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**TESTIMONY OF LORI WALLACH
PUBLIC CITIZEN'S GLOBAL TRADE WATCH
EUROPEAN UNION PARLIAMENT, COMMITTEE ON INTERNATIONAL TRADE
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I. INTRODUCTION

Thank you for the opportunity to testify today. Public Citizen is a nonprofit citizen research, lobbying and litigation group based in Washington, D.C. Public Citizen, founded in 1971, accepts neither government nor corporate funds. We have 250,000 members, mainly in the United States. Public Citizen has been a leader in the consumer and environmental movement, working in the Congress, regulatory agencies and courts and publishing books, reports and studies. Global Trade Watch is the division of Public Citizen founded in 1995 that focuses on government and corporate accountability in the globalization and trade arena.

Few "trade" negotiations concern us more than the on-going negotiations at the World Trade Organization (WTO) to liberalize services.

When most people think about trade, they conjure up images of ships laden with goods – sacks of coffee beans, steel beams, shoes – ferrying products between nations. And indeed, before the 1993 North American Free Trade Agreement and the 1994 WTO, trade agreements exclusively set the terms for such exchange, for instance limiting cross border taxes (tariffs) and countries' restrictions (quotas) on the amounts of goods it would allow to be imported.

The WTO and some of the 17 major agreements it enforces – notably including the General Agreement on Trade in Services (GATS) – shattered these boundaries.

GATS was then and is now a highly controversial agreement. In 1998, former WTO Director General Renato Ruggiero declared: "GATS provides guarantees over a much wider field of regulation and law than the GATT...extend[ing] the reach of the agreement into areas never before recognized as trade policy."¹

Indeed, only a small aspect of GATS concerns actual *trade* in services. GATS includes expansive rules concerning what domestic policies countries are allowed to establish or even maintain on the federal, state and local levels regarding the service sector and how WTO signatory countries should

¹ Renato Ruggiero, "Toward GATS 2000 – a European Strategy," speech, conference on trade in services, organized by the European Commission in Brussels, June 2, 1998.

treat foreign service sector firms operating *within* their territory. As with all WTO rules, member countries are required to “ensure conformity of all laws, regulations and administrative procedures”² to the GATS rules.

However, the GATS rules have a much more direct and dramatic impact on people’s daily lives than traditional trade matters, such as lowering tariffs on consumer goods. Literally from birth (medical services) to death (funeral services), all of our daily lives intersect with the service sector constantly – from the store where we buy our food, restaurants and entertainment we frequent, the insurers that cover our homes and cars, the schools our children attend, the hospitals that treat our families, the banks that hold our savings and the buses, trains and airplanes that comprise our transportation systems. In many countries, access to certain essential services such as health care, education and safe drinking water, are seen as rights rather than commercial interactions. One of the few things that supporters and critics of the WTO alike agree on, is that the goal of imposing uniform rules over the entire realm of countries’ domestic policies and political processes connected to the service sector was a revolutionary undertaking.

Thus the GATS rules, unlike most other aspects of the WTO, only apply to those service sectors that countries agreed to subject to these rules. This “bottom up” approach – which preserves countries’ sovereign choices about the relative benefits of subjecting certain services to GATS obligations – was an essential element of the agreement taken by countries as a condition for agreeing to extend WTO rules into the service sector.

Service sector industry interests did not approve of this approach and pushed for an agreement, ultimately expressed in GATS Article XIX, that future negotiations be automatically started in 2000 to achieve “progressively higher levels of liberalization” in more and more service sectors and to consider whether new GATS rules should be established on certain issues, such as disciplining WTO member countries’ domestic regulation of services.

At the 2001 Doha WTO Ministerial, these “GATS-2000” talks were made part of the ‘single undertaking’ of a new Doha Round of WTO negotiations – which is to say the GATS talks became a core aspect of the Doha Round. A January 2005 deadline was agreed for the conclusion of the Doha Round – and thus for conclusion of the new GATS negotiations.

The peculiar political context of the Doha Ministerial, coming on the heels of the 9-11 terrorists attacks, and various procedural irregularities, resulted in the issuance of a Doha Ministerial Declaration that sought to bring on to the table the very matters – establishment of WTO investment, procurement, competition policy and other new agreements – that had sunk the 1999 Seattle WTO Ministerial. Not surprisingly, following the Doha summit and through the implosion of the 2003 Cancun Ministerial, the continued opposition by a majority of WTO signatory countries to this massive expansion of the WTO’s scope brought negotiations to a standstill. Thus in July 2004, a new WTO Framework Agreement was signed that jettisoned many of these matters. As a result, while there are several other important issues under negotiation, the “three pillars” of the Doha Round now are non-agriculture market access (NAMA), agriculture and services. However, given the extremely sensitive domestic policy and political implications of these subjects for all WTO signatory countries, agreement on this abbreviated agenda has also proved extremely

² Agreement Establishing the WTO, Article XVI.

difficult. The passing of the 2005 deadline should beg the question of whether the agenda now being negotiated – for instance the *expansion* of the GATS rather than the repair of the existing WTO rules that have had negative consequences for many people – has political legitimacy among the populations of the WTO signatory countries.

Indeed, in parliaments around the world, many legislators consider that service sector policy – how to ensure that residents have health care, safe water, affordable electricity and gas and quality education – is within their jurisdiction rather than subject to distant “trade” negotiations. And, to the extent that most legislators are even aware of the negotiations now underway at the WTO on the GATS, their information largely comes from the perspective of service sector businesses who view the negotiations as a tool to go on the offensive to seek service sector business opportunities in other countries.

