5, 13–16, 221, 319, 321,
324–5; social structures of 5, 325
Acheson, K 231
ACP states, see African, Caribbean and
Pacific states
ActionAid 54
Adhikari, R 100
advertising 7, 27
Afghanistan 292, 310
Africa 52, 53, 54, 85, 105, 110;
education 235; energy 291; higher
education 225, 228; Joint Integrated
Technical Assistance Programme
(JITAP) 103; PFIs 142; retirement
income plans 182; US African Growth
and Opportunity Act 2000 293
African, Caribbean and Pacific (ACP)
states 32, 53–4, 85, 102, 204, 321–2;
EC-Bananas case 256–8; EU water
investments in 102
African Union 103
Agrawal, V 207
Agrawal, V 207
Agreement on Trade-Related Aspects of
Intellectual Property Rights (TRIPS)
72, 81, 180, 256, 258, 268, 269
Agreement on Trade-Related Investment
Measures (TRIMS) 256, 260, 261,
269
agriculture 2, 7, 11, 12, 49, 50, 65, 71,
72, 74, 114, 115, 233, 262, 323; agri-
fuels 270; financing 265–6; Group of
20 agricultural exporting countries 46;
industrialisation 261–2; organic 263;
subsidies 264, 266; WTO Agreement
on Agriculture 37, 256; see also food
production and supply chains
aid 47, 73, 114, 115, 321; alignment of
trade with 53; investment as
alternative to 112; subordination to
trade 102, 103, 112
AIG, see American International Group
air transport 55, 74, 77, 78, 269, 277
Akande, D 297, 300
ALBA (Bolivarian Alternative for Latin
America and the Caribbean) 309, 320
Algeria 304, 310
Algiers Declarations 301–2
All-China Federation of Trade Unions
273
Allegeir, P 201
Altbach, P 236
Alter, KJ 257
Amazon 264
American Enterprise Institute 78
American Express (AMEX) 13, 61, 62,
76, 77–8, 157, 277
American Federation of Labor and
Congress of Industrial Organizations
205
American International Group (AIG) 13,
61, 77, 157, 295
Amin, S 111–12
Andaquig JP 147
Andean Community of Nations 294, 309
Andean Free Trade Agreement 85, 294,
321
Anderson, S 201
Anghie, A 5, 18, 19, 285, 286, 298, 321,
322
Aannan, K 117
Antigua 40, 166–7; US-Gambling case 174, 175, 176, 177–80, 272
ANZCERTA, see Australia New Zealand Closer Economic Relations Trade Agreement APEC, see Asia Pacific Economic Cooperation Apollo Group 234, 243 AquaFed (International Federation of Private Water Operators) 135 Aqua Mundo 134 Aquino, C 146 Arab League 295, 311 Arab states 229, 230, 237, 295, 311–17, 322; see also Gulf states Argentina 44, 45, 48, 49, 60, 67, 69, 70, 85; energy 290, 309; higher education 225, 228, 234; pension schemes 185, 186; retail market 271; water services 134, 135 Arnold, PJ 38 Aronson, J 59, 63, 76, 78 Arroyo, GM 146, 147, 151, 320 Arruda, M 293 Arthur Andersen 38; see also Accenture ASEAN (Association of Southeast Asian Nations) 40, 51, 52, 85, 150, 204; US–ASEAN Trade and Investment Framework Agreement 150 ASEAN Framework Agreement on Services (AFAS) 52, 150 ASEAN Free Trade Agreement 99 Asia 3, 6, 37, 51, 103, 160, 178; Economic Partnership Agreements with Japan 57; and education services 236, 237, 243; energy 284, 291; outsourcing destination 196, 206; see also specific countries Asia, East, financial crisis 11, 52, 97, 147, 148, 153, 161, 259, 274; see also specific countries Asian Development Bank 84, 101, 147; and migration-for-remittances 215; protests against 110 Asian People’s Tribunal on Poverty and Debt 149 Asia Pacific Economic Cooperation (APEC) 51, 85, 150, 204 Asia Pacific region 52, 181 Asia, South 182, 191; see also specific countries Asia, South East 11, 68, 285; see also specific countries Asia, MB 191 Asmal, K 238 asset sales 119, 121, 137; Philippines 147–8 Association of African Universities 235 Association of Southeast Asian Nations, see ASEAN AT&T 78, 154, 157, 164, 166–7 AT Kearney Retail Development Index 271 audiovisual services 48, 55, 56, 74, 75, 78, 119, 135, 168, 224, 232, 238, 239, 241 Australia 31, 38–9; and cultural services 250; and e-commerce 168; and education services 234, 235, 237; Fiji, relations with 214, 215, 216; GATS 2000 negotiations 43, 45, 47, 134–5; and GATS genesis 63, 73, 79; labour market 198; PFIs 143; regional trade agreements 51; Singapore, bilateral agreement with 240; Solomon Islands, relations with 260; trade in services campaigns 85; and US-Gambling case 180, 181; and World Summit for Sustainable Development 115 Australian Broadcasting Authority 232–3 Australian Coalition for Cultural Diversity 240 Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) 51, 73, 204, 232 Australia US Free Trade Agreement (AUSFTA) 50, 85, 150, 205, 240, 292–3, 299 Austria 124 Azerbaijan 310 Bahrain 205, 295 Baker, CE 3, 155, 221, 222–4, 225, 249 balance of payments 10, 36, 92–3, 154, 160, 172, 194, 196, 215 Balboa, JD 150 Bananas dispute 25 Bangalore 206, 208, 209–11, 244 Bangladesh 134, 192 Bank of America 157, 247 Bank of International Settlements (BIS) 182–3
banks and banking systems 159, 160, 161; foreign ownership 156; guarantees for deposits 266; privatisation 156; subprime mortgage crisis 152, 153, 183; subsidiaries, joint ventures and branches 173; Thailand 153

Barblan, A 235
Barbuda 174
Barker, SA 167
Barnett, C 284
Barshefsky, C 76, 113, 163
Bartlett, P 52, 150
Bhattasali, D 310
bilateral investment treaty 136, 269; Bolivia/Netherlands 136; investor-initiated enforcement 309, 315, 324, between US and South Korea, 85, 240

bilateral trade agreements 3, 4, 11, 25–6, 28, 31, 33, 34, 36, 42, 50, 51, 52–3, 54, 57, 321, 324; and agri-food supply chains 269–70; as threats against non-supporters of GATS 59; ASEAN members 150; cultural services and services 239–41; e-commerce 55, 56, 176; energy-related services 55, 284, 291–2, 295–6; financial services 55, 56; and GATS obligations 102, 131; government procurement provisions 37, 127, 143, 299; and labour 204–6; opposition to 60, 84, 86, 87; Philippines 150; restrictions on monopolies and exclusive service suppliers 127; retail distribution 272; services 11, 51, 55–7, 124, 131; and social essence of services 104; telecommunications 55, 56, 173; United States 36, 52–3, 54, 56, 57, 59, 86, 150, 154

biodiversity 256, 277
Bivens, LJ 207
BizClim (Private Sector Enabling Environmental Facility) 143
Blair, T 122, 138
Bolivarian Alternative for Latin America and the Caribbean (ALBA) 309, 320
Bolivarian Republic of Venezuela, see Venezuela
Bolivia 57, 75, 85, 185, 294, 320, 322; water services 134, 135, 136–7, 144
Bond, P 52, 110, 112, 123, 135
Botswana 134
Bottari, M 258, 271, 272
Braithwaite, J 81, 153, 154, 157
Brazil 11, 203, 309; cultural services 230; energy 288, 290, 315; food supply 264; FTAA, opposition to 85, 293; GATS 2000 negotiations 43, 45, 46, 47, 48, 49, 50, 114; GATS, resistance to 58, 60, 61, 67, 69, 70–1, 72; Group of 20 46; higher education 229; ‘new Quad’, member of 46, 47, 201; pensions, and women 185; retail market 271, 273; US investigation of law on informatics 68; tourism 278–9; water services 134
Bremner, P 315
Bressie, K 155, 162
Bretton Woods institutions 19, 90, 91, 92, 93, 97, 100, 114, 309
Bretton Woods Project 2002 106, 107
Britain, see United Kingdom
British Invisibles 79
Brittan, Leon 43, 80
Brixen Declaration 234
broadcasting 229, 230, 232, 240; local content 232–3;
Brock, William 65, 80–1
Bronfenbrenner, K 206, 208, 211
Brown, R 215, 216
Brunei 290
Buchanan, R 191, 210, 211
build-operate-transfer arrangements 127;
Philippines 146, 147, 149
Bullard, N 153
Burch, D 263
Business Action for Sustainable Development 117
CAFTA 205, 293–4, 320
call centres 189, 191, 195, 206, 208–13
Cambodia 142
Camdessus, M 132
Canada 10, 11, 31, 60; call centres 206, 208; and cultural services 231, 232, 233, 248, 249, 250, 252, 253, 254; and education services 234–5, 237; and energy 289, 291, 292, 295, 304; GATS 2000 negotiations 49, 134–5; and GATS genesis 73, 80; and Helms-Burton Act 300; Kahnawake Mohawk territory 178; labour market 200; outsourcing destination 208; PFIs 143; regional trade agreements 51, 55; and resolution of political disputes in WTO 300; split-run magazines dispute with US 233; trade in services 66; trade in services campaigns 85; Trade, Investment and Labour Mobility Agreement 322; United States, relations with 68, 81; and US-Gambling case 180, 181; and World Summit for Sustainable Development 115; see also North American Free Trade Agreement (NAFTA)

Canada US Free Trade Agreement (CUSFTA) 51, 85, 158, 231, 232, 292

Canadian Coalition for Cultural Diversity 248, 254

Cancún, impact of tourism 279–83

Cann, V 135

Cann, WA 297, 300

capacity building 102, 103–4

capital: internationalisation of 7–8, 11; mobility of 7–8, 12; national 7, 8; redistribution of wealth from labour to 190, 207; states as enablers of 89; inflow and outflow 36, 154, 156, 160
capitalism: global 8, 123, 321; industrial 2, 5, 6, 8; social nature of services integral to 1–2; transformation, late twentieth century 6, 17

