

THE WTO GENERAL AGREEMENT ON TRADE IN SERVICES

How are our essential services under attack? Traditionally trade agreements were focused on setting rules to facilitate trade in goods such as limiting tariff and quotas. But today's "trade" agreements also include broad-ranging provisions to encourage international competition by multi-national businesses in a vast array of service sectors. Now new negotiations under the auspices of the World Trade Organization (WTO) and various regional pacts are targeting essential services, such as water and public power utilities, hospitals and social services with the goal of turning these public needs into new tradable units for private, for-profit corporations to own or control. These proposals would also make it more difficult for communities to regulate privately-owned services in order to achieve vital policy goals such as: universal access to utilities and reasonable rates; expansion of health care coverage; limitations on development in environmentally sensitive areas; and preferential treatment for job-producing local firms, non-profit organizations, women, or minority owned and operated businesses. When prior trade agreements involving goods resulted in the loss of millions of U.S. manufacturing jobs, we were told that everyone would find new jobs in the high-tech and service sectors. Now these new agreements put government and private-sector service jobs at risk as well.

WTO's General Agreement on Trade in Services (GATS) was first established in 1994 as one of the "Uruguay Round" agreements to be enforced by the WTO. Rules about actual trade in services across borders (via the phone or internet) is only a small element of GATS. The WTO called the GATS the world's first multilateral investment agreement because its rules cover every conceivable way a service might be delivered, including granting foreign corporations the right to buy or establish new companies within the territory of another country. GATS is known as a "bottom-up" agreement because most of its requirements only cover service sectors countries agree to open up for competition by foreign corporations. GATS negotiators like to portray GATS as a very flexible agreement from which countries may completely exclude certain sectors. In reality, the GATS text is very ambiguous about what aspects of our lives its rules cover.

U.S. GATS Commitments: Certain articles of the GATS apply to all services automatically. Others, such as GATS rules of *market access* and *national treatment* apply to particular services only if governments specifically include these services in their list of what they agree to have covered by the GATS, called a "schedule" of a country's "commitments". The US Trade Representative (USTR), for example, overtly included financial services, libraries, certain water services, certain educational services, telecommunications, e-commerce and a broad category of communications services (including radio, TV, advertising, movie production and distribution, etc.), retail and wholesale distribution, hospitals and health facilities, construction, and hotel and restaurant services in the list of 1994 U.S. GATS commitments¹. The United States also committed health insurance, tobacco distribution, zoning, gambling and a myriad of other services of great public interest, but these commitments are not readily apparent as they are contained in the subcategories that underlie the U.S. list of commitments.

GATS Rules: The rules of the GATS are geared toward opening up business opportunities in covered service sectors to foreign firms. Thus, the GATS *national treatment* rule does not just prohibit discrimination, but it prohibits anything a government might do that modifies the conditions of competition in favor of local service suppliers. Under GATS *market access* rules, no U.S. government should do anything in committed sectors that would limit:

¹ The US "Schedule of Specific Commitments" is available by searching with the document code GATS/SC/90 at <http://docsonline.wto.org>

- (a) the number of service suppliers (including through quotas, monopolies, economic needs tests, or exclusive service supplier contracts);
- (b) the value of services transactions or assets;
- (c) the number of service operations or quantity of service output;
- (d) the number of natural persons that may be employed;
- (e) the forms of legal entity; or
- (f) the participation of foreign capital.

What does this mean practically? Take just one example relating to zoning policies. Imagine common land use policies that limit the number of hotels on a beach or the size, location or design of a retail store. These regulations would be in violation of the GATS if they were not specifically carved out (or protected) from a nation's GATS market access commitments. Unlike many other countries, the United States failed to carve out land use policies from its GATS retail distribution, wholesale distribution, hotel and restaurant commitments, a fact that might come as a shock to local officials if their sovereignty over land use policies is challenged as a violation of the GATS in a closed WTO tribunal.

