

GATS: How the WTO's New "Services" Negotiations Threaten Democracy

By Scott Sinclair

Despite the breakdown in global trade talks in Seattle in December 1999, negotiations are now underway at the World Trade Organization (WTO) to radically restructure the role of government worldwide--subjecting an ever-greater degree of governmental decision-making to oversight by the WTO.

These negotiations are aimed at expanding the General Agreement on Trade in Services (or GATS), a framework agreement that was adopted as part of the Uruguay Round in 1994. Essentially unknown to the public, the agreement is designed to facilitate international business by constraining democratic governance. The talks are taking place behind closed doors in close consultation with international corporate lobbyists.

The GATS is extraordinarily broad, dealing with every service imaginable. It applies to measures of all governments, whether federal, First Nation, provincial, state, regional or municipal. It employs both "top-down" and "bottom-up" approaches to covering measures and sectors. The agreement is not confined to cross-border trade, but intrudes into many domestic policy areas including environment, culture, natural resources, health care, education and social services.

Even though the agreement is not fully developed and some key parts of it are still untested, it is already having a significant impact on public policy. The GATS played a pivotal role in several recent WTO cases, where its broad wording was interpreted forcefully. The rulings in these cases show that the "services" agreement can be used to challenge an almost unlimited range of government regulatory measures that, even indirectly or unintentionally, affect the conditions of competition of international service suppliers.

The current round of GATS re-negotiation, in which every service is on the negotiating table, is only the first in a series of successive rounds planned to broaden and deepen the agreement. This expansion is to be achieved by increasing specific commitments of members, through re-classifying services to maximize GATS coverage, and by inserting new "horizontal" provisions that apply across-the-board to all members, services, sectors and modes of supply. Additional constraints on "domestic regulation" are among the most serious new threats to democracy posed by this round. The informal deadline to complete the GATS 2000 talks is December 31, 2002.

The GATS negotiations highlight many underlying tensions between the expansive business agenda being promoted by international corporations and the democratic principles and priorities embraced by the global citizenry. Public concern about the impacts of the GATS will almost certainly grow, as the agreement becomes more widely understood outside business and trade circles. The recent experiences of Seattle and of the defeated Multilateral

Agreement on Investment (MAI) demonstrate the vitality of well-organized citizens' movements committed to strengthening democratic authority. A similar movement can be expected to mobilize around the GATS negotiations and there is good reason to believe that another essential victory can be achieved.

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The new priority area of international services

What are services?

Services are associated with everything we need and everything we elect governments to do. Broadly defined, a service is a product of human activity aimed to satisfy a human need, which does not constitute a tangible commodity. There are many types of services, ranging from heart surgery to road construction, electricity transmission to education, and childcare to water purification.

Why are services important?

Services affect virtually all aspects of our lives from birth to death. Countless people deliver services that are vital to our daily lives. In turn, many of our jobs are directly tied to the provision of services to others. More broadly, how we choose to organize the delivery of vital services, for example, to make them affordable and universally accessible, is a fundamental aspect of how we govern ourselves.

Why are services the subject of international agreements?

Global business interests are seeking binding, global and irreversible rules on services. It should come as no surprise that multinational corporations, as they expand and extend their global reach, increasingly have a strong interest in reducing the cost of complying with the regulations they face in different countries. They also benefit by reducing competition from domestic, sometimes publicly owned, firms and from the privatization and commercialization of public enterprise that allows them to expand their market share. Adopting global rules to reduce or eliminate constraints placed by governments on their international commercial activity is understandably a key priority of many global corporations operating in the service sectors.

Many developed country service negotiators and WTO staff appear to be ardent, even fervent, advocates of promoting commercialization, privatization and deregulation of services through an expanded GATS. These officials, together with some influential government and business representatives, may also perceive an opportunity to salvage the WTO's shaken post-Seattle credibility by delivering an expanded, stand-alone agreement on services.

What is the GATS?

The General Agreement on Trade in Services is a multilateral framework agreement that restricts government actions affecting services through legally enforceable constraints backed up by trade sanctions. The GATS is one of the numerous agreements that were adopted in 1994 as part of the newly established World Trade Organization system and that apply to all WTO members. Extensive negotiations were formally launched February 25, 2000 in Geneva to augment the original GATS framework and to transform it into a comprehensive commercial agreement.