Capra 102

Caribbean 293, 309

Caribbean Community (CARICOM) 54, 204

CARIFORUM 54, 252

Caritas International 98

Carrefour 259, 270, 271, 273, 275

Carter, K 245

Castells, M 6, 8, 227

Castro, F 114, 115, 294

CEC (Centre for Education and Communication) 211, 212

Center for Strategic and International Studies 78

Central Product Classification (CPC) 15, 32, 33, 195, 199, 202; energy 149, 287, 288; food production and supply 256, 257, 269; forestry 261; gambling 174, 175–6; information technology 169, 170, 204, 239; midwife services 128, 129–30; public services 124; tertiary education supply chain 247; tourism 268; water for irrigation 267

Corporate Europe Observatory (CEO) 142, 143, 226

Cevallos, D 115

Chanda, R 192, 198, 199, 201, 202, 203, 204

Charveriat, C 100

Chatterjee, P 105

Chaudhuri, S 202

Chávez, H 115, 290, 294, 303, 304, 305–10, 320, 322

Chavez-Malaluau, JJ 98, 99

Cheney, D 294

Chevron 147, 285

Chevron Texaco 295, 304; see also Texaco

Chile 45, 49, 50, 52; and cultural services 239, 250; energy 290; higher education 229; pension schemes 184, 185–6; US–Chile Free Trade Agreement 36, 154, 201, 204, 205, 239

Chilean Coalition for Cultural Diversity 239

China 3, 4, 10, 11, 114, 115, 239, 260, 293, 321; APEC 51; assessment of GATS 1994 44; bilateral trade agreements 57, 150, 321, 324; and cultural services 230, 250; and education services 234, 242, 243, 244; and energy 284, 288, 290, 295–6, 309, 321; GATS 2000 negotiations 49, 50; information technology 11, 229; internet firewall 16–70; migrant labour from 192; outsourcing destination 196, 208, 213; PFIs 142; retail market 271, 273; US imports from 270; and World Trade Organization 100, 310

Ching, P-y 296

Chomsky, N 310

Chossudovsky, M 111

Choy, CC 214
Index

Citicorp 76, 78, 80, 157
civil society 91, 98, 122, 209
classification of services 10, 32–3, 45, 56, 63, 138; audiovisual services 238; e-commerce 168; energy 288–90; gambling 174–6; occupations 198–9, 202; PFIs, 138; telecommunications 170–1, 173, 239; tourism 278; see also Central Product Classification; W/120 Service Sectoral Classification List

Clerq, W de 71
climatic change 284, 289, 325
Clinton, B 51, 167, 292, 300–1
Coalition of Service Industries (CSI) 38, 74, 78, 202, 206, 236, 245
Codex Alimentarius Commission 263
Cold War 225, 294
collective bargaining 205, 207
Colombia 49, 69, 70, 185, 200, 290, 294, 300, 310, 315
colonisation 189, 225, 230, 285
Comfort, S 230
commitments, see GATS commitments
Committee for Economic Development (US) 78
competition, as driver of quality 105–6
concession contracts 127
Connell J 215, 216
ConocoPhillips 304, 308, 309
construction 9, 10, 12, 33, 63, 77, 78, 138–9, 140, 141, 147, 149, 153, 189, 191–2, 203, 277, 287, 308
consultants 8, 9, 25, 121
consumers 221; choice 105, 121;
preferences 222–3; protection 35, 38, 70, 169, 173, 192
Convention on the Protection and Promotion of the Diversity of Cultural Expressions 248–54
Convergys 206
Cooper, MN 156
Coopération Internationale pour le Développement et la Solidarité (CIDSE) 98
Copenhagen Summit on Social Development 90, 93, 110
Corbet, H 79
Corporate Europe Observatory 124
corporate lobbies 58, 59, 60, 61–2, 63, 75, 76, 77–80, 91, 115
corporate training 195, 212, 215, 243, 244
corporatisation 35, 99, 117, 119, 120–1; broadcasting 232
Costa Rica 44, 178, 180, 181, 293–4, 320
Cotonou Agreement 2000 53, 102, 258
Council for Foreign Relations (US) 78
Council for International Business (US) 78
Council for Trade in Services 31, 34, 37, 40, 79, 106, 297, 312; assessment of trade in services under GATS 1994 44; notification of services agreements to 55
Council of Economic Advisers 80
Cox, R 325
Crawford, J-A 56
Croome, J 70, 73
cross-border supply, see GATS mode 1
cross-subsidisation 29, 125, 127, 131, 134, 163, 164, 265–6, 289
Cuba 43, 47, 48, 49, 50, 57, 69, 115, 171, 250, 290, 300–1, 302–1, 305, 309, 320
Cuban Liberty and Democratic Solidarity (LIBERTAD) Act 1996 300
cultural exchange 33, 55, 65, 70, 135, 221–2; counter-convention on cultural diversity 248–54; marketising 229–30; and neoclassical trade theory 222–3, 224; state-directed approaches 224–5; and supermarkets 271, 273, 274; and tourism 279; trade and culture 231–3, 238–41
Curacao 178
Dahal, N 100
Danaher, K 105
Davidson-Harden, A 225, 235
De Barra, C 98, 99
Decision on Professional Services 1995 38
Deckwirth, C 134, 135
Declaration on the Right to Development 89
Deffeyes, KS 284
Deloitte & Touche 142, 143
De Sousa Santos, B 87
developing countries 3, 17, 19, 39; debt relief 59, 65, 69, 90, 97–8, 101, 108, 114, 142; and Doha round 113–14, 303; energy 285, 286, 288, 290, 291; European Union, relations with 86;
free trade agreements 50, 52, 53, 55, 56; GATS 1994 43, 44–5, 53, 107–8; GATS 2000 negotiations 47, 48, 49, 108; and GATS genesis 58–60, 61, 62, 65, 66–71, 72–3, 74, 81; offshore outsourcing 7, 9; participation in global economy 20; participation in trade in services 27–8, 303; PFIs 142–3; regulatory frameworks and globalisation 154; and tourism 279, 281; and US-Gambling case 174, 177, 179; World Trade Organization accession 100–2, 107–8; and World Development Report 2004, Making Services Work for Poor People 106–10; see also least developed countries; North/South divisions; trade-related rights and development; and specific countries development 27–8, 34; Millennium Development Goals (MDGs) 89; right to 89, 130; shift to market conception of 89–118; see also sustainable development

Devereux, C 258

DiamondCluster International Inc. 208
digital divide 28, 155–6, 170, 173
digital technologies 56, 168, 170, 238, 239–40; in education 228; in telecommunications 173, 176

Dinham, B 267, 268

Disciplines on Domestic Regulation in the Accountancy Sector 38
discrimination, see non-discrimination disputes process 4, 40–2, 323, 324;
Dispute Settlement Body (DSB) 40, 41, 299–300; Dispute Settlement Understanding 40, 41, 42
division of labour, international 5, 11–12, 20, 230, 324

Docena, H 315, 316

Doha round 21, 39, 45–6, 49, 50, 52, 57, 76, 90, 95, 110, 113–14, 323; agriculture 270; environmental goods and services 133; India’s participation 46, 95, 194, 201; labour 201, 203; telecommunications 167; and World Summit for Sustainable Development 116; see also GATS 2000 negotiations

Doha Work Programme 55, 94, 113, 116, 133
domestic regulations 29, 31, 37–8, 108–9, 149, 321, 323; China’s internet firewall 169–70; energy 288, 289, 291, 292; government procurement 127; and Helms-Burton Act 300; labour 199, 203; public services 143; supermarkets 272, 275–6; telecommunications 163; tourism 279, 281; and US-Gambling case 174, 177, 179

Dominican Republic 48, 54, 269; DR-CFTA 205, 293–4

Drahos, P 81, 153, 154, 157, 263

Drake, W 14, 20, 77, 81, 121, 169, 241

Drakich, J 6

Dresser 307

Drucker, P 145

Dryden, SJ 81

Dubai 191

Dubai Ports World 295

Duffy, G 240

Duke, C 224, 241, 244

Dunkel, A 68, 69, 75

Dunning, J 300

Eastern Europe, see Europe, Eastern

EBRI (Employee Benefit Research Institute) 183
e-commerce 26, 155, 163, 167–70, 173, 239; bilateral agreements 55, 56, 176; goods or services 167–9; regulation 169

Economic Partnership Agreements (EPAs): European Commission 53–4, 85, 102, 214, 215, 252, 258, 261; Japan 57

economic regulation 22

Ecuador 85, 257, 258, 290, 294

education 108, 119; bilateral agreements 56; and GATS 126, 135, 234–8; distance 228, 236; ‘lifelong learning’ 226, 228, 243; and neoclassical trade theory 223–4; primary 107, 111, 126; private, for-profit schools 126; right to 130; travelling overseas for 130; subsidies 126, 237, 268; United Kingdom PFI funding 138, 139, 141; universal access to 131; vocational 217, 228, 243; World Development Report 2004, Making Services Work for Poor People 105; see also corporate training

education, higher: accreditation agencies 245–6; courseware, materials and
journals, e-publishing 245; financing 246–7; marketisation 225–9, 234–5, 238, 242; para-education services 227, 228, 246; supply chain 241–7; see also universities

Education International (EI) 234
‘edupreneurs’ 222, 235, 242, 243

Egypt 49, 60, 66, 67, 69, 229, 286, 290, 295

EKOS Research Associates 156

electricity, see energy
electronic commerce, see e-commerce

El Salvador 185, 278, 293

emergency safeguard measures 37

Eminent Person’s Group on World Trade 79

employment markets, see labour markets
energy 7, 9, 284–5; bilateral agreements 55, 291–2, 295–6; climate change 289, 325; nationalisation of resources 285, 286, 287, 304, 308, 309; oil wealth as basis for alternatives 309–10, 320–1; peak oil 21, 284, 325; privatisation 121, 142, 287, 317; privatisation, Philippines 144–51; regional agreements 292, 293–5; secondary markets 289; security 284, 286, 296–302, 307; trade in services 285–91; universal access to 131, 289–90; World Development Report 2004, Making Services Work for Poor People 105; and World Trade Organization accessions 310–17

