



The General Agreement on Trade in Services: How Will It Impact Workers?

The member countries of the World Trade Organization (WTO) are in the midst of negotiations to expand the General Agreement on Trade in Services (GATS), which was first completed during the Uruguay Round of negotiations in 1994. The next round of negotiations -- the Doha round -- is due to be completed by 2005. GATS negotiators aim to create new rules that will increase the scope of competition between service providers and restrict the power of governments to regulate those service providers. These rules could have serious repercussions for services workers and consumers in both the private and public sector.

GATS rules cover cross-border trade in services, foreign direct investment in services and temporary entry programs for service workers. Though trade in services is still dwarfed by trade in goods in the global economy, trade in services is growing more quickly than trade in goods. The U.S. currently has a surplus in the services trade, which has led the U.S. government to believe that any further liberalization of services trade is inherently in our interest since we have a comparative advantage in this sector. Foreign direct investment in services is also booming; in fact, close to two-thirds of all foreign direct investment in the world is in services. Services are also an increasingly important part of our domestic economy, accounting for more than two-thirds of value added and supporting more than 100 million jobs.

At the same time, the comparatively low wages and benefits of many private sector service sector jobs and efforts to further deregulate, privatize and contract out services have been of great concern to unions and our allies. This paper provides a short explanation of GATS rules and offers examples of their potential impact on domestic laws and regulations. More research and education is needed to fully understand the links between the on-going GATS negotiations and the daily lives of our members in the service industry, and to mobilize our members and allies to make their voices heard in the GATS negotiations.

What Services Are Covered in the GATS?

Trade in services has been very broadly defined to cover four different ways, or "modes" of delivering services from one country to another. Each of the following examples would be a services export from France to the U.S.:

- 1) *Cross-border supply*: A U.S. consumer hires an architect based in France to design a building;
- 2) *Consumption abroad*: A U.S. consumer goes to Paris and hires a French architect to design a building there;
- 3) *Commercial presence*: A French company buys a U.S. architectural company and provides services in New York City; and
- 4) *Movement of natural persons*: A French architect is brought to the U.S. by a U.S. employer and paid to work here.

By covering all of these modes, services rules constrain how we regulate foreign service suppliers that operate both outside and inside the U.S. Thus, these rules affect not only workers in service sectors where cross-border transactions are common -- such as telecommunications, data entry, and shipping -- but also workers who supply services domestically in sectors where there is foreign direct investment or where foreign temporary workers are employed, like education, health care, and utilities.

In addition to different modes of service delivery, these trade agreements also cover different service sectors. Some GATS rules, like rules on most-favored nation treatment and transparency, apply to every kind of service, and a country has to affirmatively exclude a certain sector if it does not want to follow these GATS rules in that area. Other GATS rules, including rules on market access and national treatment, only apply to those service sectors that governments agree to submit to the agreement. This is called the “positive list” approach, because governments agree to be bound in a particular sector by listing that sector in an appendix to the agreement (called that country’s “schedule of commitments”). Defining these sectors and determining how and whether to include more sectors in each country’s schedule of commitments is an important part of the GATS negotiations going on now.

The U.S. has made commitments in the following sectors: business services, communication services, construction and related engineering services, distribution services, education, environmental services, financial services, health and social services, tourism and travel, and transportation. Some sectors have their own rules in special annexes to the GATS, such as the agreement on financial services and the telecommunications agreement. The U.S. has proposed broadening its commitments in existing sectors and adding commitments on energy services to its schedule in the next round of GATS negotiations. Theoretically, almost any economic activity could be classified as a service and added to the GATS, except for sectors that are entirely or partially excluded from the GATS, such as air transport and maritime services.

