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BACKGROUND ON WTO AND FTAA SERVICE SECTOR LIBERALIZATION AND DEREGULATION

“Governments are free in principle to pursue any national policy objectives provided the relevant measures are compatible with the GATS.”¹ -- WTO, Oct. 1999

When most people think about trade, they conjure up images of ships laden with sacks of coffee beans, steel beams, shoes ferrying products between nations. Indeed, before the 1994 North American Free Trade Agreement (NAFTA) and the 1995 World Trade Organization (WTO,) trade agreements focused on cutting tariffs and quotas on trade in goods. The NAFTA and the WTO (and the 21 agreements WTO enforces – including the General Agreement on Trade in Services (GATS)) shattered these boundaries. Although their proponents called NAFTA and the WTO “trade agreements,” in reality they are broad international agreements in which trade rules are only a relatively small element. Each agreement contains 800-plus pages of non-tariff rules to which all signatories are to conform their domestic policies, laws and regulations. About 30 pages of those non-tariff rules in the WTO are comprised of the GATS rules.

WTO and NAFTA include expansive rules concerning what *domestic policies* regarding activities within their own borders that countries are allowed to establish or even maintain on the federal, state and local levels. In the WTO, constraints on domestic government policy regarding the expansive service sector are set forth in the GATS. In NAFTA, service sector policies are set forth in NAFTA’s Services Chapter (Chapter 12). 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 and the banks that hold our savings and make our home loans. Thus, these rules have a much more direct and dramatic impact on people’s daily lives than traditional trade matters.

One of the few things that supporters and critics of both the WTO and NAFTA 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. The former WTO Director General Renato Ruggerio, in an uncharacteristic outbreak of candor declared in 1998 that “GATS provides guarantees over a much wider field of regulation and law than the GATT; the right of establishment and the obligation to treat foreign services suppliers fairly and objectively in all relevant areas of domestic regulation extend the reach of the Agreement into areas never before recognized as trade policy.”²

One easy definition of services is everything that you cannot drop on your foot – retail stores, banking, hotels, insurance, energy, telecommunications, maintenance and repair, construction, toxic waste processing, mining, tourism, food preparation, restaurants, laundry, cleaning, and transport (trains, passenger and cargo airlines, ships trucking). Also included are “essential public services,” such as education, hospitals, social security, libraries, mail delivery, police and prisons, water and sewage systems and more. By imposing international commercial disciplines over services, almost no human activity from birth (health care) to death (funerals) remains outside these rules. Currently, large service sector companies are maneuvering to turn what we think of

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as essential public services, such as education, social security, water and sewer systems, and public health systems, including public hospitals, and more into new private business opportunities for profit.

While the existing GATS and NAFTA Chapter 12 rules pose a significant threat to access to essential services and the ability of U.S. federal, state and local governments to regulate in the public interest, a major push now is underway to further expand the existing GATS terms and to expand the NAFTA services rules to 31 additional countries through a proposed Free Trade Area of the Americas (FTAA). The new WTO-GATS negotiations started in 2000 and thus are dubbed “GATS-2000.” To give people an idea of what is at stake with the GATS-2000 and FTAA services negotiations, in this background paper we have described (and in many cases literally transcribed the text of) the key GATS rules and explained some of their implications. At the end of this paper, we describe the key elements on the table in the GATS-2000 talks. The service sector provisions in the draft FTAA texts that have been released in recent years are yet more extreme than those in the GATS. However, because the draft FTAA contains many “brackets” (which means that there are competing versions of the provisions about which countries do not have an agreement) we have not included a section-by-section analysis of it in this brief paper. However, where applicable, we do describe the areas of the FTAA in which there already is agreement which are substantially different from the GATS.

HOW THE GATS WORKS

1. Scope of GATS Coverage

The GATS covers “any service in any sector,”³ meaning no service is excluded from the agreement’s scope. The scope of the draft FTAA services agreement is equally broad. While the GATS is meant to “cover” all services, the main concerns are the impact these rules will have on whether ‘public services’ remain public and thus provide universal access and on how our governments can regulate privately operated services to require companies to operate in a manner that does not undermine basic public interests.

The limits the GATS rules impose on governments cover all actions taken by all levels of government – “central, regional, or local governments or authorities.”⁴ The same depth of coverage is proposed for FTAA. This means GATS covers local sewer systems, public hospitals, municipal trash collection, elementary education and water systems. Remarkably, GATS constraints also cover actions of “non-governmental bodies in the exercise of powers delegated by” any level of government.⁵ This includes boards of universities or hospital and private sector standard-setting or professional organizations, such as legal bar associations.

The GATS rules set constraints not only on government policies directly regulating services, but also extend to “measures by Members affecting trade in services.”⁶ This broad definition means that all government policies, including those not specific to services, but which affect services, such as general labor market policies or other broad regulations are disciplined under the GATS’ constraints.

