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**THE GENERAL AGREEMENT
ON TRADE IN SERVICES**

A Primer

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This paper, produced by Bob Dale, the National Union's Chief Economist, is a summary of a far longer research document produced by Scott Sinclair of the Canadian Centre for Policy Alternatives for the Trade and Investment Policy Working Group. A wide range of Canadian non-governmental organizations, including the National Union, sit on that group whose purpose is to monitor trade policy and investment issues and engage the Canadian government through ongoing consultations and public debate.

TABLE OF CONTENTS

INTRODUCTION.....	1
WHAT IS THE GATS?	1
SCRUTINIZING/CHALLENGING GOVERNMENT "MEASURES"	1
ALL SERVICE SECTORS ARE COVERED.....	2
WHAT ARE "SERVICES"?	3
GATS RULINGS	3
EXPANDING THE GATS.....	5
CONCLUSION	6
ANNEX: GATS TERMINOLOGY	8

Introduction

The World Trade Organization (WTO) services agreement—the General Agreement on Trade in Services (the GATS)—is the next vehicle of choice for advocates of global deregulation, commercialization, privatization, and restructuring of government generally. International negotiations to expand the GATS have now begun, and their aims are broad, even sweeping, in range and depth. As yet virtually unknown to the public, the negotiations have the potential to affect our lives in profound ways, through establishing binding, global and irreversible rules relating to the provision of services.

Corporate service providers, business consultants, academics, the WTO, the World Bank, government officials, and others have been actively involved in setting up the framework and agenda for these negotiations for some time. The Canadian government has been described as "one of the strongest and most single-minded advocates for expanding the GATS".

What is the GATS?

The GATS is one of the agreements adopted in 1994 as part of the Uruguay Round of the newly established WTO. It is a multilateral agreement restricting government actions affecting services through legally enforceable constraints backed up by trade sanctions. The ultimate intent of the GATS is to remove *all* barriers to trade in services—in short, to liberalize everything, some day, through ongoing negotiations.

The GATS now applies, without exception, to every WTO member. But much of the heavy lifting, the extensive rolling back of existing governmental measures affecting services and of broad authority to regulate services, was left for the future. The objective of the current negotiations is to augment the original GATS framework, and transform it into an all-inclusive commercial agreement.

Scrutinizing/challenging government "measures"

Under the GATS, any government "measure" that, even incidentally or indirectly, affects services is subject to scrutiny and subject to challenge. This includes measures taken by state, provincial and local governments. It also catches actions by state enterprises, monopolies, and non-governmental organizations when they are acting on the basis of authority delegated to them by government.

Under the GATS, a "measure" can take any form: a law, regulation, administrative decision, administrative guideline, even an unwritten practice can qualify. The types of measures covered include, but are not limited to: subsidies and grants; nationality requirements; residency requirements; licensing standards and qualifications; registration agreements; authorization requirements; performance measurements; technology transfer provisions; local content provisions; economic quotas or needs tests; licensing or training requirements;

restrictions on ownership of property or land; limitations on access to markets; and most tax measures.

Under this context, the key question Canadians should be asking is, what role would there be for public services if this framework were ever transformed into the "ideal" envisaged by its supporters?

All service sectors are covered

The GATS is comprehensive in another sense. It covers *all* service sectors, and *every* possible way of providing a service. There is one limited exception: where a service is "provided in the exercise of governmental authority". This means that the service is supplied neither on a commercial basis nor in competition with one or more service providers. Because most public health, education and social service systems involve a mix of public and private funding (and public, non-profit, and commercial delivery) they do *not* benefit from this exclusion.

It is also important to recognize that even where member governments have made no specific commitments to liberalize particular service sectors, GATS rules may still apply through what are termed "horizontal rules". These rules, such as most-favoured nation and transparency (which are discussed in the Annex), apply across *all* service sectors.