Many GATS supporters claim that public services are excluded from the GATS as well, but the text of the GATS shows that this is only partially true. Only those public services that are provided in the exercise of government authority, which means those services not supplied on a commercial basis and not supplied in competition with one or more service suppliers, are truly exempt from the GATS. This means that publicly provided services that do compete with private providers or are provided on a commercial basis -- like education, health care and express delivery services in the U.S. -- are automatically subject to the most-favored nation and transparency rules (unless a country affirmatively creates an exception for these services) and can also be covered by all of the other GATS rules if a government decides to list them in its schedule of commitments. If GATS rules are applied to public services in the U.S., it could increase pressure to privatize, contract out and deregulate these services. If procurement regulations are also made subject to GATS rules (for now they are exempt), it could threaten community- and worker-friendly contracting and procurement policies like living wage ordinances, affirmative action preferences, and certain costing and bidding requirements.

How Will GATS Rules Affect Workers?

Right now, the most important GATS rules in operation are its rules on most-favored nation treatment, national treatment and market access. New rules may be created in the current negotiations, specifically on domestic regulation. In addition, the general exception for government procurement measures currently written into the GATS may be modified during the current negotiations.¹ Each rule is briefly described below, with examples of domestic laws it may conflict with.

Most-favored nation treatment requires countries to accord services from one foreign country the best of the treatment accorded to any other foreign country. We do not have many laws regulating services trade that discriminate between different countries, and the U.S. filed exceptions for the discriminatory laws that we do maintain in this area. For example, U.S. law only allows crews to

¹ Governments are also negotiating over whether or not to create new rules on subsidies and safeguards in the GATS, though subsidies are already covered by GATS rules and the U.S. does not yet feel that rules on safeguard measures are needed.

perform longshore work when they are from vessels owned and flagged by countries that provide reciprocal treatment. This is illegal under GATS rules because it discriminates against those countries that do not provide us with reciprocal treatment, so the U.S. reserved this provision from GATS coverage. The most-favored nation rule could also become important for unions if it were applied to government procurement regulations, which is addressed in more detail below.

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, foreign service suppliers already receive the same formal treatment as domestic service suppliers, with some exceptions that the U.S. reserved in our 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 if 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. Though the U.S. appears to have filed reservations for most of our laws which formally deny equal treatment to foreign service providers, there is a danger that the national treatment rule could be used to challenge many of our federal, state or local measures that could 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. In fact, this rule is 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 the GATS. In resolving such a dispute, the U.S. would have to bear the burden in proving to the WTO that the English requirement for nurses is necessary to protect human life or health. This exception has been interpreted very narrowly by the WTO in the past, and is much stricter than the domestic balancing tests our own courts use to review the constitutionality of discriminatory laws and regulations.

The national treatment rule could have a devastating impact on public employees if it applies to government subsidies. Currently, government subsidies are a “government measure” subject to GATS rules. The U.S. filed exceptions for a number of government support programs that violate the GATS national treatment rule, such as differential tax treatment for foreign companies, the insurance available from the Overseas Private Investment Corporation, preferences for socially or economically disadvantaged groups and small businesses, research and development grants, educational scholarships and grants and National Endowment for the Arts grants. If the U.S. expands GATS coverage to more sectors without also expanding exceptions for subsidies, important government programs at the federal, state and local level could be at risk.

Many public services which are subject to GATS coverage (because they are provided on a commercial basis or in competition with one or more private providers) depend on public support either in the direct form of financial assistance or in other ways. This assistance is designed to create an advantage for public providers and thus inherently disadvantages private competitors, including foreign private competitors. Such measures could thus be considered violations of national treatment, and could be challenged at the WTO. In fact, UPS has already challenged Canada’s maintenance of a public postal service as an illegal, trade-distorting subsidy under NAFTA. If the UPS case succeeds, it would set a dangerous precedent that international trade rules on services and subsidies can be used to undermine the provision of public services.

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 service suppliers in order to violate the GATS -- they simply have to restrict the ability of these suppliers to do business in our market. For example, in the financial services area, the U.S. filed an exception for a non-discriminatory 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 the GATS.

The market access rule could lock in privatizations and make them impossible to reverse. Once a sector is opened to private competition, and unlimited market access in that sector is bound under the GATS, it will be impossible to limit the number of providers permitted in that sector. The market access rule could also invalidate some restrictions on access to local markets such as zoning laws or blue laws, which limit the number, size, or hours of operation of certain kinds of businesses in local communities. The market access rule could also restrict the ability of governments to exercise their licensing authority, since it gives foreign service providers a right to penetrate domestic markets.

