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Joan Claybrook, President

## MEMORANDUM

**To: State Officials and Other Interested Parties**  
**Fr: Public Citizen's Global Trade Watch**  
**Dt: May 20, 2005**  
**Re: Contact USTR -- Urgent Action Needed to Safeguard State Regulatory Authority in World Trade Organization Negotiations; Proposed U.S. General Agreement on Trade in Services "Offers" Implicating State Regulatory Authority to Be Tabled by U.S. Federal Government at the WTO by May 31, 2005**

On May 3, 2005, the United States Trade Representative (USTR) sent a memo to the State Points of Contact (SPOCs) and the Intergovernmental Policy Advisory Committee (IGPAC) asking for comments by May 26, 2005 regarding ongoing negotiations at the World Trade Organization (WTO) on the General Agreement on Trade in Services (GATS). We are writing to ensure that you have been notified of this correspondence, and to provide some context that may be helpful in evaluating and responding to the federal government's request for your opinion.

The WTO GATS has significant implications for states because its provisions extend far beyond trade in services to establish requirements with which WTO signatory nations and their subfederal governments must comply. These obligations include requirements regarding who can own and operate services within the United States, and how such services may be regulated.

The USTR's memo comes at a crucial time in the WTO GATS negotiations. Recent WTO Appellate Body rulings have raised critical new questions about the agreement's scope, and the implications for states and localities' right to regulate under current GATS rules and commitments. Yet, ongoing negotiations, if completed as currently conceived, would *expand* the GATS by committing additional U.S. service sectors to GATS rules and establishing new GATS disciplines on "domestic regulation" that would apply to *all* service sectors and would further constrain state regulatory authority.

The U.S. federal government is required to ensure conformity of U.S. policy regarding all service sectors with some of the GATS obligations. Other GATS obligations only apply to particular services if the USTR specifically includes these services in the list of U.S. services we agree to have covered by the GATS, which are called a country's "commitments." The GATS includes schedules for each WTO signatory nation listing which service sectors are "bound" (meaning a listed sector is covered by GATS obligations) or "unbound" (meaning a listed sector is explicitly not covered by the agreement's provisions).

If U.S. federal trade negotiators commit a service to be covered under the GATS, then the agreement's terms limit quite broadly the kind of policies a government can maintain or implement domestically regarding that service. For instance, under existing GATS rules for covered sectors, policies limiting the *number of providers*, as well as those creating a new public service or a regulated private monopoly service, are prohibited. Additionally, in covered sectors, domestic regulations must be constructed to be "no more burdensome than necessary" to foreign corporations to achieve a desired goal – a shifting legal

standard which has proven extremely hard to satisfy if a domestic law is challenged before a WTO dispute resolution tribunal. (For more information and examples, see enclosed *GATS Backgrounder*.)

In the past, the federal government has not even submitted expansions of U.S. service sector WTO commitments for congressional approval. If Congress was given an opportunity to consider such expansion, it would be under the Fast Track voting procedure, which limits Congress to an up or down vote, with no amendments and limited debate. Therefore, the time to affect the process is now. On or before May 31, 2005, the United States will submit a new “offer” which could put additional service sectors on the negotiating table. Absent immediate action, your state laws and regulations in these additional proposed sectors could be subject to GATS rules.

Unfortunately, the information USTR has provided to SPOCs and the IGPAC is insufficient for states to comprehensively analyze and comment on the new commitments USTR proposes to make. State officials may want to consider exercising their prerogative to ask for the necessary information to form an informed opinion, and write urgently to USTR withholding consent vis-à-vis the proposed commitments until sufficient information and time is provided for meaningful input.

### **USTR Summary of Sector-Specific Elements Fails to Give Key Information Needed for States to Evaluate Impact on State Law**

In its May 3, 2005 memo, the USTR requests comments from state officials regarding proposed service sectors for GATS expansion. However, this communication did not include the proposed schedule of commitments USTR is considering submitting to the WTO. With the general descriptions USTR has provided, it is impossible to analyze the *extent* of the commitments being proposed, and the adequacy of any exceptions or limitations. States cannot be expected to give informed consent regarding the coverage of state laws without adequate prior knowledge of the proposed U.S. negotiating position, including which modes of delivery are being proposed to be bound and to what specific levels of commitment.

