

# STATE ATTORNEYS GENERAL

## A Communication From the Chief Legal Officers Of the Following States:

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Iowa • Kentucky • Louisiana • Maine • Massachusetts • Michigan • Minnesota  
Mississippi • Montana • Nevada • New Mexico • New York • Oklahoma • Oregon  
South Carolina • South Dakota • Tennessee • Utah • Vermont • Washington  
Wisconsin • Wyoming**

May 31, 2005

*Sent via facsimile and Messenger*

The Honorable Rob Portman  
Ambassador  
United States Trade Representative  
600 17<sup>th</sup> Street, N.W.  
Washington, D.C. 20508

Dear Ambassador Portman:

Congratulations on your appointment as Ambassador to the World Trade Organization.

In July 2003, many of us wrote to your predecessor with concerns about the World Trade Organization's General Agreement on Trade in Services (GATS) and the ongoing GATS-2000 negotiations. Now, in light of recent WTO rulings and information regarding the current status of these negotiations, we, the undersigned Attorneys General, write to you to underscore our past concerns and convey some new ones. Our concerns are especially urgent given the GATS-2000 negotiating schedule, and we hope to meet with you personally and engage in dialogue with your office so as to seek redress for our concerns in a timeframe relevant to the current negotiations.

The recent WTO Appellate Body ruling on Antigua's WTO challenge to the U.S. Internet gambling ban (U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services) is quite troubling. Putting aside disagreement about whether the WTO Appellate Body's decision ought to be considered a "win" or "loss" for the United States, it cannot be disputed that the panel's ruling on several underlying issues raised in this dispute will have significance far beyond the trajectory of this individual case.

First, the Appellate Body determined that regardless of U.S. intentions, U.S. "gambling and betting services" are subject to GATS coverage. The panel came to this conclusion by reading in a gambling commitment as being subsumed under a commitment the U.S. explicitly made to subject "other recreational services" to GATS coverage. The U.S. commitment for other recreational services was taken without limits, meaning that the

Appellate Body's logic requires the United States to abide by market access and national treatment obligations with regard to the gambling service sector. Among these GATS obligations is the right of foreign service providers to establish a commercial presence within the United States to provide a covered service. Thus, while this case concerned cross-border trade in gambling services via the Internet, the panel's determination that the gambling sector is subject to all GATS requirements means that an array of common U.S. gambling regulations, including limitations on the number of casinos or slot machines, state monopoly lotteries or exclusive Indian gaming rights, are now subject to challenge before future WTO tribunals as violating U.S. GATS obligations.

After the lower panel's ruling, USTR assured state officials that if the Appellate Body upheld the lower panel's ruling on this point, the United States could act to withdraw the gambling sector from the United States' specific GATS commitments. We urge you to do so, as the cost of withdrawing the sector will only increase as foreign suppliers of gambling services invest in the U.S. market in the wake of this case. Our states have a diversity of regulations vis-à-vis gambling. We believe that under our constitutional system of federalism, states should continue to have the flexibility and sovereign authority to determine whether and under what conditions gambling occurs within their borders, without such decisions being subject to second-guessing by WTO tribunals.

Secondly, the Appellate Body made some general interpretations of the GATS' market access rules that have significant, troubling implications for the right of states to regulate in a wide range of service sectors well beyond gambling. The Appellate Body upheld the lower panel's interpretation that a ban on an activity in a committed service sector is equivalent to a "quota of zero," and thus a violation of the GATS' market access rules. These rules forbid quantitative limits whether expressed as a limit on the number of service providers, their size, or other limits for a covered service sector. As the Appellant Submission of the United States of America stated, determining that non-discriminatory bans on pernicious activity are violations of market access rules "unreasonably and absurdly deprives Members of a significant component of their right to regulate services by depriving them of the power to prohibit selected activities in sectors where commitments are made." The new zero quota standard has implications for diverse areas of regulation ranging from advertising (i.e. bans on billboards) to anti-spam rules to zoning and land use (i.e. bans on the dumping of toxic waste). The prospect of WTO challenges to these kinds of prohibitions should alone be sufficient to give U.S. negotiators enormous motivation to use the current GATS negotiations to secure a rule change that makes explicit the right of a WTO signatory to ban undesirable activity in a GATS covered sector.

Based on your office's May 3, 2005 memo to State Point of Contacts (SPOCs) and the Intergovernmental Advisory Committee (IGPAC), it appears that your office is *not* reevaluating current U.S. commitments in light of this troubling ruling. Instead, your office has proposed binding *additional* U.S. service sectors to the GATS' expansive rules, despite what your own pleadings in the gambling case identified as "unreasonable" and "absurd" limits on states' right to regulate. We believe more complete information, followed by analysis and dialogue with state officials, is needed before U.S. negotiators move forward with submission of an offer to bind additional U.S. service sectors to GATS jurisdiction.