The voice of the consumer who relies on having access to affordable, quality services is one that is not often considered in GATS negotiations. Yet the existing GATS rules pose significant threats to the ability of those who will live with the results – consumers – to have democratic decision-making over the service sector policies that will affect their daily lives. The existing GATS rules pose considerable threats to people’s affordable access to quality essential services and to the public interest regulations of services upon which we all rely.

You have no doubt been told repeatedly that the right to regulate is secure in the GATS. It is true that the right to regulate is mentioned in the nonbinding preamble of the agreement, but the actual GATS rules trump this language, as described below. You may not know that GATS negotiators have rejected calls from the Transatlantic Consumer Dialogue (TACD) and others to enshrine the right to regulate in a binding article of the text of the agreement.³ As the original panel in the WTO challenge of the U.S. ban on internet gambling so pointedly stated: “members’ regulatory sovereignty is an essential pillar of the progressive liberalization of trade in services, but this sovereignty ends whenever rights of other members under the GATS are impaired.”⁴ And now, a major push is underway to further expand the GATS – both as regards what service sectors are covered and the scope of the GATS disciplines to which domestic service sector policy must conform.

In my written testimony, I have focused on four issues:

- **GATS negotiations on Mode 4 movement of natural persons to provide services:** “Mode 4” is the WTO term for the right of individuals to provide a service in a foreign country. A better term for Mode 4 would be “domestic immigration policy.” Current GATS negotiations are focusing heavily on Mode 4 while many domestic policy makers have no notion that “trade” talks could be determining countries’ future immigration policy.
- **GATS Threat to the Right to Regulate Services in the Public Interest**

³ TACD, Recommendations on Trade in Services, Trade-11-01, May 2001 available at: www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=93. An excellent TACD background paper on consumer concerns with the GATS is available at: www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=190.

⁴ WTO, United States - Measures Affecting The Cross-Border Supply Of Gambling And Betting Services, Report of the Panel, WT/DS285/R, November 10, 2004, p. 209, para. 6.316.

- **Negotiations to Establish New Cross-cutting Constraints on Domestic Regulation in the Service Sector:** At issue with these new disciplines is not whether domestic policies treat foreign service providers less favorably, which is already forbidden under GATS rules, but rather to establish new *subjective* WTO limits on regulation that would apply to nondiscriminatory domestic regulations.
- **“Benchmarking”:** Service sector industry interests are now seeking to undo the core “bottom up” principle of the GATS bargain through what is called a “benchmarking” approach which would require all countries to submit a certain amount of their services to GATS coverage. EU negotiators in Geneva have been at the forefront of pushing this approach, which has met with strong opposition by developing countries and consumer groups from around the world.

II. HOW GATS RULES AFFECT MATTERS OUTSIDE THE REALM OF TRADE AND LIMITS GOVERNMENTS DOMESTIC RIGHTS TO REGULATE THE SERVICE SECTOR IN THE PUBLIC INTEREST

It is because GATS extends its reach beyond the notion of trade in services, to incorporate immigration policy, constraints on domestic regulation of services, including potentially public services, that the agreement remains deeply controversial in the north as well as in the south.

GATS covers all conceivable ways a service might be provided which are enumerated as four “modes.”

Mode 1 is cross border trade in services via phone lines, internet, postal service, satellite, etc. This is what most people think of when they think of cross border trade in services, yet in itself poses difficult challenges for protecting the consumer interest, prosecuting fraud across borders, etc.

Mode 2 is consumption of services abroad. This is the right to sell services in one nation to citizens of another nation, such as overseas tourism, heart surgery in India, dental work in the Philippines, etc. Protecting the consumer interest with this type of “trade” is extremely challenging as well.

Mode 3 is commercial presence. This is the right to establish a business in another country for example by setting up a subsidiary or merging with a local company. This category is also not really about trade, but about investment.

Mode 4 is movement of natural persons. This is the right of individuals to provide a service in a foreign country.

Mode 4 – Movement of Natural Persons to Provide Services

Let’s start with the last of these categories first. A better term for “Mode 4” would be “domestic immigration policy.” In the United States, the Constitution gives the Congress exclusive authority for setting our domestic immigration policy (Article I-8.) The very notion that immigration policy would be set via GATS Mode 4 negotiations by trade negotiators in Geneva has our congressional leaders deeply concerned. Indeed, when such immigration provisions were slipped into U.S. Free

Trade Agreements with Singapore and Chile, the agreements were nearly rejected by Congress and a commitment was obtained from the Bush Administration that future trade pacts would never again contain such provisions. I understand that here in the European Union there have been equally heated debates over immigration policy and I assume there are the same concerns about separation of powers and democratic accountability here as well.

A group of developing countries led by India have joined together to forward a common position on Mode 4 that focuses on the cross border movement of professionals, but does not insist that these professionals are paid the same wages as their peers in developed nations.⁵ Moreover, these proposals would set up a system within countries by which a class of workers would have their basic rights – indeed their very right to be in a country – controlled by their employer not the laws of the country in which they are working. This would not only undercut wages, work hours, vacation policy, the right to organize, and other labor policy in developed countries and generate foreseeably ugly social tension, but it would also exacerbate the problems of “brain drain” in the developing world.