The GATS is explicit that no sector is excluded *a priori*,⁷ meaning nations must follow some GATS rules even if they do not offer a service sector for GATS coverage. This is an important fact because the main argument of GATS supporters is that the GATS provides countries a flexible, “*la carte*” approach to service sector liberalization with countries only bound to GATS’ rules in service sectors for which they choose. (This is in stark contrast to the draft FTAA, which is designed as “top-down” agreement, meaning all elements of all services are automatically covered unless a country negotiates an exception to coverage.)

Some GATS rules – such as the important Most Favored Nation (MFN) rules, which require nations to give the same treatment to all other WTO nations that they give any WTO country – apply unconditionally to all service sectors whether they are offered by a nation to be covered by GATS or not.⁸ Practically, what the Most Favored Nation rule means is that if a government, for instance, gives a tax break, special regulatory treatment or a subsidy to any single foreign service sector company or investor, it must extend the same treatment immediately and unconditionally to every interested company from every WTO country. Some GATS analysts argue that this rule should be called the “most favored foreign company” rule because if one foreign service company

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obtains public subsidies or the right, for instance, to provide water or electric services or grant educational degrees, then all other foreign companies must be given the same funding or rights immediately.⁹

Another common line of GATS' defenders is that the GATS rules explicitly exclude all public services. It is hard to imagine a public service that actually would qualify under this exclusion. There is a provision in the GATS (Article 1.3) stating that certain government-provided services are excluded, but the provision 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."¹⁰

First, most public services in the U.S., and increasingly in other nations, are provided both by government and the private sector. U.S. examples are primary education, medical and hospital services, and transportation. For example, in the U.S. there are public hospitals (such as the world's largest hospital, Cook County hospital in Illinois), private not-for-profit hospitals (such as religious-affiliated and charity hospitals such as the Shriners), and for-profit operators (such as Columbia HCA and Humana). One sector that might fit under this exception is national security provided by the military, although recently certain elements, such as transport of troops and equipment, increasingly have been bid out to private shipping services.

Second, even for services provided exclusively by the government, only direct government-to-people delivered services that have no commercial basis are exempt from the GATS under this provision. Yet, almost all forms of public services - with Social Security perhaps the only clear exception - involve some kind of commercial participation. If Social Security were just partially privatized as the Bush Administration AND Republican Congressional leadership are now proposing, the program would no longer meet the exemption from GATS' disciplines. The U.S. Postal Service is clearly a public service, but we pay for its services, meaning it does not qualify. Similarly in most nations, the delivery of health, education and social services is provided through a "mixed system of delivery" that includes public and private components. Often, the private components are not-for-profit groups which obtain government funds to perform a service such as soup kitchens which receive city grants. Yet, these "mixed" modes of delivery are not considered pure forms of public services and therefore would not be exempt from the GATS rules under Article 1.3.

Indeed, as noted in a paper by the Organization for Economic Cooperation and Development dug up by the Canadian Centre for Policy Alternatives for their 2002 GATS booklet called *Facing the Facts: A Guide to the GATS Debates*, "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."¹¹

Finally, confusion abounds about the relationship of GATS rules to government procurement. Defenders of GATS overstate a provision that now excludes government procurement from GATS coverage. Under existing GATS rules, when a government is procuring services "for government purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale" most GATS rules do not apply.¹² What this means is that when the government purchases telephone service for internal phone systems or electricity for use in its own buildings, it can give preference to local providers or give special concessions to just one foreign supplier but not others. However, if the government is purchasing electricity from a private generator or long distance units from a private carrier for sale to the public - for instance through a national monopoly carrier - GATS rules do apply. In addition, there is a requirement to initiate new GATS talks on government procurement of services built in to the existing GATS text.¹³

2. What Do GATS Rules Require

Given an understanding of how broadly the GATS rules apply, the next question is what do those rules require besides the most favored nation treatment discussed above. One way to understand the substantive requirements is to view them as covering two overarching categories of provisions: First, market access; second, regulation of service suppliers and the provisions of services.

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A. Who Owns, Controls or Operates What Services

The first category concerns who owns and controls services: are they public services or are they private and if private companies are operating in a service sector, for instance telecommunications and banking, are there limits on how many companies may be established and who can own them? Many nations that have privatized services that were operated by the government did so by creating private non-for-profit monopolies which are heavily regulated (e.g. in the U.S. Fannie Mae and Freddy Mac which are government-sponsored, but operate in the free market and guarantee a secondary mortgage market and thus generate a willingness for banks to make home loans knowing they can sell the notes to Fannie and Freddy.) Other privatization schemes include establishment of several competing private for-profit firms or by regulating the percentage of foreign or absentee ownership allowed.

Under GATS rules, these issues of control are decided according to what “commitments” a country offers in different service sectors. Much more than what we might view as traditional “trade” of services over borders is included. Rather, GATS covers all conceivable ways a service might be provided which are enumerated as four “modes,” only the first of which is what many people would consider “trade in services.” Countries can agree to providing access for all modes or only for one or some. These modes are:¹⁴

Mode 1: Cross-border trade in services.¹⁵ This is the right to provide services from one country to another, such as international phone calls, remote data processing, software engineering and “distance learning.”