The GATS distinguishes between four modes of supplying services:

- Cross-border supply is defined to cover services flows from the territory of one member country into the territory of another member (e.g. banking or architectural services transmitted via telecommunications or mail);
- Consumption abroad refers to situations where a service consumer or his/her property moves into another member's territory to obtain a service (e.g. tourism, ship repair or aircraft maintenance);
- Commercial presence implies that a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service (e.g. insurance companies or hotel chains); and
- Presence of natural persons consists of persons of one member country entering the territory of another member country to supply a service (e.g. accountants, doctors or teachers).

The breadth of these categories explains why the WTO has proclaimed the GATS as "the first multilateral agreement on investment, since it covers not just cross-border trade but every possible means of supplying a service, including the right to set up a commercial presence in the export market".

Although Canadian officials assure us that certain sectors of our economy (like health care or social services) are excluded from the GATS because Canada has not made—and will not make—any specific commitments to liberalize in those sectors (and/or has scheduled formal exemptions), the above paragraphs

demonstrate that this may not really be the case. There are already several examples of situations where Canada felt it had provided ample protection in relation to particular sectors, only to have those exemptions knocked down under challenges from other countries.

What are "services"?

Some people think that the application of GATS to services is limited to certain sectors of the economy. Not true. According to Scott Sinclair of the CCPA, "a service is a product of human activity, aimed at satisfying a human need, which does not constitute a tangible commodity". This definition is broad, covering virtually all aspects of our lives. While it is difficult to grasp the full range of services that exist in any complex society, a small part of a list compiled by the United Nations in 1991 can help provide us with an overview.

That list reads like a catalogue of occupations and human needs. Among the thousands of listings are the following examples: retail sales of dairy products and eggs; repair of household goods; hotel services; children's holiday camp services; air traffic control services; travel agency services; postal services for letters and parcels; local telephone services; motor vehicle insurance services; pension fund management services; real estate services; computer services; medical research; legal and taxation services; urban planning services; patents, trademarks and copyrights; police and fire protection services; hospital services; pre-school education services; secondary education services; higher education; adult education; etc.

This list goes on and on. While not every one of these services would be fully covered by the GATS, this list shows how a broad agreement which, in principle, covers all service sectors, could potentially reach into virtually all aspects of society. In addition, such international classifications make absolutely no distinction between public or non-profit services, on the one hand, and services provided on a for-profit basis, on the other.

GATS rulings

Another indication of the potential impact of the GATS comes from the body of rulings that have come out of trade panels. A common thread is that they expand the reach and force of the GATS, and its commercializing and deregulatory impact. Taken together, these rulings have confirmed the following:

- *The GATS applies to any government measure, no matter what its aim—* environmental protection, consumer protection, enforcing labour standards, promoting fair competition, ensuring universal service, anything else;
- *The GATS not only prohibits actual discrimination, it also prohibits de facto discrimination.* Under the GATS, member countries must extend to other members of the agreement the most favourable treatment allowed to any other member country. This is called "most favoured nation" treatment.

Under a similar set of rules, called the "national treatment" provisions countries are prohibited from treating domestic services and service suppliers more favourably than like services and suppliers from other member countries, unless this treatment is registered in a special schedule.

Under GATS rulings, even if government measures *seem* to be neutral, non-discriminatory, and in non-violation of these rules, they have been struck down when panels felt they were *capable* of violating such measures—even where no violation had actually taken place.

- *The mode of service supply is irrelevant in determining whether services or suppliers are alike.* Under the GATS non-discrimination rules, "like" things must be compared to ensure that the "most-favoured nation" and "national treatment" provisions, discussed above, are being complied with.

Decisions, under GATS panels, seem to indicate that the *way* a service is supplied may be irrelevant in such determinations of "likeness". A service consumed by a citizen abroad is the same, for regulatory purposes, as a service consumed locally. A service provided by management dispatched from a foreign country is the same, for regulatory purposes, as one consumed locally. A service provided over the phone, or Internet, is the same, for regulatory purposes, as one provided through a locally established subsidiary.

