

8

LOOKING FOR FACTS IN THE GATS ATTACK: IMPACTS ON SOCIAL SERVICE SOVEREIGNTY

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This paper investigates the implications of the General Agreement on Trade in Services (GATS) for members' regulatory sovereignty over social services. It presents the moderate view that, while some of the outcomes envisioned by those opposed to the agreement are unlikely, they are not impossible and there is therefore some cause for concern. Legal ambiguities and gaps in the GATS undermine how both civil society and World Trade Organization (WTO) members perceive it, limiting its credibility and future scope. The essay concludes with recommendations aimed at improving the reliability and credibility of the agreement in order to increase the degree of trade occurring under its purview.

INTRODUCTION

Almost fifty years span the gulf between the birth of the General Agreement on Tariffs and Trade (GATT) in 1947 and that of the General Agreement on Trade in Services (GATS) in 1995. This gap reflects both the limited role that services have traditionally played in the global economy and their conventional treatment in public finance. Aside from certain sectors integral to the exchange of goods, such as international finance and naval transport, trade in services has traditionally occurred intra-nationally, with considerable government involvement. It thus comes as little surprise that

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the GATS has met with resistance, despite not being as familiar to the public as the GATT.

Central to the controversy over the agreement is the question of how it affects the right and capacity of members to regulate services, especially social services such as health and education which play a central role in human welfare and development, and are particularly susceptible to market failure. On the one hand, it is important that governments retain the ability to regulate the delivery of social services, so as not to leave them entirely to the invisible hand of the market. On the other, even if not intentionally protectionist, social service regulatory measures can serve to shield local markets from competition, slowing the flow of trade and limiting the potential economic benefits of liberalization.

GATS supporters herald the agreement as a landmark success, carefully crafted to further free trade while protecting the right and responsibility of members to govern in the public interest. Opponents claim, however, that the agreement risks irreversibly limiting the regulatory jurisdiction and choice of WTO members to the detriment of social service efficiency, equity, and quality.

This essay explores the implications of the GATS for members' regulatory sovereignty over social services. Understanding the document's language and terms is essential for this exploration, thus the essay begins with a general overview of the agreement. While this overview is reasonably thorough, it is not exhaustive; attention is given to the central features of the agreement as well as to aspects most related to the regulation of social services, with further detail arising as the essay develops. It continues by showcasing arguments made both in defense of, and in opposition to, the GATS as it concerns regulatory sovereignty, especially in terms of social services. Testing these claims against a careful reading of the agreement, it is determined that, while concerns about regulatory sovereignty are only speculative and often exaggerated, they are not without legal basis. The essay concludes with recommendations geared at decreasing uncertainty surrounding the implications of the GATS so that it may be more effective in its goal of progressively liberalizing the services trade.

OVERVIEW OF THE LEGAL FRAMEWORK

The GATS consists of six main elements: (1) a preamble outlining the purpose of the agreement, and its members' shared values and principles, (2) a statement of scope and definition, (3) a description of general obligations, specific commitments and related disciplines, (4) institutional provisions, (5) commitment schedules, and (6) a work program to further

develop and expand regulatory disciplines, and further liberalize through continued negotiations.

The preamble recognizes the growing value of services in the global economy and notes the important role of a progressive and transparent rules-based framework in ensuring that all members—and developing countries in particular—enjoy the benefits of economic growth. It identifies progressive liberalization and greater developing country participation as key goals of the agreement, achievable through successive rounds of negotiation which respect national policy objectives and take into account members' varying levels of development.

Part I (Scope and Definition), consisting only of article I (Scope and Definition), notes that the GATS covers all “measures¹ taken by [m]embers affecting trade in services,” including those taken by “central, regional or local governments and authorities” and “non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities” (WTO 1994a, 285-86). No explicit definition of services is provided in the agreement. Instead, services represent an inexhaustible category that encompasses all except, according to the article's third paragraph, those “supplied in the exercise of government authority,” which, the agreement specifies, are “supplied neither on a commercial basis, nor in competition with one or more service suppliers” (WTO 1994a, 286). The agreement identifies four modes of supply: cross-border, consumption abroad, commercial presence, and the cross-border movement of members' citizens.

The GATS has a unique commitment structure, with both GATT-like horizontal, or general, obligations and disciplines, applicable to all service sectors and modes, and commitments that relate only to member-specified sectors and modes. The development of specific commitments through a positive-list approach sets the GATS apart from its counterpart in merchandise trade.

