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Joan Claybrook, President

To: National Caucus of Environmental Legislators and other interested parties
From: Public Citizen's Global Trade Watch
Date: April 29, 2004
Re: Pending Trade Pacts and Threats They Pose to Hard-Fought Environmental Policies, and State and Local Sovereignty

More and more elected officials are becoming aware that today's "trade" agreements contain certain provisions that bind signatory governments on matters far beyond traditional trade subjects such as tariffs and quotas. State and local elected officials are also learning that these pacts do not just contain obligations and constraints on the policies of the federal government which negotiates these pacts, but that they also limit policy options and decisions that State and local governments make.

We are writing to alert you to several new trade pacts, recently completed and under negotiation, which if implemented, would limit the ability of State and local governments to protect the environment by creating binding constraints upon their regulatory authority in certain areas. These agreements could subject a broad array of State and local environmental policies to challenge as "barriers to trade" in the closed-door dispute resolution systems that accompany these pacts. Already "trade" agreements such as the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) have resulted in the weakening of federal Endangered Species and Clean Air Act policies and other ongoing challenges including complaints against state mining regulations, toxic bans and more.

Concerned State and local officials must act now to ensure the problems in existing trade pacts are not made worse by being extended to more countries or by being expanded in depth and scope. If the proposed pacts are approved by Congress and become federal law, States are legally bound by their provisions. Yet States cannot rely on their Congressional representatives to fix the terms of trade agreements because Congress cannot vote to amend these pacts under constraints imposed by the specialized "Fast Track" trade voting procedure. Thus, the time to affect the process is now, before the agreements are signed and approved.

Important deadlines are rapidly approaching: the six-nation Central American Free Trade Agreement (CAFTA), a NAFTA expansion, has been finalized and will be signed by the Bush administration on or shortly after May 20, 2004; negotiations continue on a hemisphere-wide, 31-nation NAFTA expansion called the Free Trade Area of the Americas (FTAA) which is to be completed by 2005; and WTO negotiations to expand the 1994 General Agreement on Trade in Services (GATS) are ongoing, with a completion date of 2005. Meanwhile, the Bush administration has given notice to Congress of its intent to negotiate bilateral free trade agreements (FTAs) with a dozen countries.

The rulings in multiple WTO and NAFTA disputes have made clear that State and local governments are bound by the type of trade and investment rules contained in these pacts. However, the mechanisms used to consult municipalities and States about the implications of these agreements have been woefully inadequate to the extent that subfederal officials are being denied their right of informed consent prior to federal trade negotiators binding State and local authorities to trade pact obligations and constraints. This memo is intended to alert State and local officials to three specific aspects of pending trade agreements

that could greatly implicate State and local regulatory authority with regard to the environment and other public interest policies:

- A. The threat to State procurement policy – including “green” purchasing preferences – contained in the recently released CAFTA text and the procurement chapter of the proposed FTAA and bilateral free trade agreements ;**
- B. The threat to State and local environmental and other public interest policies posed by the proposed expansion of NAFTA’s corporate investor rights via CAFTA, the FTAA, and the FTAs;**
- C. The threat to State and local regulatory authority and the environment if additional constraints on governmental regulation of services sectors such as oil drilling, mining and construction are imposed, and energy and water “services” are included under the proposed FTAA services chapter, in an expanded WTO services agreement, or in FTAs.**

This memo concludes with a call to State and local elected officials to consider developing mechanisms to ensure that they are consulted with regard to these pending pacts, and to ensure that States undertake an open, public and deliberative process for examining the impacts of each agreement on State interests and State regulatory authority. State officials should demand prior informed consent before the U.S. Trade Representative binds States to the terms of these agreements.

A. Green Procurement Policy at Risk in CAFTA, FTAA, FTAs

State Legislatures are constitutionally charged with setting State procurement policy. However, a September 2003 letter from the Bush administration to State Governors reveals an attempt now underway to get Governors to ‘voluntarily’ commit their states to comply with major constraints on State procurement policy included in CAFTA and proposed for the FTAA and numerous bilateral trade pacts.

