

Facing the Facts:

A guide to the GATS debate

EXECUTIVE SUMMARY

The growing GATS debate

Shrouded in obscurity when the last round of World Trade Organization (WTO) negotiations were concluded in 1994, the General Agreement on Trade in Services (GATS) is only now beginning to receive the public scrutiny that it deserves. In response to growing public concern, GATS proponents recently issued two official works contesting GATS critics: “GATS: Fact and Fiction” by the WTO Services Secretariat and “Open Services Markets Matter” by the Trade Policy Committee of the Organization for Economic Cooperation and Development (OECD). This analysis provides a detailed critique of these official rebuttals, documenting numerous instances where they provide oversimplified or misleading assurances. It concludes that critics’ key concerns — that the GATS threatens public services systems and public interest regulation — are well-founded.

The scope of the GATS is immense

The subject matter of the GATS – services – is almost unimaginably broad. The GATS applies to all measures affecting services taken by all levels of government, including central, regional, and local governments. No government action, whatever its purpose, is in principle beyond GATS scrutiny and potential challenge. All service sectors are also on the table in ongoing, continuous negotiations.

Public services

The GATS does not now fully protect public services. The treaty’s governmental authority exclusion – which proponents claim protects public services — is, at best, unclear and subject to conflicting interpretations. At worst, if narrowly interpreted by dispute panels, it is of little or no practical effect.

Flexibility

Certain GATS obligations, most notably the most-favoured nation rule, already apply unconditionally across all service sectors. While it is true that the most forceful GATS obligations only apply to sectors that governments explicitly agree to cover, there are serious limits to this flexibility:

- Most governments have already given up much flexibility by not making full use of their one-time chance to specify limitations to their initial GATS commitments.
- Members remain under intense pressure to cede flexibility in successive rounds of negotiations to expand GATS coverage.
- The GATS requires governments that withdraw previously-made commitments to compensate other governments whose service suppliers are allegedly adversely affected.

- Protective country-specific limitations will endure only if all future governments are committed to maintaining them.

Policy Implications of GATS rules

Right to regulate

The mere affirmation of the right to regulate, contained in the treaty preamble, does not fully protect governments' right to regulate; this language has strictly limited legal effect. Governments retain their freedom to regulate under the GATS only to the extent that the regulations they adopt are compatible with the treaty.

MFN rule

The little-discussed GATS Most-Favoured Nation treatment (MFN) rule has the practical effect of consolidating commercialization wherever it occurs. While not legally precluding it, the rule makes it far more difficult for governments to reverse failed privatization and commercialization.

National Treatment and Market Access rules

The hard core of the GATS is comprised of restrictions that apply only to the sectors, or sub-sectors, where governments have made specific commitments. These commitments, together with any country-specific limitations, are listed in each government's GATS schedule.

The GATS national treatment rule applies a very tough test of de facto non-discrimination requiring that government actions not modify the conditions of competition in favour of domestic services or service providers. This opens the doors for non-discriminatory public policy to be frustrated for reasons that are unrelated to international trade.

The GATS Market Access rule is one of the treaty's most novel, and troublesome, provisions. Framed in absolute rather than relative terms, it precludes many types of non-discriminatory policies. For example, it prohibits limits on the number of service suppliers, calling into question limits imposed to conserve resources or protect the environment. It also prohibits restrictions on the types of legal entities through which suppliers may supply a service, which are commonly used to ensure the non-profit delivery of social services such as childcare and basic services such as rail transportation, water and energy distribution. These restrictions are now exposed to GATS challenge.

Restrictions on monopolies and exclusive service suppliers

The GATS imposes new burdens on monopolies and exclusive service supplier arrangements. In fact, monopolies (such as in postal services, electricity supply, health insurance, water distribution) and exclusive supplier arrangements (common in post-secondary education, health care and other social services) are inconsistent with GATS provisions and must be listed as country-specific exceptions in covered sectors. Governments wishing to designate new monopolies in listed sectors are required to negotiate compensation with other member governments or face retaliation.

Restrictions on domestic regulation

If new restrictions on domestic regulation, now being negotiated in Geneva, were ever agreed to, they would constitute an extraordinary intrusion into democratic policy-making. At issue is the development of "disciplines" on member country's domestic regulation – specifically non-discriminatory regulations that treat local and foreign services and service providers evenhandedly. The proposed GATS restrictions on domestic regulation are a recipe for regulatory chill and are among the most excessive restrictions ever contemplated in a binding international commercial treaty.

Conclusion

The GATS is a deservedly controversial agreement. Its broadly worded provisions give too much weight to commercial interests, constraining legitimate public interest regulation and democratic decision-making. GATS proponents would prefer to keep its dangers out of the public eye but negotiations to broaden and deepen GATS coverage will make services one of the centerpieces of the new Doha Round of WTO negotiations. These negotiations raise such serious threats to democratic governance that they are almost certainly to stimulate greater public interest and controversy. In this circumstance, the WTO and OECD rebuttals are so filled with misleading assurances that they could prove counterproductive – provoking citizens to greater efforts both to change the nature of GATS negotiations now underway in Geneva and to chart a more balanced future.



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