

VI. THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The most significant political development in the context of international trade in services is the proposed General Agreement on Trade in Services (GATS). Much like GATT, which focused predominantly on liberalization of trade in manufactured goods, GATS is a multilateral, legally enforceable agreement governing international trade in services. GATS is currently being negotiated under the auspices of the WTO. It represents the extension of negotiated trade liberalization to the service sector. GATS forms part of the Uruguay Round single undertaking “package” of multilateral agreements; meaning that all WTO members are bound by its rules. In a nutshell, once it is finalized, any nation that wishes to join WTO would be bound by the rules of GATS.

GATS consists of three core components: a framework of rules that lays out *general obligations*, *annexes* on specific sectors, and a *schedule of commitments* submitted by each individual member country, detailing their liberalization undertakings by sector.

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A. General Obligations (or top-down rules)

- a. **Most-favored nation treatment** requires countries to accord services from any foreign country the best of the treatment accorded to any other foreign country. The U.S. does not have many laws regulating services trade that discriminate between different countries, so, this provision would have little immediate effect on the U.S.
- b. **Transparency** requires that all nations publish all measures that affect services, inform the WTO Council on Trade in Services about changes, and respond to requests for information from other nations about the changes.

Disciplines on *domestic regulations* limit how governments can use licensing requirements, technical standards, or qualification requirements as a means to restrict market access. The U.S. government has acknowledged that licensing requirements, technical standards, and qualification requirements could be interpreted to include virtually every regulation of the service sector at the federal, state, and even local level. The basis for these negotiations will be nonbinding language already in GATS that would only allow governments to deny market access to foreign service suppliers that do not comply with their domestic laws and standards if these laws and standards are based on objective and transparent criteria and are no more burdensome than necessary to ensure the quality of the service.

What is especially confusing about this aspect of GATS (calls for disciplines on domestic regulations) is that though its inclusion in the *general principles* suggests that it applies to *all* service sectors, some of the

¹ Much of the analysis here, and several specific examples of trade rules, are drawn from the work of Elizabeth Drake of the AFL-CIO, and from Jones and Hardstaff (2003).

sub-paragraphs regarding this indicate that it only applies to those sectors for which specific commitments have been made. The scope of this obligation remains unclear.

- c. The GATS similarly calls for **disciplines** to be developed on **government procurement** as part of the current negotiations—calling on governments to open up the procurement system to foreign competition. However, GATS does *not* require the most stringent principles (most favored nation, for example) apply to government procurement. That is, the U.S. government could, for example, hire Canadian firms to provide government services while not allowing Russian firms to bid for these.

The extent of the GATS' potential reach into the area of government procurement is the subject of some debate. Previous trade agreements, such as NAFTA and the Agreement on Government Procurement (GPA) have gone quite far in restricting public policy aims that may be met through procurement policies at the national and sub-national level. GPA is an agreement signed under the auspices of WTO. Adherence to GPA is not yet a precondition for entry into WTO, yet it has been signed by the U.S.. NAFTA also includes a chapter that sets the rules for government procurement.

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The NAFTA chapter on procurement and GPA require transparency in the awarding of government contracts, and, in some cases, restrict the public policy aims that may be met through procurement practices. This is because only rules that relate to “product quality” have been deemed acceptable grounds for influencing procurement decisions.

A high-profile example of the effect of this is the decision of the U.S. government in 1999 to forbid the procurement of goods produced by forced child labor. On its face, this rule seems nondiscriminatory (i.e., it does not specify which nations are barred from proffering goods to the U.S., only the manner in which they are produced). However, the order creating this policy explicitly states that it does not apply to products from any of the nations that have signed GPA or NAFTA, as the child labor rule goes beyond the issue of “product quality” in setting procurement rules.

In the case of education, especially K-12, rules regarding government procurement could impact the provisions of educational materials that can be selected by school districts. Currently, many local school districts strive for consistency in their textbook and learning aids. This consistency allows easier transitions between grades and between schools in the system. Incoming fourth-graders who attended third-grade in the same school district, for example, will all have been exposed to the same (or very similar) material and will be at roughly equivalent levels of instruction.