Public services at risk under GATS: The GATS contains a cleverly worded provision excluding from its coverage government services that are "supplied neither on a commercial basis nor in competition with one or more service suppliers." However, most government services (like health care and utilities) involve some public/private mix or fee structure, fall outside of this exception and thus are covered by GATS. Public interest policies governing such services could be challenged for violating WTO rules in closed-door trade tribunals. A country would have to change the WTO-illegal rules or face trade sanctions.

No way out: If a nation seeks to withdraw a sector from GATS coverage, the government has to enter into negotiations to compensate trading partners for their lost business opportunities. In other words, under the GATS privatization or deregulation is a one-way street—once you go there you can only get out by paying a ransom. Examples of failed privatization or deregulation schemes already abound in the third world as well as the first. In the United States, where the corporate provision of water services is still very rare, at least 17 cities have had to "buy back" their water services or revoke multi-year contracts due to poor performance. If GATS rules had been in place in this sector, the United States may first have had to compensate WTO trading partners before cities would be allowed to take these actions. (The ransom would not be in the form of cash, but in the form of an "adjustment to the schedules" to grant trading partners market access in an equally lucrative service sector.) The expansion of government programs in covered sectors (such as a state providing universal health insurance for its citizens) would also trigger the compensation requirement as the GATS prohibits the creation of new government monopolies in covered service sectors.

Lessons from Recent WTO Gambling Decision

Gaming in the United States is regulated largely by states and there are a multitude of cultural attitudes about gaming ranging from blanket bans on all forms of gambling in Utah and Hawaii to very liberal gambling rules in towns such as Las Vegas and Atlantic City. The April 2005 WTO Appellate Body decision on the gambling case was a stunner, not so much for the immediate impact of the decision which addressed the narrow issue of internet gaming, but for the threat the new WTO jurisprudence established by the decision poses for the regulation of *other* service sectors covered by the GATS.

The U.S. covered gambling: First, the WTO upheld the initial ruling's determination that the United States had inadvertently submitted the entire gaming sector to WTO rules when it agreed to commit "recreational services" to WTO disciplines – even though the word gambling does not appear in the U.S. schedule of commitments. While this case focused on the subcategory of Internet gaming, the ruling that the United States committed gambling services to WTO jurisdiction has significant implications for *all* U.S. federal, state and local gaming policies which are now vulnerable to WTO challenge. An array of common U.S. gambling regulations, including regulatory bans on gambling which differ from state to state, limitations on the number of casinos or slot machines, state lotteries (which would be considered monopolies) and exclusive Indian gaming compacts, are now subject to challenge before future WTO tribunals as violating U.S. GATS obligations.

Bans equal a "quota of zero": Second, the Appellate Panel affirmed the radical lower Panel ruling that outright bans on gambling such as the federal policy banning Internet gambling constituted a numerical "quota of zero" that violated GATS rule prohibiting limits of service suppliers and impaired the right of Antiguan gambling companies to enter the U.S. Internet gambling "market." This aspect of the ruling means that not only are U.S. bans on Internet gambling WTO-illegal, but so are all regulatory bans of pernicious behavior in any covered service sector – even if a ban applies equally to potential domestic and foreign providers.

While the United States ultimately dodged a bullet when the WTO Appellate Body ruled that the special harms of Internet gambling qualified the federal U.S. ban under the never-before-used "public morals" exception in the agreement, it is highly unlikely that many other gaming policies (especially those that differ from state to state) would qualify for this exception, nor would U.S. zoning policies, and there is no exception in the GATS for environmental measures as there is in many other trade agreements.

*The WTO gambling ruling constitutes a frontal attack on the right of nations to regulate in the public interest, not just in the gambling sector but in any covered sector. As Duke Law School Professor Joost Pauwelyn said, "this may well mean that, with the stroke of a pen, the validity of scores of domestic services regulations, including those that are non-discriminatory, are threatened."*²

GATS-2000 negotiations: New negotiations (called for in the agreement) are underway, called "GATS 2000," to expand the coverage of GATS' rules to more service sectors and to establish new cross-cutting disciplines on domestic regulation that could affect a wide variety of service-sector regulatory policies at all levels of government. In 2001, the new GATS negotiations were rolled into the larger "Doha Round" of WTO negotiations which had an initial, but now missed, January 2005 deadline. The final deadline for the GATS talks is now mid-2007. However, between now and then, several meta-deadlines have been set for countries to table offers of new sectors to be bound and proposals on the rules. Currently, much work is being done in preparation for the Hong Kong Ministerial which will be held Dec. 13-18, especially on a proposal to apply a "necessity test" to all service sector regulations.