A respected study presented at the WTO that advocated increased Mode 4 liberalization showed that the community left behind by Mode 4 workers suffers significantly increased welfare costs. In other words, developing countries pay dearly for “brain drain” associated with outward migrating professionals.⁶ Plus, the ongoing tragedy presented by the immigration of doctors and nurses from Africa to Europe and the United States has been well-documented.⁷

Moreover, there have been various alarming proposals on licensing and qualification requirements (in the context of the Working Party on Domestic Regulations which is discussed in detail below). What is envisioned here are “harmonization exams” to establish equivalency and to facilitate the movement of workers across borders. National, state or provincial licensing requirements and “language competency” are characterized as unnecessary obstacles to the smooth flow of workers across borders.⁸ Once professional service sectors are signed up to the GATS, “disciplines” are envisioned which would apply a “necessity test” to all domestic regulations relating to that profession. The WTO has already completed one such set of rules which apply to the accounting sector and require that licensing, qualification and technical standards be “no more trade restrictive than necessary.”⁹

⁵ WTO, Council for Trade in Services, Communication from Argentina, Bolivia, Brazil, Chile, Columbia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay, Categories of Natural Persons for Commitments under Mode 4 of GATS, TN/S/W/31 February 18, 2005.

⁶ L. Alan Winters, “The Economic Implications of Liberalising Mode 4 Trade,” Paper prepared for the Joint WTO-World Bank Symposium on “The Movement of Natural Persons (Mode 4) Under the GATS,” World Trade Organization, presented April 11, 2002, at 30.

⁷ See for instance, Celia W. Dugger, “Where Doctors are Scarce, Africa Deploys Substitutes,” *New York Times*, Nov. 23, 2004; Celia W. Dugger, “Botswana’s Brain Drain Cripples War on AIDS,” *New York Times*, Nov. 13, 2005; Celia W. Dugger, “An Exodus of African Nurses Puts Infants and the Ill in Peril,” *New York Times*, July 12, 2004.

⁸ This paper by Chile, India, Pakistan and Thailand entitled “Proposed Elements for Disciplines on Qualifications Requirements and Procedures (JOB(o5)/50 March 30, 2005 is described in Working Party on Domestic Regulation, Report on the Meeting Held on 7 and 18 February 2005, S/WPDR/M/2911 July 2005 paras. 43-79.

⁹ WTO, Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, S/L/64 December 17, 1998.

These “accountancy disciplines” were drafted in large part by the now defunct U.S. accounting firm Arthur Andersen.¹⁰ Formerly one of the ‘big five’ U.S. accounting firms, Andersen disintegrated in 2002 when a criminal investigation was launched into the firm’s role in the bankruptcy of the energy giant Enron. Andersen also had the privilege of being the accountant for Worldcom, whose CEO was recently imprisoned for 25 years for inflating the firms assets by \$11 billion.

Recent accounting scandals both in the United States and Europe which resulted in serious losses for employees and consumers underscore the importance of the rules that govern professions who are guardians of the public trust. Global professional standards developed in nontransparent organization like the WTO or in closed-door negotiations with only business representatives at the table, are destined to result in lowest-common-denominator policies that most assuredly will not serve the public interest.

Mode 3 – Commercial Presence and GATS Unprecedented Market Access Rules Limit the Domestic Right to Regulate

The GATS is often called the first multilateral agreement on investment because it includes “Mode 3” which is the right for foreign service firms to establish a presence, own and operate services *within* another WTO country’s borders under WTO rules rather than domestic rules. This means that the agreement set constraints on the types of regulations domestic governments can apply to foreign services firms operating *within* their territory.

For instance, the GATS National Treatment rule (Article XVII) not only prohibits government policies that treat foreign service firms less favorably, but also prohibits any action of a government that modifies the “conditions of competition” in favor of local service suppliers. This means that any services regulation that even inadvertently, unintentionally, or indirectly creates a disadvantage for foreign services companies can be challenged at the WTO as a violation of Article XVII. Thus, a labor market policy that may apply beyond the service sector to all workers in all sectors, but that arguably could have a different *effect* on a foreign service firms, could be challenges as a violation of this requirement.

Another example of the deep domestic regulatory implications of GATS’ rules is the GATS Market Access requirements (Article XVI). Under these rules, a government is forbidden from maintaining any policy in a service sector committed to GATS rules that would *limit*: (a) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test, or (b) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

What does this mean practically? Imagine common land use policies that limit the number of hotels on a beach or the size, location or design of a retail store. These regulations would be in violation of the GATS if they were not specifically carved out (or protected) from a nation’s GATS market access commitments.

¹⁰ Anthony De Palma, “WTO Pact Would Set Global Accounting Rules,” *New York Times*, March 1, 2002.

Let's take one example from the European Community's original 1994 GATS list of commitments: Greece successfully protected the Acropolis from hotel and restaurant development by exempting historic and artistic sites from its hotel and restaurant service commitments, but it failed to take such reservations for historic sites in its full retail commitments as many other EU nations did. Now I must assume that Greek negotiators were not issuing an invitation to Sam Walton to place a Wal-Mart sign on the Acropolis. The problem is that there are likely hundreds of examples of these oversights by negotiators, because even today, GATS negotiators cannot agree on how to write their commitments, what needs to be explicitly exempted and what does not. And, even when a country thinks that it has limited its commitments, ultimately when the question is contested, it is a WTO tribunal that decides exactly to what service sectors which GATS rules apply. It is exactly this set of problems that led to the U.S. loss in the WTO's Antigua gambling case, which I discuss below.

GATS Has no Meaningful Exemption for Public Services

Before I get to gambling however, there are two other important provisions in the GATS I want to mention. First, it is now well accepted that GATS' much touted protection for public services, is when put to application, actually no protection at all. GATS Article 1.3 is written in such a way that it only applies to government services which are provided neither on a "commercial basis" nor "in competition with one or more service suppliers."¹¹ As regards most WTO signatory countries, it is hard to imagine a public service that actually would qualify under this exclusion.