The fourteen articles laid out in Part II (General Obligations and Disciplines) form the bulk of commitments and include rules addressing most-favored-nation (MFN) treatment,² transparency, domestic regulation, monopolies, government procurement, and subsidies. General obligations apply to all services except those carved out by article one, paragraph three (hereafter referred to as article I:3). Further flexibility rests in the ability of members to limit the application of the MFN principle by specifying exemptions³ either upon the agreement's entry into force or upon the country's subsequent accession to the WTO.

Part III (Specific Commitments) outlines commitments, most notably

market access and national treatment, which apply only to scheduled sectors and modes, subject to the terms and limitations articulated in members' schedules. The market access provision prohibits restrictions in such areas as the number foreign of service suppliers, operators or employees, the value of transactions, the types of legal entities allowed, or the participation of foreign capital. Under the national treatment provision, members agree to eliminate legislation and measures that favor domestic services and service suppliers over foreign ones.

Rules being the first component of international law and discipline the second, article XXIII (Dispute Settlement and Enforcement) completes the legal equation by outlining guidelines to address both violation and non-violation complaints. Any member who feels that another member is in violation of its general obligations or specific commitments can seek recourse under the Dispute Settlement Understanding (DSU) of the WTO. The article also permits legal action against any member who, by implementing a measure not otherwise in conflict with the provisions of the agreement, nullifies or impairs a benefit which another member "could reasonably have expected to accrue" (WTO 1994a, 301). However, article XIV (General Exceptions) outlines that, unless measures are used discriminately or to unduly restrict trade, no part of the agreement should be construed so to outlaw GATS-inconsistent actions when they are necessary to: (1) "protect public morals or to maintain public order," (2) "protect human, animal or plant life or health," or (3) "secure compliance with laws or regulations which are not [GATS] inconsistent" (WTO 1994a, 294-95).

Part V (Institutional Provisions) of the agreement establishes the Council for Trade in Services (CTS), the body responsible for overseeing the functioning of the GATS and furthering its objectives. It is open to all members of the WTO and operates under the guidance of the WTO General Council. It currently has four subsidiary bodies: the Committee on Financial Services, the Committee on Specific Commitments, the Working Party on Domestic Regulation,⁴ and the Working Party on GATS Rules.

In acknowledgement that the Uruguay Round is only the first step towards liberalizing and regulating trade in services, the GATS has a built-in agenda, or work program, often referred to as GATS 2000. Article XIX (Negotiation of Specific Commitments) mandates successive rounds of bilateral, plurilateral, and multilateral negotiations aimed at increasing the general level of specific commitments among members. The GATS also mandates the CTS, through appropriate bodies, to define rules and disciplines on domestic regulation, emergency safeguards, government

procurement, and subsidies. Negotiations towards the dual aim of the work program, which began in 2000, are ongoing.

THE GATS: SOVEREIGNTY AND DEVELOPMENT FRIENDLY

Responsible for more than 60 percent of global output, the service sector is the largest and fastest-growing component of the global economy (WTO 2000, 4). Economic integration and technological developments have transformed the role that services play internationally. Recognizing the importance of an efficient service sector to overall economic success, many governments are choosing to unilaterally liberalize even previously heavily protected or nationalized service sectors, such as telecommunications, transportation, and insurance. Expanding the multilateral legal framework to include rules and disciplines governing trade in services is meant to provide stability and predictability to this liberalization in order to further economic growth and development for all members. The WTO secretariat, academics, and former negotiators dismiss claims that the agreement will have negative implications for social service provision and regulation, arguing that these complaints reflect a fundamental misunderstanding of both the agreement's purpose and provisions.

Supporters often suggest that concerns surrounding the agreement are borne of the anti-globalization movement, which (especially since the demonstrations at the 1999 WTO ministerial meeting in Seattle) focuses much of its attention on the WTO (Sreenivasan 2005, 269). Weaving the GATS into the anti-globalization narrative has made it "the subject of ill-informed and hostile criticism. Scare stories are invented and unquestioningly repeated, however implausible" (WTO 2000, 4). Thus, the claim that the GATS will irreversibly "accelerate privatization and deregulation in areas such as health care" by "preempting possibilities for future action to reverse such privatization and deregulation" (CCIC 2002, 3) is simply one of many popular misconceptions about the agreement.