States traditionally have used taxpayers’ dollars to promote local economic development, the preservation of natural resources and other socially beneficial goals reflecting the interests of the taxpayers and values of State residents. Yet procurement rules contained in CAFTA and proposed for other pacts strictly limit the factors that States can consider while making purchasing decisions. While there is no comprehensive listing of State laws that may be in conflict with these trade agreement procurement dictates, at least 48 States have adopted at least one environmental procurement preference that could be subject to challenge under such rules. For instance, thirty-four States have preferences for recycled materials generally, and many other states have purchasing preferences for recycled paper and plastic. Eighteen States have laws restricting the purchase of products containing ozone depleting CFCs, five promote purchases from renewable energy sources and many States have laws requiring the purchase of some alternative fuel government vehicles, energy efficiency in government procurement and purchases of wood products that are sustainably harvested.

The January release of the final CAFTA text allows for the analysis of its terms’ actual implications for environmental protection.

States Cannot Set Rules for *How* a Good or Service is Produced: The CAFTA procurement chapter’s Article 9-2 requires “National Treatment” for goods and services that a State government may purchase. Requiring “National Treatment” or “non-discrimination” means that a State is required to provide the same or more favorable treatment to foreign goods and foreign service suppliers as it provides to domestic firms supplying “like” goods and services. First, this means governments cannot favor the purchase of local goods or services, even for environmental reasons (e.g., using locally grown food for school lunches

so as to minimize packaging, transport, and the adding of preservatives). Second, over the decades, trade jurisprudence has evolved interpreting “like” to mean physically similar. As a result, distinguishing typically similar goods based on their process and production methods (PPMs) – how the good is manufactured, harvested or produced – has been ruled to violate National Treatment requirements. For instance, in the now infamous tuna-dolphin case, a GATT trade tribunal ruled that under trade rules tuna caught with dolphin-killing purse seine nets was “like” tuna caught with less deadly nets.¹ Thus, the tribunal decided that a U.S. ban on tuna caught with purse seine nets was a discriminatory barrier to trade – in other words, unless dolphin meat ended up in the tuna, both dolphin-safe and dolphin-deadly tuna had to be treated identically. This line of reasoning, repeated in other trade rulings, extended the prohibition on discrimination between like products on the basis of *where* they are produced to also forbid distinguishing between products based on *how* they are produced. Thus, the Clinton administration acknowledged these constraints when it exempted from its Executive Order banning the purchase of products made with child labor the 27 countries that had signed onto a WTO procurement agreement (which contains similar National Treatment rules). In other words, the administration acknowledged that it could not distinguish products made with child labor from “like” products made by adults under the terms of the agreement. Similarly, State purchasing preferences for recycled paper over ‘virgin’ paper, or sustainably harvested wood over non-sustainably harvested wood could run afoul of the same trade rule.

Technical Specification Rules Ban Consideration of Descriptive or Design Characteristics: If there was any question whether CAFTA’s National Treatment rule prohibits procuring entities from conditioning procurement on PPMs, CAFTA rules limiting technical specifications erase any doubt. Article 9-7 reads: “procuring entities shall not prepare, adopt or apply any technical specification describing a good or service with the purpose *or the effect* of creating unnecessary obstacles to trade... and that technical specifications are limited to performance requirements rather than design or descriptive characteristics.” This rule reiterates that procuring entities are prohibited from setting specifications describing goods or services sought based on *how* a good is made – for instance banning procurement of GMO grass seed – or *how* a service is provided – for instance requiring a portion of energy procurement be from renewable sources. As long as the seed can perform the desired function – grow grass – other distinctions are not allowed. But, this provision goes even further: any qualification not intended to make the prohibited distinctions, but that might have the unintended *effect* of creating an obstacle to trade – such as environmental or consumer safety labels or certain packaging requirements – is exposed to challenge before a trade tribunal. In the past, federal trade officials have lobbied in State Capitols against laws which might have such effects – chilling State policy-making.