The GATS is an extraordinarily ambitious and quite complex agreement. There are several levels of obligations that apply. First, the agreement contains an overarching commitment to successive future negotiations to increase coverage and expand the agreement. Second, the agreement contains general rules, such as most-favoured nation treatment and commitments to transparency, that apply to all services. Third, the agreement contains specific commitments to market access and national treatment that apply only to those services listed by countries in their schedule to the GATS. Finally, the agreement contains sectoral annexes that set out rules for particular sectors such as telecommunications and financial services.

Some of the most significant features of the existing GATS include the following:

- **It covers practically all government measures. This includes laws, regulations, guidelines and even unwritten practices- for example subsidies and grants, licensing standards and qualifications, limitations on access to markets, economic needs tests, and local content provisions. No government measure "affecting trade in services," whatever its aim--environmental protection, consumer protection, enforcing labour standards, promoting fair competition, ensuring universal service, or any other goal-is, in principle, beyond GATS scrutiny.**
- **It covers all service sectors, and all modes of supply. Certain obligations apply to all sectors without exception, and all sectors, without exception, are on the table in future negotiations. The agreement also covers not just cross-border trade, but every possible means of supplying a service, including through electronic commerce, international travel and foreign investment. The GATS uses a hybrid approach to the coverage of sectors and measures, combining features of both a "top-down" agreement (which covers all sectors and measures unless they are explicitly excluded) and a "bottom-up" agreement (which covers only sectors and measures that are specifically identified).**
- **It covers most public services. Services "provided in the exercise of governmental authority" are excluded from the agreement. However, these are defined so narrowly that the exclusion has very limited practical value. All governmental services provided on a commercial basis are subject to GATS provisions. Similarly, governmental services supplied in competition with any other suppliers are also subject to the GATS. This exclusion does not appear to protect most aspects of**

- public education, social services, Medicare and other services provided through a mix of public and private delivery and funding.
- It extends beyond trade, and beyond "non-discrimination." The GATS is far more than a simple "trade" agreement; it is designed to cover all government measures which affect the supply of a service having some international component. The agreement prohibits "discrimination" (treating like services or service suppliers from one country more favourably than another, or treating like domestic services and service suppliers more favourably than their foreign counterparts) in sectors specified by individual members. But the agreement goes further, by absolutely prohibiting certain types of non-discriminatory government measures.
 - Its most significant constraints apply only to sectors covered by member governments. The most powerful and intrusive GATS provisions, such as national treatment and market access, currently apply only to those sectors that are specifically listed in a member government's country schedule. However, the coverage of these provisions is intended to become increasingly comprehensive through successive rounds of future negotiations.
 - Most protection provided in the agreement is uncertain and temporary. There are a variety of exemptions and exclusions in the GATS. However the effectiveness of most exceptions and limitations on coverage for existing and future measures is untested and remains an open question. In the cases to date, the WTO dispute settlement bodies have made clear that they will interpret exemptions narrowly. Moreover, any protection that is now afforded to even vital public policy measures must be seen as temporary, because it is a target for eventual removal in repeated re-negotiation sessions.
 - The GATS is designed for ever-increasing expansion. Ratchet-like tightening of constraints on government regulatory authority is built into the very structure of the agreement, as members have committed to expand the GATS through "successive rounds of negotiations ... aimed at achieving a progressively higher level of liberalization."

The increasing impact of WTO services rules

The GATS is the first such agreement of its type. Its scope, architecture, and many of its provisions are innovative and complex. When the GATS was signed, therefore, many of its provisions lacked a body of legal precedent, making it very difficult to assess clearly its likely impact. There are still many remaining unanswered questions and issues.

However, even though many provisions of the GATS have still not been fully adjudicated, there is a growing body of rulings and mounting evidence that the existing agreement has significant public policy implications. These initial cases confirm that the broadly worded legal obligations in the GATS will be interpreted forcefully and that the agreement can be used to challenge an almost unlimited range of government measures regulating goods, services and investment that, even indirectly, affect the conditions of competition of international service suppliers. Moreover, the decisive victories of the initial complainants

in these recent cases almost guarantee that the GATS will be used much more frequently in the future to frustrate government policies, practices and programs that allegedly adversely affect foreign commercial interests in services.