GATS advocates respond to the claim that the agreement will expedite privatization of health care and other social services with two comments. First, article I:3 serves to carve out such services from the scope of the agreement. Borrowing from the WTO, "social security schemes and any other public service, such as health or education, that is provided at non-market conditions" are excluded from the reign of the agreement unless a government deliberately opens them to trade (WTO 2005). Second, while the agreement advocates progressive liberalization, members set the pace and extent of negotiations. To date, the agreement has done little more

than secure status quo market conditions (or less) in a limited number of sectors (WTO 2003; Chanda 2003). Sensitive and highly regulated sectors, such as social services, have not been subject to significant liberalization commitments.

Supporters of the agreement also forward a two-part response to the claim that the GATS will entrench privatization and deregulation. First, the agreement is highly flexible and includes several means by which a member may modify, suspend, or withdraw commitments. Members may seek a temporary waiver, suspend commitments in the case of a balance of payment issue, or renege under the provisions of article XXI (Modification of Schedules). They may also maintain GATS-inconsistent measures according to the provisions of article XIV (General Exceptions). Second, those in favor of the agreement argue that critics falsely conflate liberalization—the opening of markets to competition—with deregulation. The anti-globalization narrative commonly compares the potential consequences of the GATS to the detrimental impact of World Bank and International Monetary Fund structural adjustment programs (SAPs), on the quality, equity, and cost of social services.⁵ GATS advocates see the SAPs as a poor proxy for the GATS, noting that the lesson of structural adjustment is that the benefits of liberalization depend on effective regulations. Correspondingly, the GATS explicitly recognizes the “right of [m]embers to regulate, and to introduce new regulations” (WTO 1994a, 285).

Moreover, it is understood that liberalization often requires stronger regulation and domestic policies, especially where developing countries are concerned. It is in light of this consideration that the agreement includes special provisions allowing developing countries to liberalize more slowly by “opening fewer sectors, liberalizing fewer types of transactions, [and] progressively extending market access in line with their development situation” (WTO 1994a, 298). The object is not to deregulate, but to ensure that regulations are administered in a reasonable, objective, and impartial manner so as not to unduly restrict trade. Indeed, proponents argue that the agreement was crafted in order to balance the goal of increased liberalization with the right and responsibility of members to regulate the supply of services in order to meet national policy objectives.

According to supporters, the benefits of regulated service trade liberalization mirror those arising from the liberalization of trade in goods. Increased competition will facilitate the development of economies of scale as members specialize according to comparative advantage, promote innovation, and contribute to lower prices for consumers. Liberalization contributes to increased technology transfer and diffusion, heightened further by the

rise in trade and investment resulting from a transparent and predictable rules-based framework such as the GATS. Moreover, advocates assert that the benefits of service trade liberalization will exceed those of open markets for goods because services are more heavily protected, make up a larger share of the economy, and play an essential role in the development and distribution of merchandise (OECD 2005, 2). Service liberalization is therefore central to overall economic performance.

Far from being rigid and absolute, many see the GATS as the most flexible and development friendly agreement to come out of the Uruguay round of negotiations. Members have the flexibility to tailor their commitments according to trade interests, level of development, capacity, and policy objectives, and to limit them to select modes of supply. In terms of general obligations, members can also list exemptions to the MFN principle, which would otherwise apply to all services covered. The special rights and needs of developing members are explicitly recognized throughout the agreement, through, for example, provisions that allow them to maintain restrictions in order to safeguard against balance of payments issues and to receive multilateral technical assistance from the secretariat of the WTO. Indeed, supporters argue that the agreement's flexible and highly voluntary commitment structure has "put an end to the north-south controversy over services which marked the early years of the Uruguay Round" (WTO 2000, 7).

THE GATS: A THREAT TO SOVEREIGNTY, DEVELOPMENT, AND SOCIETY

While supporters of the agreement characterize criticisms of it as exaggerated and exploited by the anti-globalization movement, it is not only activists and radicals who find fault with the agreement. An array of non-governmental organizations, academics, and research institutes are also concerned about the GATS' impact on service regulation. While they acknowledge many of the arguments made in defense of the GATS, these groups point out that such arguments require qualification. They assert both that the agreement is not as flexible and development friendly as advertised, and that it may not actually exclude social services as claimed.