Supplier Qualification Rules Forbid Consideration of the Environmental Track Record of Contractors: The CAFTA procurement chapter also restricts what sorts of qualifications and consideration states may employ to choose suppliers of goods and services via Article 9-8. Procuring entities can only set conditions for supplier participation in procurement that are essential to ensure that the supplier has the “legal, technical, and financial” abilities to fulfill the requirements of the contract: CAFTA forbids consideration of a contractor’s past environmental performance or preferences for suppliers with good environmental track records. Thus, many State policies conditioning state contracts on environmental performance could run afoul of this rule.

Exceptions Included in CAFTA are Inadequate to Protect Eco-friendly Purchasing Policy: CAFTA provides for exceptions to its rules, but as with all legal instruments, the devil is in the details. There is language sprinkled throughout CAFTA that sounds quite eco-friendly. Unfortunately, the provisions seem to have been designed for public relations, not legal defense as they are written so as to strictly limit their effectiveness in application. First, CAFTA’s rules limiting the sort of technical specification that

¹ The General Agreement on Tariffs and Trade is the precursor to the WTO. GATT, United States-Restrictions on Imports of Tuna (DS21/R), Report of the Panel, Sep. 3, 1991.

procuring entities use includes a clause² stating that “for greater certainty, this article is not intended to preclude a procuring entity from preparing, adopting or applying technical specifications to promote the conservation of natural resources.” This language is completely inadequate to safeguard the type of measures at risk. First, the clause “is not intended” provides a trade tribunal with enormous discretion to rule against a suspect measure. If this clause were meant to be effective, it would be written in the same definitive tone as the agreements other rules (e.g., “Nothing in this article precludes a procuring entity...”). Finally, this language does not apply to the rest of the agreement and does not avoid the National Treatment and “like products” problem discussed above or the limits on supplier qualifications. In fact, this clause seems to highlight the *absence* of the boilerplate natural resources conservation exception that exists in other trade agreements such as WTO and NAFTA, but is missing in CAFTA’s procurement text.

This absence of a real natural resources exception highlights the horatory environmental rhetoric that is sprinkled throughout the CAFTA text. For instance, in “Notes to United States - Section B, Annex 9.1” the notes include circular language concerning environmental considerations regarding procurement which reads “Nothing in this Section shall be construed to prevent any State entity from applying restrictions that promote the general environmental quality in that State, as long as such restrictions are not disguised barriers to international trade.” The last clause, with its long GATT-WTO jurisprudence interpreting policies based on how a good is made or harvested as being disguised barriers to trade, effectively eats the first half of the sentence. That is to say, this so-called exception does not protect the many procurement policies requiring product or producer environmental specifications which conflict with other CAFTA procurement rules. Additionally, Article 9.14 includes a clause purporting to safeguard includes environmental measures “necessary to protect human, animal or plant life or health.” This exception follows boilerplate language that is derived from the WTO and its predecessor the GATT. This is relevant, because this language has decades of jurisprudence attached to them which severely limit their usefulness in defense of challenged environmental measures.³

If a policy is judged by a trade tribunal to violate CAFTA or FTAA rules, it must be eliminated or changed. Otherwise the tribunal could authorize the imposition of trade sanctions until the policy is brought into compliance with the terms of the trade agreement. CAFTA’s limits apply to the many existing State procurement policies that would be in conflict with its rules.

State legislators concerned about environmental protections have a significant stake in these “trade” agreements and negotiations, but no voice. The process now being used by USTR to sign up States to comply with CAFTA’s procurement rules - contacting Governors for a letter of consent - is not only

² Article 9-7-5

³ The trade jurisprudence defines what these exceptions mean in the context of trade law – which is quite different than what they might appear to mean on their face. For instance, the *chapeau* language which begins Article 9.14 requires that to even qualify for an exception, “measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on trade between the Parties...” These words have launched hundreds of pages of trade rulings, which boil down to a set of difficult-to-overcome tests that must be applied before the exceptions listed below can even be considered. The bottom line is that despite scores of attempts, GATT and WTO tribunals have very rarely permitted countries seeking to use these exceptions to proceed past the *chapeau*. Assuming a challenged State policy can get past the *chapeau* limitations, then it must be proved to be “necessary” to protect human, animal or plant life or health. The term “necessary” has been interpreted to require that the defending party must prove that another less-trade-restrictive means to obtaining its public safety or health goal does not exist. It is not surprising that countries seeking to use these “necessity” test exceptions have had a difficult time proving the negative – that another means does not exist – especially since tribunals have not been willing to consider financial, technical or other limits on the feasibility of hypothetical alternatives.