This consistency in curriculum and materials often means that local school districts have close relationships with one textbook/material provider. Proposed drafts of FTAA could conceivably allow a foreign provider of textbooks, for example, to argue that the procurement decisions of local school districts are being made on bases other than product quality; if the foreign company provides similar books for any given instructional level. Even if the foreign company does not provide a consistent set of materials across grade levels (a crucial goal of some procurement decisions) they could argue that the procurement decisions at any given grade level are being made on grounds that violate international trade agreements.

Most procurement decisions made in education, both in higher education and K-12, are done at the state level. To date, 37 states in the U.S. have consented to GPA, meaning that they have in principle agreed to limit the public policy goals that may be met through government procurement. However, in almost all 37 cases, this consent has been through executive decision (i.e., a governor has sent a letter to the United States Trade Representative (USTR) saying that they agree to abide by GPA rules). There seems to be ample room to drive legislative action on this at the state level. That is, state level activists could push for a legislative decree that GPA unduly restricts government goals on procurement or similar actions.

- d. The general principles section of GATS also commits WTO member nations to “develop discipline” regarding **subsidies** for various service industries. This makes it sound at first as if subsidies are not covered as of yet in GATS. Some have argued that this is not true—subsidies may come under the heading of government “measures,” so the MFN rule may apply to subsidies in all sectors covered by GATS.
- e. Lastly, in the general principles section of GATS, a provision for **general exceptions** to GATS for specific sectors is provided. Specifically, it is provided to allow nations to enact measures *necessary to protect public morals or maintain public order, or necessary to protect human, animal, or plant life or health*.

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B. Annexes (or bottom-up rules)

As well as containing the *general principles* applying to all service sectors, GATS also contains two provisions for which nations may submit *annexes* that prescribe the rules for specific sub-groupings of services. That is, an annex essentially provides for even stricter rules for specific service industries, committing the signatory nation to obligations over and above those in the *general principles* section.

- a. **National treatment** requires governments to accord foreign services and service suppliers treatment that is at least as good as the treatment accorded domestic suppliers. In many sectors, U.S. law already guarantees foreign suppliers of services the same treatment as domestic suppliers, with some exceptions that the U.S. reserves in its *schedule of commitments*. For example, the U.S. filed an exception for federal law that prohibits the initial sale of federally owned land to anyone but U.S. citizens. State laws that discriminate against out-of-state service providers also violate the national treatment rule since foreign service providers must get the best of the treatment available to domestic providers, *even it is only available to a subset of domestic providers*, such as residents of the state. For example, the U.S. filed exceptions for a number of states that require lawyers to have in-state residency to receive a license to practice law.
- b. **Market access rules** prohibit governments from restricting the number or size of service suppliers and the quantity or value of services provided in their territory. In addition, governments cannot restrict the legal form a corporation must take in order to provide a service. Such restrictions on market access do not have to discriminate against foreign suppliers to be in violation of GATS—they simply have to

restrict the ability of these suppliers to do business in the U.S. market. For example, in the financial services area, the U.S. filed an exception for a nondiscriminatory part of federal law that prohibits the offer or sale of futures, options, or options on futures contracts on onions. This law does not discriminate against foreign suppliers, but it does limit access to the securities market and thus had to be reserved from GATS.

- c. The U.S. has so far made commitments (agreed to preliminary negotiation for annexes) in eleven sectors: business services, communications, construction and related engineering, distribution services, education, finance, health and social services, tourism and travel, recreation, culture and sports, and transportation and has proposed adding energy services to GATS. So far, the U.S. has only highlighted the key issues and principles it wants recognized as a precondition for further negotiations under GATS regarding education.

Regarding the role of government, the U.S. has identified the principle that governments have a right to regulate to meet domestic policy objectives and has recognized that education is “largely” a government function and that it seeks to “supplement” public education systems.

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As the rationale for trade liberalization in education services, the U.S. identifies as “aiding the upgrading of skills and knowledge through training and education, while respecting each country’s role in prescribing and administering appropriate public education for its citizens.”

The U.S. identifies, as the benefit of liberalization of education services, that “these services constitute a growing, international business, supplementing the public education system and contributing to global spread of the modern ‘knowledge economy.’”

- d. An **additional commitments** clause allows governments to make additional liberalization commitments that go beyond the wording in the national treatment and market access rules. These additional commitments clauses are currently under negotiation, and, there is no currently available information on how they will affect education.