Negotiations on a "necessity test": New negotiations underway in the WTO's "Working Party on Domestic Regulation" threaten to establish new cross-cutting "disciplines" on domestic regulation that could affect a wide variety of service-sector regulatory policies

² Joost Pauwelyn, Duke University School Of Law, "Rien Ne Va Plus?" World Trade Review, July 2005.

at all levels of government. Under consideration is an EU proposal to apply a “necessity test” to all service sector regulation, not just in service sectors signed up to the terms of the agreement. If such a test is applied, governments might be faced with proving that their non-discriminatory service sector regulations are both “necessary” and “least trade restrictive” if challenged in a WTO tribunal.

The specific domestic regulations that would explicitly be subject to such new limits on regulation are: licensing requirements of all kinds; the technical standards service suppliers have to meet; qualification requirements for individual service suppliers, such as accountants, architects, engineers, doctors and teachers, etc. While many involved in these negotiations attempt to portray their work as dealing with a very narrow group of service sector regulations applying merely to licensing issues, in practice there is hardly any service sector that is untouched by licensing requirements and technical standards.

News reports indicate that momentum is building in these talks. The former chair of the services negotiations, Alejandro Jara, believes that “the Working Party on Domestic Regulation should be able to provide some elements for disciplines before Hong Kong.”³ This suggests WTO trade ministers could be asked to approve key aspects of GATS disciplines on domestic regulation in Hong Kong. Not only has there been no consultation of federal, state or local elected officials in the United States on a proposal that would have such far-reaching domestic implications, but in fact no draft text is even available.

New disciplines on domestic regulation are in fact not necessary: the only requirement in the GATS text is to discuss whether new disciplines on domestic regulation are necessary. Thus these negotiations could simply conclude at Hong Kong with the statement “we found no new disciplines were necessary.”

Benchmarking Controversy

GATS boosters repeat endlessly their mantra that GATS bottom up structure means that the agreement is “flexible,” commitments are “voluntary” and in the interest of developing countries.

Now the European Commission has put forward a “benchmarking” proposal (also called “complementary approach”, or “common baseline approach”) to force the pace of negotiations and force service sector liberalization upon reluctant nations.⁴ By whatever name, the proposed new multilateral and plurilateral methods would drastically change the structure and architecture of the GATS.

Under consideration is a proposal to force nations to make offers in a minimum number of sectors/sub-sectors in an agreed list of priority sectors/sub-sectors and across all modes of supply. This would be accompanied by a requirement to reduce exemptions. It is likely this list of priority sectors will be decided with little input from member states or civil society, posing dangers for both developed and developing countries.

³ WTO, Council on Trade in Services, Special Session of the Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, TN/S/20, July 2005.

⁴ European Commission, Room Document, Council for Trade in Services, Non Paper On Complementary Methods For The Services Negotiations, September 13, 2005 available at: www.tradeobservatory.org/library.cfm?refid=76781

This proposal constitutes a complete reversal of promises made to developing nations in the original GATS that they could liberalize at their own pace, utilizing whatever democratic structures they normally employ. It also subverts Articles IV and XIX of the GATS which specifically establishes flexibility in favor of developing countries, not against them.

To justify these radical changes, developed countries, including the United States and the EC, are creating a crisis-like atmosphere around the services negotiations. Developing countries are being chastised for not making enough offers or offers of “poor quality.” But in truth, there are now some 70 initial offers representing 95 member countries and around 30 revised offers. This is certainly a big leap from the 47 countries that had made offers at the beginning of this year.

The EC’s benchmarking proposal is a desperate attempt to force developing nations to speed up the privatization and deregulation of their public services and lock it in – not for the benefit of developing nations and their internal development goals, but for the powerful European services lobby – making yet more of a mockery of the Doha Round’s official name, the Doha “Development” Agenda.

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