Mode 2: Use of service abroad.¹⁶ This is the right to sell services in one nation to citizens of another nation, such as through tourism and foreign exchange studies.

Mode 3: Establishment of a service business or investment in another country.¹⁷ This is the right to establish a “commercial presence” or investment in the service sector, including setting up subsidiaries or acquiring or merging with local companies. The WTO calls the GATS Agreement the world's first multilateral agreement on investment since it includes the right to set up a commercial presence in another country. This aspect of GATS is why some people consider it a backdoor means to revive the Multilateral Agreement on Investment (MAI), a radical investment pact which was killed by public opposition in 1998.

Mode 4: Movement of natural persons.¹⁸ This is the right to move people between countries to supply services. To date this mainly has involved professionals such as lawyers and consultants, with negotiations now underway to harmonize professional qualification standards so as to facilitate this movement of professionals across borders under one global standard for licensing lawyers, doctors and so forth. In the GATS 2000 negotiations, some countries are requesting broader Mode 4 access.

An initial set of commitments by sector and by mode was completed before the 1993 signing of the Uruguay Round agreements in which the GATS and WTO were established. In the GATS-2000 negotiations, countries are undergoing these negotiations anew, as described below. The process for making GATS commitments involves a negotiating period during which countries make requests of each other to have market access in specific service sectors. These requests are then followed up with a period during which countries submit offers in response to the requests. This is the so-called request-offer procedure. For GATS-2000, requests had to be made by June 2002 and offers are due starting March 31, 2003. This process occurs on many levels – countries negotiate bilaterally, groups of countries negotiate with pressure groups of countries and countries submit general offers. However, in the end, because of the Most Favored Nation rule discussed above, all WTO member countries obtain access in the areas each country offers.¹⁹ (If a country offers a specific sector or mode to one country, it is effectively open to all WTO members because of MFN.) Thus, for example, in the original GATS the U.S. committed certain energy services in modes 1, 2 and 3.²⁰ This means that companies in all WTO member countries have the right to provide cross border services (Mode 1) and to provide a service to a U.S. citizen or entity in their country in these areas (Mode 2) and that also all companies and/or investors have

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the right to establish or acquire businesses (Mode 3) within the U.S. which provide these services. Each countries' GATS market access coverage is listed in a "schedule" of commitments.

Two important sets of GATS rules apply only to the particular sectors that countries offered for coverage. Those sets of rules are called "national treatment" and "market access."

B. No Limits on Foreign Service Firms ("Market Access Rights")

The GATS bans countries from certain limits on market access for any sector that is offered for GATS coverage. These Article XVI market access requirements are extraordinary, as they simply ban certain types of policies – unless a country listed them in their GATS schedules in 1993 – even when they are applied equally to foreign and domestic services or suppliers. The following limits are forbidden:

- limits on the number of service suppliers, including through quotas, monopolies, economic needs tests or exclusive service supplier contracts;
- limits on the total value of service transactions or assets, including by quotas or economic needs tests;
- limits on the total number of service operations or the total quantity of a service;
- limits on the total number of natural persons that may be employed in a particular service sector;
- policies which restrict or require specific types of legal entity or joint venture through which a service supplier may provide a service; and
- limits on foreign ownership expressed as a maximum percentage or total value.

Indeed, there is nothing quite like GATS Article XVI in any other international commercial treaty. These market access rules are framed in absolute, rather than relative terms, pre-judging certain types of public policies and practices whether they are discriminatory or not.

What does this mean practically? Once a service sector is offered to be covered under GATS rules, countries are forbidden from limiting the number of service providers in that sector.²¹ Thus, for instance, once a government offers GATS access for concessions in national parks, waste incinerators, oil drilling, or golf course construction it loses the right to limit the number of such businesses, even if the limit applies equally to domestic and foreign service providers. Many local anti-sprawl measures set limits on the number of hotels, residences and resort facilities to minimize the development impact on the environment and protect open space. If hotel services are bound under GATS, a state or community that halts beach-front development for environmental purposes could be challenged by a foreign hotel or construction firm even though the policy applies to domestic firms also. As well, economic needs tests – a market analysis to determine if a market already is saturated with a certain type of service – are prohibited as a mechanism to judge whether there is demand for more service providers. Moreover, forbidding countries to have policies determining the type of specific legal entity required for providing a service is not allowed. This means that some governments' requirements that elder care or childcare services be non-profit entities are forbidden. For example, in the U.S., the state of Rhode Island prohibits for-profit hospital operators. Under the GATS, a government's maintenance of any of these policies in a service sector covered by GATS would be subject to a WTO challenge.