C. GATS and the Provision of Public Services

One particularly contentious aspect of discussions over the final configuration of GATS concerns the provision of *public services* and the degree to which GATS will require signatory nations to modify these. Past trade agreements and others currently under negotiation have dealt with the provision of public services in various ways. Critics of GATS have worried that its adoption could potentially accelerate privatization of public services that enjoy wide public support in their current forms. This debate is obviously relevant to the issue of education and globalization. The extent to which public service provision will be subject to the rules of GATS remains an open question. It will be decided in forthcoming negotiations and individual nations’ submitted schedule of commitments. The degree of insulation from the GATS rules that will be enjoyed by public service providers seems entirely dependent on the outcome of these negotiations.

D. Why Are Some GATS Rules Controversial?

Many of the rules contained in GATS regarding service trade will be relatively uncontroversial. If, for example, the U.S. government decided, without any compelling explanation, to allow firms in the U.S. to buy architectural services from France, but not from Germany, this would probably strike most people as unfair. There are many areas, however, where the rules on GATS could conceivably run up against national, state, and local regulations and laws that many would consider well-conceived.

For an example of the former, GATS would prohibit a U.S. law from discriminating against service providers from other nations—affording them the same treatment afforded domestic firms. GATS would disallow, say, a regulation saying that accounting services may only be purchased from U.S., not French firms. This is an instance of the *national treatment rule*, and, this seems sensible enough at first glance—if a French firm can provide services to U.S. consumers at high quality and competitive prices, then it seems that they should be allowed to do so.

However, there is a danger that this national treatment rule could be used to challenge federal, state, or local laws on the grounds that they constitute *de facto*, rather than *de jure*, discrimination. For example, a requirement that all nurses must speak English to practice in the U.S. does not *intentionally* discriminate against foreign nurses. This rule is, of course, necessary to ensure that patients can communicate effectively with their healthcare providers. Though foreign nurses from English-speaking countries or with English proficiency would be able to satisfy this requirement, those foreign nurses who could not satisfy the requirement may argue that the requirement discriminates against foreign service providers and thus violates the national treatment rule of GATS. In resolving such a dispute, the U.S. would have to bear the burden in proving to WTO that the English requirement for nurses is necessary to protect human life or health. Failure to provide this proof would mean that English language requirements for nurses would be considered a violation of GATS.

Recently, documents were made public relating to requests made by the European Union (EU) regarding service sector commitments it would wish to see from a range of member nations. From the U.S., the EU has requested the privatization and deregulation of public energy and water utilities, postal services, and alcohol distribution. It has also requested that foreign firms be made eligible for government small-business loans and further deregulation of financial services. *The EU has also requested substantial privatization and deregulation of higher education services.*

Critics of GATS have pointed to these requests as evidence that the treaty provides an opening for those who want to substantially privatize education (and other public services). Instead of debating the issue openly with the American electorate, privatization could be spurred by the need to comply with the dictates of GATS, which would remain unfamiliar to most Americans.

A crucial area of these further negotiations will be precisely in which service sectors the U.S. will make commitments to liberalization and how far-reaching this liberalization is. Interested parties will have to fight to make sure that their concerns are heard by the USTR and reflected in WTO negotiations. To date, the lack of openness in the WTO treaty process has been a prime complaint of critics.

The USTR is bound by law to make public requests for input into the design and implementation of trade agreements. However, it is not bound to follow any of these requests. Further, the passage of “fast track” trade negotiating authority in 2001 provided the executive branch the power to negotiate trade agreements without any input from Congress. While any formal treaty must be approved by Congress, “fast track” only allows them an up or down vote on the final form of the treaty, well after all contested issues have been settled in the negotiations. It was the lack of input implied by this “fast track” authority that led the Congress to deny fast-track authority to the Clinton administration after the passage of NAFTA and the joining of WTO.

However, the restoration of “fast track” authority to President Bush has again allowed the executive branch alone to decide what are appropriate subjects for inclusion in international trade agreements. While interested parties can try to stay abreast of calls from the USTR to submit their input on trade agreements in progress, there is absolutely no guarantee that their concerns, regardless of how broadly they are shared, will be accommodated. Involvement in the process of international trade agreements would be much easier if fast-track authority was not granted to the executive branch. This authority will expire in 2005 and will need congressional approval to be extended.