undemocratic, it is likely unlawful as a matter of domestic law. Setting government procurement policy, deciding whether to cede to policy constraints imposed by a trade agreement or volunteering to be preempted is the purview of State Legislatures. Governors do not have the authority to simply proclaim changes to State laws. To make matters worse, if a State were signed onto CAFTA and Congress approved the agreement, the State would find it very difficult to extract itself from the agreement. CAFTA rules would require the U.S. to compensate all parties to the agreement for current and future lost business opportunity if a State withdraws, a prohibitively expensive undertaking. Plus, only the federal government is recognized under the pact, so a State would have to get the federal government to act as its voice in the entire process – an improbable outcome.⁴

The tribunals that hear challenges to domestic laws are staffed by trade officials who are empowered to judge if a State or local policy violates CAFTA's constraints. State government officials have no standing before these tribunals and thus must rely on the federal government to defend a challenged policy. Policies judged to violate the rules must be changed, or trade sanctions can be imposed. As well, the federal government is obliged to use all constitutionally-available powers – for instance preemptive legislation, lawsuits and cutting off funding – to force subfederal government compliance with a panel ruling.

When it was published in January 2004, the CAFTA text listed 23 states⁵ as having agreed to 'sign on' to comply with that pact's procurement rules. However, more may have signed on since the text's publication. To avoid State procurement policy prerogatives and authority from being preempted, State Legislators must act now, before CAFTA is signed and before Congress votes on CAFTA, to remove their States from the CAFTA list and to specify that the State does not agree to be bound by the procurement rules of the other list of future trade pacts for which USTR's September 2003 letter sought blank-check accession, sight unseen. Urgent action is needed now to protect State interests and to make sure that no further commitments are made to bind current and future State and local governments to trade agreements without the prior informed consent of State Legislatures.

B. CAFTA, FTAA and Assorted FTAs Threaten to Expand NAFTA's Controversial Corporate Investment Rights to More Nations

The Bush administration is working to expand NAFTA's unprecedented investor rights to 31 additional countries via CAFTA, the FTAA, and via additional FTAs to many more countries including Thailand and five Eastern African nations. Since NAFTA's enactment in 1994, corporations in all three NAFTA countries have used NAFTA's investment chapter (Chapter 11) and the vast new rights it grants to foreign investors to challenge a variety of national, State and local environmental policies and even civil judicial decisions as NAFTA violations. NAFTA allows the companies to equate these policies to an "expropriation" of their assets, or "takings." This broad provision for corporations to be compensated for regulatory takings does not exist under U.S. domestic law, and grants corporate investors private enforcement rights via special trade tribunals.

Under NAFTA, corporations can pursue these claims in a closed-door arbitration system that operates outside the domestic court system and excludes public participation even while it is the taxpayer who must foot the bill for any cash compensation that may be awarded. Moreover, even if a State law is implicated in such a case, the State has no standing and must rely upon the federal government to defend

⁴ Article 9-16

⁵ Initial States listed in the annex to the CAFTA procurement chapter are as follows: Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New York, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming.

its policy. While many of these NAFTA investor cases are still pending, some companies have succeeded with these challenges already.

A variety of measures taken by state, provincial, and municipal governments to protect the environment have been challenged by corporations as regulatory takings using NAFTA's Chapter 11. These include:

- *Metalclad v. Municipality of Guadalucazar, Mexico*: A Mexican municipality demanded that a U.S. company obtain the same construction permit that had been required of the Mexican company that previously owned the toxic waste facility. When the municipality insisted that the company obtain the permit before it could begin expanding the facility, Metalclad filed a NAFTA Chapter 11 complaint. The NAFTA panel ruled that limiting the company's use of its property was a NAFTA-illegal action tantamount to an "indirect" taking. The Mexican government was ordered to pay \$15.6 million in damages.
- *SD Myers v. Canada*: In this case, a U.S. company sought compensation because its "right" to treat Canadian PCB waste in its Ohio facility was halted by Canada, which was acting in compliance with the Basel Convention, a multilateral environmental agreement that encourages nations to treat toxic waste domestically. Canada stopped the toxic trade before the U.S. did although both signed the treaty. SD Myers filed a NAFTA suit claiming discrimination. SD Myers was awarded \$5 million in damages by a NAFTA tribunal.
- *Methanex v. U.S.*: California's law banning MTBE in gasoline was challenged by a Canadian company that produces a component of the gasoline additive which has polluted water supplies in dozens of U.S. States. The company is demanding \$970 million in compensation charging that the ban is tantamount to an expropriation of its assets.
- *Glamis Gold v. U.S.*: As stated earlier, a Canadian mining company, Glamis Gold, recently filed a notice that it intends to pursue a \$50 million dollar NAFTA claim against mining regulations promulgated by the State of California intended to safeguard the environment and indigenous communities from the impacts of open-pit mining.

NAFTA Chapter 11's dismal track record of undermining State and local sovereignty has led to opposition from many bipartisan national organizations representing subfederal officials, including the National League of Cities, the National Conference of State Legislators, the Council of State Governments, State Supreme Court Justices and other state officials. However, despite widespread criticism of Chapter 11, the Bush administration continues to push for more of the same. Unbelievably, CAFTA's new investment provisions give *even more rights* to foreign corporations to challenge government actions by broadening the definition of what constitutes a protected investment to include foreign companies' oil, timber, and mineral concessions. The CAFTA investment terms ban particular policy tools such as capital controls used in financial crises. The CAFTA investment rules also provide foreign corporations greater property rights than domestic companies are granted by the U.S. Constitution as interpreted by the U.S. Supreme Court by failing to include proposed language that would have fixed some of NAFTA's worst excesses.

CAFTA contains a number of rules that corporations can use to challenge state and local regulations and decisions:

- CAFTA Article 10-7 guarantees foreign investors compensation from the treasuries (i.e., from the taxpayers) of CAFTA governments for any direct government expropriation (i.e., nationalization) or any other "indirect" expropriation or through measures "equivalent" to expropriation. This broad language, barely modified from the original NAFTA text, allows corporations to be

compensated in “regulatory takings” challenges against environmental regulations that impair their profitability.

- CAFTA Article 10-3 establishes National Treatment guarantees. This means that foreign investors from a signatory country are guaranteed no less favorable treatment than domestic investors with respect to all phases and aspects of investment, from the absolute right to establish an investment (for instance, the right to acquire natural resources or to set up a factory) to the sale of the investment.
- CAFTA Article 10-4 provides for Most Favored Nation treatment, which requires governments to give foreign investors from signatory nations no less favorable treatment than the best treatment given to investors of another signatory nation or even nonsignatory nations, even if that treatment is *better* than that given to domestic investors. This means that if any foreign investor is ever given an oil, gas or mining contract or access to timber lands, countries provide such contracts or access to all foreign investors from other signatory countries.
- CAFTA Article 10-5 requires governments to assure that foreign investors are provided a minimum standard of treatment. The CAFTA notes that this standard is provided by customary international law, including fair and equitable treatment and full protection and security. Similar language in NAFTA has been used as a vague catch-all of expected corporate rights that dramatically expanded the basis for investor claims and was used to launch numerous complaints. Assorted clauses and definitions in CAFTA seem to attempt to narrow the scope of this provision. However, in April 2004, a letter signed by nearly every U.S. environmental group concluded that the alterations were insufficient to avoid attacks on domestic environmental and conservation policies.

CAFTA’s investment text also contains language purported to safeguard environmental measures. For instance, Article 10-11 states “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.” Yet the requirement, that such environmental measures be “otherwise consistent” with the rules contained in the chapter, effectively nullifies any use of the language as a safeguard for nonconforming environmental measures. Identical language in NAFTA has failed to protect environmental measures that have been challenged. Similar circular language is used in a clause concerning measures “related to the conservation of living or non-living exhaustible natural resources.”⁶ However, the language at the start of this provision (called the *chapeau*) requires that to qualify for such an exception a measure cannot constitute a “disguised barrier to trade,” once again limiting its use and placing into the hands of a CAFTA trade tribunal full discretion to judge whether or not a domestic environmental policy is justified and represents the least trade restrictive option available.