C. GATS Goes Beyond Requiring "National Treatment," Foreign Service Firms are Guaranteed Favorable "Conditions of Competitiveness"

Under GATS, it is not sufficient for governments to treat foreign and domestic services and providers the same. The GATS National Treatment rule requires governments to give foreign service providers and services the best treatment available to domestic services or service providers.²² This means that in setting taxes, regulatory requirements and more, governments cannot discriminate in favor of the domestic or local. The sorts of policies that could run afoul of these requirements include:

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- restrictions on non-resident ownership of services;
- targeting government development or research funds to locals or nationals;
- special tax breaks or other benefits available to locals to start up day care or other “social” services
- contracting set-aides for women or minority owned businesses or small business contract guarantees.

However the actual national treatment language in GATS goes farther. GATS not only forbids domestic policies which are written to treat foreign services or providers less favorably, but also forbids laws which may unintentionally have such an effect “Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers....”²³ In effect, this rule gives WTO dispute panels wide latitude to find public policies to be GATS illegal, even when they are not intended to be discriminatory and are written in a manner that applies identically to both foreign and domestic service firms. The pursuit of a policy goal can have, as an unintended consequence, the altering of conditions of competition. If that change benefits even some domestic companies relative to some foreign firms, the policy could be challenged as a violation of the national treatment rule of the GATS.

This language creates a *de facto* discrimination standard that means that first, even if a policy does not actually affect service trade flows, if it limits an opportunity in the sector it is a violation of GATS. Second, this provision means that even if a law is written to treat domestic and foreign services and service providers identically, if in practice such a law can be shown to have a different impact on even one foreign service or provider, it can be found to violate the rules. This problematic requirement could be used to attack a neutral policy. For instance, some countries require that any and all retailers must see to the recycling of the packaging of their goods or that manufacturers must deal with toxic waste on-site or at the nearest facility. These rules could be easier for a local retailer or manufacturer to comply with than for a foreign company, even though the goal of such laws is not to hinder foreign companies. Rather, it is to promote waste reduction and to avoid unnecessary long distance transport of hazardous materials. A similar case already has occurred in the context of the European Union (EU) regarding Danish laws which required the recycling of beverage bottles. German beer companies successfully claimed it was more costly for them to comply to the identical rules that applied to foreign and to Danish firms.²⁴ As well, almost any benefit that is provided to small businesses could be claimed to be *de facto* discriminatory to the extent that more small businesses are local and larger ones are foreign-owned. In short, the GATS ‘national treatment’ standard amounts to a form of ‘reverse discrimination’ for local businesses by favoring the interests of foreign-based, transnational corporations.

A similar provision in NAFTA has led United Parcel Service (UPS) to claim in a NAFTA challenge that the Canadian postal service is obtaining discriminatory privileged treatment in its for-profit private small parcel delivery service. The UPS argument is that because the not-for-profit Canadian postal service has a monopoly in letter delivery, parcel delivery being done by the Canadian postal service on the same route by the same personnel and equipment effectively is being subsidized. In practice, this sort of provision requires governments to provide all foreign service providers any subsidy or privilege granted to any foreign service provider. The NAFTA tribunal has not yet ruled in this case. However, almost every countries’ postal service could be subject to the same sort of challenge even though the purpose of having a letter delivery monopoly is not to harm private sector express delivery services.

D. Government Actions that do not Violate GATS Rules Also are Subject to Challenge

If these rules were not broad enough, the GATS also includes a right for one country to take another to a WTO dispute resolution tribunal as having violated GATS even when there is no specific one of these extensive rules that has actually been violated! Under GATS provisions called “nullification and impairment,” a country can challenge another for failing to guarantee anticipated benefits of services liberalization. Nullification and impairment is a weasely concept that exists in the General Agreement on Tariffs and Trade (GATT.) It means that even if a country has not actually broken a specific rule, if its actions cause the undermining of expected

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benefits of an agreement, then the country can be taken to dispute resolution anyway. In the GATS, the actual provision is vast: “If any member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another member [...] is being nullified or impaired as a result of the application of any measure which does not conflict with the provision of this Agreement, it may have recourse to” a WTO tribunal.²⁵ A country whose expected benefit is judged to have been nullifying or impairing “shall be entitled to a mutually satisfactory adjustment [...] which may include the modification or withdrawal of the measure.” This vague and open-ended provision raises any number of extremely troubling problems. Concepts such as “member considers” and “reasonably has expected” are inherently subjective. One country’s notion of its reasonable expectations may not be another country’s intended commitment – a matter over which a WTO tribunal, meeting in secret, would have total discretion. Not only does this open up opportunities for arbitrary and inconsistent rulings, but it promotes pro-liberalization re-writes of countries’ actual GATS commitments by unaccountable WTO tribunals. The GATS nullification and impairment provision is based on the same logic as the provisions requiring compensation for “regulatory takings” found in the controversial NAFTA investment agreement (Chapter 11) and in the draft MAI text referred to above. The notion is that the investor – in this case a foreign service sector corporation – is owed treatment by the government that goes beyond any explicit provision of the agreement. One example of this principle in operation regarding trade in goods comes from a Canadian challenge in the Canada-U.S. Free Trade Agreement (CUFTA) against a U.S. requirement that only pasturized milk could be sold in the U.S. Canada argued that the U.S. should have found that Canadian Ultra-High-Temperature (UHT) processed milk was “equivalent” in health and safety to pasturized milk and thus the U.S. should accept UHT milk imports under CUFTA. The CUFTA dispute panel ruled that the U.S. was justified in determining that the two types of milk were not equivalent in safety. However, the panel also ruled that Canada’s reasonable expectation that it could sell more milk in the U.S. under CUFTA had been nullified and impaired even though no specific CUFTA provisions had been violated by the U.S. and ruled in favor of Canada.²⁶