In terms of general obligations, while members may maintain measures which derogate from MFN treatment, those measures must be: (1) listed in, and meet the conditions of, the annex on article II exceptions; and (2) identified at either the entry into force of, or accession to, the agreement. The majority of the members of the WTO self-identify as either developing or least developed. As such they are particularly disadvantaged by the

requirement for a pre-determined list of exceptions because it “demands a level of foresight and capacity unavailable . . . not least as it requires an awareness of both current and future regulations” (GATSWatch 2002). Furthermore, the CTS reviews MFN-inconsistent measures if they are maintained for more than five years. The agreement states that “in principle, such exemptions should not exceed a period of [ten] years . . . [and] shall be subject to negotiation in subsequent trade liberalizing rounds” (WTO 1994a, 305).

While members may also introduce MFN exceptions via a waiver, the ministerial conference determines the appropriateness of such a measure, and may decline waiver requests. Again, as requests for waivers or extensions are human resource-intensive and require administrative capacity, less developed members may face challenges in this process as well. Finally, when waivers are granted, the ministerial conference decides the terms, conditions, and date of termination. They also become subject to annual review, whereby the conference decides whether the exceptions will be maintained, modified, or terminated.

The ability of members to modify, suspend, or withdraw specific commitments is similarly restricted. For example, members may not utilize article XXI (Modification of Schedules) until three years from the date on which the commitment in question entered into force, and they must inform the CTS of a change at least three months before its implementation.⁶ In addition, the agreement authorizes the CTS to develop further procedures for the rectification or modification of schedules, whereby “any [m]ember which has modified or withdrawn scheduled commitments under this article shall modify its schedule according to such procedures” (WTO 1994a, 300). Thus the CTS may deny or change modifications made using this provision in accordance with such developments.

What is more, if a proposed measure is expected to adversely affect another member’s benefits, even if not in violation of the GATS, this affected member may be either entitled to compensation or authorized to suspend concessions or other obligations affecting the modifying member’s service providers. If the members involved cannot reach agreement on an appropriate compensatory adjustment,⁷ which the modifying member provides voluntarily to all affected members on a MFN basis, the affected member may seek recourse via arbitration. If successful, it would have permission to suspend obligations or concessions benefiting the modifying member. Again, the limited negotiating and legal capacity of many developing countries may result in their not being as well served in this process as other members. Meanwhile, having to supply compensation or

being denied concessions is likely to have a greater economic impact on developing members.

Central to defensive claims about the impact of the GATS on the regulation of social services is the argument that article I:3 excludes such services from coverage. Critics qualify this statement, however, by noting that few social services are provided exclusively by governments, with most involving at least some commercial or competitive component. It is thus unclear “how far this article goes to protect the grey areas relating to a public service” (Status of Women Canada 2004, 12); much depends on how understandings of “commercial” and “competition” are applied. While many may hold opinions regarding the meaning of article I:3, the actual interpretation will only become clear once a social service trade dispute is brought to a WTO tribunal.

If commercial is interpreted narrowly, social services that have user fees, for example, would be subject to the general obligations of the agreement, even if the fees are below competitive market rates. Likewise, the Dispute Settlement Body (DSB) of the WTO may construe a situation in which government and private enterprise simultaneously provide social services, although at higher rates, as constituting competition. Thus, if the DSB interprets either of these terms narrowly, it could hold the provision of social services to MFN treatment and all other general obligations and disciplines, including article VI on domestic regulation.⁸

Negotiators included article VI in the agreement in response to concerns that the GATS did not sufficiently address hidden forms of protectionism concealed in domestic regulations. They intended it to ensure that qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to services trade. The article authorizes the CTS to develop additional disciplines to ensure that these requirements are, *inter alia*, “based on objective and transparent criteria” and “not more burdensome than necessary to ensure the quality of the service” so as not to unduly restrict trade (1994a, 290). Paragraph four outlines this task in terms of general commitments, and paragraph five in terms of specific commitments.

It is important to note that article VI is meant to discipline measures that do not violate GATS provisions but which nonetheless distort competition and restrict access to domestic markets. As the WTO explains, “trade barriers may not only result from measures falling under the market access and national treatment provisions of GATS, but from a variety of factors, including licensing and qualification requirements, and technical standards in pursuit of legitimate national policy objectives. Such objec-

tives, of course, will not be the subject of multilateral negotiations” (2003, 140). Deciding whether a measure represents an unnecessary barrier to trade in services, however, requires the application of a necessity test—essentially, a weighing of the means against the end. Judging whether a given measure constitutes an unnecessary barrier to trade in services unavoidably involves subjective interpretation of the terms of the provision. How article VI affects regulatory sovereignty depends upon future understandings of key ambiguities in the provision. It is yet unclear which criteria the DSB will consider objective and transparent, or how it will measure quality, for example.

