

June 30, 2005

USTR Response to IGPAC Memorandum on the Updated U.S. GATS Submission

USTR wishes to thank the IGPAC committee for its ongoing input in the trade policy process and for comments submitted on the updated U.S. GATS Submission (May 25, 2005). We appreciate IGPAC's view that "state and local governments generally support objectives to liberalize trade in services industries as a means of increasing market access for US firms and for reaching trade development objectives. IGPAC members are hopeful that USTR leadership in reenergizing the Doha Round will successfully advance multilateral efforts to improve market access to services sectors under the General Agreement on Trade in Services (GATS)."

IGPAC notes in the introductory paragraph that "While endeavoring to avoid discriminatory trade practices, it is essential for international agreements such as the GATS to respect rational, nondiscriminatory regulation at the state and local level, designed to protect the public interest. The independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system." *USTR would like to highlight that we fully concur with the IGPAC in this view, and wish to emphasize that the GATS clearly respects the sovereign right of WTO members to regulate services and to introduce new regulations, as detailed below. Domestic laws, regulations, qualification requirements and other standards that apply to domestic service suppliers will also apply to foreign service suppliers, so federal, state, and local governments fully preserve their right to regulate.*

We appreciate the fact that IGPAC members regularly receive inquiries concerning the GATS and, as responsible public officials, have an obligation to ensure that the information they provide to others is factual and objective. USTR is always available to provide the facts concerning all of our trade agreements, and welcomes continued opportunities for dialogue with IGPAC, such as this one, on matters of importance to states. In keeping with this objective, we would like to respond to some of the comments provided by the IGPAC concerning the updated U.S. submission to the WTO GATS negotiations, and in particular, to correct some of the misunderstandings and inaccuracies in the memo.

In response to the request of the Committee, IGPAC may distribute its Memorandum publicly, but in that event we ask that you circulate USTR's response along with it, so that misunderstandings in the memo are clarified for the reader.

General comments

In the introduction to the Memorandum, IGPAC indicates that issues of concern include: "government-provided services (e.g. energy, water, health, education, or public safety); potential privatization of such services; state/local regulation of monopolies; state/local regulation of professional services and other services sectors; government procurement; subsidies, and such sensitive areas of regulation as energy, water, zoning and land use controls."

As we have emphasized, *the GATS explicitly recognizes the right of governments to regulate services and to introduce new regulations at all levels of government.* In the preamble, GATS recognizes "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives..." Nothing in the GATS impairs the ability of any regulatory authority to establish, maintain, and fully enforce domestic laws protecting consumers, health, safety, and the environment. The same applies to laws and regulations concerning

zoning and land use, as well as the supply to the general public of essential services like electricity and water.

Similarly, *the GATS in no way requires privatization or deregulation of any sector or public service*. The GATS expressly recognizes the authority of national governments to supply services, to maintain public monopolies in any service sector they designate, and even to create new monopolies. Therefore, the GATS does not inhibit the freedom of state and local governments to regulate services activities and to provide services to their citizens.

Consultation Period:

Prior to making these proposals, USTR staff consulted extensively over a period of many months with relevant federal and state regulatory authorities and other interested parties in formulating the proposal. Given the small number of services sectors involved and the fact that the submission did not request any changes to state or federal law, we believe that three weeks is a reasonable period of time.

Consultation in WTO dispute settlement:

IGPAC states that the U.S. should provide “prompt notification to state and local officials when their regulation or law is being challenged, seek their input and assistance at all stages of the process, and allow impacted state and local governments to participate fully in the hearing and deliberation process.” The Uruguay Round Agreements Act expressly requires the U.S. to consult with states in WTO dispute settlement where a state law is at issue, and indeed, it is USTR’s policy and practice that if WTO dispute settlement proceedings challenge particular state or local laws and regulations, we promptly notify the state. We work to share information with state officials and involve them at every stage in developing the U.S. position and share information. That is the best way for us to succeed in achieving our objective of defending the measure at issue.