First, most public services are provided both by government and in the private sector – such as education, medical and hospital services, and transportation. One sector that might fit under this exception is national security provided by the military, although certain elements such as transport of troops and equipment increasingly have been bid out to private shipping services. Given the growing presence of private security companies, domestic policing would not qualify as a government service excluded from GATS coverage under this definition.

Second, even for services provided exclusively by the government, only direct government-to-people delivered services is exempt from the GATS. Yet almost all forms of public services involve some kind of commercial participation in the delivery of health, education and social services. In most countries, governments provide public services through a "mixed system of delivery" that includes both public and private components. Often, the private components are not-for-profit community organizations which obtain government funds to adequately perform a service, such as soup kitchens which receive city grants. Yet, these "mixed" modes of delivery would not be considered pure forms of public services and therefore would not be exempt from the GATS rules under Article 1.3.

¹¹ GATS Article I-3-b and c. "... (b) 'services' includes any service in any sector except services supplied in the exercise of government authority; (c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

Indeed, as noted in a paper by the Organization for Economic Cooperation and Development, “This exception is, however, limited: where a Government acts on a commercial basis and/or as competitor with other suppliers, its activities are treated like those of any private supplier.”¹²

GATS Commitments Are Extremely Difficult to Reverse

Secondly, it is crucially important to understand that once market access is granted in a service sector under GATS, it cannot be reversed unless compensation is offered to all interested WTO countries for their current and future lost business opportunities. This rule in GATS Article XXI is intended to “lock-in” the level of liberalization and makes reversals of mistakes or even the most disastrous of privatizations or deregulations extremely difficult. Thus, as European negotiators are now making “offers” to subject additional aspects of your service sectors to GATS disciplines, it is vital to consider the policy space that such commitments would foreclose for addressing future developments in these sectors.

Moreover, examples of failed privatization schemes already abound in the third world as well as the first. In the United States, where the corporate provision of water services is still very rare, at least 17 cities have had to “buy back” their water services or cancel multi-year contracts due to poor performance. If GATS rules had been in place in this sector, the United States may first have had to compensate WTO trading partners before cities would be allowed to take these actions.

The first exercise in this type of compensation negotiation is underway and it involves the European Union. When ten more nations states joined the European Union early in 2004, the European Commission (EC) decided to extend protections for utilities, audio visual and other sectors that were included in the EC’s previous GATS commitments to the new countries. Because the EC is “taking back” liberalizations, the acceding countries had already offered or asserted the right to regulate in those sectors without GATS limitations, it triggered the Article XXI compensation rule.

Not surprisingly, the EC is keeping these negotiations top secret because it reveals the difficulties and disagreements on how to write the list of commitments (called a schedule) to protect sensitive sectors and the public interest. Yet at the same time, the EC is pushing for the application of this rule to even more vulnerable developing nations, who would be even harder pressed to fulfill this rule.

The Ruling in Antigua’s GATS Challenge of the U.S. Internet Gambling Ban Reveals New GATS Threats to Countries’ Right to Regulate in the Service Sector

Those of us who have been sounding the alarm over the constraints poised by GATS rules on the right to regulate watched with interest as the island of Antigua brought a WTO case against U.S. laws banning internet gambling. While this case has been largely portrayed as a David against

¹² OECD. “The General Agreement on Trade and Services (GATS): An analysis,” Paris 1994, pg. 7 cited in Canadian Centre for Policy Alternatives, Facing the Facts, pg. 20.

Goliath struggle or as an attack on strange Puritanical objections to gambling, the results of this WTO case pose significant threats to the rights of countries of all sizes to regulate an array of services within their territories.

Gaming in the United States is regulated largely by states and there are a multitude of cultural attitudes about gaming ranging from blanket bans on all forms of gambling in Utah and Hawaii to very liberal gambling rules in towns such as Las Vegas and Atlantic City.

The April 2005 WTO Appellate Body decision on the gambling case was a stunner, not so much for the immediate impact of the decision which addressed the narrow issue of internet gaming, but for the threat the new WTO jurisprudence established by the decision poses for the regulation of *other* service sectors covered by the GATS.

WTO Panels Can Expand a Country's GATS Commitments: First, the WTO tribunal exercised enormous discretion in deciding what GATS obligations the United States had made – a precedent that leaves all WTO signatory countries open to finding themselves required to comply with GATS rules in service sectors countries never intended to subject to GATS rules. The WTO Appellate Body declared that the United States had signed up or made GATS commitments for gambling because the United States had made commitments under a category called “recreational services.” Although the U.S. government showed that it had never intended to do so, the panel ruled that under one system of classifying service sectors developed by the United Nations – a system the U.S. GATS commitments specifically list as *not* being adopted by the United States – gambling services was a subset of “recreational services.” Because the United States did not use the UN system of classifications and only those sectors a country lists are covered by GATS rules, the United States did not consider gambling covered and thus obviously took no limitations to such coverage! Thus by “reading in” gambling as being committed to GATS, the WTO ruling means that *all* U.S. gambling regulations, not only ones dealing with internet gambling, have to comply with GATS market access and national treatment rules. This implicates a huge swath of state gambling policy, from the 30 states which have exclusive lotteries used to raise school and highway funds, to numerous state compacts that provide for exclusive provider arrangements for Native Americans to operate gaming on reservation land, to the states which simply ban gambling.

Bans on Pernicious Activity Constitute a “Quota of Zero”: Even more shocking, the panel ruled that outright bans on undesirable behaviors are a GATS violation by ruling that a regulatory ban is a “quota of zero.” Thus policies criminalizing certain acts or banning certain behaviors are now presumptively WTO-illegal when a government has made full market access commitments in a covered service sector. Thus, not only is Utah's ban on gambling now vulnerable to challenge in the WTO, but European policies banning the dumping of toxic waste are also vulnerable to challenge because such policies were not carved out of the EC's commitments on hazardous waste disposal.