While the full extent of this principle is still to be clarified, the policy implications may be huge. For example, under the Autopact, vehicle manufacturers, no matter what their nationality, are eligible for tariff protections if they meet minimum Canadian "value-added" requirements. Canadian "value-added", in this case, includes such things as purchases from Canadian-based suppliers of services, such as computer or banking services. In a challenge under the Autopact, it was successfully argued that this discriminated against suppliers who do not have a presence in Canada, and who cannot purchase such services from organizations in Canada. In other words, services that are listed under the GATS cannot be counted under the value-added requirements of the Autopact.

This interpretation of the GATS would seem to demolish the feasibility of government policies designed to promote local or national value-added, except in instances where Canada had made no specific commitments to liberalize services under the GATS.

This could raise several key questions about the likeness of service providers under the GATS. Are for-profit and not-for-profit service providers "like" providers? Is a community-based, private social service provider "like" a foreign-based, commercial social service provider? Is a cataract operation performed in a private Houston hospital "like" one performed in a public hospital in Ottawa? Are private clinics and public hospitals "like" service providers? Is a university course provided over the Internet like a course provided at a bricks-and-mortar university? Are subsidies provided to small, local-based businesses discriminatory to huge, multinational enterprises?

The answers given to such questions by WTO panels and appeal bodies could determine whether public funding, accreditation, licensing, and similar types of "advantages" now reserved for the local and not-for-profit sectors must be extended to all manner of foreign commercial service providers.

- *The WTO restrictions on goods and services are overlapping:* Even if a measure is consistent with global rules on goods (under the General Agreement on Tariffs and Trade—GATT), it could be found to violate the rules on services (under GATS). The opposite is also the case. This interpretation therefore expands the grounds available to challenge a particular measure, and enables a panel to overturn a measure related to services if part of it may affect trade in goods, or vice-versa.
- *Exemptions and limitations to the GATS will be applied as narrowly as possible.*

WTO agreements are often promoted as providing a way of adding certainty to the international commercial environment. However, as can be seen from the above (and the cases on which they are based), the aggressive interpretation of the broadly worded GATS commitments creates considerable uncertainty, and costs, for governments, policy makers, and citizens. It is far from clear what government measures are permissible under the existing GATS agreement, let alone what might be permissible in the future. Anything, and everything, might be open to liberalization, whether or not an actual problem has occurred.

Viewed in this light, it seems reckless for governments to expand the GATS before the full implications of existing agreements and current coverage have been assessed.

Expanding the GATS

Instead of doing this, WTO member governments, including Canada's, have now begun work towards expanding the GATS. This work can be grouped into three main areas:

1. Increasing specific commitments in national schedules

Under the GATS, countries have formally committed themselves to expanding the coverage of the agreement. The heart of the GATS negotiations will be the drive to increase the number and extent of specific commitments to liberalization that countries make under the GATS; to remove existing limitations on liberalization within already committed sectors, and to bind more new and existing commitments so that future governments cannot reverse them.

Aiding in this quest will be some very technical work aimed at devising commonly accepted classification systems for services. These systems will be used in scoping current commitments, structuring further negotiations, and reaching common understandings about exactly what is meant when certain things are agreed to.

A similar process relates to something called "horizontal negotiating modalities". Broadly speaking, these refer to the negotiation of broad-based rules that would then apply to every country, every sector, and/or every mode of supply. For example, countries might agree that they will commit to a minimum level of liberalization in every sector of their respective economies; or that certain GATS principles will be applied in each one of those sectors (for example, the elimination of performance requirements). Such broad-based rules obviously stack the deck in favour of greater liberalization.

2. Restricting domestic regulation

Article VI:4 of the GATS requires the Council for Trade in Services, or any bodies it may establish, to develop 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".

A Working Group is now in place to deal with this issue in some detail, with the view to apply them to all service sectors. If these disciplines are ever agreed to, it would greatly expand the authority of the WTO to oversee, and second-guess, a broad range of non-discriminatory regulations. This could include a regulation that applies to things like professional licensing and accreditation, university accreditation, educational requirements, certification of competency, and the like. It could also apply to such things as facilities licensing for clinics, hospitals, and laboratories, waste disposal licenses, and many other matters.