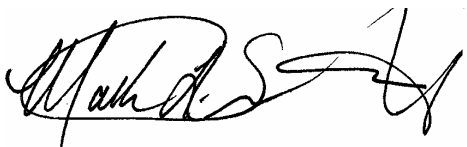
However, our concerns are not limited to the substance of the on-going GATS negotiations and the current GATS rules and U.S. commitments now viewed in light of the Gambling case. The May 3 USTR memo highlights several problems with the process currently used to consult with states regarding trade negotiations. We reiterate that it is vital to maintain the principle that the federal government may request, but not require, states to alter their regulatory regimes in areas over which the states hold constitutional authority. We also stress the importance of having a broader and deeper range of contracts with a variety of state entities, and particularly with those bearing regulatory and legislative authority. In order to fully evaluate the new GATS commitments USTR is proposing to offer, and to give prior informed consent, states must receive more detailed and frank information from your office. Thus, the actual proposed commitments, including the service sectors you propose to bind and the GATS rules that would apply to them, rather than vague descriptions, must be submitted to states for review, with adequate time for analysis. It is also important that your correspondence with state officials not dismiss out of hand legitimate concerns about the restrictions that today's trade agreements place on domestic policymaking. Rather, an acknowledgement of the trade-offs states face when committing to abide by trade agreement terms is sorely needed.

Finally, it is our understanding that in addition to the "request" and "offer" process underway at the WTO regarding what service sectors will be newly submitted to GATS jurisdiction, the GATS Working Party on Domestic Regulation is negotiating additional rules that have significant implications for state regulatory authority. One proposed draft of these new GATS restrictions would require governments at all levels not to "prepare, adopt, or apply" measures that are more "burdensome than necessary," and to review all existing regulations to ensure that they are "the least trade restrictive."<sup>ii</sup> In our view, any new GATS provisions that would confer on WTO panels the right to judge whether regulations made by elected representatives, within their constitutional mandates, are "necessary" or "proportionate" would unacceptably encroach upon our states' regulatory authority, and we urge you to oppose the addition of such language to the GATS.

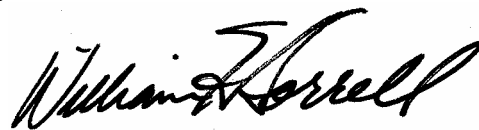
As we would like to keep our Congressional delegations apprised of our concerns and your response, we have copied them on this letter and anticipate sharing your reply with their offices.

Thank you in anticipation of your timely attention to this matter.

Sincerely,




Mark Shurtleff  
Attorney General of Utah



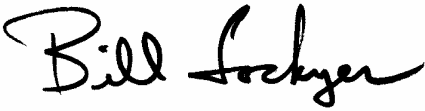
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Terry Goddard  
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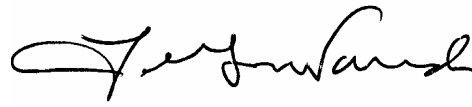
Bill Lockyer  
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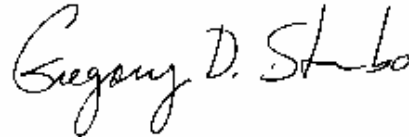
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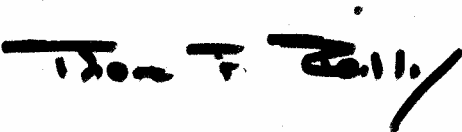
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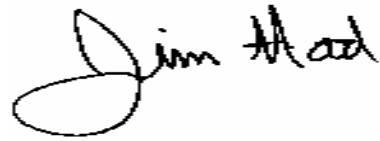
Thomas Reilly  
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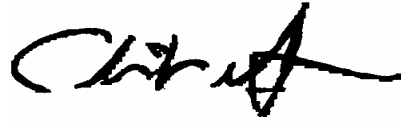
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Henry McMaster  
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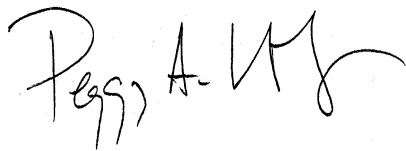
Lawrence Long  
Attorney General of South Dakota



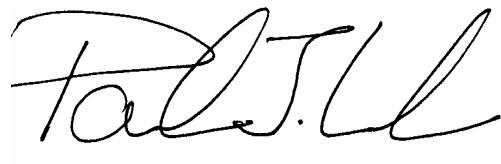
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Patrick Crank  
Attorney General of Wyoming



Mike McGrath  
Attorney General of Montana



Brian Sandoval  
Attorney General of Nevada



Attorney General M. Jane Brady  
Attorney General of Delaware

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<sup>i</sup> United States of America, “Appellant Submission of the United States before the World Trade Organization Appellate Body: United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (AB-2005-1),” January 14, 2005, at 62.

<sup>ii</sup> GATS Working Party on Domestic Regulation, “Communication from Japan - Draft Annex on Domestic Regulation,” WTO Document JOB (03)/45/Rev.1, May 3, 2003.