Energy Charter Treaty 295

Energy Services Coalition (US) 287–8, 289

Engels, F 18

Enron 38, 106, 147, 281, 282, 287–8

environment: exploitation 123; protection 35, 116, 133, 205; see also sustainable development

environmental services 125, 133

‘epistemic community’ 77, 81–2

Equations (India) 276

Equatorial Guinea 310

Ernst & Young 142, 143

Escobar, P 317

Estonia 156

Estrada, J 144, 147, 151

Ethiopia 310

EurepGAP 263

Eurocommerce 269

Europe, see European Union

European Commission 3, 45, 46, 49, 65; adjustments to schedules of commitments 34; and audiovisual services 232; and banking guarantees 266; bilateral trade agreements 51, 52–3, 102, 321–2, 324; and cultural services 232, 250, 251, 252; and Doha round 46, 113; EC-Bananas case 25, 256–8; and e-commerce 167–8, 170; Economic Partnership Agreements 53–4, 85, 102, 214, 215, 252, 258, 261; and education services 234, 237; and energy 288–91; failure to list MFN exception 32, 257; and financial services 159–60, 161, 172, 184; GATS 2000 negotiations 43, 47, 48, 49, 173, 260–1, 281, 289; GATS 2000 requests 87, 133–5, 149, 170–1, 184, 200, 204, 260–1, 266, 267, 275, 290–1, 313; government procurement proposal 126; and maritime 269; Mercosur Free Trade Agreement 309; and mode 4, temporary movement of people 193, 194, 200, 203, 204; and pension fund management 184; and Philippines 149; Private Sector Enabling Environmental Facility 133, 143; regional trade agreements 50, 53, 321–2; and security 299, 300; and telecommunications 171, 172, 239; and US-Gambling case 180–1; and water services 132–7; and World Trade Organization accessions 311, 313, 314; see also Bananas dispute; Maastricht Treaty; and specific countries

European Court of Justice 124

European Economic Area 204

European Economic Community 51; and GATS genesis 60, 62, 64–5, 69, 70, 73, 74, 75, 160

European Energy Charter 295

European Parliament 134

European Roundtable of Industrialists 231

European Services Forum (ESF) 43, 80, 134, 202, 206, 281

European Union 51, 181; agriculture 264; and cultural services 248; and energy 284, 295–6, 304; external competitiveness 53; Global Europe strategy 53, 295; and imperialism
53–4, 86, 295; international trade in services 10; loss of competitiveness to Asia 6; and Millennium Development Goals 112; and national security 300, 302; opposition from NGOs 86; private sector services 10; reorganisation of historical trade relationships 4; retail market 270, 272; subordination of aid to trade 102; supermarkets 270, 271; telecommunications 154, 173; and United States sanctions 300–1, 302; Water Facility 102; Water Initiative 132–3; water investments 132–7; and World Trade Organization 41

Europe, Eastern 51, 97, 103, 105; energy 284, 295; EU water investments in 132; foreign ownership of banks 156; higher education 226, 229; outsourcing destination 196, 208; retirement income plans 182; ; see also specific countries

Evans, M 2
Evenett, SJ 101
exclusive service suppliers 29, 30, 31, 127
externalities 14; cultural and knowledge exchange 223, 224; tourism 277
Exxon Mobil 270, 295, 304, 308, 309, 312

fair trade production chain 262, 263
Farley, R 266
Farrell, D 207
Feketekuty, G 13, 32, 60, 61–2, 63, 64, 65, 66, 76, 79, 80, 81, 157–8
Fiji, migrant labour from 214–20, 320
film industry 222, 229, 230, 231–2, 239, 240–1, 252
Financial Leaders Group 80
financial markets 8
financial services 8, 9, 11, 33, 51, 59, 69, 74, 75, 78, 87, 97, 119, 152–3; agriculture 263–6; bilateral agreements 53, 56; energy-related 287; GATS 2000 negotiations 42–3, 49, 171–3; GATS Annex on Financial Services 39, 158–9, 183–4; GATS Understanding on Commitments in Financial Services 159–60, 172, 184; information transfers 157–8, 159, 162; meta-regulation 152, 158–61; as social phenomenon 153–4, 156; MFN on 75; and PFIs 141–2; privatisation 121, 156; and privatised higher education market 246; universal access to 131; Uruguay round negotiations 157–61; see also banks and banking systems; insurance; pension schemes

Financial Times 79, 84, 140–1, 185, 288

Fine, B 1
Fink, C 56
Finland 62
Fiorentino, R 56
Fitzpatrick, P 18
Flour 78

Focus on the Global South 117
Food and Agriculture Organization 266
food production and supply chains 9, 261–70; food security, market model 268; GATS 2000 negotiations 268–70; just-in-time system 264–5; purchasing alliances 264; standards 263–4
foreign investment 9, 11, 15, 19, 130, 169; alternative to aid 112; ASEAN countries 150; driver of development 114, 115, 130, 280, 281; education services 228, 236, 242, 246; energy-related services 287, 291; financial markets 156; and GATS 25, 26, 37, 61, 62, 71, 73, 78, 276; government discrimination against 108–9; joint ventures 308; media 230; and natural resources 286; Philippines 144–5, 147, 149, 151; regulation of 13, 95, 173; regional trade agreements 55; safeguard measures 37; Saudi Arabia 311; Solomon Islands 260–1; tourism 276, 280; and WTO accession 101–2; see also Multilateral Agreement on Investment (MAI); privatisation; transnational corporations
forestry, Solomon Islands 259–60, 261
Forum on Trade in Education Services 236
France 10, 69, 78; agriculture 264; and cultural services 231, 232, 239, 248, 249, 253; energy 285, 302; supermarkets 259, 270, 271, 273
free trade agreements 50–7, South/South 50, 52, 53; see also bilateral trade agreements; multilateral trade agreements; regional trade agreements;
Index 383

trade in services agreements; and specific agreements
Free Trade Area of the Americas (FTAA) 51, 85, 292, 293, 309, 320
Freeman, H 77–8, 80
Frye, N 229
‘funder-provider split’ 121

G7/8, see Group of Seven/Eight major powers
Gaddafi, M 313
Gaffney, D 138

gambling, US-Gambling case 32, 38, 42, 174–81, 272
GATS: ‘affecting’, definition 22, 25; Annex on Financial Services 39, 158–9, 183–4; Annex on Movement of Natural Persons Supplying Services 26, 198, 300; Annex on Negotiations on Basic Telecommunications 39, 127, 162; Annex on Telecommunications 39, 127, 162, 164, 165, 168, 171, 239; as legal imperialism 16–20; as legal text 22–7; ‘café au lait’ proposal 70, 71; corporate lobby 58, 59, 60, 61–2, 63, 75, 76, 77–80, 91, 115; disputes process 4, 40–2, 299–300, 323, 324; exclusions 34–6, 130, 136; failure, as tool of consolidation 100; framework agreement 73–5, 124; General Obligations and Disciplines (GODs) 27–9, 169; genesis and establishment 3–4, 58–88; and human rights 130; institutional arrangements 40–2; ‘measures’, definition 22, 24; ‘Members’, definition 22, 24; negative list approach 31–2, 37, 51, 56, 73, 74, 102, 131, 232, 312, 323; opposition to 58, 60, 61, 65, 67, 69, 70, 71, 72, 82–8; positive list approach 29, 31, 32, 35, 37, 38, 44, 60, 73, 74, 75, 202–3; priorities 11; Reference paper on Regulatory Principles for Basic Telecommunications 163, 164, 165, 166, 168, 171, 172, 289; rules 24, 36–9, 131; ‘services mafia’ 76–82; ‘supply’, definition 26–7; ‘trade in services’, definition 22, 25–7; Understanding on Commitments in Financial Services 159–60, 172, 184; UNDP position on 96; and World Trade Organization accession 100; see also specific sectors
GATS commitments 30–4, 47, 56, 109, 149, 153; audio-visual services 232–3; education 234, 235; financial services 159–60, 161, 183–4; food production and supply 269, 271; midwives 128; research 268; telecommunications 155, 162–3; tourism 161, 278; US-Gambling case 174–7; WTO accession 100–2, 107–8, 284, 310–17; see also GATS modes
GATS mode 1: cross-border 25, 26, 31, 36, 56, 95, 269; EC-Bananas case 257; education 236, 242, 247;
energy-related services 291; financial services 154, 156, 160, 161, 172, 173; labour 189, 192, 195–7, 197, 200, 201–4; professional services 143; and rights to health services 130; telecommunications 171; US-Gambling case 168–9, 175, 176, 179; Venezuela 305; water services 134

GATS mode 2: consumption abroad 25, 26, 95, 261; e-commerce 169; education 234, 242, 247; financial services 172, 173; labour 200, 204; and rights to health services 130; telecommunications 171; US-Gambling case 169, 175, 179

GATS mode 3: commercial presence 25–6, 56, 143, 144, 261, 269; EC-Bananas case 257; education 236, 242, 247; energy-related services 291; financial services 154, 156, 160, 161, 172–3; forestry 261; labour 200, 201; professional services 143, 144; and rights to health services 130–1; supermarkets 270, 272; telecommunications 171; US-Gambling case 175, 179; Venezuela 305, 308

GATS mode 4: presence of natural persons 12, 25, 26, 44, 47, 48, 95, 103, 131, 143; education 242, 247; labour 26, 28, 46, 49, 103, 189, 191, 192, 193–5, 197–8, 199, 200–4, 214, 215, 220, 320; professional services 143; and rights to health services 131; US-Gambling case 175, 179; Venezuela 305

GATS modes of supply 15, 25–6, 31, 32, 33, 45, 47, 48, 55, 138

GATS 2000 negotiations 21, 22, 33, 34, 38, 39, 42–50, 59, 60, 75, 80, 100, 114, 118, 323, 324; audio-visual services 238, 239, 241; and cultural exchange 250; education services 234–8; ‘Enchilada’ talks 49; environmental services 133–5, 267; energy-related services 284, 287–91, 308, 312; food production and supply 268–70, 272, 276; and ‘GATS attack’ 82; labour 200–4, 215; minimum commitment benchmarks proposal 47; model schedules proposals 45, 47, 107, 202–4, 289; Philippines 149–50; plurilateral requests 33, 34, 45, 47, 48–9, 56, 134–5, 149, 172–3, 184, 188, 203–4, 237, 238, 269, 290–1, 308, 313, 324; public services 124, 133–4; quantitative targets 46–7; quantitative targets 46; ‘signalling’ conference 49; telecommunications, e-commerce and financial services 170–3; tourism 278–9; water services 267; and World Development Report 2004, Making Services Work for Poor People 106–10; see also Doha round

GATT see General Agreement on Tariffs and Trade

GATT ministerial meetings Brussels 1990, 74; Montreal 1988, 72; Punta del Este 1986, 60, 70, 71

GAWU (Guyana Agricultural and General Workers Union) 54

Gay, D 101
gender inequalities: call centres 211; labour market 190, 191–2, 214; retirement income 184–5