CAFTA does include new language to improve the transparency of the dispute resolution system. However, CAFTA’s substantive provisions so closely replicate the NAFTA model that they will foreseeably generate similar “regulatory takings” attacks on State and local policies and decisions. Moreover, under CAFTA and the proposed FTAA, corporations of 31 additional would be granted the right to pursue such regulatory takings challenges.

State and local government are not being asked to agree to be bound to the terms of the investment chapters contained in CAFTA and the proposed FTAA. Yet, many State environmental laws could run afoul of these rules. USTR, not even using the illegitimate Governors sign-off process, has presumed the

6 Article 10-9-3-c-iii

authority to act on behalf of states and localities, but State and local governments can object to having their policies jeopardized in this manner. Some States and many localities already have passed resolutions condemning these agreements and their inappropriate reach into matters of local jurisdiction. To translate these political expressions into binding safeguards, states must demand their laws are “carved out” (i.e. excluded) from these pacts’ investment rules.

C. State and Local Governments Lose Authority over Energy, Water Resources and over Regulation of Construction and Extractive Industries in Proposed Service Sector Negotiations

Recent “trade” agreements have contained rules promoting privatization of public services and limiting government regulation of private sector services. One such mechanism is the General Agreement on Trade in Services (GATS), which took effect in 1995. GATS is one of 17 substantive agreements enforced by the WTO. New negotiations of GATS was launched in 2000, as part of the WTO’s “built-in” agenda. The stated purpose of the “GATS-2000” negotiations is to expand GATS’ constraints on domestic regulation of the services sector and to extend these rules to more service sectors. Similar service sector talks have taken place in the context of the proposed FTAA and other bilateral FTAs.

More is known about the details of the GATS expansion talks than the FTAA talks because the services issue is one whose scope is now being contested at FTAA by several nations. GATS negotiating documents that were leaked in 2003, and now provided by governments, make clear that the new GATS talks are designed to turn a broad swath of services now provided by governments into commodities that can be traded like stocks or bonds and only accessed by those who can afford them. The agreement also constrains regulation of services by federal, State and local governments and allows such domestic regulations to be challenged as “barriers to trade” in the binding, closed-door dispute resolution body of the WTO. The GATS-2000 negotiations could inhibit subfederal policymakers from regulating in such traditional areas of State and local control as health care, insurance, alcohol distribution, construction, as well as water and wastewater management. Areas of mixed State and federal oversight are also implicated, including financial services, energy, transportation, telecommunications and all professional services.

As with all WTO and NAFTA requirements now in place, State and local governments would be required to conform their existing policies to these new proposed rules. Domestic policies that go beyond what is allowed by GATS rules would be subject to challenge adjudicated in trade pacts’ closed-door dispute resolution bodies. If a policy is judged by a tribunal to violate trade rules, it must be eliminated or changed, or the U.S. will face trade sanctions until the policy is brought into compliance with an agreement’s terms. Unlike many other trade pacts, GATS does not even contain the usual limited exception for policies to conserve exhaustible natural resources.

Key provisions now being discussed in GATS-2000 talks and in FTA services talks would result in the following:

- If the U.S. responds to demands by Europe and others to commit the U.S. water and energy sectors to GATS disciplines, then GATS Market Access requirements (Article XVI) would prohibit the U.S. from maintaining public service “monopolies” or exclusive suppliers of the service on the basis of a regional subdivision or on the basis of the entire territory of a government. This provision could result in U.S. State and local governments being required to give private, for profit water companies “access” to the “market” of our more than 60,000 U.S. municipal water service providers and could result in the breaking apart of public power companies and exclusive service providers to provide a market for foreign competition.
- Further, under GATS Article XXI, privatization is a one-way street. If a municipality decides, for instance, to experiment with privatizing water services by selling its operation to a foreign

corporation, and the municipality is unhappy with the private company's performance, under GATS it would be prohibitively difficult to bring the utility back under public control. The municipality must compensate the company under U.S. law, but as well the U.S. government would be required to negotiate compensation for all potentially affected trading partners for their corporations' lost business opportunities. This double jeopardy is geared toward "locking-in" privatization, and preventing the water take-backs which have occurred in many U.S. cities which were dissatisfied with privatization experiments.