E. Countries must pay to reverse access once it is ever granted; privatization becomes a one-way street

Remarkably, under GATS rules, once market access is granted, it cannot be reversed unless compensation is offered to nations to whom access was ever granted for their lost future business.²⁷ This means that getting out of failed experiments, such as the California electricity privatization, becomes extremely costly and thus nearly impossible. GATS Article XXI.4 requires that a country “may not modify or withdraw its commitment until it has made compensatory adjustments...”²⁸ Countries were required at the time they made their initial GATS commitments to submit a list of all existing monopolies. Countries seeking to establish new monopolies, whether government or private sector, national or local, can only do so by paying for this “right” by compensating other nations.²⁹ Failure to compensate would open a country to a WTO challenge. Then a WTO tribunal effectively would simply order the compensation in the form of trade sanctions against the country who changed policies without advanced permission by the other WTO countries and compensation to them. Before the GATS became so controversial, the WTO had on its website a remarkably reveling online guide to what the GATS rules mean. “[B]ecause unbinding is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector...”³⁰

Thus, a government had to have given notice by 1993 of all existing or future possible government services or be required to pay to maintain or establish them. Obviously, even for governments who understood this requirement and sought to protect future policy flexibility, it is not possible to anticipate all possible future needs. An example of this problem is the attempt by the Canadian province of Ontario to set up a government system of no-fault auto insurance in 1990. This proposal was killed before it was finally approved after threats under similar provision of the CUFTA. The U.S. insurance industry claimed that such an act would illegally undercut Canadian CUFTA commitments in insurance services.³¹ To make this example even more chilling, these threats were issued on behalf of the U.S. insurance industry by Carla Hills a corporate trade attorney who

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was the United States Trade Representative who had negotiated these provisions during the first Bush Administration.³²

Second, these rules mean that if a public service is ever privatized or if a regulated private sector monopoly is ever replaced by competitive private sector provision of a service, it becomes excruciatingly difficult to ever go back to a public service. Such costly constraints against reversing course on privatization create a chilling effect on a number of services with major consumer implications, for instance health care reform (if new areas of public coverage were to be added, for instance covering children or adding pharmaceutical benefits for the elderly), on putting back into place regulation of scandalized accounting firms, or in furthering government insurance-based social programs such as social security, workers compensation, medicare and unemployment insurance. Obviously efforts to create public monopolies, such as single-payer style health care reform in the U.S., could also run afoul of GATS rules.

F. GATS Sets Limits on Domestic Regulation of Services and Suppliers

The second broad element of GATS rules pertains to if, when and how governments are permitted to regulate those services in which they permit private firms. Often defenders of the GATS refer to a clause in the GATS' preamble which recognizes governments' rights to regulate in the service sector. However, preambular language is not binding in the same way that the GATS' actual rules are. Specifically, the rules that come after the Preamble, which are binding, set constraints about when, how and if countries may regulate. The WTO staff has written about this quite clearly: "Governments are free in principle to pursue any national policy objectives provided the relevant measures are compatible with the GATS."³³

What does it mean for a domestic policy to be compatible with GATS? Under existing GATS rules, countries are constrained in domestic regulation for the sectors they have already committed for GATS coverage in 1993. Meanwhile, a central element of the GATS- 2000 negotiations is the development of new "disciplines" on domestic regulation which are now envisioned to apply horizontally to all service sectors, whether committed or not. This proposal now under negotiation in the GATS-2000 talks stands out as extremely outrageous in an agreement that contains numerous egregious provisions.

The GATS-2000 talks on new disciplines on domestic regulation are about setting constraints on a wide range of non-discriminatory domestic regulations, which means an absolute ban on certain government policies even when those policies treat domestic and foreign services and firms the same. The audacity of this proposal is remarkable as non-discriminatory regulations involve no "trade" issue. Specifically, the existing GATS rules (Article VI-4) on domestic regulation contain a commitment to undertake negotiations to develop "necessary disciplines" to ensure that "measures relating to qualification requirements and procedures, technical standards and licensing procedures

do not constitute unnecessary barriers to trade in services."³⁴ These future disciplines are supposed to ensure that domestic regulatory policies are:

- 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."³⁵

First, the scope of the proposed disciplines on regulation is stunning. They would not only cover qualification requirements and procedures, technical standards and licensing procedures, but also "measures relating to"³⁶ them. It is hard to imagine a domestic regulatory policy that does not fall under the listed categories, making one wonder just what else is intended to be covered by the "relating to" clause. Qualifications cover not only professional standards and assorted consumer and quality assurances, but also accreditation of schools and hospitals. Licensing means not only obtaining permits and professional licensing, but liquor licenses, broadcast

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licenses, commercial drivers licenses and more. The realm of “technical standards” is endless – from safety, environmental and consumer standards to regulations about service quality and employment rules.