General Agreement on Tariffs and Trade (GATT) 4, 13, 16, 19, 20, 27, 28, 52, 110, 240; Article III 126; Article XIX bis 299; Article XX 35, 36; Article XXI 296, 297; disputes process 40; EC-Bananas case 256–8; and e-commerce 167–8; and energy 285–6; and GATS genesis 58, 59, 60, 62, 63, 64–6, 67–8, 69, 70, 72, 75, 78; Japan-Distribution Services case 258–9; safeguard provisions 37; Tokyo round 61, 65, 287; Work Programme for 1980s 65

General Agreement on Trade in Services see GATS

Geneva 80, 87, 92

Georgia 310

Germany 10, 11, 78, 79, 115, 207, 249, 271, 273

Ghandi, R 196

Gibbs, M 52

Gibraltar 178

Giddens, A 122, 319

Gilbert, A 244

Gill, I 5, 13, 16, 186, 221

Gillespie, J 39, 43, 159, 160, 170, 171–2

Ginsberg, M 226, 229

Global Alliance for Transnational Education (GATE) 245–6
GlobalGAP 263
Global Europe strategy 53, 295
globalisation 3, 5, 20, 75, 78, 313, 321;
‘globalisation from below’ 255; and
regulation of socio-economic relations 123
Global Risk Security 218
Global Services Network 84
Gold, M 292
Gonzales, CH 282, 283
Gould, E 83, 164, 174, 179, 258, 271, 272
government procurement 35, 37, 55, 56,
126–7, 143, 299, 323
Gramsci, A 82, 84
Greater Arab Free Trade Area 295
Greece 249
Greenberg, H 77
Gross Domestic Product (GDP) 10
Group of Five 67, 71
Group of Seven/Eight major powers 16,
110, 132, 167, 301
Group of 10 70, 182
Group of 20 agricultural exporting
countries 46
Group of 77 19, 67, 68, 114, 115
Grynberg, R 100, 101, 310
Guatemala 48, 293
Gulf Cooperation Council 295–6
Gulf states 54, 294; Fijian migration to 215
Guttal, S 98, 99
Haas, PM 77
Haffajee, F 114, 115
Haggard, S 97
Hahn, MJ 297, 299
Halliburton 287, 294, 298, 312
Hardstaff, P 276
Hardt, M 7, 11, 12, 152, 155, 189
Hartridge, D 76
Harvey, D 2, 230, 255, 270
Hauknes, J 6
Head, S 263
health, right to 130
health services 1, 9, 10, 49, 56, 91, 95,
hospitals 107, 119, 125; private 125,
130–1; Thailand 131; travelling
overseas for 130; United Kingdom PFI
funding 138, 139, 141, 142; universal
access to 130–1; World Development
Report 2004, Making Services Work
for Poor People 105
Heavily Indebted Poor Countries (HIPC)
initiative 97–8, 114
Hellinger, D 97
Helms-Burton Act 300
Henisz, WJ 97
Hermele, K 98
higher education, see education, higher
Hilary, J 92
Hill, JB 245
Hills, C 288
Hinz, R 187
Hoare, Q 82, 84
Hoekman, B 13
Holliday, CO 117, 136
Holzmann, R 187
Honduras 134, 278, 293, 300
Hong Kong SAR 10, 250; APEC 51;
GATS 2000 negotiations 43, 45; retail
market 271; United Filipinos in Hong
Kong 191
Hong Kong Ministerial Declaration 48
Hong Kong People’s Alliance 86
Hoogvelt, A 11–12, 190–1
Howard, J 292
HSBC Infrastructure Company 141
Huang, S 192
human rights 93; Philippines 144; shift
to market conception of 89, 90–1,
93–7, 98–100, 104, 105, 110, 130;
state’s obligation to promote and
protect 130–1; United Nations
organisations 96–7
Human Rights Watch 191
Hunt, A 18
IBON 135, 147, 148
ICTSD (International Centre for Trade
and Sustainable Development) 94, 180
Iga, M 236
immigration 26, 193, 198, 201, 204,
236, 242; Service Provider Visa 202;
see also migrant labour
income, widening gap in 2, 190–1
India 3, 4, 10, 11, 16, 26, 44, 203, 321;
bilateral trade agreements 57, 321; call
centres 206, 208–13; and cultural
services 230, 250; and Doha round 46,
95, 114, 194; and education services
234, 243, 244; energy 284, 290;
GATS, resistance to 58, 60, 61, 65,
67, 69, 70, 71, 72, 84–5; GATS 2000 negotiations 43, 46, 47, 48, 50, 200–1, 203–4, 320; Group of 20 46; higher education 225; India Shining 84–5, 194, 209, 212, 213; IT industry 11, 170, 196, 197, 200, 201, 206–10, 229; migrant labour from 194, 198, 200–1; National Association of Software and Service Companies (NASSCOM) 196; ‘new Quad’, member of 46, 47, 201; outsourcing destination 196, 197, 200–1, 206–7, 208–13; United States, relations with 58–9, 65, 194, 198, 200, 201, 207, 213; and US-Gambling case 180, 181; water supply 266

Indian Institute of Management 244
indigenous peoples: and colonialism 225; knowledge 268; resistance to trade in services agreements 85; rights 55; and tourism 277, 278, 279

Indonesia 48, 49, 52, 79, 195; energy 290, 304; water services 135
industry 22, 65, 114; tariffs 115; see also specific industries
inequalities 13, 16, 19, 20, 75, 94, 123, 130–1, 145, 155, 184–5, 214, 304, 319, 322, 325; income 2, 190–1; see also gender inequalities; race inequalities
‘information economy’ 167
information technologies 8–9, 11, 69, 152, 154, 155–6; China 11, 229; and cultural and knowledge exchange 224, 227, 228, 230; and export of professional services 9; India 11, 170, 196, 197, 201, 206–10, 229; and offshore outsourcing 195, 196; regulation of 13; remote control of data 306–8; and splintering of services 7, 79, 195, 287; see also digital divide; digital technologies; e-commerce; internet
Infosys 206–7, 209
Innisfree 139
innovation 227
Institute for Agriculture and Trade Policy 266
insurance 78, 79, 158, 159, 161, 172–3, 266
Integrated Framework for Technical Assistance to Least-developed Countries 102–3
intellectual property 20, 40, 62, 71, 72, 81, 131, 167, 169, 224, 227, 229; indigenous peoples 268; see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
International Alliance of Midwives 129
International Association for the Study of Insurance Economics Programme for Research on the Service Economy (PROGRES) 79–80
International Aviation Transport Association (IATA) 63
International Bank for Reconstruction and Development, see World Bank
International Cancun Declaration of Indigenous Peoples 279
International Centre for the Settlement of Investment Disputes 309
International Chamber of Commerce (ICC) 79
International Confederation of Free Trade Unions 86, 205
International Court of Justice 286, 300
International Energy Agency 287, 288
International Federation of Coalitions for Cultural Diversity 253
International Federation of Private Water Operators (AquaFed) 135
International Finance Corporation (IFC) 99, 147, 228, 245, 267; EdInvest Facility 246
International Financial Services, London 38, 79
International Forum on Indigenous Tourism 278
International Labour Organization 205; International Standard Classification of Occupations 198
International Liaison Committee of Coalitions for Cultural Diversity 248
International Mass Retail Association 271
International Monetary Fund (IMF) 10, 15, 19, 20, 21, 36, 42, 74, 102, 104, 317; and financial services and telecommunications 153, 161; and foreign investment 281; and higher education 229; and Millennium Development Goals 91, 112; and Philippines 145, 146, 147; Poverty Reduction Strategies 89, 97–100, 102, 104; protests against 110; and
Index 387