- Governments, including local or State governments, could be prohibited from setting limits on the size or quantity of service operations under GATS Article XVI, including environmentally-harmful operations such as oil rigs and pipelines, water extraction, garbage incineration and hotel or road construction.
- New negotiations on domestic regulations under GATS Article VI.4 could result in a "necessity test" for all government regulation, meaning that federal, State and local governments could be required to prove to a WTO tribunal that their policies are both "necessary" and the "least burdensome" to multinational service corporations if these regulations are challenged as barriers to trade by a WTO trading partner.
- The GATS Article XVII on National Treatment is written so broadly that environmental policies that have a differential *effect* on domestic and foreign firms that could put a foreign operator at a competitive disadvantage, are subject to challenge and sanctions. This is true even if the environmental standard was intended to treat all service operations similarly, and is the most effective way to protect the environment. For instance, a facially neutral requirement, that glass beverage bottles must be refilled, was held to have a discriminatory effect on foreign beverage makers.

The leaked GATS documents reveal that the European Union alone asked the United States to change or eliminate at least 44 specific State laws. The USTR has contacted certain national associations representing State regulators in specific service sectors, such as the National Association of State Insurance Commissioners. However, there has been no concerted effort to contact Governors, Attorneys General, State legislative or municipal officials in each State.

Many State and local officials who learned about the GATS because of the leaked documents, including a group of 30 Attorneys General, raised concerns about the threat posed to their states' regulatory authority and the grossly inadequate consultation by the USTR. Now, in the absence of any recent additional information leaking from the closed process, concerned parties are in the dark once again about the status of the negotiations. Bilateral negotiations between countries – where each country submits both "requests" and "offers" for access to the other's services markets – continue as the December 31, 2004 deadline approaches. It is essential that the USTR continues to hear the concerns of State and local officials regarding GATS-2000 negotiations – and what State service sectors and regulatory rights they must not bind – so that State regulatory authority is not trampled by new trade rules.

Take Action Today!

To date, you may have been given no voice in the trade negotiation process, but getting involved now can make a huge difference:

- 1) Ensure that your State is not constrained by the rules on government procurement in proposed international trade agreements. Call your Governor's office to inquire about its response to the September 2003 letter from USTR requesting that the State sign onto the CAFTA, FTAA, and assorted FTAs' procurement chapters. If your Governor initially consented to be included, urge that she or he withdraw the State from the list. If they have not responded, ask the Governor's office to turn over the request to the Legislature for its consideration.

- 2) Given that setting procurement policy is constitutionally under the purview of the State Legislature, not the Executive branch, legislators should demand public hearings, legislative action, and other mechanisms for ensuring the Legislature's prior informed consent before states are committed to complying with trade agreements' procurement provisions. Legislation requiring the Governor to submit such decisions to the State Legislature may be needed.
- 3) State legislatures should consider legislation to give State Attorneys General a formal review role in determining what State laws could be conflicts under trade agreement provisions. Information sharing and consent requirements should also be extended to county and city governments whose policies may be compromised in the future by global trade pacts.
- 4) Contact Public Citizen to discuss further what is at stake in the CAFTA, FTAA and WTO negotiations – and what States can do about it. Sign up to our States Trade Action listserv to stay up to date on developments by sending an email to sjohnson@citizen.org.
- 5) Join with colleagues at NCEL to demand a mechanism for ensuring prior informed consent by states before they are signed onto any trade agreements. A sign-on letter is being circulated regarding this issue and we hope you will join us in an effort to develop a more democratic and accountable trade policy mechanism for the vetting of future trade agreements.

For more information and additional ideas about how you can take action to protect your state, please contact Mary Bottari at 608-255-4566 or mbottari@citizen.org, or Sara Johnson at 202-454-5193 or sjohnson@citizen.org.