In appealing the lower tribunal's finding that a ban was an illegal “zero quota,” the United States protested that such a finding would mean foreign companies had to be allowed to do what was illegal for domestic companies to do. The WTO Appellate Body reaffirmed this outlandish finding. Thus GATS market access rules – which ban quantitative limits on covered services – are now

interpreted to require countries to allow foreign firms to provide service otherwise illegal or banned.

This situation so alarmed our states' top law enforcement officers that 30 U.S. attorneys general led by the Republican attorney general of Utah, wrote to our trade representative and told him to remove gambling from our service commitments and to actively consult with states before submitting any other state regulatory authority to the GATS.

In considering the European offers now being made in the ongoing GATS talks, it is vital to do so under this new paradigm by which flat bans of certain pernicious activities in covered sectors now can be challenged as GATS market access violations.

Qualitative, as well as Quantitative Services Regulations Threatened: Finally, I want to point out that a bright line is supposed to be drawn in the GATS between the quantitative measures covered by market access and qualitative measures governed by other parts of the agreement. For the U.S., the WTO gambling decision means this critical distinction between quantitative and qualitative measures has broken down. If governments believed that only quantitative regulations were covered by the GATS, they will not have protected the qualitative regulations they want to preserve. Thus, the WTO gambling decision has exposed a wide field of domestic regulation to GATS challenges.

The WTO gambling ruling constitutes a frontal attack on the right of nations to regulate in the public interest, not just in the gambling sector but in any covered sector. As Duke Law School Professor Joost Pauwelyn said, "this may well mean that, with the stroke of a pen, the validity of scores of domestic services regulations, including those that are non-discriminatory, are threatened."¹³

The U.S. government has predicted there will be many new disputes taken on the basis of the U.S.-gambling panel's interpretation of market access. Governments would not have known that regulatory bans were a violation of market access, and so would have made commitments in areas where they maintain regulatory bans.

In the words of two trade experts, the gambling case now reveals clearly that GATS market access "extends beyond traditional concerns of access for foreign-service suppliers to encompass all policies which restrict access to a market." This means the GATS is already "a major extension of multilateral trade disciplines into the realm of domestic policy."¹⁴

My recommendation ladies and gentlemen, is read the gambling case then reread the EC schedule and the EC offer!

In the gambling case, the United States unsuccessfully argued that the line of reasoning used by the WTO was so absurd that it would instantly make WTO-illegal such policies as: "a complete ban

¹³ Joost Pauwelyn, Duke University School Of Law, "Rien Ne Va Plus?" World Trade Review, July 2005.

¹⁴ Tony Warren and Christopher Findlay, "How Significant are the Barriers? Measuring Impediments to Trade in Services," paper presented at the Services 2000: New Directions in Services Trade Liberalization Conference, Washington, D.C., June 1-2, 1999.

on unsolicited direct advertising by fax or email, or by use of automated calling machines” and “a prohibition on highway-side outdoor advertising signs” if a member made a full market access commitment for supply of advertising services through commercial presence.¹⁵ I am sorry to tell you that the European communities already have made such a market access commitment and thus such policies held by EU member states are now likely violations of the GATS agreement. Dozens of other examples can no doubt be found upon close examination of the EC’s list of commitments.

It is important to note that by our count the EC has already lost 89 percent of the WTO cases brought against it, only successfully defending two cases. That is quite a losing streak. Remember, the EC had the honor of losing the first GATS case, the challenge of the European banana trade rules established under the Lomé Treaty with the African, Caribbean and Pacific countries. Perhaps you are wondering how a banana can be a service? Your banana case combines the same dangerous factors that resulted in the gambling case ruling: the discretion of WTO tribunals combined with the inevitable fallibility of the human beings who do our trade negotiating. In your banana case, while you “paid” for an exception under the General Agreement on Tariffs and Trade that covered the actual goods in question, European negotiators did not think to also take exceptions in GATS from your commitments on “distribution services” to exclude the banana licensing regime. EC trade negotiators will tell you that you have nothing to worry about with the current GATS talks, but the record speaks for itself.

III. GATS NEGOTIATIONS NOW UNDERWAY TO ESTABLISH NEW CONSTRAINTS ON DOMESTIC REGULATION

Background on the GATS Domestic Regulation Negotiations

Among the issues that were listed in the original 1994 GATS text to be revisited starting in 2000 was whether it was necessary to establish cross-cutting disciplines that would apply to countries domestic regulatory measures in the service sector in addition to the limits on regulation established in other aspects of the GATS text, (GATS Article VI.4). A Working Party on Domestic Regulations was established in 1999. It has held over thirty formal sessions. It also has had many behind-the-scenes “informal” meetings that are kept secret from the public and parliamentarians, despite the enormity of what is at stake.

The initial question – are new disciplines necessary at all – has not been given appropriate consideration. Thus GATS negotiators participating in the Working Party on Domestic Regulations are now close to having draft GATS amendments to propose for adoption that could subject an enormous array of domestic regulations on all services – perhaps including those not committed to GATS – to the challenge on the basis that they are “unnecessarily” burdensome or have the effect of restricting trade. At issue with these new disciplines is not whether domestic policies treat foreign service providers less favorably – as noted above, that is already forbidden under GATS rules – but rather whether nondiscriminatory domestic regulations violate new subjective WTO limits on regulation.

¹⁵ WTO, United States - Measures Affecting The Cross-Border Supply Of Gambling - Appellant Submission of the United States, January 14, 2005, para. 127.