IGPAC also urges transparency in the WTO dispute resolution process. The United States has been in the forefront in seeking more openness to WTO dispute settlement proceedings, allowing amicus submissions, and generally making as much information as possible available to the public. We post our submissions on the USTR website and seek public comment in every panel proceeding.

Consultation process in the WTO Gambling dispute:

USTR led a full and open process of consultations with states throughout the course of the WTO gambling dispute. A working group led by our General Counsel’s office was open to participation by state officials and state gambling authorities to assist in the preparation of the case. The United States worked closely with state authorities throughout the WTO dispute to mount a vigorous, successful defense. The Appellate Body threw out all of Antigua’s challenges to U.S. state laws as we requested. The dispute ended with no adverse finding against any state law.

The Appellate Body found that the United States made a market access commitment under the GATS for gambling services. However, the more important point is its affirmation that this commitment does not prevent the enforcement of laws to protect the public from organized crime and other dangers associated with Internet gambling. State legislators and state authorities can and should continue their efforts to provide strong regulation of gambling and to protect the public from illegal gambling. The WTO report does not recommend or require any change in state gambling laws or limit in any way state regulatory authority. We do not foresee any possible circumstance in which the federal

government would seek to compel a state to authorize gambling as a result of a WTO dispute settlement decision

Since the Appellate Body rejected Antigua's challenge to state measures, the report provides no basis for reaching conclusions about how future hypothetical cases might affect state laws or regulations. The fact that a service may be covered by a GATS commitment does not prevent strong regulation of that service. On the contrary, even though the Appellate Body found that we had a commitment, it agreed with our position that strong U.S. federal restrictions on interstate gambling protect public order and public morals, thereby reaffirming the right of the United States and all WTO members to regulate gambling.

Misunderstandings in IGPAC Memorandum regarding the WTO GATS negotiations

Unlike FTAs, the GATS does not contain an investment chapter:

In the first bullet on p. 2, the IGPAC Memorandum confuses the disciplines contained in the GATS with those contained in Free Trade Agreements (FTAs). The Memorandum refers to "international investment provisions in the GATS," and subsequently mentions the expropriation provisions contained in NAFTA Chapter 11. *The GATS contains no such provisions.*

There is nothing in the GATS that removes the right of federal, state or local governments to regulate services activities:

The second bullet goes on to say that international agreements "may affect a state or municipality's ability to effectively regulate services and to implement economic development programs, zoning laws, and to protect the public interest." However, the GATS contains exceptions in Article XIV that explicitly recognize the right of governments to protect the public interest in areas such as public health and safety, morals, and law enforcement. Nothing in the GATS prevents state and local authorities from engaging in their normal regulatory activities, including the establishment and administration of economic development programs, zoning laws and land use controls.

Misunderstanding in request for clarification

IGPAC has requested full information on US GATS commitments that has been publicly available for the past 10 years:

The IGPAC requested "complete information on all GATS exceptions and exemptions by each individual state and for service industry sectors within each state." This information is contained in the U.S. Schedule of Specific Commitments to the GATS and has been publicly available for over a decade. The information is organized first by sector, and then by state exceptions, if any exist. It is available on the WTO's website at

http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

Misunderstandings regarding U.S. sectoral commitments

No conflicts with state regulation of energy services (last bullet, p. 4):

None of the negotiating proposals, existing commitments, or possible future commitments will affect the ability of a state to regulate or otherwise alter the balance of powers between state and federal authorities. Regarding foreign ownership of electricity companies, we fail to see what relevance this has to the ongoing regulatory debate concerning the role of competitive market forces in the power sector. We know of no electric power regulations in effect or under consideration that contemplate

differential treatment of foreign companies. In any case, the United States is not offering any new access to electric power services and has no intention to do so. We therefore question why this point is contained in comments on this specific submission.

Education services:

The IGPAC Memorandum refers to missing language on scholarships for in-state students. This language did not display in the printed version because of a software error. The language is retained.