To date, the WTO’s approach to article VI has been sector specific, with necessity tests reflecting the differences between service sectors and accompanying regulations. However, there are some critics who consider this inadequate and advocate the application of a horizontal discipline, which would apply the same criteria and considerations to all service sectors in an undifferentiated way. Because article II:2 of the Agreement on Technical Barriers to Trade is also intended to discipline non-violation measures, the Working Party on Domestic Regulation has focused on whether or not its necessity test, which has a pilot application in the Accountancy Disciplines, could serve as a model in the development of broadly applicable disciplines to govern domestic regulation within the GATS.⁹ However, there is concern that extending these disciplines to other services, and social services in particular, will “undermine governments’ ability to set their own standards [and] professional codes of conduct, and protect consumers” (Chanda 2003, 2003).

The implications of the GATS for regulatory sovereignty would matter less if the effects of service trade liberalization were guaranteed and straightforward. Opponents note, however, that there is a lack of data, particularly statistical data, to justify the extrapolation of the benefits of merchandise trade liberalization to services. Even the WTO acknowledges this fact, noting that “there are few good empirical studies of the gains from liberalization of trade in services” (2003, 146).

Many further criticize the extension of the GATT framework to the service trade on the basis that it is conceptually ill-suited to deal with the complexities and particularities of services. Although not discussed here, many specific issues associated with trade in services complicate the application of core principles of the multilateral trading system (Footer 2002). These issues are reflected in the paucity of commitments made at the Uruguay round, where it “became apparent that services would not be easily integrated into a structure designed for goods” (Djordjevic 2002, 306).

The claim is not that there are no potential benefits from service trade liberalization, but rather that not enough is known about them. Opponents note that claims regarding the extensive benefits of service liberalization rest on very limited evidence which is partial, anecdotal, and produced mainly by developed countries. For example, “there is no evidence to date that the greater certainty associated with GATS commitments has any significant effect on increasing investment” and that “other factors, such as the size of the market, social, political and macroeconomic stability are at least as important” (UK Partnership for Global Health 2003, 24). In questioning the benefits of service trade liberalization, GATS critics look beyond the example of the SAPs and the developing world. Returning again to the example of health care, many studies have demonstrated that the United States consistently spends more on health care than any other country (without providing any additional services) but scores lower than the OECD median in most measures of health service use resulting from highly priced health care (Anderson et al. 2003, 90). Economic considerations cause many Americans to avoid seeking health care until treatment becomes more urgent, resulting in health outcomes lower than in some developing nations. Peter Julian of the Council of Canadians suggests that “virtually every credible study ever done has shown that private, for profit health care is more expensive, less efficient, and of lower quality than public” (The Corner House 2001, 25). Some GATS critics predict that liberalizing any social service will be similarly costly (negatively impacting equity), inefficient, and ineffective.

ASSESSMENT OF THE DEBATE

A closer look at the debate reveals that while some of those opposed to the GATS are certainly guilty of making exaggerated claims about the impacts of the agreement, advocates of the agreement have omitted key details when clarifying its provisions. Moreover, it seems that concerns about the effect of the GATS on regulatory sovereignty over social services are neither invented nor completely implausible, but result from a lack of unambiguous information on which to base a judgment. Indeed, the debate exists because there is room for both sides to interpret the text differently, reaching opposite conclusions regarding what rights and obligations members have assumed under it. As Yeates aptly notes, “the existence of multilateral rules neither guarantees a common understanding of them nor precludes a ‘flexible’ interpretation” (2005, 21).

The shortage of statistical data pertaining to the services trade, the intangible and particular nature of services, ambiguous criteria, the com-

plexity of the service schedules, the non-completion of work on specific disciplines, and the fact that the rules are generally untested all contribute to the lack of an unequivocal conclusion regarding the implications of the agreement for governmental regulation of social services. The current situation is one of legal uncertainty.