### **USTR Assurances Regarding States’ Right to Regulate Ring Hollow In Light of Recent U.S. Arguments to WTO Appellate Body Panel in WTO Gambling Case**

The May 3, 2005 memo and its attachments repeat numerous times that “the U.S. updated submission will not require any state to take any further action regarding its existing laws or regulations in services sectors.” The legitimacy of such a claim has recently been yet further diminished by the WTO Appellate Body’s rulings directly affecting the right to regulate under the GATS. In the April 2005 Gambling case, the Appellate Body made some general interpretations of the GATS’ market access rules that have significant, troubling implications for states’ right to regulate in a wide range of service sectors. The WTO’s Appellate Body upheld the lower WTO panel’s interpretation that a *ban* on an activity (even if applied equally to domestic and foreign service companies) in a committed service sector is equivalent to a “*quota of zero*,” and thus a violation of the GATS’ market access rules. As the USTR’s own submission to the Appellate Body on this issue stated, determining that non-discriminatory bans are violations of market access rules “unreasonably and absurdly deprives Members of a significant component of their right to regulate services by depriving them of the power to prohibit selected activities in sectors where commitments are made.”

Over the United States’ objections, however, the Appellate Body upheld the new zero quota standard, which has implications for diverse areas of regulation, including those proposed for GATS expansion. For example, if a commitment is made in “Pipeline Transportation in Fuels,” as the USTR’s letter proposes, a ban on a pipeline passing through ecologically-sensitive areas could be considered a violation of market access rules if the company involved is a foreign one. The range of policies potentially subject to WTO enforcement has been vastly expanded by the jurisprudence of the Gambling case.

Unsubstantiated repeated assurances in the USTR May 3, 2005 memo that “nothing in the GATS impedes the ability of a state to maintain or develop regulatory requirements as appropriate to each jurisdiction” should be evaluated in light of the United States’ own arguments about GATS threats to legitimate regulatory authority made in its defense of the U.S. ban on Internet gambling.

**That USTR Describes Its Proposal as “Reflecting the current market situation” Is Not a Sufficient Standard for Evaluating Whether or Not to Commit a Service Sector to the GATS**

In its letter requesting states’ input, USTR repeatedly describes its proposed new commitments as “reflecting the current market situation.” Yet, state and federal laws and policies are constantly evolving. Changes in technology, the environment, social mores and economic reality require governments to be able to adapt. When a country commits a service sector to be bound by GATS rules, future policy options are limited to those that are compliant with U.S. trade commitments, and the ability of policymakers to adapt to change is compromised. Even if particular laws are *currently* consistent with the GATS, that fact is not sufficient to evaluate whether or not it is prudent to commit a particular service sector and foreclose future policy options.

**Recommended actions:**

- **Request from the USTR the actual proposed U.S. GATS commitments as they would appear in the revised U.S. schedule.** It is impossible for states to analyze the full impact of the proposed service sectors without the language of the proposed actual commitments. The Gambling case made clear that the manner in which commitments are incorporated into a country’s GATS schedule has substantial implications for their interpretation. State officials should request the actual language that will appear in the U.S. offer – instead of the vague summaries provided by USTR – so as to more carefully evaluate the extent of the proposed commitments.
- **Refuse to consent to any offers that cover state law until such information is received.** States should make clear by writing USTR immediately that they wish for the state to be carved out of *all* new U.S. offers until they receive the language of proposed commitments, and have been given a reasonable amount of time to analyze the impact of those commitments on existing and future state law. Requesting that your state’s laws are given an exemption from GATS coverage is the only way to preserve your policy options until you have been provided the necessary information to make more specific decisions regarding what you are or are not going to subject to GATS jurisdiction.
- **Comment on areas of concern where the USTR has not requested state feedback.** State officials have raised many concerns that USTR has failed to address, ranging from the implications of the WTO ruling that the United States has a specific commitment covering gambling to ongoing GATS negotiations to establish new disciplines on domestic regulations to the inadequate process currently used to consult with states. Use this opportunity to voice your concerns before the May 31, 2005 negotiating deadline.

To download the USTR’s May 3, 2005 Memorandum and Summary of Sector-Specific Commitments, see <http://www.citizen.org/trade/subfederal/services/>

For additional information and/or sample materials, please contact Sara Johnson at 202-454-5193 or [sjohnson@citizen.org](mailto:sjohnson@citizen.org).