The specific domestic regulations that would explicitly be subject to such new limits on regulation are:

- Licensing requirements, such as the equipment required in hospitals or bonding requirements for contractors;
- The technical standards service suppliers have to meet, such as staff ratios in schools and municipal construction codes. The definitions provided by the WTO Secretariat of “technical standards” would seem to leave little out. For example, the Secretariat definition includes requirements that apply both to the definition of the service and “to the manner in which it is performed.”¹⁶ What regulation could not be defined as a requirement about how a service is to be performed?
- Qualification requirements for individual service suppliers, such as doctors, engineers, and teachers.

Limits on such regulations would apply to all levels of government and under existing GATS rules defining the scope of covered entities, non-government organizations with delegated government authority also are automatically covered. Some countries participating in the Working Party on Domestic Regulations additionally proposed that even voluntary standards should be required to be “no more trade restrictive than necessary.”¹⁷ Some delegations think the granting of work visas should be covered under these new GATS disciplines.¹⁸

Thus, while many involved in these negotiations attempt to portray their work as dealing with a very narrow group of service sector regulations applying merely to licensing issues, in practice there is hardly any service sector that is untouched by licensing requirements and technical standards.

Negotiators participating in the Working Party on Domestic Regulations report that momentum is building in these talks. The former chair of the services negotiations, Alejandro Jara, believes that “the Working Party on Domestic Regulation should be able to provide some elements for disciplines before Hong Kong.”¹⁹ This suggests WTO trade ministers could be asked to approve key aspects of GATS disciplines on domestic regulation in a scant two months from now. Not only has there been no consultation of legislators or the public on a proposal that would have such far-reaching domestic implications, but in fact no draft text is even available.

Thus at the same time that the EC is making broad new GATS commitments to allow more overseas professionals to work in Europe and broadening guarantees for foreign investors in European

¹⁶ WTO Secretariat Paper, The Relevance of The Disciplines of The Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4, S/WPPS/W/9 September 11, 1996.

¹⁷ WTO, Working Party on Domestic Regulation, Communication from Switzerland, Proposal for Disciplines on Technical Standards in Services, S/WPDR/W/321 February 2005.

¹⁸ WTO. Working Party on Domestic Regulation, Note by the Secretariat, Report on the Meeting Held on 24 September 2004, S/WPDR/M/2715 November 2004.

¹⁹ WTO, Council on Trade in Services, Special Session of the Council for Trade in Services, Report by the Chairman to the Trade Negotiations Committee, TN/S/20, July 2005.

services, it is negotiating GATS disciplines that will lead to the deregulation of these services. This is a potentially disastrous combination.

On What Models are the Proposed GATS Domestic Regulation European Restrictions Being Based?

The European Communities, perhaps more than any other WTO member, should be wary of surrendering regulatory rights through new cross cutting GATS disciplines on domestic service sector regulation. The different proposals for these new disciplines are being lifted from language in two WTO agreements restricting the domestic regulation of goods – the WTO Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements. These are the same WTO agreements that respectively have been used to rule against the European ban on meat treated with artificial growth hormones and to challenge European GMO policy.

The EC has already lost a WTO SPS case against its restrictions on hormones in beef (EC – Measures Concerning Meat and Meat Products (Hormones); WT/DS26) and continues to pay U.S. \$116 million a year in punitive sanctions for the privilege of maintaining its public health regulation. It is currently in a winner-take-all, WTO TBT dispute with the United States over bans on genetically modified foods. If the United States wins this initial case (EC – Measures Affecting the Approval and Marketing of Biotech Products; WT/DS291), the ruling of which has conveniently been delayed yet again until after the Hong Kong Ministerial, it has another TBT challenge to European labeling and traceability regulations waiting in the wings.

The lesson that Europe has bitterly learned in the beef hormone case is that it does not matter under the WTO SPS disciplines on domestic regulation that the ban on meat raised with artificial hormones applied without discrimination to both foreign and domestic products. The proposed new GATS disciplines would have the same logic. At issue in these new disciplines is not whether domestic policies treat foreign service providers less favorably, but whether nondiscriminatory domestic regulations violate subjective WTO limits on regulation. Thus it would be irrelevant whether European standards in critical areas like hospital services – where some EC members have made commitments – are applied evenhandedly to both foreign and locally-owned facilities. Under the new GATS restrictions, any standard that is deemed to be “unnecessarily trade restrictive” could be subject to challenge.

Another source for the current proposals on the table are the set of regulatory restrictions already agreed to on accounting, noted above, which the disgraced firm Arthur Andersen helped draft. Italy’s \$15 billion Parmalat accounting scandal involving Deloitte and Touche and Grant Thornton suggests that the United States is not alone in its problems of regulating the work of huge multinational accounting firms. Yet despite these crises, GATS restrictions on accounting regulations will soon enable challenges to accounting regulations as creating “unnecessary” barriers to trade as these GATS accounting restrictions will automatically come into force at the end of the Doha Round. More broadly, the structure of these WTO accounting service sector regulatory limits is also a significant influence in the Working Party on Domestic Regulations process. The accountancy standards provide limits on both what regulatory goals a country may “legitimately” pursue under GATS and requires that such measures be the least trade restrictive option.

What Are the New Subjective Limits on Domestic Regulation Being Proposed?

The GATS Article VI-4, under which the Working Party on Domestic Regulations is constituted, states, “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, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”

At the core of this language – and at the core of the proposed new limits on domestic regulation - is the obligation that regulations not be more trade restrictive and/or burdensome than necessary. In the language of trade negotiators this is called a “necessity test.”