retirement income plans 182; structural
adjustment programmes 69, 97; and
Venezuela 304, 309; World Bank,
relationship with 42, 91–23, 97–8
International Network for Cultural
Diversity (INCD) 248, 249, 253–4
International Network on Cultural Policy
(INCP) 248, 249, 250
International Organization for Migration
103
International Telecommunication Union
(ITU) 16, 62, 63, 165–6
International Telecommunications Users
Group 157
International Trade Centre 102, 103
international trade in services, see
services, international trade in
International Trade Union Congress 86
International Union of Foodworkers
(IUF) 134, 267
internet 25, 155, 168, 169; China’s
firewall 169–70; and education 234;
gambling case 32, 38, 42, 169; and
opposition to trade in services
agreements 87; US-Gambling case
174–81, 272, 320
Internet Gambling Council 179
INTESA 307, 308, 309
investment, see foreign investment
Iran 284, 286, 288, 296, 298, 301–2,
310, 311, 313–15
Iran-Libya Sanctions Act 1996 301–2
Iran Sanctions Act 2007 302
Iran-United States Claims Tribunal 302
Iraq 195, 215, 218, 219; energy
resources 284, 286, 292, 296, 297–8,
299, 304, 310, 311, 315–17
Ireland 196, 208
Islamic states 311, 313, 314–15, 316
Israel 68, 81, 232, 251, 296, 298, 311
Israeli-Palestinian conflict 296
Jackson, JH 256, 257, 258
Jamaica 70
Japan 4, 11, 81, 259; audio-visual
services 232; bilateral trade agreements
150–1, 321, 324; and cultural services
250; Doha round 46; Economic
Partnership Agreements 57; and
education services 235, 236; and
energy 284, 289; GATS 2000
negotiations 45, 49, 134–5; and
GATS genesis 63, 70, 79; Japan-
Distribution Services case 258–9;
labour market 200; and Millennium
Development Goals 112; and PFIs
142; regional trade agreements 51,
321; and resolution of political
disputes in WTO 300; retail market
272, 273, 320; telecommunications
167; and Understanding on
Commitments on Financial Services
159–60; United States, relations with
68; and US-Gambling case 180, 181;
and World Summit for Sustainable
Development 115
Japan-Philippines Economic Partnership
Agreement 150–1
Jara, A 46
Jaramillo, F 69
Jessop, B 122, 123
Jha, V 197, 201
Joint Integrated Technical Assistance
Programme (JITAP) 103
Jones, GR 245–6
Jones, T 135
Jonquères, G de 84
Jordan 54, 204, 205, 295, 310, 311
Jospin, L 248
Joy, C 276
Joy, RM 101, 310
Julsaint, M. 44
Jung, I 245
Juscanz group 115
Jussawala, MF 156, 163
Kahnawake Mohawk territory 178
Kamidza, R 54
Kapstein, E 153
Karnataka 209, 210; see also Bangalore
Katz, J 16
Kaufman, RR 97
Kazakhstan 310
Kelsey, J 31, 53, 101, 232, 237
Kenya 48, 49, 238, 264
Kerneis, P 134
Kerruish, V 17, 32
Kertzer, J 229
Khor, M 93, 116, 303
Kirkbride, M 100
Kluver, R 170
Knight, J 235
knowledge creation and exchange 221–2;
marketising 225–9; and neoclassical
trade theory 223–4; state-directed approaches 224–5; see also education
‘knowledge economy’ 8, 11, 224, 228
Kodak 258–9
Konefal, J 255, 262, 263
Korea, North 298, 313
Korea, South 44, 46, 49, 54, 79, 150, 229, 259, 266, 271, 273; GATS 2000 negotiations 49, 134–5; US-Korea Free Trade Agreement 86, 223, 240–1, 252, 293, 320
Kostecki, M 13
KPMG 142, 143, 245
Krajewski, M 124, 125, 127
Krugman, P 153
Kurian, R 195
Kuwait 69, 219, 286, 290, 295, 297–8
Kwa, A 40, 113
Kyrgyz Republic 310
labour 105; affective 12, 189; child labour 205; content in services vs commodities 12; immaterial 12, 189; integration agreements 28; managerial and mundane, distinctions between 1–2, 12, 189, 193, 194; mobility 74, 189, 190, 193; redistribution of wealth from labour to capital 190, 207; semi- and unskilled 12, 26, 49, 191–2, 194, 200, 203, 211; services workers as tradeable commodities 190–3; shift from manual to mental 12, 196; see also division of labour; migrant labour; trade unions
labour markets: deregulation 121, 123, 185, 190, 230; ‘flexibilised’ 12, 121, 190, 194; and higher education 226; integrated 28; public sector 121
Lamy, P 50, 113, 136
Larsen, K 235, 242
Latin America 51, 54, 68, 74, 103, 160, 235, 320; debt crisis 69; EC-Bananas case 256–8; and education services 237, 243; energy 292, 293, 309; higher education 225, 229; leftist leaders, threat to US 303, 322–3; natural resources 293; outsourcing destination 206, 208; private management of water in 96; retirement income plans 182; supermarkets 271; see also specific countries
law, public international 41
Lawrence, G 263
Lay, K 288
Lazaro, DC 150
least developed countries 20, 27; ACP countries 53; debt cancellation 97–8, 101, 108, 112, 114; Doha round 45, 46, 47; Integrated Framework for Technical Assistance to Least-developed Countries 102–3; World Trade Organization accession 100–2, 107–8, 310; see also North/South divisions; trade-related rights and development; and specific countries
Lebanon 296, 310
legal services 125
Lenn, MP 245
Lerman, S 245
Leys, C 120
Leyton-Brown, D 292
Liberalisation of Trade in Services Committee (LOTIS) 38, 79, 83, 157
Libya 284, 301, 304, 310, 311, 313; Libya Texaco case 286
licensing requirements 29
Lindio-McGovern, L 191, 214
Lindner, C 257
Lines, T 264, 271
Lion Nathan School of Business Ltd 243
Lister, J 139
Lloyd’s of London 79
logging, see forestry logistics 269
Lomé agreements 32, 256, 258, 259
Low, P 107
Luce, S. 206, 208, 211
Maastricht Treaty 51, 124
Macao 180, 181
McBurnie, G 237
MacDonald, Mott 139
McKinsey Global Institute 207–8, 209
Macellani, N 219
McMichael, P 264, 274
McMurtry, J 227
Madrick, J 6
Mahler, SJ 195
Malaysia 47, 48, 49, 150, 15, 161, 237, 271, 288, 290, 302
Malig, ML 117, 315
Mamani, A 137
managerial and mundane labour, distinctions between 1–2, 12
Manchester, A 217
Manila 134, 149
manufacturing 6–7, 8, 11, 12, 122
Marcos, F 144, 146
maritime services 43, 48, 63, 70, 74, 77, 265, 269, 277
market access, for services 13, 19, 27, 29, 30, 32, 34, 35, 36, 37–8, 42, 59, 70, 73, 74, 75, 101, 106; audio-visual services 232; energy-related services 291, 313; GATS 2000 negotiations 45, 59, 114; financial services 159, 160, 172–3; government procurement exclusion 127; Japan-Distribution Services case 259; labour 193, 194, 200, 202–3; and PFIs 143; public services 126, 127; supermarkets 272; tourism 279; telecommunications 162, 163, 164, 167; US-Gambling case 177; water services 132, 134; and World Development Report 2004, Making Services Work for Poor People 106
market-oriented approach 2–3, 5, 19, 89–91; cultural exchange 229–30, 231–3, 238–41; and GATS 4; impact on human rights and development 89–118; impact on social development 110–18; knowledge creation and exchange 225–9, 234–8, 242–3; public services 119–23; and trade in services agreements 3, 5, 13–14; World Development Report 2004, Making Services Work for Poor People 105–10; see also neoliberalism
Marshall, A 98
Mashayekhi, M 44
Mateo, F de 48, 49
Mattoo, A 33, 36, 92, 107–10, 161, 201, 202–3
Maule, C 231
Mauritius 44
Maxwell, R 186
Mbeke, T 122–3
Medalla, EM 150
media 86, 221, 223, 224, 229, 230, 245
Melbourne University Private 243–4
men: in call centres 211; migrant labour 191–2, 214, 215, 218–20
Menotti, V 307
Mercosur 309
Meridian (Fijian recruitment firm) 219
Merrill Lynch 78
meta-regulation 13, 123, 152, 158–61, 204, 221, 319–20
Meunier, S 257
Mexico 51, 55, 65, 85, 156, 171, 172; and cultural services 231–2, 249, 250; energy 288, 290, 292, 304; foreign investment in 266, 281; retail market 271; telecommunications dispute 41, 42, 128, 164–6; tourism 279–83; and United States sanctions 300, 302; water supply 266, 281–2; see also North American Free Trade Agreement
MFN, see most favoured nation
Michaels, L 264, 270, 274
Middle East 244, 284, 285, 291, 292, 294–6; see also Arab states; Gulf States; and specific countries
midwife services 15, 128–30
migrant labour 26, 70, 103, 189, 190, 191–3, 213–20; bilateral and regional agreements 204–6; contractual services suppliers (CSS) 202; GATS 2000 negotiations 200–4, 215; men 191–2, 214, 215; migration-for-remittances 190, 191, 197, 201–4; mode 1 195–7, 197, 200, 201; mode 4 131, 193–5, 197–8, 199, 200–4, 214, 215, 220, 320; Service Provider Visa 202; virtual 196; wages 190, 192, 193; women 191–2, 214, 215; see also immigration
Mihyo, PB 225, 228, 235
Millennium Development Goals (MDGs) 89, 91, 104, 111–12, 114, 116, 118, 119, 123, 137; MDG1 111; MDG7 102, 111, 135; MDG8 91, 96, 112, 135
Millennium Summit, United Nations 90, 91, 111–12
Mining, Minerals and Sustainable Development project 117
Minns, R 183, 185, 186
Mirant Corporation 147, 148
model schedules 45, 47, 107, 202–4, 289
modes of supply, see GATS modes of supply
Monbiot, G 231, 272
Mongolia 50
monopolies 29, 30, 31, 109, 121, 125, 127, 131, 154, 158, 173, 235, 287, 289, 290
Monsanto 266–7
Monterrey Consensus 114–15, 116
Moore, M 82
Morales, E 75, 136, 322
Morgan, B 13, 18
Morocco 49, 205, 249, 250, 295
most favoured nation (MFN) treatment 13, 28, 29, 53, 59, 73, 74, 324; audio-visual services 232; EC-Bananas case 32, 257; e-commerce 167; education services 235; financial services 75, 160, 184; government procurement exclusion 35, 127; health services 131; labour 199; supermarkets 272; telecommunications 172; and US-Gambling case 180
MRAs, see mutual recognition agreements
Multilateral Agreement on Investment (MAI) 25, 84, 85, 87, 248, 281; and cultural sovereignty 248 multilateral trade agreements 4, 9, 22, 50, 56, 60; see also Doha round; General Agreement on Trade in Services; World Trade Organization
Mundy, K 236
Murdoch, R 244
Murdock, G 232
Mushita, TA 293
Mutti, G 294
mutual recognition agreements (MRAs) 143, 245
Myles, J 188
NAFTA, see North American Free Trade Agreement
National Association of Software and Service Companies (NASSCOM, India) 196, 209, 211
National Committee for International Trade in Education (NCITE) 236
National Foreign Trade Council (US) 78
national treatment 13, 27, 28, 29, 30–1, 32, 70, 73, 74, 75, 106; audio-visual services 232; EC-Bananas case 257; and education subsidies 126, 237; financial services 159, 173; government procurement exclusion 35, 127, 134; health services 125; labour 202–3; and PFIs 143; supermarkets 272; tourism 279; World Development Report 2004, Making Services Work for Poor People 106 natural resources 255, 256–61, 279, 291, 321; UN Commission on Permanent Sovereignty of Natural Resources 286 ‘necessity’ tests 35, 38, 39, 56, 107, 136, 170, 272, 289 negative lists 31–2, 37, 51, 56, 73, 74, 102, 131, 232, 312, 323 Negri, A 7, 11, 12, 152, 155, 189 neoclassical trade theory, application to cultural and knowledge exchange 222–4 neocorporatism 122 neoliberalism 2–3, 4, 7, 9, 13, 20, 30, 34–5, 75, 77, 84, 90, 112; backlash against 122; ‘democratic deficit’ of 319; mainstreaming 91; TINA 3, 323; see also market-oriented approach neostatism 122 Netherlands 136, 271, 285 New Delhi 68, 73 New International Economic Order 17, 19, 286 New Partnership for Africa’s Development (NEPAD) 52 New York 73 New Zealand 31; audio-visual services 232; Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) 51, 73, 232; bilateral trade agreements 51, 52; education services 227, 234, 235, 237–8, 243; Fiji, relations with 214, 215, 217; GATS 2000 negotiations 43, 45, 46, 49; and GATS genesis 73; NZ-Thailand Closer Economic Partnership Agreement 204; regional trade agreements 51; trade in services activists 85; and World Summit for Sustainable Development 115
Newberry, S 9, 38, 142
News Corporation 244
Nicaragua 69, 278, 293, 300, 309
Nicolaides, K 14, 20, 77, 81, 121, 169, 241
Nigeria 49, 69, 290
Noble, DF 245
non-agricultural market access (NAMA) 45, 46, 49, 256, 261, 269, 270, 303, 323
Non-Aligned Movement 19
Index