The Memorandum also refers to the phrase “affirmative action.” As noted in an email exchange with IGPAC members, this phrase was dropped because it is a term of art that is not understood outside of the United States. Based on input from IGPAC members, the phrase “in accordance with domestic law” was inserted as a means of capturing the same intent.

The IGPAC also requested assurances that no GATS provisions will interfere with an institution’s autonomy or its admissions policies. We see no reason why institutional autonomy or admissions policies would be affected by the GATS.

The IGPAC requested that the U.S. submission “should clarify that foreign institutions must comply with ‘all state laws and regulations,’ with respect to facilities and all aspects of institutional operations.” *This is true for all services and services suppliers, in all sectors.* Nothing in the GATS exempts foreign service suppliers from any domestic laws or regulations.

Audiovisual services:

The Memorandum requests assurance that the GATS will not preclude regulations requiring public, educational and governmental channels be carried by cable television operators, or forbidding service that is obscene. Such policies do not impose quantitative restrictions on cable television operators, nor do they discriminate against foreign suppliers. As a result, they are fully consistent with the GATS obligations. Even if they were not, the GATS explicitly provides an exception for regulation to protect public morals, which would apply to limitations on obscenity.

Accounting, auditing and bookkeeping services:

The Memorandum states that “the effect of the proposed submission is to remove all in-state residency requirements.” This is not correct. The effect is to narrow the residency requirement to only auditing services, which reflects the fact that accounting and bookkeeping services are not subject to a licensing requirement. We developed this refinement in consultation with the National Association of State Boards of Accountancy and the American Institute of Certified Public Accountants.

The Memorandum notes the need to take a reservation for state regulations requiring specific training and certification for accountants performing official accounting duties for local governments. This is not necessary. Training and certification requirements are not quantitative restrictions covered by the GATS market access provisions, and assuming the same standards apply to all, there is no reason to think these would be inconsistent with national treatment. Moreover, the GATS does not cover government procurement, so if these are services procured by a local government agency, they would not be covered by the GATS in any case. And, in any event, the GATS specifically recognizes governments’ authority to impose licensing requirements to ensure that service suppliers be competent and able to supply the relevant service.

Cargo handling and storage and warehousing services (excluding maritime and air transport services):

The Memorandum indicates that states have regulatory powers that need to be reserved, and then further specifies that particular concern lies with domestic security. From our research, we were unable to identify any state or federal measures affecting these services that could be considered inconsistent with the market access and national treatment provisions of the GATS. Regarding security, the GATS already contains a broad exception for security measures, therefore no further reservation is necessary.

Misunderstanding regarding security matters

IGPAC members suggest that the United States introduce a new horizontal reservation for homeland security. Such a provision already exists in the original text of the GATS. Article XIV*bis*, protects the right of all WTO Members to take measures regarding essential security and applies to all obligations of the agreement.

Misunderstanding regarding privatization and deregulation

There is nothing in the language of the GATS, the U.S. Schedule of market access commitments, or the U.S. updated Submission to the GATS negotiations that will require privatization or deregulation of public services including water supply, electricity, and education. As a matter of policy, the United States has not offered any commitments on the public supply and distribution of water, primary and secondary education, or the generation, transmission and retail distribution of electricity, even though the private sector plays a significant role in supplying these services across the United States.

Misunderstanding regarding water supply

There is no significant support for negotiating market access commitments on water supply in the GATS. The number of Members contemplating GATS commitments on water distribution is extremely small and does not include the United States. Even so, if such commitments were made they would not affect the right of Governments to set levels of quality, safety, price or any other policy objectives as they see fit, and the same regulations would apply to foreign suppliers as to nationals. A foreign supplier which failed to respect the terms of its contract or any other regulation would be subject to the same sanctions under national law as a national company, including termination of the contract. If termination of a contract were involved, the existence of a GATS market-access commitment would be irrelevant. A GATS commitment provides no shelter from national law to an offending supplier.