The GATS 2000 agenda

The GATS 2000 negotiations, while in their early stages, are now well underway. In late May 2000, the WTO Council on Trade in Services adopted an ambitious agenda for future work, calling for members to submit initial market access proposals by December 2000, followed by a "stock-taking exercise" in March 2001. If all goes according to the Council's plan, negotiations will then accelerate. While the real trade-offs and arm-twisting may only take place in the latter stages of negotiations, the collective decisions made by negotiators in this early "rule-making" phase of the talks could profoundly affect the scope and coverage of any revised GATS package that emerges from this negotiating round.

The program to broaden and deepen the GATS can be grouped into the three main areas considered below. The negotiating approaches used in each are intended to maximize GATS coverage. Many of them can be viewed as negotiating artifices, or traps, designed to pressure governments to go further than they otherwise would and to ensure that the arguments of domestic interests concerned about further GATS entanglement are defeated.

1) Expanding market access commitments

The core of the upcoming GATS 2000 negotiations will be pressuring governments to fully cover more of their domestic services, thereby constraining their regulatory authority in services. This will include the push to expand the number and extent of specific commitments in national schedules, to remove existing limitations within already committed sectors, and to bind more new and existing commitments so that future governments cannot reverse them. These tasks will likely absorb most of the negotiators' effort and attention.

The process of expanding governments' specific commitments will focus on the agreement's National Treatment and Market Access provisions. The GATS has a very tough standard for National Treatment that extends well beyond the conventional notions of non-discrimination. It applies to government measures that merely alter the conditions of competition in any manner that might disadvantage a foreign service or supplier. The agreement's Market Access provisions are even more intrusive. They eliminate many policy options altogether, absolutely and unconditionally diminishing democratic governmental authority.

On behalf of predominantly northern-based multinationals, the U.S., Japan, the European Union and Canada, the so-called Quadrilateral governments, will be pressing developing countries for guaranteed, irreversible access to southern markets. They will also seek from each other more privatization and commercialization of public services such as education

and health care, and further deregulation of publicly regulated sectors such as media, publishing, telecommunications, energy, transport, financial, postal and other services. The Quad members will also be pressing for new negotiating approaches that they believe will lead to more significant changes than the incremental coverage that would result from the traditional "request-offer" approach to negotiation.

Classification issues

Classification issues are currently a major focus of work in Geneva. Decisions about how to classify services could affect the interpretation of existing commitments and definitely will shape how future commitments are made. The emphasis will be on maximizing GATS coverage. This could be achieved in many ways, including:

- Narrowing the description of excluded sub-sectors in which member governments have made the fewest commitments, and broadening the description of those sub-sectors where members have generally taken the greatest commitments,**
- Disaggregating services, splitting off subsectors targeted for liberalization by transnational service corporations from other sectors to make it easier for countries to demand and to offer to cover the targeted subsector,**
- Clustering services to ensure subsequent commitments apply to an entire cluster of commercially targeted services,**
- Classifying new services so they are "read into" previous governments' commitments or are included in an already covered sector.**

In each case, nominally neutral classification issues can be manipulated to skew the results in favour of greater GATS coverage. Negotiations over these apparently technical issues are also proceeding entirely behind closed doors, making them difficult for citizens to monitor and scrutinize. As a result, these technical devices could be used to expand GATS coverage by stealth--evading public accountability and public and parliamentary debate.

Negotiating new and expanded horizontal, "across the board" commitments

Another approach for expanding GATS coverage is through so-called "horizontal negotiating modalities." This refers to the negotiation of crosscutting commitments that would apply across members, sectors and/or modes of supply. These might include developing new horizontal rules or strengthening rules that already apply horizontally. They might also include so-called "formula approaches." Formula approaches do not aim to develop new rules to be incorporated into the GATS text, but are binding negotiating guidelines: for example, an agreement to make commitments in every sector or to eliminate all performance requirements in certain sectors. These are very potent means of leveraging

greater GATS coverage. The Quad pressed hard for this approach once it became clear that adopting a wholesale "top-down" approach to the GATS was not politically feasible.

2) Placing new constraints on domestic regulation

Further negotiations on the controversial GATS provisions on domestic regulation pose one of the agreement's most dangerous threats to democratic decision-making. Article VI:4 calls for the development of 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." The Working Party on Domestic Regulation was formed to fulfill this mandate and negotiations are well underway in Geneva.

The proposed restrictions would cover a wide swath of government regulatory measures. The provisions would apply to all service sectors, not just those in which member governments have made commitments. They would extend, among other matters, to measures pertaining to professional accreditation and certification of competency, to broadcast licenses, university accreditation, hospital licensing and waste disposal permits, and to all technical standards for performing services, including those aimed at ensuring the quality of a service.