The WTO and some government officials stress that article I:3 effectively removes government services from the purview of the agreement. Pierre Pettigrew, former Canadian Minister of International Trade, offered the following comments regarding the GATS: "I would like to stress that we will maintain and preserve the ability of all levels of government to regulate and set policy in areas of importance to Canadians. *We will not negotiate our health, public education or social services*" (emphasis in original) (Commission on the Future of Health Care in Canada 2002, 5). Critics urge, however, that "official assurances carry little long term weight" (Pollock and Price 2003, 1074) and that governments that adopt this interpretation of the agreement, and fail "to notify in their schedules which [public] services are to be specifically excluded from the GATS, may be in for an unwelcome surprise as [they] are consequently deemed to be covered" (Yeates 2005, 12). In other words, members may not know what they are getting themselves into when it comes to social services.

Although members may exploit article I:3 in order to challenge the regulatory measures of another, it should be noted that such action is highly unlikely. Despite the evolution of rules and disciplines in the multilateral trading system, political concerns are not obsolete. Weighing the successful challenge of another member on the basis of the government services blanket exemption against the potential damage to one's trading relationships and reputation, it is unlikely that any member would see any real advantage to pushing action in such a socio-politically charged realm. In addition, considering the effectiveness of the anti-GATS campaign in generating public awareness about the agreement, most members would also be hesitant to be publicly implicated as the complainant in such a case.

IMPLICATIONS AND RECOMMENDATIONS

To a certain degree, the likelihood of members exploiting article I:3 in order to open the door to the application of general obligations and disciplines of the agreement to social services is irrelevant. For, despite this being an unlikely and somewhat extreme prediction, the fact remains that it is not impossible. This and other legitimate, albeit often exaggerated, uncertainties about the effects of the GATS are stirring public unrest, bring the reliability and credibility of the agreement into question.

Concerns regarding the GATS' scope, rules, and disciplines may restrict the services that publicly accountable governments bring to the bargaining table. Moreover, developing countries may decide that they have more to lose than to gain from the GATS, and seek to manage trade in services through regional trade agreements rather than this multilateral legal framework. However, either of these outcomes may be preferred to hastily opening up service sector markets only to find sovereign capacity either unduly restricted or insufficiently developed.

To be fair, it must be acknowledged that the GATS is a nascent development seeking to govern a complex and sensitive area of trade. The WTO itself accedes that "rule making in services [is] a challenging undertaking" (WTO 2003, 140). Considering this, the existence of ambiguities and unfinished work is understandable. Indeed, it is expected. That said, and however much the lexicon of the left may overstate claims about the impacts of the GATS, the WTO should not consequently understate the finer points of the agreement or make sweeping claims about the clear protection that it offers to government services. Surely, obscuring less-flexible aspects of the agreement and denying uncertainties that exist will do more to feed the anti-globalization narrative than openly admitting all aspects of the agreement, even those that may be construed negatively or have uncertain effects.

The fact that the degree of liberalization under the GATS has been limited thus far suggests that WTO members, in addition to civil society, may have concerns about potentially adverse implications of the agreement. This is especially so when it comes to social services, where commitment levels are at their lowest. In order for the GATS to achieve greater success in its goal of progressive liberalization, it must address issues of reliability and credibility which may otherwise limit commitment levels. As mentioned earlier, many members have done more unilaterally to liberalize than is reflected in their commitment schedules.¹⁰ The fact that members are choosing not to embed existing liberalization in the legal framework of the GATS also suggests uncertainties regarding of the potential implications of the agreement.

The following suggestions may assist in increasing both the reliability and credibility of the agreement so that it can have greater success in expanding the amount of trade under its purview.

Efforts must be undertaken to clarify the protection offered to government services under article I:3. However improbable it is that a member would use this provision to challenge the measures of another, the CTS must ensure that commercial and competition are understood broadly by

members of both the WTO and DSBs so that social services remain outside the scope of the GATS. Conversely, the agreement could be amended so that members are able to identify and list sectors to be treated as government services, although this would require consensus on the part of all members and may therefore prove difficult.

While addressing ambiguities in article I:3 would preclude application of the article VI necessity test to government services, it is recommended that the sector-by-sector approach to the application of such tests be retained. Otherwise, a necessity test designed for a sector, such as accounting, could be used to determine acceptable measures for the regulation of other sectors, such as health or education.