Negotiators are debating whether the new draft disciplines on domestic service sector regulations restrictions should require that regulations be “no more trade restrictive than necessary to fulfill national policy objectives” or “to fulfill *legitimate* policy objectives.” The latter would leave it up to WTO dispute panels to determine whether a government’s policy objective was legitimate or not – in addition to requiring countries seeking to defend a challenged law to prove there was not a less trade restrictive way to achieve its goal. As a matter of logic, proving a negative is impossible, meaning that if the burden of proof is placed on defending countries, it will be nearly impossible to meet such a “least trade restrictive” rule.

The European Commission originally tried to get a list included to ensure that objectives like cultural protection would automatically be accepted as legitimate, but gave up when it got no support.

Negotiators have said that it is only the means and not the objectives that will be restricted under the new provisions. But debates over the appropriate means to accomplish regulatory goals are what most regulatory conflicts concern. Tobacco companies, for example, do not challenge the objective of keeping young people from smoking, but argue that advertising bans at sports events are unnecessarily restrictive.

Even if the new restrictions on domestic regulation are limited to the means of achieving such key objectives as universal service, this will severely limit governments’ policy space. For example, a requirement that hospitals or schools operate on a non-profit basis could be deemed more burdensome than necessary. A challenging country could argue that instead the poor should be given government subsidies to buy their services from private providers. The requirement that hospitals serve all those requiring emergency care, whether they can pay or not, could also be challenged as more burdensome than necessary under the same logic.

How Would These New Disciplines Relate to the Preamble Language in GATS Citing a Right to Regulate?

It is critical for legislators to understand that all of the deregulatory provisions in existing WTO agreements such as SPS and TBT and the ones proposed for the GATS start off with what sound like ironclad guarantees of the right to regulate. However, as a matter of legal interpretation, when the core rules of an agreement conflict with the pleasant-sounding language in an agreement's preamble, the specific rules trump the general introductory language. For instance, note that SPS agreement contains the same general language in its preamble about countries' rights to regulate, however this language did not stop the WTO appellate body from ruling against the European bans on artificial growth hormones in beef.

Will Rules Apply Across the Board or “Just” for Committed Sectors?

The main proposals being debated by the GATS negotiators in the Working Party on Domestic Regulations really only vary within a limited range in terms of their negative potential – will they be catastrophic or merely devastating?

One issue to be decided is whether the disciplines should apply to all services across the board or to those where governments have made market access and national treatment commitments. The European Commission has said that it could be a combination of both – general disciplines for all services and more specific ones in committed sectors.

Applying the disciplines across the board would fall into the category of producing “catastrophic” consequences. For example, with under the “across-the-board” scenario, all European cultural regulations, which the commission has promised to keep off the table in this round of GATS bargaining, could be scrutinized by WTO panels to determine whether they were really necessary – as would all European drinking water standards, gambling licenses, and licenses to sell tobacco.

But applying the GATS domestic regulation disciplines to services where governments have already made commitments would still have devastating consequences, and transform the meaning of what countries agreed to. For example, the European Communities have already committed hazardous waste disposal, advertising, and hospital services. Did EU member governments agree to allow commitments in these areas with the understanding that they would ultimately be deregulated through new GATS disciplines?

The Net Effect: Downward Harmonization

“Deregulation” and downward “harmonization” are verboten terms at the GATS Working Party on Domestic Regulations negotiations, sparking criticism of anyone who uses them. They are nonetheless the inevitable consequences of requiring all domestic service sector regulations to be “necessary.”

This term has a very specific meaning in the WTO context. In the event of a dispute, it triggers the application of an arduous test that almost always results in a negative result for the regulation being tested.

The WTO Appellate Body rulings on necessity require:

- That measures serve the specific objectives claimed for them. The EC lost a case (EC – Conditions for the Granting of Tariff Preferences to Developing Countries; WT/DS246, brought by India) because it was unable to prove that trade preferences for developing countries to encourage a shift from the production of illegal drugs would benefit health in Europe.
- That measures serve sufficiently “important” objectives to justify their trade restrictiveness.
- That less trade restrictive, alternative measures are not “reasonably available.” Panels determine subjective issues such as whether alternative measures meet the level of protection a government is seeking and whether a government can afford them if they cost more. Panels have ruled that increased cost and administrative difficulties cannot rule out the adoption of less trade restrictive options.
- Whether, in the panel’s view, the measure is effective in accomplishing its objectives. The panel can draw on whatever evidence it wants to make this determination, and its conclusions on the basis of this evidence cannot be appealed.

In determining whether alternative, less trade restrictive alternatives exist, GATS negotiators are borrowing from the SPS/TBT model in relation to the regulation of goods. They are proposing that standards set for services by international bodies be considered the safe haven for services regulations, that any national regulation conforming to these should be “presumed not to create an unnecessary obstacle to international trade.”²⁰

Since regulations exceeding the international standard would be open to challenge as unnecessarily trade restrictive, this proposal sets a ceiling for regulations of services. Its inevitable outcome is regulatory harmonization in a downwards direction. As noted above, there are proposal on the table at the Working Party on Domestic Regulations that the new disciplines should even cover regulatory innovations undertaken by non-governmental organizations.

When the fact has been raised that there are not international standardizing institutions in many aspects of services such as culture, the response has been not to worry; that creating GATS disciplines would help create them. The core question – the appropriateness or legitimacy of harmonizing services regulation worldwide in business-dominated, often nontransparent institutions – is being intentionally avoided. For instance, is this committee comfortable having important water services management standards set at the business dominated International Organization for Standardization? Of ISO’s 2,500 working groups, consumer advocates are only able to monitor a small handful.