Market access rules are particularly important to workers in “mode 4” of services trade under the GATS -- the temporary entry of services professionals. Almost all regulations on the employment of foreign temporary workers are, by their very definition, barriers to market access. The United States’ current GATS commitment on mode 4 binds our existing H-1B program, but many countries have asked for additional commitments in this area in order to expand access to the U.S. labor market for foreign workers and to reduce regulations on employers taking advantage of these foreign workers.

The U.S. services industry, along with India, has proposed creating a GATS Visa to expand access to our market for temporary workers. Under some formulations, the GATS Visa would allow workers from any WTO country to work temporarily in any other WTO country on the basis of an employment contract governed by the law of the worker’s home country rather than the law where the employment contact is performed. This would mean that a nurse from India could work in the U.S. under an employment contract that specifies that she will be paid \$2 an hour, must work mandatory overtime, can be fired for getting pregnant, and can be fired for union organizing. Under the GATS Visa proposal, such a contract would be valid as long as it complies with India’s labor laws, even though it would clearly violate U.S. law.

Even if the GATS Visa idea does not move forward, the U.S. has also been asked to open up our temporary entry system in other ways under the GATS, mostly by chipping away at our already crumbling H-1B system. The proposals for expanding market access in this area mirror provisions in free trade agreements with Chile and Singapore, and include:

- Limiting fees to the cost of processing a visa application, thus prohibiting the \$1,000 fee we now charge for H-1B applications to cover domestic worker training;
- Expanding the professional categories covered by H-1B to include professions in which we have no domestic labor shortage;
- Limiting our ability to require an LCA by agreeing that no “economic needs tests” or “prior approval procedures” can be required for professional workers, thus prohibiting us from ever strengthening the LCA to make it enforceable and possibly requiring us to even weaken or do away with the LCA;
- Lengthening the amount of time workers can stay on a temporary visa, or making the visa infinitely renewable;
- Increasing the numerical cap on H-1B workers; and
- Allowing workers to come in on a temporary visa even if they are not directly employed in the U.S., as long as they are engaged in a professional activity, even if it is through a temp agency or other contract arrangement.

Domestic regulations disciplines would limit how governments can use licensing requirements, technical standards, or qualification requirements to regulate foreign service providers. 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 non-binding language already in the GATS that would require that all domestic regulations of the service sector be based on objective and transparent criteria and be no more burdensome than necessary to ensure the quality of the service.

If current negotiations make these rules binding, a number of U.S. laws would be at risk. Even if the U.S. law is applied equally and fairly to both domestic and foreign service suppliers, foreign suppliers trying to sell services from abroad or investing to provide services domestically would have an extra legal tool to challenge the validity of these laws through their home governments at the WTO. Whether the disputed law is “necessary” to ensure service quality and is based on “objective criteria” will be decided by dispute resolution panels made up of trade lawyers, with no expertise or mandate to weigh the social, environmental, and equity consequences of their decisions.

Domestic regulations designed to protect worker rights, to protect public health and safety, to protect consumers and provide universal access to services, and to preserve the environment could all be at risk. Laws that limit the number or size of developments along sensitive coastal areas, laws that condition certification or licensing on the posting of a bond or purchase of insurance to protect consumers against fraud or malpractice, and laws that prohibit businesses from engaging in hazardous activities in order to protect employee health and safety are not designed simply to ensure the quality of the service being provided: These laws impose burdens on private companies in order to serve social ends. Thus they could be challenged because they are not “necessary” to ensure the quality of the service being provided. In addition, licensing requirements for professionals such as nurses and teachers, certification or accreditation requirements for corporate service providers and general technical requirements may be challenged if they are not based solely on “objective” criteria, such as proven science or commercial needs.

