

Memorandum

TO: Governor Brian Schweitzer
RE: Montana's Authority at Stake in WTO Service Sector Talks
DATE: April 5, 2006

Dear Governor Schweitzer:

This is to bring to your attention that at the December 2005 World Trade Organization (WTO) Ministerial in Hong Kong, U.S. federal trade negotiators agreed to push for an expansion of WTO powers. As part of a proposed expansion of the WTO's General Agreement on Trade in Services (GATS) that the U.S. federal government has agreed to negotiate, other countries would be empowered to use the WTO dispute resolution system as an international venue to challenge a range of Montana state and local laws. We ask that you take executive action with regards to these negotiations to safeguard Montana's sovereignty and ability to adopt and maintain service-sector policies that promote good jobs and a clean environment.

Background:

The GATS is one of the 17 "Uruguay Round" agreements enforced by the WTO. In the United States, Congress first approved the GATS in 1994. Rules about actual trade in services across borders are only a small element of the agreement. The GATS defines "trade" in services in an extraordinarily broad way that not only includes cross-border provision of a service via Internet, phone, or mail, but also the commercial presence of a foreign corporation in a WTO member country. Because the very notion of placing services (including some public services) under the rubric of a "trade agreement" was so controversial, GATS – unlike other WTO agreements – only covers sectors that countries have specifically listed to be bound to the terms of the agreement in a document called their "schedule of service commitments."

New negotiations are underway, called "GATS 2000," to expand the coverage of existing GATS' rules to more service sectors and to establish new rules that could affect a wide variety of service-sector regulatory policies at all levels of government. In 2001, the new GATS negotiations were rolled into the larger "Doha Round" of WTO negotiations, which are slated to be concluded in 2006.

In 2005, the extent to which GATS rules make state laws and regulations vulnerable to foreign challenge was exposed when the WTO ruled on Antigua's challenge to the U.S. ban on Internet gambling. Many state and local officials have become increasingly aware that the WTO GATS is serving as a backdoor form of international preemption of service sector regulation, and have begun to voice their concerns.

Effects:

Current GATS rules could be used to second-guess state and local decision-making in many areas of traditional state and local authority under the U.S. system of federalism. Examples include:

- **Health care:** Unless healthcare services are taken off of the current schedule of U.S. service commitments, federal, state and local governments' ability to effectively regulate health care facilities and implement certain health care reform measures designed to expand access and reduce the cost of health care insurance could be jeopardized. The United States committed insurance (including health insurance), hospitals and health facilities to the GATS in 1994.
- **Land Use and Zoning:** Multiple zoning and land use policies pursued by local governments, for instance those which limit the location, size or design of "big box" stores or those that limit development in environmentally sensitive or historic districts, could be challenged as GATS-illegal "barriers to trade." Unlike many countries in Europe and Asia, the United States failed to carve out land use policies from its 1994 GATS commitments in hotels and restaurants, retail distribution, and franchising.

- **Gambling:** As a result of the 2005 WTO Appellate Body's ruling on the U.S.-Gambling case, an array of common state gambling regulations, including limitations on the number of casinos or slot machines, state lotteries (which would be considered monopolies) and exclusive Indian gaming compacts, are now subject to challenge before future WTO tribunals as violating U.S. GATS obligations. The United States failed to carve out federal, state and local regulations on gambling from its 1994 GATS commitments in "recreational services."

Furthering the Problem:

On May 3, 2005, the U.S. Trade Representative (USTR) sent correspondence to its state contacts with notice of intent to introduce additional service sectors to be covered by GATS, including higher education. (See copy, attached.) States were informed that no further action was required to safeguard existing laws or regulations in service sectors. However, the memo failed to mention that existing and future state policies could be challenged under GATS, and if the WTO found a Montana law in a covered service sector to be inconsistent with GATS rules, the federal government would be obligated to use all constitutionally available measures (including passing preemptive legislation, withholding highway funds, and suing state or local governments) to pressure Montana to change or eliminate the offending law.

The USTR requested a response by May 26, 2005. At the Hong Kong Ministerial in December, the United States agreed to submit to the WTO on or before July 31, 2006 a new "offer" to commit additional service sectors to GATS rules. Reports from Geneva indicate that the United States is preparing to show a preliminary offer by April 30th, 2006 in order to weigh the trade-offs with agriculture negotiations. This gives Montana a new window of opportunity to review commitments that federal trade negotiators are making on the State's behalf.

Formal Requests:

While the United States Constitution places the regulation of trade with foreign countries within the prerogative of the federal government, primary responsibility for protecting public health, welfare and safety is left to the states. To preserve the State's ability to set domestic policies based on what's best for Montana's working families and environment, we request that you write to U.S. Trade Representative Ambassador Robert Portman to formally change Montana's commitments under the GATS in the following ways:

- Montana does not agree to be bound by any new service sector commitments in ongoing WTO GATS negotiations, including but not limited to those proposed in the May 31, 2005 offer (e.g. higher education);
- Montana also requests that the State be carved out of service sectors committed in 1994 that give the State particular concern (e.g. sectors related to healthcare, land use and gambling); and
- Montana does not support the development of new rules by the WTO Working Party on Domestic Regulations that would create new grounds for the challenge of nondiscriminatory state laws in the service sector and would like to discuss with USTR about how the State could be exempted from these rules.

If realized, the federal government's proposed GATS expansion would undermine Montana's ability to address issues of public concern. The WTO's ruling on the U.S.-Gambling case carries an urgent message: we must actively safeguard Montana's existing laws and guarantee Montana's ability to develop innovative solutions to public policy issues such as access to affordable health care, local control of retail box-store development, and support for public higher education without constraint or challenge under the GATS.

Sincerely,

Rep. Sue Rickerson, HD 25