



RESEARCH NOTE

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Is the GATS a Threat to Public Services?

Introduction

The General Agreement on Trade in Services or GATS is increasingly being perceived as a threat to public services, such as health and education. At the heart of the debate about the GATS is the extent of the 'government authority exclusion' in the GATS agreement. The World Trade Organisation (WTO) services negotiations, which began in early 2000, have intensified the public debate as to how far the liberalisation of trade in services should go. This has led to a public perception that the GATS will encourage the further privatisation and deregulation of the services sector, and lead to the loss of basic public services.

The GATS came into effect on 1 January 1995 and covers all internationally traded services. As a founding signatory to the GATS, Australia has made certain commitments to liberalise trade in services. Its priority in the services negotiations has been to reduce barriers facing Australian services exporters in overseas markets.

This Research Note examines the specific commitments Australia has already made under the GATS and answers the question whether the GATS really does pose a threat to public services or not.

Overview of the GATS

Specifically, the GATS has three major components: the overall framework Agreement, a Schedule

of each Member's specific commitments and special rules for some services as contained in eight Annexes.¹

All WTO Members, some 144 countries, are at the same time Members of the GATS. Each WTO Member is required to have a Schedule of specific commitments which identifies the services sector, subsectors and activities subject to Market Access and National Treatment obligations.²

General obligations and specific commitments

The Most Favoured Nation (MFN) principle underlies each Member's general obligations under the GATS. It means if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO Members.

Each Member must have a national schedule of specific commitments, but there is no rule as to how extensive this should be. Once Members make a bound commitment to liberalise a service sector they become subject to additional specific obligations. The most important of these are Market Access and National Treatment.

Market Access commitments are guarantees that foreign service providers can enter the domestic market under the conditions specified in the Schedule. The

granting of market access is subject to one or more limitations contained in Article XVI(2). Limitations may be imposed on the number of service providers, service operations or employees in a sector, the use of foreign capital, or the value of transactions.

National Treatment requires that, subject to the conditions listed in the Schedule, foreign service providers must be treated no less favourably than domestic providers.

In scheduling commitments, Members are free to adjust the extent of their commitments, so as to avoid obligations that they consider too demanding.

GATS and public services

In Australia, health and community care accounts for six per cent of Gross Domestic Product, and education slightly less. Many of these services have a strong public policy dimension to them. Importantly, therefore, the GATS excludes from its coverage services 'supplied in the exercise of governmental authority'. The GATS defines these services as any service not provided on a commercial basis or in competition with other suppliers.³ Since they do not fall under the Agreement, these services are not covered by the WTO negotiations, and the specific commitments on Market Access and National Treatment do not apply to them.

In Australia, as in most WTO countries, public services are rarely delivered exclusively by governments. Instead the provision of public services is normally supplied through a mix of public and private providers and often includes commercial aspects. But the concern is that vital public services might fall outside the GATS' protective exclusion.

A Canadian report issued by the Ministry of Employment and Investment of British Columbia suggests that the 'governmental authority exclusion' is defined very narrowly. Because of the wording of the exclusion 'only a small sub-set of services—those that are provided by completely non-commercial, absolute monopolies—appear to be protected by this exclusion'.⁴ The GATS would appear to bring many public services and their regulation within the scope of WTO authority.

Notwithstanding that services provided on a commercial or competitive basis are covered by the GATS, there is nothing in the Agreement that requires those services, which may include a mix of service providers, to be privatised or deregulated. In respect of public services, it is perfectly legitimate for any Member to maintain the service as

a public or private monopoly, or to open the service to competing suppliers but restrict access to national companies only, or to open the service to domestic and foreign suppliers but to make no GATS commitments on it. These are all legitimate options for any Member country to pursue.

Record to date

As of February 2002, fewer than 50 WTO Members have made specific commitments to open health or education services to foreign suppliers. In terms of opening health services, Australia has made no commitments other than allowing a very limited access for foreign podiatrists and chiropractors. With regard to education, Australia's commitments are limited to private tertiary and secondary schooling, and English language services.⁵ But more importantly, the 14 November 2001 Doha Ministerial Declaration reaffirmed the right of WTO Members to regulate their domestic service sectors.⁶ To date, no WTO Member has brought a challenge under the dispute settlement process to any measure of domestic services regulation.

Conclusion

The protection of public health is explicitly recognised in the GATS

as a policy of overriding importance. Article XIV of the GATS contains a General Exception stating that 'nothing in this Agreement shall be construed to protect human, animal or plant life or health'. The same applies to public safety. This means that a Member would be able to breach any provision in the GATS, including its own Market Access commitments to protect public health or safety. Consequently many basic public services will remain carefully regulated in the public interest.

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1. See http://www.wto.org/english/docs_e/legal_e/26-gats.pdf for the text of the Agreement.
2. See http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm for the Schedule of commitments by each WTO Member, including Australia.
3. Article I:3(c). See also *GATS - Fact and Fiction*, WTO. http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm
4. *GATS and Public Service Systems: The GATS 'governmental authority exclusion'*, Discussion Paper, 2 April 2001.
5. *Australia and the WTO Negotiations On Trade In Services*, Department of Foreign Affairs and Trade, 2000.
6. Doha 4th Ministerial Declaration. See [Ministerial Declaration](#).