If this came into being, governments would have to justify such measures as necessary to achieve legitimate policy objectives related strictly to ensuring the quality of the service. Any measure that potentially affected competition among service providers in any sector could be open to challenge, based on the fact that it was more burdensome than necessary to achieve the necessary quality. WTO panels would thereby have the authority to second-guess the trade-offs and compromises that occur in any democratic system, when these and other regulations are imposed.

3. Developing new GATS rules and regulations

This will deal with new rules on such things as subsidies, safeguards, and procurement.

Conclusion

It should be evident that the GATS is an extremely dangerous agreement, being used by the corporate community and its supporters to extend, and cement, the neo-conservative economic agenda that has taken hold around the world.

Among other things:

- The GATS exposes virtually every 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 provider over others, is exposed to challenge.
- The GATS absolutely prohibits certain types of public policies, diminishing democratic authority even when its exercise is completely non-discriminatory.
- The GATS is designed to enable transnational corporations, in co-operation with foreign governments, to attack general, non-discriminatory public interest regulations as unnecessary, or burdensome.
- The GATS is inimical to public services, treating them, at best, as a missed commercial opportunity 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.

Despite all of these concerns, GATS negotiators are now working in secrecy, further shrouded by the technical terminology and arcane workings of the GATS, and in close contact with international corporate lobbyists, to put an extended version of GATS in place in the near future.

The National Union has joined together with a wide range of other groups, under the umbrella of the Trade and Investment Working Group, to attempt to disseminate information about these issues and carry our message to as many people as possible. While the obstacles may seem formidable, remember that it was through a similar process that we were able to defeat the Multinational Agreement on Investment and disrupt the Seattle WTO Ministerial itself.

We may also want to work through friendly governments, such as the one in Manitoba, to formally convey our concerns about the GATS process. Provincial governments all receive a wide range of GATS documents and analyses from the federal government, and are encouraged to use them in raising their concerns with Canadian officials. Such formal pressures, at the political level, may indeed be key to addressing the types of issues described in this paper.

Annex: GATS terminology

- **Most favoured nation (MFN):** This is one of the most important GATS precepts, and requires member countries to extend to other members of the agreement the most favourable treatment afforded to any other country. While exceptions are possible under certain conditions, all exemptions are subject to review; and should, in principle, not last longer than 10 years.
- **National treatment:** Similar in intent to MFN, this means that there should be no discrimination that would favour domestic providers of a service.
- **Transparency:** The GATS requires each member to make public all service measures of general application, or other international agreements to which it belongs, that relate to the GATS or affect its operations. Members must also notify the Council for Trade in Services of new or changed laws, regulations or administrative guidelines that affect trade in services covered by their specific commitments under the agreement.
- **Restrictions on domestic regulation:** Member countries have agreed to certain commitments that are intended to apply without exception to all sectors. They have also agreed to establish domestic tribunals to enable affected service suppliers to appeal directly against government "administrative decisions affecting trade in services". Once this provision is fully implemented, foreign investors and service providers will have the ability to enforce GATS rights through legally binding domestic tribunals. Members have also agreed to "develop any necessary disciplines...with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services". Government measures are to be constrained by these measures to ensure that they are "not more burdensome than necessary to ensure the quality of the service" and are based "on objective and transparent criteria such as the ability to supply the service in question".
- **Market access:** Members are prevented from adopting or maintaining regulations that place quantitative restrictions on services, that limit foreign equity participation, or that restrict the types of legal entity of service supplier in the sectors specified by the member. Thus, within specified sectors, no monopoly, numerical quota, economic needs test, or other limitations on the number of service suppliers, transactions or operations is allowed, and no prohibition against foreign direct investment or commercial service delivery is allowed, unless that member has specifically exempted such regulations in its country schedule.

These are all obviously very powerful principles.