Second, the three criteria for what such disciplines should cover are daunting, seemingly encouraging negotiators to set constraints on what are permissible goals for service sector regulation and also what means can be used to obtain even permitted goals. Current proposals in the GATS-2000 talks include setting a list of permissible goals for regulation so that countries’ domestic regulations must be limited to those deemed WTO legitimate. Another proposal would subject the means used to achieve even the approved goals to what is called a necessity test. This test is encoded in the phrase “not more burdensome than necessary.” This clause links to a set of WTO jurisprudence that interprets “necessary” to mean “least trade restrictive.” Thus a nation seeking to maintain or establish a domestic regulation would have to bear the impossible burden of proving a negative: that no less trade restrictive means exists to accomplish a policy goal. This requirement is significant: a country must prove that the regulatory safeguard structure is the least trade restrictive mechanism to meet the same regulatory goal. Furthermore, the onus of proof is on the defending government which has exercised its regulatory authority, not on the corporation which is demanding market access.

Meanwhile, the existing GATS rules already apply constraints on the domestic regulation of services on which a country has made commitments. The provision containing those requirements, GATS Article VI-5, may contain the most under-estimated threat in the entire GATS text. It requires that until specific disciplines on domestic regulations are negotiated and go into force, regarding sectors in which countries have undertaken commitments, a country: “shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined” above from Article VI-4, and (ii) could not have been expected of that member at the time the specific commitments in those sectors were made.”

As the discussion of “nullification and impairment” above clarifies, this is a broad, vague concept which leaves enormous discretion to both potential challengers and WTO tribunals to decide if an action that does not actually break any GATS rules still should be treated as if it did! Moreover, given the reference to the three criteria from Article VI-4, in addition to this vague “broken expectations” test, limits on domestic regulatory policies goals and a least trade restrictive test are read into the discretion of this provision.

These proposed GATS restrictions on domestic regulation (Article VI.4) amount to an extraordinary intrusion into democratic governance and policy making. Given there really that are no international trade issues raised by such *non-discriminatory* domestic standards, the push for GATS 2000 reveals the underlying ideological goal of simply limiting the role of government in regulating the market.

The European Union has argued that the Sarbanes-Oxley Corporate Reform Law, a new Enron-inspired U.S. corporate accountability law requiring new disclosures to an oversight board is a violation of U.S. GATS obligations because it subjects accounting and legal firms to the “double-jeopardy” of conflicting regulatory schemes. Other laws that could run afoul of these GATS rules include the U.S. Community Reinvestment Act (which fights racial “red-lining” by requiring banks to make loans in the communities where they take deposits), or insurance or hospital policies which require providers to offer certain coverage, or environmental requirements for bus companies or electric utilities, or even rate mixing rules (which require telephone companies and others effectively to cross-subsidize so that consumers in rural and other zones which are more expensive to serve can afford access).

3. Exceptions

GATS contains two “general” exceptions which set out grounds for countries to defend policies which otherwise violate GATS terms. Only one of these exceptions, which provides exceptions for actions taken for national security, is written in a manner that ensures it can actually be employed successfully by a government

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seeking to explain an otherwise GATS illegal action.³⁷ In contrast, the other GATS general exception, which is what countries would rely on to defend actions taken for environmental, health and safety and other non-national security reasons, is written in a manner that would make its effective use in defense in a WTO dispute of a challenged law very difficult. This exception is a more restrictive version of the GATT exception for plant, animal and human health. “Subject to requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services...” countries can have policies “necessary” to protect public morals, maintain public order, protect human, animal and plant life or health or necessary to comply with regulations “which are not inconsistent with the provisions of this agreement.”³⁸ The interpretations of the *chapeau* language to this exception and the requirement that a measure be “necessary” as defined in GATT and WTO jurisprudence to fit this exception has meant that GATT and WTO panels have never accepted a country’s attempt to use this exception for saving a challenged domestic law. The last element in this GATS provision is especially deceptive in that it limits the provision to enforcement of those domestic laws that comply with the GATS rules. This circular logic essentially provides an exception to this exception, which makes it almost useless.

To put into perspective how very limited this exception is, no GATT or WTO panel has ever spared a challenged law on the basis of the broader GATT version of this language in the fifty-four years of GATT or WTO’s existence. Most simply, the catch-all exception puts the burden on a country to prove that no less trade restrictive means to accomplish its goals exists even theoretically - considerations about whether alternatives are financially or politically feasible are not allowed. Moreover, the list of reasons in the catchall exception for why a country might violate GATS rules excludes a key element of the similar GATT exception list – conservation of exhaustible natural resources.