Under the proposed constraints on domestic regulation, governments would be compelled to demonstrate, first, that non-discriminatory regulations were "necessary" to achieve a WTO-sanctioned legitimate objective and, secondly, that no less commercially restrictive alternative measure was possible. This would hugely expand the authority of the WTO to interfere in the exercise of governmental authority. It would mean transferring the delicate responsibility for balancing the public interest with commercial considerations from elected government representatives to appointed tribunals or WTO panels.

3) Developing new GATS rules and restrictions

The GATS 1994 mandated further negotiation of rules in three specific areas: emergency safeguards to provide temporary protection to domestic service suppliers, further constraints on subsidies, and covering government procurement of services. The safeguards discussions are scheduled to conclude by December 2000, but there is no formal deadline for completing work on subsidies or procurement. These so-called "rule-making" negotiations will proceed in parallel with the market access negotiations and will provide an opportunity for negotiators to overcome obstacles encountered in the main negotiating stream. The interconnectedness of the various negotiating topics, combined with the usual lack of transparency in WTO negotiations, will make it especially challenging for outsiders, and even for many developing countries, to keep abreast of all GATS issues and developments.

Safeguards, emergency actions intended to provide temporary protection against "fairly traded" products that cause or threaten to cause serious injury to domestic producers, are permitted under the GATT rules on goods but would be a new concept under the GATS.

Developing countries have been the main proponents for GATS safeguard rules, arguing that greater flexibility is required to give them the comfort to agree to further restrictions in the GATS. Such temporary safeguards could conceivably be part of a progressive agenda to reform the GATS to reflect a more balanced approach to sustainable development and human security. However, developed country negotiators have strongly resisted safeguard provisions and continue to consign them to negotiating backwaters.

Subsidies are already covered by GATS national treatment and most-favoured nation provisions, creating many thorny practical problems for governments that GATS negotiators appear to downplay or brush off even while acknowledging the need for them to be sorted out. GATS re-negotiation to develop further restrictions on subsidies is potentially the most significant and controversial of the three rule-making areas. It could be possible for GATS rules on subsidies to be revised to provide much-needed protection for subsidies, grants and other advantages related to the provision of universal public services. However, for now, the pressure exerted by international corporate lobby groups is all in the direction of further restrictions promoting commercialization and privatization.

Government procurement is the least active area of the GATS 2000 negotiations on rule-making. The principal negotiations on government procurement are occurring elsewhere in the WTO. A Working Group on Transparency in Government Procurement, set up under the auspices of the Council for Trade on Goods, is currently trying to negotiate an agreement on transparency which, if adopted, would apply to government procurement of both goods and services. For now, further procurement negotiations mandated within the GATS, have taken a back seat.

The United States has been the chief proponent of an agreement on transparency in government procurement and had pushed for it to be adopted as an "immediate deliverable" at the failed Seattle ministerial meeting. The broader transparency initiative has, however, run into determined opposition from key developing countries. If the transparency initiative covering both goods and services continues to founder, the GATS mandate may receive fresh impetus from those countries wishing to expand WTO restrictions on government procurement.

Conclusion

When the GATS 1994 was signed, almost no one other than its negotiators and a small, but influential, group of corporate supporters appreciated its scope or significance. It has stealthily moved multilateral trade law restrictions further "behind the border" than ever before.

Most citizens and even elected officials still do not comprehend the full extent or implications of the existing GATS. Yet, despite this accountability gap and the serious misgivings expressed at Seattle, negotiators are already out of the starting blocks and

running ahead to realize their ambition of an expanded GATS. Citizens, non-governmental organizations and concerned elected officials have a lot of catching up to do.

Powerful international commercial interests have directly shaped the GATS agenda. Much behind-the-scenes preparation has already occurred without the benefit of broader public debate. Not surprisingly, what has emerged is an immoderate, even extreme, agenda that must rely upon the secrecy that traditionally blankets such negotiations to succeed. This is a brash expectation that is becoming increasingly untenable.

While public awareness of the GATS and its policy impacts is still modest, it is rising. Citizen concern about the public policy impacts of the GATS will almost certainly grow, as the profound significance of the agreement becomes more widely understood outside business and trade circles.