Procurement measures are currently exempt from the GATS, which means that the binding rules on most-favored nation treatment, national treatment and market access do not apply to the government purchase of services for its own use.² Whether this general exception should be preserved or modified, and whether any new binding rules on domestic regulation would apply to government procurement measures, are questions now up for negotiation. The U.S. wants more countries to open up their government procurement processes, but appears to feel that more progress could be made by getting governments to sign on to another WTO treaty, the plurilateral Agreement on Government Procurement, rather than through GATS negotiations. The EU and U.S. are also pressing for new WTO rules on transparency in government procurement.

If the current exception for procurement were abandoned or modified, it would expose many procurement measures that are important to workers and their allies to challenge under the GATS. In fact, many of these rules are already under threat thanks to the WTO’s Agreement on Government Procurement and NAFTA. Bans on procurement from countries that violate human rights, such as the anti-apartheid ordinances of the 1980s and the Massachusetts Burma law, violate the rule on most-favored nation treatment. In addition, Buy-American and Buy-Local laws violate the national treatment rule, as do bidding and costing requirements that favor in-house contracts (since foreign bidders are inherently not in-house).

² Laws and regulations that govern the government purchase of services with a view to their eventual commercial resale or their use in the supply of services for commercial sale are subject to the binding rules of GATS. Only rules governing procurement for “governmental purposes” are currently exempt from the GATS.

Disciplines on domestic regulations, when applied to procurement measures, bar the consideration of any social, environmental, or worker rights criteria in government purchasing decisions. For example, in 1999 the U.S. government decided not to buy goods made by forced child labor (see Executive Order no. 13126, June 12, 1999). Even though this policy is non-discriminatory on its face, the order creating the policy states that it does not apply to products from any of the countries that signed the Agreement on Government Procurement or NAFTA (see Section 5(b)(1) of the order). The administration realized that if the procurement rule resulted in even one company from one country that is a party to these treaties losing a U.S. procurement contract, that company could argue that the rule violated the treaty because restricting the use of forced child labor is not “necessary” for product quality.

The following are some examples of U.S. federal, state and local procurement rules that could be challenged under these rules:

- Laws that provide aid to employees and unions in bidding for public contracts and laws that require favorable consideration of such in-house bids;
- Project labor agreements that require fair treatment of workers and their unions in order to avoid labor disputes in public works projects;
- Costing requirements that require private bidders to provide substantial savings over public providers in order to get a public contract but do not allow savings due to lower wages or benefits to be factored in;
- Rules that prohibit contractors that have violated environmental, labor or other laws from bidding on public contracts;
- Living wage laws and laws that bar the procurement of goods made under sweatshop conditions;
- Purchasing preferences for women, minorities, veterans and the handicapped, and preferences for goods and services produced in disadvantaged local communities;
- Laws that prohibit the contracting out of a service where the likely outcome would be the creation of a private monopoly; and
- Regulations that favor the procurement of goods that contain a certain percentage of recycled material or have other environmental value.

While international trade disciplines on procurement rules will not necessarily require governments to privatize state enterprises and public services, they will govern how states involve the private sector in these operations by barring any requirements that favor domestic suppliers or create an unnecessary trade barrier. Governments’ ability to integrate effective protections for consumers, workers and the environment into their policies for contracting with private entities will be seriously limited by these rules.

Conclusion

Ongoing GATS negotiations could have wide implications for workers, whether they are public employees, provide services that can be easily traded across borders or work in domestic sectors where foreign ownership or the use of temporary workers from overseas is common. GATS rules on most-favored nation treatment, national treatment and market access, and the commitments the U.S. has made to those rules, have so far not had a deep impact on the lives of U.S. service sector workers. The ongoing GATS negotiations may change all that in three ways: The U.S. may make additional commitments (or reduce our number of reservations) to existing GATS rules on most-favored nation treatment, national treatment, and market access; new GATS rules may be created

that discipline how we use domestic regulations in the service sector; and the current exception for government procurement measures may be eroded. Before GATS negotiations continue, a thorough public assessment of the impact GATS rules will have on workers, labor rights, services regulation and public services is needed.

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