non-discrimination 28–9, 30–1
non-government organisations (NGOs) 111, 116; activist 84, 85, 86, 91, 95, 107, 112, 235, 248, 319
non-state actors 91, 122
North/South divisions 11–12, 19–20, 40, 234; Council for Trade in Services assessments 44; cultural exchange 222–3, 224–5, 229–30, 248; Doha round 76, 95; energy 284–91; food production and supply 261–76; free trade agreements 50, 95, 321–2; GATS 1994 17, 27, 28–9, 40, 43, 44–5, 323; GATS 2000 negotiations 39, 43, 45, 47, 100; GATS, genesis of 20, 58–60, 61, 62, 66–71, 72–3, 74, 81; income 12, 190–1; international division of labour 1, 5, 11, 20, 189, 190, 200, 206, 220, 230; knowledge creation and exchange 224–9, 242–3; labour 26, 190–1; international division of labour 1, 5, 11, 20, 189, 190, 200, 206, 220, 230; knowledge creation and exchange 224–9, 242–3; labour 26, 190–1, 196, 198–9, 200–20; trade in services agreements 17, 84–6, 321–2; tourism 276–83; United Nations Conference on Financing for Development 114–15; World Summit for Sustainable Development 116–18; WTO Working Party on Trade, Debt and Finance 94; see also developing countries
Norway 63, 66, 134–5, 227, 238
Nowell Smith, G 82, 84
nuclear weapons 298, 313–14
nurses, export from Fiji 214, 215–18
Observatory on Borderless Higher Education 246
OECD 14–15, 16, 20, 25, 137; Centre for Educational Research and Innovation (CERI) 226–7; Code of Liberalisation of Current Invisible Operations 62; Committee on Financial and Fiscal Affairs 62; and education services 235, 236, 242, 244; and financial services and telecommunications 153, 160; and ‘GATS attack’ 83; and GATS genesis 61, 62–5, 66, 67, 68, 69, 73, 79, 81; High Level Group on Trade and Related Problems 61, 79; and Millennium Development Goals 112; ‘positive adjustment’ work 64; and retirement income plans 182–3, 184; seminar on trade and migration 103; Trade Committee 15, 16, 62, 63, 65, 80; and Understanding on Commitments in Financial Services 159–60; see also Multilateral Agreement on Investment (MAI)
OECD countries 6, 46, 232; and energy 289, 290; and GATS genesis 66, 67, 69, 70; retirement income plans 182; and WTO accessions commitments 101
Ohihoff, S 301
oil, see energy
Oman 205, 290, 295, 310, 311
OPEC, see Organization of Petroleum Exporting Countries
Operation Enduring Freedom 298
‘organic intellectuals’: of capital 82, 84, 324; of resistance 84, 319
Organization for Economic Cooperation and Development see OECD
Organization of American States 249
Organization of Petroleum Exporting Countries (OPEC) 285, 286–7, 295, 298, 304, 309, 311, 312
Ortega, D 294
Ostrovsky, A 27
outsourcing: of cultural services 230; of education-related services 245; of energy-related services 287, 289; of government functions and social services 7, 121, 122; of intra-firm services 7; of manufacturing 11; offshore 7, 9, 191, 192, 195–7, 200, 202–3, 206–8, 265; see also call centres
Oxfam 100
Oyer, H 302
Pacific Economic Agreement on Closer Economic Relations (PACER) 215
Pakistan 69, 290, 311
Panagariya, A 56
Panama 205, 278
Pan-Arab Free Trade Area 295
Paraguay 48, 309
Partnerships UK (PUK) 139, 140, 142
Paul, H 268
Pauwelyn, J 37–8, 177, 178
peak oil 21, 284, 325
Pearson plc 245
pension schemes: contribution based 184, 185, 186; Fiji, as funding for temporary migration 216; and GATS 183–4; gender inequality 184–5; pre-funded 183; private 181–2, 183–8; public 181, 182, 183, 184, 185, 186, 187
Peru 59, 85, 205, 290, 294
Pessar, PR 195
Petróleos de Venezuela Sociedad Anónima (PDVSA) 288, 290, 304, 305–7
petroleum, see energy
Philippine Institute for Development Studies 150
Philippine Overseas Employment Administration 194
Philippines 48, 49; agriculture, financing 266; bilateral trade agreements 150–1; Chamber of Commerce and Industry 150; Constitution 1987 144–5, 149, 150, 151, 320; debt 146, 149; energy 144–51, 290; Japan-Philippines Economic Partnership Agreement 150–1; migrant labour from 194, 195, 214; migrant labour to 217; opposition to trade in services agreements 84; water services 134, 135; WTO accession 145–6
Philippines Energy Ad Hoc Working Group 151
Philippines 2000 privatisation strategy 145
Picciotto, S 22, 41, 96
Pierson, P 188
Pinochet, A 75, 185, 186, 229
Pogge, T 111, 112
policy transfer, international 2
Pollock, A 138, 139
positive lists 29, 31, 32, 35, 37, 38, 44, 60, 73, 74, 75, 202–3
postal services 125
poverty 85, 89, 91, 96, 97, 111–12, 113, 117, 213, 228, 280, 318; in old age 182, 185, 186, 187; MDG1 111; and migration-for-remittances 214, 215; World Development Report 2004, Making Services Work for Poor People 93, 105–10
Poverty Reduction Strategies 89, 91, 97–100, 102, 103, 104, 115, 142
power 1, 2, 5, 17, 52–3, 122, 145, 152, 154, 206; inequalities in 16, 19, 20, 81, 84, 91, 106, 109, 262–3, 321
President’s Trade Promotion Authority 173
PriceWaterhouseCoopers 142, 143
Primo Braga, CA 142, 143
privacy protection 167
private finance initiatives (PFIs) 33, 35, 119, 121, 122; conflicts of interest 142; secondary market in contracts 141–2; United Kingdom 137–44
privatisation 3, 7, 8, 9, 31, 33, 35, 97, 98, 99, 101, 105, 106, 117, 119, 121–2, 190; and cultural exchange 230, 232; financial services 121, 156; and GATS 123, 124; opposition to 84, 86; second phase 137–8; telecommunications 121, 142, 154; water services 132–7, 142
production: integration of information into 11, 12; reorganisation of 6–8, 9, 195, 206, 262
professional services 78; Decision on Professional Services 38; response to globalisation 9; Working Party on Domestic Regulation 38–9; see also accountancy
public choice 105, 121
Public Citizen 135
public management 119, 121
public-private partnerships (PPPs) 35, 91, 104–5, 116, 117, 119, 122, 137; environmental sector 133, 135; and GATS 124; offshore outsourcing 196, 208; university research 227
public-public partnerships (PUPs) 143
public sector 124; restructuring 7, 9
public services 7, 9, 10, 14, 34–5, 87, 108, 137; defining 120; and GATS 106, 120, 121, 123–8, 137; legal obligations 34–5, 130–2; marketised 96, 119–23; midwife services 128–30; protection of 106; unbundling 7, 29, 33, 106, 124, 147, 154, 163, 195,
Index

245, 287, 289; user charges 121, 127, 130; see also pension schemes; privatisation; and specific sector services
Public Services International (PSI) 234
Public Warehousing Company (PWC, Kuwait) 219

qualification requirements 29, 31
Qatar 290, 295

race inequalities: education 242; labour market 190, 193, 211–13, 215; retirement income 185
Raghavan, C 10, 17, 36, 69, 81, 87, 161
Ramos, F 145, 146, 151
Ranade, S 178, 181
Ranald, P 292
Ratha, D 214
Raworth, P 158, 162, 173
Reagan, R 65, 75
Reddick, A 156
Reddy, M 216
Reed, J 78
Reference Paper on Basic Telecommunications 39
regional development banks 103
regional trade agreements 3, 4, 25–6, 28, 50, 55, 57, 59, 321, 324; campaigns against 60; energy-related services 292, 293–5; and exceptions 36; and labour 204–6; types 50
Reichart, T 264, 271
research 227, 229, 267–8
restrictive business practices 31
retail market, see supermarkets; and under specific countries
retirement income, see pension schemes; saving, retirement
Reuters 83
Rey report 61, 79
Riesco, M 185, 186
Rimban, L 147
Robert W Baird and Co. 246
Roberts, G 245
Robertson, S 235
Robinson, J 78
Robinson, V 208
Rolfsf, JH 163, 167
Rokoduru, A 220
Romania 207, 228–9
Roy, A 212
Roy, M 50, 55, 56
Royal Dutch Shell 285, 304
Royal Indian Raj International Corporation 209
Ruggiero, R 4, 93, 161
Russia 4, 51, 100, 271, 284, 288, 295, 302, 310, 321
Rwanda 230