4. The Current Push to Expand GATS – “GATS-2000”

At the conclusion of the Uruguay Round, the U.S. did get provisions inserted into the GATS text requiring further negotiations within five years on the matters it was unable to achieve in the Uruguay Round.³⁹ As noted above, these “built-in” GATS expansion talks now called “GATS 2000,” have been underway at the WTO’s Geneva headquarters since January 2000. The provisions requiring these negotiations commit countries to “progressively higher level[s] of liberalization.” This means both the obligation to offer new sectors for privatization, and to grant additional access rights for sectors already included.⁴⁰

Also as part of the original GATS talks, nations agreed to negotiate on government procurement in services.⁴¹ This new commitment is extremely significant: in the U.S., federal, state, and local spending, which is almost entirely services expenditures, is \$2.9 trillion – nearly 30% of the U.S. GDP.⁴² As well, in several specific provisions in the GATS text, further commitments are made for future negotiations on developing “disciplines” on subsidies⁴³ and on making detailed disciplines limiting domestic regulation in the service sector.

Before the launch of the GATS-2000 talks, a coalition of developing countries called for an assessment of the outcomes of service sector liberalization and under the existing GATS rules *prior* to undertaking further deepening of those rules under GATS-2000.⁴⁴ A global campaign of civil society groups called for a moratorium on the GATS-2000 talks until this assessment was conducted.⁴⁵ However, these demands have been steamrollered. The WTO Secretariat, which is supposed to be a neutral staff to all the WTO countries, but often operates as an advocate for further liberalization and the GATS agenda of the industrialized world, the U.S. and the European Union pushed tirelessly for the immediate launch of the built-in GATS expansion talks. Indeed, the December 2001 Doha WTO Ministerial Declaration not only reiterates the rejection of the demand for a services assessment, but sets a specific time line for GATS-2000 talks to conclude by 2005.⁴⁶

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In part this renewed push towards the most extreme paradigm of service sector deregulation and liberalization was made possible because the political context has shifted since the Uruguay Round talks. A global trend towards extreme deregulation and privatization has meant that more nations have moved towards the Reagan-Thatcher model. In the U.S., the promotion of market-driven, industry self-regulation instead of government oversight brought economic disasters, such as the collapse of the savings and loan industry in the 1980s (costing taxpayers half a trillion dollars⁴⁷) and the energy deregulation of the 1990s (which brought soaring energy costs for consumers and rolling blackouts in California). Worse, the European position in GATS has shifted dramatically. In the GATS-2000 talks, the European Union is perhaps even more vociferous in its service sector demands than the U.S., especially concerning the privatization of water services. To many developing countries who have been subjected to International Monetary Fund (IMF) and World Bank “structural adjustment programs,” the demands in the GATS-2000 negotiations to privatize essential public services and to radically deregulate private sector services repeat some of these institutions’ most extreme - and in many instance now failed - policy requirements. For developing countries, committing to such demands in the GATS would lock in failed IMF and World Bank policies because under GATS they would be required to offer compensation to all WTO member countries if they sought to reverse the failed policies.

In February 2003, a complete set of the European Union’s GATS requests of other WTO countries leaked. As a result, the public got a rare glimpse into what is on the table with the GATS-2000 talks.

America’s Municipal Water Systems Under GATS Attack

There are some 60,000 publicly owned and operated drinking water systems in the U.S. whose future could be dramatically changed if the U.S. decides to make further commits in the water services area during the current round of GATS talks scheduled to conclude in 2005. Such a decision could permanently remove U.S. water systems from the public trust and into the hands of for-profit foreign investors, leaving little recourse for dissatisfied governments and consumers. The GATS Article XVI provisions would oblige the U.S. government to give giant EU water companies such as Suez and Vivendi access to the “market” of U.S. municipal water providers and undermine establishment of new municipal water systems in the future.

If the definition of insanity is doing the same thing over and over and expecting different outcomes, the GATS and FTAA services talks prove that some of the world’s richest countries have gone stark raving mad. Spectacular cases in the U.S., the key example of radical service sector liberalization and deregulation, prove the problems with the model: Enron’s energy debacle, the Worldcom telecom meltdown, and California’s energy crisis document a failed experiment with tragic results for both those relying on these services and those whose retirement incomes and paychecks relied on these companies. The examples of yet greater failures in service sector deregulation and privatization in the developing world abound. Russia’s privatization called the “Looting of Russia”⁴⁸ and the fight in South Africa against electricity privatization⁴⁹ are only two examples. Yet, this data has not halted the push for more of the same at GATS or in the FTAA negotiations.

¹ WTO Secretariat. Trade in Services Div, “Everything You Wanted to Know about GATS but Where Afraid to Ask,” October 1999, p. 5.