Negotiating Options Regarding the Working Party on Domestic Regulations

There is no reason why the European parliament need accept these proposed new GATS restrictions on domestic regulation. First, the GATS agreement lists four areas of rules that were to be revisited – including regarding procurement, subsidies and emergency safeguard measures. Was it the

²⁰ WTO, Working Party on Domestic Regulation, Communication from Switzerland, Proposal for Disciplines on Technical Standards in Services, S/WPDR/W/321 February 2005.

European Parliament that decided that only one area of the GATS rules – limits on domestic regulations – would actually be subject to new negotiations? How was that decision taken and is it in the best interest of your constituents?

Second, the only requirement in the GATS text is to discuss *whether* new disciplines on domestic regulation are necessary. Thus these negotiations could simply conclude at Hong Kong with the statement “we found no new disciplines were necessary.”

As Members of the European Parliament face the possibility that their decisions on GMOs in Europe will be made irrelevant by WTO rulings, you may be asking yourselves how did this happen? How could our decisions that are focused on health and are applied to foreign and local alike be illegal under trade agreements? You may also ask yourselves where you could have intervened before your hands were permanently tied by agreements like SPS and TBT.

In terms of health, education, culture, and many more critical services, now is the time for you to intervene before trade ministers approve this sweeping deregulatory agenda in Hong Kong.

IV. BENCHMARKING PROPOSAL UPENDS “VOLUNTARY” “FLEXIBLE” STRUCTURE OF THE GATS

You have no doubt heard over and over again from the commission that GATS is “flexible,” commitments are “voluntary” and in the interest of developing countries. This is how negotiators often describe the “bottom up” structure of GATS, which as noted above, means that countries are only bound to meet GATS rules in the service sectors that they agree to subject to GATS rules. Such decisions by countries of what sectors to cover under GATS are listed in what are called “schedules of commitments.”

Given the repeated mantra about GATS’ flexibility, you may be surprised to hear that the Commission is now championing a proposal that would eliminate that voluntary, flexible approach.

Unlike other WTO agreements which are based on a type of “negative list” approach (meaning that all rules apply to all sectors unless explicitly exempted), the 1995 GATS was based on a “positive list” approach. Nations liberalized only those service sectors they signed up to the agreement. Nations were also allowed to choose which trade rules applied to their selected sectors and they were also permitted to exempt certain policies that were in direct violation of these commitments. This formula, while complicated, and as we have seen highly subject to errors and misapplications, did preserve an element of flexibility, as well as sensitivity both to the special needs of developing countries and to the democratic differences between nations.

Now the European Commission, normally a champion of subsidiarity and democracy, is championing a “benchmarking” proposal (also called “complementary approach”, or “common baseline approach”) to force the pace of negotiations and force service sector liberalization upon reluctant nations.²¹

²¹ European Commission, Room Document, Council for Trade in Services, Non Paper On Complementary Methods For The Services Negotiations, September 13, 2005 available at: www.tradeobservatory.org/library.cfm?refid=76781

By whatever name, the proposed new multilateral and plurilateral methods would drastically change the architecture of the GATS.

Under consideration is a proposal to force nations to make offers in a minimum number of sectors/sub-sectors in an agreed list of priority sectors/sub-sectors and across all modes of supply. This would be accompanied by a requirement to reduce exemptions.

It is likely this list of priority sectors will be decided with little input from member states or civil society. Will it include health, education, or environmental services? Will it include the top demands of the United States, energy or audio visual?

This proposal constitutes a complete reversal of promises made to developing nations in the original GATS and in the context of the much touted “Doha Development Round” that they could liberalize at their own pace, utilizing whatever democratic structures they normally employ. It also subverts Articles IV and XIX of the GATS which specifically establishes flexibility in favor of developing countries, not against them.

A benchmark approach would, in effect, force liberalization upon nations and lock it in. This poses significant hazards for developing countries, but also hazards for developed countries as well. Are the parliamentarians in this room willing and ready to privatize and deregulate service sectors based on a formula devised in Geneva or Hong Kong? If things go awry, will future parliamentarians be happy to be told that their policy discretion has been taken away and they are locked into liberalization by the GATS? Civil society in Europe has protested the lack of consultation and secretiveness of these negotiations, a formula approach may force concessions with little opportunity for EU member nations or the public to have a say.

To justify these radical changes, developed countries, including the United States and the EC, are creating a crisis-like atmosphere around the services negotiations. Developing countries are being chastised for not making enough offers or offers of “poor quality.” But in truth, there are now some 70 initial offers representing 95 member countries and around 30 revised offers. This is certainly a big leap from the 47 countries that had made offers at the beginning of this year.

The EC’s benchmarking proposal is contrary to the principles of subsidiarity and democratic accountability. It is a desperate attempt to force developing nations to speed up the privatization and deregulation of their public services for the benefit of the European services industry, not for the benefit of developing nations and their internal development goals – making yet more of a mockery of the Doha Round’s official name – the Doha Development Agenda.

VI. CONCLUSION: DO NOT ALLOW GATS TO IMPORT THE FAILED U.S. MODEL OF ESSENTIAL SERVICE PRIVATIZATION AND DEREGULATION

In conclusion, I would ask you to keep in mind that the ultimate goal of these negotiations is progressive rounds of liberalization in all service sectors. In the United States our public services have been cut to the bone. Essential services such as health care are provided largely by the private

sector and there is no safety net. Forty-five million Americans have no health insurance, a daily crisis in the lives of many. The world witnessed the result of 20 years of aggressive privatization and deregulation when Hurricane Katrina hit. Surely Europe does not want to follow the catastrophically failed U.S. model.

Decisions about service sector liberalization should be made domestically with the full involvement of impacted workers and consumers. They should not be made in the context of a one-size-fits-all global trade pact negotiated behind closed doors.