Salas, M 256, 257, 258
Salinas, C 231, 282
Salmi, J 228
Samonte-Pesacayo, S 147
Sampson, GP 92
Sánchez-Ruiz, E 232
sanitation 98, 105, 115, 118, 119, 133, 135
Santa Fe IV document 293
Santiago, LQ 230
Sassen, S 191
Saudi Arabia 286, 288, 290, 295, 304, 311–13
Saudi Aramco 288, 313
Sauvė, P 39, 43, 83, 123, 124, 126, 159, 160, 170, 171–2
savings, retirement 182
Schloemann, HL 301
Schneiderman, D 13
Schrijver, N 19
Schugurensky, D 225, 235
Science Applications International Corporation (SAIC) 306–7
Seattle to Brussels Network 53
Secondary Market Infrastructure Fund 142
securities 159, 161
Security and Prosperity Partnership 55
security exception 36, 285, 291–2, 296–302, 308, 314
security workers in conflict zones, Fijian 215–20
self-determination 19, 83, 85, 88, 99, 221, 223, 270, 278, 283
Senegal 249
service providers: exclusive 29, 30, 31, 127; foreign 29; legal form 30; parity between 15; World Development Report 2004, Making Services Work for Poor People 106; see also supply
Service Sectoral Classification List, see W/120
services: commodification of 2, 5, 7, 13, 15, 104, 120, 121, 128, 152, 221; domestic 4, 9–10, 16, 29, 30, 31, 37–9; fragmentation of 33; impact of information technologies 7, 122; impact of reorganisation of production 6–7; inter-firm 7; intra-firm 7; policies on 2, 4, 16, 34, 122; private sector 7, 10, 123, 130–1; regulation of 2–3, 4, 9, 13–14, 16, 29, 31, 37–9; secondary service industries 122; social nature of 1–2, 4–5, 12, 13, 15, 20, 96, 104, 318–19; see also classification of services; professional services; public services; social services; universal access to services; and specific sectors
‘services economy’ 2, 5, 6, 8, 9
services, international trade in 9–12; assessment by Council for Trade in Services 44–5; barriers to 62, 63–4; contractual relationships 13–14, 19; GATS definition 22, 25–7; info-industrial model 11; and national services markets 14–15; physical geography of 11–12; service industry model 11; social geography of 11–12; socio-regulatory adjustment 13–14, 123, 241; statistics 9–11; see also trade in services agreements
‘services mafia’ 76–82
Services World Forum 80
Sexton, S 183, 185, 186
Shaffer, G 20, 41
Shaoul, J 139, 140, 141
Shashikant, S 50, 53, 55
Shaw, W 214
Shep, R 77–8
Shiva, V 117, 266–7
Shukla, SP 16–17, 19, 59, 65, 66, 67, 68, 70, 71, 72, 73, 319–20
Sidak, JG 163, 165, 166, 167
Siegel, DE 93
Singapore 36, 50, 52, 150, 154, 172, 191–2, 201, 204, 205, 229, 240, 244
Singer, HJ 163, 165, 166
Singh, JP 70, 74
Singh, VP 71
Slatter, C 214, 277
SLM Corporate (Sallie Mae) 246–7
Snape, RH 19
social class 1, 12, 189, 190
social movements 51, 60, 85, 86, 91, 136, 190, 319
social services 7, 9, 10, 87, 90, 97–9, 119, 122
socio-regulatory adjustment 13–14, 123, 241
Solomon Islands 255, 259–61
Sorenson, O 238
Sorsa, P 36, 161
South Africa 47, 48, 49, 50, 52, 84, 117, 122–3; and education services 234, 238; energy 290; outsourcing destination 196, 208; retail market 271; water services 134, 135
South Africa Contact Centre Community (Sacccom) 208
South Centre 93–4, 104, 192, 201, 202
South Korea, see Korea, South
South/North divisions, see North/South divisions
South/South cooperation 93
South/South free trade agreements 50, 52, 53
Southern countries, see developing countries; least developed countries
sovereignty: people’s 84, 144, 286, 318–19, 324; state 18, 19, 20, 24, 38, 40, 131, 145, 221, 286, 297, 311, 319, 324
Soviet Union 3, 226, 227, 307, 323
Spain 79, 253, 273, 313
special purpose vehicles (SPVs) 139–40
Spinex Resources Top 100 retailers 270, 271
Spires, T 245
Spivak, G 18
splintering of services 7, 79, 195, 287
Sreberny, A 230, 231
Sri Lanka 69
stakeholders 91, 95, 103, 106, 115, 116, 117, 122
standards, technical 29, 37, 143, 170, 199, 253, 256
Steinbrecher, R 268
Stiglitz, JE 97, 153
Stoppard, A 134
Storey, D 215
Street, J 230
subsidies 30, 37, 73, 108, 131, 323; agriculture 264, 266; education 126, 237, 268; targeted 105
Sudan 310
Suez water company 132, 133, 134, 135, 136, 137, 281–2
Sumner, C 5
Supachai, P 93, 95
supermarkets 255, 262–4, 270–6; impact on local community and retail sector 270, 271, 272–6
supply chains, internationally integrated 6, 7; public services 124; see also education, higher; food production and supply chains
supply of services: GATS definition 26–7; see also GATS modes of supply; service providers
sustainable development 115–18, 255; and trade in services agreements 255, 256–61; World Summit for Sustainable Development, Johannesburg 115–18, 132, 137; see also environment
Sweeney, J 205
Switzerland 45, 46, 69, 70, 134–5, 172, 235, 238
Sykes Corporation 208
Syria 296
Taipei 237
Taiwan 46, 51, 134–5, 229, 238, 250, 260
Tajikistan 310
Tandon, Y 50, 52–3
Tanzania 156
Tascon, L 310
taxation, direct 74
Taylor, RD 156, 163
Tayob, R 50, 53, 55
Teaiwa, T 218
technical assistance 102–4, 109; Integrated Framework for Technical Assistance to Least-developed Countries 102–3; Joint Integrated Technical Assistance Programme (JITAP) 103; World Bank Public Private Infrastructure Advisory Facility (PPIAF) 142
technological neutrality 32, 129, 168, 176, 197, 238, 323
technology transfer 6, 70, 116, 264, 291
telecommunications 7, 8, 9, 29, 31, 33, 39, 42–3, 49, 51, 59, 69, 74, 87, 97, 152–3; as social phenomenon 153–6, 164, 165, 166, 229; bilateral agreements 55, 56, 173; GATS 2000 negotiations 170–1, 172; International Simple Resale 165; Mexican dispute 41, 42, 128, 164–6; privatisation 121, 142, 154; regulating 162–7; universal access to 131; Uruguay round negotiations 157–8, 162–7; value-added 168, 171, 172; see also information technologies
Television without Frontiers 168
Tesco plc 270, 271, 275
Texaco 285, Libya-Texaco case 286; see also Chevron Texaco
Thailand 48, 49, 52, 85, 150, 192, 195, 204; and East Asian financial crisis 153; energy 290; National Human Rights Commission 131; retail market 274–6; US-Thailand Free Trade Agreement 150, 275, 293, 320
Thaksin, S 85, 275, 293, 320
Thames Water 133, 134, 135
Thanh, VT 52, 150
Thatcher, M 63, 75, 79, 186
Third Way 115, 122, 138, 232
Third World, see developing countries; least developed countries
Thomson Learning 244, 245
Time Warner 231
TINA (There Is No Alternative) 3, 323
tourism 9, 25, 61, 78, 161, 256, 260–1, 276–83; eco-tourism 277–8, 282; impact on local communities 276, 277–8, 279–83; and indigenous peoples 277, 278, 279–83; sustainable 277
Trachtman, JP 176, 177, 178
trade in services agreements 3, 9; as meta-regulation 13, 123, 152, 158–61, 204, 221, 319–20; and cultural exchange 252–4; and development 91, 100, 116; and energy 149, 284; and human rights 131; and knowledge and cultural exchange 221, 226; new generation 321–4; opposition to 82–8, 123, 234–5, 244, 318–19, 322–3; and PFI privatisations 143; politicised nature of 5, 102; and public services 119; and retail markets 271, 272–3; self-referencing nature of 17–18; and sustainability 255, 256–61; unsustainability of 318, 321–5; and Western states’ dominance 17; see also
General Agreement on Trade in Services; services, international trade in
Trade Policy Research Centre, London 61, 79; High-Level Group on Services 79
trade-related rights and development 89–91; case studies 104–10;
institutional coherence 91–7; operational coherence 102–4; policy coherence 97–102
trade unions 83, 85, 86, 122, 134, 197, 204–6, 211, 217, 234
Tran, V-T 70, 71
transfers and payments, international 31
transnational corporations 3, 6, 7, 9, 10, 15, 20, 26, 41, 47, 67, 84, 94, 109, 303, 319–20; agro-chemicals 267–8; and alignment of trade with aid 53; banks 156; and cultural and knowledge exchange 224, 230; and education 235; and energy 285, 287, 288, 289, 290, 295–6, 302, 304, 308, 309, 312–13; and food supply 261–76; Fortune 500 companies 91, 270; guaranteed rights 89; and human rights 130; inability of GATS to meet needs 323; and intellectual property rights 81; and offshore outsourcing 206; personnel working internationally 189, 194, 200; and PFIs 142, 143; post-conflict stabilisation and reconstruction 298–9; and public services transformation 119–20, 123; subsidiaries, joint ventures and branches 173; UNCTAD Code of Conduct for Transnational Corporations 67; United States 13, 58, 59, 60, 61–2, 63, 74, 75, 77–8, 80, 151 (see also specific sectors and corporations); and World Development Report 2004, Making Services Work for Poor People 106; and World Summit for Sustainable Development 116–18; see also foreign investment; and specific corporations transparency 70, 73, 74, 169, 173, 203, 259, 272, 289
Transparency International Corruption Perceptions Index 144
transport 1, 6, 7, 9, 74; for just-in-time delivery 264–5; government procurement 127; privatisation 121, 142; and supermarkets 9, 270; World Development Report 2004, Making Services Work for Poor People 105; see also air transport; maritime services Treaty of Rome 1957 64–5
Treaty of Vienna 101
TRIMS, see Agreement on Trade-related Investment Measures
TRIPS, see Agreement on Trade-Related Aspects of Intellectual Property Rights
Tsang, J 303
Tucker, T 201
Tunisia 134
Turkey 45, 290
Uganda 69
unbundling 7, 29, 33, 106, 124, 147, 154, 163, 195, 245, 287, 289
unemployment 99, 185, 194, 208, 213, 215, 219
UNESCO 234, 253; Convention on the Protection and Promotion of the Diversity of Cultural Expressions 249, 250–4; World Declaration on Higher Education for the Twenty-First Century 225; World Water Development Report 2003 266
Unilever 262
Union of Industrial and Employers’ Confederations of Europe (UNICE) 226
unions (labour) 83, 85, 86, 122, 134, 197, 204–6, 211, 217, 234
United Arab Emirates 290, 205
United Filipinos in Hong Kong 191
United Kingdom 10, 11, 38, 122, 259; agriculture 264; Army, Fijians in 215, 218, 219; call centres 208; Department for International Development 95; and education services 234; energy 285, 294; and EC water requests to GATS 2000 135; and GATS genesis 63, 64, 69, 78, 79; Government Communication Headquarters (GCHQ) 137, 142; National Audit Office 141; on-line gambling industry 178, 179–80; private finance initiatives (PFIs) 138–44; retailers 270, 274; retirement income plans 183, 185, 186–7; Select Committee on Public Accounts 143; supermarkets 270, 271, 272, 273, 274; trade in services 66;
Treasury 138–9, 141; UK Food Group 262; US-UK Energy Dialogue 293

United Nations: Charter functions 94, 297; Commission on Permanent Sovereignty of Natural Resources 286; Economic and Social Council (ECOSOC) 93; and GATS 42; Millennium Summit 90, 91; peacekeepers 215, 218; summits 90–1; Third World bloc 19, 20; Working Group on the use of mercenaries 219–20; see also Central Product Classification