² Renato Ruggiero, “Toward GATS 2000 -- a European Strategy,” speech, conference on trade in services, organized by the European Commission in Brussels, Jun. 2, 1998.

³ GATS Article I-3-b.

⁴ GATS Article I-3-a-i.

⁵ GATS Article I-3-a-ii.

⁶ GATS Article I-1. (In one of the few WTO rulings on the GATS, what this provision means became a central question. The panel ruled that “Article I-1 refers to any measures in terms of their effect, which means that they could be of any type or relate to any domain of regulation.” WTO, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, Panel Report May 22, 1997, at 7.280. WT-DS27-R-USA.)

⁷ See GATS Article V. Section 1 (a), Footnote 1, “This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.”

⁸ GATS Article II. “With respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment which is no less favorable than that it accords to like services and service suppliers of any other country.”

⁹ The Canadian Centre for Policy Alternatives, *Facing the Facts: A Guide to the GATS Debate*, 2002, p 46.

¹⁰ 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.”

¹¹ 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.

¹² GATS Article XIII explicitly excludes MFN, national treatment and Article XVII market access rules for this limited circumstance.

¹³ GATS Article XIII-2.

¹⁴ GATS Article I-2.

¹⁵ GATS Article I-2-a.

¹⁶ *Id.* at I-2-b.

¹⁷ *Id.* at I-2-c.

¹⁸ *Id.* At I-2-d.

¹⁹ With the time-limited exception noted above which allowed countries to list exemptions from MFN.

²⁰ U.S. International Trade Commission, “U.S. Schedule of Commitments Under the General Agreement on Trade in Services,” Investigation No. 332-354, May, 1997, at 40.

²¹ GATS Article XVI - 2 - a

²² GATS Article XVII.

²³ GATS Article XVII-3

²⁴ Mette Boye and Christian Ege, The Danish Ecological Council, *EU Environmental Policy: Can Free Trade and Environment Go Together?*, Aug. 1999, at 118-9.

²⁵ GATS Article XXIII-3.

²⁶ In re Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk, Final Report of the Panel, USA-93-1807-01, at 3.3 (June 3, 1993), available at http://collection.nlc-bnc.ca/100/200/301/nafta-sec-alena/fta_ch18-e/puerto_rico_regulations-e/uc93010c.pdf.

²⁷ GATS Article XXI-2-a requires countries to negotiate compensation for with drawing a GATS commitment. Article XXI-2-b requires that such compensation be available to all affected countries on a most favored nations basis.

²⁸ GATS Article XXI-4.

²⁹ GATS Article XXI-4.

³⁰ WTO, “Trading Into the Future,” descriptions from WTO website printed in 1999, (on file with Public Citizen.)

³¹ Elaine Bernard, “What’s The Matter With NAFTA?” *New Politics*, Volume IV, No. 4, Winter 94 at 9.

³² Sid Shniad, “‘Free Trade’ Is Not About Trade,” *Canadian Dimensions*, May 1, 2002, at 4.

³³ WTO Secretariat.- Trade in Services Div, “Everything You Wanted to Know about GATS but Where Afraid to Ask,” October 1999, p. 5.

³⁴ GATS Article VI-4.

³⁵ GATS Article VI-4-a-c.

³⁶ GATS Article VI-4.

³⁷ GATS Article XIV *bis* provides that “Nothing in this Agreement shall be construed to...”

³⁸ GATS Article XIV.

³⁹ GATS Article XIX-1.

⁴⁰ GATS Article XIX-1.

⁴¹ GATS Article XIII-2.

⁴² Bureau of Economic Analysis, National Income and Product Account Tables, Table 3.1 Government Current Receipts and Expenditures, last updated Dec. 20, 2002.

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⁴³ GATS Article XV.

⁴⁴ See WTO, "Communication From Argentina, Brazil, Cuba, The Dominican Republic, El Salvador, Honduras, Mexico, India, Indonesia, Malaysia, Nicaragua, Pakistan, Panama, Paraguay, Philippines, Sri Lanka, Thailand, Uruguay, And The Members Of The Andean Community (Bolivia, Colombia, Ecuador, Peru, Venezuela)," S/CSS/W/13,11-24-00, at IV. (11).

⁴⁵ Signatories from http://www.citizen.org/trade/wto/gats/Sign_on/articles.cfm?ID=1584, on file with Public Citizen.

⁴⁶ Doha WTO Ministerial Declaration, Article

⁴⁷ General Accounting Office, "Comptroller General's 1991 Annual Report," Dec. 18, 1991, at 6.

⁴⁸ See Paul Klebnikov, "*Godfather of the Kremlin: Boris Berezovsky and the Looting of Russia*," Harcourt, Inc., 2000.

⁴⁹ See Patrick Bond, "Power to the People in South Africa: Operation Khanyisa! And the Fight Against Electricity Privatization," *Multinational Monitor*, Jan/Feb 2002, Volume 23, Number 1 & 2.