In order to ensure that government services are interpreted broadly and in order to reflect the complexity and importance of the provision of public goods, it is further suggested that, where disputes concern commitments involving key social services, the DSB be expanded to include individuals with expertise on the good in question. Critics point out that dispute settlement panels are largely composed of trade experts, at the expense of the inclusion of a broader range of expertise. This situation continues despite the suggestion in the DSU that “panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience” (WTO 1994b, 353). Expanding panel expertise in cases involving public goods may be achieved either through actual representation (i.e., by increasing the number of panelists) or through increased use of *amicus curiae* (“friends of the court”) briefs. Alternatively, in some cases panels could become joint panels, including representatives from other specialized multilateral organizations (Labonte 2003, 4). Expanding panel expertise would likely contribute to a more integrated approach that both reflects trade concerns and respects government priorities.

Considering that the flexibility of the agreement is dependent on governments being “well informed about their own interests and accordingly schedul[ing] sectors and file commitments with the required discretion” (Chanda 2003, 2006), a multi-stakeholder approach should also be adopted when it comes to negotiations aimed at increasing liberalization commitments. This is especially important where developing and less developed members are concerned. Involving a wider array of expertise both in the pre-negotiation stage and in the actual negotiating process will contribute to better-informed decisions. Furthermore, the WTO should make negotiations more transparent, not only to facilitate greater input and participation but also to dispel concerns regarding motivations

underscoring certain agendas. Indeed, the “confidentiality of the GATS request-offer process and its apparent lack of transparency have no doubt contributed to the distrust and misconceptions about this agreement within civil society” (Chanda 2003, 2008). This is ironic considering that the agreement identifies transparency as a central principle.

Even with more multifaceted, transparent bargaining, members, and those in development especially, should take a precautionary approach to these negotiations until “the ‘rules-making’ phase has been sufficiently developed in order to create [greater] certainty and clarity ... on key disciplines” (Footer 2002, 15). Developing countries should proceed slowly and with due process, considering their limited negotiating, administrative, and regulatory capacities, the costs of regulatory development, and the importance of correctly and completely specifying limitations to commitments at the time that they are made.

Finally, as the claim that the GATS has negative consequences for regulatory sovereignty over social services holds some grain of truth, other criticisms of the agreement¹¹ should also be evaluated according to a careful reading of the legal text. Whatever the degree of truth of these claims, the WTO should seek to counteract the negative implications that they have for the integrity of the GATS.

CONCLUSION

Explaining the purpose of the GATS, the WTO notes that it is meant to “[create] a credible and reliable system of international trade rules; [ensure] fair and equitable treatment of all participants ... [stimulate] economic activity through guaranteed policy bindings; and [promote] trade and development through progressive liberalization” (WTO 2005). As this essay has demonstrated, however, the agreement’s international trade rules will only be completely reliable once issues of clarity and interpretation are addressed. Until then, it remains unclear whether the GATS will be able to achieve its said ends. Further, and of great significance to the future of the GATS, its credibility is clearly at risk. In the end, how the agreement is perceived to affect the regulatory sovereignty of members may be as important as its actual impacts in this regard.

NOTES

¹ The agreement defines measure as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form” (WTO 1994a, 302).

² A cornerstone of the GATT, MFN treatment requires extending to all members

any favorable trade concession allocated to a third party.

³ Exemptions must accord with the Annex on Article II Exemptions.

⁴ Formerly the Working Party on Professional Services (WPPS).

⁵ For a discussion of the effects of structural adjustment programs health care provision, please consult Homedes and Ugalde 2005 and CCIC 2002.

⁶ It should be noted, however, that under Article X (Emergency Safeguard Measures), members need only wait one year provided they show cause to the CTS that the modification or withdrawal cannot wait the additional two years stipulated under Article XXI.

⁷ This determination is problematic because a lack of statistical data on services “means that there is no reference base for calculating the amount of injury suffered, based on objective and quantifiable criteria, which is a necessary precondition to sanctioning compensatory adjustment” (Footer 2002, 20).

⁸ While the focus of the discussion that follows is on Article VI, the reader is reminded that the agreement mandates the development of disciplines on government procurement and subsidies, which may also have implications for sovereignty over social services.

⁹ In 1998 the CTS adopted disciplines on domestic regulation for the accountancy sector, developed by the WPPS. The accountancy disciplines have yet to be formally integrated into the framework of the GATS and thus are not, as yet, legally binding.

¹⁰ India, for example, allows full foreign equity participation in environmental services and yet did not schedule it in the Uruguay Round (Chanda 2003).

¹¹ It is also argued that the GATS threatens development, undermines democracy, acts as the Multilateral Agreement on Investment (MAI) in disguise, gives disproportionate power to large corporations, and facilitates the phenomenon of brain-drain.

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