United Nations Conference on Trade and Development (UNCTAD) 20, 44, 58, 62, 67, 72, 86, 102; Code of Conduct for Transnational Corporations 67; conformity to mainstream views 93–4; and energy 285–6, 291, 292, 312; and government procurement 127; hostility of major powers to 94; Indian regional office 95; and labour 201; marginalisation of 69, 81, 93; Partnership for Development 94; promotion of mode 4 103; reports 94–5; role as partisan for the South 81, 93, 94; Shipping Liners Code 63; South Centre report, ‘Reinventing UNCTAD’ 93–4; technical assistance and capacity building 103–4; and tourism 276, 278; and universal access to services 131–2

United Nations Development Programme (UNDP) 95–6, 102, 209; Human Development Report 2005 262

United Nations Environmental Programme 276

United Nations Millennium Development Summit 90, 91, 111–12

United Nations Security Council 297, 299, 301

United Nations Sub-commission on the Promotion and Protection of Human Rights 96

United States: adjustment to schedule of commitments 34; Advisory Committee for Trade Negotiations 61, 77; agriculture 264; Asia, loss of competitiveness to 6; audio-visual services 232, 238; call centres 206, 208, 211–12; Central Intelligence Agency 112; Chamber of Commerce 61, 62, 63, 77, 78; China, imports from 270; corporate lobby 58, 59, 60, 61–2, 63, 75, 76, 77–80, 91, 115; and cultural services 222–3, 231–2, 233, 248, 250, 251–2; e-commerce 167, 168, 169, 170; and education services 234–6, 237, 238, 243, 244–5, 246–7; EC-Bananas case 257, 258; and energy 284–5, 286, 287–9, 290, 291–2, 294–5, 296, 302, 304–10; fast track authority 49, 50, 51, 54, 86, 147, 150, 201, 209, 241, 284, 292, 294, 295, 322, 323; Federal Communications Commission (FCC) 152, 163; Fijian migration to 215; financial services trade 160, 161, 172, 173; foreign policy 4; GATS 2000 negotiations 44, 45, 46, 48, 49, 134–5, 201, 203, 204; and ‘GATS attack’ 83; and GATS genesis 16–17, 22, 39, 58–78, 80–1; hegemony 3, 57, 58, 236, 303, 309, 321; Helms-Burton Act 300–1; India, relations with 58–9, 65, 194, 198, 200, 201, 207, 213; Industry Sector Advisory Committee for Services 61, 78; International Service Industries Committee 78; Interstate Horseracing Act 178, 179; Iran-Libya Sanctions Act 1996 301–2; Japan-Distribution Services case 258–9; labour market 192, 193, 194, 196–7, 198, 200, 201, 203, 204; Malaysia, FTA negotiations 271; manufacturing 6; Mexico telecommunications dispute 41, 42, 128, 164–6; and Millennium Development Goals 112; and national security 36, 54–5, 150, 179, 197, 236, 271, 285, 291–301; and outsourcing 196–7, 207; private sector services 10; retail market 270, 272; retirement income plans 183; sanctions against countries with ‘unfair trade practices’ 58, 59, 60, 61, 72, 300–2, 309, 313; section 301 powers 67, 68, 72; security 36, 54–5, 291–2, 296, 297–8, 299–302, 313; service industry model 11; and services markets 3, 6; split-run magazines dispute 233; statistics on international trade in
services 10; supermarkets 270–6; telecommunications regime 39, 154; telecommunications trade 157–8, 162, 163, 164–6, 167, 170–1, 172, 173, 239; Thailand, relations with 85; Trade Act 1974 61, 77; Trade and Tariff Act 1979 78; trade in services campaigns 86; trade policy 4; unilateral trade preferences 293; and UNCTAD 95, 291, 292; and UNESCO 249; US-Gambling case 32, 38, 42, 174–81, 272; US-UK Energy Dialogue 293; and United Nations Conference on Financing for Development 114; Venezuela, relations with 303–10, 322–3; water services 135; and World Summit for Sustainable Development 115; and WTO accessions 100, 101–2, 311–12, 313, 314, 315–17; and WTO public law 41; see also Barshkefsy; Brock; Feketekuty; Zoellick

universal access to services 2, 30, 35, 108, 121, 130–2; financial services 156; pensions 181, 183; telecommunications 155, 164, 165, 166

Universal Postal Union 63

Universitas 21 Global 244–5

universities 221, 224, 225–9; academic opposition to trade in services agreements 234–5, 244, 319; foreign students 242–3, 244; research 227, 229, 268; virtual 244; see also education, higher

University of Melbourne 243–4

Upadhy, C 196, 197, 209, 210, 211, 212–13

Uruguay 45, 48

Uruguay round 9, 16, 20, 33, 36, 51, 87, 89, 100, 110, 319; audio-visual services 232; education 234, 237; energy 287, 291, 295; financial services and telecommunications 157–67; labour 192, 197–8, 199; public services 119, 121, 133; shaping of GATS 27, 31, 38, 39, 44, 45, 60, 70, 71–6, 78, 79, 80, 81

Uzbekistan 310

Vandemoortele, J 96

Vander Stichele, M 156, 184

Vanuatu 101–2

Vasavi, AR 196, 197, 209, 210, 211, 212–13

Venezuela 21, 43, 47, 48, 49, 50, 57, 85, 293, 322–3; energy resources 285, 286, 288, 289–90, 303–10, 320
Index 399

Vienna Convention on the Law of Treaties 1969 36, 42, 125, 176

Vietnam 99, 230

Villaneuva, E 191

Vivendi (Veolia) 133, 134, 135

Voon, T 250

Vorley, B 262, 264, 268

W/120 (Service Sectoral Classification List) 32–3, 39, 44, 45; banking and financial services 266; education 234, 241, 247; energy 149, 287, 288, 289, 290; financial services 159; food supply chain 265; gambling 174, 176; insurance 266; midwifery services 128; occupations 199; PFIs 138; research 268; telecommunications 168, 171; tourism 278; water for irrigation 267; water services 133, 134–5

Wade, R 97, 105, 106, 153

Wagel, S 52

Walker, J 244

Wallach, L 201

Wal-Mart 239, 259, 263, 270–6

Washington Consensus template 14, 97, 115; post-Washington Consensus 52, 97, 105, 122

water 1, 9, 21, 43, 85, 86, 91, 98; distribution 107, 133, 266–7; GATS, and water services 84, 96, 132–7; MDG7 102, 111, 135; privatisation of services 91, 95, 96, 99, 102, 132–7, 142, 266–7, 281–2; right to 130; universal access to 131; World Development Report 2004, Making Services Work for Poor People 105

Watson Wyatt 183

wealth: inequalities in 2, 20; redistribution from labour to capital 190, 207

Wesselsius, E 83, 161

Western states and norms 17, 18, 19, 20, 89, 122, 229, 230, 273, 274, 276, 285

Whitfield, D 138

Williams, M 190

Williams, S 297, 300

Williamson, J 14

Winham, GR 70

Wipro 206–7

Wolf, M 79

Wolfensohn, J 93, 105

Wolfowitz, P 317

women: in call centres; and labour market 190, 191–2, 210, 214, 215–18; retirement income 184–5

Woodhouse, EJ 147, 148

Woodroffe, J 98

Working Party on Domestic Regulation (WPDR) 38–9

Working Party on Professional Services 38

World Bank 15, 19, 20, 42, 104, 130, 137, 281, 317; Averting the Old Age Crisis 182; and Bangalore 209; Country Policy and Institutional Assessments 99; and development 91, 93, 97–100, 101, 102, 103, 104; and education 227–8, 229, 236, 245, 246; and financial services and telecommunications 153, 161; and foreign investment 281; and labour 201, 214, 215, 217; and Millennium Development Goals 112; and pension plans 186, 187; and Philippines 84, 145, 146, 147; Poverty Reduction Strategies 89, 97–100, 102, 104; promotion of WTO membership 101; protests against 110; structural adjustment programmes 69, 75, 97; Trade Research Group 103; see also International Centre for the Settlement of Investment Disputes; International Finance Corporation

World Bank Institute (WBI) 100, 103

World Bank Public Private Infrastructure Advisory Facility (PPIAF) 142


World Business Council for Sustainable Development 117, 136

World Development Movement (WDM) 83

World Economic Forum 110

World Health Organization 96–7

World Intellectual Property Organization, Union for the Protection of New Varieties of Plants 268
World Summit for Sustainable Development, Johannesburg 115–18, 132, 137
World Tourism Organization 277–8
World Trade Organization (WTO) 3, 4, 10, 11, 16, 19, 24, 28, 31, 32, 36, 39, 43, 76, 104; accession commitments 100–2, 107–8, 284, 310–17, 322; Agreement Establishing the World Trade Organization 40, 42; Agreement on Agriculture 37, 256; Appellate Body 25, 32, 40, 41, 42, 174, 176, 177–8, 179, 233, 257; bilateral agreements, study of services in 55–7; Committee on Balance of Payments Restrictions 36; and cultural exchange 250–1; and development 89, 90, 91, 93, 102–3, 104; Dispute Settlement Body (DSB) 40, 41, 299–300; Dispute Settlement Understanding 40, 41, 42; EC-Bananas case 257–8; European Commission in 25; and foreign investment 281; and GATS 75, 86; and ‘GATS attack’ 82–3; and health services 96–7; and human rights 96, 130; IMF, relationship with 91–23; Institute for Training and Technical Cooperation 103; Japan-Distribution Services case 258–9; Mexico-Telecommunications 29, 41, 42, 128, 164–7; and Millennium Development Goals 91; Sanitary and Phytosanitary Agreement 256; Trade Negotiations Committee 46; Trade Policy Reviews 124; and trade unions 205; and United States financial sector 76; Working Party on Trade, Debt and Finance 94; and World Summit for Sustainable Development 116; US-Gambling case 38, 128, 174–81, 320; see also Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Council for Trade in Services; Doha round; Uruguay round
World Travel and Tourism Council (WTTC) 276
World Water Forum, Kyoto 132–3, 134
WorldCom 164, 166
Wunsch-Vincent, S 33, 167, 168, 170, 173, 201, 202–3
Yang, G-H 223
Yemen 310
Yeoh, B 192
Yeutter, C 68, 71, 292
Yu, J 144
Yugoslavia 60, 67, 69
Zambia 44
Zapatista rebellion, Mexico 85
‘zero quota’ 174, 177, 272
Ziguras, C 237
Zillman, DN 297, 299
Zoellick, R 54, 174, 292, 294