- **The GATS exposes virtually any government action affecting services to WTO oversight and potential challenge.**
- **Any government action, whatever its policy objective, that arguably alters the conditions of competition in favour of either domestic service providers or in favour of some foreign service providers over others, is exposed to challenge under a very tough test of de facto discrimination.**
- **The GATS prohibits certain types of public policies, absolutely diminishing democratic governmental authority.**
- **The GATS is designed to enable transnational corporations, in collaboration with foreign governments, to attack general, non-discriminatory public interest regulations as unnecessary or burdensome.**
- **The GATS is hostile to public services, treating them as, at best, missed commercial opportunities and, at worst, unfair competition or barriers to entry for foreign services and suppliers.**
- **The GATS investment restrictions demolish industrial policy whether primarily aimed at goods or services, closing off the path to development taken by most advanced economies to other countries.**

While these implications of the current agreement are already disturbing, the potential effects of the current negotiations to broaden and deepen the agreement go even further.

Some observers may believe that the drive and resources of international business interests, working in close collaboration with government officials, make an expanded GATS inevitable. According to this pessimistic view, the most that citizens can expect by collective intervention is to turn back only the most extreme proposals for GATS expansion.

However, recent events provide support for a more optimistic scenario. In late 1998 the proposed Multilateral Agreement on Investment (MAI), an agreement that shared the GATS excessive reach and whose proponents exhibited a similar overweening ambition, suffered a stunningly unexpected defeat largely at the hands of a well-informed, sophisticated and

organized international citizenry. In Seattle in late 1999, deep-seated public opposition was a critical factor in turning back plans by the WTO to launch a new "millennium round" of comprehensive negotiations.

Seattle and the failed MAI could represent a turning point, beyond which expansive deregulation and severe restrictions on democratic governance effected under the guise of trade liberalization can no longer succeed. But citizens and activists who wish to fulfill this promise in the case of the GATS have much to do before negotiators reach the expected deadline of December 31, 2002.

Negotiators are already working to narrow differences on their approaches to key rules, including those restricting domestic regulation. Governments are committed to tabling market access requests and offers by the end of this year. A "stock-taking" exercise to kick off the critical market access phase of the GATS negotiations is scheduled for March 2001. Then, if the negotiations follow past practice, governments and the public will be presented in roughly two-and-a-half years with a fait accompli, a "take-it-or-leave-it" GATS package.

This mould of high-stakes brinkmanship--where corporate dollars and lobbying resources can be concentrated on securing approval in each country without legislators or the public having any real opportunity to change or influence the terms of the final package--can, and must, be broken. A first task is to understand the existing agreement, and, particularly, to spell out the potential impacts of GATS coverage sector by sector. When those with a hands-on, practical knowledge of sectors--regulators, administrators, practising professionals, union representatives, workers in the field and independent analysts--discern the concrete impacts of broadly worded and abstract GATS provisions, the results are invariably illuminating, disturbing, and politically energizing. Sectoral studies of GATS impacts, based on intimate knowledge of the targeted sectors, are urgently required. Within Canada, some of the most important candidates are health, post-secondary education, kindergarten to grade 12 (K-12) education, energy services, water, postal services and culture.

Once the implications of coverage under the existing GATS framework are better understood, then attention must turn to the implications of the new areas under negotiation. The most critical are the new rules proposed to restrict "domestic regulation." If adopted, their impact would cut across many sectors. The task here is to analyze the impacts on types of public interest regulation: including environmental protection, consumer protection, and industrial policy, among others. Such research is an obvious candidate for international collaboration. Another important area for dialogue and collaborative research is the potential GATS impact in the south, particularly on southern countries' development priorities. The GATS 2000 agenda clearly calls for a vigorous, progressive research agenda to dissect its policy implications and to counter its ultimate aim: the commercialization of every services sector in every WTO country.

The tasks still ahead are:

- **to analyze, and widely publicize, the sectoral implications of existing GATS provisions,**
- **to provide analytical support to citizens' efforts to stall and then to reverse the current momentum to broaden, deepen and expand the GATS,**
- **to push fundamental structural reform of the GATS on to the international negotiating agenda, and**
- **to provide supporting arguments for work to roll back the most pernicious features of what is, from a progressive policy perspective, a deeply flawed and threatening agreement.**

The recent experiences of Seattle and of the defeated MAI have demonstrated the vitality of well-organized citizens' movements committed to strengthening democracy. There is good reason to be optimistic that, once this power is brought to bear on the GATS, an essential victory can be achieved.